Sub-surface Property, Free-entry Mineral Staking and Settler Colonialism in Canada

Dawn Hoogeveen

Department of Geography, University of British Columbia, Vancouver, BC, Canada, V6T 1Z2; dawn.hoogeveen@geog.ubc.ca

Abstract: This article examines mineral rights and claim staking in northern Canada, with a focus on settler colonialism and how liberal understandings of property are embedded in the legal geography of the right to explore for minerals. The history of these legal systems is explained through the "free-entry" principle understood as the right to stake a mineral claim without consulting with private landholders or Indigenous peoples. Free-entry debate highlights how ideologies of property are assumed neutral through staking regulations. Based on an analysis of interviews with key informants involved in mining regulation, I analyze the geographic stratification of land into two categories, above and below the surface, as an avenue to understand how dominant ideologies of property reveal a critical site of contestation.

Keywords: mining, settler colonialism, property, free-entry

Introduction

The free-entry principle guides mineral staking regimes in much of North America. Under free-entry, mining prospectors and companies can stake a claim on private or Crown land prior to informing private property owners and/or Indigenous peoples. The very idea of staking a mineral claim is reliant on liberal understandings of ownership, or possession, and such legal claims to property date as far back as the origins of Roman law. The ownership model or classical model of ownership (Blomley 2004, 2013; Singer 2000) is significant to mineral rights discourse. I complicate how legal property paradigms favour corporate mining interests over Indigenous title rights, by drawing on Joseph Singer and Nicholas Blomley who outline four elements to liberal ideologies of property ownership. Under the classical model property is assumed a thing; a right; to be associated with clear boundaries; to be allied with individual freedom. The ownership, or claiming of mineral rights for lease, by mining interests is reliant on these four pillars. This paper brings the settler colonial conditions under which ownership functions to bear on these liberal renderings of ownership.

Settler colonialism is particularly evident in the case of mineral claim staking regimes in Canada that, in many ways, continue to trump claims to Indigenous title. This paper contributes to the limited discussion in resource geography over mineral rights legislation in North America (Benson 2012; Huber and Emel 2009) as well as geographical inquiry on mining and colonialism in Canada's north (Cameron 2011, 2012; Sandlos and Keeling 2012) by foregrounding the

Antipode Vol. 47 No. 1 2015 ISSN 0066-4812, pp. 121–138 doi: 10.1111/anti.12095

significance of settler colonialism in maintaining mineral property laws. The paper elaborates on Canadian mining laws and the subsequent asymmetrical power relations that free-entry mineral staking depends upon and precipitates (Laforce et al 2009). Liberal ideologies of property provide not only a key site to explain the historical significance and settler colonial geographies of mining and Indigenous claims to territory, but also serves as an analytical frame, applicable to mining regions internationally.[1]

Historian Patrick Wolfe famously describes settler colonialism as an invasion that is a "a structure, not an event" (Wolfe 1999:2). In making this claim Wolfe and settler colonial theorists (Banivanua-Mar and Edmonds 2010; Barker 2012; Morgensen 2011; Simpson 2007, 2011; Veracini 2010, 2011) bring attention to the ways in which settler colonialism is not simply something in the past, nor is neo-colonialism an adequate descriptor for the present. Rather, colonialism is necessarily ongoing and settlement plays a key role in sustaining this process. Further to the structural and temporal dimensions of settler colonialism, scholars have argued for the recognition of the centrality of the dispossession of Indigenous lands, as distinct from postcolonial scholarship, where dispossession is often discussed in terms of labour. Indeed, in Marxian terms dispossession is also closely related to labour power, whereby primitive accumulation is most famously "nothing else than the historical process of divorcing the producer from the means of production" (Marx 1976 [1867]:875). For settler colonial theorists, however, such as Wolfe, land is a precondition of social organization (1999:3). Setter colonialism, thus, continues to take place by and through the removal of land. Similar to Wolfe, Veracini (2011:3) states that "whereas colonialism *reinforces* the distinction between colony and metropole, settler colonialism *erases* it". Veracini thus argues that settler colonialism differs antithetically from colonialism as it is based on Indigenous erasure (Veracini 2010, 2011).

This erasure of territorial claims is coupled quite closely with capitalist renderings of property. As Anthony Hall argues in *Earth into Property* "much ... capitalist development was intensified by quick accumulation through the systematic dispossession of Indigenous peoples". I concur that this dispossession has not "attracted the attention they deserve from capitalism's leading historians" (Hall 2010:32). It should be quite clear that Wolfe, Veracini and Hall can and should not be taken literally in their stark, sometimes dangerous, theorizations of elimination and disappearance. It is important to question and critique the ways in which settler colonial studies is being defined and by whom. Nevertheless the utility in drawing on settler colonialism is to illustrate that mineral tenure regimes are not innocent or neutral but premised on an erasure of Indigenous claims to land and that this legal erasure cannot be forgiven within legal frames of recognition, consultation, or accommodation (see Coulthard 2007 on the politics of recognition).

Further, there are significant critiques of white settler scholars like myself drawing on decolonization or settler colonial narratives as a means to comprehend the present. Eve Tuck and K Wayne Yang write, for example, "decolonization is not a metaphor" (2012:1) in order to unsettle what they refer to as the domestication of decolonization. Tuck and Wayne Yang critique the superficial adoption of decolonization narratives that can re-centre whiteness and attempt to extend

innocence to the settler. My intent in drawing on settler colonialism is not to domesticate decolonization, nor to move mineral tenure regimes into "innocence" (2012:3).

The purpose of this paper is to attend to the ways in which mining laws legally inscribe Indigenous space and land. I use settler colonialism as a central frame to explain free-entry mineral staking. The paper's premise is that geographers and especially those studying resources have yet to fully critique mining law as a settler colonial project, which is by no means an innocent one. This article demonstrates that settler colonialism is steeped within liberal renderings of property in Canada vis-à-vis mineral staking. This is based on historic systems of Crown mineral ownership that date much further back than the onset of regional mineral tenure regimes.

Methodologically, research is based on semi-structured interviews with key informants that include industry and federal government representatives in what in settler terms is referred to as Yellowknife, Northwest Territories Canada.[2] During the interviews I explored how mineral staking is practiced. This reveals how property continues to be contested in Canada. The legal, liberal ideologies of property fundamental to the reification of mineral staking allow the enactment of mining rights to appear legitimate. However, this enactment does not take into account settler colonialism as exercised by and through mineral staking.

In the article I first provide a description of settler colonialism and place this notion within the excellent but limited literature on the contemporary geographies of mineral staking in North America. Next, I discuss the historic legal geographies of free-entry mineral staking in Northern Canada, including a further elaboration of what is meant by free-entry. I then describe the fundamental legal understandings of property, according to the ownership model (Blomley 2004, 2013; Singer 2000) and elaborate to include a critique of the settler colonial dispossession of land that takes place through liberal ideologies that underwrite free-entry mineral staking. The final section of the paper draws on interview material to describe how ideologies of free-entry are a site of conflict, deeply rooted in imperial histories, in order to further denaturalize mineral rights regimes.

Settler Colonial Resource Geographies of the North of North America

Mining laws and mineral tenure systems, like free-entry, are embedded in ideologies of property. Colonial expansion, coupled with ideologies of property, allow for the continuation of free-entry mineral staking today throughout much of Canada and beyond. In Canada, the settler state is instrumental in maintaining mineral staking regulations, which I argue are an ongoing mechanism of settler colonial dispossession. This argument intervenes in legal geographies of mineral tenure law in that it places settler colonialism as central to mining staking regimes. In doing so, I build on legal analyses of the geographies of mining that concern competing ontologies: mining interests and Indigenous groups. Melinda Harm Benson (2012) outlines how Indigenous ontologies, based on spirituality and place, confront different legal requirements in the case of a potential uranium mine on Mount Taylor in New Mexico. Benson's work coincides with recent geographical

analysis that addresses the intersection between indigeneity and ontology (see Cameron et al 2014). A second prominent analysis of mineral staking regimes in a North American context is that of Huber and Emel who suggest that mineral title regimes are based on capital's spatial fix. These authors place mineral title struggles within the scalar resource geography literature. Benson as well as Huber and Emel write about the *US General Mining Law* of 1872 and provide critical interventions in regards to mineral staking in the United States. Building on these analyses, this paper brings colonialism into careful consideration in an examination of mining and conflicts over territory in Canada.

I place settler colonialism adjacent to liberal understandings of property. Locke's seminal argument of property is based on labour or working land in order to identify ownership. Simpson (2007), drawing on Locke's *Of Property*, points out how property comes to be conflated with a "larger economy of social and political rank and value". This argument hinges on the notion of a racial hierarchy or, to quote Simpson, "civilized mankind". She draws on Moreton-Robinson's work on Australia and points to Captain Cook's response to the first people he met. Cook stated that Indigenous peoples did not have land tenure systems because they were uncivilized. This terra nullius ideology is based on the notion of empty land and a dualism between uncivilized people and "unworked"/unimproved land. Simpson suggests that historical ethnographic accounts establish not only understandings of difference, but significantly frame "the terms of even being seen". According to Simpson (2007:67), such social rank means that property based on labour is defined in "contradistinction to the living histories of Indigenous peoples". This is critical to Simpson's larger point about ethnographic refusal and is relevant to mineral tenure systems, in that the politics of difference is and becomes more than simply representational. Difference can lead to being "ordered, ranked, [governed and possessed]" (Simpson 2007:67). My aim is to denaturalize settler colonial claims to land and resources that participate in the governance of Indigenous lands through an examination of mineral tenure regimes in Canada.

This paper is also in response to Rebecca Hall's (2013) analysis of diamond mining in the Northwest Territories, Canada. Hall argues that diamond mining in the Northwest Territories is a "colonial continuity". This paper situates mineral staking laws within a settler colonial frame and a historico-political regional context, rather than to reify "the North" as a discrete area of inquiry. I agree with Hall that colonialism is ongoing. Thus while the northern context is significant, the argument I make in terms of northern Canada that concerns the settler colonial dispossession of land vis-à-vis mineral staking shares parallels with mineral staking regimes throughout North America and even internationally. One key difference is that what is now known in settler terms as Yellowknife, the capital of the Northwest Territories, was in many ways placed on the Canada's settler colonial state map during the region's first gold rush in the 1940s. The recent temporality of this settler colonial town is significant, especially as the place remains tied to the contemporary resource extraction industry. The social geography of the Northwest Territories is unique, in that the ratio of Indigenous/settler population is higher than throughout southern Canada and the majority of the US; the Indigenous population comprises almost half of 50,000 Northwest Territories residents.

Stephanie Irlbacher-Fox (2009), Glen Coulthard (2010) and Julia Christensen (2012, 2013) have given extensive scholarly nuance to the terms of settler–Indigenous relations in the Northwest Territories. Their analyses are grounded in people and place. This paper, through a focus on how subsurface rights are "legally acquired", demonstrates that mining processes are embedded in settler colonial processes from the very beginning of regulatory procedures. The Canadian north is significant, when placed in an international context, in that Canada's northern settler colonial situation is comparatively recent and is ongoing in tandem with a conservative federal government where resource extraction is of high priority. Resource extraction begins at the mineral exploration stage and is contemporary and ongoing throughout the Americas, including in Canada. In Alberta, for example, Jen Preston (2013) examined the tar sands with a similar lens as I do in this paper.

Mining Law Travels: Free-entry and the Right to Explore

Mineral claim staking systems in Canada can be traced to the British tin mining districts where mining laws were historically based on local customary principles or law. These principles pre-date written mining laws and were established during the middle ages. Barton (1993) and Morine (1909) have written detailed accounts of Canadian mining law. Barton (1993:114) lists three categories of law that governed mining in England. The first was "the common law of ownership", in which the proprietor of the surface owned their sub-surface minerals. The second is the "royal prerogative to gold and silver" in effect during the sixteenth and seventeenth centuries when precious metals were the choice of two companies with monopoly rights to royal mines. The third consists of special mining laws that were local customary law. These laws were active in the Stannary districts throughout England: Cornwall and Devon, the Mendip Hills, the Peak District, the Forest of Dean and the Alston moor in Cumberland.

It is this third category of mining regulation that Barton argues has the most in common with Canada's mining legislation.[3] These English districts "preserved an ancient concept of free-mining" of great importance in Germany and medieval Europe (Barton 1993:115). For example, English tin-mining law is an important antecedent of free-entry and is similar to the *Northwest Territories and Nunavut Mining Regulations*, discussed in more detail below. Corner posts were used to demarcate claims, clearly abiding by the liberal ownership model described by Blomley and Singer in this paper's introduction. These posts were mounds of rocks or cut turf, and claims had to be registered at the Stannary court. This is similar to the *Northwest Territories and Nunavut Mining Regulations* that require boundaries to be staked and claims recorded at the Mining Recorders Office, housed at the Canadian Department of Aboriginal Affairs and Northern Development. Colonial expansion via mineral claim staking can be tied intimately with gold exploration. Informants in the Northwest Territories discussed how the *BC Gold Fields Act* was the basis of the *Yukon Quartz Act*, which later informed the writing of mining legislation in the Northwest Territories.

Free-entry is defined as the right to explore for minerals and is contentious throughout North America. The principle was originally formally enshrined in North

America in the American General Mining Law (1872)[4] and the western Canada in the *BC Gold Fields Act* (1859), the first Canadian mining legislation in the Canadian west. Mining regulations in much of North America, including the Northwest Territories, involve literally staking land, by dating and marking corner posts.[5] When this is done sub-surface mineral rights can be recorded at the mining recorder's office, which in the Northwest Territories and Nunavut is housed by Aboriginal Affairs and Northern Development. After mineral rights are recorded they are, in many respects, assumed to be legally secure. Subsequent permitting that involves community involvement is largely in the form of Environmental Assessment processes, which in the Northwest Territories and Nunavut are currently facilitated by Environmental Impact Review Boards.[6]

Critics, such as environmental non-governmental organizations, argue that free-entry is a colonial and archaic system. The dated nature of free-entry is perhaps no surprise given the history of legal systems can be explained as "archaic" and resource property laws originate from feudal or imperial mining regimes. However, free-entry mining remains despite advancements in resource law, such as the rise of Environmental Assessment (O'Faircheallaigh 2007), Impact Benefit Agreements (Galbraith et al 2007; O'Faircheallaigh 2010) and modern International Indigenous rights protocols, such as the *United Nations Declaration on the Rights of Indigenous*, that formally legislates the right to free prior informed consent. In the Northwest Territories, like in much of North America, neither consultation nor consent from Indigenous communities or private landowners is required *prior* to staking a mineral claim.

The historic challenge facing free-entry opposition is that many mining industry representatives support free-entry and have strong political and economic influence, through lobby groups and ties to Canadian governance structures. Free-entry opposition continues to garner increasing support. Actors such as Canadian Arctic Resource Committee, West Coast Environmental Law, and scholars such as Bankes and Sharvit (1999) were until recently among the few who have committed substantive effort to critically examine free-entry, particularly relevant to the Northwest Territories. Recent changes to Ontario Mining Act "qualifies" free-entry and the *Ross River Dena Council vs. the Government of the Yukon* case in December 2012 also significantly challenged mineral staking activity in light of the duty to consult.

The debate presented in this paper presents the view of mining interests in opposition to environmental and Indigenous rights groups that oppose free-entry. In the Northwest Territories, the private sector's access to sub-surface rights is intimately facilitated through the Canadian state and a legal framework referred to as the *Northwest Territories and Nunavut Mining Regulations*. These regulations encourage and promote exploratory drilling work, understood as of primary significance to economic development in the Canadian territorial north. These regulations sit within a broader federal context, where the Canadian state's pro-mining agenda has reached unprecedented heights (Veltmeyer 2013).

The backdrop to mineral exploration in Canada is the fact that junior exploration companies have close ties with the investment sector, in particular the Toronto stock exchange (Deneault and Sacher 2012). Together, Canadian junior exploration projects are the largest segment of mining exploration globally. There are three

tiers of mining exploration: the individual prospector; the junior exploration company; and the major (multinational) company such as BHP Billiton, Rio Tinto and Barrick Gold. Small mining companies also undertake exploration, but not to nearly the same extent as junior exploration companies. Small mining companies are primarily concerned with funds made from extraction, whereas exploration company revenues are derived solely from exploration work. Mining companies may use funds from their mines to explore, however, junior exploration companies rely completely on equity financing. They generally have a market capitalization under $200 million and are involved in the speculative/exploratory mining. Natural Resources Canada estimates that companies listed on Canadian stock exchanges raise almost 60% of the world's equity financing for mineral exploration and mining (Government of Canada 2012).

In Canada, mineral tenure law that underlies investment is governed provincially and territorially. In the Northwest Territories, though mineral rights are governed within the territorial boundaries, they are still housed by the federal department of Aboriginal Affairs and Northern Development, which is responsible for the mining legislation over mineral tenure on Crown Land in the region. In 2008 the law that governs mining changed in name from the *Canada Mining Regulations* to the *Northwest Territories and Nunavut Mining Regulations*. Despite this name change that suggests increased territorial authority, legislative power over mineral rights remained federal. Devolution is a significant change that has yet to be fully realized in the Northwest Territories. Devolution will likely have significant impacts on the Northwest Territories mining regulatory regime but have yet to impact mineral tenure systems.

Below, during the examination of free-entry principle and interview data, I build on the significance of settler colonial power that is rendered neutral in resource laws. The so-called free-entry principle and the institutionalization of sub-surface rights pre-determines mineral ownership, and this discriminates against Indigenous title rights leading to continued dispossession, that is intimately facilitated by and through Canadian colonial power.

Free-entry Defined

It should be clear by now, that free-entry is the right to explore for minerals. Entry to lands is "free" in that individuals or companies in the much of Canada can stake a mineral claim without initially consulting anyone. In the Northwest Territories this means by following mining regulations and literally staking land (by dating and marking corner posts), sub-surface mineral rights are secured. A mineral staking map is then recorded at the Mining Recorders Office (Aboriginal Affairs and Northern Development). There are also geologically based work requirements that must be filed in order to keep these claims in "good standing" and to prove the claim is being used for its mining potential. Access to lands, apart from those "withdrawn" in the case of interim land claim agreements or protected areas, is unlimited, hence the term free-entry.

Barry Barton analyses the legal groundwork of the free-entry principle in *Canadian Law of Mining* (1993), providing a foundation for Karen Campbell's (2004:2–3) work with West Coast Environmental Law. Campbell, an opponent of free-entry, outlines the premises that define the law of free-entry as follows:

- Mining prevails over private property interests.
- Mining is the best and highest use of Crown lands.
- All Crown lands are open for staking and mineral exploration unless they are expressly excluded or withdrawn by statute.
- Mining prevails over aboriginal land rights.
- Mineral tenures are appropriately granted on a first come first served basis.
- Mineral potential is so valuable that it warrants leaving the staked area potentially unusable for other resource interests.

Free-entry has been referred to as a principle (McPherson 2003), a law (Campbell 2004), and a regime (Bankes and Sharvit 1999). Campbell traces the origins of free-entry to feudalism and the British land system, a system based on the principle that the Crown has title to all land. Regulations have evolved to specify more stringent geological work requirements than at the time of the first settler colonial gold mining in the north. Several amendments have been made in the Northwest Territories with regard to "representation work", for example. Representation work is that which must be done on a claim to keep it in good standing. This conjures Lockean notions of property, connected to "working" the land. Prospectors continue to adopt a distinctly competitive frontier mentality even in contemporary times, insofar as they feel they have what Robert McPherson refers to as an "unconditional right to explore for minerals". He elaborates by stating that "Over time, the details of legal title have evolved but the concept of free-entry has persisted; it is at the root of Canadian mineral administration and is responsible for the prosperity and long reach of the mining industry" (McPherson 2003:xix). Those who oppose free-entry are concerned with the rate mining development and how decision-making takes place around mineral exploration and the erasure of Indigenous territorial claims, and thus people.

According to the majority of industry representatives interviewed, free-entry is fundamental to a vibrant economy and if the settler colonial history of mining in Canada !surfaced" it was in regards to a celebration of the past. Research findings illustrate that the mining industry, and particularly older men in industry, largely will not imagine an alternative mineral staking system, as it would not be congruent with competitive climate, fundamental to mineral exploration. This partly explains why and how free-entry opposition relies on arguments that hinge on antiquated laws, associated with colonial frontier imaginaries. The argument that mineral staking is antiquated does not escape the confines of liberal ideologies of ownership. Compounding the controversy, mineral exploration is secretive in nature. Prospectors and exploration crews keep staking quiet locations in order to obtain competitive advantage, often from other Canadian southern industrial interests. This exhibits similarities to a competitive-based rush for land exercised within a distinctly frontier imaginary.[7]

Liberal Ideologies of Property and Imperialism

This section contextualizes free-entry in terms of how mineral staking debates are steeped within liberal ideologies of property. Free-entry opponents, such as environmental non-governmental organizations, and free-entry's industry supporters

both debate within the confines of liberal property ideologies. Opposition to free-entry mineral staking suggests that staking laws are dated or archaic. In making this claim, critique remains within the confines of settler colonial legal rights discourse. Settler colonialism underwrites legal claims to property and especially minerals and also provides an avenue to critique free-entry mineral staking.

The mining industry's reliance on this regime works, in part, due to the commonplace understanding of property and sub-surface land rights. Sub-surface property can be staked and leased by individual corporate interests, which takes for granted a liberal notion of how things are owned. Property, and by extension mineral rights, viewed as things to be owned, requires property be understood as a possession. My argument intervenes in this literature by placing settler colonialism in Canada at the fore of conversations over property. This builds on literature that has explained ownership outside the confines of property as a mere *thing* (Blomley 2004, 2013; Cohen 1927; Macpherson 1978; Rose 1994; Singer 2000). Morris Cohen's seminal lecture at Cornell Law School in 1927 argues claims to property are, in effect, claims to sovereignty. Fifty years later Canadian theorist Crawford Macpherson provides a comprehensive overview of the political economy of property. For Macpherson, writing in the 1970s and 1980s, a redefinition of property was needed to salvage liberal democracy. Carol Rose, however, suggests property is relational and reliant on performances or storytelling. This is a sentiment Blomley (2013) augments in a recent article on the performativity of property. In his piece on performativity, Blomley (2004) expands on Joseph Singer's model of ownership. He makes a similar move in his work relating to the city, by drawing on the classical model to explain the liberal underpinnings of property and elaborate a typology that allows a reification of ownership, so it becomes more clearly visible.

Ownership is also significantly associated with freedom (Singer 2000; Waldron 1991). This freedom is presumed as an individual freedom that resonates with the freedom to explore for minerals examined in the northern Canadian case. Individuals staking claims are required to have a prospector's license. Companies or individuals have the *free*, unconditional right to stake mineral claims, thus further reifying mineral rights that are categorized into surface and sub-surface properties. These four elements of the classical ownership (that ownership relies on a thing and a right with clear boundaries that is associated with freedom) contribute to legal renderings of property, naturalized in mineral claim staking laws. Roman histories of conquest, from which resource tenure is derived, are also naturalized by and through colonial histories inherent in contemporary resource rights regimes in settler states.

Contrary to liberal renderings of property ownership, Indigenous title is a relative newcomer on the legal scene. The erasure of Indigenous claims to land continues to be central to expropriation and the ongoing white supremacy immersed in resource management. In contrast to property rights, Indigenous title is by and large explained within the current settler colonial confines of the duty to consult and accommodate and remains steeped in renderings of a modern/primitive binary, which coincides with Simpson's comparison to Lockean property ideals when Captain Cook reached Australia.

The modern/primitive binary is a point that Cole Harris (2002) also makes explicit. He historically traces Britain's imperial claims to property and how the

British Empire wrote and rewrote the boundaries that drew Indigenous reserve lands from the earliest years and onset of colonial administration in Western Canada. Harris' work is especially of use, as he outlines the ways in which British claims to territory were based on racist imperial ideology, whereby Indigenous land was subject to calculated colonial dispossession. There are parallels between mining laws and the racism Harris references in the drawing of reserve system boundaries. Colonial boundaries whether for native reserves or the allocation of Crown mineral rights exclude Indigenous title rights. In both cases Indigenous land rights are deemed less significant than British claims to sovereignty. Mining property law works much more favourably for settler colonialist interests than Indigenous territorial claims not just historically but in the present, despite numerous advances in resource governance.

Paralleling the classical elements of ownership, mineral rights are legally rendered in utilitarian terms. The thing that is quite literally *at stake* or of use in the practice of mineral staking is a mineral commodity, such as precious minerals like gold or diamonds. But minerals are found below the ground, and ownership of the land is divided into two rights: the right to the surface and the right to the sub-surface. Under the free-entry system the right to sub-surface minerals trumps claims to surface rights. This is significant in thinking through hierarchies of property and ownership traced historically.

Individual property ownership and claim staking is rooted in the power of the state and understandings of property ownership are significantly and historically traced to feudalism and British land tenure systems. Legal theorists were well aware of this in the early 1900s, illustrated not only by Morris Cohen's "property is sovereignty" lecture, but also by Alfred Morine (1909) who traces the ways in which understandings of mineral ownership are dated. Ideals of Crown ownership can be traced as far back as the Roman conquest, when precious metals were under state governance:

> It was the theory of Roman law that all beneath the surface belonged to the State by right of conquest, but this general rule was varied at different times and in different localities. At one period the theory was asserted only with reference to precious metals. In the early history of England the ownership of minerals was the subject of contention between the sovereign and the owners of the soil. Eventually it was established and became part of the common law that gold and silver, called royal metals, wherever found, when not specially disposed of, belonged absolutely to the Crown. This is called the regalian right of the Crown, and prevails to this day (Morine 1909:57).

In the case of free-entry mineral staking, the Roman historicity of mineral rights law and the Regalian rights of the Crown extends liberal models of ownership. The ownership model involves a legal exclusion, represented as an individual right. The imperial Regalian context of this right is central to the ways in which mineral rights exclude all others from claiming minerals and any other potential land use to the staked area. It ties Regalian and settler colonial power to minerals. Clear boundaries are drawn to ensure clear title. This is not only seen in the very delineation between surface and sub-surface rights, but further, clear title is emphasized (it is either mine, or yours) and requires property be either possessed or not. In legal terms, as Blomley (2005) has eloquently pointed out and complicated, property can be understood as a zero-sum equation. In this light, staking a claim involves

regulations whereby staking posts are dated, and claim maps ensure the claim is a proper size. There is a legal and clearly identifiable owner of the right to the mineral, even if it is only for a standard two-year term. The clearly identifiable owner has been handed down to the Crown "by right of conquest" as Morine stipulated in 1909.

This is not to argue that Indigenous interests are inherently anti-capitalist, or that the line between indigeneity and the mining industry represents an accurate dualism. Indigenous identities are plural and before the arrival of settler mineral exploration Indigenous peoples mined in a variety of capacities (see Cameron 2011 on copper mining in the Northwest Territories for example). In Canada, the emergence of an Aboriginal Mining Association, as well as the role of Indigenous mining companies and Indigenous peoples working within mining clearly places many Indigenous people's interests congruent with those of capitalist mining projects. Nevertheless, the property laws under which mining continues to function are rooted in settler colonial power, where Indigenous claims to property are situated *outside* claims to mineral rights. The mining industry and Indigenous peoples represent two discrete legal categories that are lived through the dominant ideologies of property practiced in mineral staking regimes today. Indigenous rights and mining rights are reliant on clearly established and historically bound legal systems. However, clearly the mining industry and Indigenous peoples do not perform within the binary legal categories to which this paper attends.

To elaborate, an example of the binary the law establishes is that sub-surface land rights are viewed as legitimate in the eyes of the law where as socio-historic claims to land require data in the form of anthropological land use studies. These studies are not required to prove the inherent ownership of Crown mineral rights. This dichotomy, for Benson, is explained in light of conflicting ontologies that are lived through contemporary legal systems. The courts, as demonstrated in Benson's study of Mount Taylor in New Mexico, recreate an uneven playing field. When minerals are understood in terms of property, and a thing to be owned, this by extension creates a sub-surface commodity value, the political economy of which historically and legally trumps claims to Indigenous title. Dispossession and property thus emerge as a central site of contestation and create a binary battle ground between mineral claims and Indigenous historic-cultural claims to land. This couplet has complexities. Egan and Place (2013) suggest that property is relational and there are "gaps" or openings for alternative views of property. Egan and Place's specific concern is with how Indigenous epistemologies intersect with liberal understandings of property, as exercised through the modern nation state. This paper builds on the optimistically defined gap to which Egan and Place point. My departure is reliant on the significance of settler colonialism to property relations and the ways in which the cadastral map and settler colonialism work in tandem to maintain and enforce mineral staking. In other words, it is nevertheless accurate to point out that the law excludes in a dualistic manner.

Mineral rights are dependent upon a colonial imagination of the land in terms of a cadastral map system whereby land is neatly squared off for capital (mining) interests. Blomley (2003) discusses property in terms of the violence that is inherent to the cadastral grid system. In reference to the frontier, the survey and the grid

he argues "violence plays an integral role in the legitimation, foundation, and operation of a regime of private property". He extends this in his paper to claim that geographers are "reluctant to consider the violences of state law" (Blomley 2003:121). Similarly, Bruce Braun's (2000) vertical territory argument compliments Blomley's rendering of the frontier and grid. Braun's idea of vertical territory is useful in understanding how scientifically based geological readings of place produce governable nature. This is relevant to how mineral staking functions through conceptions of land and property. John Leshy (1987:25) has described the free-entry debate as follows: "Though many regard [free-entry] as a sorry anachronism, influential interests are swift to rise fiercely to its defence". In this paper I suggest that influential interests that rise fiercely to free-entry's defence have in their favour dominant ideologies of property enshrined in the imperial, settler colonial histories of mineral rights regimes.

There is Nothing Free About It

I now outline the main controversies expressed over mineral staking law and how the politics of free-entry are colloquially framed. This includes arguments made over how ideology underpinning the regulations is dated, and that, regardless of nuances introduced by resource scholarship, such as Auty's (1993) resource curse thesis, debate over free-entry remains polarized. In Canada it is fair to say the resource industry and its critics can also be examined within the confines of the bipolar nature of resource and environmental politics. Even if this polarization is politically strategic, it is nevertheless salient. The liberal basis of free-entry complicates the presentation of this debate in dualistic terms. This is demonstrated in the case of an examination of how legal renderings of Indigenous land title compare with free-entry debates and the significance of settler colonialism in underwriting liberal understandings of property and free-entry debate.

One theme that continually arose during interviews in the Northwest Territories concerned the antiquated nature of mineral staking and mining regulations. As one former federal government employee opposed to free-entry put it: "The free-entry system is a problem. It's a hundred and some odd years out of date. In my view it conflicts directly with the aboriginal rights issue." Here, though the "aboriginal rights issue" is rendered in legal terms, there is an understanding that modern law should have a solution to the dispossession of land facilitated through mineral staking. The presupposition is that free-entry and by extension dispossession is archaic. However, since liberal ideologies of property are so deeply entrenched in mineral rights law, overturning free-entry is more complicated than modernizing mineral tenure acts.

Two interviewees compared free-entry directly to the "dinosaur ages". One settler respondent, active in the federal politics of northern policy suggested: "They've got to adapt just like the forestry industry has done and the oil and gas industry has done to a certain degree ... And, you know, they're the dinosaurs of industry at this point." Though there is an attitude of general frustration amongst those who oppose free-entry, there is also an understanding as to why many in industry still believe in the right of free-entry. This passage is taken from a different settler who also allies themselves with Indigenous and environmental rights movements:

> Why wouldn't they want to continue essentially access to 90 or so per cent of the land in Northwest Territories? I mean that's pretty hard to give up, once you've got it. So, they are fighting pretty hard to maintain that. They've got to move into the 20th Century. I mean these guys are still in the 19th Century, 18th Century, some of them. Let alone the 20th Century. And it is just so arrogant.

Informants from all sides of the debate, from Department of Aboriginal Affairs and Northern Development to environmental and Indigenous consultants as well as mineral industry representatives, noted regulations were outdated. However, the way in which this was a problem was quite different, depending on the person that drew on this complaint. For industry, a modernization of the regulations was largely technical. Changing units from miles to kilometres (which has now been done), for example. Many of the technical complaints were rectified in 2008 with the implementation of amendments and the title change from the *Canada Mining Regulations* to the *Northwest Territories and Nunavut Mining Regulations*. These changes were made in close consultation with industry. However, the free-entry principle that allows for the staking of lands prior to consulting or informing anyone remains the same. Though all law is dated in its origins, the dated nature of free-entry continually resonated among free-entry opposition. This recognition of the dated nature of the law fits neatly with this paper's concern that mining law is settler colonial and that mining laws are assumed neutral, and thus divorced from settler colonial dispossession. The reason free-entry opposition draw on the "antiquated" description of the law is due to the clear ties to colonial, frontier ideologies that are present in imaginaries about the "rush" for land. Or as another interviewee said who also used to work for the federal government:

> It's a colonial system, administered out of Ottawa, by and large, and there is no colonial system that didn't feel that it's doing the right thing for its colony. But there is probably no colonial system where its colony felt anything but oppressed. I mean this is a modern colonial context.

This analysis recognizes colonial power. The "archaic" and "colonial" nature of mineral staking remains enshrined in regulations. The changes made to the regulations in 2008 were predominantly administrative. There has been no major overhaul of the free-entry principle. So, though all informants concur that the regulations are dated, the perceived problems of how this poses problems are quite divided. For some (mainly the mining industry) it is an administrative problem. For others, the power to stake minerals without consulting Indigenous groups or private landowners needs to be overturned. This debate does not escape confines of liberal renderings of possession or ownership. Thus, the free-entry debate remains polarized, but deeply entrenched in legal understandings of what constitutes property. People are generally either quite strongly for or against free-entry. Another anti-free-entry correspondent active in the non-governmental side of northern extractive politics put it:

> Free-entry is a system by which interested parties with a prospecting license can go in and stake mineral rights without prior authorization ... without even notifying nearby aboriginal people. And then go register those claims, and acquire rights to develop the sub-surface and obligations to do work. Is there something wrong with that picture? Yes, I would suggest so!

Others agreed. Lack of adequate land-use planning was another complaint about free-entry mentioned more than once. For example, "the [regulations] still allow exploration anywhere- anywhere. In other words there is no land use planning recognition. That is absurd. They can go stake in your backyard, if they want. They can. If you were downtown Toronto they could stake it." Formal political free-entry opposition relies on ideologies of property alluded to in terms like "my own back yard" still squarely represented within the legal confines of the ownership model. Thus, both free-entry opposition and those who believe the system should remain entrenched within normative ideologies of ownership.

On the other side of the debate, some believe opposition to free-entry is associated with those who simply do not "get" the mining industry. One industry representative stated: "What we're hearing now, of course, is everybody wants to review free-entry and all that stuff, but frankly we're not interested ... they're really called for by people who don't understand the mineral industry." Here, there are people who "get it" and people who do not. This belief is generally held by many, especially older settlers, working in the mining industry that point to job creation as justification for regulatory processes and the continued application of free-entry staking.

In sharp contrast, a correspondent active in the environmental non-governmental organization community does not find the mineral staking law in the Northwest Territories fair. He said:

> There are other ways of administering the mineral system ... Whether it's map staking or cash bid system or a concessions system. The mining industry will tell you "no, we can't go to that system because there is just too much uncertainty about what's actually out there and no one would want to bid on a piece of property." Well, there may be some element of truth to that where there has been relatively little exploration. But, that's just bullshit ... they just like to be able to go wherever they want whenever they want.

This person hints at a recognition of industry's argument about the uncertainty of other systems of mineral rights allocation. They address the fear industry holds that mining will not prosper without free-entry because of a loss of the competitive atmosphere. There is the general dismissive comment, "that's just bullshit", in reference to the so-called uncertainty about mineral availability. Continuing with the examination of the stark differences between industry's pro-free-entry argument and its opposition, another person active in the mining industry described the free-entry principle as follows:

> Basically there's nothing free about it. You have to pay aircraft, you have to pay recording fees, you have to pay, you have to pay, you have to pay. So, it's not really properly worded as free-entry. But, having said that, just to keep the term similar so everyone recognizes it—that which keeps the industry working best, is free-entry ... And I think that if industry is not careful what's going to happen is they're going to have free-entry qualified by the courts and they're going to say this is what it is going to be from now on, you're going to have to do it like this, this, this and this. And part of the problem with our industry is that I don't want my neighbour to know where I'm going staking claims because he might go over there and try and get there before me.

In support of free-entry, the frontier-like quality of rushing to get land with the fear of others staking claims first continually surfaces. This is congruent with settler

colonial readings of geographical space and the frontier. The remoteness of many of the mineral claims could be understood in terms of capital's spatial fix. Similarly, there are liberal notions of property ownership, deeply embedded in Lockean ideals of labour and land. Industry representatives use the competitive nature of mineral exploration to explain what they see as the need for free-entry.

The secretive nature of mineral exploration makes many unable to envision any other way of claim staking. There are two reasons for this. One, free-entry is normative customary right. The nostalgic appeal of prospectors doing geological work and staking claims has not escaped the romantic imaginations of many northern mineral development interests. In fact, they hold on to this imaginary quite rigidly and some explicitly associated this right with freedom and democracy. Secondly, the fear of mineral claims being discovered by competition ("my neighbour") before the rightful discoverer has staked all of their claims is part of this frontier imagination. To give a final indication of how the customary right of free-entry figures into political imaginations:

> Usually it's the ecologists or some group, they present this [alternative] idea [to free-entry] and it's like how in god's name would this work? That's communism, that's dictatorship, that's not democracy and ah, that's not what our system is built on. So, if you want to do that for mining are you going to do that for everything else? Where the government just takes over everything and there's no private enterprise?

Fear of the loss of private enterprise is tied to understandings of why free-entry should not be overturned. Above, private enterprise is "what our system is built on". Liberal ideals of freedom and democracy emanate, also relevant to the classical model of property ownership.

Conclusion

I began this paper by demonstrating the fundamental ideologies of property according to the "ownership model" (Blomley 2004, 2013; Singer 2000). I elaborated on this model with a discussion of the settler colonialism, property and free-entry mineral staking as embedded within liberal ideologies of property. Calling on Barry Barton (1993) who traces free-entry from the Stannary tin-mining district in Britain, the paper suggests how sub-surface mineral rights are historically constituted. Alfred Morine further explains the imperial legacies of mineral ownership. The highlighted interview material goes on to explain how mineral rights are lived, debated systems in the Northwest Territories. Interviews illuminate how free-entry opposition understands mineral tenure to be antiquated, yet liberal ideologies of property remain naturalized within the confines of free-entry debate. This paper illuminates how mineral staking is reliant on settler colonialism, reified through ideologies of property that allow mining rights to appear politically viable and neutral.

Staking sub-surface rights necessarily demotes property to administrative, dull and even mundane staking practice. As regulations stipulate, staking a mineral claim involves marking corner posts and recording a claim sketch at the Mineral Recorder's Office at the Department of Aboriginal Affairs and Northern Development. The geographical stratification of land that takes place during this process allows for

the continued dispossession of land through the very institutionalization of sub-surface property rights. This performance that divides property into two discrete legal categories, above and below the surface, is strictly for the purposes of any potential resource extraction or to raise money for capitalist mining interests. The creation of the category of sub-surface land rights adheres to settler colonial theories that insist on recognizing what precisely is predicated on the erasure of Indigenous claims to land. The neutral rendering of this erasure makes current mineral staking regimes as much a part of Canada's past as it is settler Canada's colonial present. Mineral staking in Canada remains neither neutral nor innocent.

Acknowledgements

I would like to thank Rosemary-Claire Collard, Trevor Barnes, Brian Egan, Natalie Baloy, Geoff Mann, Nick Blomley and two anonymous reviewers for the encouragement and constructive comments on previous versions of this article. I am also grateful to the many activists, bureaucrats, consultants and lawyers, some quoted in this paper, who continue to take the time in interviews and discussions to inform my research on resource regulations.

Endnotes

[1] Empirical comparative analysis in Australia is not explored in great detail here, but would be useful given the similar settler colonial histories (see O'Faircheallaigh 2010 for comparative mining example).

[2] Participants of this study signed a consent form granting confidentiality. Names of interviewees are thus not included in this article and interview discussion and analysis does not attribute quotations to specific informants.

[3] Barton (1993:114) writes this may seem "arcane ... at first sight".

[4] John Leshy raises concerns about the anachronistic nature of free-entry mineral staking. Referring to free-entry in the US he states: "Nearly all of the public debate ... is over just one part of the Law rather than its entirety ... what preoccupies friend and foe alike is the idea of free-self-initiated access to the federal lands" (1987:25). The preoccupation with "self-initiated access to federal lands" in Canada has been challenged and interrogated by legal scholars (Bankes and Sharvit 1999; Barton 1993; Campbell 2004). However, those intimate with mining law and are economically engaged in the minerals industry in most of Canada, especially the case study presented here in the Northwest Territories, have historically supported free-entry.

[5] Much mineral staking is now done online. British Columbia was the first region in Canada to have an internet-based mineral titles administration.

[6] The Mackenzie Environmental Impact Review Board put forth in the Mackenzie Valley Resource Management Act made significant changes that formally incorporate Indigenous voices into the review process in the Northwest Territories (Christiensen and Grant 2007). In Nunavut, similar legislation put forth in the Nunavut Land Claim Agreement created the Nunavut Impact Review Board.

[7] "The lords of yesterday" is a phrase used by Wilkinson (1993) in Bankes and Sharvit (1998) that describes free-entry and other policies that seem appropriate to frontier mentalities.

References

Auty R M (1993) *Sustaining Development in Mineral Economies: The Resource Curse Thesis*. New York: Routledge

Banivanua-Mar T and Edmonds P (2010) *Making Settler Colonial Space*. London: Palgrave Macmillan

Bankes N and Sharvit C (1998) *Aboriginal Title and Free Entry Mining Regimes in Northern Canada*. Ottawa: Canadian Arctic Resource Committee

Bankes N and Sharvit C (1999) Free entry mineral regimes and aboriginal title. *Northern Perspectives* 25(3):13
Barker A J (2012) Locating settler colonialism. *Journal of Colonialism and Colonial History* 13(3) doi: 10.1353/cch.2012.0035
Barton B (1993) *Canadian Law of Mining*. Calgary: Canadian Institute of Resources Law
Benson M H (2012) Mining sacred space: Law's enactment of competing ontologies in the American West. *Environment and Planning A* 44(6):1443–1458
Blomley N (2003) Law, property, and the geography of violence: The frontier, the survey, and the grid. *Annals of the Association of American Geographers* 93(1):121–141
Blomley N (2004) *Unsettling the City: Urban Land and the Politics of Property*. New York: Routledge
Blomley N (2005) Flowers in the bathtub: Boundary crossings at the public–private divide. *Geoforum* 36(3):281–296
Blomley N (2013) Performing property: Making the world. *Canadian Journal of Law and Jurisprudence* XXVI(1):23–48
Braun B (2000) Producing vertical territory: Geology and governmentality in late Victorian Canada. *Cultural Geographies* 7(1):7–46
Cameron E (2011) Copper stories: Imaginative geographies and material orderings of the central Canadian Arctic. In A Baldwin, L Cameron and A Kobayashi (eds) *Rethinking the Great White North: Race, Nature, and the Historical Geographies of Whiteness in Canada* (pp 169–192). Vancouver: University of British Columbia Press
Cameron E (2012) Securing Indigenous politics: A critique of the vulnerability and adaptation approach to the human dimensions of climate change in the Canadian Arctic. *Global Environmental Change* 22(1):103–114
Cameron E, de Leeuw S and Desbiens C (2014) Indigeneity and ontology. *Cultural Geographies* 21(1):19–26
Campbell K (2004) *Undermining Our Future - A Discussion Paper on the Need to Reform Mineral Tenure Law in Canada*. Vancouver: West Coast Environmental Law
Christensen J (2012) "They want a different life": Rural northern settlement dynamics and pathways to homelessness in Yellowknife and Inuvik, Northwest Territories. *The Canadian Geographer/Le Géographe Canadien* 56(4):419–438
Christensen J (2013) "Our home, our way of life": Spiritual homelessness and the socio-cultural dimensions of Indigenous homelessness in the Northwest Territories (NWT), Canada. *Social and Cultural Geography* 14(7):804–828
Christiensen J and Grant M (2007) How political change paved the way for indigenous knowledge: The Mackenzie Valley Resource Management Act. *Arctic* 60(2):115–123
Cohen M R (1927) Property and sovereignty. *Cornell Law Quarterly* 13(8):12–14
Coulthard G (2007) Subjects of empire: Indigenous peoples and the "politics of recognition" in Canada. *Contemporary Political Theory* 6(4):437–460
Coulthard G (2010) Place against Empire: Understanding Indigenous anti-colonialism. *Affinities* 4(2). http://www.affinitiesjournal.org/affinities/index.php/affinities/article/view/69 (last accessed 6 March 2014)
Deneault A and Sacher W (2012) *Imperial Canada Inc: Legal Haven of Choice for the World's Mining Industries*. Vancouver: Talonbooks
Egan B and Place J (2013) Minding the gaps: Property, geography, and Indigenous peoples in Canada. *Geoforum* 44:129–138
Galbraith L, Bradshaw B and Rutherford M B (2007) Towards a new supraregulatory approach to environmental assessment in Northern Canada. *Impact Assessment and Project Appraisal* 25(1):27–41
Government of Canada (2012) Canada is a global mineral exploration and mining giant. *Natural Resources Canada.* http://www.nrcan.gc.ca/media-room/news-release/2012/25a/6030 (last accessed 6 March 2014)
Hall A (2010) *Earth Into Property*. Kingston: McGill-Queen's University Press
Hall R (2013) Diamond mining in Canada's Northwest Territories: A colonial continuity. *Antipode* 45(2):376–393
Harris C (2002) *Making Native Space*. Vancouver: University of British Columbia Press

Huber M T and Emel J (2009) Fixed minerals, scalar politics: The weight of scale in conflicts over the "1872 Mining Law" in the United States. *Environment and Planning A* 41(2):371–388
Irlbacher-Fox S (2009) *Finding Dahshaa: Self-government, Social Suffering, and Aboriginal Policy in Canada*. Cambridge: Cambridge University Press
Laforce M, Lapointe U and Lebuis V (2009) Mining sector regulation in Quebec and Canada: Is a redefinition of asymmetrical relations possible? *Studies in Political Economy* 84:47–78
Leshy J D (1987) *The Mining Law*. Washington, DC: Resources for the Future
Macpherson C B (ed) (1978) *Property: Mainstream and Critical Positions*. Toronto: University of Toronto Press
Marx K (1976 [1867]) *Capital*, Vol. I (trans B Fowkes). New York: Penguin
McPherson R (2003) *New Owners in Their Own Land: Minerals and Inuit Land Claims*. Calgary: University of Calgary Press
Morgensen S L (2011) *Spaces Between Us: Queer Settler Colonialism and Indigenous Decolonization*. Minneapolis: University of Minnesota Press
Morine A B (1909) *The Mining Law of Canada*. Philadelphia: Cromarty Law Book Co.
O'Faircheallaigh C (2007) Environmental agreements, EIA follow-up and aboriginal participation in environmental management: The Canadian experience. *Environmental Impact Assessment Review* 27(4):319–342
O'Faircheallaigh C (2010) Aboriginal-mining company contractual agreements in Australia and Canada: Implications for political autonomy and community development. *Canadian Journal of Development Studies/Revue Canadienne D'études Du Développement* 30(1/2):69–86
Preston J (2013) Neoliberal settler colonialism, Canada, and the tar sands. *Race and Class* 55(2):42–59
Rose C M (1994) *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership*. Boulder: Westview
Sandlos J and Keeling A (2012) Claiming the New North: Development and colonialism at the Pine Point mine, Northwest Territories, Canada. *Environment and History* 18(1):5–34
Simpson A (2007) On ethnographic refusal: Indigeneity, "voice", and colonial citizenship. *Junctures* 9:67–80
Simpson A (2011) Settlement's secret. *Cultural Anthropology* 26(2):205–217
Singer J W (2000) Property and social relations. In C Geisler and G Daneker (eds) *Property and Values: Alternatives to Public and Private Ownership* (pp 3–20). Washington, DC: Island
Tuck E and Yang K W (2012) Decolonization is not a metaphor. *Decolonization* 1(1):1–40
Veltmeyer H (2013) The political economy of natural resource extraction: A new model or extractive imperialism? *Canadian Journal of Development Studies/Revue Canadienne D'études Du Développement* 34(1):79–95
Veracini L (2010) *Settler Colonialism*. London: Palgrave Macmillan
Veracini L (2011) Introducing settler colonial studies. *Settler Colonial Studies* 1(1):1–12
Waldron J (1991) Homelessness and the issue of freedom. *UCLA Law Review* 39:295–324
Wilkinson C F (1993) *Crossing the Next Meridian: Land, Water, and the Future of the West*. Washington, DC: Island
Wolfe P (1999) *Settler Colonialism*. London: Cassell