Investor Brief: Responsible Investment and Indigenous Peoples’ Rights in the Energy Transition

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PREFACE

Indigenous peoples’ self-determination and sovereignty are intimately tied to the emerging energy transition and green economy, and the United Nations Declaration on the Rights of Indigenous peoples (UNDRIP) has been instrumental in communicating this relationship and providing a framework for reconciliatory action. Additionally, the United Nations Guiding Principles on Business and Human Rights “Protect, Respect, and Remedy” responds to a critical gap in engagement and implementation, and centers the discussion around corporations and other business enterprises. Companies have faced significant material losses due to failure *to recognize risks stemming from failure to respect Indigenous rights, title, and interests and respect Free, Prior and Informed Consent (FPIC). FPIC breaches are pervasive around the globe, exacerbated by economic incentives in favour of rapid deal-making and direct sourcing. With recent moves towards the adoption of UNDRIP into policy-making regimes in both the United States and Canada, there will soon be strong levers to drive further protection of the rights and welfare of Indigenous peoples in these jurisdictions.*

Investors are critical to shifting this paradigm as they can advocate for Indigenous self-determination in policies and operations, and investors new to the responsible investment space must recognize that their voices can affect change. By reflecting on how to show up and engage with both Indigenous peoples and companies through a non-transactional lens, this is an opportunity to assess risk and opportunity differently, challenge historical inequity patterns, make investment decisions that respect FPIC, and prioritize long-term equitable relations and meaningful integration of Indigenous peoples' knowledge.

INTRODUCTION

An energy transition to a low-carbon economy is underway to curb societal dependence on fossil fuels, and shift to cleaner energy alternatives to foster long-term environmental and economic sustainability. The transition has increased demand and intensive extraction of transition minerals (e.g., copper, cobalt, nickel, lithium, silver, and rare earth minerals) to produce the required technologies. It is estimated that the production of these minerals could increase by nearly 500% by 2050 to meet the rising demand for clean energy[1], and that more than 50% of the known energy transition minerals and metals reserves are on Indigenous lands.[2]

A transition of the global energy sector will create new economic opportunities, and the concept of "Just Transition" has emerged in the economic and political discourse. This has been echoed by international organizations such as the International Labour Organisation (ILO) and the Organisation for Economic Cooperation and Development (OECD), and acknowledged by the 2015 Paris Agreement. For this transition to be just, the costs and benefits of the shift to a greener economy should be fairly distributed with an intentional view toward minimizing the risks for marginalized communities. It must be an inclusive process that puts workers and communities front and center in discussions that affect their livelihoods, health, and wellbeing.

Indigenous peoples around the globe are particularly susceptible to the adverse effects of climate change due to the many ways their cultures and livelihoods are tied to the environment. Additionally, their communities tend to be geographically situated in areas with high-risk climate variabilities, and where place-based economies are shifting rapidly. Indigenous peoples have historically been excluded from decision-making processes, including climate policy-making, so their input into current policy solutions as it affects their lands, territories, and resources is limited and sometimes inaccessible.

The negative environmental and social impacts of the extraction of minerals on Indigenous peoples and communities are well-known. Research has shown that inadequate human rights protections for Indigenous peoples in business operations lead to risks with measurable material impacts and immeasurable harm to Indigenous peoples and their traditional territories.[3] If unattended, a low-carbon economy could look like the current fossil fuel-driven economy, in which profits and opportunities are accumulated amongst corporations and financial institutions. At the same time, Indigenous peoples and other marginalized groups face increasing environmental and social burdens and inequities.[4]

Through a lens of equitable partnerships, this investor brief reviews some of the risks and opportunities in the transition to a low-carbon economy. This includes critical factors important to investors when centering Indigenous rights, titles, and interests in policies and operations and providing recommendations on how investors better support Indigenous peoples in a just transition.

THE ENERGY TRANSITION'S IMPACTS ON INDIGENOUS PEOPLES

Indigenous peoples' rights have been increasingly recognized through the adoption of international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the principle of Free, Prior, and Informed Consent (FPIC).

Free, Prior, and Informed Consent (FPIC).

Free, Prior, and Informed Consent (FPIC), as defined in the United Nations Declaration on the Rights of Indigenous Peoples, sets the standard for engagement with Indigenous peoples. FPIC is a mechanism to ensure Indigenous peoples' human rights and self-determined priorities are integrated into decisions that could potentially impact them or their lands, territories, and resources. FPIC includes a decision-making process that is without pressure and intimidation (free), which is performed before the activity that affects the community is undertaken (prior), with the possession of full and accurate knowledge about the activity and its impact on the community (informed), so that the community can either provide or withhold its permission over the activity (consent).[5]

The FPIC of Indigenous peoples applies to all projects and activities that positively or negatively impact Indigenous peoples. While corporate respect for and implementation of FPIC should not be limited in any way, UNDRIP notes the expectation of FPIC in the following articles:

- The relocation of Indigenous peoples from their lands or territories (Article 10)
- The access to redress related to cultural property, intellectual, religious, and spiritual property taken without FPIC or in violation of the law (Article 11)
- The adoption and implementation of legislative or administrative measures that may affect them (Article 19)
- The storage or disposal of hazardous materials on Indigenous peoples' lands or territories (Article 29)
- Their development priorities and strategies for their lands, territories, and resources

Furthermore, Indigenous peoples who have been displaced from their lands when those lands have been "confiscated, taken, occupied or damaged without their free, prior and informed consent" are entitled to restitution, or other appropriate redresses (Article 28).

International agreements such as the 2015 Paris Agreement encourage governments to ensure a just transition that can maximize the benefits of climate policies and minimize hardships for workers and communities.[6] However, there are chronic gaps in their implementation and practice, most notably in the resource extraction sector. Despite Indigenous peoples often being the first, and most negatively affected by an extractive economy and the climate crisis, there is a lack of understanding of the multifaceted adverse impacts that this transition brings to Indigenous communities, which may include:

- Economic impacts: Curbing the extraction of fossil fuels may cause significant economic disruptions in Indigenous communities that rely on this industry as a source of jobs,[7] revenue, and energy. Conversely, past patterns dictate that Indigenous peoples will not be included in economic benefits even though they bear the long-term environmental and social extraction costs.
- Health and environmental impacts: Several transition minerals are mined through sulphide mining and the leaching of sulfuric acid, which is highly hazardous to freshwater rivers, lakes, streams, and groundwater. Biodiversity, cultural, and sacred sites, which are inherently tied to Indigenous lives, particularly the right to fish for social and ceremonial (FSC) purposes, would be negatively impacted.
- Social impacts: The Business and Human Rights Resource Centre reported 495 human rights allegations related to the extraction of transition minerals between 2010-2021.[8] Violations against Indigenous peoples include lack of the implementation of FPIC, displacement and dispossession, forced labour, and child labour, leading to violence against Indigenous women and sex trafficking, repression, and murder of Indigenous human rights defenders.[9]
- Self-determination: The right to equitable participation in decision-making that can affect Indigenous peoples' lands, territories, resources, and ways of life.

Thacker Pass Lithium Deposit (Nevada, U.S.)

Peehe Mu'huh is a sacred site which holds cultural significance for the Fort McDermitt Paiute, Shoshone, and Bannock Tribes. It is one of the few remaining places where tribal citizens can still gather traditional foods and medicines and honour their ancestors. The proposed Thacker Pass lithium mine in Nevada, U.S., puts these sacred sites and traditional foraging areas at risk. According to the tribe, mining will result in an influx of mine labourers in the area, straining community infrastructure. In an online petition, groups opposed to the Thacker Pass mine warn that this influx "will lead to an increase in hard drugs, violence, rape, sexual assault, and human trafficking."[10] The proposed 18,000-acre Thacker Pass mine would also reach into ancestral lands of the Burns Paiute Tribe, Reno-Sparks Indian Colony, and the Shoshone-Paiute Tribes of Duck Valley Indian Reservation.[11]

The mine received final approval from the U.S. Bureau of Land Management (BLM) in January 2021, and its operator, Lithium Americas, received final state-level permits in February 2022[12] without implementing FPIC. The BLM's approval came despite its conclusion that the mine would threaten nearly 60 culturally or historically significant sites, mostly Indigenous obsidian tool-making and habitation sites.[13] A lawsuit filed by Reno-Sparks Indian Colony, Burns Paiute Tribe, and Summit Lake Paiute Tribe demonstrates that the proposed mine lacks a social license to operate among directly impacted Indigenous peoples. Lithium America's plan to mitigate harm from mining to Indigenous peoples' cultural sites was also developed without consultation.[14] If established, the mine would be the largest lithium mine in the U.S.[15]

In January 2023, General Motors (GM) announced an investment of USD 650 million in Lithium Americas to help develop the Thacker Pass lithium mine and secure minerals for their electric vehicle supply chain. GM's Human Rights Policy[16] and Supplier Code of Conduct[17] contain commitments to the UN Declaration on the Rights of Indigenous peoples, ILO 169, and FPIC. GM has refused to meet with People of Red Mountain, an organization of Indigenous communities impacted by the Thacker Pass mine.[18]

Although "Environmental and Social" is considered the number one risk for the mining and metals industry in 2022,[19] investors may overlook the specific issue of Indigenous rights, title, and interests. Failure to respect Indigenous rights and FPIC exposes companies and investors to multiple risks, including legal (e.g., domestic, or international court decisions on government-granted concessions), political (e.g., referendums, legislation changes), operational (e.g., delays and cancellations due to protests), and reputational risk. A study on the cost of company-community conflict in the extractive sector evidenced that a world-class mining operation with $3 to $5 billion in capital expenditures could lose around $20 million per week because of stoppages due to conflicts between the company and the community.[20]

Rio Tinto's blast at Juukan Gorge Caves (Western Australia)

In May 2020, Rio Tinto destroyed a 46,000-year-old sacred Aboriginal site at the Juukan Gorge caves in Australia to expand its iron ore exploration project. The PKKP Aboriginal Corporation, which administers the traditional lands and waters of the Puutu Kunti Kurrama people and the Pinikura people on their behalf, previously raised concern and requested the site's preservation. However, on May 24, the area was destroyed.[21] Several senior executives at Rio Tinto resigned over the incident, and the company received backlash from shareholders, the government, and the public. The company's investors voted against executive pay packages in the 2021 AGM, which included bonuses for top executives.[22] The government started a federal inquiry highlighting Western Australia's inadequacy of existing cultural heritage protection regulations.

The transition to a low-carbon economy represents an opportunity to re-design economic and business policies, and processes to robustly account for local-level solutions, empowerment, and capacity building among Indigenous communities. For the transition to a low-carbon economy to be just, fair, and inclusive, Indigenous peoples must be included in decision-making when proposed policies and projects may affect their rights and livelihoods.

Three Nations Energy, Alberta, Canada

In a remote hamlet of northern Alberta, a coalition of the Athabasca Chipewyan First Nation, the Mikisew Cree First Nation, and the Fort Chipewyan Metis Association has led the development of Three Nations Energy, a $7.76 million project with a capacity of 2.2 Megawatts that *constitutes the largest remote, off-grid solar farm in the country.[23] The project was created in 2018 to bring clean, low-carbon, affordable and reliable electricity to the community of Fort Chipewyan. This system is connected to a 1.5-megawatt-hour state-of-the-art battery system and will supply Fort Chipewyan with some 3,200 Megawatt-hours of electricity annually, displacing more than 800,000 litres of diesel fuel annually.[24]*

RECOMMENDATIONS FOR INVESTORS

Investors can adopt the following recommendations to foster a just, inclusive, and rights-informed transition to a low-carbon economy that respects Indigenous rights, title, and interests, and identifies and mitigates potential material risks to their portfolios.

1. Articulate a clear vision of Indigenous peoples' rights that centers self-determination to guide policies and operations: This includes recognizing and understanding the importance of the relevant national and international frameworks, laws, and reports and how they apply to the industry operations, strategy, priorities, and outcomes for Indigenous peoples. Relevant frameworks that can guide policies and practices are:

- **International and national resolutions and conventions:** The United Nations Declaration on the Rights of Indigenous peoples (UNDRIP), the Indigenous and Tribal Peoples Convention (ILO 169), and the principle of Free, Prior and Informed Consent principle (FPIC).
- **National reports and calls to action:** In Canada, the Truth and Reconciliation Commission Report (TRC) and the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls.
- **Principles and guidelines for businesses and financial institutions:** The United Nations Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, the OECD Due Diligence Guidance for Responsible Business Conduct, the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector.

Investors must recognize that national, and regional laws constitute only a minimal protection standard of Indigenous rights, and no country currently protects Indigenous peoples to the standards set by UNDRIP. By adhering to these suggested frameworks of international laws and standards, investors can ensure that they are centering on the highest level of protection for Indigenous peoples' rights, which will provide both security for Indigenous peoples, and long-term shareholder value.

2. Undertake due diligence across the investment chain and use shareholder voice to advance Indigenous rights: This includes pursuing dialogue with portfolio companies, advocating for meaningful corporate policies and reporting metrics on reconciliation, Indigenous peoples' rights and FPIC, and supporting votes on Indigenous relations at investee company Annual General Meetings (AGMs).

Proxy voting and Indigenous economic reconciliation

Investors can take direct action by holding those in power accountable through proxy votes and demanding information about the industry's economic and social contributions to communities. In 2021, TMX Group Ltd. shareholders voted to support a resolution on Indigenous inclusion *and reconciliation, which received 98% shareholder support. The proposal asked the company to report on programs and policies on Indigenous employment and community relations, objectives, and disclosure on procurement from Indigenous-owned businesses, and engagement with Indigenous organizations.*[25] *Following this, shareholders at Toromont Industries Ltd. overwhelmingly supported a proposal demanding the company report on Indigenous community relations – with the resolution receiving 99% of support at the 2022 AGM.*

3. Review, identify and explore partnerships with Indigenous communities, businesses, and organizations: This includes fostering relational partnerships with Indigenous communities that can add mutual value, improve investors' and companies' understanding of Indigenous peoples' aspirations and priorities, and enhance economic reconciliation. Some resources that can guide investors are:

- *Advancing Reconciliation in Canada. A Guide for Investors*
- *Investing for Today, Tomorrow, and Future Generations. A Guide for Indigenous Investors*
- *Moving Capital, Shifting Power: Identifying opportunities for investors to enhance demand for Indigenous employment, advancement, and contracting*
- *Business Reconciliation in Canada Guidebook*

Nechalacho Rare Earth Minerals Project (Northwest Territories, Canada)

Nechalacho Rare Earths Project is the first rare earth mining project in Canada. It is located on the traditional lands of the Yellowknives Dene First Nation and started operations in March 2021. Norwegian company REEtec agreed to sign on for five years of supply. Cheetah Resources Corp., a Vital Metals Ltd. Canadian subsidiary, is the operator of the project and owner of deposits near the surface. Det'on Cho Nahanni Construction Corporation, owned by the Yellowknives Dene First Nation, runs extractive operations on the Nechalacho Project.

Despite being a small-scale mining operation, Nechalacho represents an opportunity to create meaningful employment. Eighty percent of employees at Nechalacho are Indigenous. However, many members of the First Nation and other surrounding Indigenous communities work in the fossil fuels industry, and jobs resulting from the transition to a low-carbon economy require specific skill sets. The transition represents a chance for workforce capacity building, training, and education.[26]

The project is also an opportunity to create a local mineral supply chain, partnerships, and long-term investments. Cheetah undertook sorting operations of the ore in Vital's processing facility in Saskatoon between 2021-2023 and is expected to conduct a second mining campaign in 2024. In early 2022, Ucore Rare Metals was advancing plans to develop a rare earth minerals separation facility in Alaska, which can be the piece for creating a North American supply chain of rare earth elements. There is high interest in making ties on the equity side, with the creation of equity ownerships and strong participation of Indigenous peoples in the supply chain.

Conclusion

Investors can widen the conversation to ensure that the solutions most favoured by companies and policy-makers do not repeat past patterns but rather establish new ones rooted in equity. This is the moment to establish a new paradigm for the green economy that recognizes the contributions of and impacts on Indigenous peoples, so that the next decade of economic transition proactively addresses and remediates legacies of colonization and exclusionary policies and standards.

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