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Protecting the Islands off of Oak Bay (Tl'ches and the other Songhees Islands)

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May 27, 2015

Jacques Sirois
Warden of Trial Islands Ecological Reserve/BC Parks
c/o Friends of Greater Oak Bay and Islands
1057 Fort Street
Victoria, BC
V8V 3K5

Dear Jacques Sirois and the Friends of Greater Oak Bay and Islands:

Re: File 2014-03-02 – Protecting the Islands off of Oak Bay (Tl'ches and the other Songhees Islands -- including Chatham, Discovery, Trial and nearby Islands)

The Friends of Greater Oak Bay and Islands have asked the Environmental Law Clinic to investigate the legal options for providing better environmental protection of the islands and water off of Oak Bay -- while respecting First Nations land uses, cultural sites, rights and title. The area in question includes the triangle formed by Chatham/Discovery (Tl'ches) Island, Ten Mile Point and Trial Island.

This report begins by summarizing the existing legal protected area designations within this area. Taken together, these designations form a confusing patch-work of jurisdictional boundaries and legal protections for the area. As a result of these uncoordinated protection efforts, the islands are currently threatened by environmental degradation, vandalism and overuse. Damage to the natural habitats on the islands and in the surrounding waters occurs as a result of boating, fishing, and off-trail recreation. Of particular concern are reports of vandalism to the Songhees First Nation Reserves on Discovery, Chatham, Vantreight and Strongtide Islands.

The report then canvasses the legal designations available at the provincial and federal levels of government -- and also explores the options available outside of the Canadian government system. These designations are evaluated to analyze: 1) their impact on existing designations; 2) how they can accommodate First Nations land use and governance; 3) overall benefits; and 4) overall drawbacks.

The purpose of this report is to provide interested parties (community organizations, First Nations and government agencies) with background information on each designation option and how it could apply to the area in question. It is also meant to initiate a discussion and encourage collaborations amongst these groups.

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Part I: Introduction

1.1 Introduction

The islands off Oak Bay form a region of unique biological diversity, natural beauty and cultural significance -- all within kayaking distance from the City of Victoria, Saanich and Oak Bay.

The islands are a key part of what is arguably the best coastal and marine environment in urban Canada. Rich kelp forests, seaweed, surfgrass and eelgrass not only provide key habitat and nurseries for fish like Pacific herring, salmon, rockfish, and Sandlance – but for orcas, humpbacks, greys and other whales, Steller and California sea lions, elephant and harbour seals, river otters, dolphins, porpoises and Pacific giant octopus, Sea otters have been sighted there, at the leading edge of their slow migration south into historic habitats. Beds of clams and mussels and krill nurseries are also key features.¹ The area is part of the critical habitat area for southern resident killer whales (orcas) identified under the *Species at Risk Act*.²

The islands are critical bird habitat. They are home to threatened marbled murrelets as well as rhinoceros auklets, Pacific blue herons, and rock sandpipers. They provide much-needed habitat for recovering purple martins, endangered coastal vesper sparrows and uncommon coastal Western meadowlarks. A number of dramatic raptors are found there – including bald eagles, Cooper’s hawks, peregrine falcons and merlin falcons. The islands are home to the largest numbers of wintering and nesting waterbirds, seabirds, and shorebirds in Greater Victoria³

The islands themselves include iconic Garry oak woodlands and maritime meadows. They include an area described as the most outstanding assemblage of rare and endangered plant species in British Columbia⁴. Indeed, 99% of the global population of endangered Victoria Owl-clover is found in Greater Oak Bay and these islands – with most of the population found on

¹ Sea otters were sighted in 2006 and 2014. The area is home to two marine apex predators, two ecotypes of orcas, endangered southern residents and threatened transient (Bigg’s Whales) orcas, plus five other species of whales, dolphins and porpoises (humpback, grey, minke, Pacific white-sided Dolphin, harbour porpoise). In addition, a Northern right whale dolphin has been sighted, as well as an Orca Superpod (J+K+L pods). Personal communication, Jacques Sirois, Warden, Trial Island Ecological Reserve.

² “The critical habitat for southern resident killer whales includes the transboundary areas of southern British Columbia and Washington State. These include Haro Strait and Boundary Pass and adjoining areas in the Strait of Georgia and the Strait of Juan de Fuca...This area represents a very important concentration area for southern resident killer whales.” *Recovery Strategy for the Northern and Southern Resident Killer Whales (Orcinus orca)* in Canada, Species at Risk Public Registry, online: http://www.sararegistry.gc.ca/document/doc1341a/p3_e.cfm#s3_1_1

³ Note that 500-600 of threatened marbled murrelets were documented in January 2010. Personal communication, Jacques Sirois, Warden, Trial Islands Ecological Reserve.

⁴ BC Parks, Trial Islands Ecological Reserve, online: http://www.env.gov.bc.ca/bcparks/planning/mgmtplns/trial_isle/trial_ps.pdf

Trial Island.⁵ A coastal wolf has lived on Tl'ches (Chatham/Discovery Islands) for the last two and one half years.

A trip to these islands is like a trip back in time; the ecological communities that survive on these islands offer a glimpse into what the rest of Greater Victoria would still look like were it not for the pressures of human development. These islands offer a rare opportunity to research the natural landscape of this area, in order to help return the Capital Region District to its natural habitat as much as possible.

The islands are located within the Coast Salish territories.⁶ The Songhees First Nation holds Indian Reserve land on Tl'ches (which includes Chatham/Strongtide/ Vantreight Islands and half of Discovery Island).⁷ These islands are of particular cultural, societal and spiritual significance to the Songhees First Nation; members of the Songhees First Nation continue to use the area for Camas bulb harvesting, gathering of medicinal plants, fishing and other culturally significant activities.⁸ Chatham Island is a recognized sacred burial ground and there are sacred healing sites on the islands. All the Songhees Islands are said to be the new home to the spirit of the recently deceased Chief of the Songhees Nation -- who some say was reincarnated as a wolf to protect the islands two years ago. In the near future, the Songhees First Nation would like to establish culturally-sensitive tourism opportunities on the Songhees Islands to promote their culture and demonstrate their ecological conservation. These tourism operations could include a Long House Interpretive Centre, kayak tour groups, pit-roast feasts and educational story-telling.

1.2 Existing Designations⁹

The islands off of Oak Bay are now partially protected by special designations at the provincial, national, and international level – all of which recognize the unique nature of the area. Existing designations include:

⁵ Personal communication, Jacques Sirois, Warden, Trial Islands Ecological Reserve.

⁶ The Oak Bay Islands area is also subject to modern land claims taking place through the B.C. treaty process. In early April 2015, the Te'mexw Treaty Association representing the five southern Vancouver Island First Nations (Beecher Bay, Malahat, Nanoose, Songhees, and T'Sou-ke First Nations), signed an agreement-in-principle on a treaty that has been in negotiation for more than two decades. The Agreement-in-Principle covers issues of governance, taxation and land. The parties are now in the "final agreement" stage of the B.C. treaty process and a final treaty is expected sometime within the next decade. This paper does not address the implications of treaty negotiations on potential protected area designations.

⁷ Tl'ches is the Lekwungen name for "one island". Briony Penn, "Restoring Camas and Culture to Lekwungen and Victoria: An interview with Lekwungen Cheryl Bryce", June 2006, Focus Magazine, online: <http://www.firstnations.de/media/06-1-1-camas.pdf>

⁸ This information was taken from personal correspondence with Joan Morris and Mark Salter from the Songhees First Nation in April 2015. The ELC would like to acknowledge the generous help and support from both Joan Morris and Mark Salter.

⁹ For maps of the existing designations, see Appendix C.

- Three provincial Ecological Reserves (Trial Islands, Oak Bay Islands, and Ten-Mile Point);
- A BC Provincial Marine Park on half of Discovery Island;
- A federal Migratory Bird Sanctuary¹⁰;
- A designated Important Bird Area (IBA) of global significance¹¹;
- Three Rockfish Conservation Areas;
- A Municipal park on Mary Todd Island; and
- Two historic lighthouses on Trial and Discovery Islands.¹²

Taken together, these designations form a confusing patch-work of jurisdictional boundaries and legal protections across the Oak Bay islands region. The provincial government manages three ecological reserves as well as the Discovery Island Provincial Marine Park. The federal Department of Environment is responsible for overseeing the Migratory Bird Sanctuary and the DFO is in charge of protecting important fish habitat. The Municipality of Oak Bay maintains a municipal park on Mary Todd Island and has municipal jurisdiction over the Oak Bay marina, which is a marine gateway to the area. All the while, the entire islands region exists within Coast Salish traditional territory, including the Songhees First Nation which has reserve land on four of the islands. Outside of government agencies, the Important Bird Area is supported by the Regional Caretaker Network monitoring efforts¹³ and the Friends of Oak Bay Islands group has a keen interest in protecting the area.

In sum, there are many parties involved and interested in the Oak Bay Islands area -- but without coordination, conservation efforts fall short. The disjointed oversight of these islands makes it confusing for members of the public to understand what activities are permitted where -- and whom to contact when an issue arises.

¹⁰ Victoria Harbour Migratory Bird Sanctuary, for more information see online: <http://www.ec.gc.ca/ap-pa/default.asp?lang=En&n=148670C8-1>

¹¹ Chain Islets and Great Chain Islet, for more information see online: <http://www.ibacanada.ca/site.jsp?siteID=BC045&lang=EN>

¹² The Trial Island Lighthouse was designated a Heritage Lighthouse in May 2015. See: <https://www.facebook.com/trialislandlighthouse>

¹³ The current Site Caretaker of the Chain Islets IBA is Marilyn Lambert, for more information on the Regional Caretaker Network see: http://www.ibacanada.ca/care_program.jsp?lang=en

1.3 Current Concerns

As a result of these uncoordinated protection efforts, the islands are currently threatened by environmental degradation, vandalism and overuse. Damage to the natural habitats on the islands and in the surrounding waters occurs as a result of boating, over-fishing, and off-trail recreation. There are accounts of members of the public disturbing sensitive migratory bird breeding grounds and trampling rare plant assemblages while camping illegally within ecological reserves. Meanwhile, invasive plant species are outcompeting native species and are spreading across the islands. Of particular concern are reports of vandalism to the Songhees First Nation reserve on all of the Songhees Islands of Chatham, Vantreight, Strongtide and Discovery.¹⁴ These environmental problems may soon be exacerbated by the anticipated increase in tanker traffic from new pipelines such as the Kinder Morgan proposed pipeline expansion. For example, when approximately 1000 “drift cards” were distributed along the proposed oil tanker route, at least seven cards were retrieved in the Oak Bay Islands area.¹⁵

More needs to be done to restore and enhance the ecological jewel of the Oak Bay Islands. For example, monitoring of human activities needs to be enhanced. Expanded and concerted efforts to remove the invasive exotic plants that threaten the Garry Oak habitats and maritime meadows are needed. Every effort needs to be made to restore the herring, which are foundational to the marine food web.

In considering these issues, we can be inspired by what the US and Washington State governments are doing on their side of Haro Strait – where they have designated a special marine conservation area, no-take zones for sea urchins and sea cucumbers, and designated the San Juan Archipelago as a National Monument -- with robust enforcement with both boats and helicopters.¹⁶

1.4 Gaps in Enforcement

The disjointed, sometimes conflicting, network of conservation designations within the Oak Bay Islands region results in serious gaps in enforcement. Most of the area is not protected by any

¹⁴ There are reports of garbage, vandalism, and entire fridges being left ashore. The Songhees suggest that this damage was likely caused by visitors to the Discovery Island Provincial Park on the southern half of the island. Songhees First Nation by-law officer Trevor Absolon patrols the reserve lands and removes harmful debris, such as Styrofoam, from the area. For more information see the following news items:

<http://www.oakbaynews.com/news/164506006.html>; <http://www.oakbaynews.com/news/167044115.html>;

<http://www.timescolonist.com/news/local/bylaw-officers-eyeing-chatham-island-trespassers-1.113178>

¹⁵ Personal communication, Jacques Sirois, Warden, Trial Islands Ecological Reserve. Raincoast Conservation Foundation and Georgia Strait Alliance dropped over 1000 small drift cards (4" x 6" pieces of bright yellow plywood, each with a unique serial number) at locations of higher risk of incident along the oil tanker route that runs from Burrard Inlet, through the Gulf and San Juan Islands and out into the Strait of Juan de Fuca. When the drift cards are found and reported, their recovery locations will help map the paths oil spills might take, and how far the oil could travel.

¹⁶ Personal communication, Jacques Sirois, Warden, Trial Islands Ecological Reserve.

special protective legal designation -- while the areas that are legally protected areas are under-enforced. This has the practical outcome of allowing environmental and cultural damage to occur without legal deterrence.

At present, enforcement on the islands is primarily done by wardens who are responsible for monitoring each of the three provincial Ecological Reserves.¹⁷ These wardens work hard to protect the islands, but they are under-resourced and do not have strong legal enforcement powers. The Discovery Island Provincial Park is patrolled by BC Park Rangers who are limited to managing the campground and recreation areas within the park. Members of the Songhees First Nation have begun to monitor their land, in response to trespass and vandalism on their reserve lands.

Under the *Migratory Bird Convention Act*, “any activity that is harmful to migratory birds or the eggs, nests or habitat of migratory birds”¹⁸ is prohibited within a Migratory Bird Sanctuary. Although the islands off of Oak Bay are located within a Migratory Bird Sanctuary, the Canadian Wildlife Service does not actively patrol the area or often enforce this provision. While the Important Bird Area designation is important in raising awareness of the breeding areas on the Chain Islands, it does not actually provide legal protection for the area. Rockfish Conservation Areas were created by Fisheries and Oceans Canada in response to low levels of rockfish as a result of overfishing¹⁹, especially within the inland waters of Vancouver Island.²⁰ Inshore rockfish are “protected from all mortality associated with recreational and commercial fisheries.”²¹ Unfortunately, there is no effective monitoring or enforcement within the three Rockfish Conservation Areas located in the Oak Bay Islands area -- which allows rockfish fishing to continue.

On the whole, enforcement efforts lack co-ordination and do not provide complete protection of the islands area.

In addition, the lack of protective designations means that the resources devoted to restoration and protection of the area are inadequate. For example, currently a number of volunteers are engaged in trying to remove invasive species from the islands -- but efforts are hampered by a lack of simple resources (like the availability of a boat dedicated to supporting conservation efforts).

¹⁷ There are four wardens on Trial Islands Ecological Reserve, one for Oak Bay Islands Ecological Reserve, and none for Ten-Mile Point Ecological Reserve.

¹⁸ Migratory Bird Sanctuary Regulations, CRC, c. 1036, s. 10(1).

¹⁹ Rockfish suffer from barotrauma, or “pressure shock”, which contributes to their decline. For an informative video, see: <https://www.youtube.com/watch?v=EiZFghwVOyl>

²⁰ Department of Fisheries and Oceans, Rockfish Conservation Strategy, p. ii, online: http://www.pac.dfo-mpo.gc.ca/fm-gp/maps-cartes/rca-acb/booklet-livret/RCA_booklet_2007.pdf

²¹ Department of Fisheries and Oceans, Rockfish Conservation Strategy, p. ii, online: http://www.pac.dfo-mpo.gc.ca/fm-gp/maps-cartes/rca-acb/booklet-livret/RCA_booklet_2007.pdf

1.5 Aim and Scope of this Report

Given these issues with the current set of conservation areas and management structures, the aim of this report is to canvas possible designations to better protect these islands and surrounding waters -- while respecting First Nations land uses, cultural sites, rights and title.²² This report canvasses the legal designations available at the provincial and federal levels of government and also explores the options available outside of the Canadian government system. These designations are then evaluated to analyze: 1) their impact on existing designations; 2) how they can accommodate First Nations land use and governance; 3) overall benefits; and 4) overall drawbacks.

This report is meant to provide interested parties (community organizations, First Nations and government agencies) with background information on each designation option and how each option could apply to the area. It is also meant to initiate a discussion and encourage collaborations amongst these groups.

Part II: Provincial Designations

2.1 Provincial Park

Description

Provincial parks are set aside under the BC *Park Act* for various statutory *purposes*, including conservation and recreation. Purposes of different parks can vary, but possible designated purposes include: preservation of a park's particular atmosphere, environment or ecology; preservation and presentation to the public of specific features of scientific, historic or scenic nature; offering enjoyment, convenience and comfort to the travelling public; offering recreational opportunity to the public of a particular community or area; or offering opportunities to participate in a specific recreational activity.²³ "Parks are established by the Province by order-in-council under section 5(1)(a) of the *Act*, or by inclusion in a schedule to the *Protected Areas of British Columbia Act (PABCA)*."²⁴ BC Parks are under the administration of the BC Ministry of Environment, which can subsequently cancel the park or modify its boundaries, unless it is listed in a schedule to the *PABCA*.²⁵

"A provincial park may be assigned to one of three 'classes' and one of six 'categories'. Most BC parks are Class A parks.²⁶ The classes (A, B and C) are largely similar, though it is easier to

²² This report does not serve as legal advice or as a specific recommendation to any particular party. While this report provides a summary of potential designation options, the desirability of each designation depends on the particular circumstances.

²³ *Park Act*, s.12(1).

²⁴ TNC Canada, "Legal Tools for Protecting First Nations Land in BC", November 2014.

²⁵ *Park Act*, s.7.

²⁶ BC Parks, Summary of the Parks and Protected Areas System, online: http://www.env.gov.bc.ca/bcparks/aboutBCParks/prk_desig.html

issue permits to carry out otherwise prohibited activities in a Class B park. The ‘categories’ are based on the primary purpose for which the park is set aside, such as ecological preservation or recreation²⁷,²⁸

Protections²⁹

Logging and mining are not allowed in parks.³⁰ Generally, any development or improvement of the park must be directed towards its designated park *purpose*. It is generally forbidden to carry on any activity within a park that will restrict, prevent or inhibit its use for the designated park *purpose*.³¹ Special permits are required before many potentially harmful activities can take place, such as building construction, garbage dumping, use of natural resources and most commercial and industrial activities.

The Province has the discretion to issue permits to authorize otherwise prohibited activities within a park. However, this discretion is not absolute -- the Minister may only issue a permit if in the Minister’s opinion it is “necessary to preserve or maintain the recreational values of the park involved” (in a Class A or C park), or “not detrimental to the recreational values of the park concerned” (in a Class B park).³²

Generally no one can acquire property rights in park land without a special permit.³³

In addition, provincial park designation provides the following general protections:

- It is an offence to take, damage or destroy plants, flowers, trees, animals, fossils, rocks, or other natural resources from a park without authorization. It is generally illegal to remove things from a park, except when a park use permit allows for it (except for fish and wildlife taken while following applicable laws).³⁴
- It is an offence to feed wildlife in a park.³⁵

²⁷ *Park Act*, s.12(1).

²⁸ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

²⁹ These bulleted points are taken from *Environmental Laws: A Field Guide for BC’s North and Central Coast and Haida Gwaii*, May 2011, Environmental Law Centre

³⁰ *Park Act*, s.9(10). Note that generally it is also an offence to salvage (non-manufactured) logs in a park area.

³¹ *Park Act*, ss.12(2) and (3).

³² *Park Act*, ss.9(1)-(4). Note that Park use permits may also be issued for activity that qualifies as “research” -- With the passing of Bill 4, the *Park Amendment Act*, in March of 2014, the government can now issue permits for research. See Bill 4 – Park Amendment Act, 2014: 2nd sess, 40th Parl, online at: https://www.leg.bc.ca/40th2nd/1st_read/gov04-1.htm. Given that the term “research” is not defined in the Act, it is possible that the Minister may allow research activities that do not support park values such as exploratory activities for pipelines -- Mark Hume, “B.C. parks bill’s ambiguity on ‘research’ opens door to exploitation, critics say”, March 30, 2014, *The Globe and Mail*, online: <http://www.theglobeandmail.com/news/british-columbia/bc-parks-bills-ambiguity-on-research-opens-door-to-exploitation-critics-say/article17731983/>.

³³ *Park Act*, s.25.

³⁴ *Park Act*, s.9(1).

³⁵ *Park, Conservancy and Recreation Area Regulation*, BC Reg. 180/90, [PCRAR] s.30.

- It is an offence to cause an unnecessary disturbance in a park. Disturbances can include: excessive noise, shouting or swearing; drunkenness; impeding or molesting people; indecent exposure; firing a gun at night; racing vehicles around a campground etc.³⁶
- A person must not conduct a business or industry – or conduct construction -- in a park without a special permit.³⁷
- Special permits are generally required for commercial uses in parks. Companies that organize or lead hikes, skiing, wildlife viewing, kayaking and canoeing tours, airplane tours, SCUBA diving or guiding for hunting and fishing in a park need special permits.
- A person cannot generally stay in a park for more than 14 days.³⁸

Fires

- In general, a person must not have a fire in a park except in a government-provided fireplace, and all fires must be put out before leaving the area.³⁹

Hunting

- Although hunting may be allowed in parks⁴⁰, many parks close hunting activities under the *Wildlife Act*.⁴¹
- *Wildlife Act* hunting closures are subject to Aboriginal rights and title.
- A park use permit is required for guided hunting and fishing activities in a park.
- It is an offence to have a firearm or bow outside of a vehicle, except during a designated open hunting season for that park.⁴²

Enforcement

BC Park Rangers, within the Ministry of Environment, are responsible for enforcing the *Park Act*.⁴³ A person who contravenes any provision of this Act commits an offence and is liable to a fine of up to \$1 000 000 or a term of imprisonment of not more than one year or both.⁴⁴

As noted above, a marine Provincial Park already exists on Discovery Island. It was established in 1972 and covers 61 hectares on the northern portion of the island. BC Parks encourages hiking, camping, and recreation on the island. It has been noted that monitoring and enforcement

³⁶ *PCRAR*, s.8.

³⁷ *Park Act*, s.16.

³⁸ Except with permission from a park officer or in a designated long-stay campsite, *PCRAR*, s.39.

³⁹ *PCRAR*, s.11.

⁴⁰ *Park Act*, s.9.

⁴¹ *Wildlife Act* Closed Areas Regulation, BC Reg. 76/84.

⁴² *PCRAR*, s.28.

⁴³ *Park Act*, s.4(2).

⁴⁴ *Park Act*, s.28(1).

of the Discovery Island Marine Provincial Park by BC Parks is limited; this lack of enforcement contributes to the environmental degradation of Discovery Island and its surrounding waters.

Analysis

Impact on Existing Designations

The existing Discovery Island Marine Provincial Park has a limited impact in the region as it only covers half of Discovery Island. It is possible that this provincial park could be extended, as the Province may modify park boundaries under section 7 of the *Park Act*. Alternatively, a new marine provincial park could be created to encompass the area under discussion. The portions of the islands currently designated as Ecological Reserves would likely be excluded from this provincial park because provincial lands can be protected as either provincial parks or ecological reserves (but not both). An expanded or new provincial park would not affect any of the other existing designations in the area (*i.e.*, Migratory Bird Sanctuary, Important Bird Area, Rockfish Conservation Area).

How can Provincial Parks accommodate First Nations land use and governance?

Under section 4(2) of the *Park Act*, the Province may enter into “agreements with First Nations so as to allow them to carry out any activities necessary for the exercise of their aboriginal rights on park land, or to have access to the land for social, ceremonial and cultural purposes.” Section 4.1(e) allows the Minister to enter into agreements relating to the administration and management of a park. This creates an opportunity for First Nations to negotiate agreements allowing co-management of parks. For example, the Stein Valley Nlaka’pamux Heritage Park was created in 1995 and is co-managed by the Lytton First Nation and the Province.⁴⁵ The Management Board includes an equal number of representatives from the Lytton First Nation and the Province. Members of the Lytton First Nation may continue to harvest resources for traditional ceremonial, societal and cultural purposes, as well as for sustenance. Other examples of co-management agreements include Pinecone Burke (Katzie Band), Say Nuth Khaw Yum/ Indian Arm Provincial Park (Tsleil-Waututh Nation)⁴⁶ and Ts’il’os (Xeni Gwet’in Nation)⁴⁷, to

⁴⁵ BC Parks, Stein Valley Park Management Plan, online:

http://www.env.gov.bc.ca/bcparks/planning/mgmtplns/stein/final_mgnt.pdf

⁴⁶ Tsleil-Waututh Nation, BC Parks, Say Nuth Khaw Yum / Indian Arm Provincial Park Management Plan, February 2010, online:

http://www.twnation.ca/en/About%20TWN/Stewardship/~/_media/Files/SNKY_ParkManagementPlan_Feb10.ashx

⁴⁷ BC Parks, Ts’il’os Provincial Park Master Plan, online:

http://www.env.gov.bc.ca/bcparks/planning/mgmtplns/tsilos/tsilos_mp.pdf

name a few of the 37 such agreements.⁴⁸ Under the *Park Act* the Minister can appoint First Nations members to be park rangers, among other things.⁴⁹

Benefits of Provincial Parks

Provincial parks attract relatively strong environmental protections, especially if the park is initially designated for conservation purposes (rather than for recreation or other non-conservation purposes).⁵⁰ BC Parks encourages awareness of the natural habitat through public education initiatives and by providing accessible outdoor facilities. This kind of public engagement improves conservation goals. Another benefit is that First Nations can negotiate with the Province to allow them to exercise their aboriginal rights on park land and to establish co-management of the park, as seen in the Stein Valley example mentioned above.

Drawbacks of Provincial Parks

Depending on the substance of the individualized park management plan, provincial parks may not provide the most robust protection of the environment when compared with other designations. Some BC Parks are created for recreational use to encourage more visitors to the area; without proper monitoring, enforcement and public education, increased park use could potentially exacerbate the environmental degradation of the Oak Bay Islands by increasing trampling of rare plants, disturbing bird nesting areas, etc. In addition, as noted above, in certain circumstances the Province has the power to issue special permits that could authorize environmentally harmful activities in parks.

From a First Nations perspective, there may be concerns regarding limited access and use of lands designated as provincial parks. However, these concerns could potentially be addressed by First Nations negotiating a co-management agreement with the province to allow First Nations communities to access the land and/or to co-manage the park. Much could be learned from discussion with the First Nations and government officials who established the co-management agreements listed in Appendix A.

2.2 Conservancy

Description

Conservancies, a new category of provincial protected area established in 2006⁵¹, are similar to provincial parks in many ways. They are established by an order in council under the *Park Act* or

⁴⁸ For a complete list of co-management agreements in BC, see Appendix A.

⁴⁹ See ss. 4(2), s. 4.1(e) and s. 4.2 of the *Park Act*.

⁵⁰ Section 9(1) of the *Park Act* offers one of the most robust protections of natural resources and wildlife of any designation.

⁵¹ *Park Act*, s.12.

by inclusion in a schedule to the Protected Areas of British Columbia Act. Pursuant to section 5(3.1) of the *Act*, conservancies are set-aside for four distinct purposes:

1. "...the protection and maintenance of their biological diversity and natural environments";
2. "...the preservation and maintenance of social, ceremonial and cultural uses of First Nations";
3. "...the protection and maintenance of their recreational values"; and,
4. "...to ensure that development or use of their natural resources occurs in a sustainable manner consistent" with the first three purposes.

One of the primary purposes of conservancies is to protect and maintain First Nations social, ceremonial and cultural uses of the land.⁵² First Nations can continue traditional practices within conservancies and can pursue conservation-based commercial activities such as "wildlife viewing, guided-fishing, small-scale hydro for local needs, and cultural tourism."⁵³

Conservancies also allow for protection of specific sites on the land with cultural significance such as village sites, burial sites, and any other location with "significant oral history, knowledge and stories."⁵⁴ Conservancies are collaboratively managed by both First Nations and the Province; this team works together to identify potential areas for conservancy classification and, once identified, to establish a Conservancy Management Plan.⁵⁵

Protections

Environmental protections within a conservancy are similar to those listed above for provincial parks with a few additional provisions. Logging, mining and large hydroelectric power activities are not generally allowed in conservancies.⁵⁶ Natural resources in a conservancy cannot be granted, sold, removed, destroyed, disturbed, damaged, or exploited -- unless, in the Minister's opinion, doing so will not hinder the development, use and improvement of the conservancy.⁵⁷ Additionally, the Minister cannot issue permits to authorize natural resource uses that would hinder the use of the conservancy for its intended purposes.⁵⁸

⁵² Coastal First Nations, Keeping the Land: Conservation that Protects Our First Nations Values, online: http://www.coastalfirstnations.ca/sites/default/files/imce/Fact_Sheet_4.pdf

⁵³ Coastal First Nations: Great Bear Initiative, Great Bear Rainforest, online: <http://coastalguardianwatchmen.ca/great-bear-rainforest>

⁵⁴ Coastal First Nations, Keeping the Land: Conservation that Protects Our First Nations Values, online: http://www.coastalfirstnations.ca/sites/default/files/imce/Fact_Sheet_4.pdf

⁵⁵ Turner and Bitonti, Conservancies in British Columbia, Canada: Bringing Together Protected Areas and First Nations' Interests, *International Indigenous Policy Journal*, Volume 2(3), online: <http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1054&context=iipj>

⁵⁶ Unless, in the opinion of the minister, the activity will not restrict, prevent or inhibit the development, improvement or use of the conservancy in accordance with the four distinct conservancy purposes set out in section 5 (3.1) described above. See *Park Act*, s.9(10).

⁵⁷ *Park Act*, s.9(9).

⁵⁸ *Park Act*, s.9(9).

As noted above, conservancies accommodate First Nations land uses and allow for lower-impact sustainable resource harvesting and conservation-based commercial activities. Thus protections in conservancies are similar to parks but they allow for lower-impact sustainable resource harvesting, while prohibiting high-impact activities such as mining.

Generally no one may acquire property rights in conservancy land without a special permit.⁵⁹

Among other things, Conservancy designation provides the following general protections⁶⁰:

- It is an offence to take, damage or destroy plants, flowers, trees, animals, fossils, rocks, or other natural resources from a conservancy without authorization.
- It is an offence to feed wildlife in a conservancy area.⁶¹
- It is an offence to cause an unnecessary disturbance in a conservancy. Disturbances can include: excessive noise, shouting or swearing; drunkenness; impeding or molesting people; indecent exposure; firing a gun at night; racing vehicles around a campground etc.⁶²
- A person must not conduct a business or industry – or conduct construction -- in a conservancy without a special permit.⁶³
- Special permits are generally required for commercial uses in conservancies. Companies that organize or lead hikes, skiing, wildlife viewing, kayaking and canoeing tours, airplane tours, SCUBA diving or guiding for hunting and fishing in a park or conservancy need to have special permits to do so.
- A person cannot stay in a conservancy for more than 14 days.⁶⁴

Fires

- In general, a person must not have a fire in a conservancy except in a government-provided fireplace and all fires must be put out before leaving the area.⁶⁵

Hunting

- Although hunting may be allowed in conservancies⁶⁶, hunting activities can be closed under the *Wildlife Act*.⁶⁷
- *Wildlife Act* hunting closures are subject to Aboriginal rights and title.

⁵⁹ *Park Act*, s.25.

⁶⁰ Bulleted points taken from *Environmental Laws: A Field Guide for BC's North and Central Coast and Haida Gwaii*, May 2011, Environmental Law Centre

⁶¹ *Park, Conservancy and Recreation Area Regulation*, BC Reg. 180/90, [PCRAR] s.30.

⁶² PCRAR, s.8.

⁶³ *Park Act*, ss. 13 and 16.

⁶⁴ Except with permission from a park officer or in a designated long-stay campsite PCRAR, s.39.

⁶⁵ PCRAR, s.11.

⁶⁶ *Park Act*, s.9.

⁶⁷ *Wildlife Act* Closed Areas Regulation, BC Reg. 76/84.

- A park use permit is required for guided hunting and fishing activities in a park, conservancy or recreation area.
- It is an offence to have a firearm or bow outside of a vehicle, except during a designated open hunting season for that conservancy.⁶⁸

Example

The Great Bear Rainforest (GBR) initiative is a noteworthy example that highlights the value of establishing conservancies. The Rainforest area stretches across 64,000 km² along British Columbia's mainland coast and is home to representative coastal species, including the rare and iconic Kermode or spirit bear.⁶⁹ It is one of the largest remaining expanses of coastal temperate rainforest and is some of the most productive and biologically diverse on the planet.⁷⁰ This diverse and productive area "has supported the rich cultures of 25 different First Nations since time immemorial. Today First Nations living in small remote communities up and down the coast rely on the abundance of the land and sea for traditional food, social and ceremonial uses, from medicinal plants to local food sources such as roe on kelp, salmon and deer."⁷¹

In the 1990s, the GBR region of the BC coast became the focus of an intense land-use dispute among the logging industry, environmentalists and First Nations. Eventually, coalitions of these various stakeholder groups were formed (including the Coastal First Nations, or CFN). These coalitions agreed to work together to develop solutions and present them jointly to government. Individual First Nations developed land use plans for their traditional territories, which then formed part of subsequent negotiations. The "Ecosystem Based Management" (EBM) approach adopted by the parties as the framework for their land use planning specifically emphasized both ecological conservation and "human wellness" – for example, by promoting initiatives to support First Nations sustainable economic development within the GBR. A decade later -- after years of negotiations involving First Nations, environmentalists, industry, and government -- a series of land and resource agreements between First Nations and the Province were successfully finalized in 2006.⁷²

As a result of these agreements, 1.92 million hectares of the rainforest is now protected from commercial logging in conservancies. An additional 19 million acres are under ecosystem-based management, "an adaptive approach to managing human activities that seeks to ensure the

⁶⁸ *PCRAR*, s.28.

⁶⁹ Patrick Armstrong, "Conflict Resolution and British Columbia's Great Bear Rainforest: Lessons Learned 1995-2009" at p 4, online: http://www.coastforestconservationinitiative.com/pdf7/GBR_PDF.pdf

⁷⁰ The Nature Conservancy, Canada: Great Bear Rainforest, online: www.nature.org/ourinitiatives/regions/northamerica/canada/placesweprotect/great-bear-rainforest.xml

⁷¹ Coastal First Nations: Great Bear Initiative, Great Bear Rainforest, online: <http://coastalguardianwatchmen.ca/great-bear-rainforest>

⁷² Patrick Armstrong, "Conflict Resolution and British Columbia's Great Bear Rainforest: Lessons Learned 1995-2009" at p 3, online: http://www.coastforestconservationinitiative.com/pdf7/GBR_PDF.pdf

coexistence of healthy, fully functioning ecosystems and human communities.”⁷³ Many First Nations are implementing Guardian Watchmen Programs (more recently changed to Resource Stewardship Programs within the Coastal Stewardship Network) to ensure these land and resource agreements are adequately enforced.⁷⁴ Guardian Watchmen “monitor the health of important food, social and ceremonial species and the impacts of various resource uses throughout their territory. They work in forestry, fisheries, and parks and contribute to the successful implementation of land and marine use plans and other sustainable resource management initiatives.”⁷⁵

A key component of this agreement was the establishment of a series of conservancies along the coast. In total, the Great Bear Area includes 115 conservancies and 18 Class “A” parks.⁷⁶ As one example, the Moksgm’ol/Chapple-Cornwall Conservancy covers Princess Royal Island located in the traditional territories of the Gitga’at and Gitxaala First Nations. It provides strong environmental protection for a tract of old-growth rainforest which is important habitat for wolves, eagles, bears, and many species of salmon. The conservancy also protects an area of major cultural significance that has been used by local First Nations for millennia for harvesting, fishing and other traditional resource-uses.⁷⁷ The Gitga’at have established ecotourism operations and lodges in the surrounding area and are considering expanding into the Moksgm’ol/Chapple-Cornwall Conservancy.⁷⁸

Enforcement

BC Park Rangers, within the Ministry of Environment, are responsible for monitoring conservancies and enforcing the *Park Act*.⁷⁹ Under the *Park Act* the Minister can appoint First Nations members to be park rangers in conservancies.⁸⁰ As a result of increased First Nations

⁷³ Patrick Armstrong, “Conflict Resolution and British Columbia’s Great Bear Rainforest: Lessons Learned 1995-2009” at p 14, online: http://www.coastforestconservationinitiative.com/pdf7/GBR_PDF.pdf

⁷⁴ Coastal First Nations: Great Bear Initiative, Great Bear Rainforest, online: <http://coastalguardianwatchmen.ca/great-bear-rainforest>

⁷⁵ Coastal First Nations: Great Bear Initiative, Guardian Watchmen Programs, online: <http://coastalguardianwatchmen.ca/guardian-watchmen-programs>

⁷⁶ Rainforest Solutions Project “About Our Work: Protected Areas”, online: http://savethegreatbear.org/region/protected_areas

Note that the same statistical information varies slightly in Patrick Armstrong, “Conflict Resolution and British Columbia’s Great Bear Rainforest: Lessons Learned 1995-2009” at p 14, online:

http://www.coastforestconservationinitiative.com/pdf7/GBR_PDF.pdf

⁷⁷ Turner and Bitonti, Conservancies in British Columbia, Canada: Bringing Together Protected Areas and First Nations’ Interests, *International Indigenous Policy Journal*, Volume 2(3), online: <http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1054&context=iipj>

⁷⁸ Gitga’at First Nation and the Province of British Columbia. June 23, 2006. Strategic land use planning Agreement, online: http://coastalfirstnations.ca/files/Documents/Gitgaat_FN_SLUPA.pdf

⁷⁹ *Park Act*, s.4(2).

⁸⁰ See ss 4(2), s. 4.1(e) and s. 4.2 of the *Park Act*.

involvement in conservancies, many First Nations also implement Guardian Watchmen Programs (aka Resource Stewardship programs) that ensure their own legal traditions are adequately enforced.⁸¹ Guardian Watchmen “monitor the health of important food, social and ceremonial species and the impacts of various resource uses throughout their territory. They work in forestry, fisheries, and parks and contribute to the successful implementation of land and marine use plans and other sustainable resource management initiatives.”⁸²

Analysis

Impact on Existing Designations

A Conservancy could be established to provide more cohesive and thorough protection for the entire islands area under discussion. This conservancy could replace the Discovery Island Provincial Park, as allowed under the *Park Act*⁸³, and would complement existing ecological reserves. The establishment of an Oak Bay Island Conservancy would not undermine other designations; the Migratory Bird Sanctuary, the Important Bird Area, and the Rockfish Conservation Areas could all exist within a broader Conservancy.

How can Conservancies accommodate First Nations land use and governance?

As mentioned above, conservancies allow for First Nations land use and co-management of conservancies through Conservancy Management Plans. Conservancy agreements can mandate the hiring of First Nations members as park rangers. For example, under the Kitlope Conservancy agreement, Haisla park rangers are appointed and fulfill the necessary training requirements through the B.C. Institute of Technology, as required under the *Park Act*.

Benefits of Conservancies

The *Park Act* conservancy provisions explicitly recognize First Nations social, ceremonial and cultural land uses; they also allow for co-management of the area through a government-to-government decision-making model between First Nations and the Province regarding land use and management planning.⁸⁴ Given the cultural significance of the Oak Bay islands to local First Nations, this designation could be appropriate. A conservancy would allow local First Nations to pursue cultural, eco-tourism, similar to the venture established by the Gitga’at in the Great Bear Rainforest. Additionally, improved enforcement could be achieved through a model similar to the Coastal Guardian Watchmen Network, or by hiring more First Nations members as Park Rangers.

⁸¹ Coastal First Nations: Great Bear Initiative, Great Bear Rainforest, online: <http://coastalguardianwatchmen.ca/great-bear-rainforest>

⁸² Coastal First Nations: Great Bear Initiative, Guardian Watchmen Programs, online: <http://coastalguardianwatchmen.ca/guardian-watchmen-programs>

⁸³ *Park Act*, s.5(5).

⁸⁴ Patrick Armstrong, “Conflict Resolution and British Columbia’s Great Bear Rainforest: Lessons Learned 1995-2009” at p 6, online: http://www.coastforestconservationinitiative.com/pdf7/GBR_PDF.pdf

However, it is important to note that provincial parks can also allow for co-management agreements that allow for First Nations land use and co-management. The main difference between conservancies and provincial parks is that conservancies explicitly recognize First Nations social, ceremonial and cultural uses of the land within the statute; provincial parks can also accommodate these uses of land through the negotiation of a co-management agreement.

Drawbacks of Conservancies

Although conservancies are a powerful protective tool, they are not a perfect way of protecting nature. Even with their strong restrictions on industrial activities, the Minister is able to authorize some potentially harmful activities under the *Park Act*, subject to the constraints described above. In fact, it is arguable that conservancies offer somewhat weaker protection of natural resources than do Class A Provincial Parks.⁸⁵ Conservancies allow for small-scale commercial activities such as “wildlife viewing, guided-fishing, small-scale hydro for local needs, and cultural tourism.”⁸⁶ Also, it should be noted that on the Central Coast of BC, government has allowed activities opposed by First Nations (i.e., grizzly hunting) within conservancies.⁸⁷

Finally, the negotiations required to establish a conservancy may be lengthy which may not be desirable given the environmental damage already taking a toll on the Oak Bay Islands area.⁸⁸

2.3 Ecological Reserve

Description

Ecological reserves are one of the strongest and most focused *conservation* designations available within British Columbia. Their purpose is “to reserve areas of Crown land for ecological purposes, encompassing land that may have important scientific, educational,

⁸⁵ The test under s. 9(9) of the *Park Act* referring to uses in conservancies is more lenient to resource extraction than the test regarding the protection of natural resources in s. 9(1). Section 9(1) reads: “A natural resource other than fish and wildlife taken, hunted or killed in accordance with the *Wildlife Act* and fish, game or wildlife stalked or pursued for observation or for photographic or study purposes, in a Class A or Class C park must not be granted, sold, removed, destroyed, damaged, disturbed or exploited except as authorized by a valid and subsisting park use permit.” Section 9(9) states, “A natural resource in a conservancy must not be granted, sold, removed, destroyed, disturbed, damaged or exploited unless, in the opinion of the minister, the development, improvement and use of the conservancy in accordance with section 5 (3.1) will not be hindered by it.”

⁸⁶ Coastal First Nations: Great Bear Initiative, Great Bear Rainforest, online:
<http://coastalguardianwatchmen.ca/great-bear-rainforest>

⁸⁷ A complete list of areas within British Columbia that are closed to hunting can be found in the Closed Areas Regulation, under the *Wildlife Act*, online:
<http://www.bclaws.ca/civix/content/complete/statreg/901199259/96488/reg96488/748081219/?xsl=/templates/browse.xsl>

⁸⁸ The Great Bear was a long time in the making and required all stakeholders to cooperate: “it took more than a decade of conflict, negotiation and planning to find the path to [the Great Bear Rainforest conservancy agreement between First Nations, industry, environmentalists and local governments]”. Patrick Armstrong, “Conflict Resolution and British Columbia’s Great Bear Rainforest: Lessons Learned 1995-2009” at p 3, online:
http://www.coastforestconservationinitiative.com/pdf7/GBR_PDF.pdf

ecological, and cultural values.”⁸⁹ The Province may designate Crown land as an ecological reserve under section 3(1) of the *Ecological Reserve Act*; this land is then administered by the Ministry of Environment. Ecological reserves can include a mixture of land and marine environments.

Protections

In an ecological reserve, land is expressly set aside for ecological purposes⁹⁰ -- in contrast to parks (that may also have recreational and other purposes) and conservancies (that have ecological, recreational, sustainable development and First Nations-related purposes). The land within a reserve cannot be sold and its natural resource rights (timber, minerals, oil and gas, etc.) cannot be sold off or licensed.⁹¹

Most human activities are banned within ecological reserves. This includes camping, fires, hunting, motorized vehicles, removal of wildlife, mineral prospecting, timber cutting, road construction, or any other activity with a purpose inconsistent with the *Act*.⁹² It is also forbidden to introduce new species or discharge sewage or waste within a reserve.⁹³

The strict regulation of public use of ecological reserves can lead to public closures, with access restricted to researchers.⁹⁴ However, most ecological reserves are open to the public for non-destructive observational uses. Limited research or educational uses may be allowed, and the Minister may make orders allowing limited camping, hunting, fishing or motor vehicle use within all or part of the reserve, so long as this will not significantly disrupt the reserve or any ongoing research.⁹⁵

Enforcement

Ecological reserves are managed and enforced by BC Parks pursuant to section 6(1)(h) of the *Park Act*. This provision was enacted to address the lack of express enforcement in the *Ecological Reserves Act*. Ecological reserves are also monitored by volunteer reserve wardens. Wardens do not have the legal authority to enforce the provisions of the *Ecological Reserve Act* but they are valuable resources for overseeing the conditions of ecological reserve lands.

⁸⁹ *Ecological Reserve Act*, s.2.

⁹⁰ *Ecological Reserve Act*, s.2.

⁹¹ *Ecological Reserve Act*, s.5(2).

⁹² *Ecological Reserve Regulations*, s.1.

⁹³ *Ecological Reserve Regulations*, ss.8-9.

⁹⁴ See for example Cleland Island Ecological Reserve which is closed to the public to protect nesting seabirds and their habitats, online: http://www.env.gov.bc.ca/bcparks/eco_reserve/cleland_er.html

⁹⁵ *Ecological Reserve Regulations*, ss.2 and 7.

Analysis

Impact on Existing Designations

As mentioned above, there are currently three ecological reserves in the area (Trial Islands, Oak Bay Islands, and Ten-Mile Point Reserves). These reserves were established between 1975 and 1990 to protect “the most outstanding known assemblage of rare and endangered plant species in British Columbia”⁹⁶ and “to protect vulnerable nesting seabirds, rare wildflowers and shallow-water marine habitats.”⁹⁷ The Trial Islands Ecological Reserve “protects the greatest number of endangered and vulnerable species in a single ecological reserve in British Columbia”⁹⁸ while the Oak Bay Islands Reserve has the largest breeding population of glaucous-winged gulls in British Columbia.

However, these three ecological reserves combined cover only a small portion of the total area of the islands off of Oak Bay. The ecological reserves could be extended to incorporate the remainder of the area or a new Oak Bay Islands Ecological Reserve could be created.

How can Ecological Reserves accommodate First Nations land use and governance?

Ecological reserves do not specifically provide for First Nations use, and unlike the *Park Act*, there is no provision for the negotiations of shared management agreements. The strict limitations on human activity within ecological reserves may pose limitations on First Nations social, ceremonial and cultural land uses. First Nations could obtain permits under section 2 (for educational use) or section 7 (for camping, hunting, fishing, and use of motorized vehicles) in order to undertake traditional activities in ecological reserves, but there is no guarantee that these requests would be accommodated.

Benefits of Ecological Reserves

As mentioned above, ecological reserves are one of the strongest conservation designations in British Columbia, because they strictly limit human activity within the protected area. The existence of three ecological reserves within the area highlights the ecological importance of this region and may help make the case that more of this area should be protected. The strong

⁹⁶ BC Parks, Trial Islands Ecological Reserve, online:

http://www.env.gov.bc.ca/bcparks/planning/mgmtplns/trial_isle/trial_ps.pdf

⁹⁷ BC Parks, Oak Bay Islands Ecological Reserve, online:

http://www.env.gov.bc.ca/bcparks/eco_reserve/oakbay_er.html

⁹⁸ BC Parks, Trial Islands Ecological Reserve, online:

http://www.env.gov.bc.ca/bcparks/planning/mgmtplns/trial_isle/trial_ps.pdf

environmental protections that apply to ecological reserves address many of the environmental threats that are currently plaguing the area. The Trial Islands Ecological Reserve has been notably successful in protecting natural values.⁹⁹

Drawbacks of Ecological Reserves

Environmental degradation can still continue in an Ecological Reserve. For example, degradation of Oak Bay Islands Ecological Reserve by invasive plants and human disturbance continues, and degradation by invasive Canada geese is not being dealt with adequately. The disappearance of nesting cormorants on the reserve's Great Chain Island is likely linked to both human disturbance and bald eagle predation. This is likely a problem of inadequate enforcement and protective measures, as well as a lack of public education. BC Parks has not provided adequate enforcement staff to monitor the reserves. And the wardens who volunteer to monitor these ecological reserves do not have the power to legally enforce the restrictions under the *Ecological Reserve Act*. In addition, it is impossible for wardens to provide 24-hour monitoring of these areas. This suggests that damage to the islands might continue even if the ecological reserve area was expanded.

A key concern with ecological reserves is that they create broad blanket restrictions on human activities (camping, hunting, making fires etc.). Such restrictions prohibit camping and other public recreational uses that might actually be appropriate in certain identified places.

In addition, such broad restrictions are imposed without expressly providing for First Nations social, ceremonial and cultural land uses. The islands off of Oak Bay are within Coast Salish territories – the lands and surrounding waters continue to be used for fishing, bulb harvesting, ceremonial purposes and other cultural activities. Strict restriction of human activities within ecological reserves is likely to create tension with First Nations land use, and may violate Aboriginal rights or title. In addition, there is no provision to allow First Nations management or co-management of an ecological reserve.

In contrast, within a provincial park or conservancy it may be possible to zone the highest degree of protection for key ecological areas, while accommodating public recreational use elsewhere in the overall protected area. In addition, with a park or conservancy it is possible to negotiate agreements to recognize First Nation social, ceremonial and cultural land uses.

⁹⁹ In that Reserve removal of invasive plants since 2001 is advanced and very fruitful, with rare native flora coming back. The new threat of invasive Canada geese has been partially dealt with by adding eggs.

2.4 Wildlife Management Area

Description

Wildlife Management Areas (WMAs) are designed to “conserve and manage important habitat for the benefit of regionally or internationally significant fish and wildlife species.”¹⁰⁰ They are created and protected under section 4 of the *Wildlife Act*. The BC Minister of Forests, Lands and Natural Resources Operations is empowered by section 4 of the *Wildlife Act* to set out a WMA by regulation, with the consent of Cabinet.¹⁰¹ They allow for greater flexibility than provincial parks, in that management objectives are identified and agreed upon on a site-by-site basis.

Protections

The *Wildlife Act* does not contain many express environmental protections that apply to WMAs. As the Ministry explains, “every WMA has different needs, and so regulation of activities will vary according to those needs.”¹⁰² The Act casts a broad net by specifying in section 4(4) that “a person may not use land or resources in a wildlife management area without the written permission of the regional manager.” It also makes it an offence to alter, destroy, or damage wildlife habitat or to deposit a substance harmful to it -- except as permitted by the regional manager.¹⁰³ This provision gives the regional manager considerable discretion to permit a wide range of human uses including industrial development. According to the Ministry:

“The primary management focus for conservation lands is maintenance and management of fish and wildlife habitat, however, other compatible activities can sometimes be accommodated (e.g. agriculture, grazing, forestry, mining, utility rights of way, etc.).”¹⁰⁴

This highlights the highly discretionary nature of WMAs as a legal designation. Indeed, some of the WMAs, such as the Dewdrop-Rosseau Creek WMA contain specific rights-of-way provisions that allow industrial development.¹⁰⁵

¹⁰⁰ Ministry of Forests, Lands and Natural Resource Operations, “Purpose of the Conservation Lands”, online: http://www.env.gov.bc.ca/fw/habitat/conservation-lands/#purpose_of_cl

¹⁰¹ Ministry of Forests, Lands and Natural Resource Operations, “Wildlife Management Areas (WMAs)”, online: <http://www.env.gov.bc.ca/fw/habitat/conservation-lands/wma/>

¹⁰² Ministry of Forests, Lands and Natural Resource Operations, “Wildlife Management Areas (WMAs)”, online: <http://www.env.gov.bc.ca/fw/habitat/conservation-lands/wma/>

¹⁰³ *Wildlife Act*, RSBC 1996, s.7.

¹⁰⁴ Ministry of Forests, Lands and Natural Resource Operations, “Management Emphasis”, online: http://www.env.gov.bc.ca/fw/habitat/conservation-lands/#management_emphasis

¹⁰⁵ *Dewdrop-Rosseau Creek Wildlife Management Area Regulation*, BC Reg 165/2013, online: <http://canlii.org/en/bc/laws/regu/bc-reg-165-2013/latest/bc-reg-165-2013.html>

Enforcement

It is up to a Regional Manager from the Ministry to oversee the activities within a WMA and decide which land uses are acceptable, taking into account the specific management objectives.¹⁰⁶ The Ministry relies on its partnerships with external organizations like Ducks Unlimited Canada, the Nature Trust of BC, Habitat Conservation Trust Foundation, Nature Conservancy of Canada and others, including partners in industry to monitor these areas.¹⁰⁷ Ministry Regional Managers are responsible for multiple WMAs under the *Wildlife Act*.

Analysis

Impact on Existing Designations

WMAs could complement the Important Bird Area, Rockfish Conservation Areas, and Migratory Bird Sanctuary that already exist in the area. Indeed, section 10 of the Migratory Bird Sanctuary Regulations allows for collaboration with the “agency of the province concerned with the administration of a wildlife act of the province.”¹⁰⁸ The provincial ecological reserves and Discovery Island Marine Park would not likely be included were a WMA to be established. They could continue, as is.

How can Wildlife Management Areas accommodate First Nations land use and governance?

Similar to the ecological reserves discussed above, there is no explicit mention of First Nations land use within the *Wildlife Act*. In theory, management plans are required for every WMA. These management plans could potentially allow for First Nations land use and/or management of the WMA. In practice, however, these management plans are rare and the ones that exist do not meaningfully address the issue of First Nations land use.¹⁰⁹

Benefits of Wildlife Management Areas

WMAs offer some protection for wildlife and make it an offense to deposit harmful substances in the area. They draw public attention to the area and have the benefit of being flexible for potential ecotourism or small-scale developments on the islands. They can also facilitate multi-stakeholder efforts to protect an area.

¹⁰⁶ Ministry of Forests, Lands and Natural Resource Operations, “Management Emphasis”, online: http://www.env.gov.bc.ca/fw/habitat/conservation-lands/#management_emphasis

¹⁰⁷ Ministry of Forests, Lands and Natural Resource Operations, “Importance of Partnerships”, online: <http://www.env.gov.bc.ca/fw/habitat/conservation-lands/#partnerships>

¹⁰⁸ MBS Regulations, s.10.

¹⁰⁹ As of November 2013, only four of the 28 WMAs had publicly available habitat management plans on the Ministry’s WMA website. Ministry of Forests, Lands and Natural Resource Operations, “Wildlife Management Areas”, online: <http://www.env.gov.bc.ca/fw/habitat/conservation-lands/wma/list.html>

Drawbacks of Wildlife Management Areas

WMAs do not necessarily provide meaningful protection for the land. There are notable examples of WMAs not being properly managed for conservation purposes because the Act itself lacks teeth or because the boundaries of the WMAs were drawn to allow development projects to proceed.¹¹⁰ Regulations for WMAs fail to specifically state which activities may or may not occur within a generic WMA – leaving this up to the discretion of the Regional Manager. As with other protective designations, WMAs are not adequately monitored or enforced because they do not have dedicated staff on site.¹¹¹

2.5 Heritage Designation

Description

Under the *Heritage Conservation Act*, the Province can designate land as a provincial heritage site for the purpose of “encourag[ing] and facilitat[ing] the protection and conservation of heritage property in British Columbia.”¹¹² Objects of heritage value can also be designated as provincial heritage objects. Heritage designations are not limited to Crown land, and can overlap with parks and conservancies established under the *Park Act*.¹¹³ The *Heritage Conservation Act* prevails over all conflicting legislation and is binding on the Province.¹¹⁴

Protections

- A person must not remove any object or human remains from a burial place without a permit.¹¹⁵
- A person must not damage or alter a burial place without a permit.¹¹⁶
- It is an offence for a person to dig for aboriginal artifacts without a permit.¹¹⁷ A person must not alter or move an historical aboriginal rock painting or rock carving without a permit.¹¹⁸
- A person must not damage, dig in or alter a site where humans may have lived or use the area before 1846 without a permit.¹¹⁹

¹¹⁰ This occurred in Roberts Bank WMA and Todagin WMA.

¹¹¹ University of Victoria Environmental Law Clinic “2013-03-04– Protecting an Internationally Significant Migratory Bird Area” at p 14.

¹¹² *Heritage Conservation Act*, ss.2 and 9(1).

¹¹³ *Park Act*, s.2(3).

¹¹⁴ *Heritage Conservation Act*, s.6.

¹¹⁵ *Heritage Conservation Act*, s.13(2)(b).

¹¹⁶ *Heritage Conservation Act*, s.13(2)(b).

¹¹⁷ *Heritage Conservation Act*, s.14(1).

¹¹⁸ *Heritage Conservation Act*, s.13(2)(c).

¹¹⁹ *Heritage Conservation Act*, ss.13(2)(d) and (g).

For the above prohibitions, “altering” a site or object is defined as changing it in any manner, including “any action that detracts from the heritage value” of the designated site or object.¹²⁰ The Minister may issue permits to allow damage or alteration to heritage sites or objects.¹²¹ These permits may include any requirements and conditions that the Minister deems appropriate in the circumstances.

In addition, there are provisions in the *Heritage Conservation Act* that provide protection to sites or objects with heritage values, regardless of whether they have been formally recognized by the provincial government.¹²²

Enforcement

The *Heritage Conservation Act* is administered by the BC Archaeology Branch and the BC Heritage Branch. Under the Act, it is an offence to damage or alter a heritage site with fines up to \$50,000 for an individual.¹²³

Analysis

Impact on Existing Designations

A heritage designation in the islands off of Oak Bay area would provide additional protections for the object or site that is recognized under the *Heritage Conservation Act*. These protections would be in addition to, not in lieu of, any existing protections. Heritage designations can exist on both Crown land and private land; they can also overlap with parks and conservancies established under the *Park Act*.¹²⁴

How can Heritage designations accommodate First Nations land use and governance?

Under section 4 of the *Heritage Conservation Act*, the Minister may enter into agreements with First Nations “with respect to the conservation and protection of heritage sites and heritage objects that represent the cultural heritage of the aboriginal people who are represented by that first nation”. A Section 4 Agreement may identify sites and objects of particular spiritual, ceremonial or cultural value to First Nations, and establish policies and procedures for issuing permits in respect of these sites and objects. The agreement may also define what constitutes a “desecration”, and what activities would detract from the heritage value of the site or object.

¹²⁰ *Heritage Conservation Act*, ss.1 and 13.

¹²¹ *Heritage Conservation Act*, s.12.

¹²² Section 13(2) of the Act states a person must obtain a permit from the Minister of Community, Aboriginal and Women’s Services before they may:

- damage or alter a burial place with historical or archeological value;
- damage or alter First Nations rock paintings or carvings with historic or archeological value;
- damage, alter or remove any heritage object from a site that contains artifacts or other evidence of human habitation or use before 1846.

¹²³ *Heritage Conservation Act*, s.36.

¹²⁴ *Park Act*, s.2(3).

A Section 4 Agreement can also include provisions delegating the Minister's authority to issue permits or order investigations under the *Act*, potentially allowing First Nations to assume greater management authority. It can even set out circumstances in which the permitting requirements of the *Act* do not apply, if First Nations choose to administer their own heritage protection. Unfortunately, section 4 of the *Act* has not been used to date.¹²⁵ A pilot project was launched to work towards the implementation of a Section 4 Agreement¹²⁶, but as of November 2012 little progress had been made and First Nations representatives formally withdrew from the process.¹²⁷

As mentioned above, the Minister can grant a permit authorizing damage or alteration of heritage sites. The official Ministry procedure requires the Ministry to consult with First Nations in whose traditional territory the heritage site is located. They ask First Nations to provide written comments with a "reasonable timeframe" - somewhere between 15 and 30 days.¹²⁸ Even if a First Nation objects to the activity, the Ministry may still permit harm to artifacts.¹²⁹

Benefits of Heritage Designations

The *Heritage Conservation Act* provides strong protection for heritage sites and objects because damage to a site is an offence under the Act. Another benefit is that the Act prevails over all other conflicting legislation -- which guarantees that these sites will be legally protected regardless of what other land uses are permitted under other legislation. In this way, heritage designations can supplement existing protections on the Oak Bay Islands.

These designations can provide for strong protection of sites of cultural, spiritual or social significance to First Nations (regardless of whether they are on Crown land). In theory, Section 4 Agreements could allow for First Nations oversight and authority over protection of specific sites, agreed-upon policies or procedures for decision-making. However, in practice, these agreements have not been implemented, to date.

¹²⁵ Union of British Columbian Indian Chiefs, "First Nations Heritage Planning Toolkit", at p 16, online: http://www.ubcic.bc.ca/files/PDF/UBCIC_HeritageBook.pdf.

¹²⁶ First Nations Leadership Council, "Communique to First Nations in BC – Section 4, Heritage Conservation Act, Pilot Project", online: http://www.ubcic.bc.ca/News_Releases/UBCICNews11011201.html#axzz3FulHW0qp

¹²⁷ As noted by the Union of BC Indian Chiefs: "The first challenge is the HCA's definition of a heritage site as land "that has heritage value to British Columbians, a community or an aboriginal people". Operating within this broad definition, the Archaeology Branch has adopted the view that archaeological evidence of use and occupation is the primary requirement for a heritage site to be recognized and protected. Therefore, First Nations spiritual and sacred sites that lack archaeological features are often not protected under this legislation." Alexa Walker, "New First Nations Heritage Planning Toolkit Released in British Columbia", June 19, 2013, online: <http://www.sfu.ca/ipinch/news/ip-and-cultural-heritage-news/new-first-nations-heritage-planning-toolkit-released-british-colu>

¹²⁸ Ministry of Forests, Lands and Natural Resource Operations, "Review Procedures", online: Heritage Permits < http://www.for.gov.bc.ca/archaeology/policies/heritage_permits.htm#review_procedures >.

¹²⁹ The First Nations Leadership Council, *First Nations Heritage Conservation Action Plan*, at p 5, online: Union of BC Indian Chiefs <http://www.ubcic.bc.ca/files/PDF/HeritageConservationActionPlan_030311.pdf>.

Drawbacks of Heritage Designations

Like many of the designations described thus far, the protection of heritage sites and objects is subject to Ministerial discretion. The Minister can issue permits to authorize the destruction of heritage sites and has done so in the past.

While heritage designations provide strong protections for specific sites and objects, they do not protect the surrounding area. They will not likely cover the entire Oak Bay islands area and will provide no additional environmental protection beyond the specific area designated as a heritage site.

Another problem with heritage designations is the lack of First Nations involvement in protecting sites and objects of cultural, spiritual or social significance. The Union of BC Indian Chiefs has noted the mixed value of current heritage law: “While the Heritage Conservation Act is the most important provincial legislation in place to protect heritage sites, it does not adequately address all concerns of First Nations in British Columbia.”¹³⁰

2.6 Protected Areas under *Environment and Land Use Act*

Description

“The *Environment and Land Use Act (ELUA)* gives the Province broad general powers to make orders ‘respecting the environment or land use.’ Ministers who exercise powers under other legislation must do so in accordance with these orders¹³¹.”

These broad general powers can be used to craft special land protections for areas where more conventional designations are not appropriate. For example, negotiations concerning the protection of the Great Bear Rainforest (GBR) led to orders under the *ELUA* to create the ‘Biodiversity, Mining and Tourism Area’ (BMTA) designation. BMTAs are intended to protect biodiversity and respect First Nations social, ceremonial and cultural uses of land, while still allowing industry activities such as mining that would not be permitted in, for example, a conservancy¹³².¹³³ These orders set out the purposes for which BMTAs are set aside (including environmental protection, preservation of First Nations land uses, mining, tourism, and certain power developments), and also require the Province to consult with and consider affected First Nations when establishing or implementing a land use management plan within a BMTA.

¹³⁰ Union of British Columbian Indian Chiefs, *First Nations Heritage Planning Toolkit*, online: http://www.ubcic.bc.ca/files/PDF/UBCIC_HeritageBook.pdf.

¹³¹ *Ecological Reserve Act*, s.10.

¹³² Order establishing the Central and North Coast BMTA, online: http://www.for.gov.bc.ca/tasb/slrp/lrmp/nanaimo/central_north_coast/docs/legally_established_order_002_200901.pdf

¹³³ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

Analysis

Protected areas under the *ELUA* can be helpful solutions for areas where existing designations are not appropriate. They are flexible orders that can be used to craft custom protections and they require ministerial powers under other laws to comply with the order. In the Great Bear Rainforest example, the Provincial government showed remarkable willingness to negotiate with First Nations and environmentalists. This multi-stakeholder approach can be beneficial to all parties involved.

One main drawback of this designation is that orders can be changed or cancelled without any legislative amendment. This means that changes can be made with less oversight and less consultation. Also, Protected Areas under the *ELUA* involve lengthy and substantial negotiations; once established, orders require more negotiations to flesh out what specific protections will apply.

Part III: Federal Designations

3.1 National Park

Description

“National parks are areas of federally-owned land that are dedicated to the people of Canada ‘for their benefit, education and enjoyment... [and] maintained and made use of so as to leave them unimpaired for the enjoyment of future generations.’¹³⁴ Canada may designate a national park under section 5(1) of the *Canada National Parks Act*, though the province in which the land is located must agree to the designation. Once a park is designated, the Governor in Council may not reduce its size unless a court finds that Canada did not have clear title to the land (though Parliament could still reduce it via a legislative amendment)¹³⁵.¹³⁶ National parks can include both terrestrial and marine areas.

National park reserves are “used to protect areas that are subject to unresolved aboriginal rights claims, without prejudicing those negotiations.”¹³⁷ They receive the same legal protections as national parks, except that First Nations traditional renewable harvesting activities take priority over the entire *Act*.¹³⁸ Once a land claim has been resolved, the First Nation can agree to upgrade the reserve to full park status if they wish¹³⁹.¹⁴⁰

¹³⁴ *Canada National Parks Act*, s.4(1).

¹³⁵ *Canada National Parks Act*, s.5.

¹³⁶ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

¹³⁷ *Canada National Parks Act*, ss.4(2) and 6(1).

¹³⁸ *Canada National Parks Act*, ss.39-40.

¹³⁹ *Canada National Parks Act*, s.6(2).

¹⁴⁰ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

Protections

Under the *Canada National Parks Act* no-one may use, occupy or sell park lands except as specifically authorized under the *Act* or regulations.¹⁴¹ “In contrast to the *BC Park Act*, most legal protections for national parks are set out in the regulations rather than the *Act* itself.”¹⁴² Some existing regulations, such as the *National Park General Regulations* and *Wildlife Regulations*, create general rules for all parks in respect of matters such as building construction, camping, fishing, garbage and wildlife, while other regulations create rules for specific parks. “Under section 16 of the *Act*, new regulations may be used to establish rules relating to environmental protection, heritage protection and many other matters.”¹⁴³

In general in a National Park or National Park Reserve, it is illegal:

- To remove, deface, damage or destroy any flora or natural objects.¹⁴⁴
- To remove, deface, damage or destroy any prehistoric or historic artifacts or structures.¹⁴⁵
- To hunt, disturb, hold in captivity, remove or destroy any wildlife.¹⁴⁶
- To disturb or destroy a nest, lair, den or dam.¹⁴⁷
- To touch, feed or entice wildlife.¹⁴⁸
- To possess or traffic in wildlife taken from the park¹⁴⁹, or to traffic in plants or animals taken from a park.¹⁵⁰
- To conduct a business without a special licence,¹⁵¹ or
- To possess a firearm.¹⁵²

Fishing may be regulated or prohibited within different areas of a National Park or National Park Reserve.¹⁵³ Areas can be completely closed to the public to protect spiritual and cultural features.

¹⁴¹ *Canada National Parks Act*, s.13.

¹⁴² TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

¹⁴³ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

¹⁴⁴ *National Park General Regulations*, [NPGR], s.10.

¹⁴⁵ *NPGR*, s.14.

¹⁴⁶ *National Park Wildlife Regulations*, [NPWR] s.4.

¹⁴⁷ *NPWR*, s.4.

¹⁴⁸ *NPWR*, s.4.

¹⁴⁹ *NPWR*, s.4.

¹⁵⁰ *Canada National Parks Act*, s.25.

¹⁵¹ *National Parks of Canada Businesses Regulations*, SOR/98-455, s.3.

¹⁵² Unless the firearm is unloaded and transported in a case (or wrapped and tied securely with no part of the firearm exposed), *NPWR*, s.20.

¹⁵³ See p. 77 of *Environmental Laws: A Field Guide for BC's North and Central Coast and Haida Gwaii*, May 2011, Environmental Law Centre.

Dogs must be under physical control at all times.¹⁵⁴ Gwaii Haanas National Park Reserve requires visitors to practice “leave no trace” techniques.¹⁵⁵

Enforcement

Parks Canada hires Park Wardens to enforce the provisions of the *Canada National Parks Act*.¹⁵⁶ The role of Park Wardens is to protect natural and cultural resources, conduct campground patrols, and to ensure safety in national parks and marine conservation areas. In addition, the Minister may designate employees of a First Nations government as enforcement officers authorized to enforce specific provisions of the *Act* or regulations within specified parks.¹⁵⁷ National parks can also be protected by Guardian Watchmen programs established by First Nations communities. For example, the Haida Gwaii Watchmen Program was created in 1981, prior to Gwaii Haanas being established, in response to concerns about the potential for vandalism to Haida village sites.¹⁵⁸ The Watchmen protect their natural and cultural heritage by educating visitors on the importance of Gwaii Haanas and providing information on how to enjoy the area without leaving a trace. They are partially funded by Parks Canada.

Examples

Gulf Islands National Park Reserve

The Gulf Islands National Park Reserve (GINPR) was created in 2003 in response to development pressures due to the close proximity of these islands to major urban centres. Its goal is “to protect small island ecosystems, as well as representative examples of headlands, shorelines and uplands of larger islands.”¹⁵⁹ It includes 29 sites on 15 islands and over 30 islets and reefs. Since 1995, lands have been transferred to Canada from “provincial parks, ecological reserves, Crown lands and a regional park transferred from the Capital Regional District.”¹⁶⁰ This was done by an order of the provincial cabinet under the *Environment and Land Use Act*¹⁶¹ mentioned above.

The GINPR is located within Coast Salish First Nations traditional territory; 19 of these nations assert rights over the GINPR area. Parks Canada has engaged in on-going consultations with each First Nation and has established First Nations working groups to facilitate this process.

¹⁵⁴ *National Parks of Canada Domestic Animals Regulation*, s.5.

¹⁵⁵ See p. 78, *Environmental Laws: A Field Guide for BC's North and Central Coast and Haida Gwaii*, May 2011, Environmental Law Centre

¹⁵⁶ *Canada National Parks Act*, s.18.

¹⁵⁷ *Canada National Parks Act*, ss.19 and 21-22.

¹⁵⁸ Haida Gwaii Watchmen Program, online: <http://coastalguardianwatchmen.ca/haida-gwaii-watchmen-program>

¹⁵⁹ Parks Canada News Release, “Canada and BC Sign Agreement to Create a New National Park Reserve of Canada”, Victoria BC, May 9, 2003.

¹⁶⁰ Parks Canada News Release, “Canada and BC Sign Agreement to Create a New National Park Reserve of Canada”, Victoria BC, May 9, 2003.

¹⁶¹ *Environment and Land Use Act*, RSBC 1996, c 117, s.7.

Parks Canada acknowledges the need to manage and protect sacred sites as well as to ensure opportunities for First Nations communities to collect medicinal plants, harvest shellfish, and other fish, and to hunt within the park.¹⁶²

The Gulf Islands National Park Reserve Advisory Board was created to provide advice to Canada on park planning, management, operation, and business plans. It includes representatives from 19 First Nations, local community groups and ENGOs. This Board created the Parks Canada Draft Interim Management Guidelines for the Gulf Islands National Park Reserve that highlights the importance of a healthy relationship with First Nations.¹⁶³

Of particular importance to this case, the GINPR is still in the process of acquiring land for the national park which leaves open the possibility that the islands off of Oak Bay could be incorporated into the GINPR. Parks Canada notes that “in the years to come, land will continue to be acquired within a designated core area for the national park reserve.”¹⁶⁴ The Capital Regional District has already agreed to transfer at least one regional park to the GINPR¹⁶⁵ and Oak Bay may be willing to transfer its municipal lands.¹⁶⁶ Lastly, the mandate of the GINPR – protection of small island ecosystems from development pressure associated with their close proximity to major urban centres – is particularly apt for the islands off Oak Bay.

¹⁶² Parks Canada, Gulf Islands State of Park Report, p 3, online: <http://www.pc.gc.ca/eng/docs/bib-lib/docs5hi.aspx>

¹⁶³ UVic Environmental Law Centre, Report on the Sencot'en Alliance's Participation in the Planning and Management of the Gulf Islands National Park Reserve, online: <http://www.elc.uvic.ca/documents/Sencot'en%20Report%20September%201,%202006.pdf>
The Guidelines stipulate that First Nations should help select a site for a national park and then negotiations commence between governments and First Nations. The outcome agreement will reflect “the Aboriginal communities’ vision of involvement in the management of the park” as well as any treaties or claim agreements. Between April 20 and June 9, 2013, public and private stakeholders provided feedback on the Draft Interim Guidelines. The following came from the consultations:

- Maintain ecological integrity while increasing visitation.
- Improve intra- and inter-island alternative transportation routes (trails) and infrastructure.
- Improve access for kayaks.
- Develop and expand facilities and programs, especially campgrounds.
- Increase local involvement.
- Develop cross-border collaboration and promotion with the US.
- Address increasing pressure on public safety services.

According to Parks Canada, the Draft Management Plan is now being reviewed by First Nations and will then be finalized and sent for approval by the CEO of Parks Canada and the Minister of the Environment. It will then require consent by Parliament.

¹⁶⁴ Parks Canada News Release, “Canada and BC Sign Agreement to Create a New National Park Reserve of Canada”, Victoria BC, May 9, 2003.

¹⁶⁵ Mount Norman, formerly CRD Beaumont Marine Park, was transferred in 2003.

¹⁶⁶ Parks Canada, “Canada and BC Sign Agreement to Create a New National Park Reserve of Canada”, online: www.pc.gc.ca/APPS/CP-NR/release_e.asp?id=670&andor1=nr

Gwaii Haanas¹⁶⁷

“In 1985, the Haida Nation unilaterally declared Gwaii Haanas to be a Haida Heritage Site as part of their ongoing campaign to halt logging operations in the area. In 1988, its protected status was formalized with the signing of the *South Moresby Agreement*, which led to the designation of Gwaii Haanas as a national park reserve. Funding was secured to compensate logging companies for their lost tenures, and an economic development fund was established for the area.

In 1993, the *Gwaii Haanas Agreement* was signed. This landmark agreement committed the Haida and the federal government to jointly protecting the cultural and environmental well-being of Gwaii Haanas, while ‘agreeing to disagree’ over title issues. The Agreement shares management authority equally between the Haida and the federal government. Planning, operations and management of the Reserve are governed by the Archipelago Management Board, which consists of an equal number of Haida and federal government representatives.¹⁶⁸ The Agreement provides for a multi-tiered dispute resolution system in the event that the Board cannot agree on something.”¹⁶⁹

The Gwaii Haanas Agreement established a national park reserve, a marine conservation reserve, and a Haida heritage site.¹⁷⁰ It committed the parties to the protection of the marine environment, leading to the creation of the Gwaii Haanas Marine Advisory Committee in 2008.¹⁷¹

The Haida Gwaii Watchmen Program was created in 1981, prior to Gwaii Haanas being established, in response to concerns about the potential for vandalism to Haida village sites.¹⁷² The Watchmen protect their natural and cultural heritage by educating visitors on the importance of Gwaii Haanas and providing information on how to enjoy the area without leaving a trace.

¹⁶⁷ For a comprehensive list of prohibitions in Gwaii Haanas, see *Environmental Laws: A Field Guide for BC's North and Central Coast and Haida Gwaii*, May 2011, Environmental Law Centre.

¹⁶⁸ Parks Canada, “The Archipelago Management Board”, online: <http://www.pc.gc.ca/pn-np/bc/gwaiihaanas/plan/plan1/Plan1A.aspx>

¹⁶⁹ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

¹⁷⁰ The Canada National Parks Act applies above the high water mark, and the Canada National Marine Conservation Act applies below it. The Haida Heritage Site designation, declared by the Council of the Haida Nation, does not distinguish between the terrestrial and marine components of Gwaii Haanas.

¹⁷¹ The Committee consists of 12 Haida members with different areas of traditional knowledge and western scientific expertise relating to the marine environment. Committee members worked with government representatives to develop an interim plan under the *Canada National Marine Conservation Areas Act*, resulting in the designation of the area as a National Marine Conservation Area Reserve in 2010. Marine Conservation Areas are discussed in more detail below.

¹⁷² Haida Gwaii Watchment Program, online: <http://coastalguardianwatchmen.ca/haida-gwaii-watchmen-program>

Analysis

Impact on Existing Designations

The creation of a comprehensive national park in the Oak Bay islands area would require the Province of B.C. to transfer all provincially-held lands to the federal government. These could include the Discovery Island Provincial Park, the three existing ecological reserves, and the remainder of the provincially held land. These land transfers are common practice when establishing a national park and are achieved through formal land transfer agreements. Parliament also has the power to enter into an agreement with Oak Bay to transfer the municipality's territory on the islands to the federal government.¹⁷³

Other designations such as the Migratory Bird Sanctuary, the Important Bird Area, and the Rockfish Conservation Areas would not be affected by the creation of a national park.

How can national parks accommodate First Nations land use and governance?

“By default, federal parks are under the administration, management and control of the Minister of Environment.¹⁷⁴ However, under section 10(1) of the Act, the Minister may enter into agreements with First Nations for carrying out the purposes of the Act. According to a 2006 research paper,¹⁷⁵ Parks Canada does not have a ‘standard’ agreement that it uses with First Nations, but broadly categorizes such agreements as either ‘cooperative management’ or ‘co-management’. The primary difference between the two is where the decision-making authority lies: in a cooperative management agreement, the Minister retains final decision-making authority, with First Nations acting in a consultative or advisory role”¹⁷⁶, as in the Gulf Islands National Park Reserve. “In a co-management agreement, at least some decision-making power is given to First Nations. To date, the primary example of a co-management agreement is the Gwaii Haanas National Park”¹⁷⁷, discussed above.

“The Minister is also required, where applicable, to provide opportunities for First Nations organizations to participate in ‘the development of parks policy and regulations, the establishment of parks, the formulation of management plans, land use planning and development in relation to park communities and any other matters that the Minister considers relevant’¹⁷⁸”¹⁷⁹.

¹⁷³ University of Victoria Environmental Law Clinic “2013-01-01 – Howe Sound National Park / Partnership Legislation for Parks Canada” at p 14.

¹⁷⁴ *Canada National Parks Act*, s.8(1).

¹⁷⁵ UVic Environmental Law Centre, *Report on the Sencot'en Alliance's Participation in the Planning and Management of the Gulf Islands National Park Reserve*, online: <http://www.elc.uvic.ca/documents/Sencot'en%20Report%20September%201,%202006.pdf>

¹⁷⁶ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

¹⁷⁷ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

¹⁷⁸ *Canada National Parks Act*, s.12(1).

Canada may make regulations authorizing “the use of park lands, and the use or removal of flora and other natural objects, by aboriginal people for traditional spiritual and ceremonial purposes.”¹⁸⁰ In addition, where First Nations have “existing aboriginal or treaty rights to traditional renewable resource harvesting activities within any area of a park”, or as part of an aboriginal land claim settlement, Canada may make regulations authorizing the carrying on of traditional renewable resource harvesting activities or the removal of stone for carving purposes.¹⁸¹

“Finally, the Minister may designate employees of a First Nations government as enforcement officers authorized to enforce specific provisions of the Act or regulations within specified parks¹⁸².”¹⁸³ This is another option that First Nations could use to help protect their territory. This could be supplemented by a First Nation-operated Watchmen program, as in Gwaii Haanas.

Benefits of National Parks

National Parks are subject to environmental and heritage protections under the *Canada National Parks Act* and its various Regulations. For example, it is illegal to remove, deface, damage or destroy any flora or natural objects (e.g. fossils, rocks, minerals, or other natural phenomena) in a national park or a national park reserve.¹⁸⁴ Such prohibitions could address the vandalism and damage currently occurring in the Oak Bay Islands area.

There are two possible options for including the islands off Oak Bay as a national park. One is to establish a new National Park comprised of these islands alone. The other is to simply include the islands off Oak Bay in the existing Gulf Island National Park Reserve. Protecting the islands off Oak Bay fits within the goal of the GINPR to “protect small island ecosystems” and Parks Canada’s intention to continue to acquire lands for the national park reserve. Both options would require transferring land from provincial and municipal ownership to the federal government. This is common practice when establishing national parks -- and in the case of expanding the GINPR could be further facilitated by the Federal-Provincial park establishment agreement signed in 2003.

In addition to providing environmental protection, national park designations carry with them a certain prestige and have the added benefit of attracting attention to the islands off Oak Bay area. One component of the Parks Canada mandate is to encourage public education through outreach initiatives. By highlighting the ecological and cultural significance of the islands, these outreach initiatives could help address the ongoing damage being done on the islands. Such public

¹⁷⁹ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

¹⁸⁰ *Canada National Parks Act*, s.16(1)(w).

¹⁸¹ *Canada National Parks Act*, s.17(2).

¹⁸² *Canada National Parks Act*, ss.19 and 21-22.

¹⁸³ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

¹⁸⁴ *National Parks General Regulations*, SOR 78-213, s. 10.

education initiatives are particularly viable in the case of the islands off Oak Bay because of their close proximity to Greater Victoria.

Drawbacks of National Parks

One consideration is that the establishment of a national park reserve encompassing the islands off Oak Bay would require a transfer of lands currently protected under BC Parks to Parks Canada. While this has the added benefit of increased attention and access to the national park system, there are potential implications around enforcement of the area. Parks Canada has been subject to recent budget cuts; the federal government recently cut more than \$27 million from its planned \$659.7 million 2014-15 budget.¹⁸⁵ This budget cut also involved staff cuts that will likely impact enforcement. This raises the question of whether the islands off Oak Bay would be better protected under BC Parks or Parks Canada. BC Parks has also suffered budget constraints in recent years, and a comparative analysis of this issue may be required.

Another concern is that establishing a new national park can be a lengthy process. Given the immediacy of the issues in this region, it would be prudent to consider short-term solutions to address ongoing damage in the interim.

3.2 National Wildlife Area

Description

National Wildlife Areas (NWAs) are established under the *Canada Wildlife Act* to protect and maintain habitat vital for wildlife and to improve habitat for wildlife use when necessary.¹⁸⁶ The broader goals are to ensure wildlife conservation, research and nature interpretation for nationally significant animal or plant habitat. They are administered by the Canadian Wildlife Service branch of Environment Canada.

NWAs can only be established on lands owned by the federal government or through agreements with landowners. Areas are identified based on biological criteria (e.g. critical habitat, rare or unusual wildlife habitat) and then assessed based on conservation values and natural resources. The *Canada Wildlife Act* was amended in 1994 to include Marine Wildlife Areas in response to pressure over coastal and offshore conservation issues.

Protections

Each NWA includes a management plan that specifies which activities are allowed within the protected area. General prohibitions include hunting or fishing; damaging, destroying or

¹⁸⁵ Boutilier, "Parks Canada services take hit in budget cuts", The Star, July 13, 2014, online: http://www.thestar.com/news/canada/2014/07/13/parks_canada_services_take_hit_in_budget_cuts.html

¹⁸⁶ Environment Canada, Management and Activities, online: <http://www.ec.gc.ca/Ap-pa/default.asp?lang=En&n=C0526865-1>

removing a plant; destroying any wildlife; and recreational activities such as camping.¹⁸⁷ Human access is allowed and any of the aforementioned prohibited activities may be authorized through a permit issued by the Minister.

Analysis

Impact on Existing Designations

As mentioned above, lands need to be federally owned or transferred to the federal government in order to be protected as a NWA. This would mean that most of the lands on the islands off Oak Bay would have to be transferred from the provincial and Oak Bay governments to the federal government in order to be protected as a NWA. This type of transfer would likely impact the existing provincial designations (ie. ecological reserves and Provincial Parks).

How can National Wildlife Areas accommodate First Nations land use and governance?

According to the Environment Canada website, National Wildlife Area management plans “are elaborated in consultation with Aboriginal peoples...and must respect Aboriginal rights and allowable practices specified under land claims agreements.”¹⁸⁸

The Habitat Stewardship Program (HSP) for Species at Risk establishes partnerships with Aboriginal groups. For example, one of the stewardship activities supported by the HSP is “involving Aboriginal communities in the conservation of declining fish species in British Columbia.”¹⁸⁹

Benefits of National Wildlife Areas

National Wildlife Areas provide strong environmental protection for plants and wildlife within their boundaries. For example, the destruction of plants or other wildlife is prohibited within NWAs as is camping, hunting or fishing. These strict restrictions on human activities may help prevent the environmental damage currently occurring in the area.

Drawbacks of National Wildlife Areas

The process for selecting the location and boundaries of NWAs takes a long time, especially when lands must be transferred from provincial to federal ownership. In the case of the islands off Oak Bay, there are urgent environmental issues that require timely action. It is also worth mentioning that Environment Canada maintains the discretion to actually allow prohibited activities within NWAs.

¹⁸⁷ For a full list, see Environment Canada, Management and Activities, online: <http://www.ec.gc.ca/Ap-pa/default.asp?lang=En&n=C0526865-1>

¹⁸⁸ Environment Canada, Management and Activities, online: <http://www.ec.gc.ca/Ap-pa/default.asp?lang=En&n=C0526865-1>

¹⁸⁹ Environment Canada, Habitat Stewardship Program for Species at Risk, online: <http://www.ec.gc.ca/hsp-pih/default.asp?lang=En&n=59BF488F-1>

3.3 Marine Protected Area

Description

A marine protected area is a broad category of designations that includes any ocean area that is protected by any legal designation in Canada. Unlike other categories of protected areas included in this report, marine protected areas can be established under a variety of federal and provincial statutes and can include federal designations (*Oceans Act* Marine Protected Areas, Marine Conservation Areas, Marine Parks, and Marine Wildlife Areas) as well as provincial marine protected areas. A Marine Protected Area (MPA), designated under the *Oceans Act*, is not to be confused with the generic use of the term “marine protected area”, meaning any ocean area that is protected by any legal designation. This section will focus on federal MPAs under the *Oceans Act* and will only briefly mention the other marine protected area designations.

Oceans Act MPAs are a specific federal protected area designation. An MPA is “an area of the sea that forms part of the internal waters of Canada, the territorial sea of Canada or the exclusive economic zone of Canada” that has been designated by regulation for special protection under section 35(3) of the *Oceans Act*. An MPA may be designated for the purpose of conserving and protecting one or more of the following interests: fisheries (including habitats); threatened or endangered species (and their habitats); unique habitats; marine areas of high biodiversity or biological productivity; or “any other marine resource or habitat as is necessary to fulfil the mandate of the Minister”.¹⁹⁰

Other federal marine protected area designations include Marine Conservation Areas (discussed in more detail below), Marine Parks, and Marine Wildlife Areas. The Federal Marine Protected Area Strategy was developed in 2005 to describe how DFO, Parks Canada, and Environment Canada will cooperate to deliver the federal marine protected area system. This led to the establishment of the National Framework for Canada’s Network of Marine Protected Areas in 2011. Despite committing to establishing a network of marine protected areas that conserves 10% of its marine areas by 2020,¹⁹¹ Canada’s efforts to establish these areas have stalled.¹⁹²

A provincial marine protected area is “any area of tidal water and seabed in conjunction with the associated natural and cultural features which have been designated in the *Protected Areas of British Columbia Act*, *Ecological Reserve Act*, *Park Act*, *Wildlife Act* or the *Environment and*

¹⁹⁰ *Oceans Act*, s.35(1).

¹⁹¹ Living Oceans, “Sustainable Financing Options for a Marine Protected Area Network in British Columbia” at pp 3-4, online: www.livingoceans.org/sites/default/files/sustainable-financing-options.pdf

¹⁹² Living Oceans, “Sustainable Financing Options for a Marine Protected Area Network in British Columbia” at pp 3-4, online: www.livingoceans.org/sites/default/files/sustainable-financing-options.pdf

Land Use Act.¹⁹³ British Columbia has been the most active of all Canadian provinces in establishing marine protected areas.

Protections

Due to the varied nature of MPAs under the *Oceans Act*, there are no default protections that apply to all MPAs. Instead, protections vary depending on the specific regulations established when an MPA is created. In British Columbia, most marine protected areas include protection against habitat-altering activities. Other examples from existing MPAs include “prohibitions on harming marine organisms or their habitat, or carrying on activities (such as dumping of waste or other substances) that are likely to cause such harm. Exceptions may be made for approved activities such as scientific research or authorized fishing activities¹⁹⁴.”¹⁹⁵

Analysis

Impact on Existing Designations

An MPA would enhance protection of the islands off Oak Bay area by providing much-needed oversight of the surrounding waters. Currently, rockfish conservation areas are the only established protection for the important marine environment within the area. The existing designations that apply to land will not be affected by a marine protected area.

How can Marine Protected Areas accommodate First Nations land use and governance?

“Because the prohibitions in each MPA may be tailored to suit that particular location, there is scope for First Nations to use MPAs as a tool to protect sensitive marine areas while still allowing for the exercise of aboriginal fishing rights and other culturally significant activities. In addition, under section 39 of the *Oceans Act*, the Minister may designate ‘any person or class of persons’ to act as an enforcement officer for purposes of the *Act* and regulations.”¹⁹⁶

As noted by Living Oceans, “First Nations and local communities can bring traditional and place-based knowledge and values to the Marine Protection Area planning and management process, increasing its effectiveness”.¹⁹⁷ An agreement for a Marine Protection Area, whether with a private partnership, user fee, or some other method, could include provisions for First Nations' autonomy and influence over the management of the area and if there are revenues from the MPA, then some of these could be directed towards them.

¹⁹³ BC Parks, Provincial Marine Protected Areas in British Columbia, online: <http://www.env.gov.bc.ca/bcparks/conserves/mpa.pdf>

¹⁹⁴ *Oceans Act*, s.43(b).

¹⁹⁵ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

¹⁹⁶ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

¹⁹⁷ Living Oceans, “Sustainable Financing Options for a Marine Protected Area Network in British Columbia” at p 12, online: www.livingoceans.org/sites/default/files/sustainable-financing-options.pdf

3.4 Marine Conservation Area

Description

“Marine Conservation Areas (MCAs) are a marine protected area designation available under the *Canada National Marine Conservation Areas Act*. MCAs are designated ‘for the purpose of protecting and conserving representative marine areas for the benefit, education and enjoyment of the people of Canada and the world’¹⁹⁸.¹⁹⁹ They are administered by Parks Canada.

“Canada may establish MCAs by order under section 5(1) of the Act. The designated area may include ‘submerged lands and waters within the internal waters, territorial sea or exclusive economic zone of Canada and any coastal lands or islands within Canada.’ Canada must have clear title to the designated areas, and if any of the areas fall under provincial administration, the province must consent to the designation. Once an MCA is established, the Governor in Council may not remove area from it unless a court finds that Canada did not have clear title to it (though Parliament could still do so via a legislative amendment)²⁰⁰.²⁰¹

“Similar to park reserves, marine conservation area reserves are areas that are being considered for designation as an MCA but are still subject to unresolved First Nations land claims.²⁰² After the land claim has been settled, the reserve may be cancelled or upgraded to full MCA status, as agreed upon in the settlement.²⁰³ Apart from this, reserves receive the same legal protections as MCAs under the Act.²⁰⁴ This allows disputed marine areas to receive interim legal protection without prejudicing the title claims of First Nations.”²⁰⁵

Protections

“MCAs must be managed and used ‘in a sustainable manner that meets the needs of present and future generations without compromising the structure and function of the ecosystems, including the submerged lands and water column, with which they are associated.’²⁰⁶ Each MCA is divided into different zones, at least one of which must foster and encourage ecologically sustainable use of marine resources, and at least one of which must fully protect special features or sensitive elements of ecosystems²⁰⁷.²⁰⁸

¹⁹⁸ *Canada National Marine Conservation Areas Act*, s.4(1).

¹⁹⁹ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

²⁰⁰ *Canada National Marine Conservation Areas Act*, ss.5(3)-(4).

²⁰¹ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

²⁰² *Canada National Marine Conservation Areas Act*, s.4(2).

²⁰³ *Canada National Marine Conservation Areas Act*, s.6(2).

²⁰⁴ *Canada National Marine Conservation Areas Act*, s.2(4).

²⁰⁵ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

²⁰⁶ *Canada National Marine Conservation Areas Act*, s.4(3).

²⁰⁷ *Canada National Marine Conservation Areas Act*, s.4(4).

²⁰⁸ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

“Interests in MCA lands may not be sold or otherwise disposed of, and persons may not occupy or use MCA lands, except as provided for in the Act or regulations.”²⁰⁹ The Act also prohibits dumping as well as oil, gas and mineral exploration/exploitation without a permit, though licensed fishing activities are allowed unless specifically prohibited by regulation.²¹⁰ If a substance that could harm the environment or any fish, animal or plant is discharged into an MCA, the person in control of that substance must take reasonable measures to prevent or mitigate such harm²¹¹.²¹²

Additional rules in respect of ecosystem protection, heritage protection, renewable resource harvesting, prohibited activities, and other matters may be established by regulation under section 16 of the Act.

Examples

Southern Strait of Georgia National Marine Conservation Area

Despite its small size, the Strait of Georgia is one of the most productive regions in BC. It also attracts the most visitors because of its location between two major urban centres. In 2003, Canada teamed up with the Province of BC to assess the feasibility of a national marine conservation area reserve in the southern Strait of Georgia area. The Board in charge of this assessment included federal and provincial staff with 3 seats for First Nations, and encouraged public participation through public meetings, open houses and workshops.²¹³

In 2011, the Board released a proposed Marine Conservation area boundary to the public for public comments. This proposed boundary extends just north of the Oak Bay Islands.²¹⁴ It explicitly excludes “areas of high tenure concentrations”²¹⁵ as well as “marine components of existing provincial parks.”²¹⁶ The boundary has yet to be finalized so it could still be possible for the Oak Bay Islands to be included within the Marine Conservation Area.

²⁰⁹ *Canada National Marine Conservation Areas Act*, s.12.

²¹⁰ *Canada National Marine Conservation Areas Act*, ss.13-15.

²¹¹ *Canada National Marine Conservation Areas Act*, s.29.

²¹² TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

²¹³ Parks Canada “Feasibility Study for the Proposed Southern Strait of Georgia National Marine Conservation Area Reserve - Introduction”, online: <http://www.pc.gc.ca/eng/progs/amnc-nmca/dgs-ssg/intro.aspx>

²¹⁴ See the proposed boundary map in Appendix C or online: <http://www.pc.gc.ca/eng/progs/amnc-nmca/dgs-ssg/region-area.aspx>

²¹⁵ Areas with high concentrations of commercial and industrial uses have been excluded from the proposed boundary including: Sidney, Swartz Bay, Brentwood Bay, Mill Bay, Ganges Harbour, Maple Bay, Crofton, Chemainus, Ladysmith, Telegraph Harbour, and portions of Cowichan Bay.

²¹⁶ Marine components of existing provincial parks (e.g. Gowlland Tod, Goldstream and Montague Harbour Marine) have been excluded from the proposed boundary. Additionally, a 200-metre buffer has been placed around existing provincial parks currently without a marine component (e.g. Ruckle, Wallace Island and Burgoyne Bay) to enable them to expand into the adjacent marine environment.

Gwaii Haanas National Marine Conservation Area Reserve

The Gwaii Haanas National Marine Conservation Area encompasses 3,500 kilometres of seas, protecting over 3,500 marine species identified in the area.²¹⁷ Some of the key objectives set out in the Interim Management Plan are to protect, conserve and restore marine biodiversity and ecosystems while sustaining the continuity of Haida culture and promoting ecologically sustainable uses of marine resources.²¹⁸ Close to three percent of the Marine Area has been set aside for protection meaning that no fishing or harvesting is allowed. The rest of the region will permit varying opportunities for fishing, recreation and other activities as long as they are conducted in a manner consistent with the management goals.²¹⁹ This area is co-managed by the council of the Haida Nation and the Government of Canada.

Analysis

Impact on Existing Designations

An MCA could be established to protect the islands off Oak Bay by extending the proposed boundary of the Southern Strait of Georgia Marine Conservation Area or by creating a distinct conservation area. Either way, the MCA would surround the islands and would not impact the terrestrial protected areas.

The MCA could protect the waters outside of the existing parks, conservancies and ecological reserves. For example, in the proposed Southern Strait of Georgia National Marine Conservation Area, the new conservation area would abut the marine components of existing provincial parks (e.g. Gowlland Tod, Goldstream and Montague Harbour Marine). Additionally, a 200-metre buffer has been placed around existing provincial parks currently without a marine component (e.g. Ruckle, Wallace Island and Burgoyne Bay) to enable them to expand into the adjacent marine environment.

An MCA could provide enhanced enforcement for the existing Rockfish Conservation Areas.

How can Marine Conservation Areas accommodate First Nations land use and governance?

“By default, the administration, management and control of MCAs is assigned to the Minister of Environment.²²⁰ However, under section 8(4) of the Act, the Minister may enter into agreements with First Nations for carrying out the purposes of the Act. In addition, under section 19 of the Act, the Minister may appoint employees of a First Nations government as enforcement officers for the purpose of enforcing specified provisions of the Act or regulations.

²¹⁷ Gwaii Haanas National Marine Conservation Area Reserve and Haida Heritage Site: Interim Management Plan and Zoning Plan, May 2010.

²¹⁸ Gwaii Haanas National Marine Conservation Area Reserve and Haida Heritage Site: Interim Management Plan and Zoning Plan, May 2010.

²¹⁹ *Ibid.*

²²⁰ *Canada National Marine Conservation Areas Act*, s.8(1).

The Minister is required to consult with First Nations regarding the establishment of MCAs, the preparation of management plans, regulations and policies in respect of MCAs, the composition of advisory committees to help formulate, implement and review the management plan, and ‘any other matters that the Minister considers appropriate’²²¹.²²²

Benefits of Marine Conservation Areas

One main benefit of establishing an MCA in the islands off Oak Bay area is to provide protection to the surrounding waters. The existing designations within the area provide patchwork protection for the land and limited protection for the surrounding waters. The surrounding waters contain important habitat for marine mammals, fish, and seabirds that are sensitive to human disturbance and thus require additional protection. It is promising that the federal government is in the process of establishing a Southern Strait of Georgia Marine Conservation Area as it demonstrates that these marine ecosystems have national importance.

The zoning requirements of MCAs ensure that special features and sensitive elements of ecosystems are fully protected while also allowing for ecologically sustainable development.²²³ In the Oak Bay islands area, this could ensure particularly sensitive ecosystems (e.g. rockfish habitat and migratory bird breeding grounds) are protected while accommodating eco-tourism operations considered by the Songhees First Nation.

Marine conservation areas can be co-managed with First Nations by following the Gwaii Haanas model of management. Adopting the Gwaii Haanas model would ensure that local First Nations can exercise their rights to fish within the Oak Bay Island Marine Conservation Area.

Drawbacks of Marine Conservation Areas

Marine conservation areas allow for a wide range of uses including recreational fishing, commercial shipping, marine transportation, and tourism. This may not adequately resolve the environmental degradation of the Oak Bay Islands. In addition, establishing an MCA is a lengthy process that requires negotiations among several level of government, First Nations and local groups.

Finally, it should be noted that to add the islands off Oak Bay to the Southern Strait of Georgia Marine Conservation Area might be challenging, as the proposal explicitly excludes areas “with high concentrations of commercial and industrial areas” as well as areas with marinas, marine provincial parks and ecological reserves.²²⁴

²²¹ *Canada National Marine Conservation Areas Act*, ss.9(1), 10(1) and 11(3).

²²² TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

²²³ *Canada National Marine Conservation Areas Act*, s.4(4).

²²⁴ “Marine components of existing provincial parks (e.g. Gowlland Tod, Goldstream and Montague Harbour Marine) have been excluded from the proposed boundary. Additionally, a 200-metre buffer has been placed around existing provincial parks currently without a marine component (e.g. Ruckle, Wallace Island and Burgoyne

Part IV: Other Designations

4.1 UNESCO Biosphere Reserve²²⁵

Description

A UNESCO Biosphere Reserve is much more than a protected area designation. “A Biosphere Reserve is an internationally recognized collaborative commitment among local community stakeholders, including indigenous populations, to work together on conservation and sustainable development issues and to promote conservation research. Biosphere Reserves serve three primary functions: conservation, sustainable economic and human development, and research and education. Examples of Biosphere Reserves in BC include Mount Arrowsmith and Clayoquot Sound.

Biosphere Reserves are established under the UNESCO (United Nations Economic, Social and Cultural Organization) ‘Man and the Biosphere’ program. Candidate areas are nominated by a national government and approved by the UNESCO program. Biosphere Reserves are built around ‘core areas’ that are set aside for long-term protection (typically areas already protected, such as parks). Reserves must also include ‘buffer zones’ (regions around core areas where limited sustainable resource uses are permitted) and ‘transition areas’ (areas of ongoing economic activity and human communities).

Biosphere Reserves are a flexible concept that can take on many forms. They are typically administered by a non-profit or other organization established for the purpose of administering the reserve, or by a steering committee composed of representatives from various stakeholder groups.”²²⁶ Steering committees with members from each stakeholder – business, environmental groups, First Nations, municipal, provincial, and federal governments – typically oversee the management of the reserves.

For example, the Friends of Clayoquot Sound group is responsible for overseeing the Clayoquot Sound Biosphere Reserve. They “maintain a watchdog and communications role over resource-based economic activities (logging, fish farming and mining) and threats to the rainforests and oceans. They maintain an informative website with news releases, maps and reports, and produce regular newsletters and information packages. The Friends mount strong advocacy campaigns along with organizations such as the Greenpeace and the Sierra Club when deemed necessary. They support measures to create a conservation-based society and economies in the region. The

Bay) to enable them to expand into the adjacent marine environment.” Parks Canada “Feasibility Study for the Proposed Southern Strait of Georgia National Marine Conservation Area Reserve - Introduction”, online: <http://www.pc.gc.ca/eng/progs/amnc-nmca/dgs-ssg/intro.aspx>

²²⁵ See Appendix B for more information on UNESCO Biosphere Reserves.

²²⁶ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

Friends most recently helped to organize an information session and campaigns about the possible implications of a proposed open-pit copper mining development.”²²⁷

Protections

Biosphere Reserves can act as a forum for coordination of sustainability initiatives and dispute resolution. They also send a strong political signal regarding the ecological, economic and social importance of an area. However, they do not offer any additional enforceable legal protections beyond existing designations and UNESCO does not assume any enforcement role. Biosphere Reserves undergo a review process every 10 years by UNESCO to evaluate adherence to their main goals.

Capital Regional District Biosphere Reserve Proposal

In 2010, the Environmental Law Centre spearheaded an initiative to establish a Biosphere Reserve in the Capital Regional District. The Environmental Law Centre hosted an event with various stakeholders (including municipal governments, ENGOs and other community groups) to raise awareness of the benefits of Biosphere Reserves.²²⁸ Excitement was high following this event, but without an individual or group dedicated to moving it forward, an official proposal has yet to be made. To be successful, Biosphere proposals must indicate that the area has: conservation value, a community willing to protect the biodiversity and cultural heritage of the area, well-known and respected individuals who are supportive of the project, and legally protected core areas set aside for long-term protection. A CRD proposal may satisfy these criteria; however, at this point, significant effort on the behalf of one main organizer would be required to get a proposal together.

Analysis

Impact on Existing Designations

Biosphere Reserves are flexible designations that would complement, rather than replace, the existing protections in the islands off Oak Bay area. As mentioned above, successful Biosphere proposals require legally protected core areas set aside for long-term protection. In the Oak Bay islands area, one might argue that the three existing ecological reserves and the provincial park could constitute ‘core area’ under biosphere criteria, but they are probably too small by themselves, without being supplemented by other protected core areas.

²²⁷ George Francis, Sharmalene Mendis-Millard, and Maureen Reed, “Clayoquot Sound Biosphere Reserve Periodic Review, August 2010” at p 42, online: <http://clayoquotbiosphere.org/wp-content/uploads/2011/05/CSBR-Periodic-Review-2010.pdf>

²²⁸ For an informative video on CRD Biosphere proposal, online: <https://www.youtube.com/watch?v=8-el6lBdsWs>

How can Biosphere Reserves accommodate First Nations land use and governance?

Biosphere Reserves are multi-stakeholder, flexible designations that require the involvement and support of local indigenous populations to be successful. Biosphere Reserves encourage First Nations involvement and recognize the importance of First Nations' social, ceremonial and cultural values. They also allow for sustainable development within the Biosphere Reserve area, which would accommodate proposals for eco-tourism within the islands off Oak Bay area.

One example of First Nations land use and governance within a Biosphere Reserve is the establishment of the Ha'uukmin Tribal Park within the Clayoquot Sound Biosphere Reserve. This Tribal Park is a result of collaboration between the Tla-o-qui-aht First Nation, the District of Tofino, and Parks Canada.²²⁹ The park is to be managed in accordance with Nuu-chah-nulth principals and guided by the teachings of elders. A Guardian Watchmen program has been launched in the Park and there is a sustainable development plan being developed to establish a small hydro project, an ecotourism industry, and selective forestry.²³⁰ More information on Tribal Parks in general is provided below.

Benefits of UNESCO Biosphere Reserves

In the absence of legally enforceable protection, one benefit of UNESCO Biosphere Reserve designations is the prestige associated with this designation. A Biosphere Reserve designation would increase the profile of the islands off Oak Bay and raise awareness of environmental issues plaguing the area. It sends a strong message about the importance of the area to members of the public, politicians and government agencies. The Friends of Clayoquot Sound, for example, noticed an increase in tourism as a result of the Clayoquot Sound Biosphere Reserve designation.

Biosphere Reserves are unique in their strong emphasis on indigenous rights. The Canadian Biosphere Reserves Association notes that "[t]he practice is that consultations about a proposed Biosphere Reserve include representatives of First Nations (Chiefs and/or Elders) from the area who then decide the extent or nature of their subsequent involvement."²³¹

Another benefit is the inherently collaborative nature of Biosphere Reserves. Even the process of putting together a proposal would require all stakeholders – community members, NGOs, all levels of government, First Nations, local businesses – to work together from the outset. The Biosphere Reserve designation requires establishing a forum – either a Steering Committee or a

²²⁹ George Francis, Sharmalene Mendis-Millard, and Maureen Reed, "Clayoquot Sound Biosphere Reserve Periodic Review, August 2010" at p 42, online: <http://clayoquotbiosphere.org/wp-content/uploads/2011/05/CSBR-Periodic-Review-2010.pdf>

²³⁰ George Francis, Sharmalene Mendis-Millard, and Maureen Reed, "Clayoquot Sound Biosphere Reserve Periodic Review, August 2010" at p 42, online: <http://clayoquotbiosphere.org/wp-content/uploads/2011/05/CSBR-Periodic-Review-2010.pdf>

²³¹ Canadian Biosphere Reserves Association, FAQ, online: <http://biospherecanada.ca/en/about-2/frequently-asked-questions/>

stand-alone organization – to oversee the area. Getting everyone together in a room to discuss the issues facing the Oak Bay islands is a first step towards improving the protection of these islands.

Drawbacks of UNESCO Biosphere Reserves

One major consideration is that, by themselves, the islands off Oak Bay comprise too small an area to be considered a Biosphere Reserve. This means that Oak Bay Islands groups would have to collaborate with a larger region – the CRD – to move forward with a biosphere proposal. The proposal process is lengthy; in Canada, the application process for designation usually requires close to a decade.²³²

A Biosphere Reserve would increase the profile of the area which would likely attract more tourists. This might be problematic because destructive boating and recreation is one of the environmental threats to the islands. This designation would not add any additional legal provisions to protect endangered flora from trampling and important migratory bird breeding grounds from disturbances.

See Appendix B for more detail on Biosphere Reserves.

4.2 Tribal Parks

Description

A Tribal Park is a protected area that is declared unilaterally by an indigenous community and managed under the community's own traditional laws. "The management of a Tribal Park will vary according to the laws and traditions of the nation that declares it, but Tribal Parks established thus far have often provided for a more integrated approach to conservation and land use than provincial or national parks, allowing limited resource uses within the park so long as they accord with the community's values."²³³

The Tsilqoth'in Dasiqox Tribal Park website offers the following definition of a Tribal Park:

"A Tribal Park is an assertion of physical space on the basis of Indigenous Law, established throughout Canada as a reaction to the Crown's assumed authority. They often arise as a result of industrial economic activities that are incompatible with the original people's values. Tribal Parks are also an exercise of Section 35 of the Canadian Constitution and are developed and managed by Indigenous peoples to integrate traditional ways of life, rights and responsibilities, with ecologically sound commercial

²³² The Canadian Commission for UNESCO, Biosphere Reserves in Canada, online: <http://unesco.ca/home-accueil/biosphere/biosphere%20reserves%20in%20canada-%20reserves%20de%20la%20biosphere%20au%20canada>

²³³ TNC Canada, "Legal Tools for Protecting First Nations Land in BC", November 2014.

activities. Internationally, Tribal Parks are recognized as Indigenous peoples' and community conserved territories and areas, or ICCAs.”²³⁴

Unlike other categories of protected areas, Tribal Parks have yet to receive any official recognition in Canadian law. At this point, “it is not clear whether a Tribal Park designation by itself would be accorded any weight by Canadian courts if a dispute arose over enforcement or permissible activities within the area. However, the recent *Tsilhqot'in* decision by the Supreme Court of Canada may lend some additional legal strength to the Tribal Parks model, especially in cases where a First Nation has Aboriginal title. Specifically, the SCC confirmed that aboriginal title gives First Nations the right to manage their land and decide how it will be used:

‘Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.’²³⁵

While it remains to be seen whether this decision will lead to the courts giving greater recognition to First Nations' self-governance under their own laws”²³⁶ – and what the impact might be on Douglas Treaty Nations -- it is an encouraging precedent for Tribal Parks.

Protections

Due to the varied nature of Tribal Parks and the distinctness of traditional laws, there are no default protections that apply to all Tribal Parks. Tribal Parks established thus far have often provided for a more integrated approach to conservation and land use than provincial or national parks, allowing limited resource uses within the park so long as they accord with the Nation's values. For example, the Tla-o-qui-aht Tribal Parks prohibit clear-cut logging and industrial mining while low-impact eco-tourism, habitat restoration, and controlled run-of-river energy generation is allowed.²³⁷

Examples

Tla-o-qui-aht Tribal Parks²³⁸

“The first Tribal Park in BC was declared on Meares Island in 1984 by the Tla-o-qui-aht and Ahousaht First Nations, in the midst of heated disputes over the logging of old-growth forest.”²³⁹

²³⁴ Dasiqox Tribal Park: Nexwagwez'an, online: <http://www.dasiqox.org>

²³⁵ *Tsilhqot'in v. British Columbia*, 2014 SCC 44, at para. 73.

²³⁶ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

²³⁷ Tla-o-qui-aht Tribal Parks, online: <http://www.tribalparks.ca/>

²³⁸ For an informative video on Tla-o-qui-aht Tribal Parks, online: <https://www.youtube.com/watch?v=zeQMOuSjINc>

²³⁹ Tla-o-qui-aht Tribal Parks: <http://www.tribalparks.ca/>

Though the logging was stopped in 1985, the Tribal Park designation remained and has been gaining international recognition as a model for conservation managed by indigenous peoples.²⁴⁰

The Tla-o-qui-aht have since declared three more Tribal Parks within their territories: Ha'uukmin (Kennedy Lake Watershed), Tranquil Tribal Park, and Esowista Tribal Park. The Ha'uukmin Park management plan establishes different management zones, including *qwa siin hap* (areas to be left “as is”, including rare ecosystems and areas of special cultural significance) and *uuya thluk nish* (areas of integrated economic development and ecosystem restoration).²⁴¹ The Tla-o-qui-aht intend to develop similar management plans for the other three parks²⁴² and are pursuing other economic initiatives within the Tribal parks.

Dasiqox Tribal Park²⁴³

“In the wake of the recent *Tsilhqot'in* court decision confirming Tsilhqot'in aboriginal title to portions of their traditional territories, the Xeni Gwet'in and Yunesit'in governments and the Tsilhqot'in National Government have announced the creation of Dasiqox Tribal Park.²⁴⁴ The park is intended to be ‘comprehensive’, protecting ecological values and supporting cultural revitalization while still allowing development to take place within the park, so long as it is carried out in a manner consistent with Tsilhqot'in values. The Tsilhqot'in are still in the early stages of developing a management plan for the park, and are currently soliciting feedback from local residents, industry and government.”²⁴⁵

Analysis

Impact on Existing Designations

It remains unclear how a Tribal Park would interact with existing designations in the area. It is unlikely that the establishment of a Tribal Park would, *per se*, affect the existing Migratory Bird Sanctuary, Important Bird Area, or rockfish conservation areas (although federal rules in the bird sanctuary and rockfish conservation areas remain subject to Aboriginal rights and title as elsewhere). However, it might impact designations that restrict human activity such as the ecological reserves and Discovery Island Provincial Park.

²⁴⁰ Ancient Forest Alliance, “First Tribal Park in BC/Indigenous Relations, Meares Island, Turns 30 Years Old and is Expanded”, online: <http://www.ancientforestalliance.org/news-item.php?ID=781>

²⁴¹ Wilderness Committee, “Tla-o-qui-aht Tribal Parks”, online: https://www.wildernesscommittee.org/sites/all/files/publications/2013_tla-o-qui-aht_Paper-Web-2.pdf

²⁴² TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

²⁴³ For an informative video on the Dasiqox Tribal Park, online: <https://www.youtube.com/watch?v=vmusqGbSzmY>

²⁴⁴ All information on the Dasiqox Tribal Park comes from their website: <http://www.dasiqox.org/>

²⁴⁵ TNC Canada, “Legal Tools for Protecting First Nations Land in BC”, November 2014.

Benefits of Tribal Parks

Tribal Parks maximize First Nations autonomy as they are declared unilaterally by First Nations and managed under their own laws and traditions. They allow First Nations to tailor legal protections to their own needs and vision. In terms of environmental protection, most Tribal Parks prohibit destructive extractive industry (including clear-cuts, mining, and commercial fisheries) while allowing small-scale eco-tourism. This would allow for tourism opportunities in the islands off Oak Bay.

Drawbacks of Tribal Parks

Tribal Parks are not yet officially recognized in Canadian law. As a result, it is unclear whether enforcement of Tribal Parks by First Nations will be upheld in the Canadian court system. Similarly, prohibiting major resource use, such as mining or forestry, within a Tribal Park could be considered an expropriation of resource rights, with potential legal and financial consequences. Conversely, a Tribal Park designation may allow certain energy and resource uses that would not be allowed other designations.

4.3 Coastal Management Plan

Description

Coastal management plans are another example of multi-stakeholder, flexible designations that address local needs. Under the *Oceans Act*, the DFO has a mandate to lead and facilitate the development of integrated management plans.²⁴⁶ However, federal, provincial and local government jurisdictions overlap in complex ways, and no single authority is responsible for implementing ocean and coastal activities. Innovative coastal and estuary management plans involving multiple stakeholders have been created in various places along the BC Coast.²⁴⁷

All coastal management plans are unique; this reflects both the complex nature of coastal management and the need to address local concerns. Often coastal management plans are developed to guide the issuance of tenures. However, plans can also be modified to address water quality, heritage conservation, ecotourism, and environmental protection.²⁴⁸ An ELC research paper²⁴⁹ identified several common features that exist among coastal management plans. These include:

- Development of the plan prompted by a crisis (usually industrial expansion or threats)
- Multi-stakeholder steering or management committees

²⁴⁶ *Oceans Act*, SC 1996 c 31, s.31-32.

²⁴⁷ For a complete discussion of coastal jurisdiction issues and coastal/estuary plans, see: University of Victoria Environmental Law Clinic, "2012-03-11 – Legal Tools for Protecting Shoal Harbour"

²⁴⁸ Daryl Brown Associates, "Coastal Management Area / Sub-regional Planning Processes in British Columbia--Final Report October 21, 2005", online: <http://www.dfo-mpo.gc.ca/Library/322547.pdf>

²⁴⁹ University of Victoria Environmental Law Clinic, "2012-03-11 – Legal Tools for Protecting Shoal Harbour"

- Main objectives include environmental stewardship or balancing environmental, economic, and social interests
- Habitat classification required to identify areas of high ecological value and ensure those are protected
- Coordinated approval process for development activities
- Public input / consultation important part of plan development and review
- Monitoring to establish baseline and indicators to track changes over time
- Integration with other local initiatives
- Periodic review

Management plans that are organized around a central committee are collaborative, and the partners are held together by a joint commitment to support and implement the plan. In some cases, this commitment is formalized through mechanisms such as Memorandum of Understandings. Management plans can also be established by provincial (or municipal) Order in Council to give it more formal legal protection, as was done in the Cowichan Estuary Environmental Management Plan.²⁵⁰ The Cowichan Estuary Management Plan Order in Council has prevented certain industrial activities in the Cowichan Estuary.

Protections

There are no specific environmental protections required in a coastal management plan. It is up to the steering committee to establish protections that address the unique needs of each community. That said, most management plans involve a core protected area with high ecological value that is already legally protected (for example, a park, conservancy, ecological reserve etc.). Coastal management plans often involve a balancing of environmental, economic and social interests; this means they normally allow for sustainable development in the area outside the core protected zone. However, powerful and enforceable protective zoning and rules can be incorporated into the Management Plan, through Orders in Council, as with the Cowichan Estuary Management Plan.

Analysis

Impact on Existing Designations

Coastal management plans are designed to supplement existing environmental protections. The existing protected areas within the Oak Bay islands area – namely the ecological reserves and

²⁵⁰ BC Order in Council No 1652/1986 (12 September 1986). An example provision from this Order in Council that could be adopted is:

“no licence, permit or power under an enactment shall be issued or exercised by or on behalf of any public officer ... on any matter governing the area affected by the plan ... [without] the written approval of the Minister of Environment to the effect that the issuance or exercise will have no significant detrimental environmental impact upon that area and is in conformity with the plan...”.

Discovery Island Provincial Park – could constitute the core area of a management plan. The existing Migratory Bird Sanctuary and Important Bird Area could be incorporated into an Oak Bay Islands management plan as has been done in other management plans. It should be noted that the existing rockfish conservation areas and surrounding important fish habitat should attract the attention of the federal DFO that has the legal mandate to facilitate integrated management plans.

How can Coastal Management Plans accommodate First Nations land use and governance?

A report prepared in 2005 examining the coastal management planning process in BC identified several critiques of this process from a First Nations perspective.²⁵¹ One concern raised was that coastal management plans have not sufficiently recognized and accommodated the variety of land use needs of First Nations. Another concern was the limited participation of First Nations members in these plans.²⁵²

That said, coastal management plans are flexible designations and the most successful plans establish Steering Committees that include local First Nations.²⁵³ Management plans could be designed to allow for First Nations land use and co-management of the area. Likewise, coastal management plans often promote ecotourism as a way of balancing environmental, economic, and social interests. This could fit nicely with the Songhees First Nations' interest in establishing culturally-sensitive ecotourism in the islands off Oak Bay.

Benefits of Coastal Management Plans

The flexible nature of coastal management plans allows for collaboration between different levels of government, multiple First Nations, and community groups. This type of collaborative management initiative could be well-suited to the Oak Bay Islands region as a way to accommodate the numerous and varied interests of different actors. A Management Plan for the islands off Oak Bay could also incorporate other local initiatives, including the work done by Friends of Oak Bay Islands.

Coastal management plans are often designed to balance environmental and economic interests. This could be beneficial in this area because the close proximity of the islands to the Capital Regional District creates the potential for tourism in the area. When properly managed, ecotourism could promote environmental conservation through public education and improved awareness.

²⁵¹ Daryl Brown Associates, "Coastal Management Area / Sub-regional Planning Processes in British Columbia--Final Report October 21, 2005", online: <http://www.dfo-mpo.gc.ca/Library/322547.pdf>, at p 27.

²⁵² Daryl Brown Associates, "Coastal Management Area / Sub-regional Planning Processes in British Columbia--Final Report October 21, 2005", online: <http://www.dfo-mpo.gc.ca/Library/322547.pdf>, at p 29.

²⁵³ GL Williams and OE Langer, "Review of Estuary Management Plans in British Columbia", 2002, Fisheries and Oceans Canada, online: <http://www.dfo-mpo.gc.ca/Library/276486.pdf>

Another benefit of coastal management plans is that they can be formalized through MOUs or Order in Councils (as in Cowichan Estuary). These formal designations give coastal management plans more teeth than other collaborative approaches such as stewardship initiatives discussed below. Ideally, coastal management plans are periodically reviewed to ensure they continue to function properly.

Drawbacks of Coastal Management Plans

One drawback of coastal management plans is that their collaborative model requires buy-in and support from all stakeholders involved. This can become an extremely lengthy negotiation process, and would most likely require all parties to compromise.

Coastal management plans are designed to balance environmental and economic interests – and the accommodation of economic interests can sometimes compromise environmental protection. Generally, they involve a core area that is protected from development and a buffer zone where development is managed. It is possible that an Oak Bay Islands coastal management plan might not create additional environmental protections. In multi-stakeholder negotiations, strict conservation measures might not be extended far beyond the current protected areas -- which might be viewed as sufficient core protected area.

Another concern is that coastal management plans have been criticized by First Nations in the past because of a lack of First Nations involvement. However, each coastal management plan is unique, so a coastal management plan for these islands could be designed to ensure local First Nations are meaningfully involved in the process.

4.4 Stewardship Initiative

Description

Stewardship initiatives are community-based groups formed to address local concerns. These initiatives work best when they engage other local stakeholders such as government agencies, First Nations, and other interest groups. Collaborative stewardship initiatives act as a forum for co-ordinating efforts and exchanging useful information.

Stewardship initiatives can raise awareness about environmental values, organize monitoring and enhancement projects and develop and distribute guidance documents. While there are limits to what a community-based group can achieve without higher-level buy-in, being a recognized entity and building awareness within the community could be an important first step in building momentum for more formal legal protection.

Protections

Stewardship initiatives do not have the power to create legally-enforceable environmental protections. However, local initiatives can sometimes be more successful in protecting the

environment than legally-binding protected areas. This is because a community of engaged and educated individuals can oversee an area more effectively than a single enforcement officer. They are the eyes and ears on the ground who can report incidents to key agencies (see for example, the GWI website “Report an Incident” guide).²⁵⁴

Example

Gorge Waterway Initiative

Much can be learned from the successes of the Gorge Waterway Initiative right here in the Capital Regional District. The Gorge Waterway Initiative (GWI) is “a collaborative, community-driven group of organizations concerned with protecting and enhancing the natural and cultural features of the Gorge Waterway, Portage Inlet and the surrounding watersheds.”²⁵⁵ It was established in 2005 with the purpose of protecting, enhancing and restoring “the health of the Gorge Waterway, Portage Inlet, their watersheds and communities, for the enjoyment and well-being of present and future generations.”²⁵⁶ It is a multi-stakeholder initiative including a diverse group of NGOs, landowner organizations and local governments.

The GWI partners developed a stewardship strategy in 2005 and are currently reviewing and updating their goals and objectives.²⁵⁷ In response, the CRD established a GWI Coordinator position to coordinate the group and assist with implementing their strategy.²⁵⁸ The GWI is currently overseeing six projects²⁵⁹ aimed at restoring wildlife habitat, monitoring existing conditions, and increasing public awareness. For example, the Point Ellice Woodland Shore Restoration project involved volunteers from schools, Sea Scouts, and the community to remove invasive plants from the shoreline area and replace them with native trees, shrubs, and grasses. The GWI has seen some remarkable successes including the return of the Coho salmon and in some creeks the cutthroat and chinook.

While the GWI does not have any legal enforcement powers, the GWI website provides a useful “Report an Incident” guide with information about the key agencies to contact if an incident arises.²⁶⁰ This type of approach engages community members to oversee and protect the area. It keeps eyes and ears on the ground.

²⁵⁴ See the “Report an Incident” guide, online: <https://www.crd.bc.ca/GWI/get-involved/report-an-incident>

²⁵⁵ Gorge Waterway Initiative, online: <https://www.crd.bc.ca/gwi>

²⁵⁶ Gorge Waterway Initiative, online: <https://www.crd.bc.ca/gwi>

²⁵⁷ Gorge Waterway Initiative, Plans and Strategies, online: <https://www.crd.bc.ca/GWI/about-gwi/plans-and-strategies>

²⁵⁸ To see a full list of partners, online: <https://www.crd.bc.ca/GWI/about-gwi/partners-and-contacts>

²⁵⁹ For more details, online: <https://www.crd.bc.ca/GWI/projects-outreach/projects>

²⁶⁰ See the “Report an Incident” guide, online: <https://www.crd.bc.ca/GWI/get-involved/report-an-incident>

Analysis

Impact on Existing Designations

Stewardship initiatives serve to complement existing protected areas, rather than replace them. The existing protected areas – namely the ecological reserves and Discovery Island Provincial Park – would be bolstered by volunteer initiatives. In addition, an Oak Bay Islands stewardship initiative would draw attention to the existing Migratory Bird Sanctuary, the Important Bird Area and the rockfish conservation areas.

How can Stewardship Initiatives accommodate First Nations land use and governance?

Stewardship initiatives, as extra-legal associations, cannot legally accommodate First Nations land use nor can these initiatives formally impact government-to-government relations. However, a stewardship initiative for the islands could work collaboratively with local First Nations to ensure their interests are properly respected and supported. Indeed, one of the concerns of the Songhees First Nation surrounds effective monitoring and enforcement on the islands. They would like to establish more comprehensive monitoring of the islands to prevent vandalism and trespass on their culturally significant lands, but at this point lack the resources to do so. Collaboration with a stewardship initiative could help solve this problem.

A stewardship initiative can also act as a forum for discussion between local First Nations and the different levels of government. By bringing parties together and providing a space for discussion, a stewardship initiative could indirectly impact First Nations governance in the area. That said, a local initiative would not impact the on-going treaty negotiations, nor would it on its own establish First Nations governance over the area.

Benefits of Stewardship Initiatives

The flexible nature of stewardship initiatives allows for collaboration between different levels of government, multiple First Nations, and community groups. Given the numerous and varied interests of actors involved in the islands off Oak Bay area, this type of collaborative management could be a particularly attractive option. Stewardship initiatives can also be supported by local businesses.

Stewardship initiatives have the added benefit of community engagement. This type of engagement can raise awareness of the area and the environmental and cultural damage currently occurring on the islands.

It should be noted that stewardship initiatives can exist alongside any of the previously discussed options for protecting the islands and adjacent waters. By building contacts, raising awareness, and starting the discussion, an Oak Bay Island stewardship initiative could be a catalyst for a coastal management plan or a more comprehensive protected area designation.

Drawbacks of Stewardship Initiative

One drawback of stewardship initiatives is that they do not have the same legal teeth as legislated protected areas. Stewardship initiatives do not have the legal power to create additional enforceable protections, though they can encourage governments to do so.

Also, stewardship initiatives involve a collaborative model that requires buy-in and support from all stakeholders involved. This requires strong citizen participation and a dedicated core group of people who are willing to spearhead the initiative.

Part V: Summary and Conclusion

The islands off Oak Bay form a region of unique biological diversity, natural beauty and cultural significance. Unfortunately, it is becoming clear that the existing patch-work of protected area designations is not adequately protecting the islands off Oak Bay from anthropogenic damage. There is no comprehensive management or oversight of the area and little to no collaboration amongst interested parties. This has created major gaps in protection and enforcement. Culturally significant areas are being vandalized, rare plant assemblages trampled, and important migratory bird breeding grounds disturbed.

This report canvasses possible solutions to offer better environmental protection of the area while respecting the rights of local First Nations communities. At the provincial level, a Conservancy or Class A Provincial Park would be best suited to this area because those designations can establish strong environmental protections while allowing for full co-management with local First Nations and continued First Nations land use. Park or Conservancy Management Plans should provide special protection for ecologically sensitive areas and, in concert with the Songhees Nation, *Heritage Conservation Act* designations should be used to provide comprehensive protection and monitoring of heritage sites.

At the federal level, a park modelled after Gwaii Haanas consisting of a National Park Reserve and a National Marine Conservation Area Reserve that is co-managed with local First Nations would be the most attractive in this area. Extension of the Southern Strait of George Marine Conservation Area Reserve and the Gulf Islands National Park Reserve to include the islands under discussion could be a viable option. Alternatively, provincial designations could be used for terrestrial and near-shore areas, and a National Marine Conservation Area Reserve for marine areas.

Beyond Canadian government designations, Tribal Parks, stewardship initiatives and coastal management plans all present flexible models with particular strengths and weaknesses.

In summary, there is a wide range of protection designations available to address the concerns within the area in question. Many of these designation options will require lengthy negotiations.

Given the immediacy of the issues in this region, it would be prudent to also consider short-term solutions to address ongoing damage in the interim.

Fortunately, this is a situation where a true win-win for the entire community is possible. Better conservation of the islands off Oak Bay, recognition of Aboriginal Rights and Title, improved First Nations oversight and management of the area, and economic opportunities for the Songhees Nation through monitoring and enforcement jobs and cultural tourism are all possible if a collaborative process is followed.

To this end, this report is meant to encourage collaboration amongst all interested parties and to initiate a meaningful public discussion on how to best conserve this unique area.

“Georgia Lloyd-Smith”

Georgia Lloyd-Smith, Articled Student



Calvin Sandborn, Legal Director

(Note that Ryan Solcz did the original research for this project.)

Part VI: Appendices

Appendix A – List of Co-management Agreements with BC Parks

Appendix B – UNESCO Biosphere Reserve

Appendix C – Maps of the Area

Appendix A – List of Co-management Agreements with BC Parks

- Blueberry River First Nation
- Champagne and Aishihik (Tatshenshini)
- Da'naxda'xw-Awaetlatla First Nation
- Gitga'at First Nation
- Gitsi'is Tribe/Tsimshian Tribal Council (Khutzeymateen)
- Gitxaala First Nation
- Gwa'sala-'Nakwaxda'xw First Nation
- Haisla Nation (Kitlope)
- Haisla Nation
- Heiltsuk (Hakai)
- Hupacasath First Nation
- Kaska Dena Council (Muskwa Kechika)
- Katzie First Nation (Pinecone Burke)
- Kitasoo Xaixais Nation (Central Coast)
- Kitselas First Nation
- Kitsumkalum First Nation
- Ktunaxa/ Kinbasket Tribal Council
- Klahoose First Nation (Von Donop)
- Kwiakah First Nation
- Lake Babine Nation
- Lytton First Nation (Stein Valley)
- Lax Kw' alaams First Nation
- Maa-nulth First Nations (West Coast of Vancouver Island)

- Mamalilikulla-Que'Qwa'Sot'Em First Nation
- Metlakatla First Nation
- Namgis First Nation (North Eastern Vancouver Island)
- Nisga'a Lisims Government (Nisga'a Lava Bed)
- Nuxalk Nation
- Skeetchestn Indian Band (Steelhead Park)
- Squamish First Nation
- Snuneymuxw First Nation
- Tahltan and Iskut
- Treaty 8 (West Moberly, Doig and Prophet River FN)
- Tsilhqot'in People of Xenj – Nemah (Ts'il?os)
- Tsleil-Watuth First Nation (Indian Arm)
- Wuikinuxv
- Yekooche (Rubyrock Lake)

Appendix B – UNESCO Biosphere Reserve

Overview:

- The biosphere reserve network developed as a result of the launching of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) Man and the Biosphere (MAB) program in 1970.
- Biosphere reserves are sites recognized under UNESCO's Man and the Biosphere Programme, which innovate and demonstrate approaches to conservation and sustainable development. They are of course under national sovereign jurisdiction, yet share their experience and ideas nationally, regionally and internationally within the World Network of Biosphere Reserves. There are 553 sites worldwide in 107 countries. There are currently 15 biospheres in Canada, including two in B.C: Clayoquot Sound and Mt. Arrowsmith.
- Biospheres are coastal and terrestrial ecosystems in which biodiversity is reconciled with sustainable use, and the integration of water, land and biodiversity management is tested and demonstrated. National governments nominate the reserves for designation, and if designated the reserve still remains part of its sovereign jurisdiction.”
- Biosphere reserves are intended to fulfill three functions: (1) conservation, specifically “contribut[ing] to the conservation of landscapes, ecosystems, species and genetic variation”; (2) development, specifically “foster[ing] economic and human development which is socio-culturally and ecologically sustainable”; and (3) logistics, that is, “provid[ing] support for research, monitoring, education and information exchange related to local, national and global issues of conservation and development”.

Arguments for implementing:

- A Biosphere Reserve could become an internationally significant sustainability model. It could become a model of how a metropolitan area with a world-class Greenbelt; adjacent to commercial forests slated for urban development; and subject to First Nations with legal and cultural claims can collaborate to create a sustainable region.
- Benefits of Biosphere Reserves include raising awareness of environmental and sustainable development issues; creating a laboratory to test, explore, learn, and demonstrate various approaches to environmental protection and sustainable development; creating a forum for building consensus about disputes; advancing First Nations culture; and developing a means to meet international goals and obligations, such as requirements under the Agenda 21 of the Convention on Biological Diversity, Millennium Development Goals pertaining to sustainability, and the UN Decade of Education for Sustainable Development.

Legal / Policy Framework:

- Biosphere reserves are governed by the UNESCO Statutory Framework for Biosphere Reserves, as opposed to “hard” laws like international treaties or binding conventions. UNESCO does not police this -- each country is to ensure its biosphere reserve is functioning and meets applicable criteria. This oversight is provided by a national MAB body or “Focal Point”. If a reserve is found to be not meeting the required criteria during one of these periodic reviews, the designation may be removed.
- The creation and protection of Biosphere Reserves often will not require the enactment of new legislation, and can instead be governed by existing laws pertaining to environmental management and protection.
- The international recognition [i.e. designation as a biosphere reserve] does not, nor cannot intrude on property rights, Aboriginal rights, jurisdictional and administrative authorities, or on the responsibilities of elected bodies. Biosphere reserves do not traditionally take positions on regulatory matters dealt with by local authorities. Biosphere reserves should fulfill the above mentioned three functions: (1) conservation, (2) development, and (3) logistics (i.e. research, monitoring, and education).
- **Each biosphere consists of a legally protected core area, a buffer zone, and a transition area.** Core areas are areas which are protected from human disturbances to the extent possible; for example, an existing national or provincial park or other defined natural area. Buffer zones are areas usually associated with core areas in which resource uses do not impact significantly on the natural landscape nor intrude into core areas. The transition area, or area of cooperation [as it is called in Canada], is an area where a full range of human uses occur, including some which may be unsustainable.
- There is no minimum size requirement for a reserve, however “a biosphere reserve must be large enough to conserve most of the biodiversity found in the core areas and buffer zones, and provide sufficient scope to carry out the other functions of a biosphere reserve.” The relative size of each of the three components of the reserve can vary from reserve to reserve.
- There are **7 general criteria set out in Article 4 of the Statutory Framework, which must be addressed to qualify for possible designation.** These are:
 1. Encompass a mosaic of ecological systems representative of major biogeographic regions, including a gradation of human intervention,
 2. Be of significance for biological diversity conservation,
 3. Provide an opportunity to explore and demonstrate approaches to sustainable development on a regional scale,

4. Have an appropriate size to serve the three functions of biosphere reserves [see above],
 5. Include these three functions through appropriate zonation, recognizing:
 - a. a legally constituted core area or areas devoted to long-term protection, according to the conservation objectives of the biosphere reserve, and of sufficient size to meet these objectives;
 - b. a buffer zone or zones clearly identified and surrounding or contiguous to the core area or areas, where only activities compatible with the conservation objectives can take place (e.g., eco-forestry, organic agriculture, eco-tourism);
 - c. an outer transition area where sustainable resources management practices are promoted and developed.
 6. Organization arrangements should be provided for the involvement and participation of a suitable range of *inter alia* public authorities, local communities and private interests in the design and the carrying out of the functions of a biosphere reserve.
 7. Mechanisms for implementation, including management of human use and activities in the buffer zone, a management plan or policy for the area as a biosphere reserve, a designated authority or mechanism to implement this policy or plan, and programmes for research, monitoring, education and training.
- A form of governance should be set up, such as a board or committee, to govern the biosphere and coordinate and plan actions by involved parties. Often a biosphere reserve coordinator is named as a point of contact for the reserve. UNESCO does not have set requirements for local organization. "In Canada, each biosphere reserve has its own community-based, cross-representational organizational arrangements which are judged by those involved to be appropriate for the local circumstances. Most biosphere reserves in Canada are incorporated as non-profit organizations, some with charitable status and others in the process of seeking this status. Some work, at least initially, through a steering committee with stakeholder representation. Biosphere reserve program activities are decided locally, but some can be linked to national or international programs."
 - In terms of First Nations participation, "[t]he practice is that consultations about a proposed biosphere reserve include representatives of First Nations (Chiefs and/or Elders) from the area who then decide the extent or nature of their subsequent involvement. A biosphere reserve designation is 'without prejudice' to Aboriginal Constitutional and Treaty Rights, or outstanding

issues that may exist concerning these. Designation of a biosphere reserve does not change current or evolving jurisdictional authorities for management of land, water or air.”

What a Biosphere should Feature:

- Each biosphere consists of a legally protected core area, a buffer zone, and a transition area.
- A form of governance should be set up, such as a board or committee, to govern the biosphere and coordinate and plan actions by involved parties. Often a biosphere reserve coordinator is named as a point of contact for the reserve.
- Biosphere reserves should fulfill the above mentioned three functions: (1) conservation, (2) development, and (3) logistics (i.e. research, monitoring, education).
- Biosphere projects should ideally be developed use the Guiding Principles for Projects on Biosphere Reserves (found online at: http://portal.unesco.org/science/en/ev.php-URL_ID=6949&URL_DO=DO_TOPIC&URL_SECTION=201.html).
 - Listed guidelines include giving priority to projects that engage local communities and make reserves fully functional.
 - Projects on biosphere reserves should give emphasis to UNESCO’s mandate in education, science and culture, and to the MAB approach, promoting the integration of the natural and the social sciences. Attention should be paid to cultural sensitivity, participation and benefits for local communities, tailoring scientific research to resolve natural resource use problems; fostering dialogue amongst different stakeholders, conflict resolution, biodiversity education and awareness raising, and training of specialists. Preference should be given to relatively small-scale projects with a long-term, holistic view, and the building up local and national capacity for land and water management and sustainable development.
 - Projects should also draw on the Seville Strategy for Biosphere Reserves and Seville + 5 recommendations, which have been endorsed by UNESCO and the MAB International Coordinating Council.
 - It is also recommended that biosphere reserves be used to address treaty and convention obligations and goals, as well as UN goals ((i.e. Convention on Biological Diversity, Ramsar Wetland Convention, World Heritage Convention, and follow up to the International Year of Ecotourism in 2002.

How to get a Biosphere Reserve Designation:

- Overview of the process:

This is a slow process, usually spearheaded by a local organization formed by well-known and respected members of the community. That organization first must ensure the area in question is suitable for a

designation. The area should be able to meet the “zoning” requirements (core, transition and buffer) and the key reserve functions (conservation, development and logistics (i.e. research, monitoring, and education). Then local awareness and support must be generated. The proponent needs to discuss the issue with other organizations whose cooperation will be needed to develop and manage the reserve. They must also engage with local communities in a variety of manners. Extensive information about the reserve area needs to be compiled, as required by the nomination form, and decisions need to be made on governance structures and partnerships.

When it is clear that there is sufficient local support for a biosphere reserve to proceed, then the detailed nomination submission with supporting maps and other background materials must be completed and signed by authorities responsible for the ownership and management of the core areas and buffer zones.

Letters of support should also be obtained from local organizations, municipalities, and government bodies of representatives. These materials are then submitted to the Canadian Commission for UNESCO, which must sign off on them and submit them to the UNESCO. UNESCO then makes a final decision about the designation.

- Nomination form details:
 - There are 7 general criteria set out in Article 4 of the Statutory Framework, which must be met for a place to be qualified for possible designation. Explanations of how these are met are required, as is information about how it would meet the conservation, development and logistics goals of biosphere reserves.
 - Persons / organizations who must sign their endorsement on the form include the authority in charge of the core area and buffer zone, the federal or provincial government in charge of administration of the core area and buffer zone, various authorities, local government representatives, or community representatives from the transition area, and the MAB National Committee
 - Other required info includes details about the area, its biology, its uses; maps; and the proposed breakdown of the area into core, buffer and transition zones.
- Examples:
 - In 1999 a proposal (which ultimately succeeded) was made to designate Mt. Arrowsmith on Vancouver Island as a biosphere reserve. A report on this is available at http://www.biospherecanada.ca/publications/portfolio/mount_arrowsmith-fostering_community.pdf.
 - The Clayoquot Sound reserve has a good website, and includes useful information on the designation process and design of this reserve.

- The Clayoquot Sound Biosphere Reserve (CSBR) is located both in and adjacent to parts of traditional First Nations territory. Its core areas include the various provincial parks and the Long Beach component of the Pacific Rim National Park.
- The Clayoquot Biosphere Trust oversees reserve funding and projects, and is chaired by a board of directors that includes representatives from First Nations and communities within the reserve. The Trust also developed a mission statement and goals and objectives, as well as a community vision for CSBR.

Funding:

- Funding comes from multiple sources (private, government and other organizations). In 2009 the federal government committed \$5 million over 5 years towards Canadian biosphere reserves. This money will pay for a biosphere reserve coordinator for 14 of Canada's reserves, as well as a national office. The 15th reserve, Clayoquot Sound, has its own core funding.
- Clayoquot Sound was given a \$12 million trust from the federal government when it was designated as a biosphere reserve in 2000. The principal amount in "Canada Fund" is invested to earn income to fund the programs and activities of the Clayoquot Biosphere Trust. Programs include environmental restoration, trail building, First Nations programs, elementary school programs and improvements, seniors care projects, and marine and environmental research.

More Information:

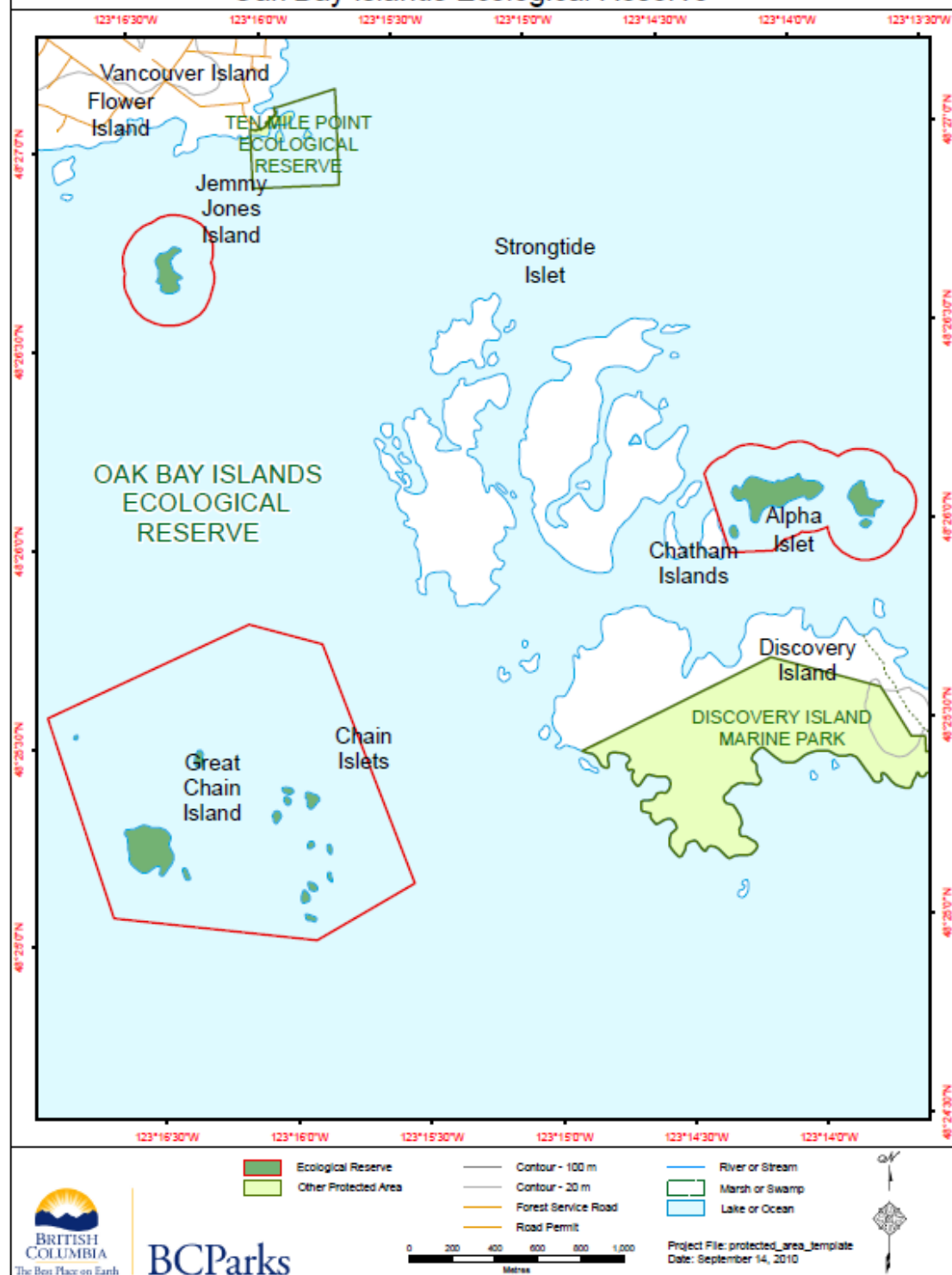
- To find more about a specific reserve and contact information for that reserve, see the UNESCO MAB Biosphere Reserve Directory.
- UNESCO's page for Biosphere Reserves: http://portal.unesco.org/science/en/ev.php-URL_ID=4801&URL_DO=DO_TOPIC&URL_SECTION=201.html
- Official documents are available online at: http://portal.unesco.org/science/en/ev.php-URL_ID=6949&URL_DO=DO_TOPIC&URL_SECTION=201.html
- The Canadian Biosphere Research Network is a network for persons conducting research on and in biosphere reserves (that is, researching the idea and implementation of the reserves, as well as researching conservation, biodiversity, development, etc. within the reserve). Its website is: <http://www.biosphere-research.ca/index.htm>.
- UNESCO has been testing out the concept of a UN Biosphere Eco-City in Ottawa, and that experience may be helpful in conceptualizing a Biosphere Proposal for the Capital Region.

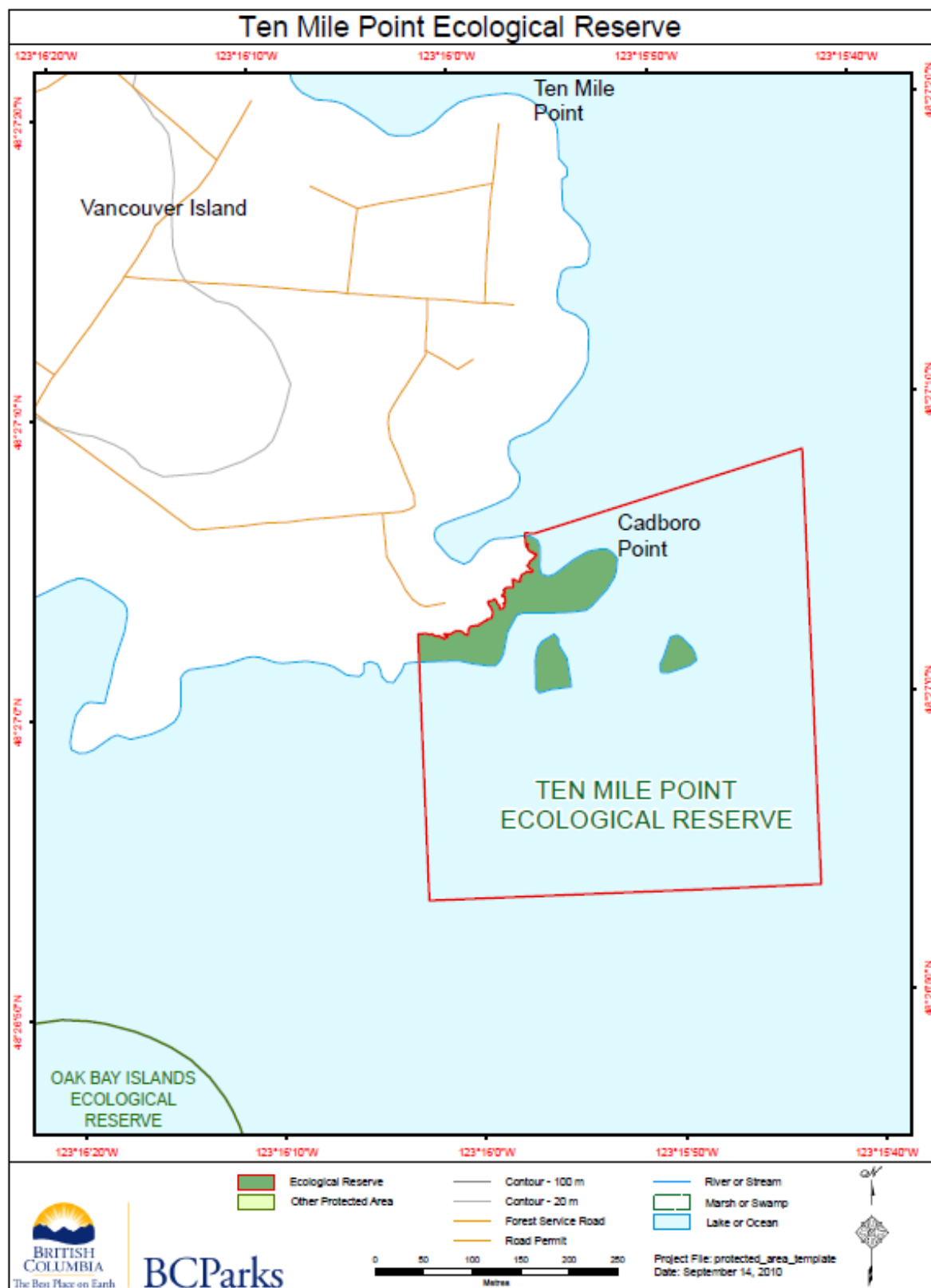
Appendix C – Maps of the Area



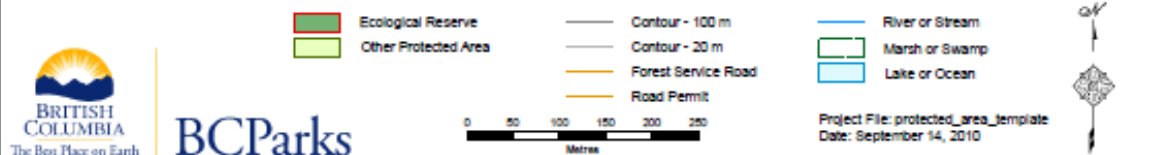
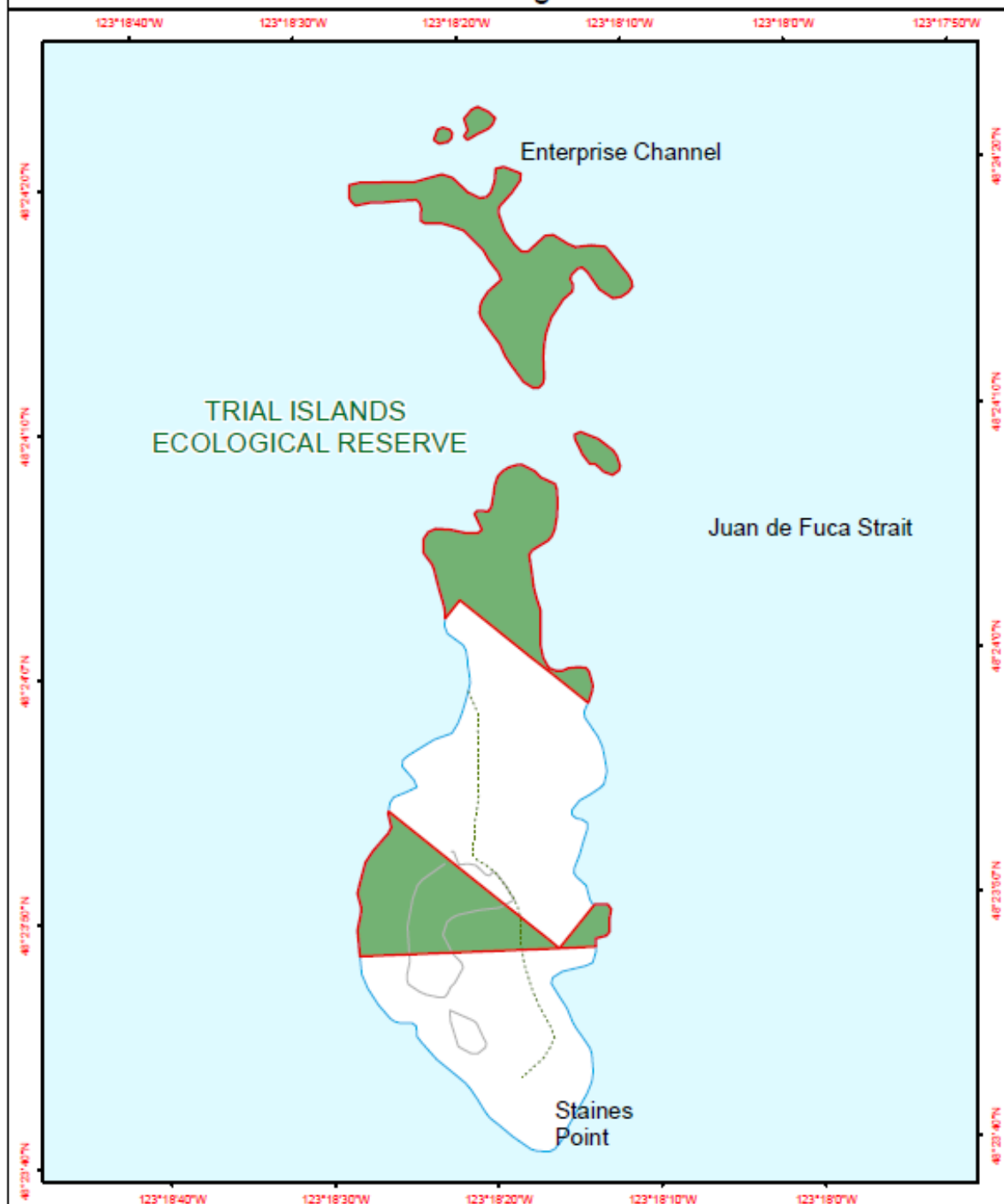
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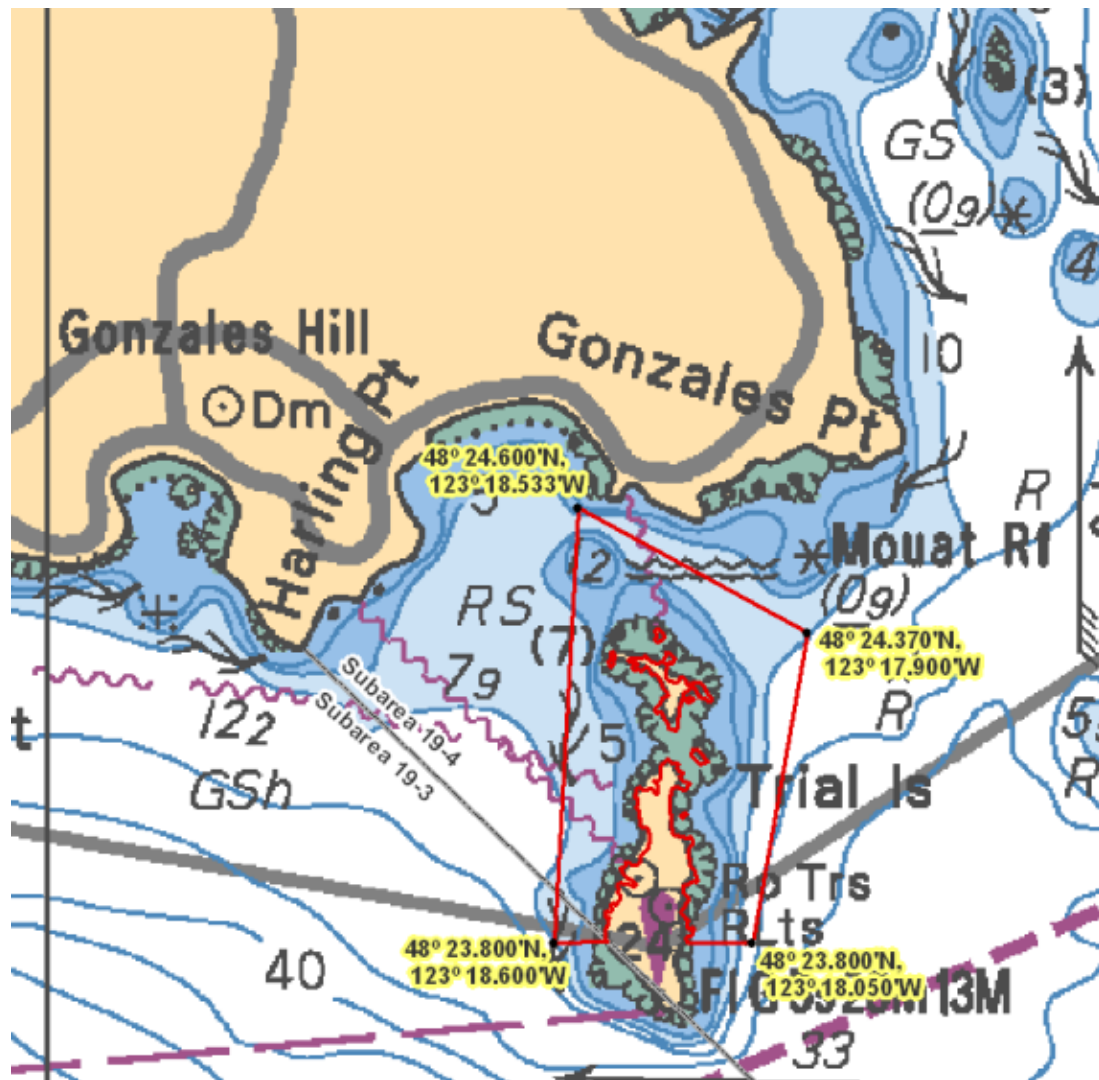
Oak Bay Islands Ecological Reserve



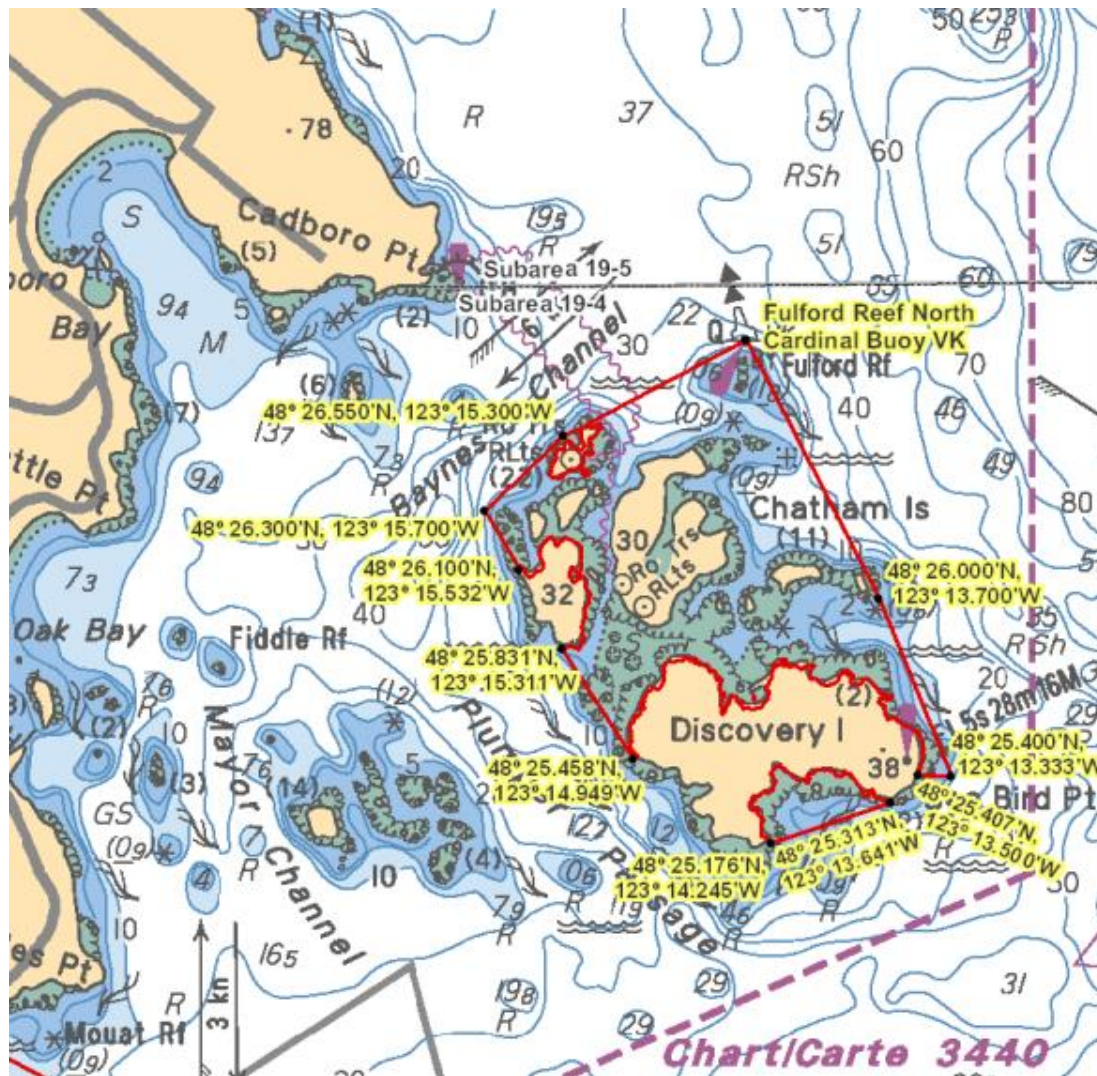


Trial Islands Ecological Reserve

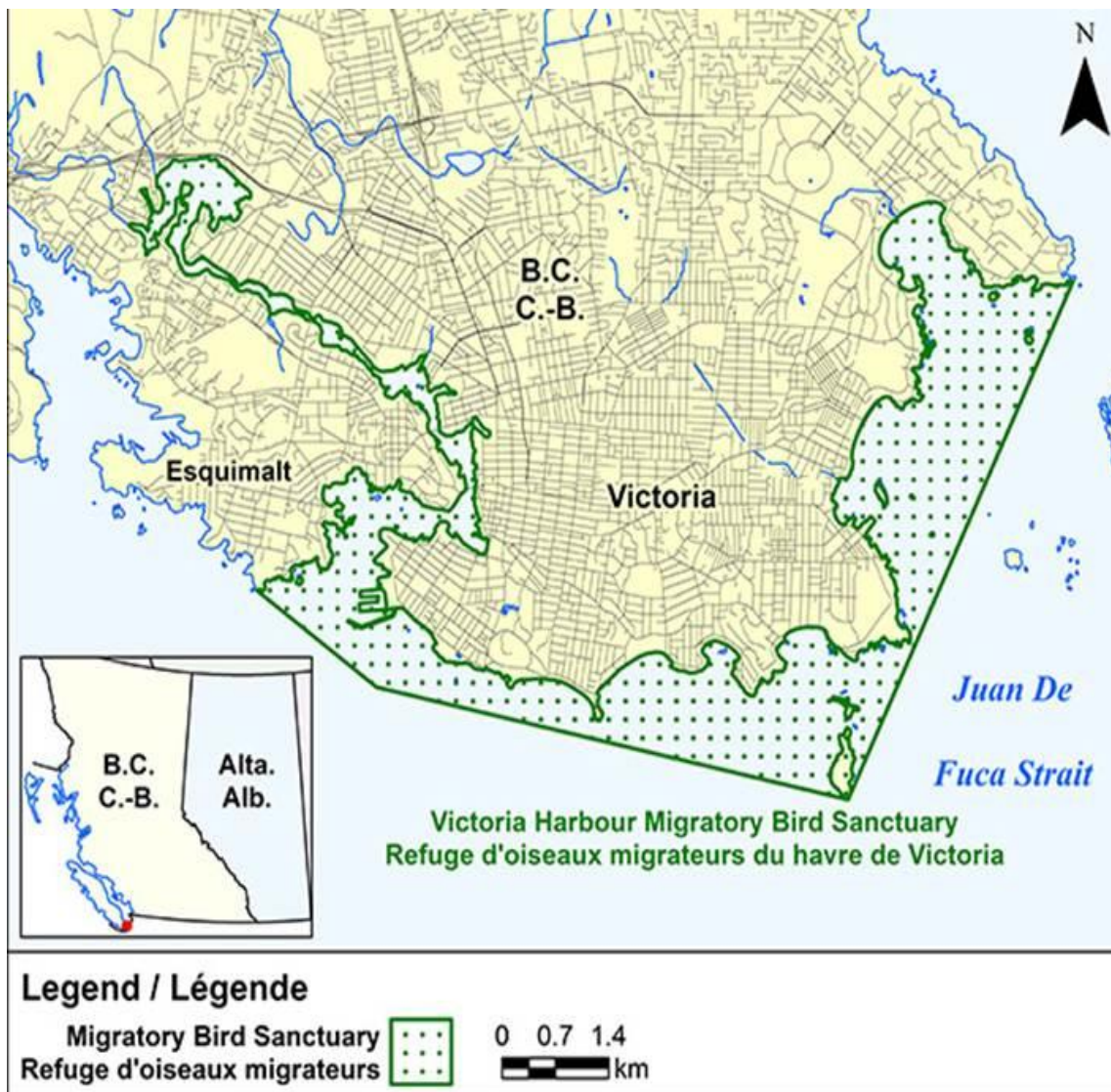




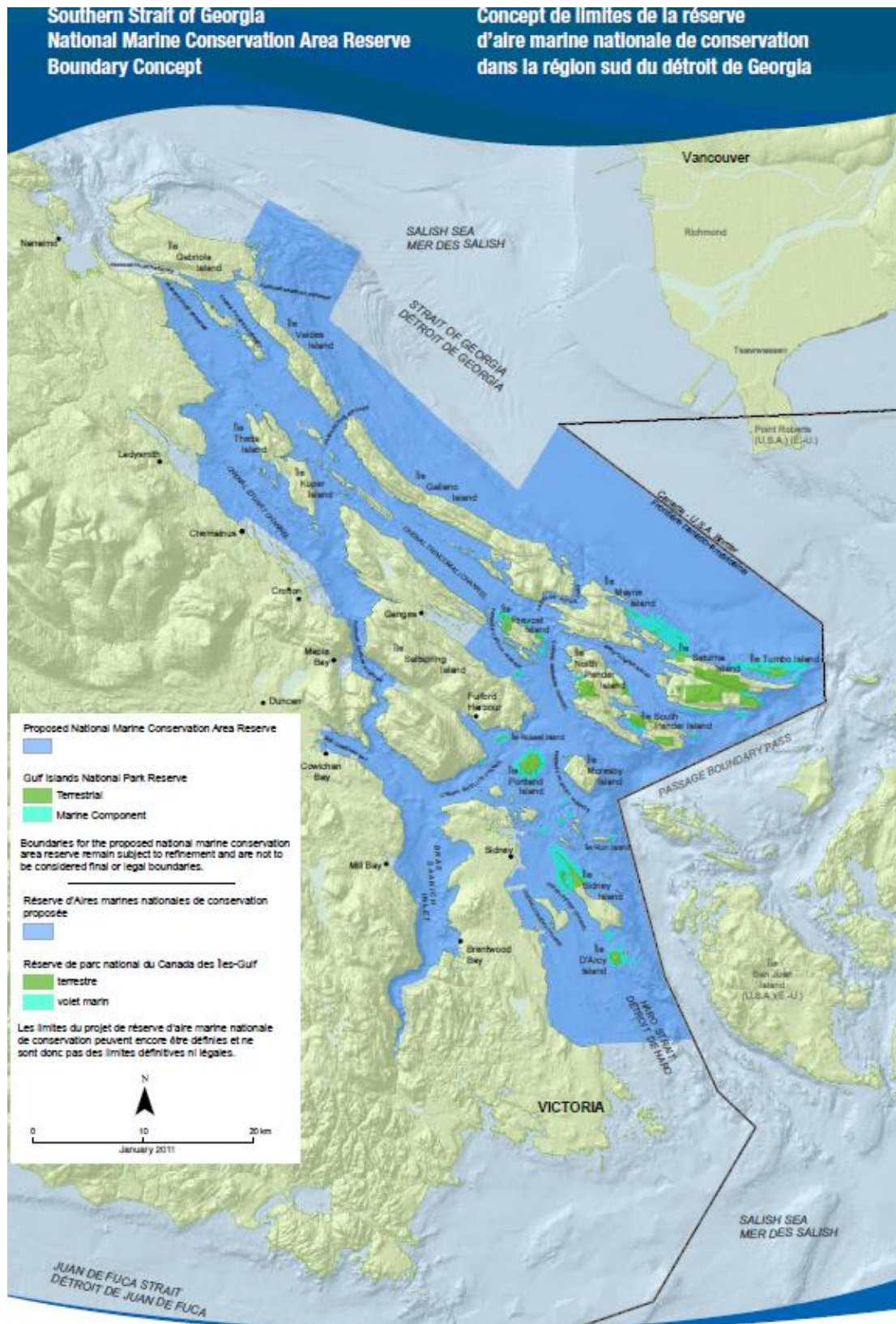
Trial Island Rockfish Conservation Area (outlined in red)



Discovery – Chatham Islands Rockfish Conservation Area (outlined in red)



Victoria Harbour Migratory Bird Sanctuary Map



Southern Strait of Georgia National Marine Conservation Area Reserve Boundary Proposal