

HUMAN RIGHTS ASSESSMENT

of Goldcorp's Marlin Mine

Commissioned on behalf of Goldcorp
by the Steering Committee for the Human
Rights Impact Assessment of the Marlin Mine

Prepared by
On Common Ground Consultants Inc.
Vancouver, BC, Canada



May 2010

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ACRONYMS AND ABBREVIATIONS

ACHR	American Convention on Human Rights	ICESCR	International Covenant on Economic, Social and Cultural Rights
ADISMI	Association for the Integral Development of San Miguel Ixtahuacán	ICMM	International Council on Mining and Metals
AMAC	Communal Environmental Monitoring Association	IFC	International Finance Corporation
AMR	Montana Annual Monitoring Report	ILO	International Labour Organization
APROSAMI	Health Promoters Association of San Miguel Ixtahuacán	INDE	Instituto Nacional de Electrificación
ARD	Acid rock drainage	IPDP	Montana Exploradora's Indigenous Peoples Development Plan
CAO/IFC	Compliance Advisor Ombudsman (CAO) of the International Finance Corporation (IFC)	IUSI	Single Tax on Real Estate
CEACR	Committee of Experts on the Application of Conventions and Recommendations	LAP	Montana Exploradora's Land Acquisition Procedures
COCODE	Community Development Council	MARN	Ministry of Environment and Natural Resources
COMUDE	Municipal Development Council	MEM	Ministry of Energy and Mines
COPAE	Peace and Ecology Pastoral Commission	MSPAS	Ministry of Public Health and Social Assistance
CRG	Montana's Community Relations Group	MTPS	Ministry of Labour and Social Welfare
CTA	Consultoría y Tecnología Ambiental, S.A.	NGO	Non-Governmental Organization
DIHR	Danish Institute of Human Rights	OECD	Organization for Economic Cooperation and Development
EMS	Environmental Management System	OHCHR	Office of the High Commissioner for Human Rights
ESIA	Environmental and Social Impact Assessment	OHS	Occupational Health and Safety
FAFIDESS	Foundation for Financial Advice to Development and Social Service Institutions	PCDP	Montana Exploradora's Public Consultation and Disclosure Plan
FSM	Sierra Madre Foundation	PDH	Human Rights Ombudsman
GDP	Gross domestic product	PNC	National Civil Police
GRI	Global Reporting Initiative	SDD	Montana Exploradora's Sustainable Development Department
HRA	Human Rights Assessment	TSF	Tailings storage facility
ICCPR	International Covenant on Civil and Political Rights	UDHR	Universal Declaration of Human Rights
		UN	United Nations
		UNSI TRAGUA	Syndicated Union of Guatemalan Workers



Introduction

This document presents an assessment of the human rights situation around, and related to, the presence and operations of the Marlin Mine, in San Miguel Ixtahuacán and Sipacapa Municipalities, Guatemala. The mine is owned and operated by Montana Exploradora de Guatemala S.A. (Montana/the company), a fully owned subsidiary of Goldcorp Inc. The assessment looks specifically at the Marlin Mine (the mine), at Montana’s responsibility as the owner and operator of the Marlin Mine, and at Goldcorp’s responsibility as Montana’s corporate parent. The findings are focused on how the policies, procedures, and practices at the Marlin Mine have affected human rights; recommendations are directed to Montana, and where appropriate, to Goldcorp.

The assessment was commissioned by the Human Rights Impact Assessment Steering Committee on behalf of Goldcorp and paid for by Goldcorp. Goldcorp has committed to responding to the assessment recommendations including issuing a published response and action plan. The intention is that the assessment will inform Goldcorp’s policies and procedures globally and affect human rights performance through the experiences and lessons-learned from Guatemala. Goldcorp has committed to issuing a public response to the recommendations, including a detailed action plan for the Marlin Mine and potential future expansions.

The assessment applies the relevant international human rights standards to various aspects of the mine’s operations in order to identify, where possible, changes to the status of human rights due to the mine’s

presence. These changes can be positive or negative; where negative, the assessment seeks to identify the gaps in Montana and Goldcorp policies, procedures, and practices that create risks of conflict with international human rights standards.

The assessment is organized around the issues of concern to stakeholders including ones that have given rise to allegations of negative human rights impacts. Recognizing that the responsibility of companies in relation to international human rights is still being clarified – and the application of approaches such as John Ruggie’s “Protect, Respect and Remedy” framework) for business and human rights are new – the assessment does not make legal judgments about past performance; rather it identifies areas of concern, risk, and impact in order for Montana and Goldcorp to implement the necessary changes to respect human rights.

This assessment was intended to include all of the stakeholders affected by the Marlin Mine, including those alleging that their rights have been affected. It is important to clarify that neither the people nor the authorities of the communities of Sipacapa were adequately represented in the assessment, although some individuals did participate. Even though the assessment has sought to represent these individual inputs accurately, they do not represent the full spectrum of opinions or impacts. Therefore, the views of the Sipakapense people as a distinct Mayan indigenous group, and of the local NGOs critical of the mine, cannot be considered to have been included fully.

BACKGROUND TO THE ASSESSMENT

The Marlin Mine has been controversial for some time, as seen in the history of events in the local area as well as a sequence of claims and complaints to both national and international bodies. After the merger of Glamis Gold and Goldcorp in late 2006, concerns about allegations of human rights infringements related to the Marlin Mine came to the attention of a group of socially responsible investors (the shareholder group) of Goldcorp.¹ In early 2008, representatives of the shareholder group travelled to Guatemala to visit the operation and speak directly with local people and Guatemalan organizations about their concerns.

The shareholder group believed at the time (and continues to believe) that there are significant human rights challenges associated with mining in Guatemala (and elsewhere) and that companies have an obligation to respect human rights. In this context, the shareholder group called on Goldcorp to undertake an independent human rights impact assessment (HRIA) of the mine, considering that HRIAs are a tool to allow companies operating in challenging environments to identify their human rights impacts and establish plans to better fulfill their obligations.

Goldcorp agreed to work with the shareholder group to undertake an assessment by commissioning and funding the HRIA. In March 2008 a Memorandum of Understanding (MOU) between the shareholder group and Goldcorp was signed, laying out the terms for carrying out an HRIA of the Marlin Mine.² The MOU specified that the process be directed by an independent steering committee, which consisted of a member of Guatemalan civil society, a shareholder group representative, and a Goldcorp representative. The steering committee was responsible for overseeing the assessment process, setting the scope and timeline of the assessment, selecting the consultant(s) to conduct the assessment, and managing the overall assessment process.

1 Ethical Funds, First Swedish National Pension Fund, Fourth Swedish National Pension Fund, Public Service Alliance of Canada Staff Pension Fund, and SHARE.

2 All documents related to the steering committee assessment process are posted at www.hria-guatemala.com.

In October 2008, On Common Ground Consultants Inc. of Vancouver, Canada was selected to carry out the assessment, and International Alert of London, UK was selected to serve as peer reviewer.

The assessment was launched in October 2008. The first action taken was to review and revise the objectives based on feedback from the assessors and peer reviewer. The primary objective was clarified to determine whether the mine's presence and activities were affecting human rights, and to review whether the company's policies, procedures, and practices address those impacts and respect human rights. The terms of the MOU were modified to further clarify that the assessment was intended to improve the company's performance in respecting human rights, not to improve Goldcorp's ability to operate profitably in Guatemala.

The MOU's three principles of transparency, independence and inclusivity were defined as:

- *Transparency:* Information on the assessment mechanisms, stages and processes will be made available to all stakeholders in a timely and understandable manner.
- *Independence:* The assessment process and the assessor(s) chosen to perform the assessment will be independent. Independence means that there shall be no material relationship (other than performance of the assessment) between the assessor and the stakeholders and that the assessor is free from external control in the performance of the assessment.
- *Inclusivity:* The assessment will engage, to the best of the assessor's ability, all the various stakeholders impacted by the company's activity in Guatemala.

In December 2008, the assessors committed to an additional set of ethical principles, which added the principles of informed consent, and to respect the confidentiality of those who participated.

In May 2009 the scope was changed to reflect the challenges encountered to carrying out the proposed participatory approach. The steering committee accepted the assessor's observation that without the inclusion of key stakeholder groups, identification of

impacts would not be complete and that carrying out the impact assessment as initially designed was not feasible. A new scope was defined; to review the potential impact of the presence and operation of the Marlin Mine on human rights, relying on a review of company policies, practices, and procedures, secondary data analysis and expert sources, and as much stakeholder participation as could be obtained. A principal change involved acknowledging that the findings about impacts and human rights were partial, due to the limited participation of some stakeholder groups.

Due to the revised scope, the steering committee, in consultation with International Alert, determined that the peer review process as initially conceptualized was not possible to implement. As a result, no peer review of the assessment was conducted as contemplated by the MOU.

Methodological Approach

The initial methodology was based on the objective of conducting a full, participatory Human Rights Impact Assessment (HRIA). As stated in *Aim for Human Rights' Guide to Corporate Human Rights Impact Assessment Tools*, "the main objective of conducting a Human Rights Impact Assessment (HRIA) is to identify, understand and manage corporate impacts in the field of human rights. An HRIA helps a company to gain a thorough understanding of the (potential) impact of corporate activities, a better understanding of the stakeholders' perspectives, and ways to manage corporate impacts in a process that benefits all involved."³

The assessment confronted a number of challenges in identifying impacts, including:

- Relative novelty of the overall field of human rights impact assessments and the need to adapt existing methodologies and assessment tools;
- Requirement to assess an existing and controversial operation, making it difficult to obtain full participation of stakeholders, address criticisms of the independence of the assessment, and avoid exacerbating conflicts between stakeholders; and

³ Lenzen and d'Engelbronner, 2009, 5; Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, February 2007.

- Absence of prior baseline studies about human rights or relevant social issues, combined with a lack of ongoing monitoring programs and documentation related to company activities, made accurate measurement of the existence and extent of human rights impacts – either positive or negative – difficult.

The intention at the outset was to complete a HRIA through a fully participative process to be developed with stakeholders. While significant participation was achieved through individual and group interviews, at the end of the process there remained an important gap in the participation of people from Sipacapa, as well as opponents of the mine. The field of HRIAs is still relatively young; while there is no clear guidance about the level of participation required to conduct an HRIA, the assessors acknowledge the importance of participation to human rights impact assessments and to human rights-based approaches in general.

At the same time, the assessors were mandated to use the Danish Institute for Human Rights (DIHR) Human Rights Compliance Assessment (HRCA) tool (see page 16), which is designed primarily for the conduct of an HRCA. The questions and indicators were adapted and used by the assessors for interviews with a wide variety of stakeholders; however, many of them focused attention on a compliance review of company policy, procedures and practices. This focus on company policy, procedures and practices complemented the application of the "Protect, Respect and Remedy" framework and the standard of ongoing due diligence for companies to respect international human rights.

During the course of the assessment the assessors made a number of adaptations to the initial methodology to respond to these challenges, as described in the following sections. For many issues, it was not possible to make a determinative judgment that impacts had occurred. In these cases, the assessors focused on reviewing company compliance with relevant international human rights standards and identifying where adequate policies and procedures to ensure compliance did not exist or had not been effectively implemented. Where these gaps existed, it was more probable that the allegations of non-compliance could be true – meaning that the company had not adequately managed or reduced the risks of impacts on human rights.

Scope

The assessment covers the period from when Glamis Gold became the operator, to the present, as well as looking forward to closure and post-closure. It covers the full area of the exploitation licence associated with the Marlin Mine, as well as exploration activities to extend the life of the current operation. While the assessors are aware that Goldcorp-affiliated companies have exploration activities in other areas of Guatemala, these are not included in this assessment.

The geographic scope for the assessment included three levels of influence:

- Four communities immediately adjacent to the mine that have sold land for the operation;
- Adjacent and downstream communities; and
- The municipalities of San Miguel and Sipacapa.

The assessment also recognizes that there are different spheres of influence when it comes to responsibility for outcomes and for implementing recommendations or changes; a company has a high degree of control over the outcome of changes in its core business, such as labour rights or contracting agreements, but less control over the actions of external actors or processes that require the participation of multiple actors. The relative influence of the company was considered in structuring recommendations.

Information Sources

Data collection for this assessment included desk-based study and review of over 700 secondary documents, including human rights, extractive industry best practices, the context in Guatemala, and documents specific to the Marlin Mine from Montana, Goldcorp, human rights organizations, and others. The data collection included a systematic review of the major daily newspapers published in the country from 2004 to the present, and review of previous assessments and independent and external audits. A gap analysis of Guatemala's implementation of its human rights commitments was done, based upon reports from international human rights organizations (UN, ILO) and expert sources (NGOs and academic).

Over an eight-month period (November 2008 to June 2009), the assessors conducted 189 individual

interviews, nine group interviews with 84 participants, eight informal discussions, and 10 focus groups with 95 participants. The inclusion of oral or testimonial sources, specifically from local stakeholders in San Miguel Ixtahuacán, and when possible, Sipacapa, was a priority for the assessors.

In parallel, the assessors conducted a corporate policy and management systems review examining policies that address human rights (explicitly or by intent), the integration of these policies in the operational procedures and guidelines of the company generally and the Marlin Mine specifically, and the coherency and effectiveness of management systems to support these policies.

Stakeholder Identification and Participation

The primary stakeholders deemed critical to the assessment were defined by two characteristics:

- Physical proximity to the mining operations and associated facilities (including roads), which includes all land-sellers in and around the mine; and
- Interaction with the company in ways that directly affected people's human rights, including employees, contractors, and project beneficiaries.

In addition, the assessment considered national level issues and impacts. Other stakeholders included individuals, groups, and institutions affected by the activities and presence of the mine, directly and indirectly.

The assessors did not address human rights impacts associated with suppliers to the mine, or clients, unless strong evidence or concern from stakeholders was identified to make that an important issue. However, some suppliers and contractors to the mine were included because they were land sellers or residents of local communities.

The stakeholder identification was defined through initial research and then subsequent information gathered through interviews and growing familiarity with the situation. The assessment remained open to including additional stakeholders, and new groups or subgroups were added as they were identified.

Stakeholder group participation in the assessment is set out in Table 1.1.

Table 1.1: Stakeholder Group Participation		
Key groups	Sub-groups	Number participating
This table sets out stakeholder groups that participated in interview and focus groups, by their primary designation for the purpose of data analysis. For example, a mine worker might also be a woman or a land seller, but is classified only once.		
Local authorities	Municipal mayors and corporations; indigenous (auxiliary) mayors	10 in individual interviews
Local public development organizations	COCODES (1st and 2nd level); COMUDES; other local authorities/leaders	6 in individual interviews
Land users	Land sellers; relocated families	9 in individual interviews
Workers	Current mine workers; senior management at Montana and Goldcorp; former employees	90 local people in individual interviews or medium-size groups; 9 managers
Contractors	Contractors; private security firms	25 in individual interviews or focus groups
Individuals/organizations in legal proceedings with Montana	Local; national	3 in individual interviews at local level; 2 in interviews with NGOs
Vulnerable groups	Women; seniors; youth	21 in individual interviews or medium-size groups
Participants in Sierra Madre Foundation programs	Beneficiaries; trainees; employees	29 in individual interviews or medium-size groups
Local businesses	Retail; services	3 in individual interviews
Local professionals	Health; education (including teachers paid by Montana); judicial; development	17 in individual interviews
Local Institutions	Justices of the peace	4 in individual interviews or group meetings
Local organizations	Women's groups; AMAC; others	17 in group meetings
Religious organizations	Catholic archdioceses; Catholic organizations; local parish priests and catequists; Protestant and Evangelical churches	14 in individual interviews or group meetings
Government	Government ministries, departments and agencies related to issues of mining, environment, water, and human rights; public security forces	23 in individual interviews
Human rights organizations and activist groups	Local; regional; national; international	9 in individual interviews
Environmental organizations	Local; national	12 in individual interviews
Research organizations	National	7 in individual interviews
Other community members	Communities adjacent to the mine; within watersheds; along roads; along the power line	6 in individual interviews or small group interviews (all other community participants are sub-categorized below)

Review of Mine Operation and Departments

The work of the assessors required an in-depth understanding of the history, organization and structure of the Marlin Mine and Montana as the operating company, including transitions in ownership, progression from exploration project to mining operation, and relations with government and permitting processes. The assessors targeted the following areas and departments for interviews and review of documentation: human resources (e.g. benefits, hiring/firing, labour standards), industrial health and safety, environment, sustainable development/community relations (including the Sierra Madre Foundation), land acquisition, and security.

Follow up interviews were done with government regulators, ministry officials, and others involved in the oversight agencies to obtain their perspectives on Montana's performance, potential impacts on human rights, and government capacity both as regulator and in fulfilling its human rights obligations.

Actions Taken to Fulfil the Ethical Principals

The assessment was set up initially with three principles; transparency, inclusivity, and independence. In undertaking the assessment, the assessor added the two additional principles of informed consent to participate in the assessment, and the confidentiality of those who participated.

All interviews and meetings began with an introduction of the assessment, why it was commissioned and by whom, and a brief presentation on the ethical principles. Stakeholders were then asked if they were willing to participate by talking to the assessors and whether they would like to remain confidential, with no attribution to their information. Every single person

who agreed to participate in the assessment requested complete anonymity and non-attribution. The assessors took measures to ensure that information would remain confidential, coding the interviews to protect the source and not referencing specific interviews in the final report. If the source did not want the information used in the report, the assessors complied with the request in all cases, but the information served to inform the findings. Finally, in all interviews, informal discussions, group meetings and focus groups the assessors requested authorization to take notes and to record the interviews.⁴

The assessor team met with and interviewed all groups and individuals willing to meet with them, regardless of their positions towards the mine or the assessment; this was the commitment to inclusivity.

For the assessors it was of the outmost importance to maintain independence from both Goldcorp and Montana. To that end, each was identified as one more stakeholder amongst many, and did not have more interaction or information than did any other group or individual. The assessors worked with total independence from the company or any other stakeholder in carrying out all of the field work, and determining groups and key informants with whom to meet; the exception to this was Marlin management's facilitation of group interviews with employees at various levels of the organization. An agreement was reached that Goldcorp and Montana would have:

- No editing control of the report;
- No say regarding the content, form, or findings of the report.⁵

Some of the information provided to the assessors by Montana was identified as confidential; however, at no time did the confidentiality of specific facts obstruct the relevance of information or its bearing on the assessment.

4 During the initial presentations of the assessment, the team circulated printed material and flyers in indigenous languages that explained the focus of and proposed process for the human rights assessment. These documents were not continued.

5 The Memorandum of Understanding between Goldcorp and representatives of the socially responsible investors identified that the Steering Committee may designate some factual information as confidential. This occurred in relation to only one piece of information, and did not affect the relevant findings.

ASSESSMENT PROCESS

The assessment methodology consisted of five phases, implemented over an 18-month period.

Preparation

The first phase of work consisted of identifying the context in which the mine is operating to clarify the issues to be reviewed, the status of human rights in Guatemala and locally, and what concerns were being raised, by whom. This initial work also included a review of information on both Montana and Goldcorp and interviews with experts and people with specialized knowledge, both in and outside of Guatemala. The review included history, Mayan culture, land issues and history, fulfilment of human rights in Guatemala, and others.

The assessors then initiated a first round of interviews (23) with government agencies, experts, and organizations in Guatemala City introducing the assessment and seeking input on:

- Current context in Guatemala;
- Identifying stakeholders and potential Guatemalan partner organizations or individuals; and
- Identifying appropriate strategies and procedures for presenting the proposed participatory process to the affected stakeholders.

At the end of this phase, the assessors compiled a preliminary stakeholder map and an initial list of key areas of concern and potential impacts.

Initiation of the Participatory Process

The second phase of work involved four tasks:

- Ongoing consultation about the context, stakeholders, and conditions required for undertaking the assessment process;
- Initial round of interviews about human rights themes to be included in the assessment;
- Efforts to identify a partnering organization; and
- Initial review of the mine's operations and documentation.

The assessment team spent more than 180 days in Guatemala and over 80 of those in San Miguel Ixtahuacán and Sipacapa, with continuous presence from mid-January through the end of March 2009, meeting with local organizations, municipal and community authorities, and residents. The focus was to identify mechanisms to build credibility, involve local organizations or community representatives in the design and oversight of the participatory process, or address concerns of institutions and organizations about the independence of the process.

Over several months, in parallel with increased national debate on the mining law, the situation in the two municipalities became more conflictive and challenging. Activation of this debate resulted in further polarization of the positions of individuals and organizations at the local level. In the context of these circumstances, the HRIA became a proxy for the larger debate over mining in Guatemala. The assessors became increasingly concerned that carrying out the assessment would put participants at risk. Meetings held with community authorities to present the assessment for their decision on whether and how to participate were increasingly resulting in conflict, and threats of violence. The determination was made that conflict was escalating in the area due to polarization associated with the assessment. The conditions for carrying out a participatory human rights impact assessment did not exist.

It was agreed with the steering committee that the assessors would review the situation to determine whether the assessment mandate could be completed under the circumstances. In spite of the challenges, some residents of San Miguel continued to encourage the assessment to take place. The assessors considered restricting the work to an assessment of company policies, procedures and practices. At this stage in the process, two new team members were added, and the team developed a new strategy that relied on personal interviews and small focus groups conducted by the assessors themselves. To obtain the participation of people from different stakeholder groups and points of view, the assessors relied on local leaders from San Miguel who were willing to facilitate the work by identifying people who represented as wide a range of local

perspectives and groups as possible and inviting them to participate in interviews. Because of the existing polarization and local norms, it was determined that without local facilitation of this kind, the assessors would not have access to most people and could not be confident that they interviewed a representative range of perspectives and groups. This access was not available in Sipacapa, which is the principle reason for its limited participation.

On this basis, it was agreed with the steering committee to redefine the work done as a Human Rights Assessment, rather than a Human Rights Impact Assessment, recognizing that further work would be required to complete a fully inclusive and comprehensive impact assessment.

Implementation of Revised Assessment Process

The focus of work for this stage was to fill the gaps in data and understanding about specific human rights allegations, and to improve participation of some stakeholder groups underrepresented in the interviews to date. At the same time the debate about mining shifted to the national level as congress debated the mining law.

In May and June 2009 an opportunity developed to work through local contacts to identify and interview people from most of the stakeholder groups previously identified in San Miguel. The assessment team spent eight days conducting interviews and focus groups with a range of stakeholder groups. In parallel, individual and group interviews were done at, and around, the mine with workers, managers, contractors, and local residents. This effort represented a total of more than 250 hours of interviews from local participants, with 213 local people including 10 per cent of local employees, and 27 community and municipal leaders and authorities.

The interviewees were from a range of stakeholder groups, ranging from land sellers well established in new businesses, contractors, and authorities working with the mine on community projects, current employees both satisfied and with concerns, to community residents with specific grievances. Testimonies were collected from several communities throughout the area, in many instances at the interviewees' residence,

and through small group meetings and focus groups in public places. However, the assessors were not able to meet with and interview those organizations most opposed to the mine and the HRIA; invitations extended to these groups were rejected. This represents a limitation to this report.

The range of perspectives was broad, and did not present a unified view of the mine or its impacts and benefits. Follow-up interviews with Montana personnel or local specialists often served to confirm information obtained from interviews, supporting the overall confidence in the interview process. Overall, the assessors deem the credibility of the information obtained to have been high.

Interaction with Montana consisted of interviews in Guatemala City, interviews with corporate officers in Vancouver, Canada, followed by two visits to the mine. The first visit (March 2009) was for document review, familiarity with the operations, review of policies and management systems; the second visit (June 2009) included in-depth follow-up interviews with selected managers and staff, as well as one focus group with management, five group interviews and individual interviews with employees at various levels of the organization.

Analysis and Assessment of Findings

Given the complexity of the situation and the divisive nature of the controversies associated with the mine's activities, it was important to develop a consistent and rigorous approach to assessing the validity of concerns and allegations about impacts from the mine, and to reviewing the adequacy of the company's performance. Due to the newness of human rights impact assessments applied to private business activities, there is not an established, tested methodology,⁶ especially for determining what constitutes respect for human rights

⁶ Unlike more mature impact assessment areas (e.g. environmental and social), which have well-developed and tested methodologies, human rights impact assessments (HRIAs) applied to private sector business impacts is a new field. HRIAs developed initially as evaluation tools to measure the effectiveness of programs to strengthen human rights. A considerable body of new literature and guidance documents has come out in the last few years, but has yet to be tested for efficacy.

Table 1.2: Top 20 Issue Areas of Concern to Stakeholders			
	Issues	Score	Ranking
Security	Conflict	184 (53%)	1
Other Issues	Benefitting from Poor Governance (Taxes)	149 (43%)	2
Environment	Water Quality	134 (39%)	3
Consultation	Role of Guatemalan Government	128 (37%)	4
Consultation	Need to Address Negative Impacts	126 (36%)	5
Environment	Health	122 (35%)	6
Consultation	Information disclosure	119 (34%)	7
Environment	Land Pollution	118 (34%)	8
Labour	Basic Work Conditions	114 (33%)	9
Consultation	Timing and Clarity of Information	112 (32%)	10
Social Investment	Participation in Projects	110 (32%)	11
Consultation	Montana's Public Relations Campaign	107 (31%)	12
Consultation	Quality and Quantity of Information	105 (30%)	13
Labour	Workers' Health	101 (29%)	14
Consultation	Consultation Mechanisms	101 (29%)	15
Labour	Grievance Mechanisms	99 (29%)	16
Environment	Water Quantity	98 (28%)	17
Environment	Grievance Mechanisms	95 (27%)	18
Other Issues	Government Capacity and Relations	90 (26%)	19
Land Acquisition	Fair Price and Informed Decisions	85 (25%)	20

in the various dimensions that need to be addressed by a mining company.⁷

Based on a review of the existing human rights assessment literature, the following approach was developed for the analysis of information and to make a determination of impacts and company compliance:

- Seven priority issue areas were identified from concerns raised by stakeholders: consultation, environment, land acquisition, labour, economic and social investment, security, and access to remedy. These serve as the framework for this report. The overall environment of conflict was the concern raised

⁷ The DIHR Compliance Assessment Tool, which was recommended for use in the original Request for Proposal, was useful for the assessment; however the indicators did not cover all areas, nor was it structured specifically to determine whether impacts had occurred, which in the assessors' opinion was a separate step from assessing compliance with a policy.

most frequently by stakeholders; this was considered as part of the context that affected all seven issue areas (see Table 1.2). A full stakeholder issues matrix is provided in Appendix D.

- For each issue area, the relevant human rights standards were identified based on the Universal Declaration of Human Rights, and international human rights and labour conventions. Given Guatemala's strong record of ratifying international human rights and labour conventions, including ILO Convention 169, which protects indigenous peoples rights, there was no question of the applicability of these standards in the national context of Guatemala, which bind the government and frame Montana's responsibility. Where the relevant international human rights standards or their interpretation had changed since the development of the mine, the changes were identified.

The Danish Institute for Human Rights^a Human Rights Compliance Assessment (HRCA) tool was selected by the Steering Committee for the assessment of the Marlin Mine. This is an online assessment tool that was developed jointly between companies and human rights experts. The HRCA Version 1.0 has been available and used by hundreds of companies since 2005.^b

The HRCA contains over 300 questions with related indicators and generates an assessment report that reflects high, medium, and low risk areas. Using this report, companies can identify gaps in compliance with international human rights standards and prioritize areas for further attention.

The assessors reviewed all the questions to determine which were relevant to the operational context and stakeholder concerns about the Marlin Mine. Questions and indicators that were potentially relevant to the assessment were included for further investigation; and only the human rights that were clearly not relevant were excluded. The questions related to a company's research and development practices and the end use of a company's products were determined to be not relevant to the assessment, leaving 243 questions to be addressed. These remaining questions were divided according to the priority issues for each section of the present report.

It should be noted that the HRCA tool contained few indicators related to some of the assessment priority areas, notably related to indigenous peoples rights issues as well as social investment practices. For these assessments, additional legal research was conducted and other assessment tools consulted to help identify relevant indicators for compliance with international human rights standards and international good practices for the extractive industry.^c

During the field work stage, further information was sought from stakeholders and the company. Interview guides were prepared based on key questions and indicators, and the company's policies, procedures, and practices were reviewed for compliance with the relevant international human rights standards.

The assessors completed the HRCA on-line assessment and generated the two summary reports. These reports are presented using a "red / yellow / green" classification. The assessors classified questions as "red" (i.e. non-compliant) if all relevant indicators were "red"; similarly, questions were classified as "green" (i.e. compliant) only if all relevant indicators were "green." As a result, the vast majority of questions (217 of 243) are classified as "yellow," reflecting the reality that the mine has indicators of compliance and non-compliance, with the implication that further attention is required through ongoing due diligence across the full range of human rights issues.

Due to the proprietary and confidential nature of the questions and indicators in the HRCA tool, these reports could not be made public. Goldcorp and Montana will be given access to the detailed on-line results of the HRCA assessment for the purposes of updating and tracking the international human rights compliance of the Marlin Mine over time.

^a The Danish Institute for Human Rights (DIHR) is an independent human rights institution modelled in accordance with the UN Paris Principles. The Institute, which was established in 2002, has a mandate for research, education, and implementation of national and international programmes (www.humanrights.dk/about+us).

^b The assessment used version 1.0 of the HRCA tool. Version 2.0 was published in early 2010, too late for application to the current study.

^c Other assessment tools consulted included: Rights & Democracy 2008, "Getting it Right: Step by Step Guide to Assess the Impacts of Foreign Investments" (www.ichrdd.ca/site/_PDF/publications/Getting-it-right_HRIA.pdf) and International Alert 2005, "Conflict Sensitive Business Practice: Guidance for the Extractive Industry" (www.international-alert.org/pdfs/conflict_sensitive_business_practice_all.pdf).

- To determine the criteria for compliance with international human rights standards, the relevant questions and indicators from the Danish Institute for Human Rights (DIHR) Human Rights Compliance Assessment (HRCA) tool were identified and assessed for each of the issue areas. To permit a more detailed analysis of the mine's operations, performance was reviewed in relation to international good practice standards applicable to mining, once again identifying changes in these standards over time, if relevant.
- On the basis of the criteria for respecting human rights, the information available to the assessors was then reviewed and weighed to determine whether it was sufficient and credible.⁸ Input from stakeholders, including was reviewed for objectivity, credibility, and reliability.

A review of the company's policies and procedures, and a comparison with what could be determined about company practice, led to the finding of company performance in terms of respect for rights, based on the following classifications:

- *Violation*: Action or inaction by the State results in human rights of individuals or groups not being protected or fulfilled;
- *Infringement*: Action by the company results in a proven worsening of the human rights situation for a person or group of people;
- *Failure to Respect*: Inaction by the company results in potential for or worsening of the human rights situation for a person or group of people. This may also cover situations in which the company has not safeguarded or provided sufficient due diligence against complicity or involvement in violations by the State or by others, such as contractors;

- *Respect*: Actions/due diligence by the company results in managing the risks of harm to human rights; and
- *Enhancement*: Actions by the company result in the proven improvement of the human rights situation for a person or group of people.

The approach used in this assessment is based on professionally informed judgement, and chosen to provide rigor and consistency. Particular attention was given to not overstepping available information. This assessment does not provide a legal judgement about the existence of human rights violations; nor was it mandated to do so. Rather, it assesses where there is credible evidence that impacts may be occurring or have occurred, and whether company policies or practices exist to reduce or avoid the likelihood of those impacts.⁹

Report Production

The assessors undertook a process of data verification with specific stakeholders to review the information provided by them, especially those who provided unique or particularly relevant information. A broader process of verification was not deemed possible because of the ongoing climate of tension surrounding the mine.¹⁰

Some findings and conclusions about company practices were reviewed verbally with Montana's senior managers in order to verify information and reconfirm documents that had not been received or did not exist.

⁸ Standard auditing guidelines and practices were reviewed and used where appropriate to guide the process of evaluating and weighing information. See the Government Auditing Office, government auditing standards for guidance on determining the reasonableness of evidence. Comptroller General of the United States, June 1994.

⁹ This part of the assessment is based on tools (DIHR) that measure company compliance with human rights standards through policies, practices, management systems, etc.

¹⁰ At the time the verification process was planned, a congressional visit to San Miguel to discuss a proposed public consultation about exploration was cancelled because of the threat of violence.

CRITICAL ANALYSIS OF THE ASSESSMENT

Challenges

Despite this assessment's success in synthesizing contributions from hundreds of local stakeholders and setting out recommendations for moving forward, it is important to clearly set out what this assessment did not accomplish.

First and foremost, it was not possible to include the perspectives of some of the groups most critical of the mine, as they chose not to participate. In Sipacapa in particular, there are gaps in the perspectives and concerns of authorities, organizations, and community members, and as a consequence the findings may under represent some allegations of impacts. Only 35 of 213 local interviews or focus group discussions were with residents of Sipacapa, including an estimated 10 mine employees. The assessors consider this gap most problematic in relation to rights associated with prior consultation and land acquisition.

More fundamentally, the assessors recognize that the Sipacapa Maya have a distinct culture from that of the Mam Maya of San Miguel. The cultural and historical distinctiveness means that impacts and issues of indigenous peoples rights associated with territorial, cultural, and linguistic aspects of human rights cannot be generalized from the Mam to the Sipakapense people. A second category of stakeholders underrepresented is local groups actively critical of the mine. Leaders of some of these organizations held initial discussions with the assessment team, but chose not to participate, and encouraged others to do the same. The assessment team was only able to meet with a few community members involved in conflicts and complaints against or from the mine. Vocal critics of the mine call for its closure, but of nearly 350 people the assessors talked to, only a small percentage proposed this as a solution to human rights concerns.

The weakness of documentation by Montana significantly limited the ability to verify or counter specific claims. In particular, the company was unable to produce documentation to substantiate claims about actions taken during specific incidents, or how the company responded to specific concerns. In some cases,

there is reason to believe that the lack of documentation was an unfortunate gap in management procedures; in others, the absence of data or documentation suggested that the company did not have substantiation for its claims.

The polarization and tensions generated within and between communities related to carrying out the assessment constrained the ability to verify findings and recommendations with stakeholder groups.

The recommendations put forward in this document are largely the work of the assessment team, rather than originating from the communities. Wherever possible, stakeholder input on recommendations has been included; however, the assessment recommendations are based primarily on professional judgement and review of good practice examples. Due to the restrictions set out above, the affected people have not been consulted with respect to these recommendations. As a result, it will be necessary for the company to engage and consult with the affected people, to the extent they are willing, before moving forward with an action plan – except where immediate actions are recommended.

Accomplishments

From the interviews with several hundred people who live around the mine in the two local municipalities, the assessment identified a range of concerns and allegations about impacts, many of which had the potential to affect human rights. Further interviews with stakeholders and specialists, and additional data collection, confirmed and corroborated much of the information provided during the initial process; clear patterns emerged in some cases that allow for findings and recommendations about respect for human rights, even when it was not possible to make a clear determination of whether impacts had occurred.

Access to company personnel and documents allowed the team to review whether company's policy and procedures are adequate to respect human rights, and to identify areas where the company's practice does not meet that expectation.

By systematically matching allegations to gaps in the company's due diligence to respect rights, it was possible to identify a number of impacts to rights that may have taken place, and which the company now

has a responsibility to address. The assessment team is confident that the information obtained provides sufficient basis for the assessment and the findings presented in this report.

INTERNATIONAL HUMAN RIGHTS FRAMEWORK

This section provides an overview of the international human rights framework that applies to companies operating in Guatemala. The analysis has two main components: the "Protect, Respect and Remedy" framework for business and human rights, and an analysis of the gaps in domestic protection of international human rights in Guatemala.

It is important to note that international human rights law has evolved since the Marlin project began, notably with respect to clarifying the "Protect, Respect and Remedy" framework for business and human rights, as well as in relation to the development of international standards related to indigenous people's rights.

Business and Human Rights: "Protect, Respect and Remedy"

There is increasing recognition of the significant impacts (both positive and negative) that businesses have on human rights. After considerable study and debate, the UN Secretary-General's special representative on business and human rights, John Ruggie, presented a report entitled "Protect, Respect and Remedy: A Framework for Business and Human Rights."

This framework was unanimously welcomed by the UN Human Rights Council in June 2008, marking a significant step forward in the development of international human rights law and policy. Since that time, the framework has been adopted and applied by various governments, multilateral agencies, industry associations and civil society groups around the world.¹¹ The framework was referenced favourably by the International Council on Mining & Metals (ICMM), an industry association that Goldcorp joined in 2009.

The "Protect, Respect and Remedy" framework determines the scope of a company's human rights responsibility and contains three core principles:

- The State's duty to protect citizens from human rights abuses by third parties including business;
- The responsibility of companies to respect human rights; and
- The requirement for both States and companies to ensure access to remedies.

Each principle is an essential component of the framework: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation that society has of business; and access to remedy, because even the most concerted efforts cannot prevent all abuse, while access to judicial redress is often problematic, and non-judicial means are limited in number, scope and effectiveness. The three principles form a complementary whole in that each supports the others in achieving sustainable progress.¹²

For the purpose of the Marlin Mine assessment, the main focus was on the corporate responsibility to respect human rights and to ensure access to remedies. In this regard, the "Protect, Respect and Remedy Framework" clarifies the following points:

- There are few internationally recognized rights that business cannot impact, or be perceived to impact, in some manner. Therefore, companies should consider all such rights.
- In addition to compliance with national laws, companies have a baseline responsibility to respect human rights. Failure to meet this responsibility can subject companies to the courts of public opinion (comprising employees, communities, consumers,

¹¹ International Council on Mining & Metals, May 2009.

¹² Ruggie, April 2008, para. 9.

civil society, as well as investors), and occasionally to charges in formal courts. Whereas governments define the scope of legal compliance, the broader scope of responsibility is defined by social expectations, as part of what is sometimes called a company's 'social licence to operate.'

- Because the responsibility to respect is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere or enhancing other human rights. 'Doing no harm' is not merely a passive responsibility, but may entail positive steps.
- To discharge the responsibility requires ongoing due diligence about human rights.¹³ In this regard, companies should consider the following: (a) the country context in which business activities take place, to highlight any specific human rights challenges that might be posed; (b) what human rights impacts company activities may have within that context; and (c) whether companies might contribute to abuse indirectly through relationships connected to their activities.
- A basic, human rights due diligence process should include: (a) adopting a corporate human rights policy; (b) undertaking human rights impact assessments of existing and proposed activities; (c) integrating human rights policies throughout the company; and (d) tracking performance, including regular updates of human rights impact and performance.
- Corporate responsibility includes avoiding complicity, which refers to indirect involvement in human rights abuses where the actual harm is committed by another party, including governments and non-state actors. Ongoing due diligence can help a company avoid complicity.
- Corporate responsibility includes access to remedies. This requires providing a means for those who believe they have been harmed to bring this to the attention of the company and seek remediation, without prejudice to the legal challenges available. Providing access to remedy does not presume that all allegations represent real abuse or bona fide complaints.

The "Protect, Respect and Remedy Framework" provides a useful reference for Montana and Goldcorp to

¹³ Ibid, para. 56.

understand and implement human rights responsibilities. Given the widespread endorsement of this new framework,¹⁴ it can be anticipated that many future legislative, regulatory and voluntary initiatives will look at human rights obligations through the concepts expressed, and the corresponding due diligence requirements to move towards an acceptable standard for human rights performance.

Implementation of International Human Rights Law in Guatemala

In areas where state institutions in Guatemala are effectively protecting human rights through national laws and policies, business can focus with greater confidence on legal compliance to fulfil its obligations to respect human rights. However, where there are gaps and shortcomings in state protection of human rights, business must go further than a compliance approach if it is to ensure its presence will not result in human rights abuses.¹⁵

As discussed above, the responsibility to respect requires companies to undertake human rights due diligence to become aware of, prevent and address adverse human rights impacts. Given the number of human rights concerns in Guatemala, this is a significant undertaking. Table 1.3 indicates that, although Guatemala has a high score for signature and ratification of human rights instruments, the State's implementation of those instruments through concrete legislative, policy and institutional measures is quite weak.

In a 2008 review of Guatemala's human rights record conducted by the UN Human Rights Council, the most frequently cited concerns and recommendations included:¹⁶

- *Implementation of Peace Accords* – particularly with respect to the measures to protect indigenous

¹⁴ The Protect, Respect and Remedy framework was welcomed unanimously by the Human Rights Council in June 2008 (Canada was a member of the council at the time). It has been welcomed by numerous industry associations, including the ICMM, as well as intergovernmental and governmental bodies, including Canada's Export Development Corporation's "Statement on Human Rights" and "Building the Canadian Advantage: Canada's Corporate Social Responsibility Strategy for the Canadian International Extractive Sector" March 2009.

¹⁵ Ruggie, April 2009, para. 66.

¹⁶ United Nations Universal Periodic Review, May 2008.

Table 1.3: Guatemala's Score on Protection of Human Rights		
The scale used attributes a lower number for better performance.		
Human Rights Compliance	Overall Score (0 to 8)	Specific Indicators
Formal acceptance of human rights	0 (high level of compliance)	Ratification of all fundamental human rights conventions and other conventions.
Compliance with civil and political rights	6 (low)	Systematic violations in extrajudicial killings/disappearances; torture and ill-treatment; unfair trial; denial of freedom of expression; discrimination. Incidents of detention without charge or trial; denial of freedom of association.
Compliance with economic, social and cultural rights	2.5 (relatively high)	High compliance for highest attainable health (under five and infant mortality); right to education (net primary enrolment); right to housing (clean water). Medium compliance for right to housing (sanitation) and right to food (under-weight children under 5). Low compliance for right to food (proportion of under-nourished).
Women's rights	6 (low)	Medium score for ratio of girls to boys in primary and secondary educations. Medium level of women's rights violations. Low score for percentage of women at ministerial level. No national action plan for women.
Source: Danish Institute for Human Rights provides summary information on country human rights compliance in Guatemala. Scoring is based on statistics and indicators from 2000 to 2002.		

peoples rights, combat discrimination and promote inclusion; as well as to leave behind the culture of violence inherited from years of internal armed conflict;

- *Promotion and protection of indigenous peoples rights* – to ensure the full enjoyment of all human rights by indigenous peoples, the protection of indigenous peoples right to be heard before traditional land is exploited, and to improve the situation of indigenous children;
- *Protection of human rights defenders* – by developing a government policy for the protection of human rights defenders, and by thoroughly and promptly investigating killings, threats, attacks and acts of intimidation and bringing those responsible to justice; and
- *Combating impunity and corruption* – by providing improved financial, technical and personnel resources to judicial institutions, providing better police protection to judges, investigators and witnesses, and supporting the implementation of the International Commission against Impunity's mandate.

In addition to these overarching human rights concerns, the assessors conducted additional research about Guatemala's national laws and practices, identifying major concerns and gaps in protection of

international human rights related to the mine's operations and stakeholder concerns.¹⁷ The resulting information was used to identify specific areas of risk of human rights impacts for Montana's operations, and assisted with the application of the DIHR HRCA tool.

The most significant areas of concern identified in the detailed gap analysis are discussed below. A more detailed discussion of the specific human rights impacts that are at risk of occurring due to these gaps is discussed within each of the relevant sections later in the document.

Civil and Political Rights (Violence and Impunity)

Guatemala ratified the International Covenant on Civil and Political Rights in 1992, and the First Optional Protocol in 2000. Although the civil war has ended, the level of violence and insecurity in Guatemala represents a major human rights concern. By many indicators, Guatemala remains one of the most violent

¹⁷ Sources of information for this review included the Universal Periodic Review of Guatemala, reports from OHCHR field presence in Guatemala; the UN Treaty Bodies; the UN Special Procedures that have conducted field missions to Guatemala; the International Labour Organization; and civil society organizations specialized in human rights.

places in the hemisphere and world, and the trend is one of rising violence.¹⁸ Of particular concern is the rise in murder and attacks against women and human rights defenders (e.g. indigenous leaders, union representatives, community and environmental organizations, journalists).¹⁹

The state has proven incapable of addressing this violence. There is little in terms of effective investigation, prosecution or convictions for violent crimes or human rights abuses. In many instances, members of the State's security forces are implicated in crime, violence and human rights violations.

Almost every report about Guatemala highlights the problem of impunity as a symptom and a cause of the State's inability to fulfil its responsibilities to protect human rights. As mentioned in the 2008 UN country report: "The weakness of the State in resolving non-criminal disputes (labour, civil, family and property jurisdictions) contributed to these conflicts overlapping into the criminal sphere, where the highest percentage of cases is concentrated."²⁰ The problem of impunity is so acute that, in January 2008, international assistance was enlisted to create the International Commission against Impunity in Guatemala (CICIG).

It is against this backdrop of violence and impunity that the national debates over mining and development are taking place. Expectations about democratic debate and peaceful protest must be tempered by the enduring legacy of the civil war (1960–1996). The risk of social protest turning violent is very high, as can be seen by some of the incidents involving the Marlin Mine, as well as other industrial projects.

Indigenous Peoples Rights

Guatemala is a multi-ethnic, pluri-cultural and multi-lingual society, in which around half of the population of 13 million belongs to the Maya, Xinka and Garífuna cultural groups. In a number of regions, especially

rural areas, indigenous peoples make up the majority. Historically, indigenous people have been subjected to political exclusion, cultural discrimination and economic marginalization. While the extremely difficult situation facing the Maya, Xinka and Garífuna is highlighted by human and social development indicators, they also experience daily racial and ethnic discrimination, which takes the form of attitudes of disdain and rejection towards indigenous people (including in the media), prejudice against various aspects of their culture, such as their spirituality, and the use of their languages and traditional costumes, and a general picture of disadvantage in gaining access to the benefits of developmental, and political and social involvement benefits.²¹

Currently, some of the key issues related to indigenous peoples' rights include access to land and resources; access to justice; participation in politics; intercultural and bilingual education; and recognition of indigenous spirituality and sacred places. Furthermore, given the large proportion of indigenous peoples in Guatemala, all other human rights and labour rights issues have an important, cross-cutting indigenous peoples rights dimension. There are also specific concerns about the discrimination, exclusion and violence that affect indigenous women.²²

In the context of mining and development, the issue of land rights is a particular concern, including: lack of access to land, lack of response to land-related claims, lack of respect for traditional places like communal forests, forced resettlement as a result of economic development projects and problems stemming from loss of land caused by armed conflict. As noted by the UN Special Rapporteur, these problems create a situation of rising social tensions.²³

Of particular importance is the fact that Guatemala ratified the International Labour Organization Convention 169 (ILO 169) concerning Indigenous and Tribal Peoples in Independent Countries in 1996. For indigenous people, ILO 169 is an important document conferring rights to, among other items, prior

18 Office of the United Nations High Commissioner for Human Rights on the work of its office in Guatemala, 2009, para. 10.

19 Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, 2005, paras. 27-41. "Manifestations of violence against women include murder; domestic violence; violence against women in the workplace; trafficking; and custodial violence."

20 Office of the United Nations High Commissioner for Human Rights on the work of its office in Guatemala, 2009, para. 40.

21 Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, February 2003.

22 Ertürk, 2005, para 15. "Indigenous women experience discrimination at 4 levels, as indigenous, as poor people, as women and as rural inhabitants."

23 *Ibid*, para. 27.

Table 1.4: Guatemala Key Social and Economic Indicators

- Guatemala ranks 121st out of 179 countries in the 2008 Human Development Index.
- Guatemala ranks 54th out of 108 developing countries in terms of the Human Poverty Index.
- More than half the population (56 per cent) lives in poverty.
- Extreme poverty is highest amongst the indigenous peoples (70 per cent).
- 5.6 per cent of the richest households control 50 per cent of total income.
- 2 per cent of the population owns 70 to 75 per cent of agricultural land.
- Chronic malnutrition is more than twice as high in Guatemala than in most countries of Latin America and among the highest in the world (only higher in Yemen and Bangladesh).
- Half of children under 5 are stunted; this affects indigenous children (70 per cent) far more than non-indigenous (30 per cent).
- 15,000+ children under 5 die each year.
- Only 30 per cent of children living in rural communities complete primary education and, in the case of indigenous children, only 20 per cent.
- Two-thirds of Guatemalan people are too poor to feed themselves adequately; in more than 60 per cent of homes, food spending does not meet minimum daily requirements.
- Statutory minimum wage is not set in relation to food costs, purchasing only 56 per cent of the minimum daily food basket.
- 55 per cent of rural inhabitants do not have proper access to drinking water; 65 per cent of the rural population does not have access to improved water or sanitation.
- Municipal authorities are responsible for providing water; however, only 4 per cent treat the water they supply.
- 1 per cent of the population aged 15 to 49 has AIDS; in 2001, there were 63,000 infected children.

Sources: PNUD, 2008a; Ziegler, 2006; CESC, 2003; Centre on Housing Rights and Evictions, 2007.

consultation ahead of any action that affects them directly, to decide on their own priorities for development, participation in decision making on matters that affect their lives, participation in the benefits derived from mining, oil or gas production on their lands, and compensation for any damages. However, in Guatemala effectively none of the provisions of ILO 169 have been brought into law and regulation.

The issue of consultation with indigenous people has become the subject of intense and polarized debate within Guatemalan society. The weakness of Guatemala's framework for consultation with indigenous peoples – despite its ratification of ILO 169 – is a major concern from a human rights perspective. This is an important gap in the implementation and protection of indigenous peoples' rights in Guatemala, which gives rise to serious social conflict and political mobilization. Local and international organizations focus on the issue of consultation as they denounce exclusionary development through which local populations do

not benefit from the exploitation of Guatemala's natural resources.²⁴

Economic, Social and Cultural Rights

In 1988, Guatemala ratified the International Covenant on Economic, Social and Cultural Rights. However, the country faces serious problems of poverty and social exclusion, which create obstacles for the progressive realization of economic, social and cultural rights (ESCRs). The social and economic indicators in Table 1.4 illustrate some of these challenges.

The Ministries of Agriculture, Livestock, and Food; Communications, Infrastructure, and Housing; Culture and Sports; Education; and Public Health and Social Assistance are responsible for developing policies and

²⁴ Special Rapporteur on the right to food, Jean Ziegler, January 2006, para. 11.

monitoring and enforcing social laws and social welfare legislation.

The 2008–2011 National Development Plan presented by the newly inaugurated government includes a commitment to sustainable economic development, poverty reduction, and development of rural communities and indigenous peoples. Health and education are identified as key priorities with specific commitments to tackle malnutrition and enhance access to education for those living in poverty.²⁵

The progressive realization of economic, social and cultural rights depends on more than just protective measures; the State is required to undertake positive acts and implement economic, social and cultural programs. In this regard, the level of government spending on human rights priorities is a relevant consideration. A 2008 UN report addresses this issue:

*If the Government is going to be able to live up to its obligations for more rapid pace of realization of social and economic rights through more progressive and proactive social spending and promotion of pro-poor growth, fiscal revenues and political support from society at large are needed. The Government has very limited fiscal space which will become even more of a challenge in 2009. Guatemala already has a very low tax base. To raise the tax base and undertake major fiscal reform will require a major political effort.*²⁶

25 The 2008-2011 plan contains eight cross-cutting principles: priority to the nation's poorest; gender equity; investing in children; multiculturalism; ethics and moral conduct; environmental conservation, citizen engagement, and respect for human rights. The plan clusters actions around four pillars: solidarity, governance, productivity, and regional relations.

26 Office of the United Nations High Commissioner for Human Rights on the work of its office in Guatemala, 2008, paras. 63-65.

Labour Rights

Guatemala has ratified all eight of the ILO fundamental conventions relating to the rights of workers and conditions of work.²⁷ A study conducted by the International Labour Organization in 2003 concluded that Guatemala has a Constitution and a framework of labour laws that give effect to, and are largely in conformity with, the core principles in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

The Ministry of Labour and Social Welfare is responsible for developing policies and monitoring and enforcing labour laws and social welfare legislation, as well as setting minimum wages, occupational health and safety, and resolving disputes between employers and workers.

The key concerns identified with labour rights protection in Guatemala include:

- Inadequacy of the minimum wage to provide for an adequate standard of living of workers;
- Right to freedom of association and to collective bargaining are at risk given the low level of unionization (3%) across the country and ongoing patterns of intimidation and reprisals against union leaders;
- Discrimination against women in terms of pay, benefits and occupation; and
- Weak enforcement of labour standards by the Ministry of Labour, including occupational health and safety standards.²⁸

27 ILO, Fundamental Principles and Rights at Work: Central America. These ILO Conventions have been identified as fundamental, and are at times referred to as the core labour standards: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); and Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

28 U.S. Department of Labor report in Section 4: Labour.

Administration of Justice and Rule of Law

The Guatemalan legal system is reported to operate in a manner that favours certain sectors of society over others. For example, while the non-payment of salaries to workers is classified as a minor misdemeanour, social protest and land occupation are considered crimes, with the full force of the law brought down on peasants and indigenous populations.²⁹

The lack of equality before the law manifests itself in the criminalization of social protest. The UN Special Representative described this phenomenon after her recent visit to Guatemala:

This phenomenon most affects defenders working on land rights, the environment and the rights of indigenous peoples, whose enjoyment of those rights is perceived to interfere with strong economic interests linked to projects such as the construction of a cement factory or the functioning of a gold mine. Available data on the criminalization of defenders is considered to underestimate the real extent of the problem, but the reported figure of 45 proceedings against defenders registered in the last few years gives the phenomenon the dimension of a pattern rather than a series of isolated cases. Human rights defenders are charged with crimes like terrorism, activities against the security of the nation, or aggravated theft of land. In two cases, court proceedings have already resulted in convictions. Considering the overall immobility of the judiciary in providing justice, prosecutions against defenders appear to be conducted with inexplicable speed and efficiency.³⁰

29 Ziegler, January 2006, para. 54.

30 Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, February 2009, para. 25.

Amnesty International also notes that as “a consequence of this practice of criminalizing social problems, the judicial officials are failing to abate tensions in society, and in many cases are exacerbating them.”³¹

Numerous reports discuss the particular difficulties that indigenous peoples have in relation to the legal system and access to justice. Problems include discrimination, lack of legal interpreters, and non-recognition of customary law and indigenous legal authorities.³² The Special Rapporteur on the right to food notes that:

[I]ittle progress has been made on the recognition of indigenous law, of indigenous rights to land and their rights over the use and administration of natural resources in their territories ... with the justice system failing to resolve the claims of communities and individuals, but rather criminalizing social conflicts over land and the use of natural resources.³³

Together, the problems of impunity, lack of equality before the law, criminalization of social protest and non-recognition of indigenous peoples’ rights and legal traditions combine in a generalized lack of confidence in judicial institutions by the Guatemalan population. The International Commission of Jurists recently noted that “a negative image and distrust of the justice system continues to prevail in society.”³⁴ In the Barómetro Iberoamericano 2009 survey of attitudes towards democratic institutions in Latin America, only 29 per cent of the Guatemalan population reported confidence in the country’s courts.³⁵

31 Amnesty International, April 2005.

32 Ziegler, January 2006, para. 30: “Guatemalan justice system needs support to ensure that victims of human rights violations, and particularly indigenous women, find redress, and indigenous customary law needs to be recognized and incorporated in the work of the judiciary.” Also, Stavenhagen, February 2006, para. 64: “Study regarding best practices carried out to implement the recommendations contained in the annual reports of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples.”

33 Ziegler, January 2006, para. 39.

34 International Commission of Jurists, January 2008, 5-6.

35 Consorcio Iberoamericano de Investigaciones de Mercados y Asesoramiento, Barómetro Iberoamericano, 2008 2009, www.cimaiberoamerica.com.

GUATEMALAN CONTEXT

For most Guatemalans, the 1996 peace accords ending the 36-year armed conflict symbolized not only the closing of an era, but also the beginning of a new one in which peace would be accompanied by significant changes in political, social and economic spheres. However, the failed 1999 referendum on constitutional amendments to implement the accords was, for many, a step backward. Although the peace accords were a watershed in Guatemala's political development, 13 years later disillusionment characterizes the low degree of implementation, and more significantly, the lack of genuine change for the indigenous population.

Guatemala, like other post-civil war countries, has put an end to the armed conflict, but has not dealt effectively with its dire consequences. The police and judicial systems are far outmatched by the levels of crime and violence. Extreme economic hardship combines with few social mechanisms and venues to settle divergences peacefully to foster ongoing violence. Democratic participatory processes seldom succeed due to mistrust; lack of trust has become a way of life and a triggering factor for social conflict. The result is frequent public unrest and protests.

Political Context

In contrast to the negative legacy of the civil war, positive transformations have also occurred. Regular democratic elections are established and Guatemala now self-recognizes as a multi-ethnic, multicultural and multilingual nation.³⁶ Guatemala formally became a democracy in 1986; by the 2007 elections, procedural democracy had consolidated as a unitary republic with eight regions, 22 departments and 333 municipalities.

The government is spending more on health and education; access to utility services (drinking water, sewage, electricity) is also improving, although at an uneven pace; infrastructure is slowly improving; vulnerable populations like women and children are the focus of several social programs; and opportunities to

build social capital and promote human development are unevenly expanding.

It is also worth noting the prominent role of civil society³⁷ as an, at times powerful, actor to chart Guatemala's course. The proliferation of civil society organizations (e.g., non-governmental, advocacy and professional organizations) has been one of the most striking developments. Civil society organizations have given new meaning to the 'culture of involvement.'

Yet, Guatemala remains a fragile democracy with elected government but weak institutional structures. The emergence of local political power, control and administration is starting to check the central state and break up the concentration of administrative, fiscal and political power. Ideally, decentralization would open up more possibilities for holding political leaders accountable for their (in)action and institutionalize a new form of democratic politics.

The 2002 Municipal Code identifies communities of indigenous peoples (Art. 20) and indigenous mayorships with a right to legal status (Art. 55). Even more important, it recognizes the auxiliary mayors, also known as community mayors, as entities representative of the communities (Art. 56) and not only as government delegates (Art. 65), as was the case previously. As proposed in the Peace Accords, community mayors can thus be chosen by the community instead of appointed by the municipal mayor.³⁸

Unfortunately, the majority of municipalities have limited capacity to govern due to a scarcity of administrative, financial, and human capacity. There is no long-term technical or financial assistance, or training of personnel in the medium term that might help fill the void in human resources. The speed with which financial resources have been channelled to the municipalities is faster than the rate at which they have been able to address their institutional weaknesses. This has created problems of governability as tensions rise due to mishandling of funds.

36 Mestizo (mixed Amerindian-Spanish – in local Spanish called Ladino) and European 59.4%, K'iche 9.1%, Kaqchikel 8.4%, Mam 7.9%, Q'eqchi 6.3%, other Mayan 8.6%, indigenous non-Mayan 0.2%, other 0.1% (2001 Census).

37 The Civil Society Assembly (ASC) was formed in 1994 and played a crucial role in the signing and review of the Peace Agreements, developing consensus among the different sectors.

38 International Work Group for Indigenous Affairs (IWGIA). "Indigenous peoples in Guatemala". Undated. www.iwgia.org/sw31533.asp.

Guatemala's democracy faces a number of challenges regarding effective public sector management, state modernization and institutional capacity building, empowering communities, strengthening of community and social participation, and accountability and responsiveness of state institutions. These challenges include:

- Deep-seated historical grievances around highly-centralized land holdings, tight controls on political organizations, and lack of effective checks on state violence;
- Unrealized expectations of increased opportunities for Guatemalans, intensifying communal and indigenous opposition and resistance;
- Insignificant change in spite of a return to civilian rule and rhetoric of rights and reconciliation;
- Lack of coherence and consistency in the legal system regarding human rights violations;
- Municipal opposition to mega- and extractive projects being "judicialized"; and
- No widespread disposition or space for meaningful dialogue and conciliation.

Against the backdrop of national debate about the model of development to be pursued, extractive industry activity has become a contentious issue framed by Guatemalans' conflicting interests. Opposition to mining has coalesced into an informal alliance of environmental and human rights (national and international) organizations, communal leaders, and local development and campesino organizations, with the Catholic Church taking a leadership role in many instances. Current strategy is focused on reforming the 1997 Mining Law to strengthen environmental protection clauses, reform the tax and royalties regime, and incorporate procedures for consultation of indigenous peoples.

Economic Context

Import substitution industrialization was abandoned as the primary economic model more than 20 years ago in exchange for trade liberalization, market deregulation and reduced state intervention. The government of Guatemala strongly promoted the idea that the combination of "democracy and free markets" would bring prosperity, development and well-being for the majority of the population.

The primary-commodity export model has been challenged, however, by groups within Guatemala who prefer a focus on alternative development models. The current economic model is rejected for supporting the ongoing structural inequality, centralized system of production and decision-making, economic role of the military and elites through business associations, chambers, etc. and land use, tenure and (lack of) distribution.

The 2006 Guatemalan GDP per capita was 18 per cent higher than in 1990. Yet, this represents an annual growth of only 1 per cent over this same period, below the Latin-American average. More important is the continued level of inequality, which is the highest in the region.

As a result of limited employment opportunities, economic emigration is prevalent, especially to the US where 1.1 million Guatemalans are estimated to live. According to a 2005 survey, remittances to Guatemala topped US \$3 billion, equivalent to \$306/month for each household in the country, exceeding annual exports or income from tourism. The poorest households receive between 50 and 60 per cent of total income from remittances, which have a significant impact on disposable income.³⁹

To address the most acute problems, the Guatemalan government adopted the 2005–2015 National Competitiveness Agenda, identified six strategic themes: human capital development, institutional strengthening, cluster development for exports, infrastructure development, environmental and business social responsibility, and rural economic development.

Mining Sector

The current government's economic strategy strongly relies on attracting foreign investment, including megaprojects (e.g., mining, oil and hydroelectric dams). The vision is to exploit the gold, zinc, lead and nickel mineral deposits and the extensive jade deposits found in the central part of Guatemala. The petroleum industry has also been targeted, although political unrest and environmentalist opposition have limited development. The strategy continues to be promoted by

³⁹ Adams, 2004; Cheikhrouhou et al., 2006.

the government in spite of the fact that megaprojects have intensified social tension.

In 2008, mining accounted for 1 per cent of the gross domestic product (GDP) and directly and indirectly employed 2 per cent percent of the labour force.⁴⁰ The mining sector reported revenues for the Guatemalan government of Q19.5 million (\$2.5 million) in 2007, compared to Q8.3 million (\$1.03 million) in 2006 (74 per cent increase). According to the General Directorate of Mines, 3,642 jobs were created in 2007 paying a total of Q150 million (\$18.8 million) in wages. Indirect jobs generated by the mining sector were estimated at 13,636, paying Q190 million (\$23.8 million) in wages and salaries (2006).

Mining interests are broad based; of the 49 licences granted in 2007, 2 per cent corresponded to exploration for construction materials, 57 per cent to metals exploration, 6 per cent for non-metals exploration, 18 per cent for construction materials extraction, 4 per cent for metals exploitation, and 12 per cent for non-metals exploitation.⁴¹

Regulatory Regime

The Guatemalan constitution has declared that subsoil, hydrocarbon and mineral deposits as well as other organic or inorganic subsoil substances are the property of the State, to be developed in the manner most beneficial to the nation. Mining has been declared to be of public need and utility.

According to the Mining Law (Decree 48-97), the Ministry of Energy and Mines (MEM) is responsible for formulating and coordinating government policies, plans and programs for the mining sector. MEM's General Directorate of Mining grants three types of licences: reconnaissance, exploration and exploitation. The titleholders of reconnaissance and exploration licences must present a mitigation study before beginning the corresponding work. Mining exploitation licenses require an Environmental Impact Study (EIA), which must be submitted to the Ministry of the Environment and Natural Resources (MARN) for evaluation and approval.

40 Ministry of Energy and Mines, Anuario Estadístico Minero, 2006.

41 Ministry of Energy and Mines, Anuario Estadístico Minero, 2007.

Mining royalties were reduced from 6 per cent to 1 per cent in the new mining law passed in 1997. The royalties are paid to the State and to the municipalities for the extraction of mining products within their jurisdiction. The royalty is divided among municipalities in proportion to the mining products extracted in each jurisdiction. Royalties are paid annually to the State and municipalities; 0.5 per cent of the value of sale consigned in the national market or international stock exchange to each.

The mining titleholder may use water, provided the use does not affect the permanent exercise of the rights of others. Titleholders must ensure adequate water treatment to avoid contamination. Acquisition of a surface right of way for infrastructure requires payment to the property's owner and must include indemnity for damages and anticipated prejudice, in advance and in cash.

In October 2007, MEM adopted the 2008–2015 Energy and Mining Strategic Policy and Guidelines, aimed at promoting these sectors while ensuring:

- Environmental protection;
- Socio-economic development of the communities whose lands contain mineral wealth;
- Rational and technical development of the country's mineral resources;
- Modernization of the regulatory regime; and
- Promotion of dialogue and conciliation with the actors directly involved during the licence granting process.

Some members of the High Level Commission on Mining have criticized the guidelines and no further action has been taken to regulate its dispositions.

Further modification of the mining code is currently under review. The MEM has proposed modifying the Mining Law to improve the financial regime and consultation processes as part of the licence granting process, under the supervision of MEM's Vice Minister of Sustainable Development. Several proposals to reform the Mining Law are also being studied by the Guatemalan Congress, and include:

- Regulation of public participation mechanism and consultation of indigenous peoples in accordance with ILO 169;

- Revision of the types of licenses and process to grant them;
- Territorial zoning;
- Transparency, accountability and free access to information;
- Better inter-institutional coordination among government agencies to oversee mining activity and strengthening of MEM's and MARN's capacity and expertise;
- Improvement of the regulatory regime for environmental monitoring, evaluation and review of environmental and social impact assessment studies;
- Formulation of unified water use and distribution law;
- Improved supervisory mechanisms for management, discharge, and disposal of toxic substances and other contaminants (e.g., ARD, cyanide);
- Requirement of environmental remediation bonds and closure trusts; and
- Improved financial regime (e.g., taxes, royalties and canon) and better means to account for volume and quality of production.

The Environmental Protection and Improvement Law was adopted in 1986,⁴² and the Environmental Evaluation, Control and Follow-up Bylaw in 2003.⁴³ The Evaluation, Control and Follow-up System establishes the government agencies, procedures, technical and operational instruments to evaluate, control and monitor operations and activities that "may harm the environment and cause the deterioration of renewable and non-renewable natural resources." The General Directorate of Environmental and Natural Resources Management of MARN is entrusted with setting up the specific requirements for each industry and/or project.

Experts and government officials agreed that both MEM and MARN lack technical expertise and oversight and regulatory capacity to oversee mining projects. Both ministries acknowledge they do not have sufficient mining expertise among their staff and that the number of personnel currently dedicated to supervising mining operations is inadequate.

42 Environmental Protection and Improvement Law, Decree 68-86.

43 The Bylaw has been amended by decrees 23-2003 of January 27, 2003, 431-2007 (amendment of Title VIII on public participation), 33-2008 of January 11, 2008 (further amendments in relation to public participation in the process of elaboration of EIAs), and 89-2008 of February 27, 2008 (amendments of articles 72, 74 & 78 related to public participation).

National Level Human Rights Institutions

Human Rights Institutions

Four Guatemalan institutions charged with promoting and protecting human rights are most relevant for this Assessment:

- Human Rights Ombudsman (Procurador de los Derechos Humanos – PDH): Created by the 1985 Constitution and operational since 1987, making it the first human rights institution established in Latin America. As a Commissioner of Congress, the PDH is elected by and responsible to the legislature to defend the constitutional and international human rights obligations of the State and supervise their administration in the public and private sectors. The PDH has powers to promote good functioning of government administration in human rights matters, investigate and criticize administrative behaviour detrimental to the interests of persons, and investigate human rights violations complaints. The PDH's rulings have moral authority, but not sanctioning power.
- Human Rights Commission: to assist in the appointment of the PDH, propose laws to Congress and research human rights issues, but without human rights investigative power.
- Presidential Coordinating Commission on Executive Policy in the Field of Human Rights (COPREDEH): Created in 1991 with the responsibility to develop a comprehensive national plan of action for the follow-up on the recommendations made by various human rights monitoring bodies of the United Nations, including the specific recommendations made by the Office of the High Commissioner for Human Rights (OHCHR) in Guatemala. Responsibilities include promoting the ratification and observance of international treaties including the ILO Convention 169.
- International Commission against Impunity in Guatemala (CICIG): Accord signed in 2006 and ratified by Congress in 2007. Commission established jointly by UN and Guatemalan government to investigate and promote the prosecution of illegal security organizations.

Human Rights Non-governmental Organizations

Multiple human rights organizations have formed and are actively promoting respect for human and indigenous peoples rights. In 1984, the Mutual Support Group (Grupo de Apoyo Mutuo – GAM) was constituted, followed by the National Coordination of Widows in Guatemala (Coordinadora Nacional de Viudas de Guatemala – CONAVIGUA) in 1988. Among the most prominent human rights organizations are: Myrna Mack Foundation, Defensoria Maya, Rigoberta Menchu Tum Foundation (FRMT), Centre for Legal Action in Human Rights (CALDH), National Coordination of Human Rights of Guatemala (CONADEHGU) and Office for Human Rights of the Archbishop of Guatemala (ODHAG).

As stated earlier, serious human rights violations continue to be committed in Guatemala and human rights defenders assassinated, threatened or otherwise attacked. In the vast majority of such cases, effective investigations have not been carried out and the perpetrators are never brought to justice.

Regional Context: San Marcos Department

In 2007, the total population of the San Marcos Department was 929,116, with a strong concentration of indigenous peoples, of which an estimated 36 per cent are Maya.⁴⁴ The gender split is 52 per cent female and 48 per cent male. Poverty indices show that 67 per cent are poor, and 20 per cent are extremely poor; however, in the indigenous population, the same rates are 78 per cent and 36 per cent. An indigenous family is nearly twice as likely to be in extreme poverty as a non-indigenous family.⁴⁵ The rural population represented 78 per cent in 2002.⁴⁶

44 Kindberg, 2006. The indigenous population of San Marcos is estimated at 321,500, or 36% of the population. Approximately 150,000 indigenous people in San Marcos, including San Miguel and the High Cuchumatanes, speak Mam Mayan, while around 18,000 indigenous people from Sipacapa speak Sipakapense. Sipacapa Municipality is the only area in Guatemala where people speak this Mayan language.

45 Instituto Nacional de Estadística (INE), Encuesta Nacional sobre Calidad de Vida (ENCOVI 2006).

46 INE, XI Censo Nacional de Población y VI de Habitación (CENSO 2002).

The main economic activity is subsistence farming on steep hillsides. There is limited access to land and high deforestation rates. Infant chronic malnutrition is very pronounced, especially in the communities located in mountains and hilly areas where local food production is very limited and access to local markets is severely constrained by poor road conditions.

Low yields and insufficient agricultural production force the local population to sell their labour to neighbouring plantations (especially during the harvest of coffee and sugarcane crops) or to engage in petty commerce with Mexico. Life in San Marcos is characterized by the separation of male teenagers and adults from their families for seasonal labour in the coastal plantations, although entire families may move as well for this seasonal labour. Conditions are generally poor and wages almost invariably fall well below the minimum scale set by the government.

Remittances from emigrees provide an important source of cash. According to a 2005 survey, San Marcos received an estimated US\$326 million in remittances sent from the US.⁴⁷ Since October 2008, there has been a drop in overall remittances, which has had a direct impact on the economy of many households in San Marcos.⁴⁸

Institutional presence in San Marcos includes the departmental government, regional offices of the Human Rights Ombudsman and the main ministries, and the judicial system including criminal, family, civil and labour courts. On the side of civil society, the departmental capital is home to the Catholic Church's Diocese of San Marcos and its related organizations, the Council of Peoples of the Western Highlands (Consejo de los Pueblos del Occidente), the Council of San Marcos Peoples Ajchmol (Consejo de los Pueblos San Marcos, Ajchmol), Agrarian Platform (Plataforma Agraria), and the Campesino Workers Movement (Movimiento de Trabajadores Campesinos – MTC).

47 Smith, James, April 2006, "Guatemala: Economic Migrants Replace Political Refugees", Migration Information Source, Migration Policy Institute, www.migrationinformation.org/Profiles/display.cfm?id=392. The population of San Marcos sending remittances would be over 100,000. However the data also reports that only 23% of all migrants sending remittances were indigenous.

48 Banco de Guatemala, estadísticas, www.banguat.gob.gt/inc/ver/asp?id=-/estaeco/remesas/remfam2010.htm&e=81562.



San Marcos Department, Guatemala

Marlin Mine, the nation’s first large mining project in the post-civil war period, was established in San Marcos. As a result, the first community consultation focused on mining development took place in the department.⁵¹

The Diocese of San Marcos has taken a leadership role opposing mining in Guatemala or expanding current projects in San Marcos. Environmental concerns cross all sectors (communities and indigenous populations; local, regional and national governments; civil society and religious organizations; and local-to-international non-governmental organizations).

According to the PDH, the Department of San Marcos occupies second place among the 22 departments in terms of the number of conflicts (violence and insecurity, lack of medical attention, environmental contamination, intra-family violence, mistreatment of children, lack of access to water and abuse by authorities) with 33 conflicts noted in 2009, showing a steep increase in four years: five in 2005, 16 in 2006, eight in 2007 and 19 in 2008.⁴⁹ The PDH establishes a link between poverty, extreme poverty, exclusion, social marginalization, and levels of conflict.⁵⁰ Economic indicators confirm a high degree of unsatisfied basic needs.

Local Area for the Assessment

The Marlin Mine is located in the northeast corner of the San Marcos Department, on the border between the municipalities of San Miguel Ixtahuacán (San Miguel) and Sipacapa, with most of the surface area and the deposit itself located in San Miguel. These two municipalities constitute the local area for this assessment.

San Miguel is a large municipality, covering an area of 184 km². The town of San Miguel is located 65 km northeast of San Marcos capital and 332 km from Guatemala City. Current estimates place the population at 39,000, distributed in 43 communities with 19 smaller

49 Procurador de los Derechos Humanos, “Mapa de Conflictividad Social 2009”, [www.pdh.org.gt/images/files/Mapa%20Conflictividad%20Social%202009%20\(PDH_DIMERCIPP\).pdf](http://www.pdh.org.gt/images/files/Mapa%20Conflictividad%20Social%202009%20(PDH_DIMERCIPP).pdf).

50 What the World Bank calls the poverty-conflict trap.

51 The *consulta popular* in Sipacapa took place on June 18, 2005.

Table 1.5: Human Development Indicators for Guatemala and San Marcos Department, 2006

	Guatemala National Average	San Marcos
Literacy rate	75%	70% (79% male, 63% female, over age 15)
Poverty rate	51%	67%
Extreme poverty	15%	20%
Human Development Indicators	0.702	0.663
Health	0.763	0.720
Education	0.700	0.682
Income	0.642	0.587

hamlets,⁵² with 95 per cent of the population indigenous (Maya Mam) and 5 per cent ladino (mixed race). Local inhabitants depend on subsistence agriculture, irrigated from the Cuilco River and its tributaries. According to the 2002 Census, there were 21,870 people of working age (7 and over) and the economically active population was estimated at 6,399, which suggests a large number of children, consistent with local estimates of large families with 5 to 7 children. San Miguel's population had approximately 97 per cent people living in poverty, and 81 per cent in extreme poverty.

Sipacapa, in contrast, is smaller, with 19 communities, 13 hamlets and a population of around 14,812 inhabitants, according to the 2002 Census.⁵³ Less than 700 people live in the capital town of Sipacapa, located 79 km from San Marcos. The majority of the population is Maya Sipakapense. Spanish and Sipakapense are spoken; however, a greater percentage of residents spoke Sipakapense in preference to Spanish in 2006 than in 1982.⁵⁴

A study of language vigour in Sipacapa found Sipakapense language use increasing, with younger people using a version of the language less influenced by Spanish than older generations.⁵⁵ In 1998, commun-

ity leaders in the Municipality of Sipacapa established the Academy of Sipakapense Maya Language, which is credited with raising peoples' awareness of the threat of potential loss of self-identity caused by the Maya Mam who are relocating in the territory.⁵⁶ The language institute is very active in the social and political dynamics in Sipacapa.

Life in San Miguel and Sipacapa revolves around the municipality as the centre of political decision-making and development projects, which are typically limited due to the absence of funds. The municipal mayor is elected for four years, with possibility of re-election. The mayor is assisted by the Municipal Corporation integrated by concejales (advisors) and síndicos (trustees), also elected for four years.

The Mayan communities of San Miguel and Sipacapa are represented by Auxiliary mayors and the presidents of the local development councils (COCODEs). Auxiliary mayors are elected by communal assembly for one year and receive no remuneration since it is the obligation of every male to serve their respective community. They are elected for each community, aldea and caserío, and in turn elect a president. They represent their communities in meetings with the municipal mayor and corporation. These meetings are held once a week, indicating the potential for a regular and ongoing flow of information between communities and the municipality. The role of the Auxiliary mayors is to consult, inform, and make decisions in conjunction with their community through the assemblies. Auxiliary mayors are distinguished by the "vara" (authority stick) they carry when on official business.

52 2002 Census, reported in Montana AMR 2004. Currently, San Miguel is estimated to have a population of 40,000 and up to 60 recognized communities or hamlets because of population growth and the formation or division of communities, according to municipal records.

53 Sipacapa Municipality currently records 29 communities because of recent community formations or sub-divisions.

54 Kindberg, 2006.

55 Barrett, Rusty, June 2008, "Linguistic differentiation and Mayan language revitalization in Guatemala", *Journal of Sociolinguistics*, 12.3, 275–305.

56 Academia de Lenguas Mayas de Guatemala, www.almg.org.gt.

OVERVIEW OF THE MARLIN MINE

The Marlin Mine is a gold and silver mine employing a combination of open pit and underground mine technology. The mine began operating in October, 2005.

As of 2006, the mine property spanned 6.5 km², located in the western highlands of Guatemala in the department of San Marcos, 25 km by air west-southwest of the town of Huehuetenango or 300 km by paved and gravel roads from Guatemala City. The mine is situated within the Municipality of San Miguel Ixtahuacán, with some of the industrial facilities located within the neighbouring Municipality of Sipacapa (85 and 15 per cent, respectively). The facilities are situated in the village of San Jose Nueva Esperanza, and also occupy land within the boundaries of Agel and San José Ixcaniche in San Miguel and Tzalem in Sipacapa.

The Marlin Mine exploitation license is for 25 years; however, the initial mine life was permitted for 10 years of operation, until 2015. An EIA⁵⁷ covering the mining and processing of ore from the La Hamaca deposit, a satellite orebody which would supplement mill throughput during its expected seven-year mine life, was approved in 2005. The original Social and Environmental Impact Assessment for the mine stated that at the end of operations, the main facilities would be closed and the site restored.

Marlin is identified by Goldcorp as one of their lowest cost operations, with costs of \$192 per ounce of gold in 2009 as compared to an average cost of \$295 for the corporation. The mine achieved a nearly 29 per cent increase in revenues from 2008 to 2009 (from \$258 million to \$332 million), attributed by Goldcorp to increased underground mining rates and enhanced metals recovery in the processing plant.⁵⁸

Table 1.6 presents a summary of the annual production results and production costs to 2008.

The mine employs conventional open pit mining methods at two pits. Underground operations use mechanized cut and fill methods with underground loading equipment feeding haul trucks. The mill was

originally designed to treat 1.82 Mt per year of ore and was expanded in 2008 to allow for increased production. Ore is fed through a crusher, then fed to a grinding circuit. The pulp produced by the mill is leached in tanks with cyanide. After leaching, the pulp is 'washed' in a series of settling units, producing two products: a clear gold and silver bearing solution and a pulp without precious metal values. The gold and silver solution is sent to a refinery where the metals are precipitated through the addition of zinc. The precipitate is filtered and smelted to produce doré bars for further refinement.

Tailings from the process are treated by the INCO cyanide destruction plant prior to being sent to the tailings storage facility (TSF). The TSF is formed by a cross valley dam consisting of a rockfill shell with a low permeability core. It is being raised progressively over the mine life to an ultimate elevation of 69 m using waste rock placed in downstream staged raises.

The mine facilities span two sub-watersheds, the Quivichil Creek and the Tzalá River. Both drain to the Cuilco River, which runs north into Mexico and eventually discharges into the Gulf of Mexico. The Mexican border is approximately 80 km downriver from where the Quivichil Creek enters the Cuilco River. The climate is predominantly warm and dry, with well-defined wet and dry seasons. Topography at the project site is characterized by moderate to steep terrain with elevations ranging from 1,800 to 2,300 masl.

The main mine access is a secondary road, which also provides access to nearby towns including San José Nueva Esperanza, San José Ixcaniche and Agel. Montana improved the road and constructed a bridge over the Cuilco River to allow safe, all-season access. The Guatemalan government and Montana have entered into arrangements with San Miguel to pave several transport routes in the municipality and connecting communities.⁵⁹ Montana has constructed a small airport near the mine to facilitate access of senior mine personnel and transport the final product to market.

⁵⁷ For the La Hamaca assessment, only an EIA was done, not an ESIA as MARN had required for the Marlin 1 application.

⁵⁸ Goldcorp Annual Report 2009, 13.

⁵⁹ According to representatives of the Municipality of San Miguel.

Table 1.6: Marlin Mine Operating and Economic Statistics				
Operating Statistics	2005	2006	2007	2008
Ore milled – tonnes	116,000	1,088,000	1,773,000	1,845,000
Total production gold – oz	23,900	161,000	227,200	241,400
Total production silver – oz	154,600	1,598,400	2,837,300	3,287,500
Total production cash cost – US\$/oz	\$217 (Q1,737)	\$209 (Q1,673)	\$144 (Q1,152)	\$191 (Q1,529)
Economic Statistics				
Total employment	2,339	1,132	1,149	1,609
Local employment ^a	56%	71%	68%	61%
Payroll	\$11 million (Q88 million)	\$8.6 million (Q69 million)	\$11.4 million (Q91 million)	\$16.9 million (Q135 million)
Local payroll	\$3.6 million (Q29 million)	\$3.8 million (Q30 million)	\$4.8 million (Q38 million)	\$6.9 million (Q55 million)
Corporate income taxes (31%)	0	\$3.4 million Q26 million	\$9.5 million Q77 million	\$12.5 million Q97 million
Royalties	\$130,000 Q1 million	\$1.3 million Q9 million	\$1.9 million Q14.6 million	\$2.5 million Q19.2 million
Revenue	\$11.7 million	\$109.9 million	\$203.7 million	\$258.1 million
Notes: Financial data in U.S. dollars. Conversion to Guatemalan quetzales (in brackets) was calculated in April 2010, when U.S. and Canadian dollars were approximately at par. Figures have been rounded. ^a Local refers to residents of San Miguel Ixtahuacán and Sipacapa municipalities Source: Montana Annual Monitoring Reports, Goldcorp Annual Reports, Goldcorp website, “Marlin”, accessed September 14, 2009, www.goldcorp.com/operations/marlin/				

The mine has made a significant economic contribution in terms of tax and royalty revenues and employment. Table 1.6 presents a summary of relevant statistics.

Project History and Ownership Structure

The Marlin Mine is 100 per cent owned by Montana Exploradora de Guatemala, S.A. (Montana), a wholly-owned subsidiary of Goldcorp. Montana is a ‘Sociedad Anonima’ or privately held corporation under Guatemalan law, formed in 1998 by Montana Gold Corporation of Canada. Geologists working for Montana discovered the Marlin deposit in 1998. Montana obtained an exploration license for the Marlin area in 1999 and did further exploration work. Montana created a formally separate company named Peridot S.A. to acquire and hold the land rights, which were in turn given to Montana through a usufruct contract.⁶⁰ In

2000, the company and deposit were purchased by Francisco Gold Corporation, which continued exploration work. In 2002, Francisco Gold merged with the USA based, medium-sized operating company Glamis Gold Ltd.

Glamis was incorporated in 1972 as Rennick Resources Ltd.⁶¹ in Vancouver, Canada and in 1977 was re-organized and named Glamis Gold. The corporation became an operator (as opposed to an exploration company) and for 20 years grew slowly, focusing on obtaining low production costs for gold at its operations in the US, with its first mine opening in 1981 and its second in 1987. Through a series of acquisitions Glamis continued to expand and in the mid-1990s began to acquire exploration projects in Latin America, initially Mexico and Guatemala, and became an intermediate-scale producer. Under the ownership of Glamis Gold Ltd., Montana developed the Marlin

⁶⁰ Guatemalan companies affiliated with Goldcorp are Montana Exploradora de Guatemala S.A., Entre Mares de Guatemala S.A. and Peridot S.A., Geothermia Oriental de Guatemala.

⁶¹ Funding Universe. “Glamis Gold, Ltd.” n.d. www.fundinguniverse.com/company-histories/Glamis-Gold-Ltd-Company-History.html.

Mine. In September, 2003, MARN approved the environmental permit for the ESIA submitted as the Marlin 1 and in November, 2003, the MEM granted Montana a 25 year exploitation license for a 20 km² area, which included the Marlin project. In addition to the Marlin exploitation license, Montana also obtained at least three other exploration licenses adjacent to Marlin and has been conducting early reconnaissance and exploration since 2002. Current information provided by the company identifies 20 exploration licenses in various departments.

Construction of the Marlin mine commenced in mid 2004. In June, 2004, the International Finance Corporation (IFC) approved a US\$45 million loan to the project, as well as a grant to support a reforestation project. By participating in the project, the IFC hoped to support the Guatemalan government's policy decision to attract new mining investment to the country.⁶²

The mine entered production in late 2005. In November, 2006 Glamis merged with Goldcorp and ownership of Montana passed to Goldcorp. Operational control and management remained to a large extent in the same hands as Glamis management moved into many senior positions at Goldcorp. Like Glamis, Goldcorp had grown through a series of acquisitions and mergers. It was incorporated in 1994 and by the merger with Glamis Gold became one of the largest gold producers in the world. Goldcorp today has operations in eight countries, with reported global revenues in 2009 of \$2.7 billion.

When Goldcorp merged with Glamis it also acquired a separate operating company, Entre Mares de Guatemala S.A.,⁶³ which owns and operates the Cerro Blanco Project located approximately 80 km east of Guatemala City, near the border with El Salvador. The regional offices of Goldcorp in Guatemala City support both of these companies.

In 2005, Montana presented an EIA for the La Hamaca expansion. Additional ore mined from La Hamaca (approximately three km distant from the mine) would be transported by truck to the existing processing facilities. The EIA was approved in 2005.

62 Compliance Advisor Ombudsman, September 2005, 6-7.

63 Minerales Entre Mares Honduras S.A. is a separate, fully owned Goldcorp company that operated the San Martin Mine in Honduras.

Environment Study and Permitting

Montana obtained a reconnaissance permit for the Marlin area in 1999. In November 2003, MEM issued an exploitation permit for 25 years. Table 1.7 presents a summary of the principle permits obtained by Montana.

The Marlin ESIA committed to implementing eight management plans to ensure mitigation of the identified impacts. In 2006, the mine implemented an Environmental Management System (EMS) designed to promote continuous improvement of environmental management. Since 2004, a detailed annual monitoring report (AMR) is published and made available to the general public in English.⁶⁴ The AMRs and some of the appendices are also available in Spanish on the Goldcorp Guatemala website.⁶⁵ The AMR reports on environmental and social issues considered relevant to compliance with the IFC's policies, including environmental management and monitoring, employee benefits, industrial health and safety, and others. The annual reports include an explanation of cases of non-compliance with national requirements and international guidelines or applicable regulatory limits that have occurred, identifying the cause and the corresponding corrective measures planned or underway to prevent future occurrences.

In addition to the current exploitation license, Montana has also been granted at least three other exploration licenses adjacent to Marlin and has been conducting early reconnaissance and exploration in both San Miguel and Sipacapa since 2002. In 2004 Montana presented an EIA for the La Hamaca deposit three km north of the main Marlin ore body. The ESIA was approved in 2005, but to date development of the La Hamaca deposit has not yet begun. Ore from La Hamaca will be processed at the Marlin facilities.

64 Montana AMRs, 2004-2008.

65 Ibid.

Table 1.7: Principle Environmental Permits			
Permit, Resolution or License	Duration	Date of Renewal	Obligations or bonds
Marlin I ESIA Approval MARN	Functional life of Marlin Mine, starting Sept. 29, 2003.	N/A	Annual environmental license. Demonstrated compliance with environmental commitments in the ESIA.
Mining Exploitation License MEM	25 years starting Nov. 27, 2003. Extension granted Feb. 1, 2006 authorizing zinc, lead, iron, copper and mercury recovery as well as gold and silver.	Year 2028	Annual tax and royalty payments. Annual report.
Annual Sworn Declaration for Royalty Payment MEM	Annual reporting.	The first 30 days of each year.	Present invoices to support yearly exports.
Environmental License MARN	Annual, first issued Jan. 27, 2006.	First renewal valid to Aug. 8, 2007. Second renewal to Aug. 8, 2010.	Renewal of bond C-626561 Q400,000 El Roble, to MARN. Renewal of bond C-6 26561 with a voluntary bond increase of Q.3 million in favour of MARN (three-year duration to Aug. 8, 2010).
Surveillance and Follow-up License MARN	Three years, Aug. 9, 2007 to Aug. 8, 2010.	Aug. 8, 2010.	3 year license fee 15,000. MARN to verify progress and compliance of environmental commitments established in ESIA.

Tax and Royalty Payments

Since Marlin mine began production in 2005, Montana has paid Q44.6 million (\$5.8 million) in royalties, which have been split equally between the Municipality of San Miguel Ixtahuacán and the central government, as required by Guatemalan law. Additionally, Montana has set aside a reserve for the Municipality of Sipacapa, an amount equal to 10 per cent of total royalties, which in 2008 amounted to Q4.5 million (\$575,000). According to the AMRs, the total available in this fund at the end of 2008 was US\$905,000 (Q7.24 million); Sipacapa Municipality had not been willing to use this money as of late 2009. This constitutes a voluntary donation and was calculated on the basis of the percentage of total Marlin property that is in Sipacapa, though it does not qualify for royalties under Guatemalan law since no minerals are mined in the municipality. By law, royalties in Guatemala are fixed at 1 per cent, with 0.5 per cent for the government and 0.5 per cent for the municipality in which

the mineral deposit is located. Royalty values are calculated on product volume and value of goods sold in international markets.

At the end of 2003, the Guatemalan Ministry of Economy (MINECO) granted Montana a petition to operate under the Law to Promote and Develop Export and Maquila Activity (Decree 29-89), by certifying Montana as an “exporting company.” This meant that Montana would be exempt until 2008 from paying Income (ISR) and Value Added Tax (IVA), as well as being allowed to import materials and equipment without custom tariffs. However, Montana announced on July 19, 2006 that it would voluntarily renounce the exoneration of the Income Tax (ISR). The World Bank and IFC helped facilitate negotiations between the government and Montana that resulted in the government receiving an additional Q98.9 million (\$12.9 million) through the end of 2007 from payment of this tax.

Payments of IUSI tax on real estate, which is a municipal tax, were increased at the same time due to an agreement in the same agreement to update land values on which the IUSI is calculated.⁶⁶

In addition, the agreement calls for government provision of technical assistance to the municipality of San Miguel Ixtahuacán and capacity building programs to benefit MARN and MEM.

Reporting, Supervision and Oversight by the Guatemalan Government

The areas of government with supervisory responsibility include:

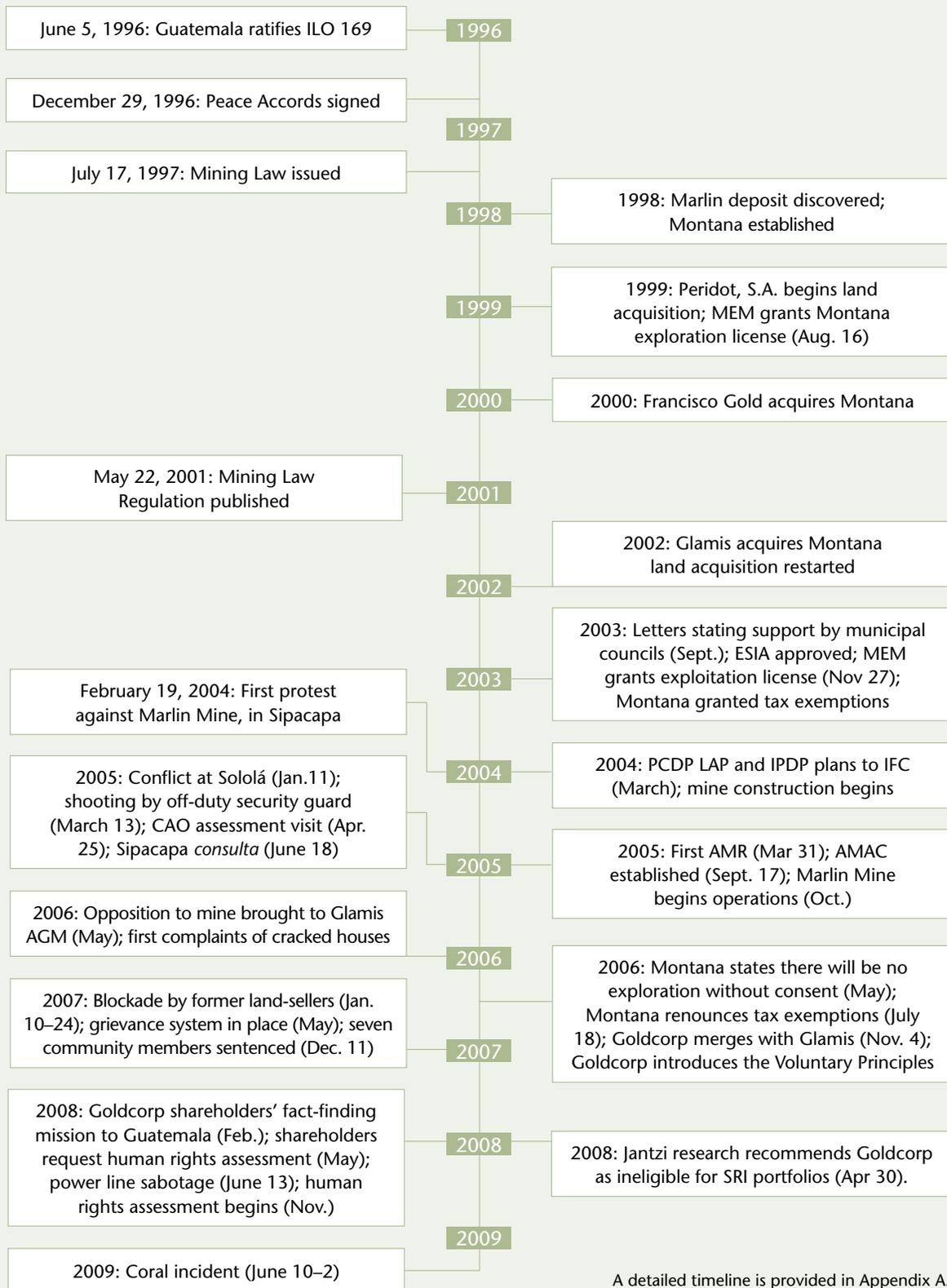
- Ministry of Environment and Natural Resources (MARN): Has principal responsibility for mine operation oversight to ensure that ESIA commitments are fulfilled and that the mine is not harming the environment. Since the ESIA approval, Marlin has presented quarterly reports. Ministry of Energy and Mines (MEM): Since 2005, MEM has a full time inspector on site. His principle responsibility is to sample the dore bars as they are produced, to

ensure that royalties are correctly paid. The supervisor also reviews compliance with OHS standards and ESIA commitments, and submits monthly reports to MEM with observations and results of the dore tests. Montana does not receive copies of these monthly reports.

- Ministry of Labour and Social Welfare (MTPS): Responsible for oversight of labour conditions, industrial health and safety issues, and compliance with labour laws and code.
- Ministry of Public Health and Social Assistance (MSPAS): Responsible for health in general and function of the on-site health clinic, which is required by law. This ministry has not undertaken an audit, and has confirmed to the assessors that it does not have any complaints or concerns registered relative to the mine's operations.
- Human Rights Ombudsman (PDH): Receives and investigates complaints against government agencies and private corporations in cases of violations/abuses of human rights. The PDH has performed three site inspections examining multiple issues (health, labour conditions, environment); one resulted in a resolution, discussed in Section 3: Environment.

⁶⁶ Acuerdo de Entendimiento entre el Gobierno de La Republic de Guatemala y Montana Exploradora de Guatemala S.A. (Agreement of Understanding between the Government of the Republic of Guatemala and Montana Exploradora de Guatemala, S.A.) July 18, 2006

Figure 1.1: Marlin Mine Timeline and Related Events, 1996 to 2010



A detailed timeline is provided in Appendix A.

Consultation

Consultation associated with permitting the Marlin Mine has been one of the most controversial aspects of the project, and figures prominently in the media and written material critical of the mine. The full range of stakeholders (community residents, employees, local and national authorities, and non-governmental organizations) raised concerns about issues related to consultation, including access to information and disclosure of the negative impacts of the project. These issues were among the most frequently raised by stakeholders, with over 1,000 comments or concerns registered.¹

Prior consultation is a fundamental element of indigenous peoples rights, notably with respect to the right to decide their priorities for development and the right to natural resources pertaining to their lands. This is particularly significant in Guatemala, since this is one of the countries to have ratified the International Labour Organization Indigenous and Tribal Peoples Convention (ILO 169), which it did in 1996.² ILO 169 includes specific protections of the right to prior consultation before granting permits for exploration or exploitation of natural resources; consultation is also seen as key for compliance with all other aspects of the Convention.³

1 For specific details on issues and levels of stakeholder attention, see Appendix D: HRA Stakeholder Issues Matrix.

2 Currently, 20 countries have ratified ILO 169: www.ilo.org/ilo-lex/cgi-lex/ratifce.pl?C169.

3 ILO 169, Article 15(2). ILO, 2009b, Chapter V on Participation, Consultation and Consent. Other specific obligations under ILO 169 are addressed as appropriate in sections on land acquisition, labour and social investment.

At the outset, it is important to underline that this is an area in which international human rights norms and stakeholder expectations have evolved since the mine was permitted. There is now clearer guidance about what is required for states and companies to comply with ILO 169. In addition, the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the UN General Assembly in 2007 has led to heightened awareness and expectations about the practices required for prior consultation with indigenous peoples.

Concerns about consultation, information disclosure, and the quality of both are shared by stakeholders nationally as well as internationally; at the local level most people talk about not being fully informed about risks or impacts, and a small number mention the rights of indigenous people to prior consultation. Concern about the role of the State is also shared. Overall, four of the top 10 issues mentioned by stakeholders involved some aspect of consultation or information disclosure, reflecting how important the issue is to both local and non-local stakeholders. Consultation as a category of concerns is the single most important to stakeholders.⁴

The most frequent issues related to consultation identified by stakeholders were: the role of government in consultations, the need to address negative impacts (34 per cent), the use of biased or misleading information (34 per cent), and the timing and clarity of

4 See Appendix D: HRA Stakeholder Issues Matrix.



information (28 per cent). These concerns were raised as frequently by local people employed by the company or in positive relations with the mine, as by those with no formal association.

There are differences, however, in which of these three issues was most important, with local people most concerned about the need to address negative impacts and misleading information, while for non-local groups the most frequent concern was the role of government in consultation, followed by disclosure of negative impacts, and then concerns about the quality and quantity of information as well as the timing and clarity of explanations. National and international stakeholders raised specific concerns about ILO 169 requirements for prior consultation; the issue did not

come up in local interviews, although there was some mention of indigenous peoples rights.⁵

This section addresses various aspects of Montana's consultation practices. First, the process for permitting the Marlin Mine is examined in terms of indigenous peoples rights to prior consultation; this discussion also examines the practices for planned or future expansions of the mine's activities. Second, Montana's ongoing consultation and information disclosure practices are reviewed.

5 The assessors consider it likely that if more interviews had been done in Sipacapa, the issue of ILO 169 and the government's role in consultation would have figured more strongly in local interviews.

BACKGROUND

National Context

The state's obligation to consult indigenous peoples is established through the Guatemalan Constitution,⁶ the 1996 Peace Accords, particularly the Indigenous Peoples Identity and Rights Accord (AIDPI) and the Human Rights Comprehensive Agreement (CHRA),⁷ and by the 1996 ratification of ILO 169.⁸

Guatemala's Mining Law⁹ was approved after ratification of ILO 169; however, as discussed below, the legal and regulatory framework for mining does not comply with the State's obligation to consult indigenous peoples prior to permitting exploration or exploitation projects. Public consultation is required during the company's elaboration of the Environmental and Social Impact Assessment (ESIA), but this requirement does not constitute consultation in conformity with

ILO 169 since the ESIA consultation process is undertaken by the company and not the government.¹⁰

Participation processes are also spelled out as part of the Environmental Evaluation, Control and Follow-up Bylaws,¹¹ enacted in 2003, which implements the Environmental Protection and Improvement Law. This bylaw establishes the Ministry of Environment and Natural Resources (MARN) as the government agency responsible for promoting public participation during the course of the ESIA. MARN is responsible for promoting public participation¹² during the environmental evaluation, control and follow-up processes, as well as during the operation of the project. Those responsible for the project are required to involve the population as early as possible and inform MARN of all participation/consultation activities undertaken to comply with this requirement, in accordance with the Procedures Manual. Currently, companies are also required to elaborate a Public Participation Plan for the life cycle of the project, which must include the identification of the affected group or community; mechan-

6 Guatemalan Constitution of 1985/1993, Title II: Human Rights and Title VI: Chapter V: Human Rights Commission and Ombudsman.

7 Indigenous Peoples Identity and Rights Accord (AIDPI) of March 5, 1996; Human Rights Comprehensive Agreement (CHRA) of March 29, 1994.

8 Constitutional Court Case # 3878-207. December 21, 2009. re: Municipality of San Juan Sacatepequez.

9 Mining Law, Decree 48-97.

10 ILO, 2006.

11 Environmental Protection and Improvement Law, Decree 68-86 (and Environmental Evaluation, Control and Follow-up Bylaws), Government Ruling 23-2003, Chapter IX: Public Participation (Articles 49-53).

12 Government Ruling 89-2008.

isms for public participation (e.g., surveys, interviews, workshops, assemblies or other meetings); and mechanisms for information disclosure, responding to information requests, and resolving potential conflicts. This bylaw was not yet in effect at the time the ESIA for the mine was prepared, but became effective in October 2003.

At present, the issue of prior consultation with indigenous peoples is part of an intense and polarized debate about mining and development in Guatemala. Revisions to the Mining Law relating to consultation prior to mining concession approval continue to be debated by the Guatemalan Congress. In municipalities across the country, local groups and/or local authorities continue to organize popular referendums (*consultas*) in response to major industrial projects. The Municipality of Sipacapa became the first to undertake a *consulta* in June 2005. Since then, a further 41 communities (as of February 2010) in different departments have organized *consultas* about whether communities were in agreement with allowing megaprojects and mining activities in their territories; with few exceptions, the *consultas* have resulted in votes against the projects.¹³

The Constitutional Court ruled on this situation in response to a writ of unconstitutionality from Montana.¹⁴ The court stated that indigenous peoples' right to be consulted is unquestionable and that the *consultas* are expressions of popular sentiment in exercise of the right to freedom of expression. The court also found that, while the municipality is entitled to conduct consultations on matters within municipal jurisdiction, the results were not binding with respect to mining since this is the responsibility of the central government. The court urged Congress to draw up legislation on consultations and ruled that the Executive must create mechanisms for fair compensation where mining activities are conducted, through community development measures.¹⁵

In October 2007 the Guatemalan government adopted an energy and mining strategy that envisages improved consultation processes for the mining sector, but no legislative or administrative actions have been undertaken to date. The Guatemalan president stated publicly in July 2009 that since January 2008 MEM suspended the granting of new exploitation licenses, declaring a *de facto* moratorium until the reform of the mining law was completed.¹⁶

In terms of disclosure of information, Guatemala enacted access to information legislation in 2008 that applies to government departments and agencies, as well as to companies that have a permit or concession to exploit natural resources.¹⁷ The law requires these entities to establish public information units to disclose the required information and to respond to requests from the public.

Local Context

At the local level, communities have a long tradition of participation and consultation on local matters; leadership in the communities is vested in the auxiliary (or indigenous) mayor and the COCODEs, the community development committees. Auxiliary mayors represent their communities in dealings with the municipal mayor and since 2002 are recognized as representatives of their communities, chosen by election, rather than being government appointees.¹⁸ Auxiliary mayors do not make decisions on behalf of their communities; the expectation is that they return to the community for a decision on matters of importance, a practice verified in multiple interviews. Local authorities also confirmed that communities in the local area have removed auxiliary mayors from their position for failure to respect the decisions of the community. As well, each community has a high degree of autonomy for decision-making, which was acknowledged

13 Such as in the municipalities of Sipacapa, San Marcos; Río Hondo, Zacapa; Momostenango, Totonicapán; and Colotenango, San Juan Atitlán, Concepción Huista, Todos Santos Cuchumatán and Santiago Chimaltenango in Huehuetenango.

14 See Section 7: Security on Montana's use of the legal system for further information on this case.

15 *Montana Exploradora de Guatemala, SA v. Municipal Council of Sipacapa*, Case # 1179-2005; Office of the United Nations High Commissioner for Human Rights on the work of its office in Guatemala, January 2008, para. 51.

16 There are 395 active mining licenses with 383 still pending issue as of March 2009; however, a suspension on the issuance of *all* types of mining licenses is presently in effect. In 2006, President Colom instructed the Ministry to suspend the issuing of any further licenses: www.cim.org/csr/MenuPage.cfm?sections=141,143&menu=154#block356.

17 Access to Information Law, Decree 57-2008.

18 International Work Group for Indigenous Affairs. "Indigenous peoples in Guatemala". Undated. www.iwgia.org/sw31533.asp.

in interviews with municipal authorities, and local and national institutions.

In the municipalities of San Miguel Ixtahuacán (San Miguel) and Sipacapa, there is a well-defined institutional framework for coordination and consultation between municipal authorities and the communities. Weekly meetings are held between the auxiliary mayors and the municipal mayor at which auxiliary mayors or a substitute nearly always attend; these have multiple functions, from distributing documents and communications to the communities, to advising and informing on municipal activities, to consulting on specific issues. Development opportunities or programs proposed at the municipal level are discussed, debated and decided by each community, according to auxiliary mayors and officials from both municipal governments.

As discussed, an important social mobilization is taking place in Guatemala that is making use of municipal powers to hold local consultations (*consultas*) as mechanisms for referendum-style votes on the acceptability of megaprojects. When the Municipality of Sipacapa undertook a *consulta* in 2005, it was the first identified use of that municipal power since the new Municipal Code took effect in 2002. On June 18, 2005, 2,564 residents of Sipacapa (of a total population of over 14,000 in 2002) participated in a *Consulta a Vecinos*. According to reports of the organizers, of those who voted, 98 per cent “rejected mining.”¹⁹ Since the *consulta*, the public position of the municipal authorities of Sipacapa has been to not work with the mine. As mentioned above in the national context, the Constitutional Court declared the results of this *consulta* to be not binding since the granting of mining licences is under the authority of the national government.²⁰

Since mid-2009 there has been some effort in San Miguel to hold a *consulta*. After a confrontation in June 2009 related to Montana’s exploration activities in Coral (discussed Section 7: Security), municipal leaders advised the assessors there is uncertainty in the population about Montana’s future development and expansion plans. In response, some are calling for a

consulta. The municipality is currently consulting with lawyers as to how to proceed.

Consultation for the Marlin Mine

Consultation and Disclosure of Information during Early Project Stages (2000–2003)

Company personnel reported that, during the original exploration work by Francisco Gold from 2000 to 2002, information was provided to local inhabitants regarding the potential for developing a gold mine on the site. There is no documentation of any meetings held with the communities or what was discussed.

Based on Montana’s documentation, the first recorded meeting between Montana and the municipal authorities in San Miguel and Sipacapa took place in 2002, soon after Glamis Gold bought Montana and acquired the Marlin project. The content of meetings was not recorded, but exploration was going on in both municipalities; Montana managers remember the meetings to have been about exploration activities and priorities for community development projects.²¹ The timing coincided with a renewed program of land acquisition by Peridot, S.A.²² In 2002, the company conducted several surveys to evaluate the level of knowledge about mineral exploration in the area and in particular among the three communities of Agel, San José Nueva Esperanza and San José Ixcániche, which the company had identified as the most directly affected by its proposed operation; this information formed the basis for Montana’s public information and participation program, according to the ESIA.²³ The program’s objectives were to disseminate information about exploration, explain the project’s characteristics and potential environmental impacts, and establish collaborative alliances.

According to company records, its initial Community Relations Group (CRG) was formed in early 2003, consisting of three local people and one specialist.

19 The assessors were unable to obtain a copy of the wording for questions asked in the *consulta*.

20 The 2002 municipal code specifies the issues on which a municipality can conduct a *consulta*.

21 Compliance Advisor Ombudsman, 2005, 17, Appendix A, Table 7. Management interviews confirmed these meetings.

22 Peridot was originally formed by Montana Gold Corporation to buy and hold the land for the Marlin project; see Section 5: Land Acquisition for more information.

23 Montana ESIA, 2003, Section 3.7: Public Information and Participation Program.

These community promoters were Mam speakers and responsible for providing information, as well as obtaining responses to community concerns. Montana began a process of engagement focused on the three communities directly around the mine within San Miguel, as well as the municipal center.²⁴ Starting in these three communities, the promoters held meetings with authorities and broader questions/response sessions with community members. Montana's records include documentation confirming that early in 2003 Montana carried out participatory diagnostic workshops to develop profiles of the communities, identify issues and social investment needs, and identify priorities such as education, employment and infrastructure. An anthropological review was also done at that time,²⁵ but only for the three Maya-Mam communities in San Miguel; Sipacapa was not considered at all in the baseline or participatory work at this stage and no identification of cultural, linguistic or socioeconomic differences was done at this or any future stage.

Consultation and Disclosure for the ESIA (2003)

Interviews and Montana documents suggest that consultation specifically about the ESIA began in June 2003 at the same time the ESIA was submitted to MARN.²⁶ It should be noted that consultations held after that date could not have informed the assessment or resulted in changes to design or mitigation plans. They could have served to inform the population about the ESIA.

An abridged version of the ESIA executive summary was provided to the promoters as reference material for presentations during the second half of 2003, but according to interviews, the complete executive summary and the ESIA were not available for distribution at that time. This information conflicts with company reports that the full ESIA was available in its offices in both San Miguel and the project site in San Jose Nueva Esperanza.²⁷

24 The CAO assessment reports that internal records indicate that prior to June 2003 the CRG group held 13 meetings, attended by 963 people.

25 Montana, June 2003.

26 According to interviews, the communications strategy initially developed in 2003 had three stages: improve understanding of mining in the communities, consult on the ESIA, and develop agreements; the third stage was not implemented.

27 The CAO report confirms only that the full ESIA was delivered to the two company offices some time in August or September

The executive summary was audio recorded in Mam, and the company reports that the recording was available to local communities around the mine and in the town of San Miguel starting in October 2003; again, there is no documentation providing substantiation of how the recording was distributed, frequency of use, or other details.

In compliance with the Guatemalan legal requirements in force at the time,²⁸ copies of the ESIA were made available by MARN for a 20-day period for review and formal comment in the MARN office in the departmental capital of San Marcos and in Guatemala City. According to government records, only one person/group reviewed the documents during that period, with no formal comment, although the Compliance Advisor Ombudsman (CAO) notes that MARN recorded concerns from people in Sipacapa, but without adequate recording of what those concerns were or when they were submitted to MARN.²⁹ MARN required Montana to advertise the availability of the ESIA more frequently on the radio than required by law, and to do so in Mam.³⁰ There was also a formal period of "consultation and public opposition" established by MEM prior to the authorization of the exploitation license. This consisted of a 30-day period in which MEM was open to receiving comments and declarations from citizens or organizations if they felt they would be harmed by the proposed action. No actions were taken by MEM, or opposition to the project registered in relation to this review period.³¹

2003, along with the recording of the Executive Summary in Mam. This recording is known to have been available from July, when the consultant delivered it, but was not presented to communities until October, according to internal documents and the CAO report. This highlights the difficulty of determining after the fact what materials were actually provided to people in an accessible way if good records are not kept of the disclosure process.

28 Guatemalan mining law requires public participation and recognizes the right to public opposition; it defines the procedure for public involvement for the ESIA approval before the issuance of a mineral exploitation license. See 1997 Mining Law.

29 CAO, 2005, 19, Annex A.

30 Resolution 014-2003/CRMM/lila, dated May 8, 2003, approved the proposed terms of reference for the ESIA for the Marlin project with the additional requirements to include a social impact assessment for the direct and indirect areas of influence, that the publication of the ESIA's availability in San Marco and Guatemala City should be announced by radio three times per day for one week rather than just the day of publication, and that the study include a schedule for abandonment and recuperation of all areas in each of the operations of the Project. ESIA, June 2003, 5-6.

31 Montana, March 2004.

In mid-September 2003, the municipal authorities of San Miguel and Sipacapa were asked by Montana to provide signed letters of support to the government for approval of the mining project. Although interviews identified this process as being controversial, within the communities; however, the letters of support³² were provided and MARN and MEM proceeded to approve the ESIA (September) and then the mining license (November 2003). The review of this process by the Compliance Advisor Ombudsman (CAO) focused on whether there was evidence of a meaningful discussion of the project impacts or the ESIA; the document from San Miguel indicates awareness of the ESIA, mitigation measures and project benefits; the document from Sipacapa does not mention the ESIA.³³

In the period of Montana's consultation for the ESIA, the company focused efforts on the three communities previously identified as directly affected (Agel, San José Nueva Esperanza and San José Ixcaniche), and the town of San Miguel Ixtahuacán. However, the municipality of Sipacapa was not included in the baseline studies and only minimally mentioned in the impact assessment section of the ESIA.

Multiple meetings were held by the promoters in the three communities. Meetings and presentations were often conducted in Mam by the Community Relations Group, and according to community promoters and some local residents, meetings were well-attended. Comprehension by the communities, however, was described in several interviews as a challenge, and that even with repeated presentations in Mam, some of the information was not understood.

In the months immediately prior to the approval of the ESIA and the exploitation permit, Montana expanded its consultations with other communities. The first recorded meeting in Tzalem was held in June 2003, with meetings in the Municipality of Sipacapa in the following months. Additional consultation efforts were held along the main road because of identified impacts from traffic. Other communities further away

from the project site, but still in the Municipalities of San Miguel Ixtahuacán and Sipacapa, did not receive as much information or have as many meetings with Montana personnel, although company records show that 47 meetings were held in 26 communities (19 in San Miguel and seven in Sipacapa) between June and October 2003 that had something to do with the ESIA. CTA, the technical consultants who prepared the ESIA, was present at a limited number of presentations including one for national and municipal officials at the project site, suggesting that more detailed or technical information may have been presented at that meeting, but no records of their participation or the content of presentations were provided to the assessors. Company records also show that public meetings were held in both municipal centres prior to obtaining the signed letters of acceptance from municipal authorities. By mid-2003 accurate records were being kept about the meetings held and number of people participating; however, there is little information about the content of meetings, such as agenda, information presented, or issues raised by participants and how Montana responded.

Consultation and Disclosure of Information after Permitting (2003–2004)

After receiving the exploitation permit in November 2003, Montana increased disclosure of the ESIA documents, and meetings with communities continued. This corresponded to the period when the project was seeking approval of the International Finance Corporation (IFC) loan, as well as when the feasibility study was completed. The IFC loan required preparation of additional environmental and social documentation as well as fulfillment of its consultation and information disclosure requirements, but as far as the assessors have been able to determine, did not require additional work on the social baseline, impact assessment or related aspects of the ESIA.³⁴ In February 2004, nearly three months after the ESIA was approved,

32 The Municipality of San Miguel Ixtahuacán provided a letter of support for the approval of the project by the government, signed on September 18, 2003 by the Mayor and approximately 42 Auxiliary Mayors (some stamps not fully legible); the Municipality of Sipacapa provided a letter of support dated September 18, 2003 for the extraction of minerals signed by the mayor and six municipal officials. Copies of the letters were presented to MEM.

33 CAO, 2005, 20, Annex A.

34 The IFC did not request a Corrective Action Plan (CAP) be submitted, but did require some changes to environmental practices and capacity. No requests were made for changes in the social assessment. The first external environmental audit, in 2004 which was a requirement of the IFC, identified additional environmental work required to be compliant with Montana's commitments and IFC's environmental standards; this audit produced a CAP that was entirely focused on environmental gaps. See Dorey & Associates, L.L.C., January 2005.

copies of the full ESIA document were delivered to both municipalities.

Display materials and printed documentation reviewed from 2003 focused primarily on benefits and company commitments, with some information about the industrial process and the use of cyanide.

A detailed review of printed material used for community meetings suggests that more detailed information about the mine and its processing methods was provided in the company's disclosure materials (e.g. posters, printed material and site models) by mid-to-late 2004. As part of its IFC requirements, Montana prepared a Public Consultation and Disclosure Plan (PCDP) in March 2004, which stated that "consultation is intended to inform affected indigenous communities, governments and interested parties about current and potential future activities and to facilitate participation in planning, development and implementation of the project. Public consultation was also used as a method to allow indigenous communities to identify ways to share in the benefits of the project."³⁵ Although produced in early 2004, the PCDP identified Tzalem as affected by the project, but relied on the baseline of the Mam communities as those directly affected by the project.

Montana also organized mine visits to Glamis' San Martin Mine in Honduras for select citizens and authorities.³⁶ Twenty-two local authorities and community leaders including Sipacapa's municipal council at that time as well as local employees, visited in the last

months of 2003³⁷ to obtain a first-hand look at a mining operation. Most of the local citizens and authorities that participated in the visits to the San Martin Mine did so in 2004 after permitting took place.

Since operations began, the Sustainable Development Department (SDD), including its Community Relations Group (CRG), has had responsibility for consulting and informing communities, as well as channelling information and concerns from communities back to management. The scope of the SDD's work with communities has been expanded over time to include communities throughout the municipalities of San Miguel Ixtahuacán and Sipacapa; communities in the departments of Huehuetenango and Quetzaltenango that are located along the access road from the mine to the Pan-American Highway; and, most recently, communities located along the electric power transmission line from Tejutla to the mine. The team of promoters includes Sipakapense and Mam-speaking community members and has grown from three to 14 members to communities around the mine. A further five promoters (total of 19) were added in 2008 in order to implement the assistance program along the power line. The promoters and SDD staff have received some training on mining and meeting facilitation, among other topics.³⁸

As reported by Montana in the AMRs and interviews, the primary mechanisms employed by the Community Relations Group for engagement with local stakeholders have been individual or small group meetings, mine visits and targeted written or visual communication. Indirect consultation mechanisms such as courses, seminars and workshops are part of the SDD's programs and are seen as additional means of consulting with communities.

Montana also considers other ongoing activities of the SDD to be part of the overall communications and engagement process, including work with the Community Environmental Monitoring Association

35 The PCDP described several stages: (a) post-project acquisition by Glamis, when key issues were identified by communal authorities (need for teachers, improvements of water distribution and treatment systems, road improvements, and health care) and Montana responding to these needs; (b) ESIA consultation and disclosure, which followed procedures required by MARN and was complemented by actions taken by the company such as community surveys; and (c) actions taken to institutionalize public consultation and disclosure functions. The PCDP stated in the document that it would continue to guide information disclosure after the closure of the mine.

36 According to company records, 28 local authorities and residents visited the San Martin Mine in 2003: 13 in two trips in March and July, and a further 15, including municipal authorities from Sipacapa, in October after the municipal letters of support were provided. In 2004, 62 local leaders, 10 departmental authorities, and 24 officials from the regional health system visited the Honduran operation. In 2005, 16 people visited the San Martin Mine, including regional political authorities, health specialists, and elected officials and their advisors.

37 The assessors reviewed a list of mine visits compiled by Montana. According to this information, in 2003 there were three visits, with half of the participants being company representatives. In 2004, 14 trips took place, comprising 126 Guatemalan officials and community members.

38 The assessors reviewed materials used for short training sessions for promoters on making presentations, preparation of community project profiles, planning, processes, and others.

(Asociación de Monitoreo Ambiental Comunitario – AMAC),³⁹ Sierra Madre Foundation (FSM)⁴⁰ programs, good neighbour activities, and projects implemented through the Organizational Development Group (also part of SDD).⁴¹

Montana estimates that more than 15,000 people have been involved in meetings with, or received information from, the company through the above-noted mechanisms since 2003, when the company started tracking consultation meetings.⁴²

Goldcorp's 2008 Sustainability Report states that it is "sensitive to the particular needs of indigenous communities, and recognizes that targeted programs may be required to ensure these groups are able to successfully engage with the company."⁴³ There are no mechanisms or indicators proposed to measure whether this is taking place, nor did Montana personnel indicate any changes in practice or procedures related to this corporate statement.

Human Rights Context

As set out in the introduction to this section, prior consultation is a fundamental element of indigenous peoples' rights, notably with respect to the right to decide their priorities for development and the right to natural resources pertaining to their lands, as set out in the International Labour Organization Indigenous and Tribal Peoples Convention (ILO 169), which Guatemala ratified in 1996. ILO 169 includes specific protections of the right to prior consultation before granting permits for exploration or exploitation of

natural resources; consultation is also seen as key for compliance with all other aspects of the Convention.⁴⁴

It is important to underline again that this is an area in which international human rights norms and stakeholder expectations have evolved since the mine was permitted. There is now clearer guidance about what is required for states and companies to comply with ILO 169. In addition, the adoption of the Declaration on the Rights of Indigenous Peoples by the United Nations General Assembly in 2007 has led to heightened awareness and expectations about the practices required for prior consultation with indigenous peoples.

Ongoing consultation and information disclosure is also related to a company's responsibility to respect human rights. In the application of the DIHR HRCA tool,⁴⁵ consultation and information disclosure were cross-cutting indicators for a range of international human rights.⁴⁶ A specific right to be informed can also be inferred from international human rights instruments, as well as Montana's obligations under Guatemalan access to information laws.

The principle concerns about consultation identified for the assessment are:

- Assessment C1: Did consultation prior to the permitting of the mine comply with the requirements of ILO 169?
- Assessment C2: Does Montana's ongoing consultation and information disclosure practice respect the right to be informed?

39 AMAC was created by Montana in 2005 in response to community concerns about water. AMAC is discussed at length in Section 3: Environment.

40 The Sierra Madre Foundation was created by Montana in early 2003 to facilitate social investment in San Miguel and Sipacapa. FSM is discussed at length in Section 6: Economic and Social Investment.

41 These include meetings with COCODEs and COMUDEs about development projects, the work of AMAC, the functioning of a formalized grievance mechanism in 2007, and others.

42 Montana AMR, 2008, 21. The break down for 2003/2004-2008 is: 2,594 community visits; 47,702 people attending meetings; 15,072 number of persons contacted individually; 7,440 number of persons visiting the mine; and 970 (2008) number of persons visiting the information offices.

43 Goldcorp Inc., 2008a.

44 ILO, 2009b, Chapter V on Participation, Consultation and Consent. Other specific obligations under ILO 169 are addressed as appropriate in sections on land acquisition, labour, and social investment.

45 As set out in Section 1: Introduction, DIHR Human Rights Compliance Assessment provides questions and indicators to assess a company's compliance with international human rights standards.

46 Human rights related to consultation and information disclosure include rights to food, housing, education, health, and an adequate standard of living, as well as rights to own property, freedom of movement, right to a cultural life, and the right to life, liberty and security of the person.

Information Reviewed

Consultation was a particularly challenging issue to assess after the passage of six to seven years since the main activities related to permitting the mine, and the development in the interim period of divergent explanations of the adequacy of the consultation process. The assessors were concerned to understand how people may have perceived the process at the time, as well as how it is perceived in 2009, but the absence of substantive documentation by the company made that difficult.

To assess how consultation was carried out and its relation to human rights, the assessors relied on a range of information sources: company documentation and consultation materials,⁴⁷ public and media information from the time, and interviews with stakeholders, specialists and authorities. Most of the printed criticism of the consultation process is in documents and Internet sites prepared by non-governmental organizations.⁴⁸

As noted, the assessors had access to less information from Sipacapa authorities or institutions, and had a limited number of interviews with community members. The more limited participation of people from Sipacapa is a concern particularly for this issue because much of the public criticism regarding the adequacy of the consultation process has come from local leaders and municipal authorities in Sipacapa. Interviews were done with community leaders and authorities in Sipacapa, in addition to a review of the extensive media coverage of the issue, and a number of Internet sites and articles based on the position of some Sipacapa leaders have provided some information on their perspectives and allegations. One source partially addressing this information gap was the 2005 report

of the Compliance Advisor Ombudsman, in response to a complaint filed by a national NGO and Sipacapa groups.⁴⁹ The CAO review focused on responding to the concerns from groups in Sipacapa and provided particular attention to impacts and the adequacy of the consultation process with the people of Sipacapa; however, the report's findings about consultation refer to Montana's activities generally.

The CAO assessment took place in 2005, after a formal complaint filed with the World Bank by the NGO Colectivo Madre Selva and a community based group in Sipacapa about the IFC's investment in the Marlin Mine. The CAO assessment reviewed whether the project would negatively affect Sipacapa as per the complaints, and whether the IFC had fulfilled its policy commitments in its review and decision about funding the Marlin Project. The CAO report focused on five areas of concern: water quality and dam safety, water quantity, socioeconomic impacts, consultation and information disclosure, and security.

The CAO report reviewed consultation practices by Montana and found that much of the information disclosure and consultation took place after the ESIA was submitted or after permitting, and that at the time, sufficient information was not available to allow stakeholders to be informed of the likely adverse impacts of the project. Montana's intent in carrying out the consultations, according to the CAO report, was to inform stakeholders about the project, *some* (emphasis added) of its potential impacts, and obtain input on potential development projects. The report went on to state that, "The CAO finds that there are also significant ambiguities about the definition the project's ultimate area of influence and impacted people. Maps presented in the project's environmental and social impact assessment indicate that communities in Sipacapa

47 The company documentation reviewed included: Public Consultation and Disclosure Plan (PCDP), Land Acquisition Procedures (LAP), Indigenous Peoples Development Plan (IPDP), and the company's Report on Compliance with ILO 169, all prepared for the IFC in 2004; internal reports on community relations activities; consultations and meetings reported in the annual monitoring reports from 2004–2008 and printed consultation materials from 2003–2005, reviewed in Montana's offices in San Miguel Ixtahuacán.

48 ADISMI 2007; Bank Information Center, 2005; Castagnino 2006; COPAE – Diócesis de San Marcos 2007; Frente Nacional Contra la Minería de Metales, 2005; Halifax Initiative Coalition, 2005; Imai, Mehranvar and Sander, 2007; MISEROR International and Food First Information and Action Network, 2005; MiningWatch, 2007; Morales, 2005; Moran, 2004; Rights Action, 2005; Solano, 2005.

49 The CAO is the independent recourse mechanism for the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) of the World Bank. The CAO "responds to complaints from project-affected communities with the goal of enhancing social and environmental outcomes on the ground" (www.cao-ombudsman.org/). In March 2005 the CAO received a complaint from communities in Sipacapa municipality about the impacts of the Marlin Mine. The CAO investigated this complaint through a field visit to the project location and exhaustive examination of IFC and Montana documentation; it also interviewed the complainants and other local groups, national and international civil society leaders. It published its report on September 7, 2005. For CAO documentation related to the Marlin Mine, see www.cao-ombudsman.org/cases/case_detail.aspx?id=95.

are directly impacted – if not environmentally then as a result of socio-economic changes.”⁵⁰ As noted previously, the actual baseline studies on which project impacts were based did not include Sipacapa municipality or the Sipakapense community Tzalem even though 13 per cent of land for the initial Marlin project footprint was acquired from Tzalem/Sipacapa.⁵¹

The assessors also consulted other external reviews, including information related to consultation about

50 CAO, 2005, ii.

51 CAO, 2005, 12; confirmed by Montana, 2009.

Marlin’s implementation of the Voluntary Principles;⁵² diverse reports of the ILO Committee of Experts and UN representatives, some with specific references to Marlin Mine; review of media reports from 2003 to 2010 and relevant Internet sites; and review of published documentation on Guatemalan indigenous people’s rights, the mine, mining in Guatemala, and the *consultas*. These sources of additional information are discussed below where appropriate.

52 See Section 7: Security; Avanzar, 2006; Avanzar, 2008.

CONSULTATION PRIOR TO PERMITTING THE MINE

Assessment C1: Did consultation prior to the permitting of the mine comply with the requirements of ILO 169?

This assessment looks at human rights impacts from consultation for the initial permitting of the Marlin Mine in 2003; and from subsequent consultation on new activities, in particular for any that are significant enough to require additional permits for new or expanded activities of the company.

Prior consultation is a fundamental right of indigenous peoples, as articulated in ILO 169 and the UN Declaration on the Rights of Indigenous Peoples. While other international instruments are relevant to the analysis of the issue of consultation,⁵³ this assessment focuses on ILO 169 because of its particular relevance to the context of Guatemala and its specific protections of

the rights of indigenous peoples to decide their own priorities for development⁵⁴ and to natural resources pertaining to their lands.⁵⁵

Under ILO 169, the government of Guatemala must consult with indigenous peoples to obtain consent or agreement to proposed administrative measures and for “ascertaining whether and to what degree the interests of these peoples would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of (...) resources pertaining to their lands.”⁵⁶

53 For a review of the “normative grounding and general character of the duty to consult,” see Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, July 2009, paras. 38-42.

54 Article 7.1 of ILO 169 provides that: “The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programs for national ;and regional development which may affect them directly.”

55 Article 15.2 of ILO 169 provides that: “In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”

56 ILO 169, Articles 6(2) and 15(2).

The indigenous peoples rights that are part of the ILO 169 framework and relate to prior consultation about a mining project include:

- The right to be consulted through appropriate procedures and representative institutions before natural resources on their lands are explored or exploited;
- The right to be informed about impacts and all aspects of resource development; and
- The right to having the impact of exploration and exploitation ascertained.⁵⁷

The ILO governing body has stated that the “concept of consulting the indigenous communities that could be affected by the exploration or exploitation of natural resources includes establishing a genuine dialogue between both parties characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord.”⁵⁸

As noted above, consultation with indigenous peoples is an area of international law that has evolved in recent years, and the understanding of the respective roles and responsibilities of the State and of companies to meet the obligations of prior consultation under ILO 169 were not yet well articulated in 2003. Like all international human rights instruments, the text of ILO Convention 169 is clearly aimed at the States that sign and ratify it; there was ambiguity about the role of companies in States that were not effectively implementing the provisions of the Convention. Since the permitting of the Marlin Mine, the ILO clarified that responsibility for ensuring that indigenous peoples’ rights are protected lies with the concerned governments and not with private companies or entities that are licensed to undertake exploration or exploitation.⁵⁹

The ILO Committee of Experts spoke directly to this question⁶⁰ when it addressed a complaint about the Marlin Mine in 2006, stating that “the responsibility for consultation lies with the government, not the company” and that “the impact study carried out by

the company is no substitute for the consultations required by Article 15, paragraph 2.”⁶¹

More recently, the 2009 guide to ILO 169 includes clear statements that “the core area of application for the concepts of consultation and participation is in the context of relationships between indigenous peoples and States;” and that “the obligation to ensure appropriate consultation falls on governments and not on private persons or companies.”⁶² Also in 2009, the UN special rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples affirmed that the “duty of the State to protect the human rights of indigenous peoples, including its duty to consult with the indigenous peoples concerned before carrying out activities that affect them, is not one that can be avoided through delegation to a private company or other entity.”⁶³

Although the State’s duty to consult under ILO 169 does not provide indigenous peoples with a veto power, it establishes the need for the State to adopt consultation procedures in order to make every effort to build consensus on the part of all concerned.⁶⁴ While there is still debate about the scope and practical application of obtaining consent or agreement, there is emerging consensus about the need for much better practices in consulting with indigenous peoples, particularly with respect to major development and extractive industry projects. Of relevance in the Guatemalan context is the ruling in the *Saramaka v. Suriname* case, in which the Inter-American Court of Human Rights held that “regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions.”⁶⁵

Although the Guatemalan constitution and legal framework include provisions to recognize and protect indigenous peoples rights,⁶⁶ there is a serious gap

57 Ibid.

58 ILO Governing Body, 2001.

59 This issue was addressed by the ILO Committee of Experts as early as 2005 in its observation about Bolivia. ILO, 2005.

60 The ILO Committee of Experts is the main supervisory body for the ILO Conventions. It receives communications from non-state parties and makes comments and recommendations to the government about the implementation of the ILO Conventions.

61 ILO, 2006, para. 13.

62 ILO, 2009b, 60-61.

63 Anaya, July 2009, para. 54.

64 Ibid, para. 48.

65 Inter-American Court of Human Rights, November 28, 2007, “Case of the Saramaka People v. Suriname”, para. 134, www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

66 Indigenous Peoples Identity and Rights Accord (AIDPI) and Human Rights Comprehensive Agreement (CHRA), among others.

in the implementation of ILO 169. The Guatemalan government has not yet developed an adequate legal, regulatory or institutional framework to ensure prior consultation in the manner prescribed by ILO 169 regarding the use of national resources.⁶⁷ This issue has been continuously highlighted by the ILO Committee of Experts and by UN human rights mechanisms; to date, the government has not acted on the recommendations.⁶⁸ Many actors in Guatemala, from the Constitutional Court to Congress to NGOs and the private sector, are calling on the government to pass regulations on how to consult.

Montana management reported that the initial due diligence (2002) about legal issues when Glamis Gold purchased Montana did not identify ILO 169 as part of the legal or regulatory regime to be met in Guatemala and neither Montana nor Glamis had a specific policy about consultation with indigenous peoples.

Montana focused on complying with the national legal and regulatory requirements for consultation in place at the time the mine was permitted, which required limited disclosure of information by government agencies, and company-led consultations as part of the ESIA review and approval process. There are no records that the Ministry of Energy and Mines (MEM) or any other government agency conducted public consultations about the mine or the ESIA *prior* to approving the environmental permit (September 2003) and granting the mining licence (November 2003).⁶⁹

Montana expanded its consultation program and undertook measures to comply with the IFC requirements after the permits were granted by the

government, producing a Public Consultation and Disclosure Plan (PCDP) and a report about the company's compliance with ILO 169 in March 2004.⁷⁰ While Montana concluded that it had complied with Guatemalan law and the provisions of ILO 169, the ILO Committee of Experts observed that "the responsibility for consultation lies with the Government, not the company" and that "the impact study carried out by the company is no substitute for the consultations required by Article 15, paragraph 2."⁷¹ This interpretation of ILO 169 – that the obligation for prior consultation lies with the State and not with Montana – was highlighted in a subsequent guidance document by the IFC that specifically discussed the case of the Marlin consultation.⁷² The Guatemalan Human Rights Ombudsman (PDH) also reviewed the issue of prior consultation in a 2005 report about the Marlin Mine, noting that "the licence was granted without proper community consultation and that the right of indigenous peoples to be consulted has been violated by the Guatemalan government."⁷³

The State's obligation to undertake consultation is intended to ensure certain criteria, including that:

- The consultation process adequately respects indigenous institutions;
- The information provided to communities is adequate and accurate;
- The company fairly represents the potential impacts and benefits so that the affected community can make an informed decision about the project; and
- An accurate account of the consultation process and the information disclosed can be provided afterwards.

The concern is that without governmental oversight, companies will not fully and objectively disclose impacts to community scrutiny.⁷⁴ Another concern is that, without governmental oversight, the consultation with affected communities may not occur suffi-

67 The relevant provisions of ILO 169 are Article 15, para. 2 in conjunction with Articles 6 and 7. Article 6 refers to the procedure for consultation; Article 7 to the process of development; and Article 15, para. 2 governs consultations on natural resources in particular and sets the objective of consultation: "ascertaining whether and to what degree the interests of these peoples would be prejudiced, before undertaking or permitting any programmes for the exploration and exploitation of ... resources pertaining to their lands." See ILO, 2006, para. 10.

68 Special Rapporteur on the right to food, Jean Ziegler, January 2006, para. 28; Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, February 2003, paras. 26-27; Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, February 2009, para. 36.

69 The CAO review also found that there was no evidence of either prior consultation or disclosure associated with the granting of the original Marlin exploration license or the subsequent exploration licenses granted to Montana and Entre Mares – another fully-owned Glamis company operating in Guatemala.

70 Montana, March 2004.

71 ILO, 2006, para. 13.

72 IFC, March 2007, 3.

73 Procurador de los Derechos Humanos, 2005.

74 Articles 6 and 7(3) of ILO 169 stipulates that the social, spiritual and environmental impacts of development activities on indigenous peoples shall be assessed in cooperation with them, and that the results of such activities shall be considered as fundamental criteria for the implementation of these activities.

ciently early in the process. ILO 169 stresses the importance of early engagement: consultation should occur beforehand, which implies that the communities affected should participate as early as possible in the process, including in the preparation of environmental impact studies.⁷⁵ As discussed above, the company's consultation on the ESIA took place only after it was submitted.

The findings of the Compliance Advisor Ombudsman (CAO) report in 2005 and the opinions of stakeholders are in agreement that these criteria were not met for the consultations about the Marlin Mine. As mentioned above, the CAO review found that information provided to stakeholders was insufficient for an informed opinion, the ESIA was based on an inaccurate definition of the baseline area for socioeconomic impacts, potential impacts were not fully represented, and an informed decision could not have been made. Additional concerns of importance to local stakeholders include timing of the consultation, which did not allow for meaningful input into the design of the project, as well as the failure to fully recognize Sipacapa as part of the directly affected area and to take steps accordingly to include it as fully in the early consultation process as San Miguel Ixtahuacán.

On the environmental side, the two most significant gaps in terms of this assessment's findings on environment⁷⁶ were that the acid rock drainage potential of the ore had not yet been determined, and that water users downstream of the mine, in particular the tailings facility, were not identified in the assessment. These two gaps made consideration of the potential impacts, risks and mitigation measures impossible. In terms of social assessment, the ESIA emphasized positive project impacts without identifying potential risks to communities from a range of predictable negative socioeconomic impacts, including in-migration, presence of non-local construction labour force, inflation, and an increase in social ills. With these significant gaps, informed consultation about the project's impacts could not have taken place.

For stakeholders, consultation was an important issue, with more people expressing concerns about consultation than any other issue area. In all, stakeholders identified 11 separate issues associated with consultation.

The biggest concerns for local interviewees were the need to address negative impacts, that consultation had involved biased or misleading information, and many questioned the role of the State.⁷⁷ It is worth noting that these concerns were consistently raised by all categories of stakeholders, although employees raised them half as often as other local stakeholders.

The assessors reviewed the limited documentation from Montana's consultation activities that was made available. While it provided good examples of information about mining and potential project benefits, and various important initiatives were taken to effectively communicate with the Mam populations, the documentation does not provide sufficient evidence to counter the CAO's findings and the testimonies of a range of local stakeholders. Consultation on the draft findings of the ESIA did not take place, so that community/stakeholder input was not integrated into the ESIA. In the months leading up to submission of the ESIA, Montana focused on building an understanding of mining because of the low levels of comprehension identified in the community by the company, however good practice would have required that submission of the ESIA be delayed until meaningful consultation on the findings and proposed mitigation measures, could take place.

These issues were highlighted in relation to the company-led consultation process for the Marlin Mine, in a guidance document on ILO 169 published by the IFC in 2007. Referring specifically to the case of Marlin, the IFC recommends:

In countries like Guatemala, where the government has not issued specific regulations on consultations with indigenous peoples to ensure compliance with Convention 169, private companies need to play a proactive role in the design and implementation of a consultation process with government participation and endorsement. Companies should invite appropriate government agencies and other third parties to join the key consultation meetings with the local communities. The presence of the government representatives adds credibility to the process and facilitates the delivery of information on certain subjects,

75 ILO Governing Body, 2001.

76 See Section 3: Environment for a full discussion.

77 These three issues were raised by between 34 and 37 per cent of all interviewees; four more issues were raised by more than 29 per cent.

*such as the licensing processes and the legal obligations of private companies.*⁷⁸

Therefore, although Montana undertook various efforts to consult and engage with the communities adjacent to the mine and to disclose information about the proposed project, the company could not, and cannot, adequately respect indigenous people's rights under ILO 169 without the Guatemalan government's involvement in and oversight of its consultation efforts. This is perhaps the most important legacy issue for the Marlin Mine and it remains a pertinent issue with respect to current exploration activities as well as any plans Montana has for future expansion of its operations.

Montana has not updated its consultation policies and procedures to take into account the clarification of the requirements about ILO 169. From the interviews with company representatives and government officials, Montana continues to operate and to expand its exploration activities within the area of the initial permit without involving the government in its processes of consultation and disclosure.

The CAO report identified three additional exploration licenses that had been granted to Montana in the area around Marlin Mine up to 2005,⁷⁹ and found that there was no evidence of government disclosure or consultation about the granting of those exploration licenses. After the Coral incident in 2009, the assessors were told that the mayor of San Miguel Ixtahuacán traveled to Guatemala City to obtain the information that Montana had a total of seven exploration licenses in the area around San Miguel,⁸⁰ suggesting there had not been effective disclosure or government consultation about those exploration licenses.

In 2009, Montana was carrying out active exploration both within and outside of the Marlin 1 exploitation license.⁸¹ The assessors are aware of three planned

expansions to the original mine plan: the West Vero drilling area (adjacent to the current operation); La Hamaca (already permitted by MARN in July 2005 as a mine mouth for underground mining), and the proposed second tailings dam located to the north of the current tailings storage facility. Exploration drilling at Coral hamlet, which led to a violent confrontation in June 2009, was part of exploration to support future expansion of the underground mine.⁸²

Montana advised the assessors that subsequent to the Coral incident the company has begun to consult with the immediate community – local village or hamlet – around an exploration target prior to drilling. The intent of this is to obtain the consent of the local residents to the proposed activities. The assessors were also advised that Montana undertook consultation for the permitting of both La Hamaca and the second tailings facility. However, the company confirms that the government has not been involved in its consultations.

Given the importance of consultation for compliance with ILO 169, and that it has been clarified that the State must be involved for the process to be compliant, Montana's consultation practices are not compliant and potentially take advantage of the government's violations of human rights.⁸³ New activities that will have impacts on indigenous peoples require consultations compliant with ILO 169 and should involve government representatives.⁸⁴ While clarification of the necessary role of government had not yet been issued when Marlin 1 was permitted, there is no uncertainty today about the State's necessary role in prior consultation. Industry guidance, such as the IFC's guidance on ILO 169, clarifies that while a new mining law and/or formal regulation on consultation processes are ideally what is required, there are other mechanisms in the interim period that would ensure the State's responsibility for oversight is fulfilled.

78 IFC, March 2007, 10; Anaya, July 2009, para. 54.

79 CAO, 2005, 3.

80 Interview with community leader in San Miguel.

81 Both Montana and Entre Mares de Guatemala, a subsidiary company, have exploration permits in other areas of San Marcos and Guatemala; this assessment is focused on the activities associated with the Marlin Mine and therefore limited the review of exploration activities to those within the exploitation concession or in adjacent communities.

82 Goldcorp Inc, Undated, "Marlin Exploration", www.goldcorp/operations/marlin/exploration/, accessed July 2009.

83 IFC, March 2007.

84 While there is no clear distinction as to which of the mine's activities require consultation with indigenous people, an appropriate criteria would be any new activity requiring a government permit.

Findings

Prior consultation is a fundamental element of indigenous peoples rights, notably with respect to the right to decide their priorities for development and the right to natural resources pertaining to their lands. This is particularly significant in Guatemala, since it ratified the International Labour Organization Indigenous and Tribal Peoples Convention (ILO 169) in 1996. Although there were requirements of public consultation as part of the approval of mining licences, notably with respect to the Environmental and Social Impact Assessment (ESIA) approval process, the ILO and other international bodies consider that the Guatemalan government was, and is, in violation of ILO 169 since it has never implemented an appropriate framework for consultation with indigenous peoples at a national level.

This is an area in which international human rights law has evolved since the mine was permitted and there is now clearer guidance about what is required for States and companies to comply with ILO 169. In addition, the adoption of the United Nations Declaration on the

Rights of Indigenous Peoples by the UN General Assembly in 2007 has led to heightened awareness and expectations about the practices required for prior consultation with indigenous peoples.

Montana carried out extensive consultation efforts; however, it did not involve government directly in those efforts in a manner that would satisfy the requirements of ILO 169. There was no independent oversight of the process or the adequacy of the information. This was a failure to respect indigenous peoples rights.

Montana also has undertaken consultations about new activities without involving the government, and its policies or procedures have not been updated to take into account the requirements of ILO 169. If these new activities relate to expanding the mine or obtaining new permits, company-led consultations that do not involve the government also fail to respect indigenous peoples rights.

ONGOING CONSULTATION AND DISCLOSURE

Assessment C2: Does Montana's ongoing consultation and information disclosure practice respect the right to be informed?

Ongoing consultation and disclosure of information are a touchstone for the respect of all human rights, and are key components of transparent and accountable governance. In this regard, consultation and disclosure of information is a cross-cutting indicator for company compliance with international human rights standards, as highlighted by the application of the DIHR Compliance Assessment Tool.⁸⁵ Moreover, issues about ongoing consultation are discussed in other sections of this assessment, including land acquisition, environment, security, and social investment.

In addition, all stakeholders have a right to seek, receive and impart information that can be inferred from article 19 of the International Covenant on Civil and Political Rights and article 13 of the Inter-American Convention on Human Rights. Guatemalan access to information legislation (Decree 57, 2008) also extends the obligation to disclose information to companies with a licence or concession to exploit natural resources.

Furthermore, ongoing consultation and information disclosure is part of international good practice, currently supported by the IFC Performance Standards, the OECD Guidelines for Multinational Enterprises, GRI Sustainability Reporting Guidelines on Human Rights, and the ICMM Sustainable Development Framework. The IFC's Environmental and Social Safeguard Policies were widely recognized as representing an international good practice standard for consultation when

85 DIHR 52, 119, 165, 167, 168, 215, 216, 219, 229, 230, 231.

the mine was being permitted in 2003. Although not directly based on international human rights laws or conventions, these standards were established to protect the rights of project-affected people, and were being applied in the mining industry at that time. Montana formally committed to comply with the Environmental and Social Safeguard Policies to obtain the IFC loan in 2004.

The company's responsibility in ongoing consultation is to provide an opportunity for meaningful dialogue with stakeholders, including the provision of timely and accurate information about the project, potential impacts and measures to mitigate or manage them. The process of consultation is important for proactively addressing human rights concerns, effectively mitigating risks, and building trust. Furthermore, in an area of operation that involves consultation with indigenous peoples, ongoing consultation should take place within the context of ILO 169: in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.⁸⁶

In this regard, consultation under ILO 169 in relation to the exploration and exploitation of natural resources should not be viewed as a discrete event at the time of permitting:

Considering that exploratory and exploitative activities are often long-term processes where companies are granted concessions of periods of 30-50 years, it is important to underline that the obligation to consult does not only apply when taking the decision to explore or exploit resources but also arises on a general level, throughout the process as it affect indigenous peoples.⁸⁷

As described above, Montana's Sustainable Development Department (SDD) and Community Relations Group (CRG, a division of the SDD) are responsible for consulting and informing communities, as well as channelling information and concerns from communities back to management. The primary mechanisms employed by the CRG for engagement with local stakeholders have been individual or small group meetings (either on-site or off-site), site visits, and targeted written or visual communication. Indirect consultation

mechanisms such as courses, seminars and workshops are part of the SDD's programs and are seen as additional means of consulting with communities. The company also considers other ongoing activities to be part of the overall communications and engagement process, including work with AMAC, the Sierra Madre Foundation's programs, good neighbour activities, and projects implemented through the Organizational Development Group (also part of SDD).⁸⁸ One of the key mechanisms for information disclosure is the publication of an Annual Monitoring Report (AMR) that contains information about the mine's administration, finances, operations, employment, and environmental and social management. Montana continues to prepare AMRs on a voluntary basis since the IFC loan was re-paid in 2007.

As noted, Montana prepared a Public Disclosure and Consultation Plan in 2004 as part of the requirements to obtain IFC financing. There is a similar obligation to prepare a public disclosure and consultation plan under Guatemala's environmental regulations; however, this requirement did not formally apply to the Marlin Mine as the regulation was adopted after the mine was permitted. This plan stated that it would be updated and would apply throughout the life of the mine and through to closure. To date it has not been updated.

As discussed above, there were strengths and weaknesses to Montana's consultation and information disclosure prior to the permitting of the project in 2003. The assessors acknowledge, as do most stakeholders interviewed, that Montana's engagement and communication program went far beyond what was legally required in terms of the quantity of meetings; what is in question is the quality of the information and its availability accessibility, and the timing of disclosure, relative to international standards. Due to the overall weakness of documentation, doubt remains as to the quality of the process in terms of adequate disclosure about the technical aspects of the project and potential impacts and risks.

In the interviews conducted in 2009, 34 per cent of local stakeholders said they did not feel they received information about the changes or impacts they were

86 ILO 169, Article 6(2).

87 ILO, 2009b, 107-108.

88 These include meetings with COCODEs and COMUDEs about development projects, the work of AMAC, the functioning of a formalized grievance mechanism in 2007, and others.

going to experience once the mine began to operate, and nearly the same number felt that negative impacts needed to be addressed. The impression given to the assessors was that most interviewees did not feel that community concerns were being addressed, or that Montana provided opportunities to do so.

The CAO report underscored that in the consultation process for permitting the Marlin Mine, the government and Montana had not comprehensively considered the local norms for community decision-making and how Mayan customary perspectives could be integrated into the consultation process. The CAO report concludes with a finding that “neither the company or the government appears to have engaged in a proactive process of working with local people to build a clear understanding of appropriate protocols for disclosure and consultation. Current actions by the company appear to be relatively *ad hoc*, albeit better documented than in the past.”⁸⁹

The CAO report recommended higher levels of transparency in terms of document disclosure and consultation with local communities about potential impacts. Most of these recommendations have not been done, including carrying out further impact assessments and consultations about water quantity and quality issues, mine closure, and exploration activities. Furthermore, Montana has not succeeded in building a trusted means for engagement with the people of Sipacapa for all phases of the project and to establish a new framework for ongoing dialogue and consultation.⁹⁰

It must be acknowledged that the establishment of a new framework for ongoing dialogue and consultation requires the willingness of other actors, including the local communities, organizations, and ideally opposition groups and individuals with grievances. While Montana has maintained and expanded its mechanisms for engagement with communities, there has been a continuation of an *ad hoc* and reactive approach. To date, the company has not succeeded in resolving past disputes and transforming its community relations into a structured and comprehensive dialogue about the full range of community concerns and past, present and future impacts. The outstanding grievances identified by the assessors, which are discussed throughout the assessment, signal clearly that

Montana has not established a meaningful process or mechanism to consult about concerns and respond to them.

Montana does not seem to distinguish between ongoing engagement with communities and more formalized or structured consultation processes to provide information on and obtain feedback about specific issues of importance to the communities – or that would affect them. This is evident from the lack of any structured or documented processes separate from ongoing engagement mechanisms. As described in the AMRs, Montana considers all interaction between company personnel and stakeholders a consultation, and all organizations working in that interface become part of Montana’s consultation program. While all interactions provide opportunities for information flow, development of understanding and improved relationships, such interactions do not automatically constitute a consultation process in which the input and concerns of stakeholders are formally requested, documented and taken into consideration. An example of this is the absence of a clear community/municipal consultation process around security and how the mine’s use of public security forces and private contractors impacts the communities. The lack of a structured process also makes transparent access to information, feedback and accountability to stakeholders about the process impossible.

There is a need for broader consultation and renewed dialogue between Montana, the communities and other stakeholders was underscored by the recent Congressional Transparency Committee report. The report recommends the need for consultation involving Montana, the municipal and traditional authorities, as well as the government, about the future of the mine with a focus on enhancing sustainable development benefits for communities. It also highlighted the need for Montana to comply with Guatemalan access to information legislation by establishing a unit for public information at the mine.⁹¹

Some specific concerns about ongoing consultation and information practices relate to the discussion of land acquisition, environment, security, and social investment activities of the mine in the relevant sections of the report. In summary they are:

89 CAO, 2005, 30-33.

90 Ibid, 38

91 Comision Extraordinaria Nacional por la Transparencia, 2009, Informe.

- *Land acquisition:* Although the initial price for land was established through discussions with a large group of land sellers (approximately 70), once the price was established, negotiations and ongoing consultation for land acquisition was done on an individual basis. There have been rumours, concerns and complaints when information about unequal prices paid for land and improvements have circulated in the communities. There also exists confusion about the purpose of Montana's ongoing land acquisition and whether it is for expanding the buffer zone for the mine or for exploration and expansion of operations.
- *Environment:* Although environmental issues are managed well on the whole, there are significant concerns in the communities about environmental management and potential impacts on them; Montana does not undertake ongoing consultation about environmental issues even when specific concerns are known to exist, except through the role of AMAC, which is mandated to supply the information to the communities. Some additional studies have been done that Montana has to date not disclosed to stakeholders. The environmental department has not been involved in consultations about the company's environmental managements systems, emergency preparation⁹² and other matters. Information disclosure and consultation with specific communities is needed on water quality and quantity, with downstream water users about water release plans, and all affected communities including along the road about emergency response procedures and training. The issue of the cracked houses has been a significant grievance for community members for some time, and Montana has been aware of the complaints since 2006. Montana has not undertaken consultations to address environmental concerns (e.g. cracked houses and skin rashes) despite the fact that the issues are well-publicized and a number of studies have been undertaken. Montana did respond to the situation of the cracked houses with training programs for local carpenters, but that is not consulting with the affected or aggrieved stakeholders to hear their opinions.
- *Mine closure and post-mine land use:* Closure plans and long term liabilities are extremely important for local communities as well as municipal authorities to understand and participate in. Associated with this is the question of disposal of land after closure and the management/mitigation of long term environmental impacts, should there be any. Closure planning has only recently been done as an internal activity at the mine, but to date there has been no consultation with local communities about mine closure plans and impacts on communities.
- *Security:* As discussed in Section 7: Security, there has been a lack of formal consultation with stakeholders about issues relating to the mine's interaction with public security forces, private security firms as well as general public safety concerns. Previous external audits of Montana's compliance with the Voluntary Principles on Security and Human Rights have recommended further attention to risk assessments regarding the external security situation in the area –involving both the security and sustainable development departments, and conducted through community consultations and interviews – in order to enhance the quality of the company's overall engagement process with local communities, ensure a more stable macro environment, and provide insight about the security measures that need to be taken to address the risks.⁹³
- *Employment:* There is little evidence that access to information has been addressed relative to labour. There is little transparency around job postings and availabilities, and residents and current employees express a lack of information about hiring criteria, processes and what their expectations can be. There has not been a consultation with communities about local employment and contracting practices and what the communities have to say about those.
- *Social investment:* Montana's consultation about social investment has been improved through structured annual consultations with communities through the COMUDES and COCODES, which are appropriate representative institutions for the indigenous communities. The assessors received strong positive stakeholder feedback about this consultation process. However, to date, company representative acknowledged there has not been

92 Engaging with local communities and authorities is a component of compliance with the International Cyanide Code, but had not yet been done by the mine at the time of the last field visit by the assessors, in June 2009.

93 Avanzar, 2008.

consultation about Montana's forthcoming strategic plan for social investment and development activities. The company representatives said that such consultations were envisioned when the strategic plan was further developed. The effectiveness of social investment and the work of the sustainable development department investments and the Sierra Madre Foundation have not been consulted on.

Access to information about how and why specific projects are funded, from both Montana's projects as well as the foundations, is not clear to many people in the communities.

From the discussion above, there are strengths and weaknesses to Montana's ongoing consultation efforts. The strengths include:

- Montana respects traditional structures by deferring to indigenous/community authorities to engage and communicate with communities at large;
- Meetings and presentations are often conducted in Mam and Sipakapense by the Community Relations Group, and meetings were reported to be well-attended;
- Diverse techniques are used to inform members of communities about mine activities and about mining (e.g. flyers, posters, radio announcements, information offices and field trips to mines);
- Innovative communication strategies have been developed and efforts made to communicate technically challenging information;
- Multiple channels of engagement and consultation with communities have been maintained; and
- Annual Monitoring Reports (AMRs) have been published, including information on the activities of the Community Relations Group and engagement practices. Reports are available in Spanish on Montana's website.

The weaknesses of Montana's consultation efforts include:

- Initial consultation materials concentrated on positive impacts of mining (e.g. employment opportunities), and did not fully disclose potential negative social and environmental impacts;
- Initial focus on San Miguel Ixtahuacán communities as the "core" affected area resulted in baseline and impact assessments not including Sipacapa, and

reduced focus on reaching them in culturally or linguistically appropriate ways;

- Lack of record-keeping through the consultation process has made it difficult to verify the level of disclosure of negative impacts and quality of the process (the number of meetings was easier to reconstruct);
- No permanent and institutional mechanism has been created to proactively consult opponents as well as supporters, and engage indigenous peoples and stakeholders;
- While mechanisms such as FSM, AMAC and the grievance mechanism may have an indirect role in consultation, their potential for consultation has not been developed and is not coordinated;
- Stakeholders do not feel fully consulted or informed on an ongoing basis (there is almost no positive feedback from stakeholders on this point); and
- The context of conflict makes it difficult for Montana to transform its consultation and information practices into a more structured and formal process.

Findings

Ongoing consultation and disclosure of information are a touchstone for the respect of all human rights, and are key components of transparent and accountable governance. Issues about ongoing consultation are discussed throughout the assessment in relation to land acquisition, environment, security, and social investment.

All stakeholders have a right to seek, receive and impart information under international human rights law. Recent Guatemalan access to information legislation also extends the obligation to disclose information to companies with a licence or concession to exploit natural resources.

The Marlin Mine applies a range of strategies and mechanisms to engage and communicate with stakeholders, in particular the local communities around the operation. There are both strengths and weaknesses to Montana's ongoing consultation efforts; however, the interviews with stakeholders reveal they do not feel they are adequately informed or consulted with. Furthermore, Montana's engagement activities do not include structured opportunities to elicit the opinion

and concerns of stakeholders on key issues. There is a need for further attention to more structured and formal consultation mechanisms and to improve

transparency and information disclosure in order to respect stakeholders' right to be informed, as well as the other human rights discussed in the report.

RECOMMENDATIONS

RECOMMENDATIONS FOR IMMEDIATE ACTION

- **ENSURE EFFECTIVE GOVERNMENT INVOLVEMENT.** While respecting the appropriate role of companies in interacting with governments, encourage the Guatemalan government to implement an appropriate framework for consultation with indigenous peoples under ILO 169.

RECOMMENDATIONS THAT ADDRESS LEGACY ISSUES

- **CONSULT ABOUT ESTABLISHMENT OF A MULTI-STAKEHOLDER DIALOGUE PROCESSES.** The recent recommendation of the Congressional Transparency Commission presents an opportunity for Montana to participate in a renewed consultation with affected communities, local authorities and government representatives. The company should clearly signal its willingness to participate in good faith to all stakeholders and accept that it cannot control the result of such an attempt at dialogue and consultation.

- **FULLY DISCLOSE AND CONSULT ON PROJECTS.** Montana should fully disclose documents related to past and current projects, including the full ESIA for the Marlin 1 Mine which is not currently available on the Internet, and proposed project descriptions and EIAs of planned mine activities, including La Hamaca, West Vero expansion, and the potential second tailings facility.

RECOMMENDATIONS FOR ONGOING DUE DILIGENCE

- **REVISE PLANS AND PROCEDURES FOR CONSULTATION AND INFORMATION DISCLOSURE.** Revise Marlin and Montana's overall approach to consultation. Develop a new public consultation approach, with particular focus on increased information disclosure and formalized feedback processes. Involve affected communities and their representatives in review/redesign of ongoing consultation and information disclosure mechanisms. Ensure compliance with the requirements of Guatemalan access to

Free, Prior and Informed Consent

The international legal protections of indigenous peoples rights are evolving toward a standard of free, prior and informed consent for mining projects. The UN Declaration on the Rights of Indigenous Peoples states that: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project [emphasis added]." In addition, the Inter-American Court of Human Rights has recognized the standard of free, prior and informed consent, as has the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples. Furthermore, there is an increasing focus on formalizing prior agreements (e.g. impact and benefit agreements – IBAs) with indigenous communities as part of the development and approval of mining projects.

ICMM members make an explicit commitment to "seek broad community support for new projects or activities" and recognize that "following consultation with local people and relevant authorities, a decision may sometimes be made not to proceed with developments or exploration even if this is legally permitted." They also commit to "seeking agreement with Indigenous Peoples and other affected communities on programs to generate net benefits." Furthermore, ICMM members agree to participate in national and international forums on indigenous peoples issues, including those dealing with the concept of free, prior and informed consent.

information legislation. Include objectives and performance indicators that are measurable.

- **EXPAND CONSULTATION EFFORTS ABOUT OPERATIONAL ISSUES.** Effective consultation is required about land acquisition; environmental performance, including closure and post-closure issues; social investment; and security issues. This includes strengthening consultation efforts with the full range of stakeholders, including critics of the mine. Coordinate more effectively and ensure that Montana's diverse departments engaging with project-affected communities and other stakeholders meet regularly to complement their activities and response to community concerns. The current development of a new strategic sustainable development plan is an opportunity for significant consultation with affected communities.
- **PROVIDE TRAINING ON ILO 169 AND INDIGENOUS PEOPLES' RIGHTS.** Further training is required for Montana's management and relevant staff on these issues, with a focus on the importance of consultation to respect indigenous peoples rights under ILO 169.
- **IMPROVE RECORD-KEEPING AND DOCUMENTATION-TRACKING SYSTEMS.** Implement procedures to carefully document all interactions with community members and other stakeholders, ensuring that all concerns are recorded and information is provided back to stakeholders in transparent and predictable ways, on actions taken to address these concerns.
- **ENSURE ONGOING REVIEW OF CONSULTATION AND INFORMATION DISCLOSURE PRACTICES.** Undertake periodic reviews and ensure feedback from project-affected communities and stakeholders is incorporated into revised policies, procedures and practices.

CONCLUSIONS

Indigenous peoples right to prior consultation has been and continues to be violated by the State; Montana failed to respect those rights by undertaking its own consultation efforts without the government's involvement. This is not to say there was no engagement and consultation with indigenous peoples at the time of permitting of the Marlin Mine, but rather that the government's and company's processes did not meet standards for the protection and respect of indigenous peoples rights. As expert bodies have subsequently clarified, the quality of Montana's consultation process was not relevant for compliance with ILO 169 without government involvement.

In this context, prior consultation processes were not adequate. The fact that the original agreements with these communities have been contested over time highlights the long-term risks and consequences associated with inadequate consultation processes. The Marlin Mine was the first modern mining project after the Guatemalan civil war, and the legal and regulatory framework for permitting mining projects was untested in terms of protection of indigenous peoples rights. The legacy issues related to prior consultation

underscore the need for improved due diligence about indigenous peoples rights when companies develop projects in States with poor governance.

The fact that Guatemala ratified ILO 169 in 1996 is significant for the assessment of the Marlin Mine in this section – as well as for a number of other indigenous peoples rights issues discussed elsewhere in the report. However, even in countries that have not ratified ILO 169, the expectation is still that mining companies will engage in meaningful consultation with indigenous peoples. In this regard, Goldcorp's recent membership in the ICMM comes with a commitment to engage in the international debates on this subject.

Even in areas of operations that do not affect indigenous peoples, ongoing consultation is required for Goldcorp to respect the full range of human rights. Lessons learned about good consultation practices with indigenous peoples should be applied in other context, as the objective of free, prior and informed consultation, with the intention of reaching agreements, provides a strong foundation for the social licence to operate.

Environment

Changes to the environment are a central concern in mining, with impacts experienced in the short and long term by project-affected communities. Environmental concerns come from both technical issues and how they are being managed, and from perceptions people have of changes in their surroundings or well-being.

An analysis of stakeholder interviews showed that environment was the second most frequently mentioned issue after consultation. Water quality was the environmental concern most frequently mentioned, ranking third overall: one out of three local¹ inhabitants interviewed mentioned concerns about water quality. Concerns about health, land contamination and the need for concerns about the environment to be addressed were amongst the top 10 concerns (mentioned by 28 per cent of local interviewees); water quantity, dust,

and vibrations were also mentioned (ranging from 14 to 24 per cent of local interviewees). See Appendix D: HRA Stakeholder Issues Matrix for more details.

This section reviews whether there is a technical basis for allegations of impacts to the environment and whether the company's environmental management complies with international good practice standards and adequately protects community members against impacts that would infringe upon their human rights.

The section also looks at whether there are future risks of impacts that are not adequately addressed, particularly after closure of the mine. The concern about impacts to houses from mine activities is included in this section. The issues of access to information and consultation about environmental risks and impacts are addressed in Section 2: Consultation.

¹ For all reporting on interviews, the term "local" refers to residents of Sipacapa or San Miguel Ixtahuacán municipalities. "Adjacent communities" refers to San José Nueva Esperanza San José Ixcaniche, Agel, and Tzalem.

BACKGROUND

National Context in Guatemala

Although small in size, Guatemala is a country of high biodiversity, with rich ecosystems that were the origin of many domesticated plants. Although environmental protection has improved, the country suffers from significant environmental problems, most notably related to water resource use, water and air pollution, environmental health, deforestation, land degradation, and vulnerability to natural disasters. Poverty, in particular rural poverty, contributes directly to these problems with the lack of rural employment resulting in ongoing reliance on subsistence agriculture; with population growth this leads to further pressure on the environment. Deforestation in 2006 was taking place at a rate of 73,000 hectares/year.

Environmental awareness in Guatemala is growing, but remains relatively low compared to other Central American countries. New legislation is in place to create the appropriate governmental agencies to provide legal recourse to sanction environmental damage, but the agencies are weak, with insufficient financing and low levels of professional capacity.

Guatemala has signed a number of international agreements that help frame the internal environmental regulatory structure, including the Central American Convention for the Protection of the Environment (1989), the United Nations Framework Convention on Climate Change, the Kyoto Protocol, the Convention on Biological Diversity, and the Basel Convention on the Control of Transborder Movement of Hazardous Wastes and their Disposal, among others.

In 1986, Guatemala enacted the Environment Protection and Improvement Law,² which defined “environment” and adopted the precautionary principle. Environmental Evaluation, Control Follow-up Bylaws were issued in 2003 and amended in 2007. However, in 2006 a review by the World Bank identified ongoing obstacles to ensuring effective environmental protection.³ Environmental legislation in Guatemala is not

managed under a single code integrating government policy and environmental rules. This creates overlapping jurisdictions and potential inconsistency in the legal framework. More importantly, implementation of the regulations is hampered by financial and technical limitations of the regulatory agencies and lack of trained personnel. Furthermore, laws exist without the necessary regulations for their application.

The Ministry of Environmental and Natural Resources (MARN) was created in 2001. MARN is charged with the control and supervision of the environment and natural resources and protecting environmental and human security. Responsibility to review and approve Environmental Impact Assessments (EIA) lies with MARN, which issues specific observations, and technical and reporting requirements that constitute the legal enforcement framework. The Ministry of Energy and Mines’ (MEM) obligations with regard to environment are to fulfil environmental standards and specifications established by MARN with regard to non-renewable resources.⁴ Local municipalities are responsible for managing natural resources, but have minimal capacity or funding for oversight of environmental issues within their jurisdictions.

Although the MARN budget has increased significantly since 2005,⁵ there is lack of capacity and limited experience with the issues required to enforce environmental standards in the mining industry. Interviews with professionals, who served as senior government officials in previous administrations, and others currently working in government, confirmed the lack of experience and capacity of both MARN and MEM to address the complexity of mining in a country with no mining experience. Limited government budgets limit hiring experts with the required expertise.

A number of nongovernmental environmental organizations operate in the country; several have been successful in attracting funding from international organizations to support their efforts and have gained

and Infrastructure Expansion.

2 Environmental Protection and Improvement Law, Decree 68-86.

3 The World Bank, 2006. Republic of Guatemala Country Environmental Analysis Addressing the Environmental Aspects of Trade

4 Executive Branch of Government Law, Decree 114-97.

5 The 2009 budget for MARN grew to over Q98 million, from Q38 million in 2005. MARN, “Liquidacion de la Ejecucion Presupuestaria al Ejercicio Fiscal 2009”, www.marn.gov.gt/.

credibility for the quality of their work. Campaigns by Guatemalan and international civil society organizations critical of mining have highlighted potential negative impacts of mining.⁶ An active coalition of NGOs, indigenous groups, the Catholic Church, and some of the national media have raised significant national awareness of the Marlin Mine and other mining licenses being granted by the Guatemalan government.⁷

Local Context

The western highlands of Guatemala are typified by deep, steep-sided valleys ranging in altitude from 2,050 to 2,300 meters above sea level. The area is relatively dry, with moderately low precipitation (1,000 mm/yr), high temperatures, and well-defined wet (April to mid-October) and dry seasons.⁸ The western highlands have high levels of land degradation from deforestation and conversion of unsuitable land to agriculture and grazing; in upper watersheds as much as 56 per cent of the land is considered to be severely degraded.⁹

The unequal distribution of rainfall combined with its relative scarcity contributes to water shortages during certain periods of the year; water supplies, especially potable water, are generally considered limited in the area. Not all streams flow year-round. A 2004 study of five municipalities in the region, including San Miguel Ixtahuacán and Sipacapa, found that only 68 per cent of households have domestic water supply.¹⁰ Many residents have access to spring water through community water systems,¹¹ but also use rivers as a backup water source for both human and animal consumption when the source springs dry up. Most of the villages closest to the mine depend primarily on water piped from distant springs in Sipacapa rather than sources in San Miguel Ixtahuacán. Water access is negotiated

with the landowner of the water source¹² and delivered through collective systems to groups of households.

The population density is high, with over 200 people/km² in San Miguel Ixtahuacán and roughly half that in Sipacapa. Local communities practice subsistence agriculture, but with subdivision of lands and relatively low productivity of the steep slopes in the area, subsistence production has been insufficient to support families, requiring farmers to supplement farming with wage labour. Historically, this has meant poorly-paid seasonal agricultural work on coastal or lowland estates.

Marlin Mine Background

In November 2003, MEM granted Montana a 25-year exploitation license for a 20 km² area named Marlin 1. The mining operation permitted in the Environmental and Social Impact Assessment (ESIA) covered an area of about 5 km², with the majority (85 per cent) located within the boundaries of the Municipality of San Miguel de Ixtahuacán and a lesser portion (15 per cent) in the Municipality of Sipacapa. By 2005, that footprint had expanded to 6.5 km².¹³

Two watersheds are directly influenced by the mine. Most operations and facilities are located within the Quivichil drainage basin upstream of the tailings storage facility, including a portion of the Marlin pit, the Cochis pit, access and haul roads, landing strip, borrow areas, stockpiles, process plant, and waste rock dumps. The Quivichil is a tributary of the Cuilco River, which flows north into Mexico.

The mine components within the Tzalá River watershed (also a tributary of the Cuilco River) include the remaining portion of the Marlin pit, some access roads, and the production well. There are no cyanide-related facilities, waste rock or tailings facilities within this watershed.

6 Compliance Advisor Ombudsman, 2005, iii-iv. "The campaign against Marlin has not always been a reasonable source of information for local people."

7 CAO, 2005, 6.

8 Water Management Consultants (WMC), 2007, 9.

9 The World Bank, 2006, 9.

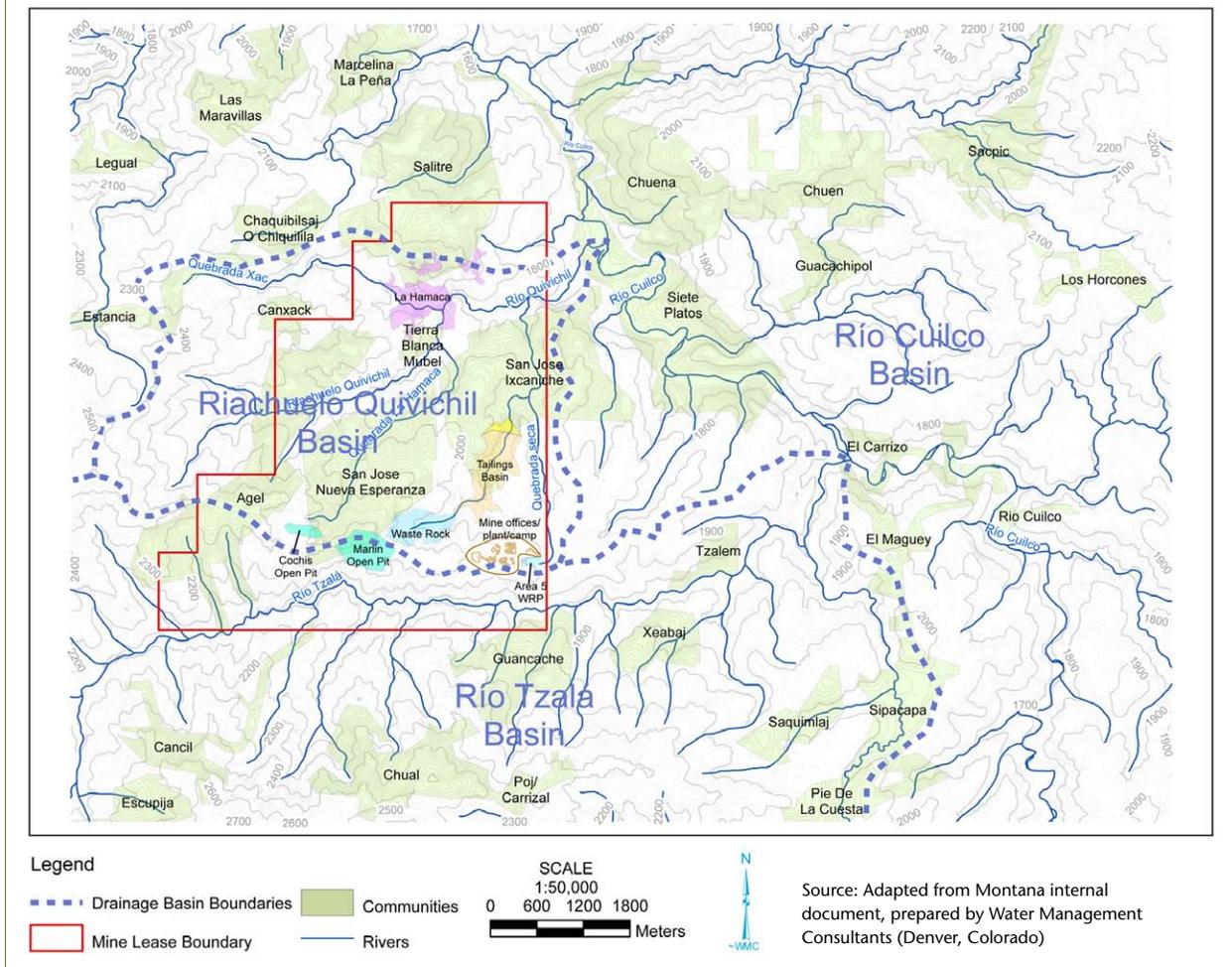
10 Asociación de Investigación y Estudios Sociales (ASIES), 2004, 11-12. Study covered the municipalities of San Miguel, Sipacapa, Tejutla, Concepcion Tutuapa and Ixchiguan.

11 WMC, 2007, 44.

12 Water rights appear to have a dual reality; access to water is by contractual arrangements with the surface owner of the spring, but once established, there is a use-right. See Section 5: Land Acquisition for further discussion of common property resources.

13 The 2005 La Hamaca EIA identified an expanded mine footprint for the Marlin 1 facilities of 6.5 km².

Map 3.1: Watersheds Near the Marlin Mine



Human Rights Context

From the human rights perspective, changes to the environment have ramifications for the right to health, right to food, right to an adequate standard of living, right to security of the person, and the right to life.¹⁴

¹⁴ Although the right to a healthy environment is not explicitly stated in the International Covenant on Economic, Social and Cultural Rights, it is mentioned in regional instruments such as the San Salvador Protocol and in UN statements such as General Assembly Resolution 45/94, which states that “[a]ll individuals are entitled to live in an environment adequate for their health and well-being.” Furthermore, the right to a healthy environment is a prerequisite for many other rights, such as rights to food, health, and life. For the purposes of the assessment, the analysis focuses on the underlying rights explicitly protected by the core international human rights instruments; the DIHR HRCA tool analyses environmental issues in terms of these underlying human rights. For further discussion of the right to a

The principal environmental concerns identified for the assessment are:

- Assessment E1: Has the mine affected the availability, quality and accessibility of water?
- Assessment E2: Has the mine affected human health and well-being through its environmental impacts?
- Assessment E3: Has Montana ensured that closure of the mine will not result in long-term negative environmental impacts to communities and individuals?

healthy environment, see ESCR-Net, September 8, 2006, “The Right to an Adequate/Healthy Environment,” www.escr-net.org/resources/resources_show.htm?doc_id=401515.

Information Reviewed

A compilation of environmental concerns and allegations was developed based on review of existing documents, including media articles, and Internet campaigns, interviews with national and international NGOs and organizations, and interviews with municipal and local community authorities and residents.¹⁵

Some of the claims and concerns raised were about impacts already taking place; others referred to future mining impacts to the environment that might lead to human rights infringements. Contradictory information was presented by different sources, including Montana, the government, religious institutions, and NGOs. This has led to significant differences between the company and stakeholders about the perceived risks of adverse environmental impacts, and has left community members uncertain and fearful about whether they are at risk. This uncertainty was highlighted in the 2005 Compliance Advisor Ombudsman (CAO) review and appears to be still valid today.

15 There have been a number of legal and administrative cases involving Montana's environmental performance. These include criminal and civil cases between Montana and an environmental NGO; stakeholder complaints to the PDH, MARN, IFC CAO and the OECD National Contact Point; and, 2 complaints to Montana's grievance mechanism. For further information, see Section 8: Access to Remedy.

INDEPENDENT TECHNICAL REVIEW

The independent technical review involved extensive revision of information provided by the company and external consultants, including studies, company management plans, monitoring results, audits, and public reports, as well as critical reviews, articles, and water monitoring information alleging environmental damages. Contradictory information was highlighted and reconciled, whenever possible. See Appendix H for the full technical review, as well as qualifications of the reviewer.

In general, the independent technical reviewer found that technical information provided by the mine was consistent with high professional standards. However, as he did not review actual practices at the mine, there is no independent verification that document reporting was correct. Findings are therefore conditional on

The present assessment was based on a combination of technical review, stakeholder input in focus groups and interviews, and follow up-with specialists to confirm the understanding of technical issues and to identify good industry practices.

Due to the importance of the environmental concerns and the significance of the potential impacts, the assessors commissioned an independent technical review of Montana's environmental management, based on available documentation, to assess whether the company was applying international good practice standards in the critical areas of environmental impacts, and to be able to assess respect for human rights in this area.¹⁶

In response to concerns about worker health, a second independent review was commissioned to identify chemicals in use at the mine or in the ore that pose potential hazards in the workplace. This report is discussed in Section 4: Labour.¹⁷

16 The reviewer's expertise includes 40 years of environmental and related work in mining, including leadership in the areas of ARD prevention and improving mining environmental performance for sustainable development. Before retirement, his senior position at a Canadian mining company included site environmental performance evaluation, due diligence and risk management, mine environmental management plans and closure planning.

17 Intrinsic, 2010.

verifying that the mine is implementing environmental management consistent with documented plans.

Based on information provided regarding the mining process, the principal potential impacts on the environment from the mine include:

- Changes to surface water quality and quantity;
- Water discharges and influences on groundwater;
- Dust and other atmospheric emissions;
- Noise from facilities;
- Water impacts from waste and tailings impoundments; and
- Closure plans including post-closure maintenance and financial resources to maintain the site in a sustainable condition.

Table 3.1: Principle Conclusions of the Independent Technical Review			
Issue	Good Practice	Insufficient	Discussion
Corporate standards		√	Mine operates according to the Goldcorp Environmental and Sustainability Policy, but without specific corporate standards or performance measures for guidance.
International certification	√		Mine certified to the International Cyanide Code and working toward compliance with ISO 14001, but not currently seeking formal certification for that standard.
Independent environmental audits		√	Absence of on-site technical performance review by independent auditors means there is no verification of Montana's claims.
Monitoring	√		Performed by qualified professional consultants. Annual Monitoring Reports (AMR) are publicly available on internet, in Spanish and English.
Community participatory monitoring	√		Formation of community committee (AMAC) consistent with good industry practice. Water quality testing performed by independent, certified laboratory consistent with good industry practice.
Mine effluent management	√		Air, water and waste management is consistent with good practice. Dust and noise management has been improved with current management consistent with good industry standard.
Liquid effluents	√		Water treatment facility not yet fully operational, but no discharge to the environment to date. No measured groundwater impacts and containment systems show very slow seepage migration not likely to affect water quality, even if they reached groundwater.
Water demand	√		Site water balance managed to best practice standards, recycling site water to provide in excess of 85% of water requirements. Technical studies did not encounter evidence of competition for water use.
Tailings management	√		No issues identified. Acid mine generation study consistent with good industry standards, performed by qualified professional consultants. Tailings neutralization and containment procedures are adequate.
Cyanide management	√		Adherence to International Cyanide Code is consistent with good industry practice. However, no records available of performance audits and unclear if consultation has yet taken place with communities or authorities to ensure emergency preparedness.
Closure bonding		√	No provisions of financial assurance to ensure liabilities are addressed in case of unplanned closure.
Closure		√	Apparently insufficient estimates of closure cost and time required to complete.
Post-closure		√	Insufficient provision for post-closure supervision or technical oversight, no information regarding guarantees for post-closure financial and human technical resources.

The review found that the mine's management of impacts is generally to a good standard of practice within the international mining industry;¹⁸ however, a few

areas were identified where performance is below par. The findings are summarized in Table 3.1.

Specific findings from the independent technical review are discussed in more detail in the relevant sections of the following assessments.

¹⁸ A newly-developed mining good practice website (www.good-practicemining.org), jointly developed by the International Council on Mining and Metals (ICMM), the United Nations Conference of Trade and Development (UNCTAD), the United Nations Environment Programme (UNEP), and the UK Department for International Development (DFID), provides a good practice guidelines, standards, case studies, legislation, and other material that are leading examples of their kind globally. As of March 2010, the site has not been activated for public

access. Further reference for mining industry good practice is found in the 2006 IFC Performance Standards, 2003 Mining Minerals and Sustainable Development (MMSD), and ICMM, amongst other organizations fostering environmental stewardship in the mining sector.

WATER

Assessment E1: Has the mine affected the availability, quality and accessibility of water?

The right to water is protected in international human rights law by the following covenants and conventions:

- International Covenant on Economic, Social and Cultural Rights, articles 11 (right to an adequate standard of living) and articles 12 (right to health);¹⁹
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), article 14(2) (h); and
- Convention on the Rights of the Child, article 24(2) (c).

The Committee on Economic, Social and Cultural Rights in General Comment 15 states that the right to water comprises both “freedoms” (i.e., the right to be free from interference through, for example, arbitrary disconnection or contamination of water supply) and “entitlements” (i.e., the right to a system of water supply and management that provides quality of opportunity for people to enjoy the right to water).

General Comment 15 acknowledges that while the adequacy of water may vary according to different conditions, three factors apply in all circumstances:

- **AVAILABILITY:** Each person has the right to a water supply that is sufficient and continuous for personal and domestic uses, and the quantity of water available for each person should correspond to World Health Organization (WHO) guidelines, though some people or groups may require more;
- **QUALITY:** People are entitled to water of adequate quality. This means that the water for personal or domestic use must be safe and free from microorganisms, chemical substances, and radiological hazards that constitute a threat to a person’s health; it should be of an acceptable colour, odor, and taste for each personal or domestic use; and
- **ACCESSIBILITY:** Water and water facilities and services must be accessible to everyone, without discrimination; this includes physical accessibility, economic

accessibility, non-discrimination, and information accessibility.²⁰

To comply with international human rights regarding water, the mine must avoid discharging contaminants to the environment that might lead to unacceptable changes to water quality. It must also avoid competition over scarce water sources, leaving local inhabitants with insufficient resources.

In addition to the above-mentioned international human rights standards, the assessment referred to international environmental standards (International Finance Corporation’s Social and Environmental Safeguard Policies operative in 2003, ISO 14001 and the International Cyanide Management Code, in particular) that represent industry good practice and contribute to a company’s due diligence with respect to water and human rights.

More specifically, the company is expected to:

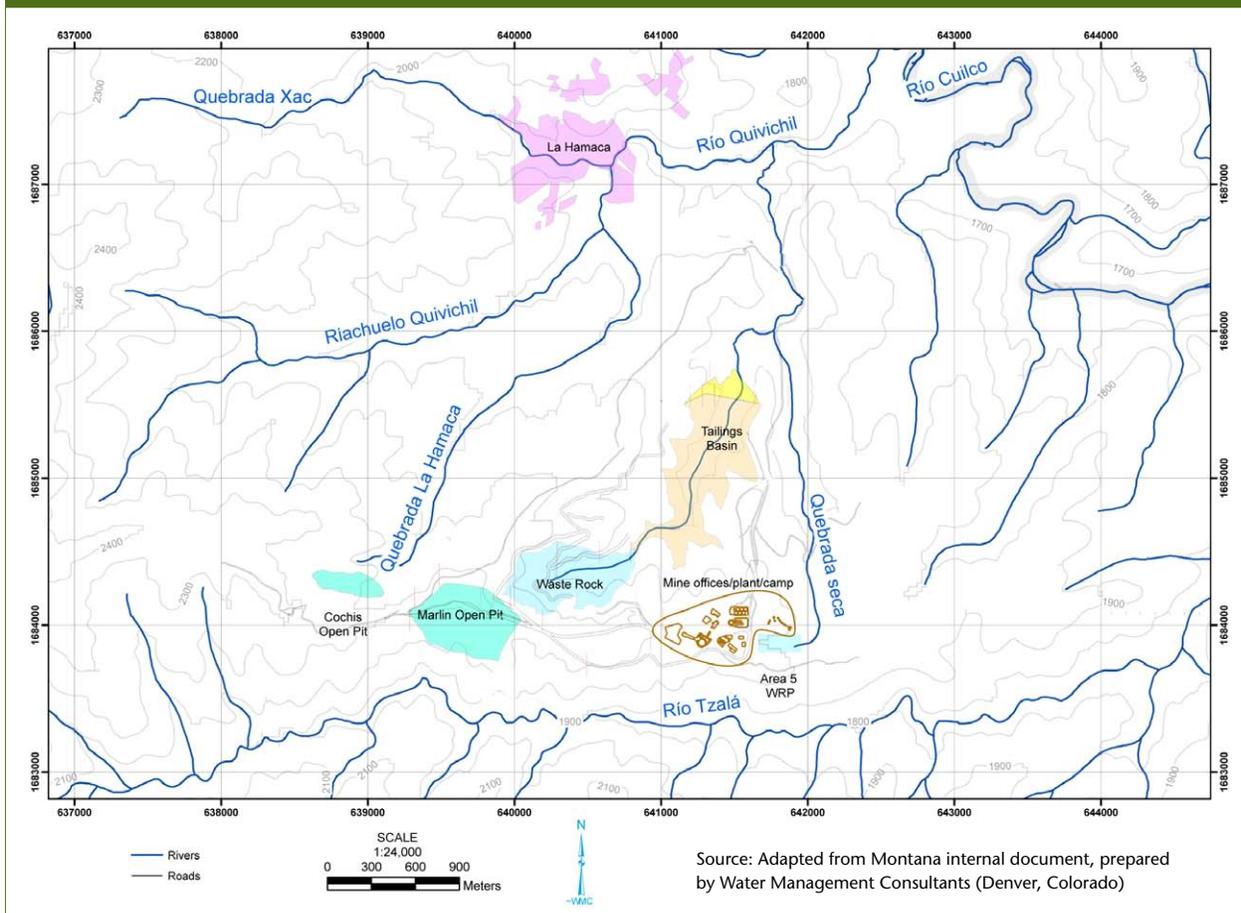
- Minimize conflicts over water as a resource;
- Ensure all mine discharges meet water quality standards;
- Secure containment of mine wastes (tailings and waste rock), adequate to minimize long-term problems of acid rock drainage, including post-closure;
- Employ effective internal environmental management controls, including early detection and response, and a comprehensive and transparent water monitoring program;
- Facilitate external, independent environmental performance audits; and
- Maintain transparent engagement with stakeholders.

From a broader perspective, water resource protection should be incorporated into all aspects of the mine throughout its lifecycle. This implies that the company is responsible for the design, operation, and closure of the mine such that impacts on water quality, availability, and accessibility are avoided, mitigated, or compensated throughout each stage of the operation.

¹⁹ See General Comment 15 of the UN Committee on Economic Social and Cultural Rights.

²⁰ The Right to Water, 2003-2010, “General Comment No. 15,” www.righttowater.info/code/no15_2_2.asp.

Map 3.2: Water Sources Adjacent to the Marlin Mine



Goldcorp has published an environmental policy that discusses water protection in general terms. The independent technical review commissioned for this assessment found that Montana has achieved performance consistent with good industry standards with regard to most of the responsibilities cited above.

Areas that require improvement include:

- No external, independent environmental performance audits; and
- Insufficient provision for closure.

This does not mean Montana maintained good standard practice from the start, or that the issue of water is uncontroversial. The initial ESIA did not include a survey of water users that could be affected by the mine, nor did it include an ecological risk assessment, amongst other shortfalls. This was partially rectified as a result of the stakeholder concerns about water, which led to a formal complaint and the resulting CAO

investigation. The CAO study resulted in additional studies being commissioned, including:

- An independent review of water issues undertaken by an international hydrologist;²¹
- A screening-level ecological risk assessment (SLERA) for downstream waters;²²
- A local water use survey (hydrocensus);
- Establishment of a clear set of water quality standards; and
- Disclosure of key environmental documents.

One of the recommendations from the CAO report was to establish a comprehensive participatory process for environmental monitoring that would include government, communities, and other stakeholders. In 2005

²¹ WMC, 2007.

²² WMC, 2007, 69-70.

Montana created, in consultation with communities,²³ a Community Environmental Monitoring Association (AMAC). Originally involving the participation of seven communities from the middle part of the watershed, AMAC grew to 10 communities by 2006. AMAC members are elected by their respective communities for two-year terms. Communities in the lower watershed, further downstream of the mine's facilities, are not part of the organization.

Funding is provided by Montana to cover operating costs and water testing; to support independence, funds are channelled through a third party institution and technical support is provided by a small team of professionals from San Carlos University and a Canadian consultant. AMAC is formally registered as a community-based organization, but to date has not been able to obtain funding from other sources and remains dependent on Montana.

AMAC independently samples a limited number of the same surface and groundwater monitoring stations established by the mine. It undertakes water sampling four times a year at 12 sampling points, with four on each round on a rotating basis. All analyses have been carried out by ALS Laboratory Group in Canada, which is a fully accredited international laboratory. Results are published on the Internet in English and Spanish, and made available in paper format to community members. Monitors convene their respective community assemblies to discuss the results.

The assessors understanding from interviews is that while the organization is interested in including other communities, AMAC members feel that funding limitations prevent the organization from growing. Other interviewees indicated that Montana has agreed to funding increases in response to AMAC requests, with a condition that AMAC stay within its original mandate of only addressing environmental concerns.

Montana recently concluded an agreement with MEM to facilitate government oversight of water quality monitoring.²⁴ The agreement requires Montana, in addition to its regularly reporting on company monitoring results, to provide funding to the government

to independently monitor mine discharges or any other point of interest. Montana is required to perform a parallel monitoring of all government sampling. Monitoring results must be made public, with access to the results financed by Montana.

Finally, Montana funds social investment projects, some of which have contributed to community water systems.²⁵

Availability

One of the key concerns raised by critics has been that the mine's water use reduces water availability to local residents. In early 2005, the NGO Colectivo Madre-selva, representing people from Sipacapa filed a formal complaint with the IFC Compliance Advisor and Ombudsman (CAO) charging, among other issues, that the high volume of water needed for the mine would limit community access to this resource, and that the mine would potentially contaminate the environment and water supply.²⁶ The complaint resulted in a review by the CAO of the mine and its environmental management, published in 2005 and a followup document in 2006.²⁷ The review found no indication that the mine competes with local communities for water and therefore does not affect availability.²⁸

One of the 2005 CAO recommendations²⁹ was to collect information on downstream water users in the Quivichil drainage to address a gap in baseline studies. Montana contracted an international consulting company - Water Management Consultants (WMC) - to develop a hydrocensus of water users in the mine's area of influence.³⁰ The study was intended to cover water use by 12 communities including those participating in AMAC, but only three communities agreed to participate.³¹ The study examined current and future water uses and spanned three watersheds: Tzalá,

23 Interviews and review of AMAC documentation and website.

24 Convenio de Cooperación Técnica para la Toma de muestras de Agua en los Punto de Monitoreo Ambiental de la Mina Marlin 1, signed between the Ministry of Energy and Mines and Montana, November 18, 2009.

25 These contributions will be discussed in Section 6: Economic and Social Investment.

26 CAO, 2005, i.

27 CAO, 2006.

28 CAO, 2005, 18.

29 Ibid, 21-24.

30 WMC, 2007.

31 The three communities participating in the water use census were San José Ixcaniche, San José Nueva Esperanza, and Salitre.

Quivichil and Cuilco. The implications of the non-participation of other communities is discussed below.

According to the ESIA, the mine uses water for processing ore, underground mine activities, dust control, reforestation, and personnel. As currently configured, the mine does not draw from the rivers; most of the daily requirement is recycled from the water in the tailings impoundment (providing 85 per cent of demand) and fresh water sourced from a 300 meter well in the Tzala basin (15 per cent). The Tzalá River was originally permitted as the fresh water source. However, due to opposition from local residents, Marlin decided early in 2004 to source water from deep wells rather than the river.

The main production well PSA-1 has water chemistry different from the adjacent Tzalá River, indicating the well pumps from a separate deep ground source. This well appears able to supply the mine operational requirements that average about 6.8 litres per second.³² However, data from mine management reports of January and February 2009 suggest that water levels in PSA-1 are declining, creating concern. Continued close monitoring of the level of this well, together with diligence in managing new water consumption, is necessary to avoid impacts on aquifers. Ongoing monitoring of aquifer recharge rates should be considered.

The WMC study concluded that, based on the existing information, the mine has no significant impact on water supply³³ and deep groundwater will not be affected post-closure when operational demands cease and the well recharges. Most households that participated in the hydrocensus study use water from spring-fed community water distribution systems or shallow wells that were found to have good quality. Occasional use of surface water for drinking, irrigation and livestock is practiced in the summer months when the hand-dug wells tend to dry up, or when municipal supplies are interrupted.

The only area where water availability is potentially affected is the Quivichil basin, where the tailings storage facility (TSF) captures water in the Quebrada Seca that would otherwise flow into Quivichil.³⁴ This could impact the Txeshiwe spring, located downstream of the TSF, which supplies a community water system for households in the village of Siete Platos.³⁵ The WMC water study recommended that an emergency response plan be developed to provide replacement water should any impacts be identified. Company personnel have indicated that, although they have informally discussed how to replace supply to the community system if required, they have not prepared a contingency plan, nor has the potentially affected community been consulted on this issue or involved in development of an emergency response plan.

An important information gap exists with the incomplete baseline study on downstream water users and sources for communities in the area. In 2006, nine of the 12 communities invited to participate in the hydrocensus declined to do so; the company therefore does not have full information about other water users adjacent to mining operation or in the downstream area. The understanding of the assessors is that baseline information is still missing for 75 per cent of the communities identified for the study, and those located downstream of the mine's area of influence.³⁶

There is consistent information that the mine has not affected water availability; however, there are gaps in the baseline information about water sources and water users that mean that the mine is not fully addressing potential impacts. This results in a failure to respect the right to water availability.

32 The water balance compares water inputs (rainfall, pumping, recycling) with water loss (evaporation, discharge, storage, etc.) to calculate how much new water must be added to the system to meet mining process requirements.

33 WMC, 2007, 59-60.

34 The TSF collects water from the catchment basin above it, which could affect recharge of the spring. Spring monitoring is ongoing; as of June 2009, Montana reports no flow reduction to date (pers. com. with Marlin Environmental Manager).

35 WMC, 2007, 60-61.

36 The responsibility to respect rights to water must address concerns about impacts that may exist downstream beyond what the company has technically defined as the zone of potential impacts. AMAC has identified the concern of communities in the lower part of the watershed and proposed working with them for three months prior to water release from the TSF.

Quality

Early NGO concerns about water quality focused on the use of cyanide for processing.³⁷ A 2004 critical review of the original Environmental and Social Impact Assessment also questioned the contamination potential of acid rock drainage and potential cumulative effects of mining.³⁸ Three NGO water sampling studies have been conducted alleging water quality impacts from the mine, including the Pastoral Commission Peace and Ecology (COPAE) (with two rounds of sampling completed) and Flaviano Bianchini's (one round of sampling).³⁹

Baseline water monitoring, measuring both the quality and flow of surface water in the area and groundwater quality and depth, has been performed by Montana and its consultants since July 2002 and continues through to the present. Three separate and independent technical reviews⁴⁰ have all confirmed that the locations and design of the water monitoring program are consistent with good practice, and appropriate to establish and monitor background water quality and to identify any change due to the mine. The sample testing is credible and performed by an independent lab. Sampling results are presented in annual monitoring reports (AMR) to MARN and MEM and are publicly available on the Internet, in Spanish and English. Additional monitoring is performed quarterly by AMAC.

The monitoring results show that surface water quality in the area surrounding the mine is inconsistent. As highlighted in the WMC review, even before mine construction, surface water quality of rivers upstream (i.e., before entering the Marlin mine area of influence) occasionally did not meet some of the widely accepted national or international water quality beneficial use standards,⁴¹ including drinking water supply, irrigation, livestock, or aquatic life for certain constituents (i.e., metals and other compounds). This indicates an underlying problem with regional water quality that

must be considered when determining impacts from the mine.

According to the water quality reported in AMRs,⁴² the patterns established in the baseline studies continue, with variation in water quality strongly related to the variation in flow between rainy and dry seasons. Other than this seasonal behaviour, there has been no significant change observed in water quality over the years since the mine began operating.

According to company statements, the mine has not discharged water from the tailings facility.⁴³ The only discharges to the surrounding environment relate to embankment seepages, which represent small volumes. Montana has committed to treating all discharge prior to release and has constructed a water treatment plant. The plant was still being tested in 2009 when the decision was made to relocate it in conjunction with raising the height of the tailings dam. The HRA independent technical review identified concerns about water quality that the mine needs to address prior to any release.

During the construction phase in 2004, there were problems with erosion control,⁴⁴ which would have created short-term impacts to water quality downstream of the facilities; the issue was identified in the 2004 external environmental audit done for the IFC, and the 2005 audit reported that problems with the erosion control methods were corrected and not repeated. Current erosion control management practices have been found to be consistent with international good practice, limiting the amount of sediment entering the water bodies. No stakeholder concerns were expressed on this issue.

Independent monitoring efforts by COPAE and Bianchini are not directly comparable to the monitoring work performed by the company or AMAC, as the sampling stations are not identical or as widely dispersed. Furthermore, the timeframe for sampling was different, and as stated above, there is a strongly seasonal variation to water quality results. Although there

37 Consejo de Organizaciones de San Marcos (COSAM), 2004. Requested the new government cancel Marlin's exploitation license arguing that "environmental impacts and specially the use of cyanide on water sources have not being properly assessed."

38 Moran, 2004.

39 COPAE, 2008a; COPAE, 2009; Bianchini, 2006.

40 WMC, 2007; CAO, 2005, Appendix C; KP Consulting, 2010, 6.

41 WMC, 2007, 77.

42 Montana ESIA, 2003; Montana AMRs, 2004-2008.

43 TSF discharge will only occur during rainy seasons when storage capacity is exceeded; this has not happened to date. In 2009, the dam height was raised to increase storage capacity.

44 Dorey & Associates, L.L.C., 2005, 9; MFG Inc, 2006, "Screening Level Ecological Risk Assessment for the Tailings Storage Facility Discharge at the Marlin Mine, Guatemala". [internal document]

is significant difference in the conclusions regarding water quality downstream of the mine, the COPAE study corroborates water quality issues upstream of the mine with elevated levels of iron, manganese, and copper found in the upper waters of the Tzalá River. A more detailed comparison of the conclusions is beyond the scope of the present document.

Water contamination remains controversial. Given the contradictory information from various sources, much uncertainty regarding water quality exists among local residents. A majority of interviewees recognized there are widespread rumours about the extent of water contamination from the mine. AMAC continues to provide community-based monitoring, with reputedly good attendance at meetings to discuss results.⁴⁵ However, relatively few communities participate in the AMAC process and the lack of broader participation of other communities, including some further downstream that are concerned about planned releases, limits the organization's ability to convey an understanding of water quality and monitoring efforts to the broader range of concerned stakeholders.

Based on the specialists' reviews of the mine's water quality monitoring, there has been no infringement of the right to water quality by the mine's practices to date. Late development of management plans and adequate erosion control mechanisms, as noted above, constituted an initial failure to respect, but this appears to have been addressed by the company. External audits are required to confirm that actual performance is consistent with management plans.

Future impacts on water quality might occur as a result of the TSF discharge, possible acid generation from the Area 5 waste rock facility, or potential failure of the tailings dam itself, as identified in the CAO specialist report.⁴⁶ Post-closure monitoring is critical to identify and address any future problems. The concerns about closure and post-closure are addressed below.

Accessibility

Water accessibility is an indirect issue, as the company is not responsible for providing the facilities and infrastructure that would provide new or better access to water. However, it is responsible for ensuring that its actions do not affect local inhabitant's ability to access water.

Families that were resettled or that sold land may have had their access temporarily affected by the move; company documentation states that the company supported families to reconnect to community-based water systems, and compensated for water systems that were temporarily interrupted during construction. Although this issue was not verified in detail in the interviews, the company did have some documentation that detailed its actions and none of the land sellers or residents in communities that sold land mentioned concerns about families losing access to water due to the sale of land or construction damage.

Access to water has been affected, however, at least in the short term, by what is reported in interviews to be the physical sabotage of community water systems, as well as alleged demands by 'owners' of the water sources that communities benefitting from mining activity and projects pay more for their water than originally agreed. Interviews with local residents, employees, and mine management as well as various municipal and community authorities corroborated the existence of these intercommunity problems. Local community authorities reported having to go to court to get a water owner to respect existing contracts, and that at least five such disputes had been brought to Justices of the Peace for resolution.

Finally, communities in the area do not have water treatment systems, although there is some co-financing for potable water systems available through the mine's Department of Sustainable Development (DDS).

There is, on the basis of this information, concern that access to water has been temporarily affected, but with only an indirect relationship to the mine. The presence and activities of the mine have not led to reduced access to water systems and Montana has respected the right to access to water. Positive contributions have been made to enhance water access through social

⁴⁵ Review of AMAC meeting minutes, interviews.

⁴⁶ CAO, 2005, 11, Appendix C.

investment projects; these are discussed further in Section 6: Economic and Social Investment.

Findings

The right to water is protected in international human rights law. While the adequacy of water may vary according to different conditions, three factors apply in all circumstances: water availability that is sufficient and continuous for personal and domestic uses, water quality that is safe and free from pollutants, and accessibility without discrimination.

There is no evidence that there has been any infringement of the right to water by Montana. For the most part, Montana's environmental management is appropriate to avoid impacts to water availability, quality and accessibility.

The company's environmental management respects human rights from the perspective of technically strong management and access to adequate resources and expertise. However, there are areas where the company is failing to respect the right to water and further due diligence is required, particularly to ensure that community engagement and ongoing consultation address community fears and build trust in the company's environmental management.

- Full information about water users and water sources in all adjacent and downstream communities has

not been compiled, although five years has passed since this issue was identified as a gap in the baseline studies. Claims that springs in the area have been affected by the mine cannot be fully addressed without a more complete hydrocensus and groundwater monitoring program.

- Some households in Siete Platos depend for their water on the Txeshiwe Spring, located downstream of the tailings storage facility. A contingency plan for the users of Txeshiwe Spring has not been consulted on and completed, exposing them to the risk of potential changes to their water supply.
- AMAC's formation as a community monitoring committee and its auditing process is an example of industry good practice, but its links to Montana, including reliance on the company for funding, undermine its credibility with some local people and organizations.
- Independent, external auditing of the water monitoring program has not been implemented in accordance with international standards. Auditing by a third party would provide additional assurance that the mine is complying with environmental management plans.
- A positive step was recently taken by Montana for improving external verification and public confidence in water monitoring through an agreement with MEM for additional independent water monitoring.

HEALTH AND WELL-BEING

Assessment E2: Has the mine affected human health and well-being through its environmental impacts?

International human rights⁴⁷ relevant to the assessment of the mine's environmental performance affecting human health and well-being include:

RIGHT TO HEALTH:⁴⁸ Related issues include risks associated with the use, handling, transport and disposal of hazardous substances; control and monitoring of emissions and pollution; preparedness for health emergencies and industrial accidents; and providing information to and dialoguing with communities about environmental and safety issues;

RIGHT TO ADEQUATE FOOD:⁴⁹ Related issues include preservation of community water supplies, impacts on farming, and chemical use that may be harmful to food production, amongst others; and

RIGHT TO ADEQUATE HOUSING AND THE RIGHT TO OWN PROPERTY:⁵⁰ Related issues include avoiding disruptive or harmful activities in sectors neighbouring residential areas and fully mitigating any negative effects on the local inhabitants, as well as implementing the necessary measures (including through policies, consultation and grievance mechanisms) to protect property by minimizing and repairing environmental damage caused by mining activities.

47 The DIHR Human Rights Compliance Assessment tool provided the principle indicators and criteria for this section, unless otherwise noted.

48 UDHR, Article 25(1); ICESCR, Article 12(1); ACHR, Article 26; Additional Protocol to ACHR, Article 10; UN Convention on the Elimination of All Forms of Racial Discrimination, Article 5; UN Convention on the Elimination on All Forms of Discrimination against Women, Articles 11, 12; UN Convention on the Rights of the Child, Article 24; General Comment 14 of the Committee on Economic, Social and Cultural Rights.

49 UDHR, Article 25(1); ICESCR, Article 11; ACHR, Article 26; Additional Protocol to ACHR, Article 12; General Comment 12 of the CESCR.

50 UDHR, Article 25(1), 17; ICESCR, Article 11; ACHR, Article 21; UN Convention on the Elimination of All Forms of Racial Discrimination, Article 5; UN Convention on the Elimination on All Forms of Discrimination against Women, Article 14; UN Convention on the Rights of the Child, Article 27; General Comment 4 of the CESCR.

Montana's responsibility is to manage the design, operation and closure of the mine, and ensure that its actions do not negatively affect these rights, by fulfilling commitments made in the ESIA, or with industry good practice such that impacts are appropriately managed.

Implementation of the environmental management plan in conformity with international good practices is fully within the company's control. The company should conduct its own environmental monitoring and facilitate independent review and monitoring.

The independent technical review commissioned for this assessment found that at present, Montana has achieved performance consistent with good industry standards with regard to most issues having direct impact on human health, including:

- Air emissions monitoring and mitigation;
- Dust mitigation;
- Noise mitigation and monitoring;
- Water monitoring, including establishing a community participatory monitoring committee (AMAC);
- Erosion control; and
- Mine and liquid effluent management.

Areas that require improvement include:

- Disclosure and consultation with communities about health and safety issues;
- Resolving the controversy over vibration damage to houses;
- Coordinating emergency response plans with local authorities and civil organizations; and
- Insufficient provision for closure and post closure monitoring and maintenance.

Human Health

The primary health issue involves mine-related contamination, an extremely important issue as it has the potential to directly affect the lives (i.e. risk of

disease or death), livelihoods, and means of survival (i.e., crops and animals) of individuals and local communities. There was widespread concern about this issue expressed in interviews with local residents and some employees; nearly all mentioned concern about the presence of contamination and whether the company's statements were true. The fear of living in an unsafe environment may also affect health, leading to higher levels of stress and anxiety.

Health concerns varied, but in general could be summarized as:

- Concerns that range from rumours to specific allegations about mine contamination causing sickness, usually skin rashes and hair loss;
- Employee health (mentioned by various groups: teachers, youth, women, health care providers, and former employees), with allegations of workers getting sick and dying from exposure to chemicals at the mine site (addressed in Section 4: Labour); and
- Air and dust contamination.

Many of the interviewees made it clear they were reacting to rumours and not to first-hand knowledge. Very few said they actually knew someone who was sick, and only one person of all those interviewed reported having been personally affected by contamination, complaining of illness.⁵¹ However, concerns and fears about contamination were widespread; for example, of 25 people who mentioned water quality in two San Miguel focus groups:

- Six said they lived or grazed animals nearby and saw no sign of contamination;
- Eight said they had not seen evidence of health problems, but were very concerned they were being affected; and
- Eight said firmly there was contamination and people and animals were being affected.

The 2005 CAO report found that NGO campaigns in the communities about potential environmental impacts of mining had generated considerable fear and apprehension.⁵² This was corroborated in one of the focus groups; several interviewees confirmed these campaigns as the source of their concerns.

51 Interviewee's complaint of contracting the flu (*gripe*) as a result of living near the mine.

52 CAO, 2005, iv.

One of the patterns noted in the assessment is that with a few exceptions, concerns seem to be more pronounced in residents of communities further from the mine; those closer to the mine expressed less fear of contamination. In focus group discussions, some local employees specifically mentioned that living with and visiting the mine had made people more comfortable, and that people were less fearful than in 2005–2006.

Local health care practitioners did not corroborate an increase in human health problems (e.g. skin rashes and stomach problems), even though they also expressed concern about possible contamination.⁵³ They report no change in disease frequency patterns since the mine began operating. Respiratory infections have not increased; historically they have been the most common illness in the area, consistent with health statistics for rural communities in Guatemala.⁵⁴ They acknowledged, however, that gaps in prior data collection make definitive conclusions impossible, in part because more patients are now being seen due to a government vaccination incentive, complicating comparison of past and present frequencies.

During 2008, AMAC became involved in addressing community members' concerns about illness, especially skin rashes, and organized visits for two communities to a doctor at the San Miguel Ixtahuacán Health Centre. Montana's 2008 AMR reported that the skin rashes and infections were diagnosed as due to poor hygiene and not contamination;⁵⁵ in the health care focus group in San Miguel skin rashes were attributed to untreated sewage. Health care providers noted that the municipality lacked capacity and facilities to diagnose the cause of skin problems, reporting that laboratory tests were required for real diagnosis, not just clinic examination.

From the information provided, it does not appear that Montana has undertaken any studies to determine the origin and cause of skin problems that are being attributed to water contamination. The company has not registered this issue as a complaint or

53 Interviews were conducted with health care professionals in San Miguel and Sipacapa, a doctor at the Marlin Mine clinic and a focus group was held on health issues in San Miguel with 10 medical technicians from the public clinic.

54 Use of wood for cooking is considered a major source of air contamination in rural areas, and the principal cause of respiratory illnesses. World Bank, June 2006.

55 Montana AMR, 2008.

grievance. However, in 2005, in agreement with the Ministry of Public Health, Montana financed a health baseline study to track human health issues. This report paid particular attention to establishing health status before the mine was operating (May to early September 2005), and measured the prevalence of symptoms and problems that could be associated with contamination from mining, with the intention of being able to monitor whether any of these symptoms were increasing in frequency over time. This study has not been disseminated for broader use, and is not part of an ongoing health-monitoring program as it was initially designed, even though frequency and type of skin disease were among the measured indicators. The non-disclosure of the health baseline, failure to implement the health care monitoring that was to follow, and failure to identify or address the concerns of local health care providers about accurate diagnosis of the skin problems contribute to not addressing community concerns or ensuring respect for the right to health.

The local public health clinic in San Miguel Ixtahuacán has attended to employees with work-related health problems.⁵⁶ Although health care providers in Sipacapa recently received their first training in cyanide contamination response (in early 2009), staff in San Miguel have not received training, equipment, or awareness of hazards and potential health effects to respond to medical emergencies from the mine. These concerns were revealed late in the review process and independent verification did not take place.

In 2009 Montana began construction of a new, expanded-care health clinic in San Miguel; this is discussed in Section 6: Economic and Social Investment.⁵⁷

Concerns about dust pollution were also raised in the interviews. This is an area where local inhabitants noted a performance improvement, as the company and government have paved a number of roads. The technical review found that the monitoring program and dust mitigation measures are consistent with

industry standards, and that dust levels as reported do not exceed permissible levels. Nonetheless, a limited review of AMAC's meeting minutes indicate that the local communities continue to complain about dust, indicating that the mitigation measures are not always being implemented as designed; efforts to manage dust on unpaved roads by sprinkler trucks have only been partially successful during the dry season and that dust continues to be a concern for neighbouring communities.⁵⁸

The independent review of potential chemical hazards (discussed in Section 3: Environment and provided in Appendix I) identified some components of the ore, which if present in the ore dust in concentrated amounts, could pose a problem to people exposed to excessive levels of dust. While workers are required to wear protective equipment in high dust conditions that protects them from exposure, community members are not protected in the same way. The report recommends an assessment of ore dust and potentially increasing measures to control dust, based on the findings.⁵⁹

Air contamination is also a concern for local residents. People expressed concern about odors from the mine that might represent contamination or wonder whether dust carries contamination. AMAC has indicated interest in expanding activities to include monitoring airborne emissions in response to community concerns, but have acknowledged not having the resources or expertise to do so.⁶⁰

Concerns about noise were raised in only a few interviews. Noise has not been identified by regulators or in any complaints as a potential problem. Marlin monitors noise levels, and the technical review found that monitoring is correctly performed and noise levels off the property do not appear to be at intrusive levels or pose a health risk.

56 If there is a regular pattern of employees using the public health clinic instead of the clinic at the mine, it would mean Montana has non-compliance with several indicators in the DIHR Compliance Assessment Tool.

57 In 2009 Montana finalized an agreement with the Ministry of Public Health to construct a Permanent Care Centre (CAP in Spanish), the designation of a top-tier category of health centre, in the town of San Miguel Ixtahuacán. This centre was under construction in mid-2009 and expected to be completed before the end of the year.

58 Asociación de Monitoreo Ambiental Comunitario, 2009.

59 Intrinsic, 2010.

60 AMAC interview.

Food

The right to adequate food is a concern because of allegations of animals dying from drinking contaminated water or dust contamination. One of the three complaints to the company ever formalized through its grievance procedure was a complaint that a cow had died from contaminated pastures. The company sent a veterinarian to examine the animal, who determined that the animal had died of parasites.

Animal health was a generalized concern, and like human health, few people knew specific cases of animals thought to have been affected by mine contamination. No systematic evaluation has been developed to address the concerns of local residents about the potential impact of the mine on animal health.

It appears that the mine has addressed the technical issues of air, dust and noise through the environmental management programs that are consistent with international good practice standards; however, there is insufficient information to determine whether the rights to health and adequate food have been infringed and additional due diligence is required.

Housing

The right to adequate housing is a concern because of allegations of damage to structures from vibrations related to mine operations. Since 2006, some residents in the villages closest to the mine (Agel, San José Nueva Esperanza, and San José Ixcániche) have reported cracks developing in their houses. In the ESIA, Montana committed to performing ongoing measurement of vibrations in the communities adjacent to the mine and along the transport route, especially in Chuena during construction,⁶¹ but did not predict any impacts from blasting during the operational phase.⁶² Prior to project construction, measurements of vibrations from traffic were made to establish a baseline; however, no structural assessment was performed on buildings around the mine site to establish a baseline or determine the potential for damage from vibrations.

61 Montana ESIA, 2003, 6-42.

62 Ibid, 3-59.

Montana management maintains that the company has never been presented with a formal complaint about cracked houses. The company has not registered the issue as a grievance, although Montana has been aware of the problem since 2006; the 2006 AMR cites three events involving the communities, government officials, and AMAC “to show that the cracks in their houses were not due to mining activities.”⁶³ The same AMR indicates that an independent expert report was commissioned. The assessors were provided with a 2008 report by a geophysicist who conducted a study to determine whether the vibrations were caused by blasting.⁶⁴ The report concluded that, based on measurements made for the study, a 250 meter radius from the blast centre was a sufficient buffer zone to prevent vibrational damage to buildings. The report notes that houses in San José Nueva Esperanza, the village closest to the Marlin pit, are located 100 to 500 meters from blasting sites, whereas Agel houses are from 1.5 to 2 km distant.⁶⁵

The allegations have caught the attention of local and international NGOs as well as the PDH, which have recorded complaints and documented damage (photos, testimonials, etc.). Both MARN and the National Seismology Institute⁶⁶ performed inspections, but advised the assessors they could not definitively determine the origin of the damage.⁶⁷ In May 2008, a team of qualified specialists from the Unitarian Universalist Service Committee (UUSC), a USA-based NGO, teamed with the Pastoral Commission Peace and Ecology (COPAE–Diocese of San Marcos), to develop a detailed technical study of the damage and probable causes. Their report, published in November, 2009⁶⁸ contained the following findings:

- Initial baseline studies did not include a census of houses in the immediate vicinity of the mine. The lack of baseline data rules out the opportunity to definitively determine the cause of the damage;
- Local construction materials (cement blocks and adobe) are susceptible to vibration damage, with

63 Montana AMR, 2006, 13.

64 Ligorria A., 2008, 1.

65 Ibid, 5.

66 INSIVUMEH Instituto Nacional de Sismología, Vulcanología, Meteorología e Hidrología.

67 Interview with senior government official.

68 Comisión Pastoral Paz y Ecología, Diócesis de San Marcos, and Unitarian Universalist Service Committee, 2009.

a low resistance to vibration compared to wood or reinforced concrete;⁶⁹

- Houses around the mine have significantly more cracks than houses in control villages;
- Factors eliminated as probable cause of the structural cracks include land instability (slides, etc.), seismic activity, damage due to subsoil subsidence under and around the houses, and construction defects;
- Circumstantial evidence (type, orientation, and model of the majority of cracks) indicate the most likely cause is associated with vibration;
- No other sources of vibration exist in the area other than mine explosions and heavy truck traffic; and
- Monitoring of mine-produced vibration was inconclusive, but no other possible cause has been identified.

The study noted that before the mine began operating, the typical housing construction materials were adequate and it was not necessary to construct with more substantial and costly materials. The study recommended additional monitoring, in particular because the mine had recently begun to exploit a second open pit (the Cochis Pit), which is much closer to parts of the affected villages.⁷⁰

In March 2009, the assessors were advised by a mine manager of the claims being made about cracked houses and that the issue was fabricated by a small group of people who had been the source of ongoing problems and opposition to the mine; in essence, the company did not consider the complaints valid. The assessors were provided with the study commissioned by the mine, but not advised that there was an independent technical assessment underway, even though Montana management was meeting and corresponding with the UUSC team during the same period of the HRA interviews.⁷¹

The assessors obtained the UUSC study after it was made public, as well as additional independent input from an open-pit mine blasting specialist,⁷² who con-

firmed observations in the UUSC/COPAE report that damage could have occurred even though vibration monitoring in 2008 was inconclusive. In particular, blasting in the start-up phase before the blasting team gained experience, may have involved more explosives than current blasting and therefore produced greater vibrations.⁷³ Furthermore, any single blast can cause unusually high vibration levels if errors are made in calculating the timing of the blasting sequences;⁷⁴ the expert described this as likely to occur from time to time because of the complexity of the calculations for sequencing open-pit blasting.

Historical blasting records would have provided stronger evidence that Montana controlled the blasts in the past consistent with current practice, but the UUSC team leader advised that Montana did not make these records available, although they were requested.⁷⁵ Overall, the assessors find the UUSC/COPAE study to be a credible investigation that addressed a broader range of issues than Montana's study, and cast reasonable doubt on the conclusion that the findings of the 2008 vibration study cleared the company of responsibility for the cracked houses. Montana has not provided clear evidence that blasting could not have been responsible for the damage to houses.

Findings

Rights to health, adequate food, adequate housing, and to own property are the international human rights relevant to the assessment of the mine's environmental performance as it affects human health and well-being.

There are widespread concerns about health-related impacts from mine contamination that are not being addressed by currently available information. Although there is no apparent increase in health-related problems, lack of public health data and insufficient diagnostic capacity do not allow the cause of current health problems to be determined. Technical issues of air, dust and noise have been addressed through

⁶⁹ Ibid, 49.

⁷⁰ Ibid, 47. The report notes that the Cochis pit halves the distance between blasting locations and houses in Agel.

⁷¹ Ibid, Appendix B.

⁷² Interview with senior manager responsible for open-pit blasting at a major Canadian mine.

⁷³ COPAE & UUSC, 2009, 47.

⁷⁴ Ibid, 47. "It only takes a single mistake or omission during the blasting process to cause ground vibrations orders-of-magnitude greater than intended."

⁷⁵ Interview with Robert H. Robinson, mining engineer and UUSC team leader.

environmental management programs, consistent with international good practice standards; however, there is insufficient information to determine whether the rights to health and adequate food have been infringed and additional due diligence is required.

By failing to identify the risks from blasting and heavy traffic, Montana failed to respect the right to adequate housing and the right to own property. Montana did

not establish the necessary baseline studies or monitoring. Since complaints began in 2006, Montana has denied any potential for responsibility for impacts. While recent studies do not definitively establish that the mine has caused the damage, they eliminate all other reasonable explanations.

MINE CLOSURE

Assessment E3: Has Montana ensured that closure of the mine will not result in long-term negative environmental impacts to communities and individuals?

As noted in the technical review, mining has a bad history of closures without adequate resources to clean up and close the facilities safely; unplanned closures have also resulted in abandoned mines or governments picking up clean-up costs.⁷⁶ Although very few countries and their constituent states/provinces have enacted specific mine closure regulations,⁷⁷ there is a recent trend toward the development and implementation of regulations and/or guidelines that relate primarily to mine closure.⁷⁸ National and international agencies are actively promoting closure best practices.⁷⁹

Closure of a mine facility creates risks of negative impacts on all of the human rights discussed in this section. If the proper environmental management systems are not maintained after closure, contamination from the mine and changes in land use could affect the rights to water, food, housing, and health. Adequate

closure planning and financing is particularly important to prevent long-term human rights impacts on surrounding communities.

To respect human rights, the company is responsible for ensuring that closure is implemented in ways that minimize long-term negative impacts to the environment or surrounding communities. The process of establishing an integrated closure plan should include:

- **STUDY OF CLOSURE OPTIONS:** Evaluate the feasibility of all aspects of possible options;
- **CONSULTATIVE PROCESS:** Involve all interested parties to determine the preferred use for the mine site and associated facilities and infrastructure post-closure;
- **STATEMENT OF CLOSURE OBJECTIVES:** Mining company's commitment to the outcome of the closure of its activities;
- **ESTIMATE OF CLOSURE COSTS:** Cost of achieving the stated objectives; and
- **PROGRAMME OF STUDIES AND TEST WORK:** Confirm any predictions that are part of the closure plan.⁸⁰

A review of the latest literature on closure planning revealed strong agreement on the importance of integrated closure planning and the elements encompassed by the concept. Integrated planning is a dynamic process that must commence in tandem with the other planning aspects of a mining process and must contain social and environmental aspects at the same core level of planning importance as waste

⁷⁶ United States Environmental Protection Agency, 2005.

⁷⁷ MMSD, 2002, 21. The temporary closure of mines presents a special issue for regulatory agencies. The length of time before full closure should be implemented, the amount of pressure that can or should be exerted on mine owners to declare bankruptcy, and the ability of the authority to deal with abandoned mines need to be addressed. Mine closure legislation and regulations are based on environmental aspects of a site; they rarely include socio-economic aspects and temporary closure issues are not well addressed.

⁷⁸ ICMM, July 2006, 9.

⁷⁹ ICMM, 2010a.

⁸⁰ Mining, Minerals and Sustainable Development, 2002, B-4.

management and revegetation, the more traditional rehabilitation components of closure plans. Issues of sustainable economic programs and closure cost provisions, as well as participatory monitoring, are also prominent aspects of good practice. Most countries do not have comprehensive legislation for mine closure.

Goldcorp has established closure policy in line with international standards. However, there are elements of the Marlin Mine closure plan documents that fall short of current good practice, as documented in the following analysis.

The 2003 ESIA included a conceptual closure plan with little detail. In 2005, as part of the tailings dam design,⁸¹ Montana identified the requirement for post-closure monitoring and the potential need for ongoing water treatment. The March 2007 water quality and quantity assessment⁸² identified the risk of long-term discharge that could affect water quality and that ongoing monitoring and additional studies were needed to determine appropriate final closure designs. In 2009, an international consultant completed an update of the closure plan.⁸³

Montana has maintained a \$1 million closure bond in favour of MEM since September 2005, as a guarantee that the closure activities will be executed in compliance with the commitments specified at the time of mine permitting.⁸⁴ This bond was not required by national legislation or the permits issued by MARN or MEM,⁸⁵ but resulted from negotiations with the government.

The 2009 closure document was reviewed as part of the independent technical review contracted for this assessment (Appendix H). A number of concerns were identified, as not all parts of the closure plan were

considered consistent with industry good practice.⁸⁶ The following summarizes the findings:

The closure plan prepared in 2009 appears comprehensive and covers all aspects of site closure, but assumes closure will take place very quickly. A more conservative estimate would consider potential delays that could extend the time required for closure to two or three years.

Closure costs are low compared to norms; further investigation on these costs should be undertaken.

The post-closure monitoring period is very short and does not reflect any long-term monitoring or maintenance costs for the site. Good practice varies, but for potentially acid-generating materials, a 25-year period of post-operations monitoring should be considered for planning purposes. There should also be provision for continued care and maintenance of the facilities associated with post-closure for a very long time, often defined as 100-plus years;

Long-term maintenance costs (none of which have been included in the overall updated closure costs) would include items such as:

- Annual dam inspections, periodic dam investigations, and maintenance;
- Treatment of impacted waters until they meet discharge criteria;
- Tailings facility and waste-rock pile inspections and maintenance, especially for areas of damage to covers and vegetation; and
- Periodic groundwater sampling and testing to ensure no migration of seepage into surrounding water tables.

The technical review notes that because in rural and poorly-serviced areas it can be a challenge to sustain services and infrastructure, institutional arrangements must be adequate to maintain long-term closure plan integrity.

Development of skills and capacity in the communities to assume monitoring and maintenance functions, with funding provided in an assured way by Marlin/Goldcorp would reduce Goldcorp's long-term obligations on site; and

81 Marlin Engineering and Consulting, 2005.

82 WMC, 2007, 76.

83 "Marlin Mine Updated Closure Plan", May 2009. [internal document]

84 Convenio Ministerio de Energía y Minas – Montana Exploradora de Guatemala, S.A., 2005. Cierre Técnico y Fianza de Cumplimiento.

85 A past MEM official indicated the closure bond was agreed to in negotiation with Montana at the time the company renounced its tax exemption under the Maquila Exporters Law, and was based on the ministry's recognition that existing closure legislation was weak.

86 KP Consulting, 2010, 9-12.

*The actions that Marlin plans to take should be formulated on the basis of consultation with the appropriate communities and government authorities, at least 5 years before the actual date of closure. With the current estimated closure date in 2016 that would mean initiating discussions in 2011, leaving approximately 2 years for developing these measures.*⁸⁷

The review further finds that the financial assurance provided by Montana/Goldcorp to the government of Guatemala, in the form of the \$1 million bond, is insufficient to protect the interests of government and community, given that the estimated cost of closure is over \$13 million, without adjustment for the items identified above.

Interviewees mentioned mine closure as a concern about future contamination. For example, in focus groups held in San Miguel, women and youth expressed concern that the area would be contaminated and the local population would be left with no agriculture or usable water after the mine closed. Several employees also mentioned the issue in focus groups, indicating uncertainty as to whether the company's promises about closure would be respected. Doubts about closure and post-closure provisions were also raised in the reports critical of the ESIA and the company's environmental impact disclosure.⁸⁸

A mining operation will nearly always leave behind environmental liabilities associated with open pits, tailings facilities with dams of varying heights and types of construction, and waste rock disposal sites.⁸⁹ The long-term considerations for ensuring that water quality does not deteriorate depend on the closure technology applied and the provision of adequate funding to perform long-term monitoring and maintenance. Dams and other physical structures remaining on site must be periodically evaluated for their stability, which

can be affected by events such as hurricanes or earthquakes. Furthermore, when a mining operation leaves behind acid-generating or potentially acid-generating waste (tailings or waste rock), the implications for long-term risk, in particular to water quality, are significantly higher.⁹⁰ Studies on the environmental liabilities of mining have identified acid rock drainage as "the most serious and pervasive environmental problem related to mining."⁹¹

The implications of long-term maintenance and monitoring requirements after active closure mean that Montana's intention to transfer land ownership to the Sierra Madre Foundation⁹² has to take into consideration how these obligations will be met. The company has stated that the land will become an asset for achieving the longer-term objectives of the Foundation, and the updated closure plan suggests that the Foundation might assume responsibility for site monitoring after closure.⁹³ According to the technical review findings, the Foundation will require funding from Montana/Goldcorp over an extended period of time if it is to assume responsibility for managing long-term site maintenance. This has significant implications for how the Foundation is structured, managed and financed, as well as the capacity-building and institutional arrangements required.

The 2005 CAO assessment recommended that Montana publicly report closure plan details and financial provisions. It also suggested establishing institutional monitoring of post-closure infrastructure and capacity building to meet these requirements. This assessment found no indication that disclosure or capacity building was taking place. The failure to openly consult on closure and closure timing is consistent with the overall lack of disclosure regarding further exploration within the mining license and mine expansion plans in the short to medium term. This issue is further addressed in Section 2: Consultation.

87 Ibid, 11.

88 Moran, 2004; Bishop Ramazzini issued a letter to the Guatemalan president in November 2007, as a member of the High Level Commission, expressing concern about the use and access to water for current and future generations, in protection of the rights to water and food.

89 ICMM, July 2006.

90 The International Network for Acid Prevention, Undated, "INAP: Addressing a Global Need", www.inap.com.au/index.htm.

91 MMSD, May 2002, 238.

92 Peridot S.A. is the actual land owner; see Section 5: Land Acquisition for more discussion.

93 "Marlin Mine Updated Closure Plan", May 2009. [internal document]

Findings

Closure of a mine facility creates risks of negative impacts on all of the human rights discussed in this section. If proper environmental management systems are not maintained after closure, contamination from the mine and changes in land use could affect rights to water, food, housing and health. Adequate closure planning and financing is particularly important to prevent long-term human rights impacts on surrounding communities.

Closure best practice is an evolving area of mining standards, actively promoted by national and international agencies. The process of establishing an integrated closure plan should include study of closure options, consultative processes with all stakeholders, statement of closure objectives, estimate of closure costs, and studies and testing to confirm predictions of the closure plan.

Closure is the weakest aspect of the mine's plans and has the potential to leave the community vulnerable to long-term impacts on human rights. In particular:

- The closure timeframe is optimistic and doesn't contemplate potential for delay;
- Post-closure monitoring is very short and does not reflect any long-term site monitoring or maintenance;
- Closure costs are low compared to norms;
- Long-term maintenance costs are not considered in the present plan; and
- Insufficient financial assurance has been provided to ensure the availability of adequate funds to implement closure and post-closure plans regardless of what happens to Montana or Goldcorp.

There is a failure to respect the human rights of local communities due to the shortcomings of mine closure planning. The potential negative impacts associated with closure have not yet occurred, but would result in harm to human rights. The risk of this occurring can be addressed by promptly developing a more robust closure and post-closure plan in consultation with stakeholders. The inadequate financial assurance to cover the full cost of remediation in the event of an unforeseen closure is a serious shortcoming at present and fails to respect human rights.

RECOMMENDATIONS

RECOMMENDATIONS FOR IMMEDIATE ACTION

- **PROVIDE ADEQUATE FINANCIAL ASSURANCE FOR UNANTICIPATED CLOSURE.** Post a bond to adequately cover closure cost or provide other mechanism of financial assurance for the full cost of closure.
- **REPAIR THE CRACKED HOUSES.** Develop a plan to repair, rebuild or compensate for the cracked houses. Consult with affected families about the plan and implement immediately where there is agreement.
- **COMPLETE A FULL WATER CENSUS.** Complete the hydrocensus of current communities in AMAC, and include other communities potentially affected by planned or potential expansion areas. Address community concerns about participating in the study, and develop a strategy with communities

that addresses those concerns and allows collection of the required data. This may involve AMAC and the regulatory authorities carrying out such a study, with the community retaining control over the results, or engaging a credible third party to conduct it.

- **DEVELOP A CONTINGENCY PLAN FOR TXESHIWE SPRING.** To ensure Txeshiwe Spring water users have access to water as a priority, complete a contingency plan in consultation with the users to supplement or replace the water source in case of impacts to quality or quantity.

RECOMMENDATIONS THAT ADDRESS LEGACY ISSUES

- **INCREASE TRANSPARENCY.** There are an outstanding set of environment-related issues about which stakeholders have significant concerns and which have not been adequately addressed. These require specific ongoing consultation and information disclosure, including collaboration with public health officials to investigate and resolve uncertainty about existing health concerns. Work with public health officials to disclose the 2007 health baseline study and implement ongoing health risk monitoring for community health issues.

RECOMMENDATIONS FOR ONGOING DUE DILIGENCE

- **IMPROVE GOVERNMENT CAPACITY FOR WATER MONITORING.** Work with the government to establish an independent audit/monitoring function to provide reliable and credible information for regulators on issues related to water, including water quality measurements, flows and a basin wide monitoring of contamination sources. Consult in an ongoing way with communities about monitoring results. The recent agreement with MEM could provide a vehicle to accomplish this objective.
- **SUPPORT GREATER INDEPENDENCE FOR AMAC.** Increase support for AMAC to become a more recognized independent community-based monitoring committee, including support for other institutions

to work with AMAC, further training, and autonomy to determine scope and breadth of their work. Support efforts to expand to other communities in the watershed and to address other community concerns related to environmental issues. The recent agreement with MEM could provide a vehicle to accomplish this objective;

- **REVIEW MINE CLOSURE TIMEFRAME AND COSTS.** Conduct an internal review of post-closure management plans incorporating international good practice. Evaluate long-term funding, technical, and administrative support necessary to ensure that the Sierra Madre Foundation, or another appropriate institutional arrangement, has adequate resources to successfully manage post-closure challenges. Consult with communities about closure and ensure substantial and sustainable funding, depending on the communities' interests, capabilities, and long-term commitments.
- **SUPPORT REGIONAL WATERSHED MANAGEMENT.** Provide leadership and funding to assist government to develop a multi-stakeholder initiative for basin-wide water management. Upstream sources of contamination should be identified and progress made on returning the river basin to a more healthy state that supports multiple uses.

CONCLUSIONS

Strong environmental management and protection is essential for respecting some of the most fundamental human rights, including the right to health and the right to life. Although they are intimately related, environmental and human rights issues are not identical in scope or approach. Environmental concerns extend beyond impacts on human beings to include impacts on biodiversity and ecosystems (although these can be indirectly related to human rights, e.g. as impacts on animals may result in impacts on the right to food). Conversely, human rights concerns extend beyond environmental issues to impacts in social spheres. Some

impacts to the environment may be tolerated from a human rights perspective so long as these are within the established standards for human health. The overarching standard for human rights is an absolute: "do no harm."

A comprehensive approach moving forward should include clear attention to the links between environmental management and human rights due diligence, especially for mining companies. Marlin's good technical performance in almost all areas of environmental management is the necessary foundation, but respect

for human rights requires the company to go further and address the potential risks of their operations more fully. At the same time, communities, NGOs and governments are increasingly understanding the inter-connections between the environment and human rights, both at a conceptual level and to strengthen advocacy efforts.

The “Protect, Respect and Remedy” framework establishes due diligence for human rights as the standard that companies should meet; however, this framework is new. States, companies and other stakeholders have much to learn about how this framework can be

implemented – including through the application of human rights impact assessments to new and existing operations. In this regard, human rights can benefit from the lessons learned and international good practices that have been developed in the more mature field of environmental impact assessment and management. Montana and Goldcorp would be well-advised to pay particular attention to how human rights can be explicitly embedded in their existing environmental policies and management systems as part of expanding their due diligence for human rights.

Labour

Labour is a central issue in any human rights assessment given the wide range of positive and negative impacts a company can have both on its own workers and on local employment generally.

Human rights allegations related to labour issues at the Marlin Mine were not raised by the media. They were identified however, as a key area in the desk study of human rights issues in Guatemala, and also surfaced in the review of Human Rights Ombudsman documents.

In local interviews, labour concerns were raised by residents, sectoral labour specialists from the area, current and past and present employees, and on a few topics, by the Catholic Church. Local residents were more concerned about labour issues than national or international stakeholders.

Many of the interviewees who contributed this information were present or past employees, and family members of employees. They were interviewed both at the mine site and in groups and individually through contacts in San Miguel Ixtahuacán.

Amongst employees, the single most important issue was labour equity, with over 60 per cent indicating concerns or problems; non-employees did not often raise this as an issue. Basic working conditions was the next most frequently cited concern identified by more than half of all past and present employees. Worker health was raised by 30 per cent of interviewees.

Some interviewees claimed that local employees were reluctant to speak out because they were fearful of losing their jobs, which could explain why concerns are not more generally publicized. The assessors noted that while many interviewees were glad to have jobs and glad the mine was present, they felt that many concerns are not being addressed.

Access by the assessors to company representatives, employees, and documentation allowed the examination of labour rights to be an important facet of the assessment.

BACKGROUND

National Context in Guatemala

Multilateral agencies and international organizations have highlighted concerns about labour rights in Guatemala, including: inadequacy of minimum wage, lack of collective bargaining and intimidation of unions, and ineffective enforcement of labour laws and health and safety regulations.

According to the Ministry of Labour, out of 9.6 million people of working age in 2008, participation in the formal labour force was 52 per cent, underemployment was 19 per cent, and unemployment was 11 per cent (7 per cent for men and 19 per cent for women).¹ Most of Guatemala's population engages in subsistence agriculture and self-employed handicrafts. In the labour market, mining has one of the highest average salaries, estimated at Q5,084 (\$635) per month in 2009, compared to Q1,634 (\$204) for agriculture.²

In 2009, the minimum wage was Q1,810 (\$226) per month for non-agricultural work. However, the minimum wage is not considered adequate to support a family;³ the Guatemalan National Statistics Institute puts the minimum living wage at Q3,657 (\$446) per month, nearly double the present minimum wage.⁴

A study by the International Labour Organization in 2003 concluded that Guatemala has a Constitution and a framework of labour laws that give effect to, and are largely in conformity with the core labour principles in the 1998 ILO Declaration on Fundamental Principles and Rights at Work. Guatemala has ratified all

eight of the ILO fundamental conventions relating to the rights of workers and conditions of work.⁵

The Ministry of Labour and Social Welfare is responsible for developing policies, monitoring, and enforcing labour laws and social welfare legislation, as well as setting minimum wages, occupational health and safety, and resolution of disputes between employers and workers. Notwithstanding the measures taken by government to decentralize and expand the labour inspections services, there are concerns that labour inspections are not carried out regularly, especially in rural areas.⁶

While all workers in Guatemala enjoy the right to form or join trade unions (with the exception of security companies), less than 3 per cent of the workforce is unionized, as union leaders were the target of assassination and disappearances during the civil war, and continue to be subject to intimidation and violence. Workers also have the right to strike; however, given the low level of unionization and extensive procedural requirements for conciliation, legal strikes are extremely rare.⁷ A form of association more common in Guatemalan industry (and throughout Central America) is the solidarity association; with over 170,000 members of solidarity associations in 400 enterprises.

The Constitution and Labour Code provide guarantees of equality between men and women; however, many women face job discrimination and receive lower pay than men. Guatemalan law does not prohibit sexual harassment in the workplace, which is reported to be a common phenomenon.⁸

1 Ministerio de Trabajo y Previsión Social, Dirección de Estadísticas Laborales "Informe del Dirección de Estadísticas Laborales, Conteniendo Datos Estadísticos Recopilados Sobre la Población Económicamente Activa, Periodo 2005 a 2008" Guatemala: 12 de Agosto de 2009, 7.

2 Ministerio de Trabajo y Previsión Social, Dirección de Estadísticas Laborales "Informe del Dirección de Estadísticas Laborales, Conteniendo Datos Estadísticos Recopilados Sobre Salarios, Periodo 2006, 2007 y 2008" Guatemala: 12 de Agosto de 2009, 10.

3 CESCR, Concluding Observations, para. 14.

4 Instituto Nacional de Estadística. "Canasta Básica Vital". www.ine.gob.gt/index.php/estadisticasdeprecios/58-estadisticasdeprecios/138-cbv. Accessed March 2010.

5 ILO, 2003. These ILO Conventions have been identified as fundamental, and are at times referred to as the core labour standards: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); and Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

6 CESCR, Concluding Observations, para. 15.

7 US Department of Labor, 2005, 78-80. For instance, only one legal strike occurred between 2002 and 2004.

8 Ibid, 95-97; CESCR, Concluding Observations, para. 16.

The Guatemala Labour Code requires employers to adopt all necessary precautions to protect the life, safety and health of workers. Workers have the legal right to remove themselves from working in a hazardous situation, but this right is rarely exercised due to the fear of losing one's job. Companies with more than 50 employees are required by law to provide on-site medical facilities.

Although labour inspectors have reported abuses of the working hour limits and other problems related to occupational health and safety, enforcement of labour standards by the Ministry of Labour and Social Welfare's is weak due to an ineffective labour court system;⁹ although the number of inspections and fines increased after labour system reforms in 2001 and 2003.¹⁰ The 2004 decision of the Supreme Court of Guatemala undermined this tendency, however, when it found unconstitutional the labour ministry right to impose administrative fines against companies that violate labour laws.¹¹

Local Context

There were limited employment opportunities in San Miguel and Sipacapa prior to the Marlin Mine development. Subsistence agriculture typically did not provide enough to meet family needs and 80 per cent of families reported engaging in seasonal employment outside the area.¹² Seasonal agricultural labour has a very poor track record for workers' rights and working conditions. After charges for hiring, transport, and accommodation, families often return with very little.

Outside the mine, the majority are involved in the informal economy, making it difficult to obtain reliable numbers on employment and income. A study conducted for Montana in 2005 by the Research and Social Studies Association provides some insight into the economies of the two municipalities: of the five communities around the mine site, 81 per cent of the

working population was employed in agriculture, 4 per cent in industry and 6 per cent in services.¹³

According to the Guatemalan Ministry of Labour, total salaries earned in the department of San Marcos in the agriculture sector have remained constant over the past decade – Q133 million (\$16.6 million) in 1998, compared to Q132 million (\$16.5 million) in 2007 – whereas total salaries related to mining increased considerably from Q2,480 (\$310) to Q60 (\$7.5 million). The average monthly salary in the department of San Marcos in 2007 was reported to be Q4,736 (\$592) for mining and Q1,005 (\$126) for agriculture.¹⁴

Overview of Employment and Policies at the Marlin Mine

In June 2009, the company reported having 1,033 full time employees, of which 641 were from San Miguel and Sipacapa, or 61 per cent of the directly employed labour force. A further 658 are employed by contractors, of which 383 are reported to be from local communities.¹⁵

According to current managers, Glamis Gold had no corporate level policies on employment. In 2009, neither the mine nor Montana had additional policies or formal statements on employment beyond the required Internal Regulations of Work approved by the Guatemalan General Inspectorate of Work,¹⁶ which are largely based on provisions of the Guatemalan labour code.

Employment is the responsibility of the human resource manager, who reports to the general mine manager. According to human resources management, there is no strategic plan for human resources relative to employment strategies or objectives. Supervisors and department heads are responsible for managing labour

9 US Department of Labor, 2005, 94.

10 Ibid, 94- 95.

11 Constitutional Court File # 898-2001 and 1014-2001 (August 3, 2004).

12 Montana ESIA, 2003, 5-156.

13 Research and Social Studies Association (ASIES in Spanish), 2005, Estudio de la Economica de Cinco Municipios del Altiplano del Departamento de San Marcos, pp.10-21.

14 Ministerio de Trabajo y Previsión Social, Dirección de Estadísticas Laborales "Informe del Dirección de Estadísticas Laborales, Conteniendo Datos Estadísticos Recopilados Sobre Salarios, Periodo 2006, 2007 y 2008" Guatemala: 12 de Agosto de 2009, 10.

15 Marlin mine monthly management report, internal, May 2009 reporting on employment.

16 Approved by the General Inspectorate of Work, Nu.149-2005, and Registry #083-2005, 23 July 2005.

issues and handling complaints within their areas, replicating within each department the hierarchical structure for the mining operation as a whole.

The Organizational Health and Safety (OHS) department is responsible for training programs. The assessors note a large increase in the number and frequency of training programs since the appointment of a full-time training manager in mid-2008.

Goldcorp has corporate-level policy statements on a range of labour issues, including commitments to employee development, equal opportunity, non-discrimination, and freedom from harassment. Goldcorp explicitly states that employment policies conform to human rights legislation in the jurisdictions in which it operates.¹⁷ The corporation acknowledges a lack of alignment between different mines in terms of performance reviews and management systems for employee relations.¹⁸

Human Rights Context

The right to work, along with a number of work-related rights, are entrenched in Articles 23 and 24 of the Universal Declaration of Human Rights and Articles 6–8 of the International Covenant on Economic, Social, and Cultural Rights. The work-related rights that are relevant to this assessment:

- Just and favourable work conditions and protection from unemployment;
- Just and favourable remuneration and equal pay for equivalent work;
- Reasonable limitations to working hours and holidays with pay; and
- Safe and healthy work environment.

The ILO Declaration of the Fundamental Principles and Rights at Work identifies four core labour standards that are universally applicable and establish a base for conduct by business operations in any country:¹⁹

- Non-discrimination in employment;

17 Goldcorp Inc., 2008a, Statement on Equal Opportunity.

18 Goldcorp Inc., 2008a. See for corporate statements on labour issues; Employee Relations statement for specific reference to nonalignment.

19 ACHR, Article 26; Additional Protocol to ACHR, Articles 6-8.

- Prohibition of any forms of forced labour;
- Elimination of child labour; and
- Freedom of association, independent of government and employer influence, and the right to collective bargaining.

The principle issues identified for the assessment on the basis of concerns raised by stakeholders and recognized by the assessors are:

- Assessment L1: Has Montana respected the right to work and non-discrimination in the workplace?
- Assessment L2: Has Montana provided just and favourable work conditions?
- Assessment L3: Has Montana ensured that working conditions are healthy and safe?
- Assessment L4: Are there adequate mechanisms to protect workers interests and rights?

Information Reviewed

The information base for the assessment comprises:

- Desk review of labour issues in Guatemala, including reports from the following sources: United Nations, International Labour Organization, US Department of Labour, international NGOs and unions specialized in labour rights, the Human Rights Ombudsman (PDH) and the Guatemalan National Statistic Institute;
- Company documentation, including Goldcorp and Montana public reports (sustainability report and AMRs), policies, employee handbook, and internal records of employment and occupational health and safety issues;
- Employee files, including a spot-check of employee files for general content, with detailed examination, including medical records, related to specific employees or categories of employees;
- Interviews with management, including human resources, safety managers, supervisors from different departments, current and former employees from different departments, family members of workers, and local residents and authorities; and
- Interviews with representatives of government agencies involved in labour inspections, including the Ministry of Labour and the PDH, and review of

these agencies' internal reports, administrative decisions, and cases before labour tribunals, supplemented with interviews with national NGOs and labour specialists.

The assessment is heavily reliant on information gained from interviews with persons directly involved as employees, past employees, and managers because there were no existing reviews of labour issues, either internal or independent. Many of the interviews with employees took place at the worksite, which raises reasonable questions as to the objectivity of these sources.²⁰

20 One employee urged fellow participants in a group interview to be honest about things not being done right. In another group interview, an employee initially critical of the assessment and defensive of the company, later described serious concerns and hoped the assessment would be an opportunity to change things for the better.

The assessors interviewed more than 10 per cent of local employees. Many participated in a series of group interviews or focus groups at the mine site so that the assessors could meet with employees from all areas or departments. Other interviews with workers and managers took place independent of mine management, but at the mine. In parallel, the assessors conducted interviews and focus groups with employees and past employees outside the work environment and organized through channels not associated with the employment situation.

The assessors have a high degree of confidence in the information obtained about labour rights and conditions, as there was consistency in the issues raised across groups and in different interviews and environments. Furthermore, there was correspondence between employees' complaints and observations by managers, as well as between alleged problems and the absence of management systems and/or policies addressing those issues.

THE RIGHT TO WORK AND NON-DISCRIMINATION

Assessment L1: Has Montana respected the right to work and non-discrimination in the workplace?

This section considers the right to work²¹ and the elimination of discrimination in employment and occupation,²² together with the right to protection from unemployment, as the relevant international human rights standards.

To respect the right to work and eliminate discrimination in employment and occupation, the primary requirement is for the company to have in place:

- Objective and non-discriminatory criteria in hiring practices, promotions, compensation, and

benefits,²³ with similar criteria or procedures in place to protect against discriminatory practices in discipline and dismissal;²⁴

- Policies and effective procedures for eliminating harassment in the workplace;
- Elimination of discrimination in contract awards; and
- Due diligence on contractor employment practices to avoid being involved in human rights infringements by others.

To ensure the voluntary exercise of the right to work, the company must eliminate forced labour, which includes ensuring that workers are not subject to physical captivity, psychological intimidation, threats of discipline, and/or financial coercion to compel their

21 ICESCR, Article 6; Additional Protocol to ACHR, Article 6. The employment of local indigenous peoples may also be considered one of the benefits of development in relation to ILO Convention 169.

22 ILO 1998; The general principle of non-discrimination is included in UDHR Article 2; ICESCR Article 2; ACHR Article 1.

23 DIHR 297, 298.

24 DIHR 300, 307, 308.

Table 4.1: Marlin Mine Employment and Wages Paid, 2004 – 2008					
	2004	2005	2006	2007	2008
Total employment	1,527	2,339	1,132	1,149	1,609
Local employment ^a	57%	56%	71%	68%	61%
Guatemalan – other	27%	33%	28%	31%	38%
Foreign	16%	11%	1%	1%	1%
Employment model					
Direct	27%	26%	63%	82%	69%
Rotational (not in total)	(150)	11%	14%		
Temporary	8%	9%	0%		
Contractors	65%	54%	23%	18%	31%
Payroll	\$4.9 million (Q39 million)	\$11 million (Q88 million)	\$8.6 million (Q69 million)	\$11.4 million (Q91 million)	\$16.9 million (Q135 million)
Payroll to local employees	\$2.4 million (Q19 million)	\$3.6 million (Q29 million)	\$3.8 million (Q30 million)	\$4.8 million (Q38 million)	\$6.9 million (Q55 million)
Local purchasing, materials, equipment and supplies	\$100,000 (Q800,000)	\$2.3 million (Q18 million)	\$2.2 million (Q18 million)	\$1.1 million (Q9 million)	\$1.7 million (Q14 million)
Women-owned companies, local area ^b				\$218,000 (Q1.7 million)	\$73,000 (Q600,000)
Notes: Financial data in U.S. dollars. Conversion to Guatemalan quetzales (in brackets) was calculated in April 2010, when U.S. and Canadian dollars were approximately at par. Figures have been rounded.					
^a Local refers to residents of San Miguel Ixtahuacán and Sipacapa municipalities.					
^b AMRs began reporting on purchasing from local women-owned companies in 2007. In 2008, Montana also paid \$415,000 (Q3.4 million) to women-owned businesses in San Marcos Department.					
Source: Compiled by the assessors from Montana Annual Monitoring Reports; not verified independently or by the assessors.					

labour.²⁵ Similarly, a company has the responsibility to eliminate child labour.

Right to Work

In the Environmental and Social Impact Assessment (ESIA), Montana committed to locally hiring 180 of the projected labour force of 200; an unrealistically low number which has been far exceeded. During construction, the workforce peaked at over 2,300, and during operations has exceeded 1,000. In June, 2009 the company reported having 1,033 full-time employees, of which 641 were from San Miguel and Sipacapa, or 61 per cent of the directly employed labour force.

25 ILO 1998; ILO 1930; UDHR, Articles 4, 5; ICCPR, Article 8; ICE-SCR, Article 7(b); DIHR 82-95.

A further 658 are employed by contractors, of which 383 are reported to be from local communities.²⁶

Table 4.1 provides summary statistics on employment at the mine.

Human resources has reported employment by residency since 2004; local refers to residents of San Miguel and Sipacapa. Data are also reported for San Marcos residents, Guatemalans, and international hires. In percentage terms, employment of people from San Miguel and Sipacapa has been between 56 per cent and 68 per cent, and is currently at slightly above 60 per cent. From the data in Table 4.1 it is evident that the mine has contributed substantially to opportunities for employment for local people, as well as for people in the region and country.

26 Marlin mine monthly management report, May 2009 reporting on employment.

Montana has no formal policies that directly address unemployment protection. However, during construction, the company had four employment modalities: direct, contract, rotational, and temporary. The rotational work force grew out of an early agreement with the municipality whereby the mine would provide labour for municipal projects. According to management, these projects were not able to absorb the workforce that Montana had committed to supporting. Most temporary and rotational workers have been transitioned to the formal payroll, providing more job security and benefits. There remain 51 rotational positions shared by 102 local workers.

Local contracting also contributes to employment opportunities; however, the mine does not track its indirect employment creation. Other than reporting on 49 new businesses in 2004,²⁷ no measure of indirectly generated jobs or economic activities has been developed. Nonetheless, interviews have provided anecdotal evidence of stimulation of indirect employment opportunities.

A significant contribution to the right to work and the elimination of discrimination has been Montana's commitment to train people with low levels of literacy and formal education. A focus on job-based training rather than formal qualifications is likely to have contributed to hiring significant numbers of local residents who might otherwise fail traditional literacy, educational, or pre-qualification based evaluation processes.²⁸

All mine employees complete various training programs on an ongoing basis to maintain employment. However, although the company provides employee training, there is no overall framework for professional development, supported by training and performance evaluations.

Although initial training does not take place in Mam or Sipakapense, translation is reportedly made available through bilingual supervisors. Employees confirmed that Montana supports training through translation into indigenous languages; however, one management representative raised a concern about the effectiveness of standard training programs for people with variable levels of literacy and education.

²⁷ Montana AMR, 2004.

²⁸ Harvey and Gawler, 2003.

It is important to stress that given the relatively short life-span predicted for the mine, an area of future risk to the right to work relates to closure, when the majority of the employees will be laid off. As of November, 2009, Montana had not developed a strategy to address this issue.

Finally, the assessors found no evidence of forced labour at the mine. The restrictions placed on the entry and movement of workers are necessary for the protection of their safety and security; and, as discussed in the section on security, the private security contractors are not used to compel labour from the workers. Some workers referred to pressures and threats of discipline or firing by supervisors to get them to be more productive and of being pressured to work while sick; these do not constitute forced labour but do reinforce the necessity for human rights training for supervisors and managers.

Discrimination in Hiring, Promotion, Discipline and Firing

Discrimination was a significant area of concern for employees and other stakeholders. Allegations were made of:

- Preferential treatment involving jobs, promotions, and contracts given to those with connections rather than on the basis of qualifications;
- Discrimination against local people in promotions;
- Employees dismissed without due process;
- Pressure, disrespectful treatment, and indirect threats of firing from some supervisors; and
- Discrimination against local contractors.

While it is beyond the scope of the review to interview all present and past employees or conduct an exhaustive evaluation of employment records to obtain quantitative information on patterns of promotion, hiring, or firing, the assessors were able to verify the lack of documented human resources policies and procedures that would effectively safeguard against discrimination in hiring, promotion, discipline, and firing practices. In particular, the assessors note the absence of transparent and objective criteria and process for these decisions.

There was a very high level of consistency between interviews and agreement within three of the five group interviews that discrimination in human resources practices was a serious problem. There was disagreement, however, about whether the alleged practices were a form of favouritism and/or nepotism, or whether they were discrimination against local people as indigenous people. Given the high rate of local indigenous employment at the mine overall, it is difficult to find support for allegations of discrimination in hiring based on being indigenous; some interviewees specifically said that discrimination in hiring was occurring, not based on race, but rather on channelling employment opportunities, and possibly internal promotion, to specific groups within the local population. The evidence and some testimonies support this interpretation, in which case it is a problem of ethical behaviour.²⁹ However, the lack of procedures to ensure non-discrimination in hiring leaves the possibility open that discrimination is occurring at levels that are not reflected in the statistics.³⁰

Employment of Local Indigenous People

Although Montana did not at any time make a written policy statement about local employment, the internal culture of the mine seems to have integrated the objective of employing local people from the neighbouring communities. By employing a significant proportion of local indigenous peoples (currently 62 per cent of the workforce), including a number of women, as well as seniors, Montana has provided opportunities that did not previously exist in the local economy. In the opinion of the assessors, the relatively high level of employment of local indigenous people should be considered a successful example of respecting the right to non-discrimination in employment, given the low levels of literacy in the local population and the

²⁹ While nepotism may not be a human rights issue, it has important implications for fairness and for the perception of equal opportunity within the local communities.

³⁰ Some of the comments expressed concern that a new pattern of employment was perceived in the last year in which only local people with qualifications were being hired, such as those with secondary education. Management stated that no additional formal qualifications were being required for employment. The lack of documentation about employment positions and hiring criteria meant that it was not possible to verify either position.

absence of any legal or contractual requirement to do so.

While the company tracks local vs. non-local employment statistics, systematic information about retention rates, attendance at training programs and other relevant indicators is lacking. Better tracking would assist the company in identifying the needs of employees and also demonstrate the impacts that it is having on the right to work and non-discrimination of local employees.

Employment of Women

Montana has hired women across a range of jobs, including a small number as heavy equipment (haulage truck) operators, although female workers tend to be employed in traditional occupational categories such as the kitchen, cleaning, and administration. Of the 1,113 direct employees at the mine in December 2008, 13 per cent (145) were women.³¹

Women interviewed were satisfied with work conditions, confirmed that management accommodated their needs to sometimes attend to sick family members, and in general were satisfied with wages. In the context of rural Guatemala, women employees reported being particularly grateful for the opportunity to work at the mine. As one woman described it, "I didn't study, and could only work in agriculture here. What would I earn? Maybe Q30 [\$3.75] a day? And now I am working here."³² Nonetheless, there were complaints from other women outside the focus group; about discrimination in hiring and benefits based on personal relations, not on gender or race, an opinion shared by male employees across the full spectrum of interviews.

Although Montana has implemented bus transportation and a day care centre at the mine, both of which reduce barriers to female employment, Montana management reported it does not have a long-term strategy for the employment and advancement of women. There is not consistent disaggregated tracking of women employees, their performance or success within the company in terms of pay levels relative

³¹ Montana AMR, 2008.

³² Interview with local female employee.

to other groups, advancement, or retention – even though Goldcorp reports on both female employment and wage ratios of men to women.³³ There is also no reporting of female contractors. There is, however, tracking of women in training programs, a number of which have been for non-traditional positions (heavy equipment operator, drillers, labourers). Tracking of these indicators is part of determining whether any commitment in employment to a specific disadvantaged or underrepresented group is actually being effective. As Goldcorp has begun using the GRI reporting framework for its annual Sustainability Report, there should be better tracking of indicators related to the employment of women in the future.³⁴

In general, women's employment and advancement will be supported through respect for other human rights (e.g. right to food of pregnant and nursing mothers, and the right to family life). In the context of rural Guatemala, where women typically have lower levels of education and literacy than men, measures that support the right to education through training programs are essential to provide opportunities in non-traditional occupations. Comments from women employees were generally positive about their ability to carry out other family obligations, and they have incomes that in turn support the fulfilment of other rights.³⁵

Promotion

The process for internal promotion involves petitioning for reclassification, with the understanding that this also involves an increase in salary. The petition goes to human resources, but must be supported by the employee's direct supervisor. From what the assessors were told, there are no other criteria or procedures for consideration of these petitions. Assessors note that according to all employees interviewed, a worker's direct supervisor is also the only person to whom a

33 The assessors assume that the mine's reported lack of tracking of female employment numbers or wage levels relative to men, even though Goldcorp reports on these indicators, reflects the inconsistency in labour management systems between its different mines noted earlier.

34 GRI G3 Guidelines, indicator LA13 and LA14.

35 This assessment has not looked systematically at how the economic contributions of mine employment are affecting the fulfilment of other human rights, nor has Montana undertaken such a study.

worker can make a complaint or lodge a grievance.³⁶ This combination of roles in the supervisor prejudices transparency and disadvantages the worker.

Overall, there is an absence of defined performance criteria or regular performance evaluations upon which to base promotion and no measurement of the turnover and advancement rates of women and indigenous people. These are common tools for determining whether non-discrimination policies are being fulfilled. According to the human resources manager, performance evaluations will be formalized in line with Goldcorp's commitment to implement company-wide evaluations.³⁷

Discipline and Firing

Workers can be fired for absenteeism or working under the influence of alcohol; and although workers can be fired immediately for cause, they are reported to receive warnings, followed by suspensions, before termination. Both the supervisor and the worker are reported to have the opportunity to present their point of view to human resources, which decides upon the disciplinary measure and puts a report in the worker's file. The review of personnel files confirmed the existence of formal written warnings related to specific violations of the employment handbook.

The overall impression given to the assessors, however, is that the disciplinary and termination process remains relatively informal, with inadequate procedures to prevent non-discrimination, arbitrariness, or retribution. It was acknowledged by some managers and supervisors that there are no clear and standardized criteria for discipline and firing.

One specific incident highlighted by the assessors involved employees alleged to have been leaders of the January 2007 blockade who were fired for the cause of not showing up for work. However, during the same incident, other employees did not show up for work and were not terminated. Of the 14 fired, only seven

36 In all interviews of employees on and off the mine site, employees were asked if there was any established mechanism or process for them to lodge a grievance related to work. Except for senior mine management, no one identified any means other than through one's direct supervisor.

37 Goldcorp Inc., 2008a, Labour Practices.

were either among those charged in criminal proceedings in relation to physical violence against company personnel, or named in complaints by other workers. Despite the assertion of Montana managers that they had verified allegations and followed due process in firing, after multiple requests to see the relevant files, the company acknowledged that it did not have documentation verifying that these employees had acted illegally, other than being suspected or alleged by other workers of having been leaders in the demonstration. In view of the absence of documentation, Montana could not dispel allegations that disciplinary measures and termination were arbitrary and retaliatory. Record-keeping is essential to ensure that disciplinary measures are applied in a non-discriminatory manner, as well as to facilitate internal reviews of the appropriateness and consistent application of disciplinary measures up to and including termination.

Harassment

Eliminating harassment in the workplace is intimately related to non-discrimination and disciplinary procedures. The issue was raised in some interviews where employees reported pressure to perform under indirect threats of discipline and firing from supervisors, who used comments such as 'there a plenty of people willing to take your job.' Further, Marlin's grievance mechanism files revealed one allegation of sexual harassment. Although the complaint was brought by a community member, not an employee, it reinforces a national level concern about female employees in Guatemala given the absence of laws against sexual harassment in the workplace. Finally, three separate interviews corroborated a supervisor being fired for abusive behaviour, indicating that, at least in this specific case, complaints or employee concerns were communicated to management and corrective action was taken to respect labour rights.

While Goldcorp has a clear policy against harassment in its Code of Business and Ethics, this is not distributed to employees of Montana. The mine's 'Internal Work Regulations' contains a commitment to respect workers, abstaining from verbal or physical acts of mistreatment.³⁸ Marlin regulations do not ban sexual

harassment, which is in keeping with the weakness of national legislation in this area, but is inconsistent with Goldcorp policy. This is an example where labour relations conform to a national standard even when Goldcorp corporate policy commitments are more stringent.

The mechanisms for policy implementation are not clear and complaints persist. Furthermore, the absence of a formal grievance mechanism that treats harassment complaints in a confidential manner represent a significant gap in the measures required to respect workers' rights.

Relationship with Contractors

The company's contracting practices have a potentially significant impact on employment in San Miguel and Sipacapa and are a source of important revenue streams and economic diversification. In 2007 and 2008, Marlin paid \$1.1 million (Q8.9 million) and over \$1.7 (Q13.8 million) to local contractors from the two municipalities, as well as over \$50 million (Q404 million) and \$75 million (Q606 million) within Guatemala. Local contractors have created businesses in response to the mine, extending the indirect economic benefits of the mine more broadly. This practice not only expands the economic impact of the mine to involve more people (benefits to the local communities in the area), but also builds skills and experience in these entrepreneurs.

If contractors or suppliers are involved in activities that infringe on human rights, the mine is implicated, especially when the mine is a primary or only customer for that contractor. It is the mine's responsibility to extend its human and labour rights policies along the supply chain.

It was beyond the scope of the assessment to conduct a full review of contracting practices at the mine, or to review the human rights practices of contractors. Nevertheless, the assessors note that many of the complaints and concerns assessed above for employment appear in interviews with contractors. Concerns about nepotism in contract awards, absence of clear criteria for winning or losing work, and discrimination

³⁸ Montana, 2005, Internal Regulations of Work, Approved by the General Inspectorate of Work, Nu.149-2005, and Registry

#083-2005, 23 July 2005.

against local contractors in certain kinds of contracts indicate similar patterns. There are no formal criteria to standardize contracting and ensure that the processes adhere to standards of transparency and fairness, as well as protection of the contractor by providing formal agreements.³⁹

Three specific additional concerns are noted with regard to contractors.

- The mine does not always formally contract local contractors and service providers, apparently to provide additional contracting flexibility. However, not providing written contracts limits transparency and fails to provide small businesses with legal recourse or stability in their dealings with the mine.
- Some cases were identified where managers awarding contracts were members of ASOTRAMÓN, the employee association that undertakes micro-enterprise activities, indicating a potential conflict of interest. While supporting these employee-owned initiatives might be justified, it also conflicts with commitments to support independent local businesses and contractors. Three contractors mentioned losing jobs to ASOTRAMÓN businesses.
- The mine provides no monitoring to ensure that basic labour rights of contractors and sub-contractor employees are respected. Although contractors are required to commit to Marlin's environmental and safety standards, labour practice standards are not treated the same way.

Findings

The mine has respected the right to work by providing employment to people from the local communities as well as elsewhere in Guatemala. Efforts to preserve employment for temporary and rotational workers have respected both the right to work and to protection against unemployment. Marlin respects the right to freedom from forced labour or child labour at the mine. Montana is compliant with the Guatemalan law prohibiting children under 18 to work in mines.

³⁹ Assistance to local start up businesses and contractors to formalize their businesses, comply with laws, pay taxes and fair wages is considered good practice in improving local benefits from mine developments.

The ability to hire and retain local, indigenous workers with lower levels of literacy or formal skills is made possible in large part through the focus Montana has given to on-the-job training rather than formal qualifications. In this regard, measures that respect the right to education also support the right to work and to non-discrimination in employment.

Despite the lack of formal policies and procedures, or a long-term strategy, Montana has respected the right to work and non-discrimination in employment through the significant hiring of local indigenous people. To ensure that respect for this right is sustained, it should be formalized by the development of policies, procedures, and associated support programs.

It is not possible to determine whether in practice the Marlin Mine is respecting the rights of women employees because of the lack of information or analysis by the human resources department of the status of women in the workplace. There are positive indications in some aspects of female employment, but no data on retention of women, promotions, access and retention of non-traditional jobs, review of job categories and pay equity. Further due diligence is required through assessment of the current situation and implementation of formal policies and procedures about the employment and advancement of women in the workforce.

There is insufficient information to determine whether specific firings were infringements of the right to non-discrimination in firing. Failure to follow due process is a failure to respect for the right to non-discrimination in firing.

Existing practice at the mine does not provide adequate protection of workers against harassment in the workplace. Although Montana has taken action in individual cases, stronger policies and procedures are required for the elimination of harassment. Sexual harassment is not addressed in national laws; failing to address it through company policies and procedures is a failure to respect.

There is a lack of due diligence about the labour and human rights practices of contractors. This represents a failure to respect because it is an area of responsibility that company's need to address because of the risks presented by the actions of third parties – in this case contractors.

WORKING CONDITIONS

Assessment L2: Has Montana provided just and favourable working conditions?

This section examines material working conditions – wages, benefits, work hours, and holidays – as essential components of the right to enjoy just and favourable working conditions.⁴⁰

Among a company's responsibilities are to:⁴¹

- Provide an official employment status and accurate information about wages, benefits, and deductions to all workers;
- Respect national and international standards for working hours, use of overtime, breaks, leave, and holidays;
- Ensure that wages are sufficient to cover the living costs of workers and their dependents (the issue of a "living wage" is also a criteria for respecting rights to food, housing, and an adequate standard of living);
- Contribute to national and/or private unemployment, sickness, and pension benefit plans; and
- Apply appropriate due diligence on the employment practices of contractors to avoid being implicated in the infringement of human rights by others.

In 2009, the basic entry-level salary at the mine was Q2,100 (\$247) per month, slightly higher than the national minimum wage of Q1,810 (\$223). Annual wage increases have been given each year; the pattern has been a blanket raise for all employees, typically 10 per cent each year. Employees confirmed a positive attitude towards annual salary increases.

⁴⁰ UDHR, Article 23; ICESCR, Article 7; Additional Protocol to ACHR, Article 7. In terms of the related human rights standards, the provision of adequate breaks and facilities for the consumption of food and water is a criteria for the right to food; the provision of leave to participate in legal or customary holidays is a criteria for the right to participate in cultural life; contributions to national and/or private worker compensation and disability plans and the provision of leave for illness and injury are criteria for the right to health; the provision of leave to participate in governing processes is a criteria for the right to a fair trial and the right to participate in government; etc.

⁴¹ DIHR 303, 309-313; 316-327; 329; 15-19; 1-3; 281-282; 224; 146; 148; 225; 20; 34; 50; 51.

An operational bonus was introduced in March 2008, based primarily on production, and including safety, environment, cost-reduction, and attendance criteria established for each department. The bonus is typically in the range of 10 to 20 per cent of monthly salaries, but is not paid if there is a fatality or work stoppage. This is in addition to a number of small statutory bonuses required by law.

Most full-time employees are on payroll with an indefinite term of employment. They receive full legal benefits, plus life insurance, medical attention, burial assistance, transport to work, school materials, and a daily snack.⁴² Daycare facilities are provided for children of nursing age as a legal requirement. Employees have the option of voluntary participation in a retirement savings program (ASOTRAMÓN). Rotational employees (approximately 112) are included in the social security system; but unlike workers on full payroll do not have private medical insurance. They receive other benefits such as medical care, school supplies, transport and snack.

In 2009, an external firm benchmarked Marlin against other industry employers for wages and benefits; Montana was considering performing an independent review of wage and benefit structure by the same firm. As shown in Table 4.2, Montana complies with or exceeds minimum standards established by Guatemalan law for the wages, benefits, leave and holidays of its employees. The Guatemalan minimum standards generally conform to the international standards established by the ILO.

According to the human resource manager, wages are paid regularly and without unauthorized deductions,⁴³ and workers are provided with a pay stub that accurately summarizes all deductions.

Stakeholder concerns with respect to just and favourable working conditions may be summarized as:

- Long work hours and lack of rest time;

⁴² Providing a snack to workers as they arrive was started in March 2009, and explained to the assessors as a voluntary contribution by the company since workers were often traveling two hours before starting their 12-hour shifts.

⁴³ ILO 95.

- Adequacy of compensation;
- Lack of pay equity within and between job categories; and
- Inadequate or inappropriate work conditions and basic amenities (access to food, water, rest periods, washrooms, and places to eat).

Work Hours

The legal workweek in Guatemala is 48 hours, 6 days a week, with a daily work period of eight hours. Hours worked in excess are considered overtime and are paid at time and a half of regular pay. One day of rest per week is mandatory.

Regular shifts at the mine are 12 hours (11 hours work), while underground workers have a 13 hour night shift. Many employees travel, in a combination of walking and bus, up to two hours each way to and from work. Under these conditions, some workers are home less than eight hours per day.

Although work hours at the mine may exceed the daily limits specified by law, the company has obtained specific permission from the Ministry of Labour and Social Welfare. The rotations adhere to weekly maximums; however, the assessors did not verify whether employees in some departments work overtime in excess of their rotation, which would put them at risk of overwork. According to the employee handbook, employees are given three weeks of holidays per year, as required by law, and time taken for vacations is recorded in personnel files.⁴⁴

The demands of this routine, added to rotational shift work (rotating between day and night shifts) put workers in situations of having restricted home or family life and, more seriously, very little rest, which in turn creates an increased risk of work-related incidents, accidents and injury.⁴⁵ The issue of workers' rights to a family life is a particular concern for female employees who traditionally have additional family (child-care, parent care) responsibilities. Employees in general, did

not complain about shift work or rotations, although several former employees mentioned the demanding schedules as a reason for quitting.

The management focus group raised concerns about the 12-hour shift combined with long travel time. While most mines operate on 12-hour shifts, several managers mentioned mines operating on 8-hour shifts in other countries. The assessors recognize that operating mines on 12-hour shifts is considered standard practice in many countries, but these rotations do not generally involve such significant travel to and from place of residence. At the same time, long travel is a result of several decisions that have had positive impacts, such as: providing transportation to employees from communities at some distance from the mine, which increases access to employment for residents in those communities; and the decision to require contractors to locate personnel in Huehuetenango to reduce the impact of a larger male mining camp or greater population pressure on San Miguel.

Wages

While the legal minimum wage in Guatemala in 2009 was Q1,810/month, the living wage – the income required for a family of five to enjoy the right to an adequate standard of living⁴⁶ – was Q3,597/month. According to local interviews, families in the local communities have an average of seven to nine members.

From a review of average salary and overtime for each position, the assessors determined that:

- Salaries of 206 local workers and 13 non-local workers do not meet the living wage threshold, even with overtime wages included;
- Salaries of 102 local workers and 28 non-local workers only meet the living wage threshold when overtime wages are included; and
- Given that these figures are based on average values for each job category, it is possible that a greater number of workers have incomes below the two thresholds.

⁴⁴ ILO 132.

⁴⁵ A detailed review of monthly OHS incident reports from January 2008 through February 2009 revealed that two accidents, with no reported injuries, took place from drivers falling asleep at the wheel, with reference to a previous incident by one of the drivers.

⁴⁶ Instituto Nacional de Estadística. "Canasta Básica Vital". www.ine.gob.gt/index.php/estadisticasdeprecios/58-estadisticasdeprecios/138-cbv. Accessed March 2010.

Table 4.2: Wages and Benefits		
	Marlin Mine	Guatemala
Wages	<ul style="list-style-type: none"> • Entry level wages are Q2,100+ (\$247) per month; some payroll employees make less • Overtime pay: time and a half • 14th salary bonus of one month's wages • Christmas bonus of one month's wages • Monthly production bonus (up to 25% of monthly wage) 	<ul style="list-style-type: none"> • Q1,810/ month • Overtime pay: time and a half • 14th salary bonus of one month's wages • Christmas bonus of one month's wages
Benefits	<ul style="list-style-type: none"> • Social Security (IGSS) • Health insurance for employees and their families • Free on-site health care for employees and their families • Life insurance • Accidental death and dismemberment insurance 	<ul style="list-style-type: none"> • Social Security (IGSS)
Holidays and leave	<ul style="list-style-type: none"> • 15 days vacation/year • Maternity leave: 30 days prior and 54 days after birth 	<ul style="list-style-type: none"> • 15 days vacation/year • Maternity leave: 30 days prior and 54 days after birth

Pay Equity

One of the most frequent employees concerns was pay equity within the same employment categories. The mine has a complex structure of rotations and pay scales for different parts of the operation. The presence of different wage scales, scheduled versus unscheduled overtime, and the payment of overtime and its tracking (which varied between day and night shifts), were so complex that the assessors were unable to fully determine issues of pay equity and fairness across departments or levels. Moreover, management representatives acknowledged that salary scales are inconsistent, blaming irregularities on legacies of previous managers.

The failure to establish and implement policies and procedures that ensure pay equity both within and between salary categories constitutes an infringement on the right to just and favourable work with respect to equal remuneration for work of equal value. Montana is in the process of an external review of its salary structure. This review provides an opportunity to address the issue of “living wage” and improved pay equity. Similarly, the company intends to implement periodic performance evaluations. These initiatives could strengthen the company’s human resources practices, improve pay equity transparency, and help eliminate

concerns about discrimination in relation to employment and occupation.

Working Conditions

Employees expressed concerns about the basic working conditions at the mine, including discriminatory conditions for breaks and meals with allegations that non-indigenous people from outside have access to better conditions. Additional concerns were for underground miners, including lack of breaks, places to eat, availability of first aid, and long work hours.

These conditions were not verified independently by the assessors; however, review of OHS monthly reports indicates an ongoing process of addressing gaps in performance related to safety issues, which are discussed below. Other improvements included constructing a new employee dining hall, although employees from some departments reportedly do not have enough time in their lunch breaks to use the facility, given their work location.

The absence of an appropriate forum for raising and addressing worker concerns or complaints suggests there are risks of infringements on the right to just and favourable working conditions, and associated human rights such as the right to food. Except for the

allegation that non-locals receive preferential treatment, allegations were based on work areas within the mine site, not treatment specific to indigenous people. Similar to gender issues, if local indigenous people hold certain jobs predominately and these jobs are associated with less favourable work conditions, there is discrimination that could appear to be race-based.

The importance given by workers to these issues highlights the lack of a mechanism for employee-management dialogue about working conditions, as well as the absence of an effective grievance mechanism to address employee concerns.

Contracting Practices

There are ongoing concerns about the right to just and favourable work conditions in terms of Montana's contracting practices. According to a management representative, contractors are not required to adhere to any standard for payment or benefits.

Contract negotiations are decentralized, and human rights criteria such as respect for labour standards are not structured into the contracting process. Several managers identified their principal criteria as price, "it is none of our business what contractors pay their employees."⁴⁷ The concern is whether the mine is hiring contractors who provide services at the lowest price by lowering workers wages or potentially not paying overtime.

Although it was beyond the scope of the current assessment to investigate the human rights practices of the mine's contractors, the human rights impacts of the "supply chain" is an area for further assessment and due diligence.⁴⁸ Given concerns about the adequacy of wages and the enforcement of basic labour standards in rural Guatemala, there are risks that the contractors' labour practices fail to respect the right to just and favourable conditions of work.

Findings

There are divergences between wages provided within and between job categories that are not based on objective criteria or performance evaluations. This is an infringement on the right to equal pay for equivalent work and raises concerns about discrimination in employment and occupation.

The minimum wage in Guatemala does not provide for a "living wage" that would respect the right to just and favourable remuneration and other human rights (e.g. adequate food, housing, and standards of living). Some full-time employees at the mine receive wages under the living wage threshold, even when overtime wages are included, and others only surpass the living wage threshold when their overtime wages are included. This represents a failure to respect the right to just and favourable remuneration.

Given the time and distance most workers must travel to work, there is a risk that 12-hour rotations infringe on the right to just and favourable conditions of work and the right to a family life.

The assessors did not have sufficient information to identify whether other existing working conditions were adequate or constituted infringements. Concerns were raised by some employees, so further due diligence is required to identify and address any gaps.

Montana lacks adequate due diligence in contracting practices to ensure respect for human and labour rights by its contractors.

47 Interviews with Marlin managers.

48 Business partners, suppliers and customers is one of the focus areas in ICMM, October 2009, 13.

HEALTH AND SAFETY

Assessment L3: Has Montana ensured that working conditions are healthy and safe?

The importance of health and safety issues at the mine, and the well-being of employees, justified a separate assessment. This was an area of concern to employees and other stakeholders, in particular residents of the local area, and was heightened by the deaths in early 2009 of three employees.

The right to healthy and safe work conditions is a component of the right to just and favourable working conditions.⁴⁹ International labour standards address policies aimed at reducing accidents and injuries arising in the course of employment, and to minimize the causes of inherent workplace hazards.⁵⁰ These rights can be infringed when working conditions are unhealthy or unsafe, regardless of whether accidents or injuries actually occur. In the event of an actual accident or injury, the right to health and even the right to life of the worker(s) would be affected.

- The overall responsibility of the company is to protect workers against foreseeable dangers in the workplace.⁵¹ Among a company's responsibilities are to:⁵²
- Implement and update health and safety standards specific to and appropriate for the industry;
- Supply workers with appropriate personal protective equipment (PPE) and clothing;
- Provide adequate safety training and appropriate information about risks of handling hazardous substances and operating equipment;
- Implement procedures to respond to health and safety emergencies and provide access to suitable first-aid and medical treatment;
- Provide independent medical examinations and health services to workers exposed to hazardous substances;

- Conduct routine inspection and monitoring of equipment and working environment for health and safety dangers;
- Eliminate sources of physical and mental exhaustion;
- Reduce and eliminate risks to the reproductive capacity of workers and ensure tasks of pregnant and breastfeeding women are not harmful to unborn or newborn child;
- Ensure safety of transportation of workers; and
- Support employees to avoid health problems associated with night work.

Documentation on OHS performance prior to mid-2008 consisted of quarterly monitoring reports on OHS workplace indicators. A Goldcorp internal safety audit was conducted in May 2008. The OHS department provides monthly reports to the mine manager. Overall, the mine has a good track record in terms of reported safety and accidents since starting operations.

At present, Montana actively promotes the Goldcorp safety culture through safety promotions, visible daily awareness, safety supervisors assigned to operational departments, training activities, and creation of incentives and disincentives. The OHS department has a strategic program with objectives, an implementation plan, and milestones to be measured. In mid-2008 Montana implemented a safety program of the National Safety Council (US) and the mine has recently become certified compliant with the International Cyanide Code. Furthermore, Goldcorp conducts audits of the mine for safety issues within a company-wide program called the Golden Eye Safety Review.

The importance attributed to this area by management and by Goldcorp is recognized by most employees, as is the fact that conditions have improved significantly. Testimonies from mine management, the head of OHS, and employees at all levels indicate that in the last two years health and safety performance at the mine has improved significantly. There is good corroboration that safety is taken seriously and continues to improve. The company reports a 24 per cent reduction in lost time incidents from 2007 to 2008.

49 ICESCR, Article 7; Additional Protocol to ACHR, Article 7.

50 ILO 155; ILO 161.

51 DIHR 331.

52 DIHR 160 and 198; 157; 159; 156, 151, 155, 154, 138, 67, 145, 139, 150.

There is an on-site medical clinic staffed with a doctor 24 hours and equipped to deal with work-related accidents and incidents. Prior to 2009, testing for indicators of industrial illnesses took place only when indications of a problem existed; in 2009 the mine began to compile a baseline of employee health and to monitor on an ongoing basis certain indicators for industrial illnesses associated with gold mining.

During construction of the mine there were six deaths in the construction workforce in three separate accidents.⁵³ In recent years, the mine has had a good safety record, and no fatalities have been reported during operation of the mine. Despite this statistical improvement, stakeholders have concerns about health and safety at the mine that include:

- Historically, a lack of access to personal protection equipment (PPE) and training on handling hazardous chemicals;
- Concentration on cyanide code compliance to the exclusion of other chemicals;
- Employee exposure to hazardous chemicals; and
- Adequacy of medical treatment at the mine.

Independent Hazard Assessment of Chemical Constituents

During the assessment of potential risks of adverse health effects, the assessors commissioned an external independent hazard assessment, provided in Appendix I, to identify chemicals of potential concern in the workplace. The assessment was based on the chemical composition of the ore and process chemicals used in the mine and refining process, as provided by Goldcorp's regional environmental manager. In addition, the assessment examined the procedures workers are currently expected to follow when handling and using materials in the mine and processing facility.

The principle findings of the assessment are:

- Ten chemicals of potential concern (COPCs) were identified in the ore⁵⁴ and one (cyanide) associat-

ed with the Merrill Crowe process that may require further consideration. There are also several caustic chemicals⁵⁵ of potential concern used in the Merrill Crowe process. However, the materials handling and process management documented for the mine were consistent with procedures that ensure adequate control over workplace exposure to the COPCs and other process chemicals, provided these procedures are consistently and properly followed by workers.

- Chemicals employed in the Merrill Crowe process are all used in a closed system. The only time the system is open is during repairs/maintenance, which is performed by specially trained and protected workers following procedures established by the International Cyanide Management Council.
- Small particles of ore could become suspended in the air as dust. The dust, containing the 10 COPCs, would contribute to the airborne dust at the work-site and, to a much lesser degree, in the adjacent community, potentially posing a health concern.

Based on the hazard assessment, the independent expert made three recommendations:

- Establish procedures for regular, documented, unannounced, independent, third-party audits of the occupational health and safety procedures, chemical handling procedures, and general practices at the mine.
- Implement a program to improve the general health and well-being of the community where employees and their families live. The result would be improved worker health and safety in the workplace by addressing the secondary health and societal situations that affect the safety of the workplace per se.
- Investigate the presence and risks associated with COPCs from the ore in dust on the mine/processing site and in the adjacent community. If risks exist, adopt procedures to improve mitigation measures already in place in a manner consistent with the data.

⁵³ Montana AMR, 2005, 76-77. Five of the deaths occurred in two accidents related to transport to work, but not at the construction site.

⁵⁴ Arsenic, cadmium, chromium, lead, manganese, mercury, nickel, selenium, thallium and zinc. Of these, the assessors note the markedly high natural abundance of thallium in the ore.

⁵⁵ Sodium metabisulphite, hydrochloric acid, sulfuric acid, sodium hydroxide, lime.

Health and Safety Procedures

Significant improvements to health and safety have been made under Goldcorp's management, both with respect to the systems put in place for compliance with the International Cyanide Management Code since mid-2008, and in the introduction of a new safety culture at the mine. Nonetheless, employees expressed concern about health risks associated with exposure to other chemicals at the plant, for which they had not received training on risks or symptoms.

The assessors observed five-minute safety talks at shift changes, safety review cards at commencement of shifts, and a 30-minute safety briefing at the underground mine. The OHS manager also reported that there are monthly safety inspections and cross-departmental reviews. Review of monthly reports indicate that a number of activities have been initiated to strengthen OHS performance, including regular reviews of contractor compliance, departmental safety meetings that include employees⁵⁶, and intensified internal training. Actions in response to Goldcorp safety audit findings are also indicated in the monthly reports.

There is convergent information from interviews and focus groups with supervisors, managers and workers that:

- Health and safety procedures were previously not to the standard practiced today. Standard operating procedures, supported by a formal training program were not in place in some high risk areas prior to mid-2008;⁵⁷
- Proper safety equipment and PPE were not always used or available in the past, including for workers handling cyanide and other chemicals in the processing plant; and
- Training on cyanide risks is widely recognized as a positive improvement, but training and education on other risks and chemical handling concerns have not been provided.

⁵⁶ Inclusion of workers was a new policy in mid-2009. No worker mentioned these meetings as a mechanism for addressing concerns.

⁵⁷ Interview with Marlin Mine manager.

With regard to chemical exposure and handling, the hazard assessment indicates that current procedures are adequate and appropriate for worker protection and respect the right to a safe and healthy workplace if the procedures are implemented as designed. Nevertheless, the lack of procedures in the past may have resulted in workers exposure to chemicals that may present risks to their health and further due diligence is required.

Health Related Incidents

Interviews with local residents and employees indicated a high level of concern about the three recent employee deaths; reports circulated amongst health specialists and local people that the symptoms were similar and that the workers had been exposed to chemicals at work. Two of the employees were purported to have been sprayed with cyanide solution or to have fallen into the tailings facility.

The information available does not permit conclusive determination on work-related exposure. The plant maintenance employee who died in May was diagnosed with liver cancer and under treatment for six months prior to his death. Independent expert opinion requested by the assessors indicated that liver cancer generally takes 15 to 20 years to develop; it was very unlikely that it was related to employment at the mine. The other two deaths occurred, according to their employee files, without medical treatment of any kind.⁵⁸

The assessment identified that during the life of the mine there have been other indications of exposure to chemicals sufficient to cause temporary symptoms, including employees who report incidents of cyanide intoxication. The assessors looked closely at one particular incident involving cyanide intoxication of two supervisors in August 2008. The incident indicates the risk existed in spite of the processing system being closed with the absence of stationary or portable cyanide gas monitors suggesting a lack of prior attention.⁵⁹

⁵⁸ Post-mortem causes of death were given as pneumonia and diarrhea; however, neither had medical attention, diagnosis or treatment prior to their deaths at home. Review of notices of termination of contract in personnel file, Marlin Mine.

⁵⁹ According to interviews and the incident report, prior to the incident there was no monitor in that part of the plant and the two portable monitors available were not used when operating in and around the cyanide circuit.

The incident was well documented internally, and was followed up with increased education on risks, changes to procedures, and improved use of safety equipment, indicating appropriate responses to the incident.⁶⁰

The occurrence of chemical (cyanide) intoxication and the employee deaths have collectively raised uncertainties among stakeholders about exposure to hazardous chemicals and drawn attention to serious ongoing concern about the right to health, and even the right to life, of employees at the mine.

Employee Health

Addressing health risks and impacts on employees requires baseline health studies, ongoing health monitoring, and access to proper medical treatment. The assessment found serious deficiencies in the conduct of baseline studies and monitoring. In the original ESIA, Montana committed that all employees would receive medical exams at the start of employment (hearing, complete physical, lab tests, chest x-rays and EKG), followed by annual blood tests and chest x-rays for all employees and hearing tests for underground miners.⁶¹ However, a health specialist representing the Human Rights Ombudsman (PDH) visited the mine in June 2006 and confirmed that there was no systematic follow-up on worker health.⁶²

The first systematic health tests were only begun in mid-2008, when Montana conducted blood tests of workers in the processing plant and lab. Monitoring hearing in workers in high noise areas was also initiated in 2008. A non-compliance resolution issued in April 2009 by the Ministry of Environment and Natural Resources (MARN), found that although the company committed to annual blood tests and chest x-rays of all employees, as well as hearing tests for underground and plant employees, the records for these exams were not provided for inspection.

60 The mine's OHS department conducted an incident investigation to identify causes of the incident, procedures were introduced restricting access to and requiring the use of PPE in that area, a stationary monitor for cyanide gas was installed in the work area, and portable monitors required for all maintenance workers in the area. This was verified through interviews and review of documents.

61 Montana ESIA, 2003, 8-34, 10-20.

62 PDH, 2006.

The fact that systematic health testing only began four or five years after the start of the mine's operations is a significant failure to respect the right to health of employees through appropriate due diligence. Employee interviews identified the recent initiation of health monitoring, and human resources and OHS management acknowledge that health baseline studies of employees and monitoring of priority health indicators – lung x-rays, hearing, heavy metal blood testing – were initiated in 2009. Chest x-rays were initiated in June 2009 when the assessors were on site.

Another issue identified by mine's management is that there had been no prior risk assessment for underground mine-related health issues such as noise, rock fall, dust, or equipment breakage. The company intended to conduct an OHS assessment in 2009. By November 2009 this had not been done.

Provision of On-Site Medical Support

The assessors were informed of three separate occasions where fear and uncertainty led workers to seek second opinions, at their own cost, regarding medical incidents that took place at the mine. Similarly, public health practitioners reported a pattern of workers going to the public health system with what were described as work-related problems, despite medical services being available at the mine. This reveals serious ongoing concerns among workers about the adequacy and credibility of the health care and attention provided by the company. Interviews indicate that there is poor communication or disclosure associated with medical testing that has been performed. Employees did not feel informed about the results and the implications of the findings.

The assessors note that in two of the three employee deaths, review of the employee files indicated the employees died at home without medical care, of apparently treatable diseases. The cause of death in one case was pneumonia, and in the second case, diarrhoea, although the absence of medical treatment suggests these determinations may not have been accurate. There is insufficient information to determine what took place in either case; however, the absence of medical care alone is a serious concern as the company purports to provide employees clinic attention and medical insurance to address health care requirements.

Montana has instituted a program of private health insurance to benefit employees; exceeding legal requirements. However, there is an ongoing pattern of workers and their families resorting to the local public health clinic in San Miguel for treatment. The preference for the public clinic over the mine clinic was not verified, however, as the issue was identified late in the assessment. Nonetheless, the Q300 (\$38) co-payment required to use the private medical insurance could be a potential barrier to the medical insurance program.

Findings

Prior to mid-2008, health and safety procedures were deficient in some areas and it is probable that there were infringements in the past on the right to healthy and safe working conditions. However, there is insufficient material evidence to identify the extent of such infringements, nor is there information to determine whether they led to infringements of the right to health or life of employees. The Marlin Mine is addressing

past gaps in safety and shows steady improvement over the last two years, indicating respect for the right to a safe work environment.

Montana has failed to respect the right to health of employees through adequate due diligence in the form of employee health baseline testing on entering employment, and routine testing for known industrial illness indicators during employment. Improvement in the attention to worker health has dragged behind safety, and does not yet show a level of due diligence that can be qualified as respect for the right to health. The lack of material evidence that this failure resulted in health impacts prevents the assessors from identifying this as an infringement on the right to health or the right to life, but a thorough health risk assessment, including a review of past exposure, is required to address the information gaps, including review of the illnesses and deaths of workers to date.

Further due diligence is required to review past incidents and risk levels, determine whether there are ongoing health impacts, and ensure company commitment to non-repetition of past gaps.

PROTECTION OF WORKERS INTERESTS AND RIGHTS

Assessment L4: Are there adequate mechanisms to protect workers interests and rights?

The primary mechanism for workers' to protect their interests and rights is their ability to associate and bargain with their employer. In this regard, freedom of association and the right to collective bargaining are included in the fundamental labour rights set forth in the ILO Declaration on Fundamental Principles and Rights at Work.⁶³

Freedom of association and the right to collective bargaining can be respected through organization and industrial relation processes other than unionization; however, the specific right to form and join trade unions and the right to strike are protected by

the International Covenant on Economic, Social and Cultural Rights.⁶⁴

In addition, many of the criteria for compliance with international labour and human rights standards mentioned in this section point to the need for responsive internal mechanisms that allow workers to report concerns about working conditions and to resolve grievances. This is distinct from the need for mechanisms to provide access to remedies for the company's external stakeholders, which is discussed in Section 8: Access to Remedy.

Inspections by independent experts and government labour authorities are also important mechanisms to protect workers' interests and rights and enforce the relevant labour, health and safety standards.

⁶³ ILO 87; ILO 95; ICCPR, Articles 19, 22 protect the related to rights of freedom of expression and freedom of association.

⁶⁴ ICESCR, Article 8.

To respect the right to freedom of association and collective bargaining,⁶⁵ a company's responsibilities are to:⁶⁶

- Recognize independent worker trade unions and representatives where they exist (free from influence by employer), and respect the right to engage in collective bargaining;
- Prohibit discrimination, intimidation, harassment, or violence against union workers and representatives, or workers engaging in union-related activities;
- When trade unions do not exist, establish alternative measures to allow employees to gather and discuss work-related issues free from the influence of the company or government;
- Consult with employees and provide information on matters of mutual concern;
- Facilitate the participation of workers in occupational health and safety issues;
- Recognize the role of consultation with employee representatives in ensuring layoffs are conducted fairly and in mitigating the impact of the layoffs;
- Provide responsive mechanisms for resolving workers' grievances and for workers to report unsafe or unhealthy working conditions;⁶⁷
- Ensure employees can exercise their rights and report concerns without fear of retaliation; and
- Ensure non-interference with labour inspectors and remedy the deficiencies identified.

In the context of Guatemala, the issues of freedom of association and collective bargaining are sensitive, with a history of repression of labour unions and assassination of union leaders during the civil war and more

65 ILO 95.

66 DIHR 237, 246; 240-244; 245; 330; 153; 304-306; 152 and 332; 302; 296.

67 In terms of providing a grievance mechanism, IFC Performance standards state that: The client will provide a grievance mechanism for workers (and their organizations, where they exist) to raise reasonable workplace concerns. The client will inform the workers of the grievance mechanism at the time of hire, and make it easily accessible to them. The mechanism should involve an appropriate level of management and address concerns promptly, using an understandable and transparent process that provides feedback to those concerned, without any retribution. The mechanism should not impede access to other judicial or administrative remedies that might be available under law or through existing arbitration procedures, or substitute for grievance mechanisms provided through collective agreements.

recently. There is a recognized anti-union attitude in the country in spite of formal support for the right to organize.

Montana's internal regulations formally recognize workers' right to unionize. Goldcorp has stated publicly that the company "supports its employees' rights of freedom of association and collective bargaining. This includes the right of individual employees to join a union or other work-related cooperative. We also support the right of our employees not to join a union or other work-related cooperative and to be free from coercion to do so."⁶⁸

There is no union at the mine. Montana has supported the formation of ASOTRAMÓN, a solidarity association that serves various functions, including stimulating workers savings and generating additional income through employee investment and company contributions to a common fund.⁶⁹ When the worker terminates their working relationship with the company, the worker withdraws their contribution to the fund, plus the interest gained from the personal and employer matching contributions. Until recently, Montana managers have served on the executive board of ASOTRAMÓN. Solidarity associations do not represent workers concerns or issues to management, and are not involved in wage discussions or collective bargaining.

Stakeholder interviews with current and past employees, and residents of adjacent communities, provided the following information:

- Allegations that in 2005/2006, leaders of unionizing efforts were selectively fired as a warning to others;
- Other employees were threatened with dismissal if they supported the effort to unionize or participated in social mobilizations;

68 Goldcorp Inc., 2008a.

69 Each employee puts between 5 and 8.3% of his/her income into a common fund, which is matched by a similar contribution from the employer. This matching contribution is an advance on the retirement obligations of the employer. The accumulated capital is used to provide credits (health, education, housing, personal expenses); services (food provider, dining, recreational activities, food stores, transportation); investment (shares, enterprises); and profit (proportional distribution of profits from businesses or investments operated using the savings contributions).

- Employees are afraid of losing their jobs if they try to organize a union; and
- There is no forum in which employees can raise issues of common interest or seek redress for unfair treatment or conditions.

Association and Collective Bargaining

Specific concerns about attempts to prevent the organization of a union at the mine were brought up during interviews. In eight separate individual or group interviews, employees gave convergent accounts of other employees being fired for attempting to organize a union in 2006. The reason given for the dismissals at the time was departmental restructuring; however, it was reported that the intention was clearly understood and that now everyone is afraid, no one dares to organize anymore. Three employees, in separate meetings, said they had been told by their managers they would be fired if they supported the effort to organize a union. According to one worker, “ASOTRAMÓN does not function as a union, the union is forbidden, there is not one. They throw us out if we form a union.”

Management representatives and company’s reports present ASOTRAMÓN as a mechanism that facilitates the association of workers; however, a review of the mandate and functions of the organization demonstrates shortcomings in terms of respecting freedom of association and collective bargaining. Interviewees who identified the union issue saw the formation of ASOTRAMÓN in 2006 as a management effort to supplant unionizing efforts.

The principle objectives of ASOTRAMÓN are economic (e.g creating micro-enterprises to maximize workers’ contributions to their retirement funds) and social activities outside the normal working environment and relations at the mine. While these economic and social activities may be important and valuable, the organization is not involved in labour rights, health, or safety issues, nor does it participate in the minimum collective bargaining issues of hours of work, breaks, vacations, and wages. The association does not intervene with management on behalf of employee concerns or interests. Even if ASOTRAMÓN were to address labour issues, the fact that managers and supervisors are also

part of ASOTRAMÓN is problematic from the point of view of collective bargaining.

The limitations of ASOTRAMÓN as a mechanism to ensure respect for freedom of association are consistent with concerns raised by Guatemalan trade unions that “employers promote these associations to avoid the formation of unions.”⁷⁰ The fact that Guatemalan law allows workers to belong to both a solidarity association and a union, but not to two different unions, reinforces understanding that solidarity associations typically serve different purposes than unions. Moreover, the lack of collective bargaining is consistent with the US State Department’s observation that the “low level of unionization and employers’ aversion to share power with workers limits the practice of collective bargaining in Guatemala.”⁷¹

There was external confirmation from both the PDH and union organizers in Guatemala City regarding requests for assistance to unionize from mine workers. Some of the information from external sources was consistent with local interview information; however, the information provided was inconclusive and dates were inconsistent. The union representative suggested there had been several attempts at different times to unionize, and that the distance to travel as well as perceived threats to union organizers meant the union movement had been able to provide little assistance to Marlin workers.

The assessors recognize that unionization is a complex and sensitive issue in Guatemala, particularly given the historical fears associated with union activity repression and violence against union leaders. Unionization is not necessarily the solution that workers will choose voluntarily as an expression of their rights of freedom of association and collective bargaining; however, if Montana is to respect these rights, it needs to ensure that measures to support these rights are implemented and that there is no tolerance of reprisals (dismissals, blacklisting) against union activity or other forms of worker organization. It is useful to note that, in the Global Reporting Initiative G3 Guidelines, one of the indicators is “operations identified in which the right to exercise freedom of association and collective bargaining may be at significant risk, and actions taken

⁷⁰ US Department of Labor, 2005, 78.

⁷¹ Ibid, 78, citing the 2003 US State Department country report for Guatemala at footnote 698.

to support these rights.”⁷² Workers are not aware of Goldcorp’s policies on employees’ rights of freedom of association and collective bargaining.

Grievance Mechanisms

The need for an internal grievance mechanism for workers is similar to the issue of access to remedies for other stakeholders. Without an effective mechanism for workers to raise concerns and have grievances addressed, it is difficult for a company to exercise due diligence; an effective grievance mechanism is part of the corporate responsibility to respect labour rights.

Stakeholders expressed specific concerns that:

- Workers can only present a grievance or complaint through their supervisor, who is also responsible for promotions, reclassification and raises; and
- Management is closed to contributions and opinions of workers.

At present, there are no formal, functioning mechanisms for addressing workers’ concerns and grievances at the mine. In the interviews, none of the workers knew anything about a grievance process other than going through their direct supervisor. Senior management referred to the whistle-blower program put in place by Goldcorp; however, it was not mentioned by any employee including supervisors and mid-management as a mechanism for registering complaints or concerns about labour issues.⁷³

The OHS manager advised the assessors that the mine has recently expanded departmental safety committees to include worker participation. This has the potential to open a channel for addressing employee concerns about safety and is a positive innovation. Of itself, this is not sufficient, or indeed appropriate, to deal with all labour-related concerns, but is an example of what can be done. Indeed, multiple channels provide better flows of information between workers and management.

Findings

Montana has infringed the right to freedom of association and collective bargaining because there are no mechanisms in place that safeguard those rights. There is reasonable evidence that during 2006 Montana infringed on the right to freedom of association by taking retaliatory action up to and including dismissal against employees that attempted to form a union. This action has had a lasting effect on employees who continue to believe they would face retaliation from the company if there were attempts to unionize. Montana continues to infringe on the rights of all workers by allowing this climate of intimidation to persist.

The mine does not have an effective internal mechanism for workers to raise concerns and have grievances addressed. This represents a failure to respect the right to remedy, and has implications for all relevant labour and human rights that might need to be addressed. This is a major shortcoming in the mine’s ongoing due diligence on labour rights.

72 GRI G3 Guidelines, indicator HR5.

73 The most senior level managers at the Marlin Mine were the only ones who expressed any knowledge of the Whistleblower hotline as a complaint process available to employees.

RECOMMENDATIONS

RECOMMENDATIONS FOR IMMEDIATE ACTION

- **ADDRESS FOUR URGENT AREAS OF CONCERN FOR LABOUR RIGHTS.** The following four issues require a serious review of labour relations at the marlin mine, and must be carried out by creating an environment of open dialogue and non-retaliation of workers who bring problems forward. Specific protections and assurances will need to be put in place, and a corporate commitment to transparent and ongoing dialogue to address workers' concerns and complaints. The assessors conclude that given the current environment, these internal labor issues require Goldcorp leadership and oversight.
- **INDUSTRIAL HEALTH PROBLEMS IN THE WORKFORCE.** Address immediately the situation of any employees with blood tests indicating heavy metals at problematic levels, or any other indicator of industrial health problems. Provide them with access to support and independent second opinions from health care specialists. Review the deaths that have taken place in the labour force to establish that no industrial exposure could have been the cause.
- **ADDRESS WORKPLACE ISSUES.** Take immediate action and problem-solve with employees on issues of concern, workplace logistics, and access to basic facilities. The dialogue on specific issues can evolve into a more formal structure for collective bargaining in the medium term.
- **SUPPORT FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING.** Support development of an employee-based workers' association (not management run) to promote and address workers' rights on an ongoing basis. Facilitate external advice and resources to educate workers on labour rights and collective bargaining processes. Ensure effective measures to prevent management taking retaliatory action against workers that exercise those rights. Train and raise awareness at all levels of management to respect freedom of association and collective bargaining.
- **ESTABLISH A WORKERS' GRIEVANCE MECHANISM.** Provide an internal grievance mechanism as part of

the proactive management of labour rights issues, with final recourse to an external or third party review considered legitimate by employees. Ensure confidential means for making and pursuing complaints.

RECOMMENDATIONS THAT ADDRESS LEGACY ISSUES

- **CONDUCT AN INDEPENDENT REVIEW OF FIRINGS.** Establish an independent review panel with credible third parties to review the files of employees that have been fired by Montana. Where there is inadequate evidence to establish that due process was followed in firing, provide alternatives to restore employment or compensate for damages.
- **COMPLETE A REVIEW OF WAGES.** Undertake a thorough review of existing wage structures and identify problems in equity of pay for equivalent jobs. Develop a plan to respond to the need for employees to have a living wage. Commit to and implement pay equity for the same or equivalent job. Review wages paid to contractors.

RECOMMENDATIONS FOR ONGOING DUE DILIGENCE

- **IMPLEMENT HUMAN RESOURCES PROCEDURES THAT PROMOTE NON-DISCRIMINATION AND DIVERSITY.** Implement objective, transparent procedures for hiring, promotion, discipline and firing to address the risk of bias, discrimination or favouritism/nepotism. Ensure due process for all decisions, and integrate the objectives of the new strategy across all departments. Pay particular attention to policies and procedures related to respecting the rights of women and indigenous peoples in the workplace. Develop disaggregated tracking of indigenous and female hiring, firing, promotion, pay status and raises, to report on effectiveness of indigenous and female employment commitments. Support management to implement these in practice through training, monitoring, evaluation, and incentives.
- **MAINTAIN AND FORMALIZE COMMITMENT TO HIRE LOCALLY.** Identify current barriers to female and indigenous employment and advancement and



initiate programs to address these. Develop specific educational strategies and processes for people with low literacy levels. Training is one of the keys for employment and advancement of local, indigenous men and women. Ensure that training materials are culturally appropriate and supported by translation in local languages (an indigenous and cultural rights issue, but also a health and safety issue). Link the human resources and sustainable development departments operationally so there is a coherent program to fulfil commitments from land acquisition and to ensure that local employment and contracting objectives are aligned with a long-term sustainable development strategy.

- **IMPROVE WORKERS' ACCESS TO HEALTH CARE.** Review employee perceptions and satisfaction with health care at the on-site clinic, and identify barriers to providing effective care and treatment for workers. Investigate the appropriateness and accessibility of the private health insurance with a Q300 (\$38) deductible. Determine who has been using it, for what kinds of treatment, and develop adjusted insurance coverage as required, considering the results of the investigation into employee deaths. Engage and collaborate with local health care providers to determine the reason for ongoing use of the public system by mine employees. Review social investment commitments to community health as a contribution to employee health.
- **CONDUCT UNSCHEDULED AUDITS FOR SAFETY AND HEALTH ISSUES.** Contract a qualified external company or specialist to undertake unscheduled, documented, third-party audits.
- **ENSURE CONTRACTORS RESPECT LABOUR RIGHTS.** Extend improvements in labour standards to contractors and their employees, including wages, and include these standards in contracts. Provide support

and training to help local contractors respect these standards. Conduct periodic inspections of contractors to ensure respect for human rights.

- **RETRAIN THE WORKFORCE.** Anticipate the end of the mine life through training opportunities that provide transferable skills that will provide further opportunities to exercise the right to work and to maintain an adequate standard of living after the mine closes. Develop a strategy for how to support contractors to prepare for mine closure and reduce dependency on mine economy over upcoming years.

CORPORATE-LEVEL RECOMMENDATIONS

- **REVIEW OCCUPATIONAL HEALTH AND SAFETY POLICIES, PROCEDURES AND PRACTICES.** Ensure that international standards are being met across the board, not just with respect to the International Cyanide Code. Undertake an operation-wide health risk assessment, including a review of potential health exposure risks incurred by employees since initiating operation.
- **REVIEW LABOUR RELATIONS.** Put in place a comprehensive review of labour relations and compliance with corporate policies, lead by an internal Goldcorp champion reporting directly to either the CEO or Board of Directors. Set a timetable for a review.
- **STRENGTHEN INDUSTRIAL HEALTH PROGRAM.** Establish a best practice preventive health maintenance program for all workers, including scheduled monitoring for exposure to any measurable risks, an approved action plan for responding to any identified issues, and an public disclosure and reporting process upward to Goldcorp's CEO or Board of Directors.

CONCLUSIONS

On a day-to-day basis, many of the most direct human rights impacts of the Marlin Mine are experienced by workers. Employees reported that generally these are positive in terms of personal skills development and remuneration. In relation to a mine, positive outcomes and respect for human rights are particularly linked to occupational health and safety performance. As noted above, this is one of the areas where Goldcorp's policies, procedures and practices are having a demonstrable positive impact on the performance of the Marlin Mine. Therefore, Goldcorp and Montana can draw on the successes in implementing their OHS systems for guidance on building systems for broader due diligence for human rights.

A strong safety record should be a source of pride for management and workers alike. Similarly, strong human rights performance should not only be viewed as a matter of international law and broader social expectation; as human rights are integrated into the internal culture of a company, there are many opportunities to enhance satisfaction and dedication at all levels, from security guard to CEO. In a context such as the Marlin Mine, where there have been real achievements in terms of local employment, a strong commitment to labour rights is an end in itself, but it will not go unnoticed in the broader community. The Marlin Mine's workforce is an extension of the communities; workers can be important ambassadors for communicating a broader change of policy and approach to human rights.



Land Acquisition

Land acquisition was identified as an issue for the assessment because the location of the mine in a poor, rural area of Western Guatemala raised concerns associated with land acquisition and resettlement of indigenous subsistence-level farmers. Montana has purchased over 600 parcels of land within the 20 square kilometres of its mining license,¹ and continues to acquire land around the Marlin Mine.

Land acquisition by mining companies has historically had impacts on human rights; specific industry standards to protect the rights of landowners were developed in response, with particular attention to indigenous peoples. General concerns include whether Montana's land acquisition process has avoided involuntary resettlement; provided fair compensation for loss of assets; adequately maintained the standard of living of its land sellers; and, respected indigenous peoples rights to land and common property resources.

Concerns about land acquisition were raised by international NGOs during the scoping stage interviews. Locally, both municipal and community authorities raised concerns about the land acquisition process. Several local stakeholders interviewed for the assessment expressed the opinion that issues associated with land acquisition are at the heart of conflicts related to the mine.

¹ Because the scope of this assessment is the Marlin Mine, land acquisition related to exploration activities outside of the existing mining license area was not reviewed.

BACKGROUND

National Context

Guatemala is reputed to have one of the most unequal land distributions in the world, given a long history of land alienation from indigenous people.² Land expropriation began with the Spanish Conquest, and accelerated in the late 1800s with the growth of coffee production and political reforms aimed at modernizing the country and the economy. At that time, legislative reforms oriented toward privatization of lands began a long and uneven process of conversion of various forms of communal or collective lands³ to privatized rights; along the way, this involved the loss to indigenous communities of much of the land base they previously used. The history of land loss was complex and specific to each area,⁴ but in general the most productive lands ended up as commercial farms, and the indigenous communities left with steeper, less fertile ground for subsistence farming. Through the usurpa-

² Viscidi, 2004.

³ There were various forms of collective or communal lands, including ejidos, communal forests, communal lands, etc. (see Thillet, 2003). The experience of Mayan people discussed in Lovell's review is that titling land resulted in loss of areas previously considered theirs (see Lovell, 1997 for discussions of the patterns of loss of land through titling, usurpation and legal battles from the 1880s onward).

⁴ Davis, 1997.

tion and parcelization of communal lands, the territorial possession of indigenous communities was eroded.⁵

The pattern of concentration of lands was briefly interrupted when Guatemalan President Jacobo Arbenz initiated the Agrarian Reform Law in 1952. The law called for the expropriation of mostly idle lands from large plantation owners to be redistributed to poor farmers, a reform that benefited an estimated 100,000 families. After a military coup in 1954, the law was annulled and 78 per cent of the redistributed land was returned to the prior owners.⁶ Land concentration and growing landlessness contributed to Guatemala's 36-year civil war; yet the war exacerbated the situation as the military and plantation owners forcibly controlled more land.⁷

Currently, land remains highly concentrated, and rural landlessness is increasing, reaching 29 per cent of rural households in 2000, up from 23 per cent in 1979.⁸ There were an estimated 400,000 landless rural families in the 2003 census. Guatemala is one of the few countries in Latin America where the rural population is growing, with 61 per cent of the population in rural areas.

The history of struggle over land in Guatemala led indigenous communities to develop mechanisms for protecting their communal lands. One such mechanism was to designate and title communal lands as municipal lands after the land regime was reorganized according to the Civil Code of 1877.⁹ A second strategy used was to register the name of a community elder on the land title, who essentially held that land in trust for the rest of the community.¹⁰ This pattern still exists in at least some of the communities in the area around the Marlin Mine, as was confirmed in local interviews.

5 Cordaid, 2009, Part B, Chapter 1.

6 Thillet, 2003, 81.

7 Special Rapporteur on the right to food, Jean Ziegler, January 2006, para. 16.

8 Baumeister, 2002, 13.

9 A recent report published by the Dutch organization Cordaid argues that this process was undertaken by the municipal authorities in San Miguel and Sipacapa. That this practice took place is corroborated by the case study of Santa Eulalia Municipality, Huehuetenango where, between 1888 – 1902 "...la titulación de terrenos municipales representaba un intento de la comunidad indígena para proteger los reclamos corporativos de tierras." ["...the titling of municipal lands represented an effort by the indigenous community to protect the collective land claims"]. See Davis, 1997, 48-49.

10 Davis, 1997, 48.

For example, an employee of the mine who is also a resident of a community in the municipality of San Miguel Ixtahuacán (San Miguel), described his grandfather as holding title to communal lands in trust for the entire community.

Within the communal lands, individual families could have possession rights over a specific parcel and could cultivate the land and pass the land from father to son through inheritance. Some research suggests that individual families, although they had established use rights to lands, were not able to transfer that right, or by extension ownership of those lands, to those outside the group,¹¹ although this was not described as the prevailing norm. When not in the hands of the individual, the decision-making power about alienation of land remained in the hands of the community as a whole. However, as individual property rights became more prevalent, many indigenous people went to notaries and obtained a certificate of possession¹² or at times full ownership, which they registered.

In the context of the 1996 Peace Accords, a number of commitments were made in the Agreement on the Identity and Rights of Indigenous Peoples to guarantee the land rights of indigenous peoples. These commitments related to the regularization of land tenure and guarantees of the rights of indigenous people to the use and management of their lands and resources, the restitution of communal land or compensation for dispossession, and the acquisition of land for the development of indigenous communities. These political commitments reinforced the legal protections of indigenous communal lands in the Guatemalan Constitution of 1985 and in ILO Convention 169, which was signed by Guatemala in 1996.

Successive governments have failed to effectively implement the land reforms promised in the Peace Accords. Some market-based processes were put in place, such as loans for land purchases, but these failed to provide land to those most in need. In addition, it appears that government-funded land purchases in fact drove up the prices of rural land, such that

11 Thillet, 2003.

12 Many indigenous people, including currently, hold their land with established possession right, not formal property ownership. Such possession rights can be attested to by municipal authorities through a public deed, called an *escritura pública*.

government funds provided land for fewer peasants, and beneficiaries became further in debt.¹³

Several United Nations experts have commented on the land situation of indigenous people in Guatemala:

*The lack of access to land, the lack of response to land-related claims, lack of respect for traditional places like communal forests, forced resettlement of indigenous peoples as a result of economic development projects, and problems stemming from loss of land caused by the armed conflict, create a situation of rising social tensions. The situation faced by indigenous women is especially insecure.*¹⁴

*[T]he question of land remains a serious source of social conflict due to the continued lack of an effective land registry system (catastro), of an agrarian code and of legal recognition of indigenous forms of land ownership.*¹⁵

Part of the social conflict about land is directly related to the contested issue of mining and megaprojects. In this regard, prominent officials of the Catholic Church have called on peasants not to sell their lands to multinational corporations.¹⁶

Another issue of importance at a national level involves patterns of inheritance that favour men over women. While it is part of Mayan cultural tradition to pass land from fathers to sons, or to the sons of daughters, the right to equal inheritance is protected in the Guatemalan Civil Code of 1877, 1933 and 1963. As land became increasingly scarce and there was greater awareness of the legal rights of women, disputes over the inheritance of land became more frequent. Women's rights remain secondary, however, within the complex system of Mayan use and inheritance.¹⁷

13 Handy, 1984, 25.

14 Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, February 2003.

15 Ziegler, January 2006, 2.

16 Bermúdez, 2007.

17 Davis, 1997.

Local Context

The Marlin Mine is located on land that previously belonged to four indigenous communities; three Mayan Mam communities in San Miguel Ixtahuacán – San Jose Nueva Esperanza, San Jose Ixcaniche, and Agel – as well as Tzalem, a Mayan Sipakapense community in Sipacapa. Community boundaries are not formally mapped within the municipalities, but residents know to which community they belong. As populations grow, smaller settlements known as *caserios* or *aldeas* form within a community and can obtain a degree of autonomy from the parent community over time. Today, the municipality of San Miguel has a population of approximately 40,000 in 62 communities or *aldeas* with their own elected auxiliary mayors, and Sipacapa's population is approximately 14,000 people in 54 communities or *aldeas*.

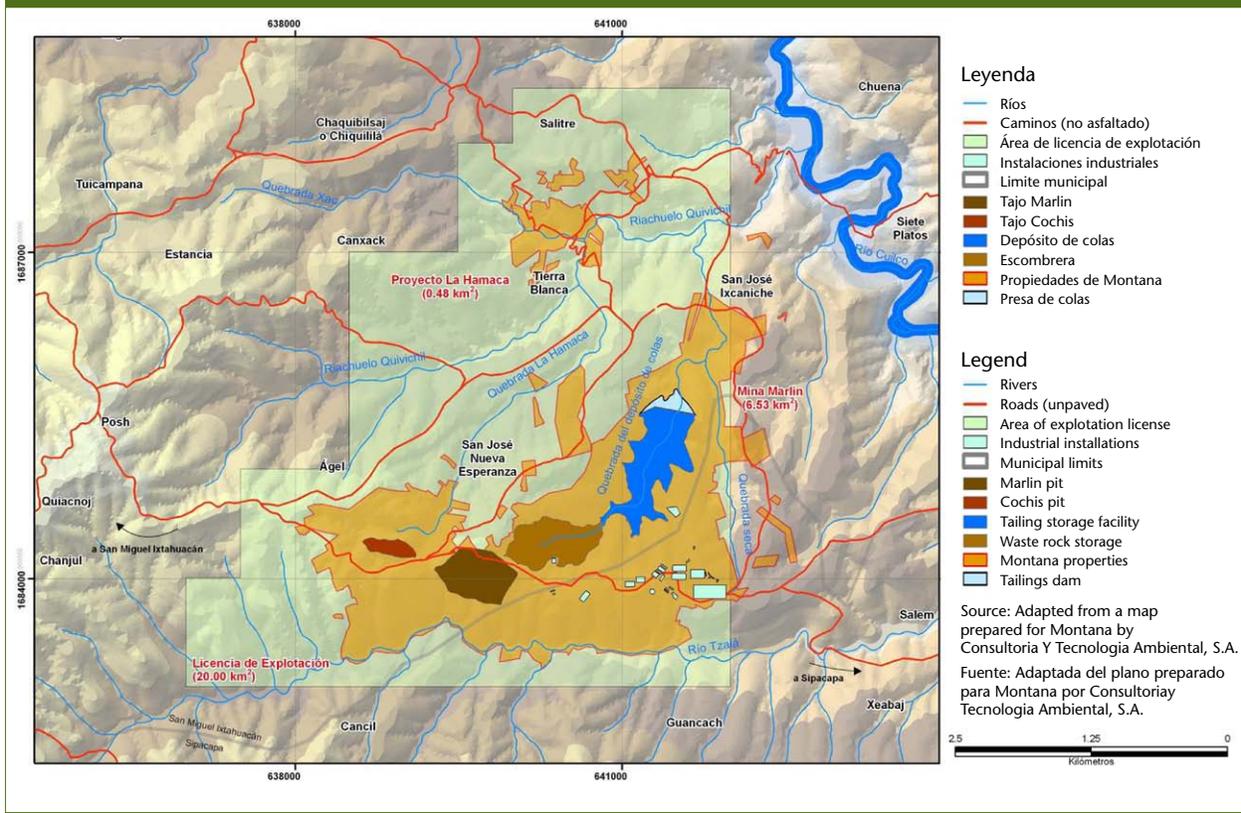
Physically, in the immediate area of the mine the terrain is described in various Montana documents as having steep slopes, dispersed forest cover, and thin soils.¹⁸ Dispersed households were said to be typical prior to the arrival of the mine and local people owned parcels of land in various locations, not necessarily nearby. Montana's ESIA described local land use in the following way, "Much of the land is minimally used, primarily for supplemental subsistence farming, occasional grazing and firewood gathering." According to studies done for the ESIA, the area acquired for the mining operation had limited area used for cropping and food production, and the majority was used for grazing or wood collection, activities integral to the economic survival of indigenous rural families.

Observation by the assessors confirms that steep slopes are frequent, with the highest villages around the mine built on the tops of ridges (Agel). Some relatively flat areas do exist in the zone, upon which are often located houses or small villages. Interviews with local residents did confirm that some people were working parcels of land distant from their homes, making them difficult to reach.

Different versions of the history of land ownership and formation of communities around the mine were recounted to the assessors. Some people reported the lands were sold off to individual owners in a

18 Montana, February 20, 2004.

Map 5.1: Montana Land Holdings at the Marlin Mine, as of 2006



parcelization process by the municipalities; others said the land was abandoned and therefore occupied by landless peasants, forming new communities as they went. According to some, these somewhat marginal lands attracted the poorest families who did not have land elsewhere.

According to a Justice of the Peace (*Juez de Paz*) in San Miguel, during the land redistribution of President Arbenz in the 1950s, lands without use (*tierras ociosas*) were identified in San José Ixcániche, Agel, and San José Nueva Esperanza. Rights of use and possession were given to the peasants, but ownership was retained by the municipality. With the passage of time, the lands were further subdivided. The peasants had informal documents, recognized locally, to establish their title to the land. Although, as discussed below, a legal process (*titulación supletorio*) is available to transform the rights of use and possession into formal ownership, many landowners have not undertaken this formality.¹⁹

19 Some studies suggest land titling resulted in the loss of land previously belonging to Mayan communities or individuals, so

As with the national context, the tradition in the local area used to be that parents would divide their heritage among their sons. However, as women became more aware of their rights, they have made claims for a portion of the inheritance of men and have questioned the validity of unwritten wills. One Justice of the Peace in San Miguel said that inquiries about this sort of inheritance dispute are among the most frequent brought to Justices of the Peace.

Water is not managed as a common property resource in the area surrounding the mine. Water sources are “owned” by the landowner on whose land the water source originates, and the owner can sell or deny access rights to that resource to other users. However, once water access has been granted by contract, which in the local area seems to be to other communities to supply groups of households, the landowner cannot change the use.²⁰ Most communities in the area

they did not in general see titling as advantageous. See Davis, 1997.

20 Although water rights are granted by contract, it was not clear to the assessors whether some broader concept of collective

of the mine obtain their water supply in this manner. Many conflicts conciliated by Justices of the Peace are situations where landowners try to change the terms of the contract; the assessors are aware of five recent cases.

Marlin Mine Land Acquisition Practices

Montana acquired the rights to exploit the subsurface minerals within its 20 km² mining licence from the Guatemalan government; however, the land surface rights were held by individuals, communities and/or the local municipalities. Therefore, Montana²¹ had to acquire the right to use the land for the mine through purchase, lease, rental or other voluntary arrangements with the surface owners.²² Montana chose to purchase the land from the existing owners, most of who had possession rights rather than formal ownership. A separate legal entity, Peridot S.A., was formed by Francisco Gold to acquire the land, purchasing rights of possession from the existing owners of those rights. Peridot granted a useright to Montana for mining purposes while proceeding with the process of titling some of the land, through *titulación supletorio*, to establish full property rights.²³ When Glamis Gold acquired Francisco Gold in 2002, it became the owner of Montana, the Marlin Mine project, and Peridot, S.A., along with the usufruct over 638 *cuerdas* (69 acres) already acquired by Peridot. The assessors understand that Peridot initially purchased the land where the orebody was located; Montana advised the assessors

rights (*derechos mancomunada*) was involved in how users then perceived their rights of access. There are potentially some cultural values that underlie issues of access to water rights.

21 For clarity and brevity, this assessment refers simply to the purchase of land by “Montana”; as elaborated here, Peridot S.A., on behalf of Montana, was the purchaser; Peridot, like Montana, was owned consecutively by Francisco Gold (1998 – 2002), Glamis Gold (2002 – Nov. 2006) and finally Goldcorp (Nov 2006 – present). The assessors did not identify any Stakeholder concerns about the ownership of Peridot, however it was not clear that whether the ownership of Peridot by Montana was disclosed.

22 Montana, February 20, 2004, 1.

23 The assessors were given two different explanations by Montana managers of why Peridot was formed to buy and hold the land, one being that the process of *titulo supletorio* can only be undertaken by a 100 per cent Guatemalan company and Peridot’s ownership structure allows it to formally meet those criteria, and the second being to protect land assets from any potential lawsuit against Montana by legally separating ownership.

there are no documents or records pertaining to the land acquisition process under Francisco Gold.

After Glamis purchased Montana in 2002, the land acquisition was re-initiated. Land was initially acquired from individual owners in at least four communities (the three in San Miguel and one in Sipacapa noted above). In addition, Montana reported that some of the land was purchased directly from the municipality of San Miguel, and some from the community of Maquivil, which sold a parcel of land that had served as a community woodlot (*astillero*). At the time of the ESIA, the company reported it had acquired five square kilometres of land, having purchased 392 parcels from 254 owners, 60 of whom were female.

When financing was being sought from the International Finance Corporation (IFC) in late 2003 and early 2004, Montana prepared documentation on how its process of land acquisition was compliant with IFC policies on indigenous people and involuntary resettlement.²⁴ According to Montana’s Land Acquisition Procedures (LAP), the process of land acquisition was (and is) approached as a free market transaction between willing seller and willing buyer. The document considered that there was an existing land market and the individuals were recognized owners under the law and by their communities. The LAP justified the lack of a resettlement strategy largely on the grounds that most of the landowners had land and usually houses in other locations so there was no need for a large physical resettlement, and that they obtained significant economic gain from the sales, providing them with expanded opportunities to improve their standard of living.²⁵ One of the implications of the characterization of the land acquisition process as a voluntary transaction is that the company was not required to prepare a resettlement plan according to the applicable IFC standards for land acquisition or resettlement of indigenous people.²⁶

The LAP was prepared in early 2004 and reviewed prior land acquisition. It stated that presentations and meetings were held at the community level about

24 Prior to the development of the IFC’s Performance Standards in 2006, World Bank Operational Directives 4.2 Indigenous Peoples and 4.3 Involuntary Resettlement were the operative standards that activities at the Marlin Mine would have been expected to meet in order to qualify for IFC loans.

25 Montana, February 20, 2004.

26 IFC 2006, para. 6; The World Bank, 1990.

Table 5.1: Land Parcels Purchased by Montana (Peridot)

Year	Parcels of land purchased
2002	32
2003	228
2004	200
2005	82
2006	12
2007	15
2008	13
2009	50
Total	632

Source: Updated information provided by Montana representatives in December 2009, further to verification meetings; not independently verified.

land acquisition and about the project, prior to entering into individual negotiations.²⁷ Current procedures for land acquisition were described by Montana managers as having the following steps: When a property is identified for acquisition by the company, municipal records are reviewed to determine ownership and the company commissions a survey of the property. Company representatives visit the landowner and initiate negotiations. Where the owner does not have documentation, Montana assists them to formalize their possession rights, which requires recognition and verification of possession by the municipal government.

Montana established a standardized price of Q4,000/cuerda²⁸ (\$500/cuerda or \$4,635/acre)²⁹, a price it continues to pay today.³⁰ According to company representatives, this price was established by Glamis in 2002 through discussion and negotiation with the group of initial land sellers from the three Mam communities (approximately 70). At the time, the Q4,000 standard price agreed upon was favourable in comparison to the reported values of Q350 and Q1,500/

27 The assessors verified that early meetings were held between the project staff and villagers, most of whom were sellers of lands, but not whether land acquisition was discussed and agreed to in community meetings.

28 1 *cuerda* = 0.927 acres.

29 All currency conversion of Guatemalan quetzales and U.S. dollars were calculated in April 2010, when U.S. and Canadian dollars were approximately at par. Original figures appear first, followed by the conversion in brackets.

30 The company reported that this was equivalent to approximately \$4,567/acre in 2004 exchange rates. Montana AMR, 2004.

cuerda for land sales in neighbouring communities identified in a study in 2002, and according to the company was an increase in the price previously paid by Francisco Gold.³¹

As the prices being offered were significantly above the local market value, Montana and some interviewees reported that many landowners approached the company to sell their lands. In addition to paying for the land at the established value of Q4,000/*cuerda*, Montana also paid for fixed assets and improvements on the land, including houses, kitchens (often separate buildings), fruit trees, barns, water sources, crops, outbuildings, etc. According to Montana, other types of transactions were also used, including land exchanges with some 25 families (replacing their land with other land), and building a resettlement “colony” for 11 families in San José Nueva Esperanza.

Montana is currently acquiring additional land around the mining operation, both from land sellers who approach them with plots for sale, as well as from owners targeted because their lands are in specific areas being acquired by the company – the main land acquisition area in 2009 being the area permitted for a potential second tailings dam.

Table 5.1 sets out the parcels of land Montana purchased from 2002 to 2009, according to figures provided by the company during interviews. The AMRs report a total of over 20,000 *cuerdas* purchased by the end of 2008, although numbers differ in total parcels purchased.

Identification of Stakeholder Concerns

The review of media coverage of the mine did not identify specific concerns with the land acquisition process; however, issues were raised in the initial interviews by a few organizations operating at the national level, including some international organizations. Land acquisition also was identified at the scoping stage by both local political and traditional authorities. It also came up in early interviews with local residents (not

31 Although there was no documentation provided as to how the price was arrived at, the assessors reviewed a limited number of land sale documents executed prior to the arrival of Glamis, which corroborated sale prices ranging from Q300 to Q1,500/*cuerda* between local owners.

land sellers) and the Catholic Church representatives (local and regional).

To pursue the issue, the assessors reviewed information publicly available about land issues in Guatemala, both historical and current, as well as publications specifically related to the agrarian problem and rural situation in San Marcos.

The assessors then conducted the following three sets of interviews regarding the land sales.

Company Representatives

Montana managers and personnel were interviewed about past procedures and current practices for land acquisition. This included interviews with those responsible for individual and group negotiations with land sellers, as well as those who complete the legal procedures to formalize the land sales. Additional interviews were conducted at the verification stage relating to collective rights and common property issues raised over the course of the assessment.

In terms of the company's information, the assessors reviewed the Land Acquisition Procedures prepared for the IFC and other company reports related to land acquisition. Company records on land sales, including contracts and documents attesting to ownership, were also reviewed. Documentation often did not include details about payments made for improvements on the land; upon further inquiry, the company made available only five files with documentation about payments for improvements. There was no documentation of offers of employment or other purported commitments in association with agreements to sell land.

Local Residents, Authorities and Land Sellers

Local residents and authorities were interviewed, and efforts were made to organize a focus group on this topic; however, there was some reluctance by people contacted to participate. Twelve land sellers were interviewed individually, and three in other settings or informal interviews; 13 were from San Miguel and two from Sipacapa. A majority of the land sellers interviewed were employees at the mine, adding weight to the concerns they expressed, which were convergent with those expressed by opponents to the mine.

Only 18 per cent (57) of local people interviewed who were not land sellers mentioned issues associated with land acquisition as being of concern, but as noted above, several expressed the opinion that issues associated with land acquisition are at the heart of conflicts related to the mine. The issue most frequently mentioned (in 21 per cent of local interviews, 24 per cent overall) was whether land sellers were properly informed. Two other issues were raised by local people (13 per cent and 16.5 per cent overall): whether there was equity and transparency in the land sales, and whether there was pressure or coercion to sell as compared to free market transactions.

Of the land sellers interviewed, three identified no major concerns; the rest had diverse concerns ranging from failure of the company to fulfil verbal commitments made during the land sales negotiations to two with concrete allegations of being pressured to sell through intimidation or threat of economic reprisals. Some alleged that the prices paid varied, resulting in unequal treatment of sellers.

The issue of coercion was initially raised by a community leader about current land acquisition and further information emerged in several follow-up interviews with land sellers. These concerns were not widespread, and were not mentioned by other stakeholder groups; however, they were raised by some directly affected land sellers. Similar allegations of coercion were raised in NGO accounts.³²

In addition, collective land rights and common property issues were identified as potential concerns based on the background information review. This is a significant issue for Sipacapa leaders; however, in San Miguel local residents did not raise the issue and in the interviews conducted for the assessment there were no indications the issue had support. The assessors specifically sought information on communal or collective land rights; elders from Mam communities and a former mayor specifically indicated that, although there were communal lands in the area a long time ago, presently that is no longer the case.

In the fall of 2009, a report about the history of land ownership in San Marcos and the collective rights issues associated with the land acquisition process for the mine was published by the Dutch organization

³² ADISMI, 2007, 6.

Cordaid. After a review of the information and allegations contained in the report, additional interviews were conducted with company representatives, municipal authorities, and the Justice of the Peace at the verification stage.

Further attention was also given to inheritance issues related to land sales and their effect on women after a review of the Coral incident in June 2009 revealed that a family dispute about the sale of a parcel of land to Montana contributed to a confrontation between community members and the company's private security contractors.

Expert information

Interviews were conducted with Guatemalan specialists on the issues of Mayan and rural land conflicts. Due to the controversy around the assessment itself, some experts refused to meet with the assessors, and those who agreed to provide information insisted on full anonymity. Additional information about these issues was obtained through interviews with international experts, including social and environmental specialists familiar with the project and anthropologists versed in Mayan land issues.

Overview of Stakeholder Concerns

Concerns related to land acquisition included:

- The company's price for land was not fair;
- The company paid different prices for land, resulting in unequal compensation for land sellers;
- The company pressured or coerced some landowners to sell in order to complete the required land acquisitions;

- Those negotiating land acquisition for Peridot made offers of jobs, contracting opportunities or development projects that influenced land sellers' decisions, but which were not always fulfilled;
- Although the monetary compensation for the land sales was significant by local standards, some land sellers lacked the capacity to manage the money and have ended up worse off over time; and
- Land sellers and resettled people, as well as other members of the communities, have had diminished access to common property resources, in particular to wood.

Concerns regarding collective land rights were mainly articulated by national and international NGOs:

- Status of collective titles to land in the municipalities of San Miguel and Sipacapa, and which overlap with individual titles;
- Role of municipal authorities in facilitating Montana's access to individual land sellers;
- Lack of consultation with traditional indigenous authorities in the land acquisition process;
- Transformation of possession rights acquired by the company into ownership rights; and
- Concerns about religious, cultural and spiritual expression of the land, given the beliefs and traditions of the Mayan peoples from whom the land has been acquired.

The assessment of Montana's land acquisition procedures focuses on three issues:

- Assessment LA1: Was the land acquisition process fair, transparent and equitable?
- Assessment LA2: Have land sellers maintained or improved their standard of living from the land sales?
- Assessment LA3: Are collective rights being respected in the land acquisition process?

FAIRNESS, TRANSPARENCY AND EQUITY

Assessment LA1: Was the land acquisition process fair, transparent and equitable?

Although Montana has publicly stated it has consistently paid the same prices for all lands acquired, many people believe later sellers received higher prices, resulting in complaints from former land sellers. The assessors examined whether the company's land acquisition process was fair and transparent in relation to individual land transactions, as well as between the different land sellers, as part of the discussion of whether Montana has respected the right to own property.³³ The fact that the land sellers are indigenous people means they enjoy additional protections under international law.³⁴

For the purpose of this section, the assessment focuses on the international standards related to compensation of individual land sellers. This assumes the individual land sellers had the necessary title and capacity to sell their land to Montana in a voluntary transaction. However, it is acknowledged that the premise of individual ownership that Montana and the land sellers have been operating under is contested for historical and legal reasons. In particular, the fact that no diagnostic study was undertaken about land ownership with the communities in Sipacapa means that the characterization of the land acquisition process as willing buyer / will seller was not based on full information. The concerns and implications related to collective land rights and common property resources are discussed in a separate assessment below.

To respect the right to own property during the land acquisition process, Montana should:³⁵

- Avoid participating in or benefiting from forced resettlement;
- Ensure that no coercive measures are used to acquire land;

- Ensure that just compensation is provided to all land sellers; and
- Obtain the informed consent of women and wives to the land sales.

The IFC Performance Standard 5 (and prior to April 2006 the Operational Directive 4.30) on land acquisition and resettlement provide additional guidance about the company's responsibilities in land acquisition. On the issue of compensation, the company must provide compensation for loss of assets at replacement cost, and provide other assistance and opportunities for land sellers to derive benefits from the project.³⁶

Furthermore, the company must ensure that land acquisition and resettlement procedures are implemented with appropriate disclosure of information, consultation and informed participation of the affected people.³⁷ The issues related to disclosure of information, consultation and informed participation are discussed in detail in Section 2: Consultation.

Avoidance of Forced Relocation

There has been no forced relocation or government involvement in land acquisition for the mine. As described above, the land sales and resettlement that occurred was undertaken on a voluntary basis. While there are concerns about a number of collective land rights issues, there is no suggestion that Montana participated in a forced relocation to acquire the land for the mine.

Montana reported a total of 54 families that had their primary residences purchased by 2005, and that most (74 per cent) built or moved to other houses in the same communities; four exchanged their houses for new houses built by Montana in San José Nueva Esperanza.³⁸ Families who sold land and assets to Mon-

33 UDHR, Article 17; ACHR, Article 21; UN Convention on the Elimination of All Forms of Discrimination against Women.

34 See, *inter alia*, ILO 169, Part II; UN Declaration on the Rights of Indigenous Peoples, Articles 25-30, 32.

35 DIHR 213-214.

36 IFC, 2006, para. 8; The World Bank, 1990, paras. 14-16.

37 IFC, 2006, para. 9.

38 As an example of the confused reporting and documentation provided by the company, status of owners and land sellers changes from report to report; here it is presumed that the four that exchanged houses were amongst the 40 who remained

tana purchased the other seven houses in La Colonia.³⁹ Montana also reports paying compensation for affected assets, that those people who had to relocate were offered assistance in the move, and that the four who exchanged houses were provided with one cuerda more land in the new location than they had prior to moving, and the houses were larger.

This approach to resettlement respects the right to own property by providing compensation of more than replacement value. In these few cases, the fact that the houses are larger and of better materials indicates the company has enhanced the right to adequate housing of resettled people. Others who sold built better houses or improved houses they owned elsewhere, according to photos in Montana's files, but not independently verified. Resettlement also provided an opportunity for the enhancement of other economic and social rights (such as the right to food and the right to an adequate standard of living) if new lands were more productive. However, in the absence of ongoing monitoring of the land sellers and resettled families, it was not possible for the assessors to ascertain the existence and extent of any positive impacts related to the new land provided to the resettled families or obtained by sellers. Concerns related to the lack of ongoing monitoring of the impacts related to Montana's land acquisition are discussed in greater detail in a separate assessment below.

The company's fulfilment of other commitments – for employment or to provide social investment projects for the resettlement community – is another factor related to the company's respect for the right to own property to the extent that these offers were part of land negotiations. It also represents an opportunity for positive impacts on a range of human rights. However, in the interviews with people who sold or exchanged land, there were complaints that the company had not fulfilled all the commitments. This is discussed further below.

in their communities, but that was not clear from company records.

39 Although some stakeholder interviews questioned the improvement to housing for these people, the assessors reviewed files and photos showing previous houses and those constructed in the new settlement.

Compensation for Land and Improvements

As noted above, Montana's practice has been to pay a standard price of Q4,000/cuerda for land acquired around the mine, established in 2002 through a discussion and negotiation with a group of initial land sellers, higher than the price previously paid by Francisco Gold and including a provision for additional payments for land improvements, which Francisco Gold had not previously included; this resulted in some claims from those who sold to Francisco Gold that they had not been compensated equally. Montana reported paying 26 people for assets they claimed were not compensated by Francisco Gold, for a value of Q1.5 million, or \$195,000.

The establishment of a consistent, transparent, above-market price for the land was a positive step, considered to be good practice in the industry.⁴⁰ It is also an indicator that the company respected the right to own property by providing compensation above the replacement value of the land.⁴¹ Furthermore, the establishment of a consistent price is a safeguard for equity in the treatment of all land sellers.

At present, the company continues to pay Q4,000/cuerda for land. However, local residents and authorities report that in the ensuing 10 years the price of land has gone up significantly, with some asserting the value has increased by up to 300 per cent, particularly if the plot has access to roads or services. Interviewees from the municipality noted that people who do not work at the mine cannot afford to buy land. Inflation therefore has likely result in the price of Q4,000/cuerda being inadequate in terms of a replacement value of land, and may no longer respect the right to own property.

In response to this concern, Montana managers said community members continue to approach the company to sell their land; however, interviews indicated that Marlin Mine personnel have difficulties in completing company targets for land acquisition because not all landowners wanted to sell at all, or at that price. As discussed below, a monitoring program for land acquisition should have addressed earlier both the adequacy of the price offered to current land sellers as

40 International Alert, 2005, 141-147.

41 DIHR 214; IFC, 2002.

well as the ability of other community members to afford land in sufficient quantity for subsistence.

While Montana has maintained a consistent and transparent price for land, it retained a degree of flexibility and discretion in the price paid for fixtures or improvements. Some land sellers negotiated substantial payments for improvements (e.g. houses, buildings, and crops). Although Montana had established benchmarks for payment of these improvements, company representatives acknowledge that the price paid was ultimately established through individual negotiations between the company and the land sellers, rather than through an objective valuation of the assets.

The documentation pertaining to these payments is not kept in the land acquisition file associated with the formal sale agreement. A review of those few receipts for improvements that were provided to the assessors⁴² revealed no documented valuations to substantiate and justify the amounts paid (e.g. photos, measurements, or detailed descriptions). Company personnel confirm payments were made on the basis of private, bilateral negotiations between the land sellers and the company. The negotiations are described as “one-on-one” and “very difficult” negotiations. These payments at times exceeded the value paid for the land, and the amount paid depended on the price demanded by the seller rather than objective, pre-determined criteria.

While the individual negotiation of prices for improvements is consistent with Montana’s overall approach to land sales being “willing buyer/willing seller,” it does not ensure the equity, integrity and non-discrimination of the land acquisition process as a whole. Moreover, it may infringe upon the right to own property of vulnerable people, who may be less able than others to negotiate with company representatives.

In practice, the absence of a more transparent and objective mechanism for establishing prices paid for improvements has led to speculation and rumours among community members. Over time, this has

42 Conflicting information was provided about where these files were held, and subsequent difficulty in obtaining the specific receipts requested by the assessors, resulted in the company providing only five examples of documentation pertaining to payment for improvements. None of these five special receipts (facturas especiales) was accompanied by any documentation other than a brief note as to what the payments were for. This documentation indicated that the payments made ranged from nothing to one individual, modest amounts to three individuals, and a relatively substantial amount paid to one individual.

resulted in complaints and grievances from the former land sellers, which contributed to a blockade and violent confrontation with Montana’s representatives in 2007 and may contribute to other incidents, according to interview comments.

In this context, the human rights concern is not about the fairness of the compensation of each individual land sale in comparison to market value, but rather about the equity of the compensation between land sellers. Interviews with company representatives and review of land acquisition files confirms that different prices were paid for improvements; interviews with some people knowledgeable on the negotiations for land typified them as power-based; in the absence of an appropriate mechanism for objective valuation of the assets, Montana cannot adequately ensure its land acquisition practices are non-discriminatory and that the rights of all land sellers are respected in a consistent manner.⁴³

Non-fulfilment of Additional Commitments Related to Land Sales

Another aspect of respecting the right to own property relates to whether there were associated commitments to sellers of land for other development benefits from the Marlin Mine, either through employment or social investment projects.

Interviews suggest that the offers of jobs and contracts held considerable weight with local people, and outside specialists confirmed that in the years before the mine was developed, the local communities were primarily concerned about obtaining employment. Nearly all of the land sellers and resettled families interviewed said that not only themselves, but others as well, sold their lands in expectation of jobs and other benefits from the mine, in addition to the purchase price of their land.

In interviews, Montana representatives acknowledge that offers of work were linked to land negotiations; however, according to Montana, such offers did not constitute a commitment to hire those who sold land or their family members. There were no written

43 Non-discrimination is a fundamental and overarching principle of international human rights law. It is protected, *inter alia*, in Article 2 of the ICCPR and Article 2 of the ICESR.

agreements confirming commitments made to hire people directly or as contractors providing services. However, interviewees were clearly of the opinion that job offers had been commitments and were part of agreements negotiated in relation to the sale of their lands.

The difference in whether the jobs were a commitment to sellers, or only offers of opportunity, is not as relevant as how the people selling the land perceived it; and without good documentation of how these offers were used in the land negotiation process, Montana can not substantiate that they were put forward as offers rather than commitments. Certainly some of the communication from local communities spoke about commitments that all employment would be of local people. Their expectations would also be consistent with the messages of positive benefits in informational material about the mine. However, there is no disagreement that the offers were made and linked to the sale of the lands; Marlin personnel confirmed this. To the extent that these were seen or portrayed as commitments, then not fulfilling them is an infringement on the right to own property, since the individuals may not have agreed to sell or resettle without the additional inducement from the company. They may have made decisions on the basis of what they perceived to be a commitment, when the company was not treating it the same way.

The lack of documentation and record keeping by Montana about these commitments has made it difficult to assess the extent of the concern – both in terms of the commitments that were fulfilled and those that were not. However, to the extent that there is a lack of formalization of offers made during land negotiations, which according to those who sold land was a critical part of the land sale agreements, puts the land sellers in a vulnerable position with no contractual recourse against Montana. This lack of documentation is a failure to respect the right to own property.

An appropriate manner to support land sellers who did not qualify for employment, well established in industry practice in 2003, would have been to provide support from Montana to find alternative means to restore their productive livelihood, or to otherwise benefit from the sale of their lands. This would have involved might have been possible either by identifying in advance certain vulnerabilities or having an alternative income program prepared into which land

sellers could pass if they failed to sustain employment or contracting through the company. This is discussed further in the following assessment.

Coercion and Pressure on Land Sellers

Some land sellers contend they were also subject to coercion and intimidation during the land acquisition process. Several described selling after company representatives turned up frequently at people's houses to pressure them to sell their land. Several others said they were told their current or future employment at the mine was at risk if they did not sell their lands. NGOs have also publicized complaints similar to what the assessors were told about people selling their lands under pressure and out of fear.⁴⁴ The assessors were also advised by a local leader and a local resident who had sold land that this problem was ongoing in relation to specific land Montana was trying to acquire in 2009.

The credibility of these claims is reinforced by the fact that some of the information came from people who are supporters of the mine and its continued presence there. Furthermore, from interviews with company employees, it appears there was, and continues to be, internal pressure for the land acquisition to be completed quickly in spite of difficult negotiations.

The allegations of coercion and intimidation are a cause for concern. The existence of pressure, intimidation tactics or coercion undermines and negates the voluntary nature of the individual negotiations for land purchases and, as such, constitutes an infringement on the right to own property. Moreover, it calls into question the fairness and integrity of the land acquisition process despite the above-market prices paid. Although the assessors could not verify the allegations of coercion, there was sufficient corroboration from different sources to determine that strict attention to oversight is required to ensure this does not take place. Montana has no established practices or procedures that would prevent such coercion, and the pressure on land negotiators to complete certain acquisition programs in spite of the considerable challenges described, in fact suggests the opposite. Although Montana management said they met on occasion with

⁴⁴ Cordaid, 2007, 104-106; ADISMI, 2007.

land acquisition personnel to stress that coercion or pressure was not to be used, there was no evidence of oversight or mechanisms that could assure the absence of coercion, such as participation of a third party to provide representation and advice to land sellers.

Consent of Right-Holders to Land Sales and Resettlement

Given the reality in Guatemala and many other countries that land is often held, transmitted and inherited by men, there are specific human rights concerns related to the role of women, particularly as they may be more negatively affected by land sales or resettlement and may not participate equally in the benefits of the compensation or development opportunities provided by the company. Moreover, one of the specific indicators of respect for the right to own property relates to whether the company obtains consent of women and wives before completing land sales.⁴⁵

This issue became a focus for the assessors after the Coral incident in June 2009, given a number of reports that a family dispute between a brother and sister over the sale of a parcel of land to the company contributed to the confrontation about exploration drilling on that parcel of land. In that specific case, the sale of that land in the village of Coral was contested by two sisters who claimed that they were also heirs and should obtain part of the sale price. The company was aware of the dispute over the sale, but in spite of being approached by the family to help resolve it, did not become involved saying it was an internal family matter. This was one of the initial reasons put forward by the community members opposing the drilling at this location, including a daughter of one of the sisters.

Once this concern was identified, the assessors were able to verify through existing studies, human rights experts in Guatemala, and local judicial and political authorities that female inheritance is protected by Guatemalan law, and has become a frequent concern in the courts and in terms of local land and family conflicts. Montana has been aware of the issue and that problems have arisen related to their own land acquisition process, but have not investigated further

with either cultural experts or consultations with communities, especially women members, on the issue.⁴⁶ Furthermore, there is a reasonable basis for arguing that Montana's land acquisition process, by significantly affecting the local market for land,⁴⁷ has led to sociocultural changes that make women's ability to inherit land, or to benefit from the sale of that land, a more important part of their survival strategies. Basically, women may be more at risk from the increased cost of land in the area while in most cases being excluded from the benefits and opportunities from being land sellers.

In interviews with Montana representatives, it was confirmed that the company negotiates with the identified 'owner' of the property, who usually has a possession right. In the majority of the cases, this is a man; however, a significant number of women owners have also negotiated land sales with the company according to both stakeholder interviews and company documents. According to Marlin personnel, it is up to each landowner to determine who will participate in the negotiation, with some involving all immediate family members and other negotiations taking place with a single individual. Nonetheless, company representatives confirmed that Montana has no policies or procedures that would ensure the consent of women and wives is obtained prior to completing land sales or resettlement.⁴⁸

46 In interviews, Montana managers indicated that they had not sought external advice or expertise to improve their understanding or confirm their interpretation of the inheritance issues. They said that they had consulted with existing male contacts in the communities who advised them that the issue of female inheritance claims was not legitimate. The issue was not identified or tracked by SDD as a concern or grievance.

47 The increased value of land may change the role and importance of inheritance for women within these communities when fewer families are trying to acquire land to reproduce their subsistence households; rather the land becomes a means to achieve a different potential future. These changes, if verified by a sociocultural impact assessment, would constitute indirect impacts to family and cultural reproduction that would have different consequences for women than for men, with implications for women's rights. These indirect processes of social change have important implications for cultural cohesiveness and indigenous peoples rights as well, and would be part of a good practice commitment to support communities through cultural change processes.

48 Ensuring such consent is one of the indicators with international human rights standards in the DIHR tool. Furthermore, the Guatemalan Civil Code, article 132 provides the right to oppose the sale of property by the wife or husband; in addition, if the property is jointly owned by the husband and wife and a sale occurs without the other's consent, the seller is liable towards the other.

45 DIHR 213

Findings

Certain aspects of the land acquisition for the Marlin Mine respected the right to own property. There was no forced resettlement or government expropriation associated with the land acquisition for the Marlin Mine. A small number of land exchanges were conducted, which provided for extra land and better quality houses, also enhanced the right to adequate housing.

Montana's practice of providing a consistent above-market price of Q4,000/cuerda (\$4,635/acre) respected the right to own property; however, the adequacy of the price is now in question because of inflation in land values.

Montana's practice of negotiating payments for the improvements on the land on an individual basis and without independent valuations is inadequate to ensure the equal treatment and just compensation of

all land sellers. This constitutes a failure to respect the right to own property.

Unfulfilled commitments related to employment, contracts and social investment projects represented a significant inducement for the land sellers. The non-fulfilment of these commitments deprives sellers of anticipated benefits from the sale and infringes upon the right to own property.

There is a pattern of allegations about coercion and pressure in the land sales that would undermine the voluntary nature of the transactions and would infringe upon the right to own property. Although the specific allegations could not be verified, Montana nonetheless fails to respect human rights as it lacks the policies and procedures to ensure that coercion does not occur, including an effective grievance mechanism for land sellers. There is also a lack of policies and procedures to ensure that the consent of women is obtained for land sales or resettlement decisions, which fails to respect the rights of women.

IMPROVEMENT TO LAND SELLER STANDARD OF LIVING

Assessment LA2: Have land sellers maintained or improved their standard of living from the land sales?

The individual sales of land generated significant amounts of money for the land sellers and their dependents, which created opportunities for positive impacts on a range of human rights. However, concerns were raised about some land sellers being unable to manage this money and "falling through the cracks," as well as diminished access to collective property resources. The assessors examine the steps taken by Montana to monitor the impacts of the land sales, as part of a broader discussion of the company's ongoing human rights due diligence.

The international human rights standards relevant to the assessment of the long-term impacts on individual land sellers and the wider community of Montana's land acquisition practices include a broad range of economic, social and cultural rights, including the right to

adequate food,⁴⁹ the right to adequate housing,⁵⁰ and the right to an adequate standard of living.⁵¹

Broadly speaking, the company's responsibility is to ensure that land sellers and resettled people maintain or improve their basic standard of living and do not suffer harm or reduction in their well-being due to physical or economic dislocation resulting from land sales. Beyond the question of the fairness and equity of the initial compensation for land sales and resettlement, respect for human rights involves ensuring that land sellers and resettled people have alternative access to food, housing, agriculturally viable land,⁵² and/

49 UDHR, Article 25; ICESCR, Article 11, 12; ILO 169, Articles 6, 7, 14, 15, 16; ILO 117, Article 4.

50 UDHR, Article 25; ICESCR, Article 11; ILO 169, Articles 2, 7, 13, 14, 16.

51 UDHR, Article 25; ICESCR, Article 11(1); Convention on Biological Diversity, 1992, Article 7; ILO 117, Articles 1, 2, 4 (b and c); ILO 169, Articles 7 (3 and 4), 14 (1), 15, 16, 17.

52 DIHR 24, 26, 35, 36, 52.

or access to the development benefits from the project and other means to replace and sustain their livelihoods over time.

The IFC Performance Standard 5 (and its predecessor, Operational Directive 4.30) provides standards and guidance for monitoring and addressing the long-term impacts related to land acquisition and resettlement. When a land acquisition process is characterized as a voluntary, willing seller/willing buyer transaction – as it was in the case of the mine – it may be outside the scope of application of these performance standards; however, the long-term impacts are nonetheless supposed to be monitored and addressed through the general implementation of IFC Performance Standard 1 on Social and Environmental Assessments. More importantly, if there are significant adverse impacts at any stage of the process, the performance standards specific to land acquisition and resettlement should be applied.⁵³ IFC Performance Standard 5 is referenced as “good practice guidance” for the mining industry in the International Council on Mining and Metals’ Human Rights in the Mining & Metals Industry: Overview, Management Approach and Issue.⁵⁴

It is acknowledged that this is a complex undertaking and that factors related to the individual land sellers and resettled people, as well as to the local economy, also play a role in whether ultimate outcomes are positive or negative. Nonetheless, the company should have appropriate systems in place for monitoring and addressing the impacts that will predictably occur over time. These systems should include mechanisms for ongoing dialogue and consultation between land sellers and the company, as well as an effective grievance mechanism to resolve specific complaints.

The average amount of land sold prior to the construction stage was reported as 49 cuerdas, which would have provided an average economic gain of \$24,168 (Q193,380) for the landowner in comparison with the estimated average income per capita of \$1,670

(Q13,362).⁵⁵ In 2008, the average amount paid for the parcels of land purchased was \$24,271 (Q169,900).⁵⁶

Although the company committed in the Land Acquisition Procedures to provide for follow-up with each seller of land⁵⁷ – to determine how the money was invested and identify whether the sellers were better or worse off – a monitoring program was never implemented. Montana provided assistance for the physical move and to deposit their relatively large sums of money into bank accounts, but there was no structured follow-up or ongoing support.

Recently in 2009 a new position was created in the Sustainable Development Department to develop a program called ‘New Associates Unit’, to provide support to ex-landowners to use the income from land sales in productive investments. In 2009, plans for the new unit involved only providing advice and guidance, as it did not have a budget for specific support activities either for new sellers of land or for those that had sold in the past.⁵⁸

The proceeds of the land sales can be viewed as an opportunity for enhancement of a range of economic and social rights for the landowner and his/her dependents. Some of the opportunities include: enhancement to the right to food when the proceeds are used to purchase more and better quality land elsewhere; enhancement to the right to housing when the proceeds are used to purchase a better house elsewhere;⁵⁹ and/or enhancement of the right to an adequate standard of living when the proceeds are invested in successful business ventures.

As discussed above, the company made commitments to some land sellers about employment or contracts with the mine. To the extent that the commitments were fulfilled, the land sales were also an opportunity for enhancement of the right to work and the right

53 IFC 2006, para. 6.

54 ICMM, May 2009, 20. Principle 3 of the ICMM’s SD Framework also refers to minimizing involuntary resettlement and compensating fairly for adverse impacts where they cannot be avoided. The GRI Mining & Metals Sector Supplement has an indicator (MM8) relating to sites where resettlement took place, the number of households resettled, and how their livelihoods were affected.

55 Montana, Land Acquisition Procedures (LAP), 2004, 3.

56 Goldcorp Annual Report 2008, 12.

57 Montana LAP, 8. The Land Acquisition Monitoring Program was described as part of the Marlin Mine’s broader socioeconomic monitoring program; see page 9.

58 An interesting comparison could be drawn with the extensive support and training programs, staff and budgets assigned to resettlement or income restoration programs in other mines, such as the five-year process for families at the Antamina Mine in Peru.

59 According to the LAP, only 30 houses (owned by 28 families) were located on the 287 parcels of land acquired as of February 2004.

to an adequate standard of living. Employment and contracts with the mine also represent an opportunity for positive impacts for the land sellers' dependents: for instance, the right to education of children could be improved if a family is no longer required to move away from the local school in pursuit of seasonal employment opportunities. However, as noted, neither the employment of land sellers nor the changes in family standard of living after the sales have been monitored or evaluated.

The assessors were able to observe and gather anecdotal evidence about some of the land sellers managing the proceeds from the land sales very well, with positive impacts on economic and social rights. Company personnel have agreed that information on the improved well being of families, school attendance and other enhancements in standard of living is anecdotal rather than documented and quantified. While some of the other land sellers interviewed also acknowledged they had experienced positive impacts on their economic and social rights, they nonetheless had complaints because of alleged inequities between the land sales and/or the non-fulfilment of commitments by the company.

There was convergent evidence that another group has experienced negative impacts on their social and economic rights over time. Without any monitoring and tracking of this group of stakeholders, meaningful numbers or judgements of the degree of impact cannot be provided.

In the interviews, the majority of the concerns expressed about land sales have to do with negative impacts that occurred and were perceived over time. In other words, for some land sellers, the initial economic benefit and satisfaction with the outcome of the land sales turned into complaints. Additional information from the interviews indicates that an important determinant of whether people saw the sales as positive or not, five years after the fact, was capacity to use that money effectively. At least some people who sold land did not know how to manage that amount of money for long-term well being. As one local resident said, "*muchos se quedaron pobres*" – "many stayed poor."

At least four interviewees who observed the land acquisition process said the reason people were demanding more payment for their lands was because they had spent the money badly or lost it one way or

another.⁶⁰ Comments by Montana management support this finding, admitting that some land sellers may have "fallen through the cracks" and in fact have become worse off rather than better off from the sales of the land. Furthermore, the company representatives confirmed they had no way to know the truth of the matter since they had not done follow-up or tracking.

International good practice standards for resettlement and land acquisition, with particular care being given when land is being acquired from indigenous people, were well established at the time Glamis acquired the project in 2002, and would have been expected for an IFC-funded project. In this case, Montana argued that no specific attention needed to be paid to the impact of land sales on the Maya Mam families and communities, because the sales took place as a free-seller/free-buyer agreement.⁶¹ The IFC agreed in its review for financing in early 2004.

These practices would have required a series of safeguards to be put in place such that the sellers of land were not disadvantaged by the loss of income, negative impacts to well-being, or loss of a traditional subsistence production. Appropriate levels of support for income restoration and other benefit would be determined by family-level socioeconomic data collection to assess how individual families will be affected by land sales and what degree of income restoration they require to, at a minimum, replace lost income or subsistence production with sustainable livelihoods. In particular, projects should not cause adverse effects on indigenous people.

In the case of the Marlin Mine, potential or real impacts could not have been identified as there was no family-level information collected or reviewed – there was no baseline study of the families to be affected by land acquisition. There was no way that Montana could have determined the risks to indigenous people of the land acquisition strategy, or later determined who might have been put at risk by it, because of the lack of information.

⁶⁰ Bad use of money from land sales can in fact be the responsibility of the company making the payments, if local sellers of land were unequipped or ill-prepared to use that money without guidance; other cases in mining have struggled with this responsibility after the fact, such as Antamina Mine, in Peru.

⁶¹ Montana, February 20, 2004, 1.

At the same time, Montana cannot demonstrate positive long-term outcomes from land sales. This corresponds to the broader issue of the weakness of the company's initial social assessment in terms of providing baseline data and identifying predictable economic and social impacts that require monitoring over the life of the mine, as well as the failure of the company to undertake systematic monitoring across a range of economic and social issues.

Given the risks associated with transfer of large sums of money to people accustomed to subsistence farming, and the probability that sellers anticipated having employment income and may not have reinvested the money from land sales in other productive assets, it is likely that some individuals and families are worse off overall after selling land. Montana has not adequately safeguarded against negative long-term impacts to the economic and social rights of the land sellers. Many of the specific concerns and grievances of the land sellers noted above could have been proactively addressed through ongoing monitoring and remedial actions, either on an individual basis or through social investment programs and other safeguards that addressed common issues. Beyond the monitoring of the impacts on the economic and social rights of the land sellers, monitoring should be conducted on the impact of the company's land acquisition on inflation in the local

land market as well as upon collective use resources such as water and firewood.

Findings

The land sales resulted in substantial payments that provided an opportunity for the enhancement of the social and economic rights of the land sellers and their dependents. Some individuals, potentially the majority, had their rights enhanced as a result of the land sales, but their number and degree of enhancement cannot be determined. At the same time, other land sellers were not able to sustain their standard of living and have had their rights infringed upon.

The assessors are unable to make an accurate determination of whether land sellers had positive, neutral or negative impacts on their standard of living and other associated human rights because no baseline study or subsequent monitoring of the land sellers and their families has been undertaken by the company. A new program for liaison with land sellers initiated in 2009, which has no program funding, is not an effective response. The absence of due diligence about the long-term impacts of the land sales fails to respect human rights.

COLLECTIVE RIGHTS

Assessment S3: Are collective rights being respected in the land acquisition process?

In the previous assessment, Montana's land acquisition practices were assessed primarily in relation to the individual right to own property, in part because land sales and voluntary resettlement were approached from the perspective of "willing buyer, willing seller." In adopting this approach, the fact that the land sellers preferred to sell their land rather than be resettled as a community or a group is an important factor. Furthermore, local indigenous residents and municipal authorities do not contest the private land titling system.

At the same time, the assessors recognize that there are important and legitimate concerns about individual ownership and transactions relating to the lands of indigenous peoples. These include concerns about common property resources and collective rights over the lands. Furthermore, the Guatemalan government has obligations to protect the land rights of indigenous peoples, particularly under the Guatemalan Constitution, the Peace Accords, and ILO Convention 169, many of which have not been effectively implemented.

This section discusses the collective land rights issues that have been raised by stakeholders, as well as concerns about access to collective resources.

Indigenous peoples right to ownership and possession comprises both individual and collective aspects: it encompasses land that a community or people uses and cares for as a whole, as well as land that is used and possessed individually.⁶² As discussed below, the collective ownership of lands is favoured in international law in order to preserve the resources and territory available to indigenous peoples.

The international human rights standards related to the acquisition of indigenous peoples' lands by a company include the provision that the peoples concerned be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.⁶³ Indigenous peoples rights outlined by ILO 169 and other indigenous peoples rights instruments protect the right of people to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.⁶⁴

As discussed in Section 2: Consultation, prior and ongoing consultation is a key principle for respecting indigenous peoples rights in the context of the exploration and exploitation of natural resources. Given the importance of land acquisition to a mining project, it is suggested that the overall land acquisition and resettlement process be part of the consultation prior to the development of a project. The prior consultation with indigenous peoples according to ILO 169 must involve the participation of government authorities, and is not something that a company can undertake on its own. This is reinforced by Article 17(3) of ILO Convention 169, which states that persons not belonging to these peoples shall be prevented by the government from taking advantage of their customs or of a lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Furthermore, international law recognizes that indigenous peoples rights over their lands and territories comprises an important spiritual dimension,⁶⁵ which

needs to be taken into account and respected in the land acquisition process, and which may constrain the acquisition and use of the land – particularly when dealing with sites with special religious or cultural significance.

In addition to ensuring appropriate consultation about land acquisition and resettlement procedures, the questions and indicators in the DIHR tool suggest actions a company should take to respect the rights of ownership and possession of indigenous peoples.⁶⁶ These include:

- Implementing procedures to verify land titles and resolve land claims, including historical and informal claims of indigenous people, the entitlements of women, and the collective use of resources on the land;⁶⁷
- Avoiding the purchase of land that would hinder the access of local communities to forests or other collective resources, or establishing procedures that would allow for continued access to those resources (to the extent that is compatible with safety considerations);
- If the company sells land upon which community or indigenous people have ongoing rights, the sales conditions clearly state that the future owner is expected to respect the access rights of the local community; and
- The company researches the religious significance and cultural heritage of the land before purchasing it, and refrains from acquiring land that contains places of worship, is used for life-cycle ceremonies, or contains cultural monuments.

In the Land Acquisition Procedures, Montana states that land acquired for the mine is held in "private ownership" and describes its approach to land acquisition in terms of voluntary transactions between willing sellers and a willing buyer.⁶⁸ In addition, a number of factors are listed to support the conclusion that "relatively few landowners have long-standing cultural attachment to the land," including the following social

62 ILO, 2009b, 94, Chapter VII; The land rights of indigenous peoples are protected by ILO 169, Part II and United Nations, 2007, 25-30, 32.

63 ILO 169, Article 17.

64 ILO 169, Article 14(1); UN Declaration on the Rights of Indigenous Peoples, Article 26(2).

65 ILO 169, Article 14; UN Declaration on the Rights of Indigenous Peoples, Article 25.

66 The following four bullets are based on the respective DIHR indicators; DIHR 52, 213; DIHR 26, 52; DIHR 52; DIHR 131, 230.

67 The DIHR tool suggests that title searches should be conducted back at least 50 years; and, that reliance on the State's system of transferring title may not be sufficient if it does not function to uncover and resolve land claims.

68 Montana, February 20, 2004, 1.

and cultural considerations: that there are few homes on the land; that many land sellers have family and social ties to people in other communities; and that many properties in the project area have been relatively recently acquired (within the last 50 years).⁶⁹

Soon after Glamis restarted the land acquisition of the Marlin project, Montana met with officials and community leaders of the municipality and the affected villages to discuss the project and the land acquisition program. In early 2003, Montana conducted participatory diagnostic workshops of the three communities in San Miguel identified as directly affected. These workshops developed community profiles and the history of the communities with community members and local authorities.⁷⁰ Land ownership was addressed, and according to the company's documentation of those events, individual negotiation was confirmed in these meetings with community members as the preferred modality for land acquisition. Montana also claims to have discussed land acquisition in broad-based community participation and consultation forums, for which no documentation exists.

From the interviews and information reviewed by the assessors, it initially appeared there was a consensus about the private ownership of land that confirmed the company's version. According to a knowledgeable local interviewee, the lands in the area around the mine are held privately as a result of the short-lived land redistribution program for the benefit of indigenous peoples in the 1950s. Therefore, the situation of the land sellers may be different than many other indigenous peoples in Guatemala.

However, some of the further inquiries made about collective land rights issues raised some conflicting issues:

- Information at the participatory diagnostic stage identified that, at least in Agel, people identified residency that went back many years before the formal political recognition of the community as an *aldea* (the date taken by the ESIA as the origin of the community), which suggested a pre- or early-colonial occupancy disrupted by many years of political and economic oppression.⁷¹

- Information from an employee (from the area but not from a community that sold land) confirmed the practice of elders holding private title in order to preserve communal lands, suggesting the parallel survival of communal property or common property rights overlaid by formal legal frameworks of private land ownership, at least in some communities.
- There was confirmation from Montana management of up to four properties purchased that were owned by communities or the municipality of San Miguel Ixtahuacán. The only property for which documentation was provided by Montana was clearly identified as an *astillero* or communal wood lot.
- From the information reviewed by the assessors, it can be confirmed that Montana conducted at least an informal review of the general land market in Guatemala and reviews of municipal records to determine ownership status of individual properties. However, the assessors find no evidence that the company ever investigated or addressed issues such as inheritance, sacred places, or collective resource use, or the potentially distinctive relationship of the Sipakapense people to their land base.⁷²
- The fact that Montana did not conduct a participatory diagnostic exercise for the communities in Sipacapa means that the assumptions about individual ownership and the preference for willing buyer / willing seller were not validated for this indigenous peoples, which is reported to have a more collective approach to land ownership.
- In the recent report on land and mining by Cordaid, the history of land ownership in San Miguel and Sipacapa is reviewed, and a number of important questions are raised about the possibility of overlapping collective titles belonging to the municipalities as a result of re-measurements of the municipal territory in the early 1900s. In sum, the report asserts that the lands in the two municipalities are collectively owned, and the individual "owners" have usufruct (use and possession) rights, and that this was a mechanism to protect and retain the indigenous land base.⁷³

69 Montana, February 20, 2004, 4.

70 Attendance at these workshops, according to records of the company, was high and involved both women and men.

71 Montana, April 2003, "Minutes of oral history recounted during participatory workshop, Agel, San Miguel Ixtahuacán." [internal

document]

72 DIHR, Question 52, Indicator 1; Question 213-214, Indicators 1-2; Questions 131, 229, 230

73 Cordaid, 2009. This work was not verified by the assessors; it was published after research in Guatemala was completed.

The implication of an underlying collective title to the land held by the municipalities is that individual owners are not or should not be able to alienate land to the company on an individual basis, and that the community – including the traditional and municipal authorities – must be included in the decision-making process. This approach is supported by Article 17 of ILO Convention 169, which states that the “peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.”

At the same time, the report acknowledges that the issue is complex, particularly given that individuals in the two municipalities have also registered individual titles with notaries, creating a situation of “overlapping titles.”

For the company, this issue creates a dilemma: On the one hand, individual ownership is recognized and acknowledged by the individuals involved in the negotiated land sales, as well as by the municipal and government authorities that are involved in the land transfers. On the other hand, it is understood that the Guatemalan government is failing in its commitments to implement the reforms required to protect collective land rights according to the Constitution, the Peace Accords, and ILO Convention 169. In addition, NGOs allege that the municipal authorities that consented to and facilitated the individual land sales were “co-opted” by the company.⁷⁴ Therefore, Montana’s compliance with the current national laws and local practices may not be sufficient to respect international human rights standards.

There are important long-term considerations that support the protection of the collective land rights of indigenous peoples. For instance, the ILO’s governing body has stated that:

The ILO’s experience with indigenous and tribal peoples has shown that when communally owned indigenous lands are divided and assigned to individuals or third parties, the exercise of their rights by indigenous communities tends to be weakened and generally end up losing all or most of the lands, resulting in a general reduction

74 Cordaid, 2009, 103.

*of the resources that are available to indigenous peoples when they keep their lands in common.*⁷⁵

In its pre-transaction process, Montana states: “When a property is identified for acquisition, municipal records are reviewed to determine ownership and the company commissions a survey of the property. Members of the land group, including Mam-speaking staff that are residents of local communities, visit the landowner and initiate negotiations. As is the case in many areas of Guatemala, land titles are often unclear. In cases where there is a dispute over land ownership, Montana works with both parties to arrive at an equitable solution.”⁷⁶

Apart from the consultation with the municipal authorities at the outset of the land acquisition process, as well as the title searches involving municipal records, the company has not conducted broader consultations within the community about individual land sales. However, subsequent to the Coral incident, Montana representatives said they are now consulting at the level of the local community group (hamlet, village) to ensure there is full agreement about exploration. This appears to be consistent with the acknowledgment that the company needs to consult and requires the agreement of the community before expanding its operations – which includes further land acquisition.

Common Property Resources

Other issues related to land acquisition that affect the broader community relate to access to collective resources such as water and wood. In this regard, the assessors were told of unfulfilled and undocumented commitments to supply wood to resettled families.

In interviews for the assessment, specific references about economic dislocation and loss of access to resources directly resulting from the land acquisition were made in relation to wood collection. This is an important subsistence activity in the area, and some

75 ILO Governing Body, 1998, para. 26. The International Working Group on Indigenous Affairs also states that: “The general trend to favour individual land ownership rather than collective land rights is another threat to indigenous peoples, since it opens up not only for the privatization of land and resources but also for sale of land to non-indigenous individuals and business interests.”

76 Montana, February 20, 2004, 4.

interviewees who sold land report having to go further now to collect firewood than they did previously, or having to buy it for cash. A Justice of the Peace noted that the practice of firewood collection from the forest has been lost, and those who are caught collecting firewood are now prosecuted. People from the communities around the mine also reported firewood shortages and inflation in the price of wood. In one interview, an elderly woman said she abandoned her bakery activities because it had become too expensive to buy wood for the oven.

Some interviewees resettled at La Colonia also indicated they were supplied with firewood for two years after the move based on an informal agreement made with Montana at the time of the land sales; however, that commitment was not formalized or documented and the company no longer provides that firewood. This is an ongoing concern for the resettled people: “Before we used to gather wood in the land of the mine, people would enter and collect wood, even though the wood did not belong to us. With the relocation, we have to buy wood.”

These changes in the access of community members to firewood could infringe on economic and social rights (i.e. rights to adequate food, housing, and standard of living) given the importance of fire as an essential source of heat and for cooking. It also could infringe upon the right to own property to the extent that there were commitments about continued access to or the provision of firewood as part of individual land sales or the resettlement to La Colonia. The consistency of the accounts, the lack of baseline studies to identify common property resources use prior to land acquisition, and professional experience lead the assessors to the judgement that this infringement has occurred; however, exactly who has been affected and to what extent needs to be determined by a review of indirect impacts of land sales on common property resources.

There are also allegations that conflicts about water ownership and use have arisen due to transfer in legal title. Some interviews indicate that one of the causes of the June 2009 conflict at Coral was related to the protection of a water source on land adjacent to where Montana was conducting exploration work. One complaint was presented to the Juez de Paz for the alleged contamination of the water spring in relation to this incident; however, as there were allegations about possible contamination impacts, the complaint was

directed to the Public Ministry. The implications of the conflicts about water suggest a need for further due diligence measures, including as part of the land acquisition process in determining the existence of common property resources. As this issue was not documented in the original baseline at all, the company had no basis for determining what kind of resource use might have been affected by the installation of the mine.

Religious and Spiritual Significance of Land

Another human rights issue that is relevant to the land acquisition procedures is the preservation of sacred sites for indigenous community members, and the preservation of the cultural and religious expression of the land. This can be understood both in terms of indigenous peoples rights to land, which recognizes the spiritual attachment of indigenous peoples to their lands, as well as in terms of the right to freedom of religion and the right to participate in cultural life.

From the interviews with land sellers, community members and company representatives, no specific allegations or concerns were raised about the company’s acquisition of land that contained sacred sites or cultural monuments. In the Land Acquisition Procedure, the company states that it would be relocating two churches as part of the land acquisition; however, this was not done as Montana failed to get agreement from the Catholic Church. Other sacred sites such as traditional Mayan sites were not identified in the area; stakeholders locally did not raise this issue. There is, however, no treatment of cultural issues from the Mam or Sipakapense cultural perspectives, or the use of or loss of land, or with regards to any other aspects of the culture. The assessors also did not have access to people who discussed cultural or spiritual issues, but that does not mean they are no relevant to local indigenous people. More due diligence is required on this issue by the company.

Montana may have respected the right to freedom of religion and the right to participate in cultural life by not acquiring land that contained sacred sites or cultural monuments; there are no suggestions that this has not taken place. However, there remains the broader question of the spiritual connection of indigenous peoples to the land as a whole.

In this regard, there are concerns about the alteration of the mountain where the mine is operating. Several interviewees identified that the mountain in San Miguel Ixtahuacan is considered sacred and has an important meaning in the rituals and beliefs of the Mam people. Only a small number of local interviewees spoke about traditional beliefs, however the information provided suggests the ongoing importance of traditional beliefs in the Mam region. For example, interviewees explained the blood payment to the spirit of the mountain, secret rituals and shamans, and the fears of the first mine workers entering the mountain. One of the interviewees who knew about religious practices in the Mam culture identified that local shamans in the area near the mine have almost disappeared. To perform their sacred rituals, Mam people have to bring shamans from other Mam regions. No treatment of traditional shamans or cultural practices has been included at any point in the mine's assessment of local baseline conditions or concerns.

The issue of the spiritual connection of indigenous peoples to the land is complex, and should have been addressed as part of prior consultation about the development of the mine. After the commencement of the project, the broader impacts on religion and culture should have been monitored as part of the tracking of social and human rights issues. To date, Montana has not been monitoring the religious or cultural impacts of the mine.

Disposition of Land at Closure

Although local people did not raise any concerns or allegations about collective land rights, it was raised in an external review that the collective land rights of indigenous peoples can be put at risk by the process of *titulación supletorio* that is undertaken to convert a usufruct right into a full ownership right. According to the Cordaid report, this process may serve to extinguish the underlying collective title of the land held by the municipality.⁷⁷ In interviews with Montana representatives, the intention to use this process to consolidate the company's land title was confirmed. There are, however, limitations on how much land can be converted through *titulación supletorio* and owned by

⁷⁷ This process is discussed in the Cordaid report, 107-109, and is referred to as a "legal hat trick."

a single legal entity (i.e. Peridot) according to Guatemalan law.⁷⁸ A Montana manager said that the priority is to complete the process for the land on which the orebodies are located, and which would be within the legal limits; however, for further conversions, alternatives such as creating other subsidiary companies would need to be considered.

This process of *titulación supletorio* adds to the complexity of the land acquisition process. Peridot currently holds possession rights to the lands, the same basis for holding the land that the community members have had historically, but is proceeding with *titulación supletorio*. With its existing use right, Peridot is able to then contractually provide a usufruct to Montana for mining that is recognized under Guatemalan law. The question then arises, why is Montana/Goldcorp, as the owner of Peridot, proceeding to transform these possession rights into full property rights through the process of *titulación supletorio*?

One of the issues that may address some of the tensions between the individual and collective land rights has to do with Montana's long-term plans for the land. According to company representatives, the intention is for the land acquired for the mine to be returned to the community upon closure by transferring the title to the FSM. This is part of the company's plan to contribute to sustainable development, by giving the community land assets that can be used for economic activities. The example of Goldcorp's mine in Honduras was given, where the land has been transferred to the community foundation for the purpose of developing an eco-tourism project.

Montana's closure plans – including the commitment to return the land to the community via the FSM – need to be clarified and should be subject to further consultation with the affected communities; however, the return of the lands to the communities may help to address some of the issues related to collective land titles and territorial integrity. This assumes that the land will be properly remediated (and adequate financial safeguards for future environmental liabilities put in place) to ensure that the returned land is desirable to the communities.

⁷⁸ Article 3 of the Titulación Supletoria Law, Decree 49-79 stipulates that land over 45.125 hectares cannot be subjected to that process. Article 4 of said law indicates that a person cannot undertake the *titulación supletoria* process for several adjacent plots of land in order to avoid this prohibition.

Findings

There are legitimate concerns about the collective dimensions of land rights of indigenous peoples. ILO 169 provides safeguards for the transfer of lands outside their community, including a requirement that consultation be undertaken with the communities.

Although there were some meetings with groups of land sellers to establish the initial price of land, Montana's land acquisition procedures are framed in terms of individual negotiations between "a willing seller and a willing buyer." The fact that no participatory diagnostic was conducted for Sipacapa means that the assumptions about individual ownership and land tenancy were not validated for this community. There is no indication that Montana undertook prior consultation with land sellers in Sipacapa. These land acquisition procedures failed to respect indigenous peoples land rights.

Common property resources and religious and cultural practices associated with land were not addressed by Montana's land acquisition procedures, which failed to respect indigenous peoples rights.

An ongoing concern relates to the *titulación supletorio* process of converting the usufruct (use and possession) rights into full ownership rights, which may serve to extinguish underlying collective rights of indigenous people. Given the complexity and uncertainty about collective indigenous title to lands in the municipalities of San Miguel and Sipacapa, there may be an opportunity for Montana to address concerns about indigenous peoples rights through consultation and agreement about return of lands at the end of the mine's operations. Beyond the technical legal issues about land title, this will inevitably entail dialogue and commitments regarding the long-term environmental sustainability, restoration, and future productive use of the land.

RECOMMENDATIONS

RECOMMENDATIONS FOR IMMEDIATE ACTION

- **ADOPT A MORATORIUM ON LAND ACQUISITION.** Halt all land acquisition, exploration activities, mine expansion projects, or conversion of exploration to exploitation licenses, pending effective State involvement in consultation with local communities, and agreements put in place with communities to structure future land acquisitions. This would particularly include any project that requires an EIA, such as La Hamaca.
- **ADOPT A MORATORIUM ON USING THE TITULACION SUPLETORIO PROCESS.** This process risks extinguishing collective land titles of the indigenous communities around the mine, and should not be used until individual and collective land usage and rights are thoroughly understood and documented, including any differences between San Miguel Ixtahuacán and Sipacapa.

- **IDENTIFY AND SUPPORT AT-RISK FAMILIES.** Identify as a priority any land sellers and their dependents considered 'at risk' and address immediate subsistence and basic service gaps.

RECOMMENDATIONS THAT ADDRESS LEGACY ISSUES

- **CONVENE AN INDEPENDENT REVIEW OF HISTORICAL LAND ACQUISITION.** Develop an independent review process to resolve complaints about land sales (e.g. inequitable payments for improvements, unfulfilled commitments related to employment, and allegations of coercion); recommended would be a three-member commission including PDH representation, a Justice of the Peace from the local area, President of the Alcaldes Auxiliares, or other authorities of importance. The commission may require additional technical expertise or advisors.
- **IMPLEMENT A REVISED LAND SELLER FOLLOW-UP PROGRAM.** Develop and implement a land seller support program that assesses impacts of land sales

on sellers and provides for targeted income restoration programs. Allocate adequate resources to the Community Relations Group (“new associates” position) to implement such a program.

- **DEVELOP A PROGRAM TO ENSURE ACCESS TO WOOD.** Determine how the cost and availability of wood have changed as a result of land acquisition, or as a loss of access to common property resource, and implement a replacement program.

RECOMMENDATIONS FOR ONGOING DUE DILIGENCE⁷⁹

- **IMPLEMENT A LAND ACQUISITION POLICY WITH REFERENCE TO INTERNATIONAL BEST PRACTICE.** Ensure comprehensive due diligence on indigenous peoples land rights issues, including inheritance and collective resource issues. Ensure appropriate documentation and follow-up on all commitments made in the land acquisition process.
- **ADJUST LAND PRICES.** Adjust future land compensation from the previously paid standard above-market price of Q4,000 per cuerda to take into account inflation in the local land market.

- **ENSURE FAIRNESS IN VALUATIONS OF IMPROVEMENTS.** Review current land acquisition procedures ensuring that all forms of compensation for land acquisition respond to clear and transparent criteria for evaluation and compensation. Establish a transparent and independent mechanism for valuation of improvements on land to be purchased.
- **PROVIDE ACCESS TO INDEPENDENT ADVISORS.** Facilitate access of potential land sellers to independent representation and advice during land negotiations to enhance the integrity of the process, protect the rights of the land sellers, and protect the company against any allegations of coercion or pressure on the land sellers, as well as undocumented verbal commitments. Goldcorp should adopt this as a matter of standard practice for future land sales.
- **CLARIFY PROCESS FOR LAND TRANSFER AT CLOSURE.** Clearly set out the intention and modality for transferring the titles to the land acquired by Montana to the communities at closure of the mine.

⁷⁹ The following recommendations are premised on the existence of community-level consultation and agreement for continued land acquisition for the mine.

CONCLUSIONS

Land acquisition demonstrates the tensions between individual and indigenous peoples rights in terms of the legal protections in Guatemalan and international law, as well as in terms of the expectations of stakeholders in the communities surrounding the mine. To date, Montana's land acquisition has been premised on individually-negotiated sales between a "willing seller and a willing buyer," without sufficient attention or ongoing due diligence related to the collective dimension of land rights of indigenous peoples. In particular, the lack of a participatory diagnostic for Sipacapa means the land acquisition process was not adapted to take into account any differences in the relationship to land ownership between the Mam and Sipakapense peoples.

While the agreement of individual land sellers is fundamental to ensure that land sales and relocation are voluntary, the company's overall process of land acquisition should be a subject for consultation and agreement with the affected communities. The fact that there were early meetings between Montana and groups of land sellers to establish a common price for land demonstrates there is a collective dimension to the expectations about land sales. Furthermore, the fact that complaints and social action has resulted from rumours about unequal payments for land sales also reinforces the expectation of equal treatment between land sellers.

Even from the perspective of the individual right to own property, greater attention to community-level issues is required for Montana to respect human rights. For example, the need to ensure consent of all rights-holders, including women, to the individual transactions; the need to ensure that all the employment and social investment commitments related to individual land sales are fulfilled; and, the need monitor the long-term impacts on land sellers – these all highlight the inadequacy of approaching land acquisition as an individual negotiation and a one-shot transaction in the context of the Marlin Mine. In many respects, the individual land sales are the building blocks for the physical presence of the mine and its relationship with the surrounding communities. It is therefore not surprising that high expectation about transparency, fairness and sustainability exist in terms of process and outcomes.

Given the complexity and uncertainty about collective indigenous title to lands in the municipalities of San Miguel Ixtahuacán and Sipacapa, there may be an opportunity for Montana to address concerns about indigenous peoples rights through consultation and agreement about return of lands at the end of the mine's operations. Beyond the technical legal issues about land title, this will inevitably entail dialogue and commitments regarding the long-term environmental sustainability, restoration, and future productive use of the land.

Economic and Social Investment

Mines provide direct economic benefits in the form of employment, services, and contracting, in the course of carrying out their principal activities. These benefits enhance the right to just and favourable conditions of work for the employees and contractors, and provides opportunities to enhance the right to an adequate standard of living for those who receive direct economic benefits. Mines also contribute new revenue streams to governments as taxes and royalty payments; these economic contributions have only an indirect relationship to the fulfilment of human rights by the State, depending on how various levels of government use the additional resources.

Increasingly, mining companies are also investing in social development and related programs in the zones where their operations are located. Social investment is normally intended to provide benefits to local populations; shortfalls in government capacity to provide basic services such as education or health care are often targeted, enhancing human rights in these areas.

As such, social investment commitments may serve as an incentive from a mining company to obtain project acceptance from local communities, and plays a role in indigenous peoples rights to participate in the benefits of the exploitation of natural resources on their lands. Increasingly, social investment is a means for companies to fulfil corporate social responsibility objectives.

Finally, social investment also plays a critical role in mitigating a project's negative impacts. Provision of targeted social investment plans is often required before permitting, such as in the Marlin Mine's Environmental and Social Impact Assessment (ESIA), and become a regulatory commitment.

Local stakeholders interviewed for this assessment recognized the mine's contributions to improved standards of living, particularly for the people who have direct employment with the mine, and most also recognized the positive impacts of social investments in the communities. However, at both the local and national level, there were concerns about both the distribution and the adequacy of these benefits. Assessing the veracity and success of the Montana's social investments is hampered by a lack of company tracking, follow-up, and reporting.

Furthermore, questions were raised regarding fair distribution of the "windfall profits" as Goldcorp has enjoyed a strong rise in the price of gold; the Marlin Mine in 2009 had the lowest cash cost per ounce of the corporation's producing mines.¹ Most stakeholders, including many employees interviewed, do not feel that enough benefit is being returned to the local communities; some local interviewees and most national stakeholders also feel more should be returned to the country as a whole.

¹ Goldcorp Annual Report 2009.

BACKGROUND

National Context

Although steps have been taken since the 1996 Peace Accords to increase social spending (from 4.3 per cent of GDP in 1995 to 7.7 per cent in 2008),² as recently as 2008, Guatemala ranked 122nd of 182 countries in the Human Development Index and 54th out of 108 developing countries in the Human Poverty Index.³

The Peace Accords included commitments to expand the tax base to generate resources required for increased social spending. The 2000 Fiscal Pact also attempted, with no success, to organize a new tax system by creating a 'tax culture' and addressing some of the most challenging problems: inequity; multiple corporate exemptions, incentives and privileges; lack of collection and enforcement mechanisms; informality; and rampant evasion.⁴ Hence, Guatemala still has one of the lowest tax bases in the region (15 per cent compared to average 26.8 per cent) and among the most generous tax exemptions and fiscal incentives for business. Guatemala's main source of public revenues – indirect consumption-based taxation (VAT) – falls disproportionately on the poor.⁵ The tax burden is less than 11 per cent of GDP, which severely limits the scope of publicly-funded programs.⁶ More recent reviews cite an increase in social expenditure in 2009 as a positive sign, in particular cash transfer programs to poor families which constitutes the government's main mechanism for poverty reduction.⁷

In this context, mining becomes one potentially important source of revenue, in the form of royalties and increased tax revenues. In 2008, mining accounted for 1 per cent of the gross domestic product (GDP) and employed 2 per cent of the formal labour force.⁸ The Marlin Mine is the single largest taxpayer in the country.⁹ However, the tax and royalty structure for mining has been highly controversial, as the Mining Law reform in 1998 reduced the royalty from 6 per cent to 1 per cent to make foreign investment in Guatemalan mining more attractive.

Furthermore, for many countries, exploitation of mineral resources does not lead to improved social conditions and may even cause additional deterioration.¹⁰ One of the key determinants is government capacity: the royalty structure in Guatemala does ensure the redistribution of fiscal resources from mining to the regions where the mining takes place, but the speed with which financial resources have been channelled to municipalities is faster than the rate at which they have been able to address their institutional weaknesses. This has created problems of governability as tensions rise due to mishandling of funds.¹¹

Local Context

In the municipalities of San Miguel Ixtahuacán and Sipacapa, the main economic activities prior to the mine start-up were subsistence agriculture and small business, operating at the margins of the formal economy and with low employment qualifications and pay. In comparison to rural communities, households in towns more frequently depend on wage earners, primarily in the public sector and small businesses. Residents in the towns may also receive money from relatives working

2 Centro para los Derechos Económicos y Sociales (CESR) & Instituto Centroamericano de Estudios Fiscales (ICEFI), 2009, *¿Derechos o Privilegios? El Compromiso Fiscal con la Salud, la Educación y la Alimentación en Guatemala*.

3 Bertelsmann Stiftung, 2009. "BTI 2010 – Guatemala Country Report". Gütersloh: Bertelsmann Stiftung, www.bertelsmann-transformation-index.de/98.0.html.

4 CESR & ICEFI, 2009, 90-91. It is estimated that in 2006, privileges and evasion deprived the Guatemalan State of Q10 billion, equivalent to 4.3% of the GDP, which represented more than 110% of what the government spent on health, food security, and education for all the citizens in that year.

5 Ibid, 79.

6 Office of the High Commissioner for Human Rights on the work of its office in Guatemala, 2007, paras. 49-54.

7 Office of the United Nations High Commissioner for Human Rights on the work of its office in Guatemala, 2009, para. 56.

8 Ministry of Energy and Mines, Anuario Estadístico Minero, 2006.

9 According to Montana's reporting in the AMRs, by 2008 Marlin Mine has paid over \$55 million in taxes to the Guatemalan Government.

10 ICMM, January 2006.

11 Infopress Centroamericana, 2007, Servicio de Información Municipal (SIM) e Instituto de Fomento Municipal (INFOM). "Información y Análisis del SIM comienza a llegar a COCODEs y COMUDEs", www.inforpressca.com/municipal/.

in Guatemala City or in another country, usually the United States.¹²

Prior to the Marlin Mine, the majority of municipal income (96 per cent) consisted of transfers from the State, with the rest (4 per cent) generated from municipal sources. Since 2004, the San Miguel municipal budget has increased by more than Q13 million (\$1.7 million),¹³ with a Q10 million jump from 2006 to 2009.¹⁴ The budget of Sipacapa, in comparison, has increased only by Q2.2 million (\$300,000),¹⁵ reflecting the fact that it does not receive royalty payments.¹⁶

Local residents rely almost exclusively on their municipality to provide services and to finance selected community projects. There is considerable competition between communities for what historically were very limited resources. The expanded resource base of San Miguel and funding provided by the mine alleviates some pressure, although there are still funding gaps to fulfil basic human rights.

In recent years, government programs have begun to target vulnerable groups. Community Development Councils (COCODEs) and Municipal Development Councils (COMUDEs)¹⁷ have taken increasingly active roles to promote development in the project-affected area, while San Marcos departmental government support has remained minimal. Both San Miguel and Sipacapa have developed integrated development plans with the participation of their respective COMUDE. In both instances, community priorities include access to clean water, health services, education/training, and infrastructure. The community development plan for Sipacapa was not made available to the assessors.

12 Montana ESIA, 2003, 5-24.

13 All currency conversion of Guatemalan quetzales and U.S. dollars were calculated in April 2010, when U.S. and Canadian dollars were approximately at par. The original figure appears first, followed by the conversion in brackets.

14 Because royalties are paid on the basis of the value of the mineral sold, royalty payments, like income taxes, fluctuate with the global price of gold; this price has increased significantly in the last few years.

15 Sistema Integrada de Administracion Financiera, Guatemala, "Transferencias Gobierno Central a Municipios", http://siaf-muni.minfin.gob.gt/siafmuni/APORTES_MUNICIPALESnew.aspx?pResolucion=1600.

16 The Mining Law establishes that royalty is redistributed to municipal governments based on the location of the ore body, not facilities or other criteria such as impacts.

17 Ley de los Consejos de Desarrollo Urbano y Rural (Urban and Rural Development Council Law), Congressional Decree No. 11-2002.

In San Miguel, municipal staff reported that in 2008, the municipality initiated a participative process to prioritize community projects, such as water systems, schools, community meeting rooms, soccer fields, bridges, and roads. Most communities have already implemented at least one project and are working on a second. If there are insufficient municipal funds to finance the projects, the municipality provides assistance to obtain funding from the State or other parties (e.g. private sector, international cooperation, and NGOs), especially for larger projects.

A limited number of national NGOs are present in the municipalities; there are also a small number of local groups that participate in sustainable development programs, with funding from international organizations or special initiatives of the Guatemalan government.

Identification of Stakeholder Concerns

The assessors reviewed the mine's contribution to the national and local economy through financial transfers and infrastructure development, as well as the mine's social investment activities based on a review of internal documents, promotional material, and information disclosure through the company's Annual Monitoring Reports (AMRs) and reports from the Sierra Madre Foundation (Fundación Sierra Madre – FSM).

A review of articles, Internet campaigns, interviews with national and international NGOs and organizations, and interviews with municipal and local community authorities and residents provided input into how the economic activities and social investment contributions are perceived by various actors and perceptions of whether human rights are enhanced through these investments. There was greater access to information in San Miguel Ixtahuacán than in Sipacapa; nonetheless, beneficiaries of foundation programs in Sipacapa did participate in focus group discussions as part of the interview process.

While information about the company's revenues and economic contributions such as taxes, royalties, and employment is publicly available, there is a critical gap in Montana's reporting about its local social investments, both in financial data and evaluations of the impacts of its programs. This is discussed further in the assessments below.

Interviews with local stakeholders were the primary basis for identifying negative impacts experienced by local people that Montana may not be addressing through its social investment programs. These are discussed below in each assessment as relevant.

Human Rights Context

In general terms, the outcomes of a company's economic and social investments are related to respect for and potential enhancement of a broad range of economic, social and cultural rights. Guatemala ratified the International Covenant on Economic, Social and Cultural Rights in 1988, as well as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights in 2000. Furthermore, indigenous peoples have rights to benefits from development related to the exploitation of natural resources pertaining to their lands and territories. In this regard, Guatemala ratified in 1996 the International Labour Organization's Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169).

At national level, protections for economic, social and cultural rights and indigenous peoples rights can be found in the Constitution, as well as in the 1996 Peace Accords, including the Agreement on Social and Economic Aspects and Agrarian Situation and the Agreement on the Identity and Rights of Indigenous Peoples.¹⁸

The human rights context specific to direct economic investment and for social investments, is set out in the individual assessments below.

The following questions guide the assessment:

- Assessment SI1: Have economic investments contributed to the fulfilment of human rights?
- Assessment SI2: Has social investment contributed to the fulfilment of human rights?
- Assessment SI3: Have social investments mitigated negative impacts that could affect human rights?

¹⁸ Agreement on Social and Economic Aspects and Agrarian Situation, May 6, 1996, Mexico: Conciliation Resources, www.c-r.org/our-work/accord/guatemala/socio-economic-accord.php.

ECONOMIC CONTRIBUTIONS

Assessment SI1: Have economic investments contributed to the fulfilment of human rights?

The Marlin Mine's economic contributions include direct payments to government such as taxes and royalty payments, and direct economic benefits in the form of employment, services, and contracting.

Data on Montana's economic contributions stemming from the Marlin Mine come primarily from the company's Annual Monitoring Reports (AMRs), which the company began to publish in 2005 in accordance with its International Finance Corporation (IFC) loan requirements, and to fulfil Guatemalan requirements and the ESIA. The 2009 AMR had not been published at the writing of this assessment. Financial data in the AMRs are split over several sections and there is no

comparison of contributions year over year. The assessors were unable to verify financial data in the AMRs. Where data in other company document appears to conflict with the AMRs, the assessors have noted so. This is particularly the case for social investments, which is discussed in later assessments in this section.

Table 6.1 provides a summary, compiled by the assessors, of the Marlin Mine's key economic contributions from 2005 to 2008.

According to Montana, in 2008, the Marlin Mine contributed Q160 million (\$20 million) in taxes and royalties to the central government. Of that amount, royalties corresponded to Q45 million (\$6 million), which is divided equally between San Miguel Ixtahuacán and the central government. San Miguel municipal staff have indicated that 70 to 80 per cent of royalty

Table 6.1: Marlin Mine Key Economic Contributions, 2005 to 2008

	2005	2006	2007	2008
	millions			
Corporate income taxes (31%)	0	\$3.4 Q26	\$9.5 Q77	\$12.5 Q97
Royalties	\$0.13 Q1	\$1.3 Q9	\$1.9 Q14.6	\$2.5 Q19.2
Sipacapa reserve ^a	0	0	\$0.19 Q1.46	\$0.25 Q1.92
Local payroll ^b	\$3.6 (Q29)	\$3.8 (Q30)	\$4.8 (Q38)	\$6.9 (Q55)
Payroll social security tax (corporate contribution)	\$0.44 (Q3.5)	\$0.76 (Q5.8)	\$1.0 (Q7.7)	\$1.1 (Q8.6)
Payroll social security tax (employee contribution)	\$0.17 (Q1.4)	\$0.17 (Q1.4)	\$0.37 (Q3)	\$0.51 (Q4)
Local purchases ^b	\$2.3 (Q18)	\$2.2 (Q18)	\$1.1 (Q9)	\$1.7 (Q14)
Value added tax ^c (12%)	n/a	\$6.3 Q48.7	\$3.8 Q29.1	\$4.7 Q35.7
Women-owned companies, local area ^d			\$0.2 (Q1.7)	\$0.073 (Q0.6)
Revenue	\$11.7	\$109.9	\$203.7	\$258.1

Notes: Financial data in U.S. dollars. Conversion to Guatemalan quetzales (in brackets) was calculated in April 2010, when U.S. and Canadian dollars were approximately at par. Figures have been rounded.

^a Montana voluntarily sets aside an additional 0.01% of royalties for Sipacapa, which it has not accepted. According to the 2008 AMR, the reserve (including retroactive amounts) then totalled \$575,000 (Q4.5 million).

^b Local refers to residents of San Miguel Ixtahuacán and Sipacapa municipalities.

^c The assessors were unable to determine whether this amount excludes tax refunds.

^d AMRs began reporting on purchasing from local women-owned companies in 2007. In 2008, Montana also paid \$415,000 (Q3.4 million) to women-owned businesses in San Marcos Department.

Source: Compiled from Montana Annual Monitoring Reports; not verified independently or by the assessors.

payments to the municipality are designated for infrastructure projects. Although not legally obligated, since 2007 Montana has also set aside a payment for Sipacapa Municipality equal to 10 per cent of royalties. In 2008, this amounted to Q4.5 million (\$575,000).¹⁹

Prior to operation, Montana applied to the Ministry of Economy and was granted legal exemptions on income and value added taxes, as well as custom tariffs on imported materials and equipment. According to company sources; these exemptions would have ended in 2008; however, in 2006, Montana renounced

¹⁹ Royalties are paid to municipalities on the basis of where the ore body is located, not on project impacts or physical footprint. The ore body is located in the Municipality of San Miguel. Montana calculated the percentage of the mine footprint in Sipacapa and set aside an equivalent amount for Sipacapa as a voluntary payment in lieu of a royalty. Sipacapa Municipality has not accepted the money.

the tax exemption status in an agreement signed with the Ministry of Energy and Mines, and in response to criticism it was contributing very little to the country; Montana paid \$12.9 million in taxes over 18 months that would otherwise have been exempted.²⁰

Company policy favours contracting local and national contractors and the company tracks the residence of the contractor. Some local contractors are not formalized and do not operate with regular taxable receipts. Montana pays the taxes due on those payments, according to management interviews.

The assessors were advised by Montana management that an agreement was recently signed with the Municipality of San Miguel to provide an additional Q1

²⁰ Montana AMR, 2007, 28.

million (\$125,000) per month of voluntary funding to the municipal development plan, contingent on the price of gold remaining high, and no shutdown at the mine from social protests.²¹

There is no data available to support further analysis of other economic benefits derived from the mine's direct contributions, such as indirect job creation, small business development, or increased savings.

Human Rights Context for Economic Contributions

The mine's economic contributions to the State have the potential to contribute positively to the fulfilment of a range of human rights. For the purpose of this assessment, the main international human rights standards are those associated with the State's general obligation to progressively realize the economic, social, and cultural rights of its citizens.²² To the extent that Montana's economic flows contribute to specific social programs or infrastructure projects, there may be an enhancement of human rights, such as rights to water, health, or education.

Employment and the associated improved income can provide for enhancement of human rights, specifically the right to work and an adequate standard of living.

Furthermore, given the high proportion of indigenous peoples in Guatemala and the municipalities surrounding the mine, the company's economic contributions are also part of providing indigenous peoples with benefits from the exploration and exploitation of mineral resources.²³ Indigenous peoples are supposed to be consulted upon and participate in those benefits.

There are fewer questions and indicators in the DIHR HRCA tool to assess the company's compliance in this area, but the international standards and guidelines for companies include:

- Contributions to economic, social and environmental progress with a view to achieving sustainable development;²⁴
- Contributions to the public finances of host countries by making timely payment of tax liabilities;²⁵ and
- Payment of wages to local employees and contractors to enhance the economic, social and cultural rights of those individuals and their dependents, and also to provide an indirect benefit through spending in the community and contributions to public finances through taxation.

The measures a company takes to combat corruption and promote transparency of its payments to governments are also important for supporting the human rights benefits and preventing injustice or impropriety.²⁶

Discussion

The State is responsible for the fulfilment of economic, social and cultural rights and Millennium Development Goals at national and local levels. Increased state revenues mean more opportunities to improve the quality of life of individuals and vulnerable groups, including in the project area. However, the Guatemalan government's ability to leverage taxes and royalties for enhancement of basic rights is low, and is criticized by human rights organizations, including the United Nations.

In this context, the fiscal contribution of the Marlin Mine is significant; the mine is the largest taxpayer in Guatemala. While large, the contribution is not a sustainable increase in fiscal resources because mines have finite lives. In terms of mining's contribution to human rights fulfilment by the government, there are no direct mechanisms to link mining's revenue contributions to social development investment, except for the 50 per cent of royalties that go directly to the municipality where the ore body is located. Funds received

21 Interview with Regional Manager for Sustainable Development. This is a new, direct payment from Montana and does not come from the Marlin Mine's operating budget.

22 ICESCR; Additional Protocol to the ACHR.

23 ILO 169, Article 15(2); IFC, 2006, Performance Standard 7, para. 10.

24 OECD, 2008, General Policies 1; ICMM, 2010b, Principle 9.

25 OECD, 2008, Section X "Taxation."

26 ICMM, May 2009, Section 3.7; OECD, 2008, Section VI "Combating Bribery"; United Nations Global Compact, Principle 10; ICMM, 2010b, Principle 1; Global Reporting Initiative G3 Guidelines, indicators SO2 – SO6.

at the national level must cover many other priorities, and Montana has little influence over whether their economic contributions actually support human rights fulfilment. Montana can work with the government, however, to increase the overall transparency in the use of resource revenues, such as encouraging the government to subscribe to the Extractive Industries Transparency Initiative.²⁷

Montana has engaged in institutional strengthening at both the national and municipal levels of government, especially at the municipal level where the revenue base has more than doubled since 2005.²⁸ This capacity building contributed directly to the San Miguel Municipality being given more direct control over the royalty and tax revenues collected in their name, instead of that money staying in the central treasury.²⁹ Montana also pays the 50 per cent of royalties due to San Miguel directly to the municipality, in regular payments throughout the year rather than annually, which supports better planning and stable budgets. The additional Q1 million (\$125,000) per month committed by Montana in 2009 to support the municipal development plan represents a significant increase in municipal capacity to fulfil human rights. According to Montana, the company negotiates with the municipality on the use of that money, which is conditional on the continued high price of gold, and no paralyzation of the mine from by social protests. The impacts in terms of additional resources, combined with improved capacity to effectively use funds, are likely to contribute positively to fulfilment of human rights.

Unlike the use of tax revenues, economic employment benefits are fully under the control of the company; contributions to the right to work are addressed in Section 4: Labour. Montana was recognized in the International Finance Corporation's Compliance Advisor Ombudsman report as being effective at strengthening local benefit streams – localizing benefits instead

of having them flow to outsiders.³⁰ In line with that finding, the ongoing success in local employment and contracting in terms of gross economic flows into the local communities is recognized as very successful. However, this success has only an indirect relationship to fulfilling other human rights unless the money is spent on their fulfillment. Montana has put forth anecdotal evidence since 2004 that the mine's economic activities were having a positive impact on poverty reduction and a better standard of living. The only result measured by the company since 2004 has been children's school attendance (discussed below); the remainder of the social data reported on is anecdotal because social and economic indicators are not monitored on a regular basis. This has been confirmed by Montana management who identified difficulties in carrying out social assessments in the communities around the mine and acknowledged that no comprehensive socioeconomic follow-up data has been collected since the ESIA.³¹

Not monitoring impacts means that Montana is also not collecting information needed to identify negative impacts, as discussed below. Inflation, for example, could undermine the positive gains achieved by some families through increased wages local procurement contracts, and land sales. There is no possibility for the assessors, or Montana, to determine net impacts of economic transfers at a local level without having data on the full range of impacts that affect people.

Some concerns with human resource practices were identified in Section 4: Labour that will affect net benefits, including local resourcing of contractors based on low cost rather than criteria to support small business formalization and economic diversification, and lack of provisions to ensure that workers' labour rights are respected by subcontractors. This leaves informal workers vulnerable in a number of important areas.

Direct economic payments and service contracting make a significant new contribution to the standard of living of some in the communities and Montana has been successful at delivering more of these economic benefits to local residents than many mining

27 The Extractive Industries Transparency Initiative is a coalition of governments, companies and civil society to improve transparency as a tool to improving the use of resource revenues from mining and oil & gas, see <http://eitransparency.org/>.

28 Since 2004, Citizens Development Corps' and Sierra Madre Foundation's projects have worked with the municipality of San Miguel Ixtahuacán to build capacity in planning, fiscal management, and other areas (see Annual Monitoring Reports).

29 Municipalities without the demonstrated capacity to collect and manage taxes, such as the local property taxes (IUSI), must wait to receive even municipal taxes from the central government instead of collecting them directly.

30 CAO, 2005.

31 There has been data collection on socioeconomic issues at various times since the ESIA, such as the ASIES report on the regional economy, several focused surveys by FSM, and anecdotal information collected by Marlin personnel and the CRG.

operations through the high percentage of employment and contracting that goes to local (municipal) residents.³² While it is certain that some enhancement has occurred, the extent to which this translates into actual enhancement of human rights for employees and other local residents cannot be determined without better data.

Local perceptions of Montana's infrastructure investments showed a certain consensus that improvements had occurred. Yet, there were also unfulfilled expectations. Ambivalence exists about the mine's contribution to infrastructure because of co-financing by government, which has led some stakeholders to discount Montana's contribution. In contrast, some stakeholders felt the State only paid attention to the area because of the mine's presence, and that infrastructure development would not have taken place otherwise.

There is significant agreement amongst observers of the Guatemalan situation that the lack of financial resources is an underlying limitation for the State to respect human rights linked to development. Therefore, in principle, the contributions provided by the mine enhance the government's ability to fulfil human rights; however, as noted, it does not mean the resources are being used effectively to address shortfalls.

Beyond reporting tax revenues and overall project budgets, the company has not collected data to evaluate socio-economic transformation or benefit distribution in the communities, without which the determination of how human rights are affected by the mine's economic activities is not possible. Furthermore, reporting is restricted to commitments made in the ESIA, rather than a broader focus on general economic improvements or the sustainability of measures. Indirect economic impacts have also not been quantified.

Findings

Montana has enhanced the human rights of individuals through efforts to maximize the local content of employment, purchases and contracting, and by strengthening the local government's ability to administer revenue. This is known to enhance the right to fair remuneration; however, the extent of the impacts to other human rights cannot be quantified.

Montana contributes new revenue streams to the national and municipal governments through taxes and royalty payments; these economic contributions have only an indirect relationship to the fulfilment of rights, depending on how various levels of government use the additional resources.

Montana's contributions to municipal revenue through royalties and local taxes provide a significant increase in the ability of the municipality of San Miguel Ixtahuacán to fulfill human rights obligations. Montana's investment in institutional strengthening has supported the capacity of municipal authorities to administer royalties and other increased tax flows from economic growth. This is a respect for human rights.

Montana's contribution of a voluntary royalty payments for use by the Municipality of Sipacapa in spite of not being a legal requirement respects human rights and provides Sipacapa with the opportunity to enhance rights fulfilment. However, as the contribution has not accepted the voluntary royalty payment, no actual positive impact has occurred.

Montana's relinquishment of the tax exemptions in 2006 increased the revenue flows to national government and improved the government's ability to fulfil its human rights obligations. However, as noted by the Office of the High Commissioner for Human Rights in Guatemala, a very low proportion of national revenue is invested into social programs that enhance human rights, and there currently is no effective tracking of the positive impacts.

³² See discussion in CAO report on localized benefits; CAO, 2005, 25.

SOCIAL INVESTMENT

Assessment SI2: Has social investment contributed to the fulfilment of human rights?

Social investment and other development projects have the potential to enhance economic, social and cultural rights.³³ They may also enhance civil and political rights through capacity-building that permits beneficiaries to develop the skills to participate more fully in democratic society. Social development programs are also a primary mechanism for delivering on ILO 169's requirement that indigenous peoples participate in benefits of the exploration and exploitation of mineral resources on their lands.³⁴

As with economic contributions outlined above, data for Montana's social investments come primarily from the Marlin Mine's Annual Monitoring Reports, which Montana began to publish in 2005 in accordance with its IFC loan requirements, and to fulfil Guatemalan requirements and the ESIA.

Reporting on social investments in the AMRs is set out over several sections, and often have no financial data attached to the programs or projects described. There is no summary or total of expenditures and no comparison of expenditures year over year.

The assessors note that Montana committed in the 2004 AMR to develop and implement a Social/Sustainable Development Management System (SDMS), as well as an Environmental Management System (EMS). While subsequent AMRs reported on the progressive development and implementation of the EMS; the SDMS was never produced. In the AMR for 2008 the company reported that Phase 1 was still being written.³⁵

The assessors reviewed the organization and management of budgets related to social investment in an effort to understand internal accountability for social investments as well as to develop a comprehensive

and verified account of overall spending by Montana in these areas. The achievement of these objectives was not possible given the scant budget information provided, even with subsequent requests to clarify expenditures. The assessors were provided with many other documents by Montana that discussed social investments from different perspectives or focused on different aspects. Many of these presented investment numbers that contradicted other figures or could not be reconciled. These documents were not used because of the inability to reconcile or verify the financial figures. Montana was advised of this problem in November 2009 and asked to provide a clear financial accounting of social investments through the various funding channels that Montana uses. This information was not provided.

Based on the information made available to the assessors, social investment spending is not accounted for internally within Montana in a way consistent with industry or development agency standards for program or financial accountability. It will be necessary for Montana and Goldcorp at a minimum to adopt more rigorous accounting and reporting procedures if they intend to have external evaluations of social investment or independent verification of their development investments.

In the absence of this documentation it was not possible to quantify development impacts or human rights outcomes other than anecdotally. This is unfortunate for Montana, as it is clear from interviews and observation that there have been positive impacts from social development funding. The lack of monitoring also limits Montana's ability to evaluate the effectiveness of its own efforts or to demonstrate positive impacts in concrete terms; this concern is discussed later in this section.

Table 6.2 provides a summary, compiled by the assessors, of three of the Marlin Mine's key social investments from 2005 to 2008. As noted, this data does not represent a full accounting of Montana's social investment expenditures.

By way of summary, Goldcorp reported that in 2007 it provided "over \$2.6 million in community investment

33 Even projects specifically targeted at improving human rights fulfillment do not always achieve positive results, and sometimes have unintended negative impacts, which gave rise to the HRIA in the 1990s. Norwegian Centre for Human Rights, 2004.

34 ILO 169, Article 15(2); IFC, March 2007, para. 10.

35 Montana AMR, 2008, 55.

Table 6.2: Marlin Mine Key Social Investments, 2005 to 2008

	2005	2006	2007	2008
Sustainable Development Department ^a	n/a	\$500,000 Q4 million	\$500,000 Q4 million	\$500,000 Q4 million
Teacher salaries ^b	\$68,663 Q535,577	\$117,375 Q892,048	\$119,893 Q919,579	\$98,573 Q749,147
Sierra Madre Foundation ^c	0	\$400,000 Q3.2 million	\$400,000 Q3.2 million	\$400,000 Q3.2 million
<p>Notes: The assessors were unable to obtain sufficient or clear data for other program, project, or donation expenditure totals by year.</p> <p>^a Figures provided in interviews with Montana managers, includes Q2.4 million (\$300,000)/year approximately for the ODU.</p> <p>^b Montana Annual Monitoring Reports, 2005 to 2008.</p> <p>^c Montana consistently reports FSM funding as Q3.2 million \$400,000 per year; however, the 2008 FSM annual report states that funding in 2007 was Q1.8 (\$200,000).</p> <p>Source: Interviews and Montana Annual Monitoring Reports, 2005 to 2008; not verified by the assessors.</p>				

funding in Guatemala,” but did not provide particulars.³⁶ Data reported for 2007 in Table 6.2 accounts for approximately half of that reported amount (\$1.3 million). The assessors were unable to locate a comparable figure for 2008.

Human Rights Context for Social Investments

To the extent that Montana’s social investment programmes have prioritized health, education, economic development and micro-financing, the main international human rights standards relevant to this assessment are:

- Right to health;³⁷
- Right to education;³⁸ and
- Right to work and an adequate standard of living.³⁹

More broadly, social investment projects contribute to the rights of indigenous peoples to participate in the

benefits of the exploitation of natural resources pertaining to their land.⁴⁰

Relevant international standards and good practice guidance⁴¹ for a company’s contributions to social investment projects include:

- Contributions to economic, social and environmental progress with a view to achieving sustainable development;⁴²
- Opportunities for culturally appropriate development benefits through a process of free, prior and informed consultation and the informed participation of the affected communities of indigenous peoples;⁴³
- Developing an understanding of the social and economic contribution of the project, including an analysis of the barriers that might weaken this contribution;⁴⁴ and
- Actively supporting partnerships or collaborations with other stakeholder groups, with the aim of ensuring the project’s full potential socio-economic contribution is realized.⁴⁵

36 Goldcorp CSR Factsheet 2007.

37 UDHR, Article 25; ICESCR, Article 12; Additional Protocol to ACHR, Article 10.

38 UDHR, Article 26; ICESCR, Article 13; Additional Protocol to ACHR, Article 13.

39 UDHR Articles 23, 25; ICESCR, Articles 6, 11; Additional Protocol to ACHR, Article 6.

40 ILO 169, Article 15(2).

41 The DIHR HRCA tool provided few questions and indicators to assess the company’s compliance in this area

42 OECD, 2008, General Policies 1; ICMM, 2010b, Principle 9.

43 IFC March 2007, para. 10.

44 ICMM, February 2010, 3.

45 ICMM, February 2010.

Montana's Commitments for Social Investment

While Montana's contributions to economic, social and cultural rights through social investment and development projects may go further than the basic standard of respect for human rights and the corresponding requirement that a company "do no harm," the social investment projects are a necessary part of the company's commitments to sustainable development made in the ESIA and other project documents such as the IPDP.

Montana's principal social investment commitments are defined in the original ESIA (2003), in terms of the impacts identified and the proposed mitigation measures; and the Indigenous Peoples Development Plan (IPDP) produced as a requirement for the IFC in 2004.⁴⁶ The commitments cover programs to improve quality of life, enhance productive skills and capabilities, and identify economic opportunities in the area surrounding the mine, including:

- Increasing and improving investments in technical training;
- Improving basic infrastructure;
- Fostering policies to promote micro, small and medium-sized enterprises (MSMEs);
- Supporting programs to promote education, with priority actions to improve quality and access to pre-primary and primary education;
- Improving health care, with an emphasis on expanding access and usage, using both supply and demand interventions, and integrating actions to reduce malnutrition into the basic health-care package;
- Reducing isolation and improving communications by investing in rural transport and roads; and
- Improving governance and the effectiveness of the public sector.⁴⁷

The IPDP, based on compliance with both the Indigenous Peace Accord and ILO 169,⁴⁸ identified five core elements to promote indigenous peoples development:

⁴⁶ The IPDP covered commitments also included in Montana's 2004 "Report on Compliance with ILO 169," which was produced in Spanish, available on the IFC website, and released to the government.

⁴⁷ Montana ESIA, 2003, Section 3.5 Social Programme.

⁴⁸ Montana, February 19, 2004, 9.

- Cultural respect;
- Informed consultation and participation;
- Participation in the direct and indirect economic benefits of the project;
- Local capacity building; and
- Sustainable development.

The IPDP also stipulated that development projects be directed at mitigating project impacts as well as supporting development objectives identified by indigenous people and community leaders.

Overview of Funding Mechanisms and Social Investment Projects

According to Goldcorp reporting, between 2004 and 2008 Montana implemented 115 community development projects, including basic infrastructure, health and education, community centres and drinking water systems, among others, with a total investment of Q7.8 million (\$1.1 million).⁴⁹

Montana's social investment is channelled through two main mechanisms: the mine's Sustainable Development Department (SDD) and the Sierra Madre Foundation (Fundación Sierra Madre – FSM), which was founded in late 2003 to respond to the limited capacity to implement "mitigation and development programs associated with the Marlin Mine."⁵⁰ Other initiatives and funding activities exist and are managed separately by Montana management, and are apparently funded through separate budgets.⁵¹

Project and social development funding through Marlin's SDD is mostly through the Organization Development Unit (ODU), and some through the Community Relations Group (CRG) in good neighbour

⁴⁹ Montana, 2009, "Los 100: Desarrollo Sostenible," (company brochure).

⁵⁰ Montana, February 19, 2004, 11.

⁵¹ According to interviews with Montana management, examples include major infrastructure such as the health clinic being constructed in San Miguel Ixtahuacán, the Q1 million (US\$ 126,000) in additional funding to the San Miguel development program, and additional funding for community programmes along the power line.

Glamis initiated efforts to establish a foundation soon after arriving in Guatemala, and the initial strategy was to hire Community Development Corp – CDC (a development NGO from Washington DC) to create an independent foundation. The vision was that the Sierra Madre Foundation would become community based, and capable of attracting funding from a variety of sources, but this has not occurred.

The initial focus of FSM was to implement the Integrated Community Development Plan (ICCP) through creating alliances with Guatemalan organizations to deliver services and programs. FSM opened an office in San Miguel Ixtahuacán in 2003 and initially worked with communities in San Miguel; in 2004 the foundation initiated work in Sipacapa as well, opening a second office. This office was closed in 2006 at the request of the municipality; Montana reports that due to ongoing interest in projects by communities in Sipacapa, it opened small information offices in five communities.

In 2006 under CDC's ongoing management, FSM initiated efforts on entrepreneurial development, and continued with other programs. The latest stage for FSM started in 2008 with a new director and now is focused on new productive initiatives such as coffee cooperatives, which appear to be well received in the communities and, in comparison with other more individualized projects, are working at a more collective level of benefits.

FSM has worked in capacity building with the municipality of San Miguel Ixtahuacán and has established alliances with institutions and local organizations such as the COCODEs and COMUDEs, and the municipalities for specific programs, and to support the participatory process for development planning.

FSM's incorporates community representation through a board of advisors (CADEC). FSM reports ongoing capacity building efforts for the CADEC, but interviews suggest community participants feel there is very limited scope for their participation, and reported that in recent years meetings were held infrequently if at all. Although the intention and structure of the FSM was for it to be community based, the reality is that it is top down, has little effective community input, and is influenced by Montana's criteria and focus.

programs. According to management interviews, the SDD has an annual budget of \$500,000 (Q4 million), of which \$300,000 (Q2.4 million) is designated to the ODU, \$100,000 (Q800,000) to CRG, and the other \$100,000 (Q800,000) for other activities.

The SDD provides internal reports on a monthly basis to the mine's general manager on events and activities, but does not have either an annual work plan or end of year report or evaluation of activities, spending and whether the department's objectives were achieved. Interviews indicate that stakeholders both internal and external to the mine are uncertain as to whether the various activities will achieve broader objectives of sustainable development, or whether there is a strategy in place to do so.

The Sierra Madre Foundation comprises the second main component of Montana's social investment strategy and is set up to operate as a development

facilitator in San Miguel Ixtahuacán and Sipacapa, with limited capacity for financing activities and programs of its own. FSM has had three separate phases to date, and according to Montana, has an annual budget of Q3.2 million (\$400,000), which has remained constant since its formation.

The division of labour between SDD and FSM is not always clear. The company directly invests through the SDD in infrastructure, but also funds education, teacher training, annual community-level projects, is building capacity in the communities and in supporting the Municipality's projects. FSM does not build infrastructure, it focuses on training and capacity building, education (environmental issues, etc.), development of small businesses, micro lending, and health.

Community development and improvement in social indicators is not in the hands of Montana alone to achieve; the strategy has been to include institutions

with expertise, and to work through and support community authorities and organizations, and municipal capacity to fulfil local government's responsibility instead of Marlin or Montana replacing the State.

The following examples illustrate some of the social investment projects and partnerships of the FSM and SDD, as reported by FSM or Montana and compiled by the assessors:

Health Care

Starting in 2003, FSM/Health Promoters Association of San Miguel (Asociación de Promotores de Salud de San Miguel – APROSAMI)⁵² collaborated to provide health services to target communities (14 according to APROSAMI) by involving community members in health baseline studies and other health related activities; supporting health centres; organizing health fairs; distributing medicine kits; and providing direct attention to patients. Recently, the FSM focus has moved away from direct patient attention to more emphasis on prevention, prophylaxis, vaccination, educational campaigns, awareness, and early controls.

As noted, few evaluations have been made of the success of any of the programs. An exception to this is the evaluation of the micro-lending program⁵³ that indicates good levels of satisfaction with sustained growth. According to the evaluation, the funds provided allowed 75 per cent of the women to make a profit, while 84 per cent used the loan to buy basic materials in the areas of: small scale animal husbandry, which increased food security. According to APROSAMI statistics⁵⁴, health indicators have improved since the mine began operating, fewer children are born with low weight, and health in the communities has improved.

Training and Small Business Development

An alliance with the Training and Productive Technical Institute (Instituto Técnico de Capacitación y Productividad – INTECAP),⁵⁵ a government vocational training organization, was described as providing occupational training to the local population, women and entrepreneurs. The initial training programs were supposed to be directly linked to the labour needs of the mine, but Montana indicated this did not take place. Training was done primarily in trades with no linkage to operations, such as baking, sewing and human resources planning.⁵⁶ While there is no data on the success rate of participants, interviewees reported that internal informal assessments indicated that few workshop participants were using their training, leading FSM to refocus on entrepreneurial development in approximately 2006.

Microfinancing

A collaboration was initiated with the Foundation for Financial Consulting to Development and Social Service Institutions (Fundación de Asesoría Financiera a Instituciones de Desarrollo y Servicio Social – FAFIDESS) in 2004,⁵⁷ a Guatemalan microfinance institution that provides microcredit and training to women through communal banks. Montana's initial contribution was to guarantee the loans so that FAFIDESS would be willing to work in the low income-low literacy rural communities;⁵⁸ follow up support by FSM included participant training to support small business activities. The programme continues to operate, and has reported 50 communal micro-lending banks and one solidarity group serving 708 women and providing access to over Q3.9 million (\$504,000)

52 Project Concern International (PCI)/(Asociación de Promotores de Salud de San Miguel (APROSAMI) subcontract, 2003. Attachment 1, Workplan for 2004

53 FSM Internal document, May 28-29, 2006.

54 Review of program information, APROSAMI offices.

55 Instituto Técnico de Capacitación y Productividad (INTECAP)/ CDC, 2004. Formal agreement. Attachment 1, Workplan for 2004

56 This appears to represent a discrepancy between how Montana described these programmes initially in the IPDP and ESIA versus what actually took place when implemented. While not unusual to adjust programmes, evaluations or annual reporting that clarified changes from initial plans would have provided better documentation of how commitments were met through different strategies, as well as stronger verification on actual programming.

57 Sierra Madre Development News, April 2004, Attachment 1, Workplan for 2004.

58 Montana management interview.

Education

Education is supported by the SDD, not by FSM. In addition to many school infrastructure projects since 2003, SDD funds teachers' salaries in a direct contribution to education in the local area. According to interviews with Montana personnel beginning in 2009, SDD's support to education is split between teachers' salaries and direct scholarships to local students to continue their education.

Teachers' salaries are one of the few expenditures consistently reported in AMRs; according to the most recent report, during 2008 Montana funded the salaries of 36 teachers in 23 communities for a total cost of Q749,147 (\$98,573);⁵⁹ no other education-related expenditures are consistently reported.

School attendance is the one socio-economic measure that is consistency reported in AMRs, for six "communities/schools" – five in San Miguel Ixtahuacán and one in Sipacapa: total enrollment is reported to have increased from 757 students in 2002 to 1,131 in 2008, a 66 per cent increase,⁶⁰ "despite relatively minor changes in population." Although no data is provided, the report notes that "fewer families are traveling to the coast for work and more children are completing the school year" and that "it is also clear from discussions with teachers that fewer children are dropping out of school each year, although the dropout rate in some schools continues to be relatively high." The information provided is anecdotal, however, and the absence of data on changes in the overall population of the communities makes it difficult to determine how much improvement there has been in school attendance. The assessors are not aware of consistent tracking or follow-up to barriers to education for local children.

Capacity Building for Municipality

Regular monthly budget flows from royalty payments have allowed the San Miguel Ixtahuacán municipality to manage projects better, with an unquantified impact on improved human rights of health, education

⁵⁹ "Teachers salaries" are inconsistently reported as including salaries, benefits, certification, training, and supplies; the proportion of these costs paid by Montana is not specified.

⁶⁰ Totals calculated by the assessors.

and well-being. Montana has promoted institutional strengthening training to enhance the effectiveness of the municipality in delivering programs. FSM is providing technical training and engaging with COCODEs and municipality representatives. In addition the municipality and company discuss the selected projects and find collaborative ways to finance them, according to interviews with both organizations. Based on interviews, there appears to be increased satisfaction in the municipality as well as some communities for the strategies in place in recent years.

Infrastructure Projects

There is an undisputed success in the contributions to physical infrastructure. Nearly all of the projects identified by communities were for infrastructure projects; and the distribution of funds and therefore the amount of money available, varies according to whether the community is in the direct, indirect or transport zone of influence of the mine. All communities in the two municipalities should qualify for some level of funding under this strategy, but in reality very little is available to those furthest away from the mine.

Discussion

In spite of a consistent presence and ongoing project implementation, community perceptions of the value of Montana's social investment program are varied:

- Widespread recognition that infrastructure projects have contributed to communities (e.g., classrooms, roads, etc.);
- Criticism that development projects and benefits to communities are small in comparison with the profit that Montana is making, or relative to the promises of development made before the mine was built;
- Allegations that projects are used to favour promoting allies in San Miguel and Sipacapa and are often directed towards resolving conflicts;
- Beneficiaries of some projects were described as hand-selected, and it is not felt that programs support the most needy;
- Concerns that benefits are being received primarily by individuals, and not by communities as

collectives, and that projects do not respond to community requests or needs;⁶¹

- Complaints that FSM contributes little to existing organizations but claims credit beyond what it has actually accomplished.
- Development is not seen as addressing the needs of the most vulnerable groups or directed at people with links to the company;
- FSM's role in articulating public institutions is not seen as contributing to the local development; programs from these institutions are already available to citizens.

These criticisms reflect unmet expectations, but also confusion by stakeholders – internal and external to Montana – about funding criteria, programmes, and overall strategy. They also reflect a tendency to value physical results such as infrastructure. The concerns and criticisms also reflect some of the weaknesses identified in Montana's delivery of social development programs and its fulfilment of commitments made, formally and informally, to local communities.

As noted, in recent years, there has been an improvement in participatory project planning of SDD projects and through support of the municipality's participatory planning process by the FSM. Community input and increasing levels of participation in FSM programming, as would be expected for fulfilment of indigenous development programmes, has lagged behind these other advances. However, the FSM does not appear to be moving towards community based management; the resources provided to build local capacity and strengthen participatory mechanisms are not evident.

While partnering with development organizations with a specialized capacity is a good strategic choice for improving the sustainability of projects, the foundation's actual impact through programs is perceived to be quite limited. Although both APROSAMI and FA-FIDESS appear to have successful programs, and some

indicators do demonstrate that, there are questions as to how much the FSM actually contributed to those successes.

In terms of a rights-based approach to development the FSM exists as a potential mechanism for indigenous peoples' decision making and participation around development options, but has not been developed to fulfill that role. Based on both interviews with staff, CADEC members, Marlin and FSM management, and the assessors' analysis of current functioning, FSM is an arm of Montana's community relations and is not a community based development organization – at least not at this point. The assessors conclude that Montana has not invested sufficient resources into developing capacity of indigenous communities, and there is little evidence that the CADEC members are part of, or informed about, any of the operational decisions, challenges or issues beyond a very limited scope of input to project prioritization.

The assessors note with concern that social investment projects are sometimes suspended in mid-execution; when the power line was shorted in 2008, Montana reported halting all community development projects and sponsorships it was funding at that time.⁶² According to Montana management, the voluntary additional funding of Q1 million (\$125,000)/month to the municipal development plan was made contingent on the price of gold remaining high, and no paralization of mine operations from social protests.

The assessors note that the suspension of social investment projects is undermining the opportunity for those projects to enhance human rights in a sustainable manner. Threatening the suspension of funding in the case of paralization from social protest also has implications about the inappropriate use of economic power. It suggests two potential outcomes in the case of a serious protest against the mine; to influence political actions by the municipality against freedom of expression or to position project beneficiaries to oppose protestors without consideration of the merits of the protest. This could turn a protest against the mine into internal community conflict.

⁶¹ This complaint surfaces several times when people described how communities prioritized projects through the participatory processes supported by the mine, but there was not sufficient funding available for the scale of the projects that they prioritized. For the communities outside of the direct area of influence, which has funding sufficient for one project each year according to Marlin personnel, funding levels were only sufficient, according to interviewees, for small projects like school toilets or fencing school perimeters.

⁶² Montana AMR, 2008, 16.

Human Rights-Based Approaches to Development

A human rights-based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. In the context of business and human rights, John Ruggie highlights the following key principles for a human rights-based approach:

- Empowerment;
- Participation;
- Non-discrimination;
- Prioritization of vulnerable groups; and,
- Accountability.

Based on a review of the literature on human rights and development, it is suggested that a rights-based approach is a useful framework for a company to exercise ongoing human rights due diligence with respect to its social investment activities, both in terms of maximizing the positive human rights impacts and overall sustainability of its investments in countries and communities, and in terms of addressing the potential negative impacts of its operations on human rights.

Sources: Ruggie, 2007, para. 28; Office of the United Nations High Commissioner for Human Rights, 2006, 35 - 37; United Nations Development Group, 2003.

Findings

Montana enhances economic, social and cultural rights by upgrading local infrastructure and providing financial support for community development through community projects and social investment initiatives, but with limitations to being able to quantify these. Specific findings include:

- The social investment activities of the Sierra Madre Foundation and Montana's Social Development Department have had discrete, positive impacts on the fulfilment of human rights for the beneficiaries of the projects.
- The right to education has been enhanced through funding of additional teachers, some training of teaching staff, improvement of facilities, and additional scholarships.
- Company contributions to health programs and a significant contribution for building a health centre have also provided an enhancement in the right to health, but there is insufficient information to measure the extent of the impacts.
- Projects that improve access to potable water systems have enhanced the right to water.

Some project planning and execution is based on good participatory mechanisms that enhance local capacities and ensure input into decisions that affect local indigenous communities, but this is uneven between programmes. FSM's attention to this aspect of indigenous peoples development is weak.

Social investment spending is not accounted for internally within Montana in a way consistent with industry or development agency standards for program reporting or fiscal accountability.

- Lack of clarity about FSM's actual and yearly contributions to partnerships and collaborative relationships makes it difficult to determine the extent of its contribution to improvements in social indicators.
- Lack of results-based objectives, social indicators, monitoring and programme evaluations hinder the assessment of effectiveness of Montana's social investments and their actual enhancement of human rights.

The current pattern of making funding of social projects, donations and other contributions contingent on the mine not being shut down by social protest risks undermining rights-based development principles and fails to respect the rights to freedom of expression and freedom of peaceful assembly.

SOCIAL INVESTMENT TO MITIGATE NEGATIVE IMPACTS

Assessment SI3: Have social investments mitigated negative impacts that could affect human rights?

The corporate responsibility to respect human rights requires companies to “do no harm” and to address all the negative impacts that arise from their operations.⁶³ Potentially, the full range of internationally-recognized human rights is at risk from a company’s activities. The priority areas of risk and potential for negative impact for the Marlin Mine are identified in the other sections of the assessment.

In some cases, addressing negative impacts requires Montana to refrain from undertaking actions, notably in relation to civil and political rights (e.g. refrain from calling upon public security forces to address the risk of negative impact on the right to security of the person or freedom of association). In the area of economic, social and cultural rights, the primary mechanism for Montana to address the potential negative impacts of its operations is through social investments and development programs.

There is also an obligation in ILO 169 to provide compensation to indigenous peoples for any damages sustained as a result of mineral exploitation, as part of indigenous peoples right to participate in the development benefits of exploration and exploitation of natural resources.⁶⁴

Furthermore, commitments to mitigate negative social and environmental impacts were also included in the ESIA as well as the Indigenous Peoples Development Plan (IPDP).⁶⁵ As commitments in the ESIA in the IPDP are closely related to respecting human rights, these confer additional responsibilities for Montana from the point of view the “Protect, Respect and Remedy” framework,⁶⁶ as well as for compliance with the regulatory and financial requirements of the project.

63 Ruggie, April 2008, paras. 24 and 55.

64 ILO 169, Article 15(2); IFC, 2006, Performance Standard 7, para. 8.

65 Montana ESIA, 2003; Montana, February 19, 2004, 11.

66 Ruggie, April 2008, para. 24.

This is reinforced by relevant industry standards and good practice guidance for addressing social and environmental impacts of projects.⁶⁷ In particular, the operative IFC standards require that potential adverse affects to indigenous people be identified and mitigated, with the objective that indigenous people not be harmed by the project development.

At the time the project was permitted in 2004, human rights impact assessments were virtually unknown. However, ESIA were considered to be routine and a good practice assessment should address many potential human rights issues.⁶⁸ The ESIA is the main instrument for identifying project impacts, and the basis on which regulators established the legal obligations for monitoring and reporting, as well as performance.

As pointed out in two external reviews of the Marlin Mine ESIA, the majority of impacts identified were positive; almost none of the negative socio-economic impacts associated with mining were discussed.⁶⁹ The only negative impacts of this type identified were the reduction in jobs related to mine closure, the risk of increased alcohol consumption, and increased land values. Impacts for Sipacapa were considered to be of lesser magnitude than for San Miguel.⁷⁰ None of these impacts have been directly addressed, as such, by the social investment activities implemented to date.

67 IFC, 2006, Performance Standard 1, paras. 13-16, Performance Standard 7, para. 8; ICMM, 2010b, Principle 3; ICMM, May 2009, 3.

68 While ESIA and HRIAs address very similar issues and impacts, there are some important differences. For instance, HRIAs should be framed by international human rights instruments and should be guided by a rights-based approach. Moreover, it is stated by John Ruggie that “the ESIA approach of studying the direct impacts of a business can miss human rights violations that are embedded in a society, such as where freedom of association is discouraged or explicitly denied, or where the right to privacy is not respected.” Ruggie, 2007, paras. 22 to 29.

69 CAO, 2005, 26; Moran, 2004.

70 Some steps taken by Montana in project design reduced the intensity of some impacts, such as requiring contractors to base their personnel in Huehuetenango instead of allowing them to move into small towns like San Miguel or Sipacapa in large numbers; local employment was also an important feature that reduced the risk of negative impacts during both construction and operations.

As predicting impacts is not always precise, ongoing monitoring of what actually occurs on the ground is required. Social investment therefore should be linked to a company's process of ongoing due diligence for human rights, including impact assessments and monitoring, as well as through its ongoing consultation with project-affected communities, and the analysis of patterns of complaints brought to the company's attention through its grievance mechanism. None of these impacts have been directly addressed, as such, by the social investment activities implemented to date.

Discussion

In interviews with stakeholders, the fourth most frequently raised concern was that Montana needed to address the negative impacts it had created. This was closely linked to the claim that the company provided misleading information in consultations.

The baseline data gathered for the ESIA focused only on the Mam Mayan communities of San Miguel Ixtahuacán, as Sipacapa was not initially identified as part of the directly affected area, nor were supplemental baseline studies undertaken to fill this gap.⁷¹ The social baseline studies did not include the full area of direct social impact as defined by land acquisition, and baseline data on economic activities and household strategies was primarily drawn from 1996 census data, supplemented with a limited number of interviews.

There were significant weaknesses in the original study such that it is not possible to consider that the company had a reasonable baseline study of the affected communities. Without information about the subsistence economy, household economic strategies, gender roles, level of income, and the like, it was not possible to have adequately assessed the risk to subsistence, indigenous households of selling their productive base. Review of records from the community participatory diagnostics held in Agel, San Jose Nueva Esperanza and San Jose Ixcaniche in early 2003 revealed several important facts that were not taken into consideration in the impact assessment or the various

plans produced for the IFC; these serve as examples of what may not have been identified. First, two of the three communities stated that community members did not own land in other areas, in direct contradiction of the information in the Land Acquisition Plan. Second, the same diagnostic workshops identified that there were residents of Agel who did not have sufficient lands for subsistence production, which was identified as requiring 10 cuerdas of land per family.

The weakness and partial coverage of the initial baseline studies, combined with the absence of any substantive cultural assessment and the failure to predict any potential negative social impacts, has meant there was no mechanism for directing project funding towards the mitigation of identified impacts. There was no identification of specific subgroups within the local population that might be particularly disadvantaged by probable changes, such as single mothers, people with little land, those who depended on collection of firewood from sources to which they did not have formal rights of access, and the like.

The review of social investment programs indicates that several key mitigation issues have not been addressed by the current programs, including:

- Lack of support to land sellers to re-establish themselves;
- Identification and protection of water sources;
- Cracked houses;
- Public safety, social ills and public health issues.

This assessment has identified a number of other potential negative socioeconomic impacts from the mine's presence, such as inflation at least partially due to the influence of the mining operation.

The responsibility to identify vulnerable groups and those affected by negative impacts has not been met. While social investment programmes are contributing positively and may benefit some of those who are experiencing negative impacts, there is inadequate social impact assessment data and demonstrated diligence to identify or target social investment toward those who are the most vulnerable or suffering the most harm from the project's activities.

⁷¹ No baseline data was gathered on Tzalem or the municipality of Sipacapa; it appears that initial impact zones were based on environmental criteria rather than social.

Findings

Montana has failed to respect human rights of affected communities by not developing sufficient due diligence on the potential negative social and cultural impacts of mining, or undertaking meaningful monitoring of social impacts and changes in the communities.

Montana has not identified either direct or indirect negative impacts from the presence of the mine that are affecting human rights. There are infringements that are not being addressed by social investment projects or programs, but the extent cannot be verified because of the absence of data.

RECOMMENDATIONS

RECOMMENDATIONS FOR IMMEDIATE ACTION

- IDENTIFY AND SUPPORT families in need or at risk due to potential project impacts. Investigate and create medium to long term solutions.
- DELINK SOCIAL DEVELOPMENT INVESTMENT FROM SOCIAL LICENSE. Montana's commitment to social development programs should not be contingent upon social acceptance by all segments of the population. Develop an effective grievance procedure to address the problems of social protest.

RECOMMENDATIONS THAT ADDRESS LEGACY ISSUES

- REVIEW whether there are outstanding commitments for social investment projects.

RECOMMENDATIONS FOR ONGOING DUE DILIGENCE

- FINALIZE A LONG-TERM AND RIGHTS-BASED SUSTAINABLE DEVELOPMENT PLAN. Adopt a right-based framework and principles for the sustainable development plan currently being drafted at the Marlin Mine. Ensure that specific objectives and targeted programs are included to address the key areas of negative human rights impacts, as well as vulnerable segments of the project-affected communities. Ensure extensive consultation and participation as part of the development of the new sustainable development plan. Establish a comprehensive social baseline for effective monitoring and evaluation.

- BUILD UPON PROGRAMMING THAT ENHANCES HUMAN RIGHTS:
 - Improve community and worker health. Implement a program to improve the general health and well-being of the communities where workers and their families live, with the objective of addressing secondary health issues that also affect health and safety in the workplace.
 - Expand teacher training.
 - Expand scholarship programs to support leadership.
 - Support programs that enhance access to water.
- REVIEW THE EFFECTIVENESS, TRANSPARENCY, PARTICIPATION AND ACCOUNTABILITY of current mechanisms and programs, including the different roles for the FSM and SDD. Direct SDD programs should be focused on addressing the negative impacts of the mine, which is the company's direct responsibility, while the FSM could contribute to building local capacity and enhancing community-level impacts. FSM should not be an additional mechanism for Montana's engagement and consultation, and should transition to be a community-based development foundation.
- STRENGTHEN FSM'S CAPACITY TO FULFIL A LONG-TERM ROLE AFTER CLOSURE. If the FSM is to provide ongoing programming after mine closure, it must evolve as a community-based development foundation. This requires strengthening the independence of the Board of Directors; ensuring an adequate and sustainable funding mechanism such

as an endowment; improving the professional capacity of the staff; and ensuring appropriate evaluation and reporting standards.

- **DEVELOP A CLEAR RATIONALE FOR INVESTMENT LEVELS.** Ensure the amount of investment is sufficient to create sustainable impacts and commensurate with a reasonable level of expectation of the communities to have benefits from the success of the mine. Include factors such as industry best practice, mine profitability, current tax and royalty contributions, and other indirect forms of social investment. A more clearly articulated strategy would also foster more effective management of community expectations.
- **ADOPT RESULTS-BASED MANAGEMENT.** Adopt clear objectives, monitoring and evaluations in order to determine the effectiveness of the strategies chosen and the funds being spent.

- **CONTINUE TO INVEST IN STATE AND MUNICIPAL CAPACITY.** Continue to strengthen municipal institutions' capacity to administer revenues from mining. Continue and expand initiatives with Ministry of Energy and Mines or other government departments and regulatory agencies to build capacity.
- **ENSURE TRANSPARENCY OF REVENUE FLOWS.** Work alongside government to ensure greater transparency in the way revenues and royalty payments from mining are invested in social programs to enhance the economic, social, and cultural rights of project-affected communities. Express support for the Extractive Industries Transparency Initiative (EITI) and encourage the Guatemalan government to participate as well.

CONCLUSIONS

The corporate responsibility to respect human rights requires companies “to do no harm.” Economic benefits from core business activities and taxes paid to government are important contributions but are not sufficient on their own. As a starting point, the identification of potential adverse impacts needs to take place as part of the planning process, with particular emphasis on those groups within the affected communities who may not be in a position to benefit from the positive impacts. While Montana’s social investment has focused some attention to traditionally vulnerable groups, especially women, the company’s management lacks an overall view of the socioeconomic impacts on local people from the presence of the mine.

In the longer term, Montana and Goldcorp will need to determine the extent to which current efforts, expertise, level of investment, and approaches are sufficient to address the risk of boom/bust economic development. Achieving sustainable economic gain and the resulting enhancement of human rights is one of the great challenges of mining-driven development. From a human rights perspective the temporal nature of the

economic stimulus presents a risk that the end result will be more negative than positive, which would confirm many of the criticisms of the extractive industries. If social and economic impacts are to be long term, the various social development initiatives should be implemented according to a long term strategy involving other partners (NGOs and government), and with a strategic focus and plan.

Social investment activities of Montana and the FSM would benefit from rights-based approaches to development; this is a positive opportunity for renewed engagement and relationship-building between the company and local communities. Enhanced participation, accountability and evaluation are key areas for improvement. The introduction of such an approach can be coupled with the strengthening of results-based management which should address the inconsistencies in reporting and help maximize the human rights outcomes of the company’s investments.

Furthermore, rights-based approaches would help build the local capacity to claim rights. In some cases, this would enhance the level of advocacy related to

the Marlin Mine, but it would also empower the local communities to advance a dialogue with the State about the protection and fulfillment of human rights. Such local capacity-building efforts should be viewed as a invaluable goal, especially as the Marlin Mine has

a relatively short life-span. For Goldcorp and Montana, better understanding of human rights-based approaches for social investment can also inform and enrich their broader management approach for human rights.

Security

This section addresses the human rights issues related to security, and the roles of public security forces¹ as well as private security contractors in the area around the Marlin Mine.

Concerns about the role and presence of both public security forces and private security contractors were raised in earlier reviews of the mine and in some Internet sources, but were not mentioned by many stakeholders in 2009. Concerns nationally focused on criminal charges against community members that followed the intervention of public security forces more than on the conduct of public or private security personnel.

Security remains a concern because of incidents and confrontations surrounding the mine, which require an ongoing private security presence and which have led to repeated use of public security forces.

The company also reported that on at least four occasions since the mine began operating, contract buses or vehicles have been fired upon, resulting in injuries to employees. Employees have also been subject to both kidnappings and robberies, and interviews indicated that in the last two years all non-local employees living in the area have been moved to the residential camp at the mine because of security concerns.

In 2005, two incidents associated with the mine resulted in deaths: the first occurred when public security forces intervened in a blockade of the company's equipment on the Pan-American Highway and one of the participants in the blockade was killed; the second when an off-duty security guard killed a local resident during an altercation. In addition to these legacy issues, there has also been a pattern of protests (in 2007, 2008 and 2009) escalating into confrontations with company personnel and private security contractors, and which required the intervention of public security forces.

¹ The public security forces include both the national civil police force (PNC) and the military. In the incidents related to the Marlin Mine, the PNC and the military have often intervened together. The military is not authorized to intervene in civilian matters on its own, but is permitted to support the PNC under the authority of the Public Ministry.

BACKGROUND

National Context

The national context in Guatemala creates a high probability that a company will interact with private security contractors and public security forces in its operations; at the same time, these interactions create significant risks for a range of human rights.

A major human rights concern is the context of violence, insecurity and conflict pervasive in Guatemala. In addition to the legacy of state-sponsored violence and genocide from the civil war, Guatemala remains one of the countries with the highest indicators of violence in the hemisphere and the trend is one of rising violence.² A particular concern is the rise in domestic violence, murders and attacks against women as well as human rights defenders, including indigenous leaders, union representatives, community and environmental organizations, journalists, and others.

At the same time, the State has proven to be ineffective in addressing this violence. In the majority of cases, there is very little in terms of investigation, prosecution or convictions for violent crimes and the most serious human rights violations. Members of public security forces are often implicated, as they were during the civil war, during which State forces and paramilitary groups were responsible for over 90 per cent of human rights violations including arbitrary executions and forced disappearances; much of the violence was against indigenous people, who although they make up 50 per cent of the population, were 83 per cent of victims.³

Because of this history, as well as reported links to organized crime,⁴ public security forces are not trusted

to protect the public. A survey on Central American democratic institutions, Barometro Iberoamericano 2009, found that only 25 per cent of the Guatemalan population has confidence in the police, one of the lowest figures in Latin America.⁵

Gangs continue to be a concern in Guatemala City and rural areas, having a far greater impact on Guatemalans than on foreigners. Gang members are often extremely well armed. In contrast, the National Civil Police (PNC) lacks sufficient personnel and logistical supplies, while the judicial system is overworked and inefficient. The populace in general is heavily armed; possession of guns is a legal right and there is widespread acceptance of firearms among the civilian population.⁶

The problem of violence is linked to the broader issue of impunity in Guatemala. Almost every United Nations report about Guatemala highlights the problem of impunity as a symptom and cause of the State's inability to fulfil responsibilities to protect human rights, including 98 per cent impunity for attacks against human rights defenders.⁷

Local Context

As with the rest of the western highlands, the Department of San Marcos suffered armed interventions during the civil war; 15 massacres took place there between 1962 and 1996.⁸ Although the armed conflict ended with the signing of the Peace Accords in 1996, there has been a steady increase in insecurity and violence throughout Guatemala, including where the

2 United Nations High Commissioner for Human Rights on the activities of her office in Guatemala in 2008, February 2009, para. 10. "Guatemala has a rate of 48 homicides per 100,000 inhabitants, one of the highest among countries formally at peace." In 2002 there was an average of nine killings per day, and in 2008 the average had risen to 17 killings per day.

3 Guatemalan Commission for Historical Clarification, February 1999.

4 Guatemala is known to be a major route for narco-trafficking, yet Guatemalan forces seized less than 1,000 kilos of cocaine in 2007 as compared to over 1 million kilos seized by law enforcement officials in neighbouring countries – with the assumption being that police and military are involved with drug cartels.

5 Barometro Iberoamericano del Gobernabilidad, 2009, www.cimaiberoamerica.com.

6 Matute, Undated.

7 Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, February 2009, para. 75. "The reported figure of 98 per cent impunity for attacks against human rights defenders makes justice an empty word in Guatemala."

8 Guatemalan Commission for Historical Clarification, "Total Percentage of Human Rights Violations and Acts of Violence by Department, 1962-1996", "Principle Violations by Year and by Department", <http://shr.aas.org/guatemala/ceh/report/english/graphics/charts/page84.gif>.

mine is situated. Drug production and trafficking, human trafficking, and the movement of arms particularly affect the western highlands region across the border. The presence of organized crime is said to be increasing, particularly as the Mexican government conducts an offensive against drug cartels. While media reports and other sources suggest that Petén has the most serious problems of this nature, the border area with Mexico north of Huehuetenango – not far from the San Marcos Department – is also mentioned as a problem area. Other phenomena causing increased insecurity in western Guatemala include kidnappings and incidents of lynching, which are reported to be on the increase in San Marcos, along with frustration with the lack of security.⁹

Both local residents and mining company employees describe the area as quiet and with limited public safety concerns as of 2002/2003. San Miguel was described in interviews by locals and non-locals as a small, quiet, rural town, fairly isolated by poor road access; few outsiders came to the area and the local economy was based primarily on subsistence farming.

Since the mine was constructed, however, in San Miguel and smaller communities around the mine, petty crime, drug use, alcohol abuse, prostitution, and offensive behaviour are identified as increasing, with a decreased sense of security and public safety.¹⁰ Interviews with local authorities and community leaders during 2009 reflect a perception that the public safety situation in the communities is getting worse, with increased presence of gangs and robberies targeted at groups known to be benefitting from development programs. Both the local police officers (PNC) and Justices of the Peace confirmed an increase in crime and delinquency in the last few years, as well as an upswing in requests for the police to investigate incidents and for the Justices of the Peace to intervene and resolve disputes.¹¹

9 Prensa Libre, November 20, 2009, “Autoridades temen que Aumenten Linchamientos”, www.prensalibre.com/pl/2009/noviembre/24/357725.html.

10 This perception was shared by those participating in the focus groups, including Sierra Madre Foundation beneficiaries, women, and youth, as well as interviews with community leaders and local authorities.

11 The public notary at the office of the Juez de Paz provided information that there were 871 and 892 disputes in 2008 and 2009, compared with an average of 550 disputes per year from 2003 to 2006.

Community concerns about public safety led San Miguel Ixtahuacan’s inhabitants to organize in 2007 a Citizen Safety Committee (Junta de Seguridad Ciudadana) to patrol the community and reinforce public safety. Since then, other communities – San José Nueva Esperanza, El Triunfo, and Tierra Colorada among others – have organized Citizen Safety Committees.

The other factor of significance in the local environment is a pattern of threats and intimidation related to divisions within the community of people for and against the mine. Since 2005, press and NGO reports, company documents and press releases, as well as external reviews, have identified a pattern of intimidation and threats, including death threats, toward people and local authorities considered to be pro- or anti-mining. Key informants and local stakeholder interviews identified ongoing intimidation, new death threats (including to the mayor of San Miguel), and disruption of meetings with the threat of violence.¹²

Overview of Security and Policies at the Marlin Mine

Montana (when it was owned by Glamis) did not have specific policies about security, or undertake any risk assessments about public security forces during the exploration and construction phases of the mine.¹³ The early management team for Glamis arrived in 2002 from Honduras, where Glamis was operating a small gold mine (San Martin). Former Glamis management acknowledge they had only a cursory understanding of the Guatemalan context and assumed initially that their experience in Honduras would serve as a model for how to operate in Guatemala.

The first external security audit of Glamis operations in Guatemala found that the company had no overall security structure or culture, and lacked contingency planning, policies and procedures to address security risks. For the Marlin Mine, the report highlighted

12 Disruption of the meetings being held in San Miguel by the Congressional Committee on Transparency, in October 2009, and death threats against the mayor of San Miguel are recent examples. The assessors also experienced intimidation and threats.

13 The first external assessment of the implementation of the Voluntary Principles by Montana also confirmed that the company did not conduct a formal risk assessment prior to opening the mine.

Voluntary Principles on Security and Human Rights

The Voluntary Principles are a set of international good practice standards that have been developed since 2000 to assist companies, particularly in the extractive industry, in maintaining the safety and security of their operations within a framework that ensures respect for human rights. The Voluntary Principles provide detailed guidance for companies in three main areas: identifying human rights and security risks; engaging with public security forces; and managing private security contractors. Participants in the Voluntary Principles contribute to ongoing dialogue and lessons-learned about best practices. Currently, participants include seven governments (including Canada), 17 companies, nine NGOs and three observer groups (including the ICMM). Although Montana is implementing the Voluntary Principles at the Marlin Mine, Goldcorp has not formally adopted the Voluntary Principles and is not one of the participating companies. For information about standards, history and participants, see www.voluntaryprinciples.org/

a reasonably positive relationship between the local community and Glamis operations, but noted that hostile actions such as firing weapons against mine equipment and employees were common occurrences.¹⁴ After the security audit and prior to beginning production in 2005, a security advisor was hired and the first private security contractor, Grupo Golan, was hired to guard the mine.

As required under Guatemalan law,¹⁵ a small military contingent of 10 soldiers was also installed at the site to guard explosives used in mining operations. According to the officer in charge, this contingent is under orders not to intervene in local conflicts.

Montana began implementing the Voluntary Principles on Security and Human Rights in 2006, after two shooting deaths and the Compliance Advisor Ombudsman review in 2005. Implementation of the principles is assessed later.

¹⁴ Control Risks, 2005, 10

¹⁵ Law on Materials for Fabrication of Explosive Artifacts, Decree-Law 123-85.

Security is the responsibility of the regional manager for security and risk. A security superintendent and two supervisors oversee private security contractors at the site. Currently, Montana has contracts with three private security contractors:

- SERSECO provides a full-time “preventative presence” at the mine site, with 36 uniformed guards in each of two shifts. Guards are local residents, trained in Guatemala City, who speak Mam or Sipakapense. Recently, the first female uniformed guard was hired to assist with searches of women at the mine entrance and at the processing plant.
- SIS provides an executive security group responsible for management who travel outside the mine site; they are also the front-line respondents for security incidents. There are 16 executive security personnel per week-long rotation. These contractors usually have a military background. They are required to receive additional training from SIS and from Montana, including on human rights. They also supervise the uniformed guards and are in turn supervised by Marlin security personnel.
- Grupo Uno provides security at the refinery on the mine site and operates the closed-circuit camera system. There are two guards on each shift.

Additional security-related employees include: five watchmen who supervise the entrance gate at the mine (registering vehicles and enforcing safety guidelines for employees and guests entering the site) and four women working in the Communications Control Centre who speak Spanish, Mam and Sipakapense (security management advised that these employees intervene on an ad hoc basis if a security issue involves a female employee).

Given the risk environment in which the mine operates, the use of private security contractors has been necessary to protect the right to life and security of the person of the employees, as well as the right to just and favourable working conditions. At the same time, there are potential issues about the interaction between private security contractors and employees in terms of human rights.

At points in the mine’s history, police and military have intervened in confrontations between protesters and Montana. The primary human rights concerns associated with Montana’s interaction with public security forces relate to the right to life and security of the

person when confrontations escalate into violence. There are also concerns about the right to freedom from cruel, inhuman and degrading treatment, such as intimidation or brutality, and the right to peaceful assembly and freedom of association due to a broader pattern of repression or criminalization of social protest.

Issues identified by the assessors include:

- Assessment S1: Has Montana's interaction with public security forces respected human rights?
- Assessment S2: Has Montana's interaction with private security contractors respected human rights?

An issue closely related to security is the failure or inability to resolve outstanding grievances between the community and the company, which escalate into confrontations and require the intervention of the private security contractors and public security forces. This is addressed in Section 8: Access to Remedy.

Information Reviewed for the Assessment

The assessors reviewed media articles and interviewed company personnel, community members, and national experts on human rights. Interviews about security were held with:

- Four security personnel at multiple levels in Montana and at the mine;
- Two members of the local police force (PNC);
- Two members of Citizen Safety Committees;
- Three local residents charged in criminal proceedings following incidents in 2007 and 2008;
- Two uniformed guards from local indigenous communities hired by SERSECO;
- One executive security contractor working for SIS;
- Five Justices of the Peace (Jueces de Paz) and staff in San Miguel and Sipacapa;
- The military officer in charge of the 10-man contingent that guards the explosives at the mine¹⁶; and
- Human rights specialists and professionals in Guatemala.

¹⁶ The officer interviewed had arrived the previous day to the mine's unit as a new assignment, which highlighted the challenges of working with the military to build any capacity or establish longer term relationships given the high rate of transfer between posts.

Company documents and external reviews (two in 2005, one each in 2006 and 2008) of company performance were also reviewed.¹⁷ Information reviewed also included security and human rights training programs, complaints specific to private security contractors, and the mine's grievance procedure. The assessors were advised there was no implementation plan for the Voluntary Principles or any that tracked implementation of recommendations from the above-noted external assessments.

Additional information reviewed included extensive company files on legal proceedings resulting from security-related incidents, and relevant regional and national court files. This review was supplemented by interviews with justice officials and personnel of agencies such as the Human Rights Ombudsman (PDH).¹⁸

In relation to the past incidents that resulted in loss of life (e.g. Sololá and murder by the off-duty security guard) the only documentation available was from media and NGO reports, press releases by the company, and internal company reports. No conclusive investigation took place by the company or the State, nor were there resolutions to cases filed in response to death and injuries. With respect to the more recent security-related incidents in 2007, 2008 and 2009, documentation from media, NGOs and the company was supplemented by information from interviews.

Identification of Stakeholder Concerns

In the initial review, the assessors identified concerns about involvement of public security forces in incidents involving the mine's personnel and property. Specific allegations relate to the use of force in confrontations with community members, particularly during the blockade at Sololá that resulted in the death of one person and injuries to others. Concerns were also identified about the conduct of private security contractors – particularly in relation to the murder of a local resident by an off-duty security guard in 2005.

In interviews in the local area, only 2 per cent expressed any concern about the behaviour of public

¹⁷ Control Risks, 2005; CAO, 2005; Avanzar, 2006; Avanzar, 2008.

¹⁸ There is further discussion about the legal proceedings in Section 8: Access to Remedy.

security forces or private security contractors, and 6 per cent nationally.¹⁹ Current and past employees were also asked whether the presence or actions of private security at the mine presented problems, and no concerns were expressed. The main complaints about public security forces were that they were not doing their job to control crime: both local residents and authorities identified the need for a more effective presence by the police.

Two concrete allegations about intimidation were made: one community member who was amongst those charged in the power line incident of June 2008 alleged intimidation by police. In a meeting in Sipacapa, a small group of Sipakapense women alleged intimidation by what they thought were members of public security forces or private firms. They claimed that cars with tinted windows followed them after an unsuccessful attempt to meet with representatives of the mine and tried to force them off of the road.

It should be noted that information from stakeholders about the behaviour of public security forces and private contractors is not comprehensive because of limited access to some groups, notably those involved in criminal proceedings in connection with protests against the mine (of 15 community members that have been charged in relation to actions against Montaña, only three were interviewed) and residents of Sipacapa. The few complaints registered during interviews came from these two groups, so their relative absence limits some aspects of the assessment.

In comparison to the low level of specific allegations or concerns about public security forces or private security contractors, there was a high level of concern about general conflict and tensions related to the mine. As mentioned above, this was the single most frequently expressed of all concerns, mentioned in 45 per cent of all local interviews and 53 per cent overall. The concern was consistently identified among all stakeholders, pro-mining and critics of mining, employees and non-employees. In most cases this concern was raised by the interviewees and expressed in terms of an overall atmosphere of tension and fragmentation at the local level and an environment of mental and psychological insecurity.²⁰

National and international stakeholders are very concerned about criminalization of social protest, and the three sets of criminal charges against indigenous community members that have come out of confrontations surrounding the mine in the last three years.

The deterioration of public safety is an additional concern expressed in interviews by a wide range of local stakeholder groups, including elders, youth, health care providers, and community leaders. They related how social problems such as prostitution, drugs, alcoholism and delinquency have arisen since the mine was constructed. In addition to the impact on public safety of these social problems, there was limited concern expressed about road safety. Several industry stakeholders at the national level also identified public safety as their major concern.

¹⁹ Interviews were not done in Sololá, although the review of legal cases and complaints did include Sololá.

²⁰ This issue is discussed in Section 10: Conclusions.

PUBLIC SECURITY FORCES

Assessment S1: Has Montana's interaction with public security forces respected human rights?

Based on the review of information and screening of the DIHR tool, the international human rights most relevant to the assessment are:

- The right to life, liberty and security of the person;²¹
- Freedom from cruel, inhuman and degrading treatment;²² and
- The right to peaceful assembly and freedom of association.²³

A company's responsibility to respect human rights includes avoiding complicity or involvement in the violations of human rights by other actors.²⁴ Given concerns about the poor human rights record of public security forces in Guatemala, as well as the role of public security forces in responding to protests, threats or violence against the mine, there is an ongoing risk that the company may be involved in human rights violation by either the police or military.

To fulfil its responsibility, a company needs to implement the ongoing due diligence measures required to address the risks and impacts specific to its operations and the country context in which it operates.²⁵ In terms of the practical measures a company can undertake, the Voluntary Principles on Security and Human Rights contain guidance related to the specific human rights challenges of the extractive industry, including:

- Undertaking risk assessments to identify potential risks associated with interaction with public security forces in the country and operational context;

- Promotion of the company's policies and codes of conduct relating to human rights with public security forces;
- Emphasizing respect for human rights and the use of minimum force when interventions are required;
- Consulting with and disclosing information to the community about the company's security arrangements; and
- Monitoring and tracking allegations of human rights violations by public security forces, and pressing the authorities for investigation and prosecution of any violations.²⁶

Further guidance on company responsibility is provided by the DIHR tool. Two indicators specify that to avoid complicity with violations by State forces, companies should continually monitor security arrangements and impacts on communities; and dialogue with NGOs and human rights groups to ensure all possible measures are taken to avoid violence.²⁷

Where there is a high risk of human rights violations and the use of excessive force associated with public security forces, a company's responsibility to respect human rights requires the company to reduce risks through its efforts to reduce and de-escalate incidents that could require the intervention of those forces.

To assess what the company has done to respect human rights, it is necessary to first provide an overview of key incidents related to the mine that have involved public security forces and raised concerns about potential violations of human rights. This is followed by a review of the implementation of the Voluntary Principles as the framework for Montana's efforts to address the human rights risks associated with its interaction with public security forces.

21 UDHR, Article 3; ICCPR, Articles 6, 9; ACHR, Articles 4, 7; UN Basic Principles on Use of Force, Articles 1, 2, 4, 5; Voluntary Principles on Security and Human Rights; DIHR 206, 207.

22 UDHR, Article 5; ICCPR, Article 7; ACHR, Article 5; UN CAT, Article 10; UN Basic Principles on Use of Force, Articles 25, 26; UN Code of Conduct for Law Enforcement Officials, Article 5; DIHR 100.

23 UDHR, Article 20, 23(4); ICCPR, Articles 21, 22; ICESCR, Article 8; ACHR, Articles 15, 16; DIHR 248.

24 Ruggie, April 2008, para. 57; See also United Nations Global Compact, December 2008.

25 Ruggie, April 2008, paras. 57, 65-81.

26 Voluntary Principles on Security and Human Rights.

27 DIHR 206-207.

Intervention of Public Security Forces in the Blockade at Sololá

In January 2005, public security forces intervened to break a 40-day blockade on the Pan-American Highway at Sololá involving the transport of the mine's ball mill. Media reports state that the government sent more than 1,200 soldiers and 400 police agents to Sololá, who used tear gas and bullets against protesters; other reports state that shots were fired by both sides. One person died, a number of protesters were injured, and 16 police were wounded.²⁸ Apart from the transportation contractors, no company representatives were in Sololá at the time of the incident. The military and police escorted the ball mill on the rest of the journey on the public highway, and it was transferred to the mine's private security personnel when it arrived at the juncture with the mine's access road.

There is no dispute amongst the sources of information reviewed that Mr. Castro Bocel was killed. There also is no disagreement that other civilians were injured, as were members of the public security forces. The Public Ministry investigated the incident and criminal proceedings were initiated against some of the alleged blockade leaders, including the indigenous mayor of Sololá and her husband. The municipality filed a complaint against the public security forces. The wife of Mr. Castro Bocel filed a complaint with the Human Rights Ombudsman (PDH) for compensation for her husband's death. While the investigations associated with these cases have confirmed the death of Mr. Castro Bocel, no suspects were identified, prosecuted or charged. All cases have been closed, with the exception of the widow's claim for compensation, which remains pending with the PDH.

The most important impediment to determining human rights violations in this case are that none of the investigations of the Sololá incident resulted in prosecution of the individuals involved or clarified what happened. This assessment did not obtain any new or additional information on the issue of human rights violations related to the death or injuries in Sololá.

²⁸ Peace Brigades International: Metal Mining and Human Rights in Guatemala, 2006, citing El Periodico, January 12, 2005, reported 16 police injured and one local resident killed; Mines and Communities reported one death and 12 peasants and police injured in initial reports. www.minesandcommunities.org/article.php?a=3707.

In terms of the company's responsibility, criteria from the DIHR tool indicate that the company should, to the extent possible, push for the use of minimum force in public security force interventions, as well as emphasize to government that human rights violations are not acceptable. The company reports that the government took the decision to break the blockade, which was obstructing a public road, a version corroborated by media reports at the time. The government's spokesperson indicated it was necessary to protect the interests of companies operating in the country. Company representatives confirmed there was a meeting with the government at which they urged the government to wait for negotiations to resolve the blockade. Media reports at the time, as well as the internal company report, corroborate that the company was involved in negotiations prior to the government's decision to intervene.

At the time, the company had not yet adopted the Voluntary Principles, and did not have policies and procedures in place to manage interaction with public security forces from a human rights perspective. While there is no evidence that the company influenced the actions of the public security forces, the absence of a policy or established procedures made it difficult for Montana to demonstrate it was not involved in decisions that led to human rights being violated.

Intervention of Public Security Forces in Social Protests at the Mine

Police and military were mobilized in response to threats at the mine on four additional occasions identified by the assessors.²⁹ These incidents are discussed together as they reveal a general pattern regarding Montana's interaction with public security forces. Three of the four situations ended with criminal charges against community members. As these incidents all occurred after the implementation of the Voluntary Principles, they allow for examination of whether the Voluntary Principles are improving performance by adopting a more explicit human rights focus for the company's interaction with public security forces.

²⁹ It is possible there were other occasions not identified by the assessors.

Blockade of the Mine (June 2007)

The first incident examined occurred when former landowners from the three closest communities in the Municipality of San Miguel Ixtahuacán requested that the company renegotiate the price paid for their land. When the company refused, the former landowners organized a blockade that lasted for 10 days. According to media reports, 25 local men were involved in the initial petition to the company and 600 people were present at the blockade.³⁰

During the blockade, there was a violent confrontation in which two mine security managers were injured; there were no other injuries. At some point, private security contractors fired guns; community leaders interviewed later complained about aggressive behaviour by the private security contractors.³¹ Complaints were filed with the Public Ministry and later withdrawn.

Public security forces intervened in large numbers afterward to break up the blockade, but according to the company, the protesters had disbanded before the police and military arrived. Subsequently, Montana and the injured security managers joined criminal prosecutions against the purported attackers,³² and seven local men were arrested. The company fired 14 employees who allegedly participated in organizing the blockade (discussed in Section 4: Labour).

One NGO reported alleged police brutality during the arrests,³³ and several complaints were filed with the Public Ministry about the behaviour of public security forces after the incidents, but were dismissed without further investigation for lack of evidence. The assessors were able to interview two of the seven men charged, and neither alleged mistreatment by the police.

In the context of the criminal proceedings, discussions were subsequently held with the assistance of various organizations, including the Human Rights Ombudsman and others, to resolve the case against the seven

accused individuals out of court, but with no success.³⁴ Two of the accused were sentenced to two years in prison, with suspended sentences, and the others were acquitted for lack of evidence.³⁵

Confrontations About the Mine's Power Line (January 2008 and June 2008)

In 2004 a power line was constructed specifically for the Marlin Mine. At the time of construction, a legal Right of Way (ROW) was obtained, including, according to Montana, from all landowners. Montana received permission from the National Institute of Electrification (Instituto Nacional de Electrificación – INDE) to commission and operate the 69-kva power line.³⁶ Agreements were signed with local landowners establishing a perpetual ROW over a 10-metre wide strip on land and in the air, and allowing installation of required equipment as well as access for maintenance of the equipment and lines.

The following description of the events leading up to the 2008 sabotage of the power line included input from two interviewees from Agel, two landowners from other sections of the power line, and an individual familiar with Montana's support program to the power line landowners and communities, initiated in late 2008. Some corroboration was provided by the history of actions and reactions by Montana, including the legal actions in 2007 (Providencias de Urgencia) and the power line support program. A police intervention in January 2008 and a second in June 2008, when the power line was short-circuited, were the

30 Revision of a Montana video of the meeting between petitioners and company management shows 20 men present in the community delegation.

31 Avanzar, 2008, 18-19.

32 The Guatemalan Code of Criminal Procedure allows private citizens to become parties to criminal proceedings.

33 ADISMI, 2007, Section 4.3.

34 The assessors were unable to verify the negotiation efforts due to a lack of documentation; however in early 2008 the VP Assessment reported that assessors had verified efforts to convince the men to apologize in order to drop the charges and to negotiate a resolution to the case. Avanzar, 2008, 28 and 34.

35 Criminal, Drug-Trafficking and Environmental Crimes Court, San Marcos; No. 54-2007, 1st oficial, dated December 11, 2007. In Guatemala, a suspended sentence can be granted if the conviction does not exceed a period of three years in prison and the beneficiary has not been sentenced before for a crime. Once granted, the person is under a "test regime" during which she or he must behave according to what the court has established; as the law states, it aims to improve the beneficiary's moral, educational and technical condition, under the Court's supervision (articles 72, 75, 76 and 77 of the Criminal Code and article 28 of the Criminal Procedure Code).

36 The 2004 MARN permit was Resolution No. 1133-2004/MAGC/EM. ROW and INDE permission discussed in Dorey & Associates, L.L.C., January 2005, 2.

second and third social protests at the mine that involved intervention by public security forces.

As early as October 2007, some landowners who claimed they had not given permission for the power line's towers to be constructed on their land, contested access to the towers and power line for maintenance.³⁷ Two interviewees involved in the protests about the power line reported that landowners had given permission for the power lines, but not for location of towers and anchors on their lands; these two interviewees and other landowners along the power line further from the mine mentioned they could no longer farm where the power line towers and anchors were placed. According to both community members, the woman who shorted the power line in June 2008 had approached the mine for compensation for the posts on her land in 2007 and was told "We shall see." Community members reported that the mine did not want to be held responsible because another company had done the work, but the other company reported to Montana it could do nothing about the claims. Montana told landowners it could not resolve the complaints, but still had the legal right to access the towers for needed maintenance. However, Montana was licensed by INDE as the operator of the power line, and Marlin was the project for which it had been constructed.

The company pursued access to the towers on private land through legal/judicial means. From October 25 to November 5, 2007 the company applied for four separate judicial orders for Montana employees to be allowed onto private property to undertake maintenance of the power lines. These orders were issued against two women and two men; however, in spite of the judicial orders, the work was not carried out because of what the judicial records described as "emphatic opposition from local residents, especially women and children."³⁸ The Justice of the Peace (Juez

³⁷ ADISMI, 2007.

³⁸ "La primera diligencia ordenada por el Tribunal no se efectuó, en virtud de haberse opuesto, rotundamente, moradores del lugar, especialmente mujeres y niños, a permitir el ingreso del Juez de Paz y Policía Nacional Civil, con fecha 9 de enero de 2008." Translation: "The first execution ordered by the Court was not carried out because of residents of the area, especially women and children emphatically opposing the entrance of the Justice of the Peace and National Civilian Police"; in records of the District Civil and State-Creditor Debt Collection Court of San Marco, Providencias de Urgencia #29 – 2007, 42-2007, 43-2007, 44-2007, initiated 25 Oct, 31 Oct, 31 Oct, 5 Nov 2007, respectively.

de Paz) and police officers (PNC) who attempted to carry out the orders in January 2008 were unsuccessful in all four cases; records indicate the police did not enter the properties because of the opposition, but that the cases remain open.³⁹ The assessors are not aware of any allegations of human rights violations stemming from these events, although the police were present in the communities.

The third incident took place in June 2008, when one of the four community members previously served with judge's orders for refusing to allow the company access to electrical towers on her land, deliberately shorted out Montana's electric power line running through her property. Reports indicate that other women, accompanied by children, joined with her to support her action against the mine's power source, because of what they considered to be outstanding complaints that Montana had not addressed. They rallied in support of her action, refusing to allow mine personnel onto the property to repair the damage. Operations at the mine were suspended on July 1, 2008. This, in turn, led to the suspension of all labour contracts at the mine as well as all funding for community projects until power was restored on July 26 by constructing a new segment of power line that bypassed the properties involved in the dispute.

When the group of women blocked Montana's attempt to repair the power line, NGOs reported internationally that 95 police officers intervened. A complaint was filed with the Public Ministry by community members about the conduct of the police force; however, the complaint has not been investigated or satisfactorily resolved.⁴⁰ This allegation was repeated to the assessors in the one interview that took place with a woman involved in this case; she told the assessors that both police and private security contractors arrived to give Marlin personnel access to repair the power lines. She said, "They came armed, they pushed the women and threatened them with tear gas; we had children there. Little by little they left and Marlin sought out other places to put their power lines."

Eight women were later named in relation to this incident in a criminal proceeding that Montana joined as

³⁹ Four separate writs each pertain to a different person, presumably the landowner of the property in question.

⁴⁰ Avanzar, 2008.

a party. Although the women have not been detained, the arrest warrants remain pending.

In interviews with Montana management and personnel, and in the internal information provided to the assessors about the 2008 power line sabotage, there was no information from Montana about the events leading up to the short-circuiting of the power line and the resulting social protests. The assessors were not advised by Montana of local opposition to the power lines and towers, that a landowner had requested compensation from the company, or that the power line constructor had reviewed the situation. The assessors did not have the opportunity to verify this information in the field, in particular the extended tensions and confrontations about access to the towers for maintenance prior to when the line was short-circuited. The review of judicial records in San Marcos revealed that power line sabotage and resulting protests took place after problems that extended back more than nine months prior to the sabotage incident.

Confrontation at Coral (June 2009)

The most recent of these four conflicts took place in May and June 2009 at Coral, a hamlet (*caserio*) in San Miguel pertaining to the community of Agel. An exploration-drilling program was underway on a piece of land previously purchased by Montana, which led to complaints from some members of the community and confrontation with company personnel in May 2009. At the centre of the dispute was a complaint that the sale of the land did not respect the inheritance rights of the sisters of the man who sold the land, and concerns about contamination of a nearby water source from the drilling.

According to an internal company report of June 2009, the company pressed for criminal charges by the Public Ministry in San Marcos after the initial confrontation with company personnel in May. There was an inspection by the Public Ministry accompanied by the Human Rights Ombudsman. Attempts to get the protesters to disperse were unsuccessful, and Montana obtained a judicial order validating the company's right to the land and ordering the removal of the protesters from the property. When exploration was restarted on June 10, a group of people took over the site. According to the company, the exploration and

security personnel withdrew to avoid escalation of the confrontation.

There was considerably more information available for this incident. Internal company reports, as well as interviews, indicate that Marlin Mine's management was aware of the risk of violence three weeks prior, and had already filed a criminal complaint and warned the Public Ministry of the threat of violence because of the initial confrontation in May. The company reports that it brought in authorities both from the local communities as well as from the Public Ministry to attempt mediation, but with no success.

The company initiated drilling on June 9, and asked for PNC presence when a security incident began to develop on the morning of June 10. According to company documents, once the police arrived, mine security personnel and the police consulted and agreed not to use force or violence against the protesters. According to internal documents, mine security personnel had been instructed by management to prevent an escalation in the tensions. The police did not leave a contingent on site, and two days later the protesters set fire to a truck and drill rig; a large contingent of police then again arrived on site to document the damage.⁴¹ The military contingent responsible for guarding the explosives at the mine also made an appearance and reports agree they withdrew without becoming involved.

The Human Rights Ombudsman (PDH) accompanied the Public Ministry to Coral twice, at the company's request: when investigating the initial complaint on May 25, and again on June 15 to execute arrest warrants after the drill rig and truck were burned. The assessors understand that no concerns were identified by the PDH representative about the actions of either the company or public security forces during these two interventions.

The assessors review of company reports on the incident confirm a number of points pertinent for this assessment:

- Although the company was aware for three weeks that local people were opposed to the exploration activity, and that there was a risk of violence, this was not considered sufficient reason to delay

⁴¹ Montana internal company reports on Coral incident, June 2009.

drilling and dialogue with the family to resolve the complaints;

- The company did not consider at any point leading up to the violence that the claims about inheritance rights to the land sold could have been legitimate;
- The fact that the underlying complaints were not submitted or otherwise brought to the attention of the company's grievance mechanism raises questions about its effectiveness and credibility with community members;
- Mine management made decisions that involved high risks of human rights violations, but senior management at the mine has not been trained in human rights or the Voluntary Principles;
- The company demonstrated improved respect for human rights when it requested the participation of the PDH in specific police actions related to Coral;
- Even though the company identified in internal reports five separate events or legal actions that took place prior to initiating drilling on June 9,⁴² the assessors were told the security department and manager responsible for implementing the Voluntary Principles were not informed of the exploration department's intent to drill the property, and were not involved in any assessment of the risks associated with that decision; and
- In this case, the risk to human rights associated with mobilization of the public security forces was clearly evident in the security department report on the incident.

Because Montana cannot control the actions of public security forces and they have a history of violations of human rights, the company should make every effort to minimize the need for their intervention. Several highly credible and informed sources reported that the company could have avoided the violence by addressing concerns, and that the company had sufficient warning there could be violence.⁴³ The evidence from the Coral incident is that the Marlin Mine does not have procedures in place to review the potential human rights risks of decisions not yet being handled by the security department, which represents a significant gap in internal procedures. It also highlights the fact that human rights are currently identified as

⁴² Company internal documents.

⁴³ Three interviews were conducted with people with first-hand knowledge of the incident.

a concern for security and are not part of the overall management approach. Interviews with various managers provided divergent accounts of what took place and whether the relevant managers were aware of the internal family conflicts over the land acquisition and the risk of open confrontation; the different accounts suggest a lack of communication and coordination internally, or that decision makers had priorities other than avoiding potential protests or confrontations and intended to deal with the protests through legal means.

Charges were laid against seven people in criminal proceedings related to this incident. On June 15, a large combined force of military and police, Public Ministry officials and PDH observers were present in the area in an unsuccessful attempt to arrest those charged.

Implementation of the Voluntary Principles with Respect to Public Security Forces

In the months following the Sololá incident in 2005, the Compliance Advisor Ombudsman's primary recommendation about security was for Montana to adopt and implement the Voluntary Principles on Security and Human Rights, which Montana initiated in 2006. Two subsequent external assessments have confirmed that, in 2006, "company compliance with the Voluntary Principles ... is moving forward very well," and, in 2008, that "a series of improvements ... demonstrate progress towards complete conformance [sic] of the Voluntary Principles."⁴⁴ However, the implementation of the Voluntary Principles at the mine is not currently supported by a company-wide policy on human rights and security at the level of Goldcorp. The need for Goldcorp to develop an official policy was presented as "the most important recommendation" of the 2008 external assessment of the Voluntary Principles.⁴⁵

The Voluntary Principles include an important component about the need for a company to undertake risk assessments. The two external VP assessments examine various risk areas including the issue of public

⁴⁴ Avanzar, 2006; Avanzar, 2008.

⁴⁵ Avanzar, 2008.

security forces.⁴⁶ The risks associated with public security forces were assessed as “low to medium” in 2006 and “medium” in 2008. Moreover, the 2008 report itself highlighted the need for further risk assessments regarding the external security situation in the area, involving both the security and sustainable development departments and conducted through community consultations and interviews. Such risk assessments could enhance the quality of the company’s overall engagement process with local communities, ensure a more stable macro environment, and provide insight about the security measures that need to be taken to address the risks.⁴⁷

In interviews with the mine’s security department, management confirmed that no other formal or external risk assessments have been undertaken in response to recommendations in the VP assessments; however, internal risk assessments are reported to be undertaken on an ongoing basis. The reports of those internal risk assessments were not provided to the assessors for review. The recommendations to strengthen risk assessment were aimed, among other things, at a more integrated approach to managing risks across departments of the mine’s operation. As mentioned in the previous section, managers, including the mine’s general manager, have not been integrated into the implementation of the Voluntary Principles (including sharing responsibility for them), yet are making key decisions that put human rights at risk.

The 2006 and 2008 external assessments of the implementation of the Voluntary Principles describe the ongoing efforts the company has undertaken to dialogue with and promote human rights to the public security forces, notably through attempts to conclude a formal agreement about human rights, as well as to include military and police officers in Montana’s human rights training initiatives.

From interviews with company management, and confirmed by the local National Civil Police (PNC), the company has made efforts to coordinate with Guatemalan public security forces on an ongoing basis at various levels (national, departmental and local); however, no formal arrangement exists between Montana

and the police or military to clarify the terms for their intervention in incidents related to the mine, including respect for human rights. Company representatives have reported there is no precedent for such an arrangement in Guatemala, and that frequent turnover of police and military personnel make it difficult to sustain and advance discussions.

While there has been no formal agreement with the public security forces, Montana has succeeded in coordinating human rights training with members of the military, and more recently with the police. The assessors verified this through review of documentation and interviews with the PNC.

Since Montana began to implement the Voluntary Principles after the Sololá incident, there have been indications of improved performance with regard to respect for human rights and the appropriate use of force. As noted above, in June 2009, during the Coral incident, Montana’s security personnel reported intervening to prevent the police from acting against the protestors. In this incident, the mine security superintendent confirmed he was instructed by senior management to prevent any escalation of violence. While this example helps confirm the integration of the Voluntary Principles into the way company personnel respond to incidents, it also highlights the ongoing risks of mobilizing the public security forces.

Goldcorp has stated it respects the rights of assembly and association, and requests intervention only when the situation begins to escalate.⁴⁸ There is no evidence that the company has requested the public security forces to break up blockades or peaceful demonstrations until a violent act was committed or company property was damaged. When complaints escalate into violence, the intervention of public security forces may become necessary, and helps ensure that private security contractors do not attempt to undertake law enforcement functions.⁴⁹

The interventions of the public security forces, however, have led to allegations related to intimidation or brutality by police and military, which could result in

⁴⁶ According to Montana management, a third assessment of the Voluntary Principles is underway at the time of the writing of this report.

⁴⁷ Avanzar, 2008.

⁴⁸ Goldcorp, 2009, “Letter to the Executive Secretary of the Inter-American Human Rights Commission dated July 3, 2009 in response to the request for precautionary measures after the Coral incident”, 3 [internal document].

⁴⁹ For instance, the DIHR tool provides criteria on preventing inappropriate law enforcement actions by private security contractors.

a violation of the right to freedom from cruel, unusual and degrading treatment. Other allegations relate to the chilling effect of the intervention of public security forces to disperse protests against the mine in terms of the right to freedom of assembly and freedom of association.⁵⁰

As there have been no conclusive investigations of the complaints of community members regarding public security forces, and conflicting accounts of the incidents remain, the assessment is unable to determine whether specific human rights violations have occurred. Independent monitoring (such as the recent participation of the PDH as observers in the Public Ministry's criminal investigation) and better documentation of communications with the government are important means of establishing that the company has respected human rights. It is not clear to the assessors whether the positive step of the PDH's participation and verification of the absence of human rights violations is a new procedure⁵¹ or was an isolated event.

For instance, the assessors were informed that the company was advised in advance of the risk of confrontation at the Coral incident, but the information was either not relayed to the relevant decision-makers and security personnel or was disregarded. This failure to use the available information suggests there are weaknesses in how personnel respond to or handle risk situations or in prioritization of respect for human rights. The security staff behaved credibly and respectfully in that context; however, the need to extricate personnel from a potentially dangerous situation could have been avoided. This issue is dealt with more extensively in Section 8: Access to Remedy.

The current pattern is that none of the investigations against public security forces have resulted in prosecutions, whereas investigations against community members have resulted in criminal charges and arrest warrants – even if these are not always enforced. In the 2008 external assessment of the Voluntary Principles,

it was noted that some stakeholders viewed the trial involving security personnel against community members to be an example of the company abusing its power and wealth against poor campesinos, while others viewed the trial as a good way to calm tensions and discourage the use of force in protests against the company.⁵²

Given the conflict in roles for the company to press for investigation of human rights violations by the public security forces at the same time as it is relying upon the same forces for criminal proceedings, there is a need for independent monitoring mechanisms. Given its independent mandate for the protection of human rights in Guatemala, the involvement of the PDH as observers (as was done in the criminal investigations of the Public Ministry after the Coral incident) could serve as a deterrent for violations of human rights.

Montana's consultation mechanism with the community about security-related issues currently lacks the formality to suggest that the company clearly and explicitly consults on security related issues and how the communities perceive this. A broader dialogue about security and public safety issues is necessary to understand and address the risks associated with the mine's operation and demonstrate respect for human rights, and to monitor how security arrangements are affecting communities.⁵³ Additional dialogue with stakeholders, including NGOs and human rights organizations, about security risks, the use of public security forces, and how to reduce the risk of violence is not currently taking place.

Findings

Montana initially failed to respect the right to life and security of the person as it lacked the policies and procedures to govern its interaction with public security forces.

The company began to implement the Voluntary Principles only after the fatal incident in Sololá, in which

50 Jilani, 2009, para. 25. Allegations exist in national and international NGO reports about violations of the rights of assembly and association of community members who have protested against the mine. The potential role of public security forces in repression of social protest was a concern because of a national-level pattern of "criminalization of social protest" that has been reported in Guatemala.

51 The participation by PDH was not mentioned to the assessors by Montana; it appeared in company documents and was mentioned in follow-up interviews with non-company actors.

52 Avanzar, 2008, Section D4.

53 It is possible that Marlin Mine's security personnel and Montana management monitor or assess some of these issues; however, the company declined to provide the assessors with internal security reports or any written documentation about internal risk assessments, so no determination could be made.

a person participating in a blockade of the mine's equipment was killed by public security forces. None of the police or military officers involved have been prosecuted or disciplined in relation to the Sololá incident. Allegations of human rights violations by the public security forces also have been made when they have responded to social actions and confrontations at the mine or tried to enforce arrest warrants in related criminal proceedings.

Given the fact that allegations of human rights violations by public security forces are not effectively investigated or resolved by the State, Montana's failure to press for investigation by the State into the specific allegations about the public security forces is a failure to respect human rights and to provide access to remedy. The company's inclusion of the Human Rights Ombudsman (PDH) as observers of police actions in recent events is a positive step toward respecting human rights.

Montana's involvement in criminal cases puts the company in the position of pressing for investigation of the conduct of community members rather than for the investigation of the conduct of public security forces. Montana lacks of effective procedures to reduce the

use of public security forces by ensuring timely treatment of concerns or grievances, and de-escalation of conflicts is a failure to respect human rights.

Montana's implementation of the Voluntary Principles is an area of improved ongoing due diligence and respect for human rights, but is not currently supported by a formal human rights policy or commitment to the Voluntary Principles by Goldcorp. There has been some success in including public security forces in Montana's human rights training initiatives; however, challenges remain in terms of reaching a formal agreement with the police and military about human rights.

Some prior recommendations from external assessments of the Voluntary Principles have not been implemented, including the need to strengthen and formalize risk assessments as well as integrating community consultation and participation into the process. Broader engagement should be initiated with municipal authorities and organizations, NGOs and human rights organizations about security measures and ways to avoid human rights violations. There is no evidence of a formal consultation process with local communities to identify and address concerns about the presence or behaviour of private security contractors.

PRIVATE SECURITY CONTRACTORS

Assessment S2: Has Montana's interaction with private security contractors respected human rights?

Montana's responsibility to respect human rights includes avoiding complicity or involvement in the violations of human rights by other actors.⁵⁴ While private security contractors are a separate legal entity, Montana exercises a high degree of control over their conduct. Given the functions of the private security contractors, as well as the mine's operational context, there is an ongoing risk that Montana may be involved in human rights infringements associated with its private security contractors – either against community members or employees.

⁵⁴ Ruggie, April 2008, para. 57. See also United Nations Global Compact, December 2008.

The relevant international human rights standards for the assessment of Montana's interaction with private security contractors are similar to those related to its interaction with public security forces, namely:

- Right to life, liberty and security of the person.⁵⁵
- Freedom from cruel, inhuman and degrading treatment or punishment.⁵⁶

⁵⁵ UDHR, Article 3; ICCPR, Articles 6, 9; ACHR, Articles 4, 7; UN Basic Principles on the Use of Force, Articles 1, 4, 5, 7-9, 18-20, 23-26; ILO C155, Articles 4,5; DIHR 195-198, 200, 201, 204-209.

⁵⁶ UDHR, Article 5; ICCPR, Article 7; ACHR, Article 5; UN CAT, Articles 2(1), 4, 10; ILO C169, Article 20(d); UN Basic Principles on the Use of Force, Article 2, 5, 7, 11; UN Code of Conduct for Law Enforcement Officials, Article 2, 3; DIHR 99-104, 107-109.

- The right to freedom of assembly and association.⁵⁷

In addition to the human rights issues associated with the external dimension of the private security contractors' interaction with community members, there is also the internal dimension of their interaction with employees.

Montana must ensure the safety of its employees from potential dangers related to the risk environment surrounding the mine, including against physical assault and kidnapping.⁵⁸ In the operational context of the mine, this has required the use of private security contractors; as discussed above, there are practical and human rights considerations that make it problematic for Montana to rely upon the Guatemalan public security forces to ensure safety at the mine.

Questions and indicators reviewed for the assessment highlighted potential issues associated with:

- Right to life, liberty and security of the person.⁵⁹
- Right to just and favourable working conditions, and safe and healthy working environment.⁶⁰
- Right to privacy.⁶¹
- Right to take part in government.⁶² (Specifically, whether private security contractors are members of political parties or associations. There was no indication that Montana's private security contractors were involved in political parties or were used to influence the political activities of employees.)

To fulfil its responsibility, Montana needs to implement the ongoing due diligence measures required to address the risks and impacts specific to its operations and the country context in which it operates.⁶³ In terms of the practical measures a company can undertake, the Voluntary Principles contain guidance

57 UDHR, Article 20, 23(4); ICCPR, Articles 21, 22; ICESCR, Article 8; ACHR, Articles 15, 16; DIHR 248.

58 DIHR 197.

59 UDHR, Article 3; ICCPR, Articles 6, 9; ACHR, Articles 4, 7; UN Basic Principles on the Use of Force, Articles 1, 4, 5, 7-9, 18-20, 23-26; ILO C155, Articles 4, 5; DIHR 195-198, 200, 201, 204-209.

60 UDHR, Article 23; ICESCR, Article 7; Additional Protocol to ACHR, Article 7.

61 UDHR, Article 12; ICCPR, Article 17; DIHR 254, 258, 259, 269, 270.

62 UDHR, Article 21; DIHR 285.

63 Ruggie, April 2008, paras. 57, 65-81.

on private security contractors related to the specific human rights challenges of the extractive industry, including:

- Implementation of human rights policies and use of force guidelines for private security contractors, and integration of the Voluntary Principles into private security contracts;
- Screening of private security contractors for past human rights infringements or use of excessive force, and training on human rights;
- Delineation of the role of private security contractors to defensive functions;
- Consultation with stakeholders about private security contractors; and
- Monitoring and tracking of allegations of human rights infringements and incidents of use of force.⁶⁴

The discussion below examines Montana's interaction with private security contractors, first in terms of the protection of the mine's employees; next in terms of its response to incidents involving private security contractors; and finally in terms of the implementation of the Voluntary Principles.

Protecting the Safety and Rights of Employees

Montana has respected the right to life, liberty and security of the person, as well as the right to just and favourable working conditions, by protecting the safety of its employees through the deployment of private security contractors.⁶⁵ There are significant external threats to the safety of employees that have manifested in at least one incident of kidnapping; in shots being fired at buses transporting employees and resulting in injuries; in shots being fired into the mine site at company equipment; and in armed robberies of employees on pay-day.

Additional security measures have been taken to protect employees outside the mine site in response to the incidents noted above, including providing guards for buses transporting female employees, arranging for additional protection on pay-days, and providing direct deposits to avoid cash payments.

64 Voluntary Principles on Security and Human Rights.

65 DIHR 197.

Based on interviews for the assessment, the conduct of private security contractors at this time is largely perceived by employees as appropriate in respecting their human rights. Local employees and former employees did not indicate any problems or concerns. In particular, there were no suggestions or information provided that indicated private security contractors infringe upon the right to freedom from forced labour by using force to compel work or overtime;⁶⁶ the right to freedom from cruel, inhuman or degrading treatment or punishment through intimidation or involvement in discipline of employees;⁶⁷ or the right to privacy through inappropriate searches or monitoring practices.⁶⁸ The assessors' observations of the conduct of the private security forces at the mine site also supported the employees' assertions that these rights are being respected.

Some interviewees indicated that the presence of local residents from indigenous communities hired as uniformed guards on the site was positive and improved interactions with them at security checks. With respect to the assessors' concern about potential impacts on women's rights, a positive step has been taken with the hiring of the first female uniformed security guard, deployed at the entrance gate and at the processing plant to assist with searches of female employees. Further steps in this direction are important signs of respect for the human rights of female employees and visitors.

Incidents Involving Private Security Contractors

A widely reported incident occurred on March 13, 2005 involving an off-duty private security guard who shot and killed a local transportation contractor, Álvaro Benigno Sánchez López, during an altercation in San Miguel Ixtahuacán. The security guard was identified by witnesses, but fled the scene. It is alleged that the private security firm repeatedly approached the victim's family and offered them money to not pursue the case.⁶⁹

66 DIHR 83.

67 DIHR 99, 100.

68 DIHR 254, 258, 259.

69 ADISMI, 2007, Section 4.7; ILO, 2005.

A police investigation was initiated, but did not result in the detention, prosecution or punishment of the security guard. In a press release dated April 20, 2005, Glamis stated that its representatives met with the family of Mr. Sánchez and assisted them in filing wrongful death charges against the alleged assailant. The company also filed its own charges for theft of a company vehicle and stated that it requested that the security contractor approach the family and offer assistance in their time of need. According to the press release, "At no time was a cover-up attempted. Glamis has pledged to cooperate fully with law enforcement and will do everything it its power to bring the fugitive to justice."⁷⁰

The company's press release states that it was undertaking a review of its operating and security procedures and would "take whatever measures necessary to prevent incidents such as this in the future." The contract with the private security firm for whom the security guard worked was terminated the following year since, according to Montana's management, the private security firm did not have a policy on the use of force.

The fact that the security guard was off-duty suggests this incident could be analyzed as a crime rather than an infringement on human rights. Nonetheless, the fact that the security guard has not been apprehended and punished reinforces ongoing concerns about impunity and the lack of access to an effective remedy in the Guatemalan context. An additional concern relates to whether Montana had sufficient measures in place to ensure respect for human rights by its private security contractors at the time. Montana had not yet implemented the Voluntary Principles – with the screening, human rights training, and codes of conducts that are now required for security contractors – a process initiated soon after the incident.

In addition to this murder, private security contractors have been involved in incidents discussed in the assessment above in which public security forces intervened in social protests at the mine. Prior to the intervention by the police and military, private security contractors have been involved in the confrontations with protestors. Some of these individuals and

70 Glamis Gold, April 20, 2005 "Glamis Gold Comments on Recent Events in Guatemala", www.goldcorp.com/_resources/glamis/pressreleases/2005/apr20-05.pdf. GR140.

groups have been armed with rocks, knives and fire-arms; the mine's security personnel have been injured in confrontations. While there have been no allegations about injuries caused by the private security contractors, there have been allegations of intimidation against opponents to the mine in these incidents and on other occasions. The 2008 assessment of the implementation of the Voluntary Principles found that private security contractors fired guns during the 2007 blockade, although no-one was injured. Local leaders later complained in interviews of aggressive behaviour by the private contractors. Intimidation is a potential infringement on the right to freedom from cruel, inhuman or degrading treatment.

An important aspect of avoiding infringements of human rights is to ensure that private security contractors engage only in defensive functions. Not only does this address the risk of infringements on the human rights of community members, including those who may engage in protest activities against the mine,⁷¹ it also minimizes the exposure to dangers of security contractors.⁷²

Other than the incident involving the off-duty security guard, stakeholders appear to perceive that the conduct of the mine's private security contractors is appropriate and respectful. None of the residents interviewed from San Miguel or any communities adjacent to the mine mentioned any current concerns about the behaviour of the private security contractors, even when specifically asked about the issue. In the 2008 assessment of the Voluntary Principles, it was noted that, "according to a majority of external interviews, private security contractors are considered professional and follow the rules of their job."⁷³

However, interviews with some external stakeholders did raise concerns about past infringements of human rights through intimidation and harassment of community members by private security contractors. The CAO report identified this in 2005, along with intimidation and harassment by mine opponents.⁷⁴ Concerns were raised by local authorities about private security contractors acting aggressively during the January

2007 blockade,⁷⁵ and about their role during the 2008 power line protests.⁷⁶ Currently, Sipacapa municipal authorities expressed concerns about the private security forces, and one group of community members in Sipacapa had specific allegations of intimidating behaviour by vehicles with tinted windows that tried to push them off the road after an effort to meet with mine management. Those concerned locally represented 2 per cent of those interviewed. At a national level, including concerns by the Catholic Church, 6 per cent expressed concerns in this area.

Harassment and intimidation are serious issues, particularly given the pattern of confrontations related to the mine, as well as Guatemala's history of violence and human rights abuse. The fact that the executive security contractors are often former members of the military must not be overlooked. The company does screen security personnel for pre-existing association with human rights or criminal problems. Given these ongoing concerns, further attention to this issue is required to ensure that security contractors do not overstep the bounds of a defensive role.⁷⁷ While there was no additional corroborating evidence about the particular event noted above, nor that the private security forces are engaging in harassment, the issue reinforces the importance of training, standard operating procedures and codes of conduct that seek to de-escalate conflict and restrain the use of force.

The recent incident in Coral is another manifestation of the potential for violence around the mine. However, the conduct of the private security contractors can be viewed positively in terms of withdrawal from a potentially violent confrontation and allowing company property to be burned rather than using force against protesters. This course of action was respectful of the rights of the community members, as well as of the safety of employees and the security contractors themselves.

71 DIHR 107–109, 200.

72 DIHR 196.

73 Avanzar, 2008.

74 CAO, 2005, 34.

75 Avanzar, 2008.

76 Interview with community resident, 2009.

77 DIHR 107.

Implementation of the Voluntary Principles with Respect to Private Security Contractors

This discussion of the implementation of the Voluntary Principles addresses those aspects relevant to Montana's interaction with private security contractors; it is supplemented by other measures relevant to the company's interaction with public security forces discussed above.

As mentioned above, when Glamis' management began to hire private security contractors for the mine in 2005, the company lacked an overall security structure, contingency planning, culture, policies and procedures.⁷⁸ Montana began to implement the Voluntary Principles for Security and Human Rights in 2006, after the CAO report that reviewed the murder of the local resident by the off-duty security guard.

An important gap exists in the policy framework for human rights and security given the lack of a comprehensive human rights policy and the formal adoption of the Voluntary Principles at the level of Goldcorp that would strengthen commitment and attention to their implementation.

Steps taken by Montana to implement the Voluntary Principles that have been verified by external assessments in 2006 and 2008 include the adoption of guidelines on use of force and respect for human rights. In addition to the Voluntary Principles, the guidelines include the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) and The Code of Conduct for Law Enforcement Officials (1978), as well as the Universal Declaration on Human Rights. These guidelines are now integrated into contracts with private security contractors.

All security personnel proposed for employment at the mine, both as uniformed guards or for the other two security contractor roles, are screened for allegations of human rights abuses through reference checks, and searches of the Public Ministry database, as well as the database of the national Human Rights Ombudsman, for any allegations of criminal activity or human rights violations. All security staff is screened on a regular basis, and is additionally subject to polygraph testing. Given the pervasive issue of impunity

for crimes and human rights violations in Guatemala, it is important for Montana to continue to make use of reference checks and other techniques to screen prospective security contractors, as public databases are not comprehensive.

Contractually, private security firms are required to provide training to their personnel prior to working at the mine. In interviews, the uniformed guards reported lower levels of training in human rights than did the executive security personnel. While working at the mine, Marlin's security department carries out ongoing training including refresher classes about human rights and use of force. The recent development of a specialized training course for executive security personnel provides a relatively comprehensive overview of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, The Code of Conduct for Law Enforcement Officials (1978), as well as the Universal Declaration on Human Rights.⁷⁹

According to Montana, the uniformed guards, who are mostly local residents, receive ongoing reinforcement of their human rights training in five-minute talks they receive daily from their supervisors (modelled after daily safety talks), under the assumption that learning is best achieved outside a classroom setting. This method of training does not appear to have been tested; there is no monitoring process to establish whether the uniformed guards are really learning and applying the knowledge acquired in this way. The assessors interviewed two uniformed guards, and were able to confirm they are aware of use of force concepts, and the need to respect local people, including recounting that guards have been fired for not doing so. The guards had some difficulty explaining human rights and related concepts. When asked, both of the uniformed guards said they had received no human rights training since they began work at site. This raises some concerns about the effectiveness of ongoing training, although the assessors recognize it could be because the five-minute security talks are not identified as training activities by the guards. The 2008 VP assessment found that 75 per cent of guards demonstrated they understand the basic principles of the proper use of force and the essential security-related human rights.

⁷⁸ Control Risks, 2005.

⁷⁹ The training and background material was reviewed by the assessors.

This highlights a need for ongoing efforts to deepen human rights training for private security contractors at the mine, including basic evaluations as to whether the current training strategy is effective. In addition, the training currently focuses on the use of force guidelines and the basic human rights principles contained in the Universal Declaration. More advanced training would be useful to address some specific human rights concerns, such as harassment, women's rights, and employee privacy issues.⁸⁰

In addition, company representatives confirmed that human rights training is currently confined to the security department, and that not all managers and employees receive human rights training, which suggests opportunities to broaden training. Expanding training should prioritize all managers and employees involved in community engagement and responding to complaints and security-related incidents.

As discussed above, Montana's interaction with public security forces highlighted a need for improved monitoring and tracking of incidents involving public security forces – including through the involvement of independent agencies such as the PDH. The same independent monitoring is of equal importance and value for incidents involving private security contractors, particularly during incidents with a potential for violence and infringement upon human rights. The practice of having regular external assessments of the implementation of the Voluntary Principles is also a good management practice for improving the human rights performance of the company and private security contractors.

The need to proactively resolve disputes, address grievances, and provide access to remedies was discussed above in terms of reducing the human rights risks associated with security. In terms of addressing allegations of intimidation and violence (by both sides), the 2005 CAO report included a recommendation for Montana to support an independent commission with members of the local judiciary. This recommendation has not been implemented.

80 The DIHR HRCA tool presents a number of indicators related to the conduct of private security guards that may have an impact upon employees' privacy rights. These considerations are not currently well-developed in the Voluntary Principles, which focus more on the external dimension of the private security contractors' interaction with community members.

The report also recommended that Montana establish a system for monitoring and reporting security concerns over the life of the mine.⁸¹ Since then, Montana has established a grievance mechanism for the communities around the mine (The Public Attention System for Communities).

The assessors reviewed one case of alleged sexual harassment filed by a local woman through the company's grievance mechanism regarding a private security guard. The complaint was investigated by the company, but was later withdrawn when the woman was not able to identify the culprit. Other than this case, the issue of sexual harassment did not arise at all; nonetheless, further attention to this issue is recommended as part of the human rights training of private security contractors, as well as the general employment policies at the mine.

Findings

Montana currently has contracts with three private security firms for different aspects of security at the Marlin Mine. Montana has respected the right to life, liberty and security of the person, as well as the right to just and favourable working conditions, by protecting the safety of its employees through the deployment of private security contractors and undertaking additional security measures in response to incidents. There are significant external threats to the safety of employees that have manifested in at least one incident of kidnapping, in shots being fired at buses transporting employees and resulting in injuries, in shots being fired into the mine site at company equipment, and in armed robberies of employees on pay-day.

An off-duty security guard murdered a local resident in 2005. At the time of the incident, Montana failed to respect human rights as it did not have policies and procedures in place to govern its interaction with private security contractors. After the incident, the private security firm's contract was not renewed and Montana began to implement the Voluntary Principles, which is an appropriate framework for ongoing due diligence for human rights related to private security firms. Montana respected human rights when it initially pressed for investigation and prosecution of

81 CAO, 2005.

the incident; however, the security guard has not been apprehended.

Steps taken by Montana to implement the Voluntary Principles include the adoption of guidelines on use of force and respect for human rights, their inclusion in the contracts with the private security firms, and the revision of standard operating procedures for security at the mine. There is also screening of prospective security guards, and training on human rights. More advanced training would be useful to address some specific human rights concerns, such as harassment, women's rights, and employee privacy issues. Expanding training should prioritize all managers and employees involved in community engagement and responding to complaints and security-related incidents.

The assessors reviewed one case of alleged sexual harassment filed by a local woman through the company's grievance mechanism regarding a private security guard. The complaint was investigated by the company, but was later withdrawn when the woman was not able to identify the culprit. Other than this case, the issue of sexual harassment did not arise at all; nonetheless, further attention to this issue is recommended as part of the human rights training of private security contractors, as well as the general employment policies at the mine.

The majority of stakeholders interviewed in 2009 confirmed that the private security contractors are conducting themselves appropriately and fulfil their proper functions. The recent incident at Coral demonstrated a commitment to a defensive role that respects human rights. However, to reduce the risks of human rights infringements by private security contractors, including allegations of intimidation, greater efforts are required to proactively resolve complaints and grievances before they escalate into confrontation or violence. If there are confrontations, independent monitoring of the private security contractors is a means to ensure that their conduct respects human rights.

Montana's security personnel report that recommendations of the external evaluations of the Voluntary Principles continue to be implemented; however, there was no documentation, action plan, or reporting on the steps taken to address identified gaps. Improved documentation and performance tracking is important to facilitate review and establish internal accountability; it will also help demonstrate the progress Montana has achieved and its commitment to addressing existing gaps.

Overall, an important gap exists in the policy framework for human rights and security given the lack of a comprehensive human rights policy and the formal adoption of the Voluntary Principles at the level of Goldcorp that would strengthen commitment and attention to their implementation at the Marlin Mine.

The practice of having regular external assessments of the implementation of the Voluntary Principles is also a good management practice for improving the human rights performance of the company and private security contractors. Compliance with the Voluntary Principles, and respect for human rights, includes ongoing consultation with stakeholders about risk assessments and security issues. Montana's consultation mechanisms with the community about security-related issues currently lack formality and internal coordination.

The assessors find that the security incidents at the mine follow a pattern related to unresolved grievances – such as land acquisition, consultation, right of way agreements, and the environment – and that the company has failed to undertake a serious review of these grievances. The lack of access to remedy has led to confrontation and escalation of violence, and thus creates human rights risks for community members, as well as for the safety of private security contractors and employees of the mine. Reducing this risk requires that Montana address legacy issues with stakeholders, strengthen the effectiveness of its grievance mechanism, and make continued efforts to engage with the public security forces about the protection of human rights.

RECOMMENDATIONS

RECOMMENDATIONS FOR IMMEDIATE ACTION TO ADDRESS INFRINGEMENTS

- **STRENGTHEN INTERNAL PROCESSES.** Ensure that a clear protocol exists for convening all relevant managers and departments to discuss human rights risks associated with all situations that involve a threat of confrontation or violence.
- **ENSURE INDEPENDENT MONITORING.** If a situation requires the intervention of private security guards or public security forces, provide for independent monitoring as a deterrent for and witness of human rights infringements or violations. The recent example of including the PDH to monitor actions of the police is a positive step.

RECOMMENDATIONS THAT ADDRESS LEGACY ISSUES

- **STRENGTHEN FOLLOW-UP OF PAST INCIDENTS.** As part of monitoring of the Voluntary Principles, pay particular attention to the follow-up and results of investigation into potential infringements by private security guards and/or violations by public security forces. Ensure that Montana is taking appropriate steps to investigate and discipline private security guards, and to press the Guatemalan government for investigation, prosecution and remedy for violations by public security forces.

RECOMMENDATIONS FOR ONGOING DUE DILIGENCE

- **OBTAIN AN AGREEMENT WITH PUBLIC SECURITY FORCES.** Despite turnover of military and police personnel, the dialogue with the Guatemalan public security forces about security arrangements must continue with a view to obtaining a transparent agreement that security be provided in a manner consistent with human rights by personnel with adequate and effective training. Companies should encourage host governments to permit making security arrangements transparent and accessible to the public, subject to any overriding safety and security concerns.

- **CONTINUE TO SCREEN PRIVATE GUARDS.** Focus primarily on in-depth reference checks for past human rights concerns rather than national databases. Complement screening mechanisms with ongoing supervision and evaluation for good human rights performance. Hire more female guards and improve gender balance in the security force by hiring and training more women.
- **EXPAND HUMAN RIGHTS TRAINING.** Reinforce and build upon early achievements in human rights training for public security forces and expand to include all relevant actors that may be involved in public security responses (e.g. unit responsible for carrying out arrest warrants). Build upon early achievements in human rights training for private security firms by strengthening and verifying training, with clear objectives and goals. Implement an appropriately-designed evaluation program to measure effectiveness, and adapt as needed. Expand current training initiatives for security guards to management and then other staff and employees. Content on human rights and the Voluntary Principles should be expanded to cover risk areas such as intimidation, sexual harassment, and privacy rights of employees.
- **ENGAGE STAKEHOLDERS ON SECURITY ISSUES.** Expand formal consultation with community members and other stakeholders about security-related matters. As the conduct of the public security forces and broader issues of public safety are shared concerns for the company and the community, there is an opportunity for engagement and dialogue with community members that can be expanded over time to other areas of mutual concern. Implement a more formal process to welcome and address concerns of community members, moving next to engagement and accountability with external stakeholders and critics.
- **UNDERTAKE PERIODIC RISK AND CONFLICT ASSESSMENTS.** Strengthen risk assessments in light of repeated use of public security forces. Strengthen and institutionalize an interdepartmental process of analyzing risk and conflict concerns in particular with decision-makers at the mine, including



identification of internal and external strategies to manage and reduce risks and conflict. This should focus on expanding the number of managers involved, and deepening understanding and capacity to manage human rights and security risks. Include in risk assessments consultation with all relevant internal departments and managers, as well as the public security forces, community members, and other relevant stakeholders.

- **CONTINUE EXTERNAL REVIEWS.** The practice of periodic external evaluations of the implementation of the Voluntary Principles, including the company's interaction with public security forces, should be continued. Given the risks identified in previous VP assessments, as well as some of the gaps in current implementation, such assessments should be undertaken on a regular basis (e.g. every 18 months). The development of more formal plans to implement recommendations from assessments is also recommended.

CONCLUSIONS

Implementation of the Voluntary Principles since 2006 has created an appropriate policy framework for due diligence by Montana about its interaction with public security forces, and has improved the human rights performance of its private security contractors. This is an example of how implementation of international standards has had a positive impact on human rights performance at the operational level, measured both by established indicators as well as by interviews with employees and the majority of community members. It is worth noting that the most serious incidents discussed above – including two incidents of loss of life – occurred prior to the implementation of the Voluntary Principles.

At the same time, the implementation has not been complete, and significant risks remain. This reinforces the importance that due diligence for human rights be understood as an ongoing process. Furthermore, the assessment also demonstrates how formal adoption of human rights initiatives such as the Voluntary Principles needs to be integrated not only within the

management system of the Security Department, but also across all departments in order to address the risks to, and enhance the internal profile of human rights. External audits of the implementation of the Voluntary Principles is a good management practice and demonstrates a commitment to due diligence.

Finally, the assessors find that the security incidents at the mine follow a pattern related to unresolved grievances – such as land acquisition, consultation, right of way agreements, or the environment – and that Montana has failed to undertake a serious review of these grievances. The lack of access to remedy has led to confrontation and escalation of violence, and thus creates human rights risks for community members, as well as for the safety of private security contractors and employees of the mine. Reducing this risk requires that Montana address legacy issues with stakeholders, strengthen the effectiveness of its grievance mechanism, and make continued efforts to engage with the public security forces and consult with communities about human rights.

Access to Remedy

In law, it is said there is no right without a remedy. When individuals or groups believe their human rights have been harmed, there must be appropriate and credible means to have their concerns or allegations addressed¹ or the concept of rights becomes meaningless. In the context of business and human rights, access to remedy is the third pillar of the “Protect, Respect and Remedy” framework. States and companies share a responsibility to provide access to remedy to address human rights impacts and violations.² In general terms, access may be sought through both judicial and non-judicial mechanisms, including courts and other tribunals, administrative bodies and regulatory agencies, international tribunals and review processes, as well as company-based grievance mechanisms.

There are multiple challenges for victims and complainants to access these different mechanisms, and each mechanism has a closely linked reputation for fairness and legitimacy. In countries with weak governance and institutional development, the legal system

may not provide access to remedy, which ultimately can result in infringements on human rights. Other state-based mechanisms can also be biased, compromised or without adequate powers.

In Guatemala, overarching concerns about the independence and impartiality of the judicial system as well as the monitoring and enforcement capacity of regulatory agencies raise questions about access to remedies. There are high levels of impunity for serious crimes and human rights violations, criminalization of social protest, and lack of recognition of indigenous legal traditions and customary law.³ Institutional weaknesses affect all aspects of the criminal justice system and extend to non-criminal matters, including labour, civil, family and property jurisdictions.⁴

The Guatemalan population in general, lacks confidence in judicial institutions and government agencies.⁵ United Nations reports highlight the perception that the judicial system does not work in favour of in-

1 According to John Ruggie, the basic principles by which all non-judicial mechanisms that provide access to remedy should be judged include: legitimacy, accessibility, predictability, equitability, rights-compatibility, and transparency. Ruggie, April 2008, para. 92.

2 There is an international right to a remedy derived from the UDHR, Article 8; ICCPR, Article 2; ACHR, Article 25; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147.

3 Office of the United Nations High Commissioner for Human Rights on the work of its office in Guatemala, 2007, 2008, 2009; Special Rapporteur on the right to food, Jean Ziegler, 2006, paras. 30, 39; Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, 2003, paras. 32-41; Report of the Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, 2009, para. 25.

4 Office of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala in 2008, 2009, paras. 38-41.

5 Barometro Iberoamericano del Gobernabilidad, 2009, 166, www.cimaiberoamerica.com.

indigenous people, particularly for cases related to land complaints.⁶ The widespread mistrust of the judicial system contributes to a culture in which individuals and groups use alternative means – including petitions, protests, blockades, and ultimately lynchings – to raise or resolve complaints.

There are also concerns about regulatory agency capacity to conduct inspections and enforce regulations intended to protect the population. Of particular relevance to the Marlin Mine are concerns about the capacity of MEM, MARN and the Ministries of Labour and Welfare and of Public Health and Social Assessment. Although internationally recognized as credible and independent,⁷ the Human Rights Ombudsman (PDH) also faces challenges in the promotion and protection of human rights at the national level. Generally speaking, these regulatory institutions lack the resources to effectively fulfil their mandates.

Courts are located in the departmental capital of San Marcos and there are Justices of the Peace in the local communities. Justices of the Peace function essentially as small claims courts dealing with criminal, civil, family and labour matters at a municipal level. They are encouraged to resolve complaints quickly, with an emphasis placed on alternative dispute resolution methods. Community members confirmed in interviews that they use the Justice of the Peace to resolve issues and disputes.

The municipality of San Miguel Ixtahuacán is part of a pilot program to establish Community Justices of the Peace,⁸ who have been given a limited jurisdiction over criminal matters. Each tribunal is comprised of three Justices, none of whom are lawyers (as all other judges are required to be by law), but rather community members fluent in the local language and Spanish, renowned for their honesty. Although the law expressly says that rulings must not contradict the Constitution

or national laws, the Community Justices of the Peace are entitled to rule according to customary indigenous law and general principles of law and equity.

Discussion

Corporate responsibility to respect access to remedy requires providing a means for those who believe they have been harmed to bring this to the attention of the company and seek remediation.⁹ Establishing an effective and credible grievance mechanism is increasingly an area of good practice for companies seeking to respect international human rights.¹⁰ A formal process for addressing complaints is especially important in the context of mining projects where there are multiple impacts on a large number of affected people over a significant period of time, and where unanticipated impacts, complaints and disputes are inevitable.

While the issue of access to remedy focuses on the company-level recourse available for stakeholders, it explicitly recognizes that they should not be prevented from using other legal mechanisms. This also implies that companies can and will make use of various legal mechanisms to protect their interests and to respond to allegations or complaints against them. However, given the relative economic strength and legal sophistication, companies' use of legal mechanisms may create additional barriers for stakeholders.

In relation to issue of access to remedy, the following are the key assessment questions:

- Assessment A1: Are there effective and credible mechanisms to provide access to remedy for stakeholders?
- Assessment A2: Has Montana's use of the legal system enhanced or impeded access to remedy?

The assessment of these issues is framed differently than other sections. Its purpose is to enumerate the mechanisms that have been used by community members and other stakeholders to raise issues about the Marlin Mine in order to assess whether there has been effective access to remedy. The analysis focuses on the functioning of mechanisms as much as the outcomes

6 Stavenhagen, 2003, paras. 32 – 41.

7 The PDH was accredited with "A" status in 2008 by the International Coordinating Committee of National Human Rights Institutions according to the "Paris Principles" for national institutions for the promotion and protection of human rights: www.ohchr.org/Documents/Countries/ChartStatusNIs.pdf

8 Decree 79-97 modified the Criminal Procedure Code by adding article 552 BIS, and created the Community Justices of the Peace. By 1998, 5 Community Justices of the Peace Tribunals were established in Santa María Chiquimula (Totonicapán), San Rafael Petzal (Huehuetenango), San Luis (Petén), San Miguel Ixtahuacán (San Marcos) and San Andrés Semetabaj (Sololá).

9 Ruggie, April 2008, para. 82.

10 International Council on Mining & Metals, October 2009; International Finance Corporation, September 2009.

of specific cases. While there are general concerns related to the right to a fair trial that are discussed in relation to the use of the legal system, the assessment is focused more on the overall patterns for access to remedies for all human rights.

To assess the issue, the Guatemalan lawyer on the team was assisted by a Guatemalan legal specialist to review documentation in court, regulatory agency and company files regarding legal cases and investigations by regulatory agencies. However, it should be noted that because most Guatemalan regulatory agencies do not have systematically compiled databases, there is no certainty that all files involving Montana were reported and reviewed. For instance, several of the complaints against Montana reported by MARN were unobtainable, and therefore not reviewed.

The assessors also reviewed reports from the United Nations and international organizations highlighting national-level concerns about the judicial system and rule of law in Guatemala as well as complaints presented to international organizations and any reports or rulings made to date. In addition, the assessors reviewed international and national NGO reports that highlighted concerns related to Montana's use of the legal system against indigenous community members.¹¹ Finally, the three formal complaints that have been submitted to Montana's grievance mechanism for community members were also reviewed, and interviews conducted with company representatives about the functioning of the grievance mechanism.

11 ADISMI 2007; Imai, Mehranvar and Sander, 2007.

MECHANISMS FOR REMEDIES

Assessment A1: Are there effective and credible mechanisms that provide access to remedy for stakeholders?

As stated above, access to remedy is the third pillar of the "Protect, Respect and Remedy" framework adopted by the United Nations for business and human rights. The focus is to ensure there are effective and credible mechanisms provided by the State and by companies to address complaints and allegations of human rights harms of project-affected community members. At the same time, providing access to remedy does not presume that all allegations represent real infringements or bona fide complaints. Individuals and organizations have used the following mechanisms in relation to the Marlin Mine:

- Guatemalan courts: Montana has been involved in eight legal cases since 2005. These have included criminal cases relating to violence against company employees and damages to company property arising from protests against the mine. There also have been civil and constitutional cases about the validity of the referendum (*consulta*) about mining conducted by the municipality of Sipacapa, as well as civil cases relating to environmental NGO

allegations about environmental impacts of the mine's activities.

- Guatemalan regulatory agencies and institutions: In addition to the permanent presence of a MEM representative at the mine, Montana has been subject to inspections, oversight, and rulings by MARN, the Ministry of Labour and the PDH. In some instances, Montana has contested some of the reports and rulings, including bringing a constitutional case to challenge the PDH findings about human rights impacts, as well as a legal challenge against a MARN resolution of environmental non-compliance. NGOs have also submitted complaints against Montana to MARN and the PDH on behalf of project-affected communities.
- International mechanisms: At least five complaints about the mine related to human rights, labour and environmental issues have been submitted to various international bodies, including the International Labour Organization (ILO) Committee of Experts, the Inter-American Human Rights Commission, the Compliance Advisor and Ombudsman (CAO) of the International Finance Corporation, and Canada's National Contact Point for the OECD Guidelines for Multinational Enterprise.

- Company-level grievance mechanism: Montana's grievance mechanism, the "Sistema de Atención Pública a las Comunidades" (Public Attention System for Communities), has received three formal complaints to date.¹²
- A table summarizing the principal legal cases and complaints is attached as Appendix F.

Judicial System

An environmental NGO has used the judicial system as a mechanism for remedy; however, the formal judicial system has been used primarily by Montana. This is not surprising, as individuals face many challenges in Guatemala to seek remedy through the domestic courts. For most community members, the cost of conducting a legal case are prohibitive. There are also cultural and linguistic barriers for indigenous peoples using the judicial system.

When complaints have been presented by community members, they have not advanced to the stage of investigation or adjudication. For instance, one case was dismissed due to a technicality; others were withdrawn or dismissed by the Public Ministry without investigation as lacking proper legal foundation.¹³ The assessors are aware of several complaints that were not advanced regarding human rights abuses at the hands of public security forces who intervened at social protests at the mine. Over the same period, the Public Ministry has also dismissed complaints advanced by Montana.

Regulatory Agencies

Montana has undertaken positive actions to strengthen the institutional capacity of MEM and MARN. Several seminars on technical aspects of mining, and a conference were held in 2003 and 2004, sponsored by Montana. Montana has recently concluded an agreement with MEM to provide for additional independent water monitoring, which has the potential to address one of the most serious community concerns about the mine's activities. In addition, there is a MEM

representative permanently stationed at the mine who, in addition to ensuring accurate recording of the mine's ore production, conducts regular mine inspections and reports on health and safety issues as well as compliance with ESIA commitments.

Montana has been named by stakeholders in complaints to MARN; specific grievances have been resolved by inspection, which concluded that Montana was fulfilling its commitments under the ESIA. In 2009, MARN issued a resolution about shortcomings in Montana's compliance with ESIA social commitments, which was contested by the company on procedural grounds. Montana maintains that MARN was required to provide a review period to address findings prior to presenting a formal resolution against the company. While Montana's concerns that regulatory agencies follow due process are legitimate, the company's action formally delays treatment of substantive issues because the parties became locked in a legal dispute. To the extent that MARN is prevented or delayed from requiring the company to respond to environmental concerns, it may limit MARN's effectiveness to address complaints and enforce regulations that protect human rights in relation to environmental issues.

On one occasion, Montana refused to allow MARN to undertake water samplings at the tailings facility based on a technicality; however, the company later allowed MEM to sample the same water source. The action highlights an inconsistent pattern in relation to regulators, shifting from a cooperative approach to what appears to be a confrontational relationship, which in the end restricts the oversight role of the regulators. Given that unpredictable environmental or social impacts could occur, the regulatory agency needs flexibility to scope oversight to address new concerns. Montana has shown a capacity to apply a narrow, legalistic interpretation of MARN's oversight role.

Montana has also initiated legal and administrative challenges against the PDH that have impeded or delayed community access to remedy. For instance, Montana brought a constitutional challenge to a 2005 resolution by the PDH's regional representative in San Marcos that concluded the mine infringed the right to prior consultation of indigenous peoples and the right to healthy environment. Although Montana's request

¹² Internal company files; Queja (complaint) #000001, Queja #000002 and Queja # 000003.

¹³ HRA Judicial System Review 2009, Report prepared for OCG, Review of cases and complaints filed in San Marcos.

for *amparo* was denied,¹⁴ the PDH's findings were declared by the Constitutional Court to be non-binding.

From the perspective of access to remedies, there are concerns about Montana's legal and administrative actions that have delayed or frustrated the mandate of regulatory agencies for investigation, oversight, and protection of human rights and the environment. At the same time there may be overlap and lack of coordination between the mandates of different regulatory agencies that may make them less effective in providing access to remedy. To address some of the concerns about regulatory agencies, a constructive approach would include further contributions to capacity-building.

International Organizations

Given some of the obstacles encountered, stakeholders have brought complaints to various international organizations, including the CAO in 2005, the ILO Committee of Experts in 2005, the Inter-American Human Rights Commission in 2007 and 2009, and, the OECD National Contact Point in Canada in late 2009.

None of these complaints have been resolved. In the case of the ILO Committee of Experts, although a ruling was made in 2006 about violations of the right to consultation of indigenous peoples under ILO 169, the necessary remedial action by the Guatemalan government has not been undertaken. The petitions to the Inter-American Human Rights Commission are outstanding and, if addressed, would focus primarily on the State's obligations to protect human rights. The assessors are not aware of the follow-up on the case recently referred to the OECD National Contact Point.

The complaint to the CAO was possible because Glamis had received a loan from the IFC in 2004 for the Marlin Mine. Although the CAO mandate is primarily to review whether the IFC fulfilled its policy commitments, not to make findings about the mining operation or project per se, the complaint resulted in recommendations for Montana. While not all recommendations have been implemented, a number of positive developments at the mine were prompted, such as implementation of the Voluntary Principles on

¹⁴ Amparo is a type of legal action used to protect an individual's rights under the Guatemalan constitution.

Security and Human Rights, creation and funding of AMAC, and improvements to the environmental management system.

In terms of access to remedy, complaints to international organizations have raised the profile of human rights issues related to the Marlin Mine. Moreover, findings of specialized international bodies have provided useful and credible interpretations of relevant international standards – such as the ILO Committee of Experts' discussion of consultation under ILO 169. However, as inter-governmental bodies do not have direct authority over a company, their rulings and recommendations tend to be aimed at longer-term issues related to the State's obligation to protect human rights, rather than shorter-term remedies for individuals who are negatively affected by a company's operations.

Company-based Grievance Mechanism

Company-based grievance mechanisms are particularly significant in a country like Guatemala where courts and regulatory agencies are unable to provide adequate and effective access to remedy,¹⁵ and as a means to proactively address issues before they escalate into legal cases or confrontations. However, there are challenges to making company-based grievance mechanisms effective and credible. According to John Ruggie, the basic principles by which company-level grievance mechanisms should be judged include: legitimacy, accessibility, predictability, equitability, rights-compatibility, and transparency.¹⁶ He also stresses that company-level mechanisms should operate through dialogue and mediation rather than the company itself acting as adjudicator.¹⁷

The development of an effective grievance mechanism is an important part of a broader process of due diligence for human rights as it provides information about community perceptions, risks, and impacts that are associated with different aspects of the mine's activities (e.g. land acquisition, environmental management, conduct of private security firms). The existence of an effective grievance mechanism was a

¹⁵ Ruggie, 2009, para. 84.

¹⁶ Ruggie, April 2008, para. 92.

¹⁷ Ruggie, 2009, para. 99.

cross-cutting indicator of compliance with international human rights standards in the DIHR HRCA tool.

A grievance mechanism was not initially established at the mine. It was not required by the IFC in 2004, presumably because grievance mechanisms were then linked to resettlement processes rather than as a necessary tool for managing project impacts. It wasn't until 2007 that Montana established a formal grievance procedure. To date, only three complaints have been presented to the Public Attention System for Communities, raising questions about its relevance and usefulness for stakeholders, since persistent and serious complaints are not being addressed through the process as designed. For Montana, it is not proving effective at identifying community or stakeholder concerns so they can be addressed.

The fact that Montana's grievance mechanism is not being used may be explained by a number of factors. First, stakeholders express a lack of trust that the company will respond impartially to complaints. Second, this is a company-directed mechanism requiring people to be identified and willing to formally present their complaints. Although the process is set up to accommodate non-literate people by allowing oral testimony, company representatives acknowledge that many are put off by a formal process. Third, because Montana designed it for only formal complaints, it is not used to register informal complaints or concerns raised directly with company personnel on an ongoing basis. The company lacks effective internal channels to refer informal complaints to either a tracking system if apparently resolved, or the grievance mechanism for further investigation. Without tracking of informal complaints, there is no way to determine how, when and why complaints and concerns have been addressed. And although the Public Attention System for Communities was designed to channel complaints to a multi-departmental management team, where appropriate resources to investigate or respond could be allocated, the monthly management meetings to address complaints are not taking place, in part because the formal grievance system is not used.

Montana's management acknowledged that the grievance mechanism has not been fully implemented. The result is that the majority of concerns and complaints are, at best, dealt with informally and without proper documentation. More serious is the possibility that the company may not be aware of a number of serious

complaints and concerns that are not identified as concerns to track, and are not part of an internal review system. The current situation prevents Montana from tracking patterns of complaints and systemic issues over time and deprives Goldcorp of the information required for management oversight to ensure that complaint resolution is adequate, timely and transparent.

A more serious outcome is that unregistered complaints may be arbitrarily determined, by individual employees or managers, as not credible or not worthy of investigation. The assessors observed a pattern of concerns that were dismissed or considered without merit if they were presented by individuals perceived to have a grudge against the company (e.g. previously fired, history of complaints). There were statements from interviewees of efforts to bring a complaint to the attention of the mine and not being able to meet with managers. Ensuring the consistent registration and thorough review and investigation of all complaints through an established, transparent process is required to ensure that personal biases or preconceived judgements do not preclude a review of all stakeholder concerns and complaints. The importance of reducing barriers to access, keeping the scope of complaints broad, and logging and documenting all complaints carefully are all elements of a basic good practice grievance mechanism.¹⁸

This also highlights the potential problems when a company serves as both defendant and judge. For this reason, company-based grievance mechanisms are supposed to focus dialogue and mediation, and should be designed and jointly overseen by representatives of the groups that may need to access it.¹⁹ This is an important aspect of building trust in the mechanism. Community or third party involvement can be integrated at various stages: designing the mechanism, investigating and fact-finding, adjudicating complaints, handling appeals, and evaluating performance.²⁰

Direct consultation with communities is necessary to determine what is possible at this stage, and what kind of grievance mechanism would be credible and effective. In the current context, the grievance mechanism requires significant third party and community

18 ICMM, October 2009, 13-14.

19 Ruggie, April 2008, para. 95.

20 ICMM, October 2009, 16-17.

involvement in order to be credible and effective – and to serve to build trust between the company and the communities.

It is also important to ensure that adequate resources (including people, procedures, and budgets) are provided to support the responsive functioning of the grievance system. It is critical that the grievance mechanism be supported by the company's overall approach to human rights and community engagement; in this regard, successful resolution of complaints and continuous improvement of the grievance mechanism is an integral part of a move from a reactive to a proactive management mode.

In the current situation, the assessors realize that a company-based grievance mechanism will not resolve all outstanding complaints in the short term, and must be understood as part of a wider commitment to dialogue, disclosure and ongoing consultation with stakeholders of the mine.

Findings

There is significant lack of public confidence in the judicial system in Guatemala, and community members are in general not using the Guatemalan judicial system to seek redress from complaints against Montana.

Montana has undertaken capacity-building efforts with regulatory agencies, particularly with MEM, which may enhance access to remedy through improved technical capacity for oversight of mining. At the same

time, legal and administrative challenges against the rulings of MARN and the PDH have delayed or impeded access to remedy related to environmental and human rights complaints.

Complaints to international organizations have raised the profile of issues related to Marlin Mine and in several instances findings or judgements have been given. Montana has taken some positive actions in response, notably to the recommendations in the IFC Compliance Advisor Ombudsman report. However, recommendations addressed to the Guatemalan government by multilateral organizations have not been implemented resulting in a continued gap in access to effective remedy.

Montana's grievance mechanism does not meet international standards for an effective, credible and rights-compatible grievance mechanism to address the existence of numerous outstanding complaints and grievances. In particular, there has been no third party or community involvement in the design, investigation, adjudication, review or evaluation of the mechanism. As currently designed, the grievance mechanism does not facilitate improved access to remedy and fails to respect human rights, including the right to remedy.

The absence of an effective company-level grievance mechanism has contributed to the persistence or escalation of conflict with some stakeholders (e.g. land sellers or the residents along the power line), increasing the risks of infringements or violations of other human rights.

USE OF THE JUDICIAL SYSTEM

Assessment A2: Has Montana's use of the judicial system enhanced or impeded access to remedy?

There are specific indicators of compliance with international human rights standards that are applicable to a company's use of the judicial system, and that are particularly relevant for concerns associated with Montana's involvement in criminal proceedings.²¹ It is understandable that a company would use the judicial system in some cases, particularly in response to violence against its employees or the destruction of property. However, in the country context of Guatemala, pervasive concerns about the administration of justice and the rule of law raise questions about using the judicial system in instances where it can be avoided.²² Particularly in criminal cases, human rights concerns extend beyond the right to a fair trial and encompass freedom of expression and peaceful assembly if and when legal action has the effect of improperly limiting or criminalizing social protest.

Company representatives reported that the judicial system in Guatemala is improving and that, in their opinion, there has been no experience of corruption or bias. They also said Montana has used restraint in its use of the legal system and that litigation is viewed as a last resort, with attempts made to resolve complaints through dialogue. Although the assessors were provided with anecdotal evidence of informal resolution of complaints, specific actions were not recorded or tracked in a manner that would establish the company's restraint in using the legal system. Conversely, a pattern exists where complaints were not addressed until they escalated into confrontations (as occurred with the land-sellers blockade in 2007, power line blockade in 2008, and confrontation at Coral in 2009).

²¹ DIHR 1, 2, 3, 4, 7, 8, 10.

²² The literature and international source review has identified four areas of concern about the administration of justice and rule of law in Guatemala: (1) high levels of impunity for serious crimes and human rights violations; (2) lack of equality before the law and criminalization of social protest; (3) non-recognition of indigenous legal traditions or customary law; and (4) general lack of confidence and disrepute of judicial institutions. See, inter alia, Office of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala in 2008, 2009, paras 38-41.

The experience at the Marlin Mine is not unusual, as complaints against companies often play out in litigation and public campaigns.²³ However, Montana, and by extension Goldcorp, have been accused of participating in and benefiting from prosecutions against poor indigenous people, especially in two criminal cases (e.g., indictments against seven men in 2007 and eight women in 2008).²⁴ As the company has joined as a formal party to criminal prosecutions, Montana is positioned as supporting or encouraging conduct court, prosecution, and police. The active rather than passive participation in these cases makes it more difficult to press for investigation of human rights abuse.

Although there have been several instances in which the company has used legal proceedings, a review of Montana's response to the power line conflict provides some important insight into the company's use of the Guatemalan judicial system.

International good practice requires Montana to take responsibility for the power line, the adequacy of compensation provided for the right of way (ROW), and response to community complaints and grievances related to that installation. From mid-2007 onward, residents of Agel complained about the agreements and then denied the company access to their lands, as verified by company and court records. Montana obtained preliminary injunctions against four landowners between October and November 2007, which did not address the ROW agreement conflicts. Nearly a year later, one of the complainants short-circuited the power line. She was supported in her protest by a large number of local women who saw an opportunity to pressure Montana to address other concerns, in particular the cracked houses. In response, eight women were charged with damaging Montana's property, a new power line was constructed, and the company then initiated a program of social compensation and community investment along the full length of the ROW.

The company associates this dispute with two previous employees; according to Montana management, both

²³ Ruggie, April 2008, para. 93.

²⁴ ADISMI, 2007, Section 4.

had been fired for participating in the 2007 blockade. Montana does not consider their complaints legitimate, has dismissed their underlying concerns as a means to extract additional compensation, and has left other unaddressed issues to escalate into protest, resulting in property damage and personal injury. Similar arguments were expressed by company representatives when the same women were involved in the Coral incident, citing the previous incident to explain that agitation against the mine is led by only a few, troublesome individuals.

While the assessment did not reveal evidence of infringements on the right to a fair trial or other human rights in the legal cases reviewed, a general concern remains about Montana's involvement with the Guatemalan judicial system. In part, these concerns relate to a perception that Montana benefits from the deficiencies of the judicial system.²⁵ Even though bringing unlawful acts to the attention of authorities supports an interpretation that Montana is compliant with national laws and regulations, it may also reinforce the perception that the Guatemalan judicial system favours commercial interests.

Given the risks associated with the use of the judicial system (in particular the criminal justice system), ongoing due diligence is required to respect human rights when Montana becomes involved in legal cases. Montana does not have a policy on litigation, use of alternative dispute resolution, risk assessments, or the broader issue of access to remedy.

Company representatives reported that decisions about litigation are made by Montana management and local legal counsel. Although information about legal cases is reported to Goldcorp, corporate headquarters is not involved in litigation decisions and strategy, nor does it have policies or guidelines in this area.

The company's responsibility to provide access to remedy may be, in some cases, incompatible with legal actions that restrict or discourage community members from raising concerns and obtaining redress. While resort to the legal system may be difficult to avoid in all cases, reliance on the judicial system can be viewed as a shortcoming in resolving grievances through other means. As discussed in other parts of the assessment, consultation, community engagement, and effective company-level grievance mechanisms should be prioritized as part of the overall approach for a company to respect human rights.²⁶

Findings

By the end of 2009, at least 15 community residents and some members of local organizations had either criminal charges outstanding against them, or had been brought to trial. The use of legal means by Montana in dealing with confrontations with protestors has been viewed critically by national and international human rights NGOs and the media.

Underlying and preceding these legal actions are a series of problems and complaints between Montana and a number of local people. Complaints are not uncommon in the relationships between mining companies and rural communities, but it is a concern that they have culminated in criminal charges against community members.

Although there is no evidence there have been actual violations of the right to a fair trial in the cases involving the company, Montana does not currently have policies and procedures in place to address the risks associated with the Guatemalan judicial system – particularly in cases of criminal prosecutions against individuals who have undertaken social action against the mine: this represents a failure to respect human rights.

25 DIHR 10.

26 In the Voluntary Principles audits of 2006 and 2008, the risks of the use of the Guatemalan legal system was given as a reason for Montana to identify of stakeholder engagement and company-based grievance mechanism as opportunities to proactively address human rights issues.

RECOMMENDATIONS

RECOMMENDATIONS FOR IMMEDIATE ACTION

- **REVIEW CURRENT GRIEVANCE MECHANISM.** There is considerable guidance on international standards for rights-compatible, company-based grievance mechanisms that Montana can draw upon to improve access to remedies. The company should re-evaluate and redesign the existing grievance mechanism, according to the key principles of legitimacy, accessibility, predictability, equitability, rights-compatibility, transparency, and dialogue or mediation. Final resolution should be by an independent third party or commission rather than a unilateral decision by the company. It is critical to involve representatives of the local communities and independent third parties in the (re)design, operation and evaluation of the grievance mechanism. This step could be an opportunity to signal a new approach to community engagement and dispute resolution around the mine.

RECOMMENDATIONS TO ADDRESS LEGACY ISSUES

- **ESTABLISH A 'COMMISSION' TO ADDRESS OUTSTANDING GRIEVANCES.** While Montana is reviewing and revising its grievance mechanism, consider and consult upon options for the establishment of a commission of independent and credible individuals or officials (e.g. PDH, Justices of the Peace, President of the Auxiliary Mayors) who can receive, review and resolve outstanding grievances through a process of dialogue and mediation.

RECOMMENDATIONS FOR ONGOING DUE DILIGENCE

- **SUPPORT REGULATORY AGENCIES.** Montana should develop a strategy to reduce contentious proceedings with regulatory agencies, and to work to strengthen the capacity of regulatory agencies to proactively protect human rights, labour and the environment. This will enhance the protection of human rights, as well as the company's compliance with the relevant international best practice standards. Respond to the need of relevant regulatory agencies for capacity-building. Explore opportunities to collaborate with international development agencies and other actors and to leverage additional resources.
- **DEVELOP A POLICY ON USE OF LITIGATION SPECIFIC TO GUATEMALA.** Such a policy should favour the use of alternative dispute resolution and non-judicial mechanisms (including company-level mechanisms) to favour the early identification and resolution of disputes. Where resort to litigation and the formal judicial system is unavoidable, prohibit any conduct on the part of the company or its legal representatives that may infringe upon the right to a fair trial or other human rights. Ensure greater oversight and guidance for the conduct of litigation from Goldcorp's corporate headquarters.

CONCLUSIONS

Enhancing access to remedy gives meaning and substance to efforts to respect human rights in a number of ways. First, meaningful access to remedy must be in place to fulfil States' obligations for protection and companies' responsibilities for respect and achieving sustainable progress.²⁷ This reinforces the underlying idea that companies and their operations do have impacts on human rights and that these impacts need to be addressed. Second, the creation of State-based and company-based mechanisms potentially allows human rights to be addressed within a more predictable and transparent manner that can reduce risks of protest and violence over time. Without access to effective and acceptable remedies, companies' primary interface with human rights will be in the context of litigation and public campaigns – which can lead to a defensive, rather than proactive, approach to human rights.²⁸ Third, access to remedy can provide closure for past issues, allowing communities and companies

to turn a page and redefine their relationship. In this regard, remedies are much more than providing monetary compensation; commitments to non-repetition and apologies are also aspects of accepting responsibility for human rights.

For the Marlin Mine, the issue of access to remedy is complex, especially now that there are high profile complaints about and organized opposition to the mine. Third party recourse is required to break the current impasse. Beyond the need to improve mechanisms and procedures, attitudes and patterns of behaviour need to be changed on all sides. However, there are steps that Montana and Goldcorp can take to enhance access to remedies. Once again, the complexity of resolving entrenched issues reinforces the need for developing stronger company-based mechanisms at the outset of a project to address issues as they emerge.

27 Ruggie, April 2008, Summary.

28 Ruggie, April 2008, para. 93.



Summary of Findings and Recommendations

This section summarizes the findings and recommendations discussed in the preceding sections of the report.

As discussed in the introduction, the assessors came to these judgements through a systematic process of weighing the information about stakeholder concerns, evidence of impacts (where possible), and the review of company policy, procedure and practices against what the relevant international human rights standards. Based on that process, the assessors applied the classifications in Table 9.1 below to the findings.

The classification then served to prioritize the recommendations so that existing problems – where company practices have harmed human rights – are addressed first.

In addition to the recommendations for each issue area, additional recommendations are addressed to Goldcorp both to strengthen ongoing due diligence for human rights at the Marlin Mine, but also for its global operations. These recommendations are found at the end of the Conclusions.

Table 9.1: Overview of Humans Rights Findings

Classification	Description
Violation	Action or inaction by the State results in human rights of individuals or groups not being protected or fulfilled.
Infringement	Action by company results in a worsening of the human rights situation for someone/group of people
Failure to Respect	Inaction by the company results in worsening of the human rights situation for someone/group of people.
Respect	Actions/due diligence by the company results in managing the risks of harm to human rights.
Enhancement/improvement	Specific actions by the company result in the improvement of the human rights situation for someone/groups of people.

CONSULTATION

Consultation is a critical issue for mining and other major development projects. At the outset of a project, prior consultation is required to ensure that affected communities are informed and their input obtained on how activities will affect them; the intent is to obtain agreement wherever possible. This is particularly important when a project affects indigenous peoples. There are also issues about ongoing consultation and disclosure of information that ensure the transparency and accountability of the operations, and provide a foundation for genuine dialogue between a company and its stakeholders.

Consultation associated with permitting the Marlin Mine has been one of the most controversial aspects of the project, and figures prominently in the media and written material critical of the mine. The full range of stakeholders (community residents, employees, local and national authorities, and non-governmental organizations) raised concerns related to consultation, including access to information, and disclosure of the negative impacts of the project.

Assessment C1: Did consultation prior to the permitting of the mine comply with the requirements of ILO 169?

Prior consultation is a fundamental element of indigenous peoples rights, notably with respect to the right to decide their priorities for development and the right to natural resources pertaining to their lands. This is particularly significant in Guatemala, since it ratified the International Labour Organization Indigenous and Tribal Peoples Convention (ILO 169) in 1996. Although there were requirements of public consultation as part of the approval of mining licences, notably with respect to the Environmental and Social Impact Assessment (ESIA) approval process, the ILO and other international bodies consider that the Guatemalan government was, and is, in violation of ILO 169 since it has never implemented an appropriate framework for consultation with indigenous peoples at a national level.

This is an area in which international human rights law has evolved since the mine was permitted and there is now clearer guidance about what is required for States

and companies to comply with ILO 169. In addition, the adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the UN General Assembly in 2007 has led to heightened awareness and expectations about the practices required for prior consultation with indigenous peoples.

Montana carried out extensive consultation efforts; however, it did not involve government directly in those efforts in a manner that would satisfy the requirements of ILO 169. There was no independent oversight of the process or the adequacy of the information. This was a failure to respect indigenous peoples rights.

Montana also has undertaken consultations about new activities without involving the government, and its policies or procedures have not been updated to take into account the requirements of ILO 169. If these new activities relate to expanding the mine or obtaining new permits, company-led consultations that do not involve the government also fail to respect indigenous peoples rights.

Assessment C2: Does Montana's ongoing consultation and information disclosure practice respect the right to be informed?

Ongoing consultation and disclosure of information are a touchstone for the respect of all human rights, and are key components of transparent and accountable governance. Issues about ongoing consultation are discussed throughout the assessment in relation to land acquisition, environment, security, and social investment.

All stakeholders have a right to seek, receive and impart information under international human rights law. Recent Guatemalan access to information legislation also extends the obligation to disclose information to companies with a licence or concession to exploit natural resources.

The Marlin Mine applies a range of strategies and mechanisms to engage and communicate with stakeholders, in particular the local communities around the

operation. There are both strengths and weaknesses to Montana's ongoing consultation efforts; however, the interviews with stakeholders reveal they do not feel they are adequately informed or consulted with. Furthermore, Montana's engagement activities do not include structured opportunities to elicit the opinion and concerns of stakeholders on key issues. There is a need for further attention to more structured and formal consultation mechanisms and to improve transparency and information disclosure in order to respect stakeholders' right to be informed, as well as the other human rights discussed in the report.

RECOMMENDATIONS FOR IMMEDIATE ACTION

- ENSURE EFFECTIVE GOVERNMENT INVOLVEMENT. While respecting the appropriate role of companies in interacting with governments, encourage the Guatemalan government to implement an appropriate framework for consultation with indigenous peoples under ILO 169.

RECOMMENDATIONS THAT ADDRESS LEGACY ISSUES

- CONSULT ABOUT ESTABLISHMENT OF A MULTI-STAKEHOLDER DIALOGUE PROCESSES. The recent recommendation of the Congressional Transparency Commission presents an opportunity for Montana to participate in a renewed consultation with affected communities, local authorities and government representatives. The company should clearly signal its willingness to participate in good faith to all stakeholders and accept that it cannot control the result of such an attempt at dialogue and consultation.
- FULLY DISCLOSE AND CONSULT ON PROJECTS. Montana should fully disclose documents related to past and current projects, including the full ESIA for the Marlin 1 Mine which is not currently available on the Internet, and proposed project descriptions and EIAs of planned mine activities, including La Hamaca, West Vero expansion, and the potential second tailings facility.

RECOMMENDATIONS FOR ONGOING DUE DILIGENCE

- REVISE PLANS AND PROCEDURES FOR CONSULTATION AND INFORMATION DISCLOSURE. Revise Marlin and Montana's overall approach to consultation. Develop a new public consultation approach, with particular focus on increased information disclosure and formalized feedback processes. Involve affected communities and their representatives in review/redesign of ongoing consultation and information disclosure mechanisms. Ensure compliance with the requirements of Guatemalan access to information legislation. Include objectives and performance indicators that are measurable.
- EXPAND CONSULTATION EFFORTS ABOUT OPERATIONAL ISSUES. Effective consultation is required about land acquisition; environmental performance, including closure and post-closure issues; social investment; and security issues. This includes strengthening consultation efforts with the full range of stakeholders, including critics of the mine. Coordinate more effectively and ensure that Montana's diverse departments engaging with project-affected communities and other stakeholders meet regularly to complement their activities and response to community concerns. The current development of a new strategic sustainable development plan is an opportunity for significant consultation with affected communities.
- PROVIDE TRAINING ON ILO 169 AND INDIGENOUS PEOPLES' RIGHTS. Further training is required for Montana's management and relevant staff on these issues, with a focus on the importance of consultation to respect indigenous peoples rights under ILO 169.
- IMPROVE RECORD-KEEPING AND DOCUMENTATION-TRACKING SYSTEMS. Implement procedures to carefully document all interactions with community members and other stakeholders, ensuring that all concerns are recorded and information is provided back to stakeholders in transparent and predictable ways, on actions taken to address these concerns.
- ENSURE ONGOING REVIEW OF CONSULTATION AND INFORMATION DISCLOSURE PRACTICES. Undertake periodic reviews and ensure feedback from project-affected communities and stakeholders is incorporated into revised policies, procedures and practices.

ENVIRONMENT

Environmental impacts from mining projects are experienced in the short and long term and are a serious concern for project-affected communities. From the human rights perspective, changes to the environment have ramifications for the right to health, right to food and water, right to an adequate standard of living, right to security of the person, and right to life.

Environmental concerns come from both technical issues and how they are being managed, and from perceptions people have of changes in their surroundings or well-being. An analysis of stakeholder interviews showed that concerns about the environment were the second most frequently mentioned, including concerns about water quality, health, and land contamination.

An independent technical review of the Marlin Mine's environmental management and principal environmental impacts was commissioned for the assessment, including a review of changes to surface water quality and quantity, water discharges and influences on groundwater, dust and other atmospheric emissions, noise, waste and tailings impoundments, and closure plans – including post-closure maintenance and financial resources to maintain the site in a sustainable condition.

The independent technical review found that at present, Montana has achieved performance consistent with good industry standards with regard to most issues having direct impact on human rights, including: air emissions monitoring and mitigation, dust mitigation, noise mitigation and monitoring, water monitoring – including establishing a community participatory monitoring committee (AMAC), erosion control, and mine and liquid effluent management.

Areas that require improvement include: disclosure and consultation with communities about health and safety issues, resolving the controversy over vibration damage to houses, coordinating emergency response plans with local authorities and civil organizations, and insufficient provision for closure and post closure monitoring and maintenance.

Assessment E1: Has the mine affected the availability, quality and accessibility of water?

The right to water is protected in international human rights law. While the adequacy of water may vary according to different conditions, three factors apply in all circumstances: water availability that is sufficient and continuous for personal and domestic uses, water quality that is safe and free from pollutants, and accessibility without discrimination.

There is no evidence that there has been any infringement of the right to water by Montana. For the most part, Montana's environmental management is appropriate to avoid impacts to water availability, quality and accessibility.

The company's environmental management respects human rights from the perspective of technically strong management and access to adequate resources and expertise. However, there are areas where the company is failing to respect the right to water and further due diligence is required, particularly to ensure that community engagement and ongoing consultation address community fears and build trust in the company's environmental management.

- Full information about water users and water sources in all adjacent and downstream communities has not been compiled, although five years has passed since this issue was identified as a gap in the baseline studies. Claims that springs in the area have been affected by the mine cannot be fully addressed without a more complete hydrocensus and groundwater monitoring program.
- Some households in Siete Platos depend for their water on the Txeshiwe Spring, located downstream of the tailings storage facility. A contingency plan for the users of Txeshiwe Spring has not been consulted on and completed, exposing them to the risk of potential changes to their water supply.
- AMAC's formation as a community monitoring committee and its auditing process is an example of industry good practice, but its links to Montana, including reliance on the company for funding, undermine its credibility with some local people and organizations.

- Independent, external auditing of the water monitoring program has not been implemented in accordance with international standards. Auditing by a third party would provide additional assurance that the mine is complying with environmental management plans.
- A positive step was recently taken by Montana for improving external verification and public confidence in water monitoring through an agreement with MEM for additional independent water monitoring.

Assessment E2: Has the mine affected human health and well-being through its environmental impacts?

Rights to health, adequate food, adequate housing, and to own property are the international human rights relevant to the assessment of the mine's environmental performance as it affects human health and well-being.

There are widespread concerns about health-related impacts from mine contamination that are not being addressed by currently available information. Although there is no apparent increase in health-related problems, lack of public health data and insufficient diagnostic capacity do not allow the cause of current health problems to be determined. Technical issues of air, dust and noise have been addressed through environmental management programs, consistent with international good practice standards; however, there is insufficient information to determine whether the rights to health and adequate food have been infringed and additional due diligence is required.

By failing to identify the risks from blasting and heavy traffic, Montana failed to respect the right to adequate housing and the right to own property. Montana did not establish the necessary baseline studies or monitoring. Since complaints began in 2006, Montana has denied any potential for responsibility for impacts. While recent studies do not definitively establish that the mine has caused the damage, they eliminate all other reasonable explanations.

Assessment E3: Has Montana ensured that closure of the mine will not result in long-term negative environmental impacts to communities and individuals?

Closure of a mine facility creates risks of negative impacts on all of the human rights discussed in this section. If proper environmental management systems are not maintained after closure, contamination from the mine and changes in land use could affect rights to water, food, housing and health. Adequate closure planning and financing is particularly important to prevent long-term human rights impacts on surrounding communities.

Closure best practice is an evolving area of mining standards, actively promoted by national and international agencies. The process of establishing an integrated closure plan should include study of closure options, consultative processes with all stakeholders, statement of closure objectives, estimate of closure costs, and studies and testing to confirm predictions of the closure plan.

Closure is the weakest aspect of the mine's plans and has the potential to leave the community vulnerable to long-term impacts on human rights. In particular:

- The closure timeframe is optimistic and doesn't contemplate potential for delay;
- Post-closure monitoring is very short and does not reflect any long-term site monitoring or maintenance;
- Closure costs are low compared to norms;
- Long-term maintenance costs are not considered in the present plan; and
- Insufficient financial assurance has been provided to ensure the availability of adequate funds to implement closure and post-closure plans regardless of what happens to Montana or Goldcorp.

There is a failure to respect the human rights of local communities due to the shortcomings of mine closure planning. The potential negative impacts associated with closure have not yet occurred, but would result in harm to human rights. The risk of this occurring can be addressed by promptly developing a more robust closure and post-closure plan in consultation with stakeholders. The inadequate financial assurance to cover the full cost of remediation in the event of an

unforeseen closure is a serious shortcoming at present and fails to respect human rights.

RECOMMENDATIONS FOR IMMEDIATE ACTION

- **PROVIDE ADEQUATE FINANCIAL ASSURANCE FOR UNANTICIPATED CLOSURE.** Post a bond to adequately cover closure cost or provide other mechanism of financial assurance for the full cost of closure.
- **REPAIR THE CRACKED HOUSES.** Develop a plan to repair, rebuild or compensate for the cracked houses. Consult with affected families about the plan and implement immediately where there is agreement.
- **COMPLETE A FULL WATER CENSUS.** Complete the hydrocensus of current communities in AMAC, and include other communities potentially affected by planned or potential expansion areas. Address community concerns about participating in the study, and develop a strategy with communities that addresses those concerns and allows collection of the required data. This may involve AMAC and the regulatory authorities carrying out such a study, with the community retaining control over the results, or engaging a credible third party to conduct it.
- **DEVELOP A CONTINGENCY PLAN FOR TXESHIWE SPRING.** To ensure Txeshiwe Spring water users have access to water as a priority, complete a contingency plan in consultation with the users to supplement or replace the water source in case of impacts to quality or quantity.

RECOMMENDATIONS THAT ADDRESS LEGACY ISSUES

- **INCREASE TRANSPARENCY.** There are an outstanding set of environment-related issues about which stakeholders have significant concerns and which have not been adequately addressed. These require specific ongoing consultation and information disclosure, including collaboration with public health officials to investigate and resolve uncertainty about existing health concerns. Work with public health officials to disclose the 2007 health baseline study and implement ongoing health risk monitoring for community health issues.

RECOMMENDATIONS FOR ONGOING DUE DILIGENCE

- **IMPROVE GOVERNMENT CAPACITY FOR WATER MONITORING.** Work with the government to establish an independent audit/monitoring function to provide reliable and credible information for regulators on issues related to water, including water quality measurements, flows and a basin wide monitoring of contamination sources. Consult in an ongoing way with communities about monitoring results. The recent agreement with MEM could provide a vehicle to accomplish this objective.
- **SUPPORT GREATER INDEPENDENCE FOR AMAC.** Increase support for AMAC to become a more recognized independent community-based monitoring committee, including support for other institutions to work with AMAC, further training, and autonomy to determine scope and breadth of their work. Support efforts to expand to other communities in the watershed and to address other community concerns related to environmental issues. The recent agreement with MEM could provide a vehicle to accomplish this objective;
- **REVIEW MINE CLOSURE TIMEFRAME AND COSTS.** Conduct an internal review of post-closure management plans incorporating international good practice. Evaluate long-term funding, technical, and administrative support necessary to ensure that the Sierra Madre Foundation, or another appropriate institutional arrangement, has adequate resources to successfully manage post-closure challenges. Consult with communities about closure and ensure substantial and sustainable funding, depending on the communities' interests, capabilities, and long-term commitments.
- **SUPPORT REGIONAL WATERSHED MANAGEMENT.** Provide leadership and funding to assist government to develop a multi-stakeholder initiative for basin-wide water management. Upstream sources of contamination should be identified and progress made on returning the river basin to a more healthy state that supports multiple uses.

LABOUR

Access by the assessors to company representatives, employees, and documentation allowed the examination of labour rights to be an important facet of the assessment. Labour is a central issue in any human rights assessment given the wide range of positive and negative impacts a company can have both on its own workers and on local employment generally.

In local interviews, labour concerns were raised by residents, labour specialists, past and present employees, and on a few topics, by the Catholic Church. Labour rights are the only issue where local and national concerns are not convergent: locals were more concerned about labour issues than national or international stakeholders. Some interviewees claimed that local employees were reluctant to speak out because they were fearful of losing their jobs, which could explain why concerns are not more generally publicized.

Assessment L1: Has Montana respected the right to work and non-discrimination in the workplace?

The mine has respected the right to work by providing employment to people from the local communities as well as elsewhere in Guatemala. Efforts to preserve employment for temporary and rotational workers have respected both the right to work and to protection against unemployment. Marlin respects the right to freedom from forced labour or child labour at the mine. Montana is compliant with the Guatemalan law prohibiting children under 18 to work in mines.

The ability to hire and retain local, indigenous workers with lower levels of literacy or formal skills is made possible in large part through the focus Montana has given to on-the-job training rather than formal qualifications. In this regard, measures that respect the right to education also support the right to work and to non-discrimination in employment.

Despite the lack of formal policies and procedures, or a long-term strategy, Montana has respected the right to work and non-discrimination in employment through the significant hiring of local indigenous people. To ensure that respect for this right is sustained, it should

be formalized by the development of policies, procedures, and associated support programs.

It is not possible to determine whether in practice the Marlin Mine is respecting the rights of women employees because of the lack of information or analysis by the human resources department of the status of women in the workplace. There are positive indications in some aspects of female employment, but no data on retention of women, promotions, access and retention of non-traditional jobs, review of job categories and pay equity. Further due diligence is required through assessment of the current situation and implementation of formal policies and procedures about the employment and advancement of women in the workforce.

There is insufficient information to determine whether specific firings were infringements of the right to non-discrimination in firing. Failure to follow due process is a failure to respect for the right to non-discrimination in firing.

Existing practice at the mine does not provide adequate protection of workers against harassment in the workplace. Although Montana has taken action in individual cases, stronger policies and procedures are required for the elimination of harassment. Sexual harassment is not addressed in national laws; failing to address it through company policies and procedures is a failure to respect.

There is a lack of due diligence about the labour and human rights practices of contractors. This represents a failure to respect because it is an area of responsibility that company's need to address because of the risks presented by the actions of third parties – in this case contractors.

Assessment L2: Has Montana provided just and favourable working conditions?

There are divergences between wages provided within and between job categories that are not based on objective criteria or performance evaluations. This is an infringement on the right to equal pay for equal work

and raises concerns about discrimination in employment and occupation.

The minimum wage in Guatemala does not provide for a “living wage” that would respect the right to just and favourable remuneration and other human rights (e.g. adequate food, housing, and standards of living). Some full-time employees at the mine receive wages under the living wage threshold, even when overtime wages are included, and others only surpass the living wage threshold when their overtime wages are included. This represents a failure to respect the right to just and favourable remuneration.

Given the time and distance most workers must travel to work, there is a risk that 12-hour rotations infringe on the right to just and favourable conditions of work and the right to a family life.

The assessors did not have sufficient information to identify whether other existing working conditions were adequate or constituted infringements. Concerns were raised by some employees, so further due diligence is required to identify and address any gaps.

Montana lacks adequate due diligence in contracting practices to ensure respect for human rights by its contractors.

Assessment L3: Has Montana ensured that working conditions are healthy and safe?

Prior to mid-2008, health and safety procedures were deficient in some areas and it is probable that there were infringements in the past on the right to healthy and safe working conditions. However, there is insufficient material evidence to identify the extent of such infringements, nor is there information to determine whether they led to infringements of the right to health or life of employees. The Marlin Mine is addressing past gaps in safety and shows steady improvement over the last two years, indicating respect for the right to a safe work environment.

Montana has failed to respect the right to health of employees through adequate due diligence in the form of employee health baseline testing on entering employment, and routine testing for known industrial illness indicators during employment. Improvement in the attention to worker health has dragged behind

safety, and does not yet show a level of due diligence that can be qualified as respect for the right to health. The lack of material evidence that this failure resulted in health impacts prevents the assessors from identifying this as an infringement on the right to health or the right to life, but a thorough health risk assessment, including a review of past exposure, is required to address the information gaps, including review of the illnesses and deaths of workers to date.

Further due diligence is required to review past incidents and risk levels, determine whether there are ongoing health impacts, and ensure company commitment to non-repetition of past gaps.

Assessment L4: Are there adequate mechanisms to protect workers interests and rights?

Montana has infringed the right to freedom of association and collective bargaining because there are no mechanisms in place that safeguard those rights. There is reasonable evidence that during 2006 Montana infringed on the right to freedom of association by taking retaliatory action up to and including dismissal against employees that attempted to form a union. This action has had a lasting effect on employees who continue to believe they would face retaliation from the company if there were attempts to unionize. Montana continues to infringe on the rights of all workers by allowing this climate of intimidation to persist.

The mine does not have an effective internal mechanism for workers to raise concerns and have grievances addressed. This represents a failure to respect the right to remedy, and has implications for all relevant labour and human rights that might need to be addressed. This is a major shortcoming in the mine’s ongoing due diligence on labour rights.

RECOMMENDATIONS FOR IMMEDIATE ACTION

- **ADDRESS FOUR URGENT AREAS OF CONCERN FOR LABOUR RIGHTS.** The following four issues require a serious review of labour relations at the marlin mine, and must be carried out by creating an environment of open dialogue and non-retaliation of workers who bring problems forward. Specific protections and assurances will need to be put in place, and a corporate commitment to transparent and

ongoing dialogue to address workers' concerns and complaints. The assessors conclude that given the current environment, these internal labor issues require Goldcorp leadership and oversight.

- **INDUSTRIAL HEALTH PROBLEMS IN THE WORKFORCE.** Address immediately the situation of any employees with blood tests indicating heavy metals at problematic levels, or any other indicator of industrial health problems. Provide them with access to support and independent second opinions from health care specialists. Review the deaths that have taken place in the labour force to establish that no industrial exposure could have been the cause.
- **ADDRESS WORKPLACE ISSUES.** Take immediate action and problem-solve with employees on issues of concern, workplace logistics, and access to basic facilities. The dialogue on specific issues can evolve into a more formal structure for collective bargaining in the medium term.
- **SUPPORT FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING.** Support development of an employee-based workers' association (not management run) to promote and address workers' rights on an ongoing basis. Facilitate external advice and resources to educate workers on labour rights and collective bargaining processes. Ensure effective measures to prevent management taking retaliatory action against workers that exercise those rights. Train and raise awareness at all levels of management to respect freedom of association and collective bargaining.
- **ESTABLISH A WORKERS' GRIEVANCE MECHANISM.** Provide an internal grievance mechanism as part of the proactive management of labour rights issues, with final recourse to an external or third party review considered legitimate by employees. Ensure confidential means for making and pursuing complaints.

RECOMMENDATIONS THAT ADDRESS LEGACY ISSUES

- **CONDUCT AN INDEPENDENT REVIEW OF FIRINGS.** Establish an independent review panel with credible third parties to review the files of employees that have been fired by Montana. Where there is inadequate evidence to establish that due process was

followed in firing, provide alternatives to restore employment or compensate for damages.

- **COMPLETE A REVIEW OF WAGES.** Undertake a thorough review of existing wage structures and identify problems in equity of pay for equivalent jobs. Develop a plan to respond to the need for employees to have a living wage. Commit to and implement pay equity for the same or equivalent job. Review wages paid to contractors.

RECOMMENDATIONS FOR ONGOING DUE DILIGENCE

- **IMPLEMENT HUMAN RESOURCES PROCEDURES THAT PROMOTE NON-DISCRIMINATION AND DIVERSITY.** Implement objective, transparent procedures for hiring, promotion, discipline and firing to address the risk of bias, discrimination or favouritism/nepotism. Ensure due process for all decisions, and integrate the objectives of the new strategy across all departments. Pay particular attention to policies and procedures related to respecting the rights of women and indigenous peoples in the workplace. Develop disaggregated tracking of indigenous and female hiring, firing, promotion, pay status and raises, to report on effectiveness of indigenous and female employment commitments. Support management to implement these in practice through training, monitoring, evaluation, and incentives.
- **MAINTAIN AND FORMALIZE COMMITMENT TO HIRE LOCALLY.** Identify current barriers to female and indigenous employment and advancement and initiate programs to address these. Develop specific educational strategies and processes for people with low literacy levels. Training is one of the keys for employment and advancement of local, indigenous men and women. Ensure that training materials are culturally appropriate and supported by translation in local languages (an indigenous and cultural rights issue, but also a health and safety issue). Link the human resources and sustainable development departments operationally so there is a coherent program to fulfil commitments from land acquisition and to ensure that local employment and contracting objectives are aligned with a long-term sustainable development strategy.
- **IMPROVE WORKERS' ACCESS TO HEALTH CARE.** Review employee perceptions and satisfaction with health care at the on-site clinic, and identify barriers

to providing effective care and treatment for workers. Investigate the appropriateness and accessibility of the private health insurance with a Q300 (\$38) deductible. Determine who has been using it, for what kinds of treatment, and develop adjusted insurance coverage as required, considering the results of the investigation into employee deaths. Engage and collaborate with local health care providers to determine the reason for ongoing use of the public system by mine employees. Review social investment commitments to community health as a contribution to employee health.

- **CONDUCT UNSCHEDULED AUDITS FOR SAFETY AND HEALTH ISSUES.** Contract a qualified external company or specialist to undertake unscheduled, documented, third-party audits.
- **ENSURE CONTRACTORS RESPECT LABOUR RIGHTS.** Extend improvements in labour standards to contractors and their employees, including wages, and include these standards in contracts. Provide support and training to help local contractors respect these standards. Conduct periodic inspections of contractors to ensure respect for human rights.
- **RETRAIN THE WORKFORCE.** Anticipate the end of the mine life through training opportunities that provide transferable skills that will provide further opportunities to exercise the right to work and to maintain an adequate standard of living after the

mine closes. Develop a strategy for how to support contractors to prepare for mine closure and reduce dependency on mine economy over upcoming years.

CORPORATE-LEVEL RECOMMENDATIONS

- **REVIEW OCCUPATIONAL HEALTH AND SAFETY POLICIES, PROCEDURES AND PRACTICES.** Ensure that international standards are being met across the board, not just with respect to the International Cyanide Code. Undertake an operation-wide health risk assessment, including a review of potential health exposure risks incurred by employees since initiating operation.
- **REVIEW LABOUR RELATIONS.** Put in place a comprehensive review of labour relations and compliance with corporate policies, lead by an internal Goldcorp champion reporting directly to either the CEO or Board of Directors. Set a timetable for a review.
- **STRENGTHEN INDUSTRIAL HEALTH PROGRAM.** Establish a best practice preventive health maintenance program for all workers, including scheduled monitoring for exposure to any measurable risks, an approved action plan for responding to any identified issues, and an public disclosure and reporting process upward to Goldcorp's CEO or Board of Directors.

LAND ACQUISITION

Land acquisition is a priority issue for the assessment because of the location of the mine in a poor, rural area of Western Guatemala populated by indigenous subsistence-level farmers. General concerns about land acquisition by mining companies include whether there is involuntary relocation, whether land sellers are fairly compensated, and whether they maintain their standard of living over time. When the land being purchased belongs to indigenous peoples, there are collective dimensions of land rights that must be respected by a company's land acquisition process, including access to common property resources such as firewood. Specific concerns about land acquisition for

the Marlin Mine were raised by international NGOs, municipal authorities, and community representatives; some allege that Montana's land acquisition practices have led to conflict between the mine and the surrounding communities.

Montana has purchased over 600 parcels of land from hundreds of Mam and Sipakapense land-holders within the 20 square kilometres of its mining license and continues to acquire land around the Marlin Mine. The land acquisition process is formally carried out by Peridot, S.A., a Glamis and now Goldcorp company. Land sales are conducted through negotiations between the

company and individual land sellers, frequently initiated by the land sellers.

Assessment LA1: Was the land acquisition process fair, transparent and equitable?

Certain aspects of the land acquisition for the Marlin Mine respected the right to own property. There was no forced resettlement or government expropriation associated with the land acquisition for the Marlin Mine. A small number of land exchanges were conducted, which provided for extra land and better quality houses, also enhanced the right to adequate housing.

Montana's practice of providing a consistent above-market price of Q4,000/cuerda (\$4,635/acre) respected the right to own property; however, the adequacy of the price is now in question because of inflation in land values.

Montana's practice of negotiating payments for the improvements on the land on an individual basis and without independent valuations is inadequate to ensure the equal treatment and just compensation of all land sellers. This constitutes a failure to respect the right to own property.

Unfulfilled commitments related to employment, contracts and social investment projects represented a significant inducement for the land sellers. The non-fulfilment of these commitments deprives sellers of anticipated benefits from the sale and infringes upon the right to own property.

There is a pattern of allegations about coercion and pressure in the land sales that would undermine the voluntary nature of the transactions and would infringe upon the right to own property. Although the specific allegations could not be verified, Montana nonetheless fails to respect human rights as it lacks the policies and procedures to ensure that coercion does not occur, including an effective grievance mechanism for land sellers. There is also a lack of policies and procedures to ensure that the consent of women is obtained for land sales or resettlement decisions, which fails to respect the rights of women.

Assessment LA2: Have land sellers maintained or improved their standard of living from the land sales?

The land sales resulted in substantial payments that provided an opportunity for the enhancement of the social and economic rights of the land sellers and their dependents. Some individuals, potentially the majority, had their rights enhanced as a result of the land sales, but their number and degree of enhancement cannot be determined. At the same time, other land sellers were not able to sustain their standard of living and have had their rights infringed upon.

The assessors are unable to make an accurate determination of whether land sellers had positive, neutral or negative impacts on their standard of living and other associated human rights because no baseline study or subsequent monitoring of the land sellers and their families has been undertaken by the company. A new program for liaison with land sellers initiated in 2009, which has no program funding, is not an effective response. The absence of due diligence about the long-term impacts of the land sales fails to respect human rights.

Assessment LA3: Are collective rights being respected in the land acquisition process?

There are legitimate concerns about the collective dimensions of land rights of indigenous peoples. ILO 169 provides safeguards for the transfer of lands outside their community, including a requirement that consultation be undertaken with the communities.

Although there were some meetings with groups of land sellers to establish the initial price of land, Montana's land acquisition procedures are framed in terms of individual negotiations between "a willing seller and a willing buyer." The fact that no participatory diagnostic was conducted for Sipacapa means that the assumptions about individual ownership and land tenancy were not validated for this community. There is no indication that Montana undertook prior consultation with land sellers in Sipacapa. These land acquisition procedures failed to respect indigenous peoples land rights.

Common property resources and religious and cultural practices associated with land were not addressed by

Montana's land acquisition procedures, which failed to respect indigenous peoples rights.

An ongoing concern relates to the titulación supletorio process of converting the usufruct (use and possession) rights into full ownership rights, which may serve to extinguish underlying collective rights of indigenous people. Given the complexity and uncertainty about collective indigenous title to lands in the municipalities of San Miguel and Sipacapa, there may be an opportunity for Montana to address concerns about indigenous peoples rights through consultation and agreement about return of lands at the end of the mine's operations. Beyond the technical legal issues about land title, this will inevitably entail dialogue and commitments regarding the long-term environmental sustainability, restoration, and future productive use of the land.

RECOMMENDATIONS FOR IMMEDIATE ACTION

- **ADOPT A MORATORIUM ON LAND ACQUISITION.** Halt all land acquisition, exploration activities, mine expansion projects, or conversion of exploration to exploitation licenses, pending effective State involvement in consultation with local communities, and agreements put in place with communities to structure future land acquisitions. This would particularly include any project that requires an EIA, such as La Hamaca.
- **ADOPT A MORATORIUM ON USING THE TITULACION SUPLETORIO PROCESS.** This process risks extinguishing collective land titles of the indigenous communities around the mine, and should not be used until individual and collective land usage and rights are thoroughly understood and documented, including any differences between San Miguel Ixtahuacán and Sipacapa.
- **IDENTIFY AND SUPPORT AT-RISK FAMILIES.** Identify as a priority any land sellers and their dependents considered 'at risk' and address immediate subsistence and basic service gaps.

RECOMMENDATIONS THAT ADDRESS LEGACY ISSUES

- **CONVENE AN INDEPENDENT REVIEW OF HISTORICAL LAND ACQUISITION.** Develop an independent review process to resolve complaints about land sales

(e.g. inequitable payments for improvements, unfulfilled commitments related to employment, and allegations of coercion); recommended would be a three-member commission including PDH representation, a Justice of the Peace from the local area, President of the Alcaldes Auxiliares, or other authorities of importance. The commission may require additional technical expertise or advisors.

- **IMPLEMENT A REVISED LAND SELLER FOLLOW-UP PROGRAM.** Develop and implement a land seller support program that assesses impacts of land sales on sellers and provides for targeted income restoration programs. Allocate adequate resources to the Community Relations Group ("new associates" position) to implement such a program.
- **DEVELOP A PROGRAM TO ENSURE ACCESS TO WOOD.** Determine how the cost and availability of wood have changed as a result of land acquisition, or as a loss of access to common property resource, and implement a replacement program.

RECOMMENDATIONS FOR ONGOING DUE DILIGENCE¹

- **IMPLEMENT A LAND ACQUISITION POLICY WITH REFERENCE TO INTERNATIONAL BEST PRACTICE.** Ensure comprehensive due diligence on indigenous peoples land rights issues, including inheritance and collective resource issues. Ensure appropriate documentation and follow-up on all commitments made in the land acquisition process.
- **ADJUST LAND PRICES.** Adjust future land compensation from the previously paid standard above-market price of Q4,000 per cuerda to take into account inflation in the local land market.
- **ENSURE FAIRNESS IN VALUATIONS OF IMPROVEMENTS.** Review current land acquisition procedures ensuring that all forms of compensation for land acquisition respond to clear and transparent criteria for evaluation and compensation. Establish a transparent and independent mechanism for valuation of improvements on land to be purchased.

¹ The following recommendations are premised on the existence of community-level consultation and agreement for continued land acquisition for the mine.

- **PROVIDE ACCESS TO INDEPENDENT ADVISORS.** Facilitate access of potential land sellers to independent representation and advice during land negotiations to enhance the integrity of the process, protect the rights of the land sellers, and protect the company against any allegations of coercion or pressure on the land sellers, as well as undocumented verbal

commitments. Goldcorp should adopt this as a matter of standard practice for future land sales.

- **CLARIFY PROCESS FOR LAND TRANSFER AT CLOSURE.** Clearly set out the intention and modality for transferring the titles to the land acquired by Montana to the communities at closure of the mine.

ECONOMIC AND SOCIAL INVESTMENT

Economic and social investment is an area where mining companies have the opportunity to enhance human rights. Furthermore, social investment plays a role in respecting indigenous peoples rights to participate in the benefits of the exploitation of natural resources on their lands. Commitments related to social investment serve as an incentive to obtain project approval from local communities. Increasingly, social investment is related to corporate social responsibility objectives. Given the corporate responsibility to “do no harm,” social investment also plays a critical role in addressing a project’s negative impacts on human rights. Provision of targeted social investment plans is often required as a condition for permitting or financing, and become a company commitment for the project.

Local stakeholders interviewed for this assessment recognized the mine’s contributions, particularly the economic contributions for the people who have direct employment with the mine. Most also recognized the positive impacts of social investments in the communities. However, at both the local and national level, there were concerns about both the distribution and the adequacy of these benefits. At the same time, questions were raised regarding distribution of “windfall profits” from the high price of gold and Marlin’s low operating cost: most stakeholders, including many employees interviewed, do not feel that enough benefit is being returned to the local communities; some local interviewees and most national stakeholders feel more should be returned to the country as a whole as well.

Assessment SI1: Have economic investments contributed to the fulfilment of human rights?

Montana has enhanced the human rights of individuals through efforts to maximize the local content of employment, purchases and contracting, and by strengthening the local government’s ability to administer revenue. This is known to enhance the right to fair remuneration; however, the extent of the impacts to other human rights cannot be quantified.

Montana contributes new revenue streams to the national and municipal governments through taxes and royalty payments; these economic contributions have only an indirect relationship to the fulfilment of rights, depending on how various levels of government use the additional resources.

Montana’s contributions to municipal revenue through royalties and local taxes provide a significant increase in the ability of the municipality of San Miguel Ixtahuacán to fulfill human rights obligations. Montana’s investment in institutional strengthening has supported the capacity of municipal authorities to administer royalties and other increased tax flows from economic growth. This is a respect for human rights.

Montana’s contribution of a voluntary royalty payments for use by the Municipality of Sipacapa in spite of not being a legal requirement respects human rights and provides Sipacapa with the opportunity to enhance rights fulfilment. However, as the contribution has not accepted the voluntary royalty payment, no actual positive impact has occurred.

Montana's relinquishment of the tax exemptions in 2006 increased the revenue flows to national government and improved the government's ability to fulfil its human rights obligations. However, as noted by the Office of the High Commissioner for Human Rights in Guatemala, a very low proportion of national revenue is invested into social programs that enhance human rights, and there currently is no effective tracking of the positive impacts.

Assessment SI2: Has social investment contributed to the fulfilment of human rights?

Montana enhances economic, social and cultural rights by upgrading local infrastructure and providing financial support for community development through community projects and social investment initiatives, but with limitations to being able to quantify these. Specific findings include:

- The social investment activities of the Sierra Madre Foundation and Montana's Social Development Department have had discrete, positive impacts on the fulfilment of human rights for the beneficiaries of the projects.
- The right to education has been enhanced through funding of additional teachers, some training of teaching staff, improvement of facilities, and additional scholarships.
- Company contributions to health programs and a significant contribution for building a health centre have also provided an enhancement in the right to health, but there is insufficient information to measure the extent of the impacts.
- Projects that improve access to potable water systems have enhanced the right to water.

Some project planning and execution is based on good participatory mechanisms that enhance local capacities and ensure input into decisions that affect local indigenous communities, but this is uneven between programmes. FSM's attention to this aspect of indigenous peoples development is weak.

Social investment spending is not accounted for internally within Montana in a way consistent with industry or development agency standards for program reporting or fiscal accountability.

- Lack of clarity about FSM's actual and yearly contributions to partnerships and collaborative relationships makes it difficult to determine the extent of its contribution to improvements in social indicators.
- Lack of results-based objectives, social indicators, monitoring and programme evaluations hinder the assessment of effectiveness of Montana's social investments and their actual enhancement of human rights.

The current pattern of making funding of social projects, donations and other contributions contingent on the mine not being shut down by social protest risks undermining rights-based development principles and fails to respect the rights to freedom of expression and freedom of peaceful assembly.

Assessment SI3: Have social investments addressed negative impacts that could affect human rights?

Montana has failed to respect human rights of affected communities by not developing sufficient due diligence on the potential negative social and cultural impacts of mining, or undertaking meaningful monitoring of social impacts and changes in the communities.

Montana has not identified either direct or indirect negative impacts from the presence of the mine that are affecting human rights. There are infringements, but the extent cannot be verified because of the absence of data.

RECOMMENDATIONS FOR IMMEDIATE ACTION

- IDENTIFY AND SUPPORT families in need or at risk due to potential project impacts. Investigate and create medium to long term solutions.
- DELINK SOCIAL DEVELOPMENT INVESTMENT FROM SOCIAL LICENSE. Montana's commitment to social development programs should not be contingent upon social acceptance by all segments of the population. Develop an effective grievance procedure to address the problems of social protest.

RECOMMENDATIONS THAT ADDRESS LEGACY ISSUES

- REVIEW whether there are outstanding commitments for social investment projects.

RECOMMENDATIONS FOR ONGOING DUE DILIGENCE

- **FINALIZE A LONG-TERM AND RIGHTS-BASED SUSTAINABLE DEVELOPMENT PLAN.** Adopt a right-based framework and principles for the sustainable development plan currently being drafted at the Marlin Mine. Ensure that specific objectives and targeted programs are included to address the key areas of negative human rights impacts, as well as vulnerable segments of the project-affected communities. Ensure extensive consultation and participation as part of the development of the new sustainable development plan. Establish a comprehensive social baseline for effective monitoring and evaluation.
- **BUILD UPON PROGRAMMING THAT ENHANCES HUMAN RIGHTS:**
 - Improve community and worker health. Implement a program to improve the general health and well-being of the communities where workers and their families live, with the objective of addressing secondary health issues that also affect health and safety in the workplace.
 - Expand teacher training.
 - Expand scholarship programs to support leadership.
 - Support programs that enhance access to water.
- **REVIEW THE EFFECTIVENESS, TRANSPARENCY, PARTICIPATION AND ACCOUNTABILITY** of current mechanisms and programs, including the different roles for the FSM and SDD. Direct SDD programs should be focused on addressing the negative impacts of the mine, which is the company's direct responsibility, while the FSM could contribute to building local capacity and enhancing community-level impacts. FSM should not be an additional mechanism for Montana's engagement and consultation, and should transition to be a community-based development foundation.
- **STRENGTHEN FSM'S CAPACITY TO FULFIL A LONG-TERM ROLE AFTER CLOSURE.** If the FSM is to provide ongoing programming after mine closure, it must evolve as a community-based development foundation. This requires strengthening the independence of the Board of Directors; ensuring an adequate and sustainable funding mechanism such as an endowment; improving the professional capacity of the staff; and ensuring appropriate evaluation and reporting standards.
- **DEVELOP A CLEAR RATIONALE FOR INVESTMENT LEVELS.** Ensure the amount of investment is sufficient to create sustainable impacts and commensurate with a reasonable level of expectation of the communities to have benefits from the success of the mine. Include factors such as industry best practice, mine profitability, current tax and royalty contributions, and other indirect forms of social investment. A more clearly articulated strategy would also foster more effective management of community expectations.
- **ADOPT RESULTS-BASED MANAGEMENT.** Adopt clear objectives, monitoring and evaluations in order to determine the effectiveness of the strategies chosen and the funds being spent.
- **CONTINUE TO INVEST IN STATE AND MUNICIPAL CAPACITY.** Continue to strengthen municipal institutions' capacity to administer revenues from mining. Continue and expand initiatives with Ministry of Energy and Mines or other government departments and regulatory agencies to build capacity.
- **ENSURE TRANSPARENCY OF REVENUE FLOWS.** Work alongside government to ensure greater transparency in the way revenues and royalty payments from mining are invested in social programs to enhance the economic, social, and cultural rights of project-affected communities. Express support for the Extractive Industries Transparency Initiative (EITI) and encourage the Guatemalan government to participate as well.

SECURITY

Security is a priority issue for the assessment as the Marlin Mine operates in an environment with significant human rights risks associated with public safety and the ongoing pattern of social actions against the mine. Montana has employed private security contractors since the construction of the mine, and there have been several confrontations that have involved the mine's private security guards and/or the public security forces. The company's interaction with the police and military in Guatemala is a particular concern given their poor human rights record and reputation. Furthermore, general indicators related to crime and violence are deteriorating throughout the country and the region where the mine is located.

In 2005, two separate incidents related to the mine resulted in loss of life and raised the profile of concerns associated with security. In the interviews for this assessment, stakeholder concerns were focused on the general environment of conflict and public safety issues, rather than on allegations about the conduct of the private security guards or public security forces. Nonetheless, significant human rights risks remain, and ongoing concerns about intimidation and harassment must be taken seriously.

Security is the primary area in which Montana has been explicitly addressing human rights, notably through the implementation of the Voluntary Principles on Security and Human Rights since 2006. A number of positive steps have been taken by Montana to improve the company's interaction with private security contractors and public security forces, verified by external assessments of the implementation of the Voluntary Principles. While there are some gaps and challenges for their full implementation, this is a good example of the type of ongoing due diligence that is required for the company to respect human rights.

Assessment S1: Has Montana's interaction with public security forces respected human rights?

Montana initially failed to respect the right to life and security of the person as it lacked the policies and procedures to govern its interaction with public security forces.

The company began to implement the Voluntary Principles only after the fatal incident in Sololá, in which a person participating in a blockade of the mine's equipment was killed by public security forces. None of the police or military officers involved have been prosecuted or disciplined in relation to the Sololá incident. Allegations of human rights violations by the public security forces also have been made when they have responded to social actions and confrontations at the mine or tried to enforce arrest warrants in related criminal proceedings.

Given the fact that allegations of human rights violations by public security forces are not effectively investigated or resolved by the State, Montana's failure to press for investigation by the State into the specific allegations about the public security forces is a failure to respect human rights and to provide access to remedy. The company's inclusion of the Human Rights Ombudsman (PDH) as observers of police actions in recent events is a positive step toward respecting human rights.

Montana's involvement in criminal cases puts the company in the position of pressing for investigation of the conduct of community members rather than for the investigation of the conduct of public security forces. Montana lacks of effective procedures to reduce the use of public security forces by ensuring timely treatment of concerns or grievances, and de-escalation of conflicts is a failure to respect human rights.

Montana's implementation of the Voluntary Principles is an area of improved ongoing due diligence and respect for human rights, but is not currently supported by a formal human rights policy or commitment to the Voluntary Principles by Goldcorp. There has been some success in including public security forces in Montana's human rights training initiatives; however, challenges remain in terms of reaching a formal agreement with the police and military about human rights.

Some prior recommendations from external assessments of the Voluntary Principles have not been implemented, including the need to strengthen and formalize risk assessments as well as integrating community consultation and participation into the process. Broader engagement should be initiated with municipal

authorities and organizations, NGOs and human rights organizations about security measures and ways to avoid human rights violations. There is no evidence of a formal consultation process with local communities to identify and address concerns about the presence or behaviour of private security contractors.

Assessment S2: Has Montana's interaction with private security contractors respected human rights?

Montana currently has contracts with three private security firms for different aspects of security at the Marlin Mine. Montana has respected the right to life, liberty and security of the person, as well as the right to just and favourable working conditions, by protecting the safety of its employees through the deployment of private security contractors and undertaking additional security measures in response to incidents. There are significant external threats to the safety of employees that have manifested in at least one incident of kidnapping, in shots being fired at buses transporting employees and resulting in injuries, in shots being fired into the mine site at company equipment, and in armed robberies of employees on pay-day.

An off-duty security guard murdered a local resident in 2005. At the time of the incident, Montana failed to respect human rights as it did not have policies and procedures in place to govern its interaction with private security contractors. After the incident, the private security firm's contract was not renewed and Montana began to implement the Voluntary Principles, which is an appropriate framework for ongoing due diligence for human rights related to private security firms. Montana respected human rights when it initially pressed for investigation and prosecution of the incident; however, the security guard has not been apprehended.

Steps taken by Montana to implement the Voluntary Principles include the adoption of guidelines on use of force and respect for human rights, their inclusion in the contracts with the private security firms, and the revision of standard operating procedures for security at the mine. There is also screening of prospective security guards, and training on human rights. More advanced training would be useful to address some specific human rights concerns, such as harassment, women's rights, and employee privacy issues.

Expanding training should prioritize all managers and employees involved in community engagement and responding to complaints and security-related incidents.

The assessors reviewed one case of alleged sexual harassment filed by a local woman through the company's grievance mechanism regarding a private security guard. The complaint was investigated by the company, but was later withdrawn when the woman was not able to identify the culprit. Other than this case, the issue of sexual harassment did not arise at all; nonetheless, further attention to this issue is recommended as part of the human rights training of private security contractors, as well as the general employment policies at the mine.

The majority of stakeholders interviewed in 2009 confirmed that the private security contractors are conducting themselves appropriately and fulfil their proper functions. The recent incident at Coral demonstrated a commitment to a defensive role that respects human rights. However, to reduce the risks of human rights infringements by private security contractors, including allegations of intimidation, greater efforts are required to proactively resolve complaints and grievances before they escalate into confrontation or violence. If there are confrontations, independent monitoring of the private security contractors is a means to ensure that their conduct respects human rights.

Montana's security personnel report that recommendations of the external evaluations of the Voluntary Principles continue to be implemented; however, there was no documentation, action plan, or reporting on the steps taken to address identified gaps. Improved documentation and performance tracking is important to facilitate review and establish internal accountability; it will also help demonstrate the progress Montana has achieved and its commitment to addressing existing gaps.

Overall, an important gap exists in the policy framework for human rights and security given the lack of a comprehensive human rights policy and the formal adoption of the Voluntary Principles at the level of Goldcorp that would strengthen commitment and attention to their implementation at the Marlin Mine.

The practice of having regular external assessments of the implementation of the Voluntary Principles is also a

good management practice for improving the human rights performance of the company and private security contractors. Compliance with the Voluntary Principles, and respect for human rights, includes ongoing consultation with stakeholders about risk assessments and security issues. Montana's consultation mechanisms with the community about security-related issues currently lack formality and internal coordination.

The assessors find that the security incidents at the mine follow a pattern related to unresolved grievances – such as land acquisition, consultation, right of way agreements, and the environment – and that the company has failed to undertake a serious review of these grievances. The lack of access to remedy has led to confrontation and escalation of violence, and thus creates human rights risks for community members, as well as for the safety of private security contractors and employees of the mine. Reducing this risk requires that Montana address legacy issues with stakeholders, strengthen the effectiveness of its grievance mechanism, and make continued efforts to engage with the public security forces about the protection of human rights.

RECOMMENDATIONS FOR IMMEDIATE ACTION TO ADDRESS INFRINGEMENTS

- **STRENGTHEN INTERNAL PROCESSES.** Ensure that a clear protocol exists for convening all relevant managers and departments to discuss human rights risks associated with all situations that involve a threat of confrontation or violence.
- **ENSURE INDEPENDENT MONITORING.** If a situation requires the intervention of private security guards or public security forces, provide for independent monitoring as a deterrent for and witness of human rights infringements or violations. The recent example of including the PDH to monitor actions of the police is a positive step.

RECOMMENDATIONS THAT ADDRESS LEGACY ISSUES

- **STRENGTHEN FOLLOW-UP OF PAST INCIDENTS.** As part of monitoring of the Voluntary Principles, pay particular attention to the follow-up and results of investigation into potential infringements by private security guards and/or violations by public security forces. Ensure that Montana is taking appropriate

steps to investigate and discipline private security guards, and to press the Guatemalan government for investigation, prosecution and remedy for violations by public security forces.

RECOMMENDATIONS FOR ONGOING DUE DILIGENCE

- **OBTAIN AN AGREEMENT WITH PUBLIC SECURITY FORCES.** Despite turnover of military and police personnel, the dialogue with the Guatemalan public security forces about security arrangements must continue with a view to obtaining a transparent agreement that security be provided in a manner consistent with human rights by personnel with adequate and effective training. Companies should encourage host governments to permit making security arrangements transparent and accessible to the public, subject to any overriding safety and security concerns.
- **CONTINUE TO SCREEN PRIVATE GUARDS.** Focus primarily on in-depth reference checks for past human rights concerns rather than national databases. Complement screening mechanisms with ongoing supervision and evaluation for good human rights performance. Hire more female guards and improve gender balance in the security force by hiring and training more women.
- **EXPAND HUMAN RIGHTS TRAINING.** Reinforce and build upon early achievements in human rights training for public security forces and expand to include all relevant actors that may be involved in public security responses (e.g. unit responsible for carrying out arrest warrants). Build upon early achievements in human rights training for private security firms by strengthening and verifying training, with clear objectives and goals. Implement an appropriately-designed evaluation program to measure effectiveness, and adapt as needed. Expand current training initiatives for security guards to management and then other staff and employees. Content on human rights and the Voluntary Principles should be expanded to cover risk areas such as intimidation, sexual harassment, and privacy rights of employees.
- **ENGAGE STAKEHOLDERS ON SECURITY ISSUES.** Expand formal consultation with community members and other stakeholders about security-related matters. As the conduct of the public security forces

and broader issues of public safety are shared concerns for the company and the community, there is an opportunity for engagement and dialogue with community members that can be expanded over time to other areas of mutual concern. Implement a more formal process to welcome and address concerns of community members, moving next to engagement and accountability with external stakeholders and critics.

- **UNDERTAKE PERIODIC RISK AND CONFLICT ASSESSMENTS.** Strengthen risk assessments in light of repeated use of public security forces. Strengthen and institutionalize an interdepartmental process of analyzing risk and conflict concerns in particular with decision-makers at the mine, including identification of internal and external strategies to manage and reduce risks and conflict. This should focus on expanding the number of managers involved,

and deepening understanding and capacity to manage human rights and security risks. Include in risk assessments consultation with all relevant internal departments and managers, as well as the public security forces, community members, and other relevant stakeholders.

- **CONTINUE EXTERNAL REVIEWS.** The practice of periodic external evaluations of the implementation of the Voluntary Principles, including the company's interaction with public security forces, should be continued. Given the risks identified in previous VP assessments, as well as some of the gaps in current implementation, such assessments should be undertaken on a regular basis (e.g. every 18 months). The development of more formal plans to implement recommendations from assessments is also recommended.

ACCESS TO REMEDY

In law, it is said that there is no right without a remedy. When individuals or groups believe their human rights have been harmed, there must be appropriate and credible means to have their concerns or allegations addressed or the concept of rights becomes meaningless. In the context of business and human rights, access to remedy is the third pillar of the "Protect, Respect and Remedy" framework: States and companies share a responsibility to provide access to remedy to address human rights impacts and violations. In general terms, access to remedy may be sought through both judicial and non-judicial mechanisms, including courts and other tribunals; administrative bodies and regulatory agencies; international tribunals and review processes; as well as company-based grievance mechanisms.

This assessment looks in most sections at the existence and functioning of the company-level recourse. That focus emphasizes what the company can do because decisions and actions are under its control. However, stakeholders should not be prevented from using other legal mechanisms. This also implies that companies can and will make use of various legal mechanisms to

protect their interests and to respond to allegations or complaints against them. However, given their relative economic strength and legal sophistication, companies' use of legal mechanisms may create additional barriers for stakeholders to access remedies.

Assessment AR1: Are there effective and credible mechanisms that provide access to remedies for stakeholders?

There is significant lack of public confidence in the judicial system in Guatemala, and community members are in general not using the Guatemalan judicial system to seek redress from complaints against Montana.

Montana has undertaken capacity-building efforts with regulatory agencies, particularly with MEM, which may enhance access to remedy through improved technical capacity for oversight of mining. At the same time, legal and administrative challenges against the rulings of MARN and the PDH have delayed or impeded access to remedy related to environmental and human rights complaints.

Complaints to international organizations have raised the profile of issues related to Marlin Mine and in several instances findings or judgements have been given. Montana has taken some positive actions in response, notably to the recommendations in the IFC Compliance Advisor Ombudsman report. However, recommendations addressed to the Guatemalan government by multilateral organizations have not been implemented resulting in a continued gap in access to effective remedy.

Montana's grievance mechanism does not meet international standards for an effective, credible and rights-compatible grievance mechanism to address the existence of numerous outstanding complaints and grievances. In particular, there has been no third party or community involvement in the design, investigation, adjudication, review or evaluation of the mechanism. As currently designed, the grievance mechanism does not facilitate improved access to remedy and fails to respect human rights, including the right to remedy.

The absence of an effective company-level grievance mechanism has contributed to the persistence or escalation of conflict with some stakeholders (e.g. land sellers or the residents along the power line), increasing the risks of infringements or violations of other human rights.

Assessment AR2: Has Montana's use of the judicial system enhanced or impeded access to remedies?

By the end of 2009, at least 15 community residents and some members of local organizations had either criminal charges outstanding against them, or had been brought to trial. The use of legal means by Montana in dealing with confrontations with protestors has been viewed critically by national and international human rights NGOs and the media.

Underlying and preceding these legal actions are a series of problems and complaints between Montana and a number of local people. Complaints are not uncommon in the relationships between mining companies and rural communities, but it is a concern that they have culminated in criminal charges against community members.

Although there is no evidence there have been actual violations of the right to a fair trial in the cases

involving the company, Montana does not currently have policies and procedures in place to address the risks associated with the Guatemalan judicial system – particularly in cases of criminal prosecutions against individuals who have undertaken social action against the mine: this represents a failure to respect human rights.

RECOMMENDATIONS FOR IMMEDIATE ACTION

- **REVIEW CURRENT GRIEVANCE MECHANISM.** There is considerable guidance on international standards for rights-compatible, company-based grievance mechanisms that Montana can draw upon to improve access to remedies. The company should re-evaluate and redesign the existing grievance mechanism, according to the key principles of legitimacy, accessibility, predictability, equitability, rights-compatibility, transparency, and dialogue or mediation. Final resolution should be by an independent third party or commission rather than a unilateral decision by the company. It is critical to involve representatives of the local communities and independent third parties in the (re)design, operation and evaluation of the grievance mechanism. This step could be an opportunity to signal a new approach to community engagement and dispute resolution around the mine.

RECOMMENDATIONS TO ADDRESS LEGACY ISSUES

- **ESTABLISH A 'COMMISSION' TO ADDRESS OUTSTANDING GRIEVANCES.** While Montana is reviewing and revising its grievance mechanism, consider and consult upon options for the establishment of a commission of independent and credible individuals or officials (e.g. PDH, Justices of the Peace, President of the Auxiliary Mayors) who can receive, review and resolve outstanding grievances through a process of dialogue and mediation.

RECOMMENDATIONS FOR ONGOING DUE DILIGENCE

- **SUPPORT REGULATORY AGENCIES.** Montana should develop a strategy to reduce contentious proceedings with regulatory agencies, and to work to strengthen the capacity of regulatory agencies to proactively protect human rights, labour and the environment. This will enhance the protection of human rights, as well as the company's compliance

with the relevant international best practice standards. Respond to the need of relevant regulatory agencies for capacity-building. Explore opportunities to collaborate with international development agencies and other actors and to leverage additional resources.

- DEVELOP A POLICY ON USE OF LITIGATION SPECIFIC TO GUATEMALA. Such a policy should favour the use of alternative dispute resolution and non-judicial

mechanisms (including company-level mechanisms) to favour the early identification and resolution of disputes. Where resort to litigation and the formal judicial system is unavoidable, prohibit any conduct on the part of the company or its legal representatives that may infringe upon the right to a fair trial or other human rights. Ensure greater oversight and guidance for the conduct of litigation from Goldcorp's corporate headquarters.

Conclusions

In rural subsistence communities, the economic benefits flowing to the more than 900 individuals employed from local communities, and the additional benefits from local purchasing and service contracting, cannot be underestimated or ignored. By rough estimate, one in 10 households would work at the Marlin Mine if employment were evenly distributed between local families. These positive contributions can be observed by the casual visitor to the area of the mine; other opportunities for the enhancement of human rights such as improved educational infrastructure, roads, and some aspects of health care can also be observed. At the municipal and national levels, the Marlin Mine makes additional economic contributions through taxes and royalties. Stepping back from these financial flows, the assessment examined the priorities and concerns identified by stakeholders that spanned the different operational departments of the mine and the full range of internationally-recognized human rights.

The assessment contained elements of both a human rights impact as well as a human rights compliance assessment. In some cases, the assessors had sufficient levels of information and participation to make judgments about specific infringements or enhancements of human rights. Where the assessors were not able to determine the full extent or nature of human rights impacts, findings were focused on whether Montana is respecting or failing to respect international human rights standards. The fact that specific findings about infringements or enhancement of some human rights could not be determined does not mean that impacts have not occurred. In some cases, multiple activities

affected the same human right, with the nature and extent of the impacts changing over time.

Because the Marlin Mine is affecting the full spectrum of internationally recognized human rights, Goldcorp and Montana need to address human rights explicitly, comprehensively, and as a matter of ongoing due diligence. The recommendations above were organized to highlight:

- *Areas of actual infringements* on human rights, or failure of due diligence coupled with significant risk, which must be addressed immediately. This relates to the basic corporate responsibility to “do no harm.”
- *Legacy issues* associated with the Marlin Mine. These must be addressed immediately; however, many of these issues have become entrenched, polarized or politicized, and solutions may require a multi-stakeholder approach and a longer time horizon.
- *Areas of failure to respect* must be systematically addressed by ongoing due diligence. Developing a comprehensive system of due diligence for human rights at the Marlin Mine has the potential to inform Goldcorp’s global operations.
- Although numerous *positive impacts* were observed and acknowledged by stakeholders, the extent of human rights enhancement could not be ascertained for lack of adequate baseline data and ongoing monitoring.
- Finally, while a *lack of strategies* to enhance human rights does not constitute a failure to respect

human rights, it is a significant missed opportunity to strengthen positive outcomes through a more explicit focus and commitment to the rights of the most vulnerable groups, communities and other stakeholders.

Importance of International Standards

Throughout the assessment, issues related to the national context of Guatemala have reinforced the importance for Goldcorp and Montana to adopt international standards.

The Marlin Mine's human rights performance is negatively associated with significant gaps in the Guatemala government's implementation and enforcement of international human rights instruments. Montana's compliance with Guatemalan legal norms is inadequate from an international human rights perspective, especially in a country like Guatemala, with weak governance and enforcement capacity.

This reinforces the need for due diligence about the country context prior to developing projects or acquiring concessions or operations, as well as the need to support efforts to strengthen the capacity of government institutions to implement their international commitments to protect human rights at the national and local levels.

Implications of Indigenous Peoples Rights

The area of indigenous peoples rights has seen an important evolution in the standards against which Montana's performance is measured due to developments of international law and industry practice since the mine was permitted. Globally, there are heightened expectations about indigenous peoples rights after the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007.

Ratification of ILO Convention 169 by Guatemala also provides an additional level of protection for indigenous peoples rights in the context of the Marlin Mine. There are concerns that Montana has inadequately addressed requirements of this convention by focusing on compliance with Guatemalan law. The emphasis on individual rights over collective rights – for instance,

when dealing with land acquisition and ongoing consultation for exploration – may weaken community institutions and in the past have resulted in complaints, protest, and even conflict.

Furthermore, the failure of Montana to acknowledge and treat the Sipakapense as a distinct indigenous people from the Mam was a significant failure to respect indigenous peoples rights. Indigenous peoples rights will continue to be the focus for mining opposition as long as the State and Montana are not fulfilling their respective responsibilities to protect and respect those rights.

The systematic integration of additional due diligence about indigenous peoples rights should be viewed by Goldcorp as an opportunity to inform a more robust approach throughout its global operations; reviewing and learning from industry best practice for mining on indigenous peoples' lands and territories, as well as integrating experiences from Goldcorp's other mines, will contribute to this process.

Implications of Conflict

The number one stakeholder concern relates to the environment of conflict, tension, and fragmentation in the project-affected communities. The social and psychological effects of conflict are inseparable from the overall perceptions and impacts of the mine's human rights performance. While conflict has direct negative impacts on the right to security of the person and the right to health, it also has serious implications for all human rights discussed in the assessment. A vicious circle is created when conflict leads to human rights violations and infringements, which in turn lead to further conflict.

The environment of conflict has existed for several years; however, mine personnel and Montana management do not appear to be knowledgeable about specialized techniques or effective strategies to manage conflict. Without tools to assess and address conflict more effectively, personnel may not be able to reframe and potentially transform the situation. This is an important area where Montana must invest in capacity building and commit to redefining how managers of both Montana and at the mine relate and respond to conflict. Montana cannot resolve or address the environment of conflict by itself; in the current

context it will also be difficult to move directly into a multi-stakeholder process.

There is a pattern of polarization between community members supporting and opposing the mine. This tension was also expressed within the labour force, with suggestions that internal pressure to be pro-mine inhibited employees from raising concerns, either as employees or as community members. The company should discourage and actively investigate any allegations of pressure, intimidation or violence by mine supporters as well as opponents.

Perhaps the most serious pattern identified is the systematic failure to address grievances in the communities, allowing them to accumulate and exacerbate. When this happens, new incidents then spark reactions of community members that may be interpreted by mine managers as being out of proportion to the incident or extremism.

Although the challenges created by conflict are large, they could be surmounted if the company takes meaningful steps to address legacy issues; adopts a proactive approach to dispute resolution; identifies and addresses impacts; and provides more effective and equitable social investment. This is not to say that Montana alone is responsible for conflict; however, the mine is the principal cause of change in the communities, and it does not currently have capacity or tools to deal with the current situation.

Ongoing Due Diligence for Human Rights

The “Protect, Respect and Remedy” framework states that to discharge the responsibility to respect requires due diligence.¹ The basic human rights due diligence process should include policies, impact assessments, integration, and performance tracking, adapted to the country and operational context, as well as the overall company structure and culture.

The assessors further conclude that ongoing consultation and grievance mechanisms should be considered as fundamental parts of the due diligence required for the Marlin Mine.

¹ Ruggie, April 2008, para. 56.

Human Rights Policy

There is no comprehensive human rights policy at Goldcorp, Montana or the Marlin Mine. While various Goldcorp and Montana policies (i.e. business ethics, sustainable development, environment and human resources) provide guidance for specific functional areas, there is an overall lack of specific policies to comply with international human rights standards. These policy gaps resulted in a number of findings of failure to respect human rights, and were a specific indicator of non-compliance for many questions in the DIHR tool.

The mine has implemented an explicit human rights policy in relation to security (the Voluntary Principles on Security and Human Rights) with positive results in terms of due diligence and stakeholder perceptions. However, Goldcorp has not formally adopted the plan, which limits fully compliant implementation at the mine.

Goldcorp has made public commitments related to human rights, including adherence to the Global Compact and the ICMM Sustainability Development Framework. However, corresponding corporate policies have not been approved by the Board of Directors, which formally bind the corporation and its subsidiaries. Without a greater degree of formality, public commitments can be used to promote external relations without necessarily being implemented internally.

As in other areas (e.g. Voluntary Principles), a pattern appears whereby Montana “implements” international standards at the mine without formal adoption. This limits Board of Directors accountability and oversight, and avoids the requirements for external auditing that come with formal adoption of international standards.

Impact Assessment

There has been no previous human rights impact assessment of the mine; some of the limitations of the present assessment are related to the practical and methodological challenges of conducting an *ex post* human rights impact assessment in a conflict situation.

Furthermore, a number of important human rights issues could have been identified by the ESIA, even if

not explicitly focused on human rights. However, as discussed throughout the report, the weaknesses of the ESIA have meant that critical issues have not been – and are not currently being – addressed.

As one of the pillars of ongoing due diligence, human rights impact assessments should be undertaken periodically at the Marlin Mine to measure improvements in performance. They should also be used throughout Goldcorp’s global operations, particularly when developing new projects or acquiring new concessions and operations.

Integration

Human rights are explicitly addressed only in the area of security at the Marlin Mine. This reduces the responsibility for human rights to the level of the mine’s security department, rather than identifying how it pertains to all operational areas, and situating responsibility at the highest levels of management and the Board of Directors of Montana and Goldcorp. An indicator of this narrow focus is that training for human rights is only being provided to the security department, but not to managers and personnel in other departments that are responsible for important human rights issues. This has led to inconsistent, uncoordinated, and even contradictory efforts.

Internal change within Montana will require internal leadership and clear commitments and statement from Goldcorp about prioritizing human rights and dealing with the legacy issues identified at the mine. Leadership and commitments from Goldcorp will need to drive this process because of the decentralized structure of the corporation, as well as entrenched attitudes and dynamics in the relations with local communities and other stakeholders in Guatemala.

Goldcorp has already effected positive change within the mine’s operating culture in the area of Occupational Health and Safety over the last two years. A similar process of “driving down” human rights to the operational level of the mine needs to be undertaken. There are some positive indicators that human rights are being addressed at the senior levels of Goldcorp, including support for the current assessment, the creation of a new Vice-Presidency in Corporate Social Responsibility at corporate headquarters, as well as

recent public commitments to the Global Compact and ICMM.

Another measure for integration relates to personnel incentives and evaluation. Incentives appear to be focused primarily on production and cost-cutting, as well as safety and environmental performance, and are not necessarily aligned with human rights performance. While these are legitimate corporate objectives, there are risks that employee financial incentives may be in contradiction with corporate-level commitments to human rights. Montana and Goldcorp lack key performance indicators and systematic performance evaluations that would ensure responsibilities for human rights issues are effectively implanted and measured for the relevant personnel.

Finally, effective integration of corporate policies and commitments to human rights must be supported by the necessary financial resources, human resources, and expertise.

Performance Tracking

A decentralized corporation such as Goldcorp must have stronger mechanisms of monitoring and performance tracking to demonstrate ongoing human rights due diligence. External auditing and reviews are necessary to assure accountability. Some operational areas of the mine have robust external auditing (e.g. Voluntary Principles) and monitoring (e.g. environmental management), while other areas currently rely upon internal monitoring. The lack of baseline assessment and monitoring of many important social and health impacts has prevented meaningful tracking – in some cases, even when public commitments were made to monitor. The lack of reliable data prevented a determination of the nature and extent of both negative and positive human rights impacts.

Internal and external grievance mechanisms are required to address employee and stakeholder concerns and grievances; effective grievance mechanisms also provide information to track patterns. Furthermore, effective ongoing consultation provides a mechanism for feedback from community about concerns, impacts, and areas of improvement.

Public reporting about Marlin Mine is achieved through the Annual Monitoring Reports and about Goldcorp’s

- **PREPARE AND CONSULT UPON A RESPONSE TO THE ASSESSMENT.** Prepare a detailed response and action plan with clear objectives and timelines to address the findings and recommendations of the assessment with a view to implementing a system of ongoing due diligence for human rights at the Marlin Mine. Consult with stakeholders about the action plan prior to its implementation.

Policy

- **DEVELOP A FORMAL, COMPREHENSIVE HUMAN RIGHTS POLICY FOR GOLDCORP** and implement it at the Marlin Mine. Have the Goldcorp Board of Directors formally adopt the policy and have it or a committee of Directors oversee its implementation.
 - The policy should cover the full range of internationally-recognized human rights and support implementation of Goldcorp's commitments to the Global Compact and the ICMM.
 - The policy should provide specific guidance about each of the issue areas identified in the assessment, including ongoing consultation and access to remedy. In particular, the policy should provide guidance on compliance with ILO 169 and other indigenous peoples rights instruments.
 - Consider adopting a human rights-based approach to social investment activities.
 - Other Goldcorp policies should be reviewed to integrate or cross-reference the human rights policy commitments.

Impact Assessment

- **UNDERTAKE A FOLLOW-UP ASSESSMENT.** Undertake a follow-up human rights impact assessment of the Marlin Mine on a periodic basis (e.g. every three years) to analyse progress made and challenges faced in improving the mine's human rights performance.

- **ADDRESS INFORMATION GAPS.** Undertake the additional focused assessments or reviews identified in the assessment to address gaps in information and risks (e.g. labour rights and contractors).
- **UNDERTAKE HUMAN RIGHTS ASSESSMENTS FOR NEW PROJECTS AND ACQUISITIONS.** Apply HRIAs throughout Goldcorp's global operations, particularly when developing new projects or acquiring new concessions and operations. Follow developments in the field of HRIAs to understand how these can be integrated into or complementary to other assessment processes.

Integration

- **EXPAND HUMAN RIGHTS TRAINING TO ALL MARLIN MINE EMPLOYEES.** Begin with managers, supervisors and employees with responsibilities for consultation and engagement with the communities. Adapt and expand the content of current human rights training as required to provide specific and practical guidance for human rights compliance. Ensure that training programs are evaluated for effectiveness and periodically updated.
- **PROVIDE CULTURAL TRAINING.** As part of broader efforts to respect indigenous peoples rights and ensure effective implementation of policies against discrimination and harassment in the workplace, provide cultural training to managers and foreign employees.
- **REVIEW RESPONSIBILITIES AND INCENTIVES FOR HUMAN RIGHTS AT THE MINE.** Review management systems at Montana, as well as the key performance indicators and economic incentives for managers and employees at the Marlin Mine, to ensure responsibilities are clearly delineated and incentives are properly aligned to support human rights performance, and that legitimate cost-cutting targets do not result in gaps in due diligence for human rights.



- **SUPPORT INTEGRATION EFFORTS WITH APPROPRIATE EXPERTISE.** With due consideration for building and supporting local capacity, ensure that appropriate expertise and experience with international good practice standards are engaged for external audits and reviews, including for the Sierra Madre Foundation.

Tracking Performance

- **REPORT TO THE BOARD.** Install a senior Goldcorp manager, or independent party with a mandate from the Board of Directors, at the Marlin Mine to assist with and report on the implementation of Goldcorp's response to the assessment and all new human rights policies or commitments.
- **ENHANCE EXTERNAL AUDITS AND INDEPENDENT REVIEWS.** Maintain the current practice of under-

taking periodic external audits and reviews of the Voluntary Principles on Security and Human Rights at the Marlin Mine. Establish independent auditing of the mine's environmental management system. Ensure that all prior commitments for baseline studies and ongoing monitoring are implemented.

- **ENHANCE PUBLIC REPORTING PRACTICES.** Enhance reporting on Goldcorp's sustainability performance in accordance with the Global Reporting Initiative, including the 2010 Mining and Metals Sector Supplement. Provide independent assurance for future sustainability reports. Continue to provide Annual Monitoring Reports for the Marlin Mine. Ensure that the information included in the AMRs is coherent with GRI reporting at the corporate level. Provide independent assurance for future AMRs.

sustainable development practices through the Global Reporting Initiative. However, there is insufficient information to meaningfully assess Montana's performance on some key issues and reporting indicators. This is an important area for improved corporate accountability and tracking improved performance.

Concluding Observations

Human rights are fundamentally about individuals, groups and communities. While technical performance and solutions are important for addressing the potential impacts of the mine, many of the human rights risks and impacts must be considered in a broader social and political context. Ultimately, perceptions and trust are critical aspects of the mine's human rights performance.

The assessment is an important step in the development of a system of ongoing due diligence for human rights at the Marlin Mine. Some of the next steps are relatively straightforward, particularly when an issue is fully within the company's control. Others steps will be more complicated and perseverance will be required

to expand consultation practices with the project-affected communities, participate in multi-stakeholder processes at the national level, and support access to remedies. A significant shift must take place in Montana's openness to consider stakeholder concerns, resolve legacy issues and investigate allegations.

Up until now, Montana has mainly been in a reactive and defensive mode when dealing with many of the complaints identified in this assessment as affecting human rights. This is not uncommon, as corporate responsibility for human rights has only recently been clarified, and many companies lack policies, procedures, and practices that respect human rights. However, where the State is weak and national compliance with international human rights standards is lagging, as is the case in Guatemala, the company is responsible for applying higher internal standards. Montana's reliance on national legal frameworks has not provided an adequate foundation upon which to respect human rights, particularly in the areas of indigenous peoples rights, labour rights and for the risks associated with mine closure. Goldcorp is responsible for establishing those standards and has the obligation to ensure they are implemented and performance measured.

The next steps should move Montana and Goldcorp from a reactive to a proactive approach to human rights; this should lead to human rights being fully integrated throughout the Marlin Mine's operations. The goal is for the mine's strategic objectives to be aligned with corporate social responsibility and human rights standards. At that point, competitive advantage and profitability should go hand in hand with a strong internal human rights culture and exemplary human rights performance that is continuously optimized.² The ultimate goal is to respect all human rights, and in particular the rights of indigenous peoples.

2 The Canadian Human Rights Commission prepared an "Integrated Human Rights Maturity Model" that describes five steps for a company to initiate the process of compliance of human rights, to human rights maturity, where performance is continuously optimized. www.chrc-ccdp.ca/hrmm_mmdp/default-en.asp?highlight=1.

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Appendices

Appendices to this assessment are available on-line at www.goldcorp.com/English/Responsible-Mining/Human-Rights/default.aspx.

Click on the titles below to link directly.

Appendix A: HRA Marlin Project Timeline

Appendix B: HRA Interview Guides

Appendix C: HRA Data Collection Activities

Appendix D: HRA Stakeholder Issues Matrix

Appendix E: HRA Table of International Standards Related to Human Rights at the Marlin Mine

Appendix F: HRA Overview of Legal Cases Involving the Marlin Mine

Appendix G: HRA Summary Table of Findings by Human Right

Appendix H: External Environmental Review of the Marlin Mine,
prepared by KPC Consulting for the HRA, March 2010

Appendix I: External Hazard Assessment of Chemical Constituents at the Marlin Mine,
prepared by Intrinsik for the HRA, March 2010



If you have comments or questions regarding this assessment, or for additional copies of the report, please direct your communication to:

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