

KITSUMKALUM INDIAN BAND

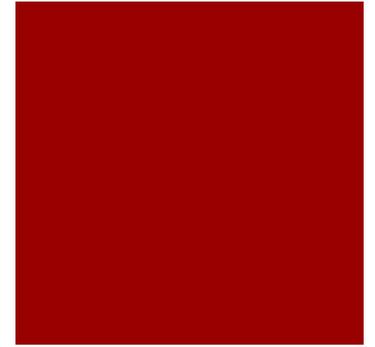


# Tsilhqot'in and Aboriginal Title and Rights

Jen Hill and Eric Wolfhard

# Agenda

- Part I: Summary of *Tsilhqot'in* decision
- Part II: Kitsumkalum's Strength of Claim
- Part III: Implementing *Tsilhqot'in*



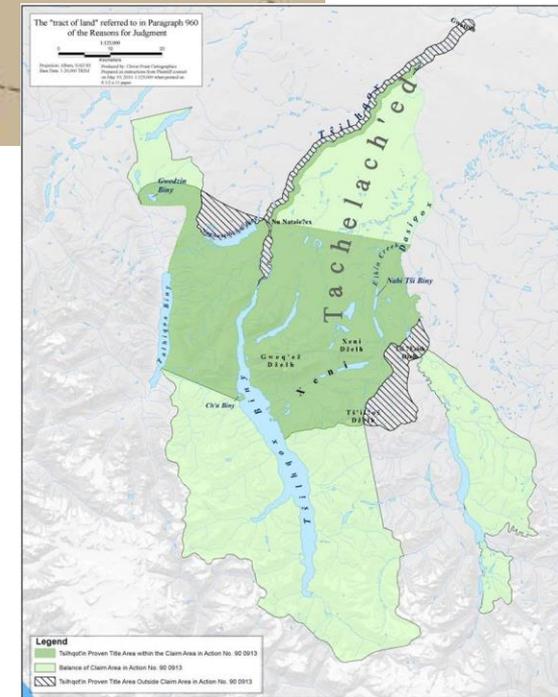


# Part I:

*Tsilhqot'in v British Columbia*

# Tsilhqot'in (the William decision)

- **First successful Aboriginal Title case in Canada**
  - BC granted timber licences to Chief William's Trapline
  - BC Supreme Court
    - 339 days of testimony
    - Vickers J. finds title with but procedural challenges
  - Court of Appeal (BCSC)
    - redefines Aboriginal title as site specific
  - Supreme Court of Canada
    - upholds BCSC decision



# Title and Rights Holder

- Aboriginal title and rights are communal rights
- When making a declaration of Aboriginal title and/or rights, the court must identify which present group or community holds those rights
- Tsilhqot'in
  - Tsi Del Del
  - Tl'esqox
  - ʔEsdilagh
  - Yunesit'in
  - Tl'etinqox
  - Xeni Gwet'in



# Test for proving Title



- Sufficiency of occupation
- Continuous use
- Exclusive use

# Sufficient Occupation



- Territorial approach:

*“occupation sufficient to ground Aboriginal title is not confined to specific sites of settlement but extends to tracts of land that were regularly used for hunting, fishing or otherwise exploiting resources and over which the group exercised effective control at the time of assertion of European sovereignty” (para 50).*

- Strong presence on land pre-sovereignty
- Notion of occupation must also reflect the way of life of the Aboriginal People, including those who were nomadic or semi-nomadic
- Context-specific: will vary with the First Nation and the character of the land over which title is asserted
- Land in question belonged to, was controlled by or was under exclusive stewardship of the claimant group

# Continuous Use



- If present use is being relied upon to prove use in pre-sovereignty times, continuous use is important
- Continuity does not require Aboriginal groups to provide an unbroken chain of occupation

*“Continuity simply means that for evidence of present occupation to establish an inference of pre-sovereignty occupation, the present occupation must be rooted in pre-sovereignty times.” (para 46)*

# Exclusive Occupation

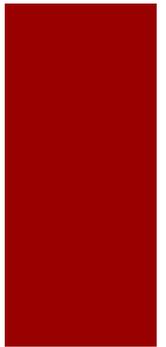
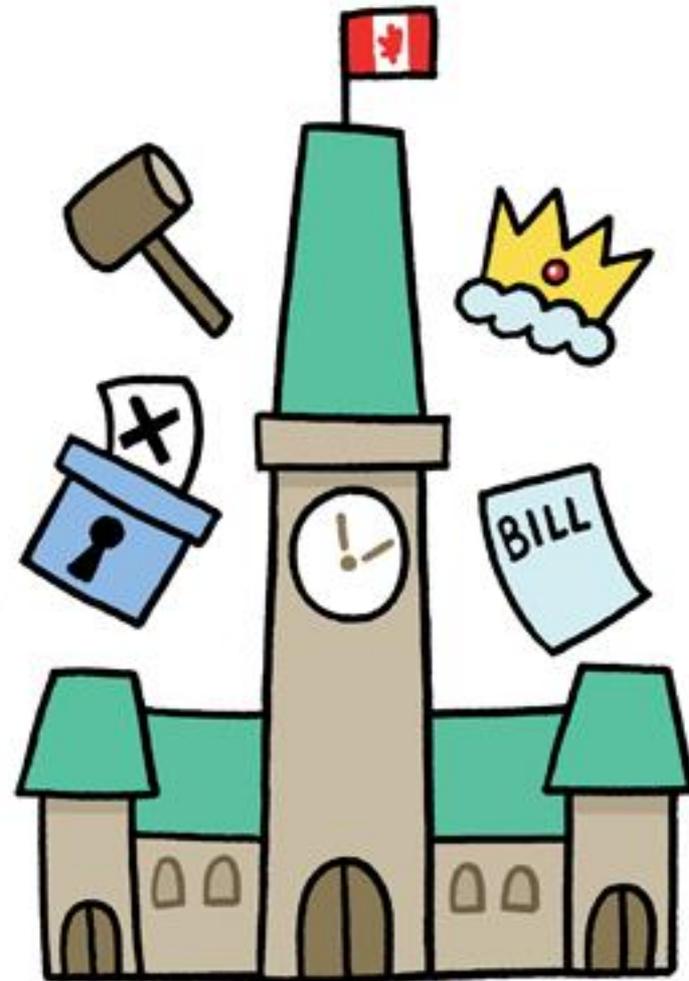
- Intention and capacity to control land
- Act in a way that would communicate to others that land is held by title holder
- Must be approached from dual perspective of common law and Aboriginal perspectives, and “*must take into account the context and characteristics of the Aboriginal society*” (para 49)
- Presence of other groups on the land does not negate exclusive occupation

# What does Title include?

- the right to decide how the land will be used
  - the right to enjoy and occupy the land
  - the right to possess the land
  - the right to reap the economic benefits of the land
- 
- While Title lands can be used in modern ways, the use must be consistent with the communal nature of the interest and the enjoyment of the land by future generations

# Infringement

- Exercise of jurisdiction on Aboriginal title land by provincial and federal governments is limited by s. 35
  - Did the government discharge its duty to consult and accommodate?
  - Did the government have a compelling and substantive purpose?
  - Is the governmental action consistent with the Crown's fiduciary obligation to the group?



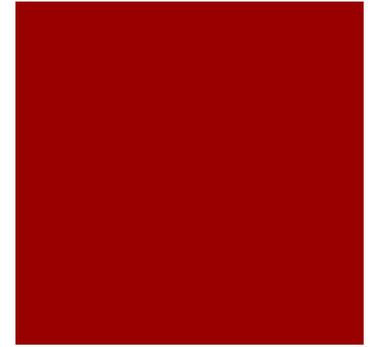
# “Pre-Proof” of Title



- Crown owes a duty to consult in good faith and accommodate for impacts on asserted Aboriginal title where appropriate (*Haida*)
- Where a First Nation has a strong claim, it would be wise for the Crown to seek consent to ensure that they are not required to cancel a project or render legislation inapplicable

*“For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title”*

# Moving toward Consent



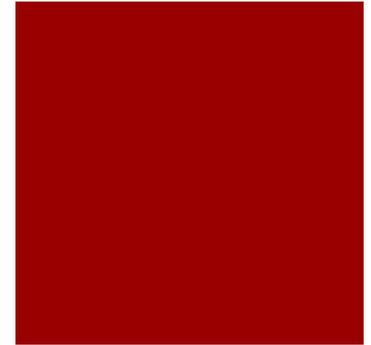
*“Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the **consent** of the interested Aboriginal group”*

**“Free, prior and informed consent (“FPIC”) is generally understood as the right of indigenous peoples to approve or reject proposed actions or projects that may affect them or their lands, territories or resources.**

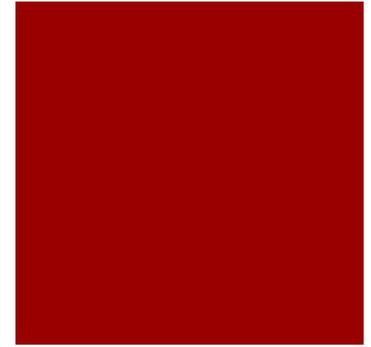


# Consequences for the Crown

- If the Crown fails to discharge its duty to consult, various remedies are available including:
  - injunctive relief
  - damages
  - order that consultation or accommodation be carried out
- If the Crown fails to obtain consent on a project, the project may be cancelled or legislation may be deemed inapplicable
- The Tsilhqot'in decision provides the incentives to move out of the inadequate interim mere consultation space of *Haida* decision, and fully into the consent space of *Tsilhqot'in*.
- This means leveraging to push the Province and Canada to make transformative shifts in legal frameworks, negotiation mandates, and conduct, and move out of the incremental change of the *Haida* era.

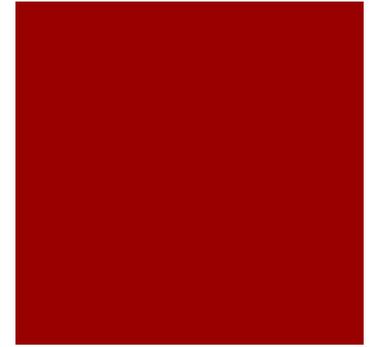


# Government Response



- British Columbia – stated commitment from the Premier to pursue the path of reconciliation
- Canada – announcements of revitalization efforts – not directly related to the decision
- No concrete action as of yet

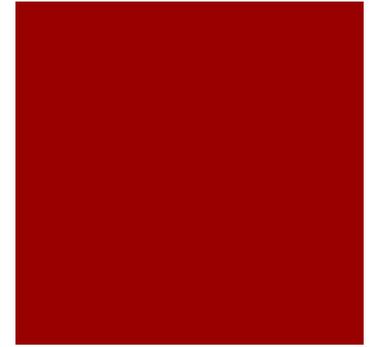
*As is typical for significant legal cases such as these, government is taking time to examine the implications including the legal, policy and public interest considerations. (EAO)*



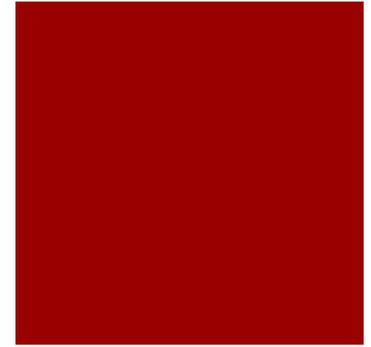
**Part II:**  
Kitsumkalum  
Strength of Claim

# What does this mean for Kitsumkalum?

- Kitsumkalum Aboriginal Title is in the “pre-proof” stage according to Canada, BC and the Courts
- Duty to Consult and Accommodate applies
- Content of the Duty to Consult and Accommodate varies with the circumstances, but the scope of the duty is proportionate to:
  - A preliminary assessment of the strength of the claim supporting the existence of the title or right; and
  - The seriousness of the potentially adverse effects upon the title or rights claimed.

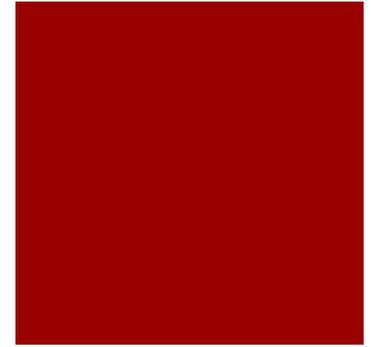


# Why strength of claim to Coast so important right now?



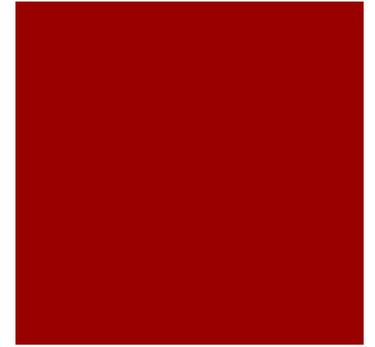
- Incorrect assessment by Canada and the Province
  - Kitsumkalum's claim of Aboriginal title and rights within the Prince Rupert Harbour area is "very weak" (Canada, August 28, 2012)
- Affects:
  - Treaty Process
  - Negotiating with proponents (LNG Industry)

# ***Declaration of the Kitsumkalum Indian Band of the Tsimshian Nation of Aboriginal Title and Rights to Prince Rupert Harbour and Surrounding Coastal Areas***



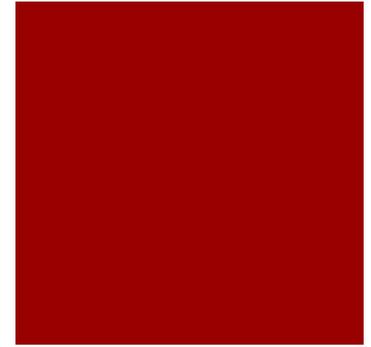
- Kitsumkalum was, and remains today, an integral part of the Tsimshian Nation, a collective of people that exclusively occupied the Prince Rupert Harbour and surrounding coast as of 1846;
- Not only was Kitsumkalum part of the Tsimshian collective, but, in accordance with Tsimshian law, ownership in specific sites on the coast, and with it the responsibility for their care and control, vested and continues to be vested in Kitsumkalum; and
- Kitsumkalum retains a strong connection to the coast, both through the continued occupation of coastal sites by Kitsumkalum and through the exercise of the aboriginal rights that have been integral to Kitsumkalum culture since prior to first contact with Europeans.

# Kitsumkalum Social History Project



- Ethnographic interviewing
- Life history interviews
- Narratives
- Genealogical method
- Ethnohistory
- Ground truthing
- Archival Research

# Kitsumkalum Social History Project



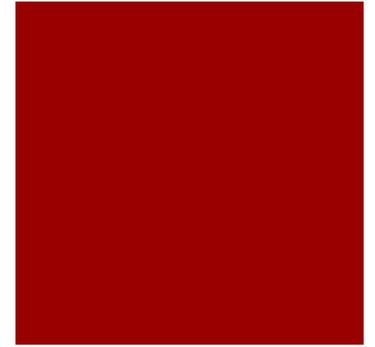
The History Project is led by Dr. Jim McDonald.

Other Researchers:

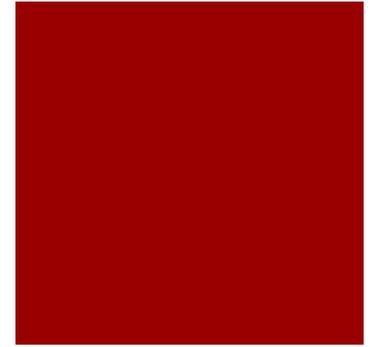
- Chrissie Douglas, Office Assistant
- Doreen George, Office Assistant
- Nicole Halbauer, Research Assistant
- Shalane Paul Research Assistant (Transcription, archival research)
- Jeremy Pahls, (Ganhada, ) Archival analysis
- Paul Harrison, BA. Anthropologist (assistance with archaeological information and mapping)
- Ken Downs, BA, MA. Anthropologist (ethnobotany, mapping)
- Marcel Robinson (Laxsgiik, Kitsumkalum member) (Research on Reserves, mapping, data entry)
- Christina Stanley Sam, Research Assistant (general research, genealogy)
- Chief Don Roberts
- Christopher Roth, Consultant (genealogy)
- Krista Voogd, Research Assistant (archival research, research on the Royal Commission archive 1916)

# Kitsumkalum Elders and Knowledge Holders

- Bolton, Alex (b. 1945- ; Hataxgm Lii Mideek, Waaps Łagaax, Gisbutwada)
- Bolton, Ben Christopher (b.1923-d.2006 ; Aya'ax; Waaps Nisho'ot; Giluts'aaw/Kalum)
- Bolton, Cliff (b.1939-d.2012; Sunaats, Waaps Łagaax, Gisbutwada)
- Bolton, Mark (b.1879-d.1940; Waaps Łagaax, Gisbutwada)

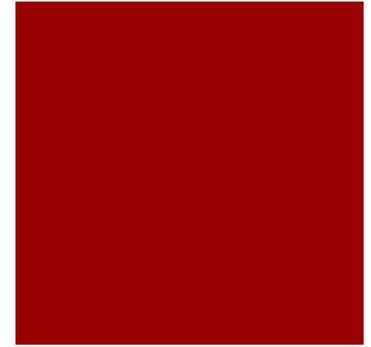


# Kitsumkalum Elders and Knowledge Holders cont'd



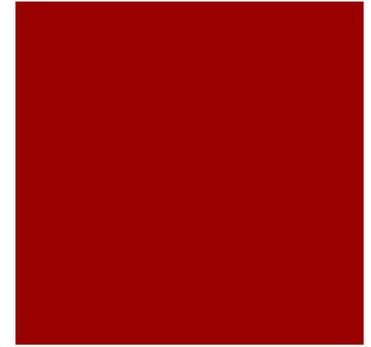
- Bolton, Rebecca (b. 1883/84- d.1976; Waaps Nisho'ot; Giluts'aaw/Kalum)
- Bolton, Stewart (b.1952- ; Waaps Nishaywaaxs; Gisbutwada; Gits'ilaasú/Kalum)
- Roberts, Vicky (b.1932 Waaps K'oom, Ganhada; Gits'ilaasú/Kalum)
- Feak, Eddie Sr. (b.1903 or 1904-d. 1981; Gisbutwada?)
- Herb Green (Lax Kw'alaams, His father is Percy Green. He is Laxsgiik and Ganhada.

# Kitsumkalum Elders and Knowledge Holders cont'd



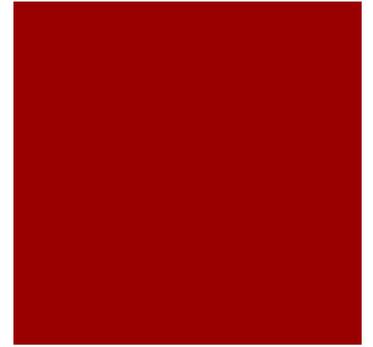
- Green, Percy (b.1926-; Ooksgehas; House of Sats'aan) Lax Kw'alaams, He is Laxsgiik.
- Hayward, Lucy (b.1881-d.1982; Ksdiyaawak; Port Simpson/Kalum)
- Inkster, Verna (b.1936-; Sagapgyoo; 'Wii'nluulk; Waaps Nisho'ot; Giluts'aaw/Kalum)
- Laidlaw, Myrtle (b.1936-; Waaps Łagaax, Gisbutwada)
- Lockerby, Sam (b.19\*5-d.1968; Waaps Łagaax, Gisbutwada)
- Lockerby, Simon (b.1915-d.1997; Gitx̄san/Kalum; House of Tsogaslee)

# Kitsumkalum Elders and Knowledge Holders cont'd



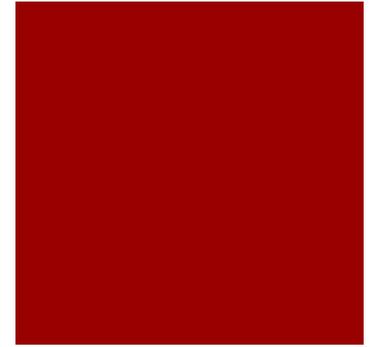
- Miller, Wally (b.1931-; Gits'ilaasú/ Kalum; Waaps Gitxon)
- Nelson, Roy (b.1925-; Waaps Xpilaxha, Ganhada)
- Roberts, Don Jr. (b.1952- ; Waaps Łagaax, Gisbutwada)
- Roberts, Don Sr. (b.1926-d.2005; Hahaalgnmhayetsk [Gitzaxlaal]; Waaps K'oom, Ganhada, Gits'ilaasú/Kalum)
- Roberts, Mildred (b.1931- ; Waaps Łagaax, Gisbutwada)
- Sankey, Bob (b.1937- ; Xaygyet) Lax Kw'alaams, Laxsgiik. Former community leader and leader of CTN and TTC. Traditional person. His Dad was a chief of the Gitwilgyoots, Gisbutwada
- Spalding, Elizabeth (b.1908-d.1987; 'Wii'nluulk; Waaps Nisho'ot; Giluts'aaw/Kalum)
- Wesley, Winnie (b.1968-d.2012?; Waaps Łagaax, Gisbutwada)

***No Permission Required:  
Title and Rights in the Traditional  
Territory of the  
Kitsumkalum Indian Band***



# Conclusion

*“There is no indication at all that any form of permission was required for Kalum people to be on the coast”, and that Kalum people travelled “freely and without permission to lands over which Kalum people exercised sole and exclusive title – an important feature for a community whose main residential areas were both inland and on the coast”.*





**Part III:**  
Implementing  
*Tsilhqot'in*

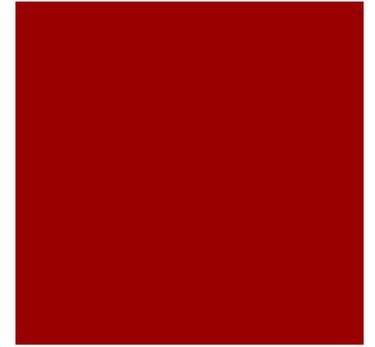
# Duty to Consult & Accommodation & the LNG Development



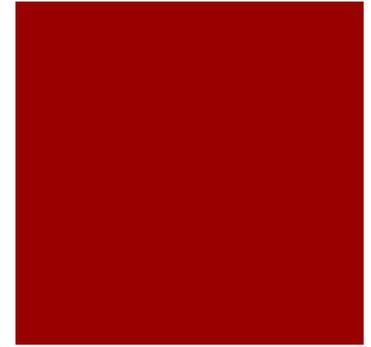
- 3 processes to participate in:
  - Regulatory Approval (EA Process)
  - Accommodation for impacts from
    - Proponent
    - Province

# Accommodation

- Confidential and off-the-record negotiations with the proponent to enter into an Impact and Benefits Agreement
- Negotiations with Province

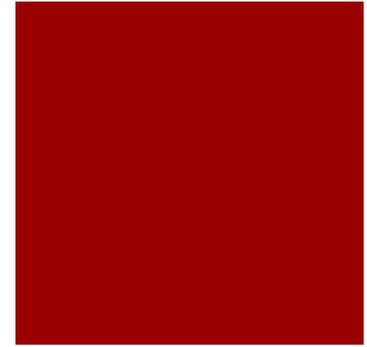


# IBA Negotiations



## Objective and Principles:

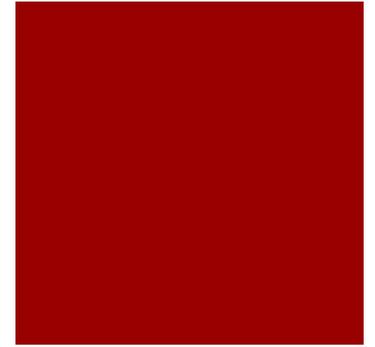
- The following objectives and principles guide KKB's negotiations with LNG Proponents and the Province with respect to the proposed LNG projects within KKB Territory.
- **Implement KKB Jurisdiction, Aboriginal Title and Rights** – KKB will implement its Aboriginal Title and jurisdiction within its Territory in a manner that facilitates economic opportunities that KKB has consented to.
- **Infringing on Title and Rights Requires Environmental Protection and Restoration** – Environmental changes impact the ability to exercise existing rights. KKB will ensure environmental risks to rights are mitigated and environmental changes are restored.



- **Creating a Strong Future for KKB Members** – KKB will create a strong future for their membership with a high quality of life based on KKB culture, traditions, and language as well as successful participation in the modern economy.
- **Develop KKB and KKB Member Business Opportunities** – KKB will ensure the community and members have business development opportunities associated with resource development projects.
- **Provide Career Development and Employment for KKB Members** – KKB will ensure that projects provide long-term employment for members and advance their careers through this employment.
- **Improve KKB Services and Infrastructure** – KKB will generate sufficient secure and stable revenues from economic projects to improve community services related to health, education, and social and cultural development. These services need to be accessible for KKB Members living on the Coast.

# Categories of an IBA

- Environmental Management and Protection
- Community Infrastructure
- Financial Compensation
- Business Opportunities
- Employment and Training



# Kitsumkalum Core Values / Goals



Core Values:

- Preserve and protect title and rights
- Preserve culture, way of life, connection to land and water
- Environmental stewardship
- Economic and social self-sufficiency
- Community development

Accepting development must be contingent on whether it complies with core values.



*Thank you!*