

**Somboon Mining Project:  
A Failure of Democracy in Thailand**

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## **Somboon Potash Mine: A Failure of Democracy in Thailand**

### **Introduction:**

*“The law is not trustworthy because they wrote the law, but they don’t follow the law. There’s the good law, but there’s no justice. There’s the law of money only. Why do I say the law of money? If someone comes and kills me, they can give money to the lawyer and the lawyer can do anything to make them safe. That’s the money law. That’s why we say there’s the law, but there’s no justice. The reason why the potash problem still exists is because of the money problem.”*

–Mae Puah, Koksi village resident.

In the district of Udorn Thani, there is a mine waiting to be built. It has been in the works for 20 years now. This mine, to be run by Asia Pacific Potash Corporation, will offer great benefits to the Thailand. It will provide jobs for local residents, cheap fertilizer for Thais, and infrastructure for a poor rural community. It will not affect the land, air, or water, and it will be one of the largest Potash mines in the world. If something does go wrong, the people will be compensated without a problem. That is all there is to know. Well, that is all that villagers were told, anyway. Not until 2001 when an NGO arrived to provide help did the villagers really learn of the tremendous risks the mine could bring to their lives.

Many arguments have been made in this Potash case about the possible effects the mine will have on the natural resources in the area on which villagers depend. This paper will not make such an argument; that is for experts to determine. The problem in this case is not that the government and APPC have been making decisions, but rather that the people who have had the least influence and participation in these decisions are also the ones who stand to lose the most. The company is rich; they will not go hungry, cold, and impoverished if this mine doesn’t occur. But the villagers may if it does, so why are they having to struggle so hard to be involved? The heart of this issue is not just about the effects of the mine, it’s about the people having a voice, having rights, and having justice. It is about democracy.

The mining process taking place in Udorn Thani tests Thailand’s democratic foundation. Democracy is a system which gives power to the people. The word ‘democracy’ originates from the Greek terms *demos*, meaning “the people”, and *Kratien*, meaning “to rule”. Power to the people means that every citizen can have real and meaningful influence over decisions affecting his or her life. In practice, democracy takes the form of a political system which is organized and regulated by a government. A democratic government needs the consent of the people in order to have legitimacy<sup>1</sup>. In a way the government is an employee of the people. In order to function honestly and efficiently, democratic government must uphold the principles of transparency, participation, and accountability. Generally, these principles are established in writing in the form of a constitution, which is the supreme law of the land. In the constitution a government also devises a system by which it makes decisions. Such a system must provide sufficient opportunities for every citizen to access information and present his or her argument in a meaningful forum. Citizens should also have the ability to hold anyone accountable, including the government, for violating those constitutional rights. With the rights of the people and the structure of the government established, laws are then created. Laws are the standards of conduct for society which are enforced by the government.<sup>2</sup> However, laws only have legitimacy in a democratic state if they uphold and comply with the values, rights, and principles set forth in the Constitution, as that is always the highest law of the land.

The Constitution of Thailand, created in 1997 embodies the spirit of democracy because it encourages the foundational principles for the empowerment of the people, which again are transparency,

<sup>1</sup> [www.indiana.edu/~ipe/glossry.html](http://www.indiana.edu/~ipe/glossry.html)

<sup>2</sup> [http://www.scicom.lth.se/fmet/ethics\\_03.html](http://www.scicom.lth.se/fmet/ethics_03.html)

participation, and accountability. It strives to provide the people of Thailand with opportunities to influence decisions that may affect them. Moreover, the Constitution declares certain rights to be universal and indivisible, such as the freedom of expression, freedom of religion, and the right to own and manage property.

This paper will determine the extent to which mining processes<sup>3</sup> in Thailand conform to the country's laws and constitutional principles, specifically making reference to the Somboon mining project in the Udorn Thani province. Before the core analysis, there will be a step by step explanation of the mining processes as they appear written in law in order to make the argument easier for the reader to comprehend. With the laws clearly understood, the first level of analysis of this case will examine the extent to which the processes have complied with the law. Next will be an analysis of whether the laws and the actions of the company and government have followed the principles of transparency, participation, and accountability established in Thailand's Constitution of 1997.

In the final section, a slightly different argument is introduced. Based on the definition of democracy as 'to be ruled by the people'<sup>4</sup>, democracy cannot exist unless the people make it so. A government cannot, by the very nature of democracy, be democratic unless the people have empowered it. One may argue that the people voted for their officials, so that is democracy, but in fact before the mining issue came up, the villagers in the Somboon mining area did not know any of their rights, nor had read the Constitution or any laws of Thailand. If democracy rests in the people, then its power is limited to the people's active participation in creating it. If democracy does not exist in the people's minds, then it does not exist at all. The final section will tell of the villagers' experiences, showing how democracy began as nothing, but now is growing. Thai society, much like this paper, is in conflict because on one hand there is a segment of Thai society which understands democracy, and for that reason this case must be analyzed from a constitutional standpoint; on the other hand the rural segment of society has a completely different worldview which must also be understood to truly appreciate the complexity of this case. Unfortunately for the villagers, this case must be fought in the governments' world because the government has the greatest power (guns, jail, military, money). Nevertheless, by exposing weaknesses in Thailand's democracy, the reader will hopefully come to realize the essential truth that a democratic government can make the laws, but laws do not make democracy.

### **What is the mining process according to law?**

To begin to understand this case, it is necessary to know the laws the government has been acting under in order to draw conclusions about the extent to which the laws have been followed. There are two key acts used in the case of the Udorn Thani mining process. The first is the Mineral Act and all its amendments, including the most recent one in 2002 which drastically affected the mining processes in law. The other is the Enhancement and Conservation of National Environmental Quality Act of 1992. The laws created from these acts establish the framework for the potash mining process. The following will be a comprehensive summary of the mining process as written in law.

### **THE MINERAL ACT**

#### *CONTRACT STAGE:*

In the case of the Somboon mining project, the process truly began in 1973 when the Thai government initiated surveys in Isan to find mineral resources. APPC, then named Thai Agrigo Potash Company,

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<sup>3</sup> In this paper, processes means both the steps for approving, constructing, and regulating a mine as specified in the laws, as well as the actions carried out by the mining company or the government in this case so far

<sup>4</sup> [www.importanceofphilosophy.com/Dictionary.html](http://www.importanceofphilosophy.com/Dictionary.html)

Ltd. became involved in the project in Udon Thani in 1984 when it signed a contract with the Ministry of Industry giving the company exclusive exploration rights in the area by virtue of the Mineral Act Section 6 ter<sup>5</sup>. From then until 2002 the company conducted its mining activities according to the Mineral Act as amended in 1979 (from now on referred to as Old Mineral Act). This law addressed the mining process for all mining methods as stipulated in the Ministerial Regulation No.28, which includes Underground mining. The following are definitions of Mining and Underground Mining respectively:

““Mining” means the operation undertaken on land or underwater to obtain minerals from an area by any method or methods, but does not include individual mining or panning for minerals as prescribed by a Ministerial Regulation.”<sup>6</sup>

“Underground Mining is mining under the ground along the lode or mineral source which is not alluvial by means of making shafts or adits or both by method or methods, e.g., use of manual labour, machinery and equipment or explosives in order to excavate rocks bearing minerals and carry them to ore dressing equipment or for direct use.”<sup>7</sup>

Until 2002, the only activity conducted by APPC was to survey the land and apply for a Special Atchayabat, which is defined as:

“A permit issued for exclusive prospecting in a special case within the area specified therein.”

Although APPC did not apply for this permit until 2000, it had conducted many surveys beginning in 1993, including some on the people’s land. This was legal by virtue of two documents: first, the contract signed in 1984, which reserved governmental status for TAPC in conducting surveys; and secondly, the Old Mineral Act which gives the government immunity from laws regarding prospecting and land rights, as clarified in Section 6 ter:

“This Act shall not apply to the Department of Mineral Resources in its works for the purpose of prospecting, testing and studying or researching in connection with minerals.”

A third regulation, Section 48 (OMA)<sup>8</sup>, expands on the rules in conducting surveys. Aside from allowing surveyors to work onto privately-owned land, surveyors can cause damages to the land necessary to complete the job, and the land owner are required to offer reasonable assistance if requested. Moreover, Section 48 (OMA) gives the company or government the right to withhold information about the project for which it is conducting the surveys.

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<sup>5</sup> **Section 6 ter:** This Act shall not apply to the Department of Mineral Resources in its works for the purpose of prospecting, testing, and studying or researching in connection with minerals.

<sup>6</sup> Old Mineral Act; Section 4

<sup>7</sup> Ministerial Regulations No. 28 (7) for Mineral Act.

<sup>8</sup> **Section 48.** For the purpose of undertaking a survey, the competent official and his labourers are empowered to enter, during the daytime, upon land over which a person has rights or possession. But he must notify the landowner or the occupier before hand and the landowner or the occupier shall render reasonable assistance as the case may require.

In the case where it is necessary to erect map posts on the land of any person, the competent official and his labourers have the power to erect the map posts as is necessary.

In carrying out the work of surveying when it is necessary and reasonable, the competent official or his labourers shall have the power to dig, cut down trees or branches or do anything to the things that obstruct the work as is necessary, taking care, however, that the landowner will receive the least damage.

The land owner has the right to receive compensation for such damage by virtue of the Constitution of 1997, section 49 regarding the expropriation of immovable properties.

*ATCHAYABAT STAGE:*

As mentioned before, the Special Atchayabat awarded to APPC in 2000 did not affect the case much in terms of the company's permissible activities; most likely the only reason it was applied for was to prevent other companies from applying for a mining license on that land by virtue of Section 46 (OMA):

“In the area covered by an Exclusive Prospecting Atchayabat or Special Atchayabat of any person, no other person shall apply for a Prathanabat<sup>9</sup> unless such person has the ownership or possession in such area under the Land Code.”

*PRATHANABAT STAGE:*

In the case of APPC, the 2002 amendments to the Mineral Act (from now on referred to as New Mineral Act, or NMA) passed just before APPC filed for their Prathanabat; therefore, it applies to the licensing, monitoring, and compensation processes. Also of note, although the Old Mineral Act has been amended, it still has legal bearing in the aforementioned mining processes as well, and both will be drawn upon here.

To begin, it is necessary to have a definition of Prathanabat, which Section 4 (OMA) clarifies: “Prathanabat” means a license issued for mining within the area specified therein.

With the addition of the New Mineral Act, it is worth noting the amended definition of underground mining by virtue of Section 3 (NMA), even though a definition already existed under the original act:

““Underground Mining” means a mining by means of drilling the ground to make the holes or tunnels in order to get the underground ore.”

The Prathanabat process begins with the application. Upon receiving the an application, the Minister will designate the mining areas not more than 10000 rai per concession. In special cases, the Minister can increase this limitation (Section 9 NMA). More than one concession can be submitted for approval.

After the company hands in its application for a Prathanabat to the Local Mineral Resources Official, (section 44 OMA), (the Local Mineral Resources Official is replaced by the Provincial Industrial Officer by virtue of Ministerial Regulation No. 78), the next necessary step is for the government to demarcate the land applied for in the Prathanabat (Section 47 OMA). The applicant must accompany the government to do this task; it can not undertake this work without the government surveyors.

After a request for a Prathanabat, the next step is demarcation. As expressed in Section 11 (NMA) the competent officials must demarcate the mapping evidence poles or boundary post of the mining area clearly visible on the ground at the expenses of the persons requesting for underground mining concession license.

As far as dealing with the land rights issues inherently raised by having an underground mine, the New Mineral Act makes 2 stipulations. The first comes in Section 12 (NMA), which states:

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<sup>9</sup> OMA, Section 4: “Prathanabat” means a license issued for mining within the area specified therein.

Section 12 (Summary)- If the mining concession covers land that is not vacant, the applicant must produce evidence they have a right to mine on or under that area.

To further clarify the laws for underground mines under land that is owned, Section 88/3 (NMA) declares:

(Summary)- if a mine is deeper than 100 meters, no permission from the owner of the land above the mine is necessary.

Granted the fact that underground mining had already been covered in the Old Mineral Act, it appears one of the only reasons for drafting the New Mineral Act was to insert this particular section allowing the mine to be built without approval of landowners. The significance of section 12 is that “written evidences” was changed to just “evidences”. This really paves the way for the provision of Section 88/3, which says that if the company can submit “evidence” that the mine will be below 100 meters, it does not need permission from the land owner to gain permission to dig. In any case, the subject of land rights is one of the key controversies in this New Mineral Act, and will be discussed in depth later.

Following the steps of application and demarcation, the first explicitly stated public participation occurs by virtue of Section 49 (OMA), which states:

“After having demarcated the area, the Local Mineral Resources Official shall make an announcement of the application for a Prathanabat by posting a copy thereof at a conspicuous place at the Local Mineral Resources Office, Amphoe or King Amphoe Office, and local kamnan Office of the locality where the Prathanabat is applied for. If no objection is raised within twenty days from the date of posting the announcement, the Local Mineral Resources Official shall proceed with the application further.”

There is some controversy over the power of TAOs in this 20 day period. Some people, namely the TAOs themselves, have asserted that if they say no to the project at this point, the project cannot proceed on their area. Others, including the Head of the Ministry of Industry in Udorn Thani Province, Mr. Nagon Sampoon said that the TAOs may oppose the project and submit opinions, but they are not the only opinions considered and do not have the final say on the matter.<sup>10</sup>

The rest of the application process entails gathering the necessary data and information together to show that the company has a plan that conforms with Thailand’s rules, regulations, and procedures for a mining operation. The collection and evaluation of this information is spelled out in Sections 88/5, 88/6, and 88/7 (see APPENDIX).

There are other limitations for receiving a Prathanabat set forth by the New Mineral Act. For one, it is forbidden to drill an underground mine beneath National Parks or Wild Animal Preservation Sanctuaries. Furthermore, in the case if is evident that the mine will adversely affect the environment to an extent that cannot be remedied or revived, then the Minister will prohibit mining in that area (Section 88/4 NMA- see APPENDIX).

At this point, the procedures for attaining a Prathanabat become unclear. There are two possible interpretations of the NMA regarding the public opinion hearing process. Both will be mentioned shortly, and the difference makes a huge impact on the people whose lands may be affected.

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<sup>10</sup> Interview with Nagon Sampoon. 24 Nov. 2004.

There are essentially 2 sections, both under Part 3 (Rights of participation by person's having interests), which specifically address the question of opinion hearing procedure. The first is Section 88/9<sup>11</sup>:

(Summary) The company has the option to hold a "preliminary discussion" with "person's having interests" if they feel it is necessary. The Director General will then arrange the details of the meeting, including the following rules and steps:

- (1) Which reports and data need to be put together
- (2) Rules regarding those allowed to participate, including headmen, executive groups, local administrators, and land owners in the mining zone.
- (3) Arrangements for a Committee to hold a preliminary meeting
- (4) Steps of the meeting and the announcement of the meeting along with data distribution in a timely fashion so that those involved can have time to prepare

A side note to this: most of the important rules, procedures, and steps about opinion hearings for mining cases are found in the Ministerial Notifications for this NMA. However, it is a fact that these Ministerial Notifications have not been made yet and according to Khun Sirirat, an official working in Department of Primary Industries and Mining, those are not to be expected until February 2005<sup>12</sup> (discussion with Khun Piyanut of TandG). In fact, various government officials, including Gitti Khon Bhut Khun in the public relations department of the Ministry of the Interior confirm that all public participation in Thailand is governed by a procedural code available in the Prime Minister's office that has not yet been passed into law.<sup>13</sup>

In any case, there is one more Section about opinion hearings necessary to know. The Section referred to is 88/11<sup>14</sup>:

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<sup>11</sup> **Section 88/9** If any of the persons desiring to request for the underground mining concession license is of the view that preliminary discussion with the persons having interests should be held in order to develop his own underground mining project, he/she shall submit the request to the Director General (of Dept. of Mineral Resources) to appoint a committee to arrange the meeting for the discussion of the matter according to the steps set forth in the Ministerial notification at the expenses of the requester.

The Ministerial Notification under Paragraph one shall indicate the rules and steps as follows:

- (1) The perfect of the preliminary reports to be brought for discussion shall consist of essential data and clear problem on the issue.
- (2) The rules on the certification of the groups or organs arising out of a grouping of persons having interests and acquisition of representatives to participate in the discussion which cover the groups of sub-district and village headmen, executive groups and members of the local administration organ council, groups of persons having the right in the land or places of residence in the mining zone.
- (3) Composite part of the Committee to hold preliminary meeting which shall consist of official representatives from related regions and government higher educational institutions.
- (4) Steps of the meeting as well as the general announcement encouraging persons having interests to dispatch their representatives in the participation in and registration for the meeting and ample advanced time to be given to persons having interests under Section 88/9 (2) for perusal of the data as appropriate.

<sup>12</sup> Interview with Khun Piyanut. 4 Dec. 2004.

<sup>13</sup> Interview with Gitti Khon Bhut Khun, 24 Nov, 2004.

<sup>14</sup> "The Director General shall call for a meeting of the persons having interests under Section 88/9 (2), within sixty days from the date the underground mining concession has been granted to anyone, in order to fix the individuals having the right to check the mining in accordance with the rules set forth as conditions in the mining concession.

The holders of the mining concession shall allocate a fund to support the employment of the experts to assist persons having the right to check mining in accordance with the rate set forth in the conditions of the mining

(Summary) The Director General shall call for a meeting with people having interests as described in Section 88/9 (2) within sixty days of the concession being granted.

The company must create a fund for experts to assist the persons who have the right to check mining.

In analyzing sections 88/9 and 88/11 together, there are two conflicting interpretations of their meaning. One basic fact that can be stated is that Section 88/9 grants the company the power to decide if it wants to hold opinion hearings and what form those will take (a review by committee of experts or an actual public hearing). The question in doubt is whether Section 88/11, which mentions an opinion hearing that occurs within 60 days after a concession has been granted, is making reference only to the opinion meeting called by the company in 88/9, or if there is a completely separate and obligatory opinion hearing which must take place. If the former turns out to be true, that would mean that the only public participation legally required comes after the demarcation during the 20 day period.

In sum, although the laws have been reviewed and government officials and APPC have been interviewed, the public participation rules, laws, and procedures remain unclear.

Whatever the case may be for public participation, there are some general prerequisites for issuing an underground mining concession. The minister must make sure that 3 conditions are met, which are stated in Section 88/5, as follows<sup>15</sup>:

(Summary)

- (1) Company submits license requests according to conditions in Section 88/6 (SEE APPENDIX)
- (2) Minister has already undergone proper opinion hearings according to Section 88/7, paragraph 1
- (3) Minister has stipulated conditions in the mining concession according to Section 88/7, paragraph 2

Section 88/7 specifies more about the opinion hearings. It provides the law for the minister to collect the Environmental Impact Analysis so that the people can review it before the public hearing. Because of its importance, it is summarized here:<sup>16</sup>

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concession within thirty days from the date following the acquisition of persons having the right to check under paragraph one.

The Director General shall pay the experts the wages after receiving the employment contracts together with the details from persons having the right to check provided only when the works already certified by persons having the right to check are received.

The term of the persons having the right to check, conditions and procedures to relieve a person having the right to check off duty after he is found to conduct in contrary to his functions by the meeting of persons having interests under section 88/9 (2), maintenance of the funds, qualification standards of the experts, nature on the employment contracts (Continued on p. 9) of the experts and procedures on money withdrawal and disbursement shall be in compliance with the provisions set forth in the Notification of the Ministry.”

<sup>15</sup> **Section 88/5** The requesters properly submit the requests in accordance with the conditions set forth in Section 88/6.

The Minister has already undergone proper opinion hearings in accordance with paragraph one of Section 88/7.

The Minister has already stipulated proper conditions in the mining concession in accordance with paragraph two of Section 88/7.

<sup>16</sup> **Section 88/7** Upon the environmental effect analysis reports of the requester for the underground mining concession license has already been approved in accordance with the law governing the environmental promotion and preservation, the minister shall collect the following data from introduction into the opinion hearing process of persons having interests according to the rules set forth in the law or related official regulations, as the case may be, in order that necessary conditions in the mining concession can be stipulated:

(Summary) After the EIA is approved, the minister will collect the following data for introduction into the opinion hearing:

- (1) Project data supporting the mining concession request
- (2) EIA and opinions of people considering it

Section 88/7 continues:

(Summary) After the opinion hearing is over and reports from the hearing have been received, the Minister will take it into his consideration and then make his own conditions based on the following:

- (1) umbrella coverage on at least every item announced in Section 88/6
- (2) If opinions from the hearings differ from the data, the Minister has the final say.
- (3) Any conditions for other projects covered in the EIA

It is critical to emphasize one point of the above regulation, and that is part (2). In essence, the entire content and debate of a public hearing will fall to the fate of the Minister's decision. There is no vote or jury of peers in this procedure.

There is another point in the preceding Section worth mentioning as well, and that is the reference to "person's having interests." It is not written clearly who those people can be or have to be. Neither does it expressly say when those people are selected or announced in order to prepare for a public meeting.

Thus, this sums up the process needed to be completed before beginning the actual mining as dictated by the Mineral Act.

As for the commencement of operations following settlement of the opinion hearing, the company may apply for a Provisional Prathanabat in order to expedite the initial day of groundbreaking (Section 51).

The Prathanabat is issued by the Minister, and is valid for 25 years from the date of issue. If a Provisional Prathanabat is issued, the 25 years begins at the date it is issued (Section 54).<sup>17</sup>

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- (1) Project data submitted in support of the request for mining concession license under Section 88/6.
  - (2) The environmental effect analysis reports together with the opinion of persons considering the reports. (Cont. on p.10)

(Footnote 9 continued from last page) After the opinion hearing process comes to an end and that the reports from the committee holding the opinion hearings have been received, the Minister shall take such reports into his consideration and then make the decision on the conditions to be stipulated in the mining concession on the following basis:

- (1) The conditions set forth in the mining concession must provide the umbrella coverage at least on every item stipulated in the announcement of the Ministry which was announced by virtue of Section 88/6.
- (2) In the case where the difference in the data and opinion towards the opinion hearings held in accordance with paragraph one, is apparent, the Minister shall have the final decision. But, if the reports or data on any problem are found to be insufficient to substantiate the consideration or that the opinion hearings was not properly held or was mistakenly led in the matter of the essence, the Minister shall then give his order for a remedy thereof, as the case may be, to enable him making his final decision.
- (3) Apart from the Minister's decision under clause (1), the conditions so contained in the mining concession must fully cover the comprehensive details of all the projects of which the requester for mining concession has already proposed in the environmental effect analysis reports in support of the request for mining concession under Section 88/6 and shall include the additional conditions or measures in the environmental effect analysis reports.

Once the concession is granted, all documents, conditions, recommendations, and regulations, including the EIA become legally binding according to Section 57 (OMA)<sup>18</sup>.

#### MONITORING/ ENFORCEMENT

Although the case obviously has not reached the point of monitoring and enforcing legal regulations, these issues are still intensely debated because land owners and environmental organizations in particular want to know how the law can protect natural resources once the mine becomes operational.

Monitoring of all things related to the Mineral Act are dictated by Sections 70 and 71 (OMA), which empower competent officials and the Local Mineral Resource Official to enter the mine site anytime for inspection, take any action to prevent harm to people or the environment, and order changes in operations or a suspension of operations as they deem fit.

Compensation for harm done to public waterways, as well as to persons, animals, vegetations, or properties (sec 68, 69 OMA), will be required by virtue of Section 138. Disregarding the EIA, which is enforced by virtue of Section 57 (OMA), is also punishable by virtue of Section 138 (OMA).

The maximum penalty under Section 138 is a fine of 200,000 Baht and possible revocation of the Prathanabat. Section 64 restricts the company's use of public waterways, but allows the Provincial Industrial Officer to issue a license under certain conditions. Section 67 (OMA) prohibits discharging slime or tailings into any water unless that water does not contain solid matter in excess of the amount prescribed in a Ministerial Regulation (CHECK THIS).

Under the New Mineral Act, there are certain situations in which the people have the right to stop the project by virtue of Section 88/12<sup>19</sup>. The occasions when this can happen include: if the mine comes above the 100 metre depth, or if the mining methods are not being done as was stipulated in the conditions of the mining concession.

With regard to damages and compensation, Section 88/13 (NMA)<sup>20</sup> declares that if any case of subsidence occurs in the mining area, it will be presumed the mine caused it, and the company will have to pay compensation.

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<sup>18</sup> **Section 57 (OMA)** The holder of a Prathanabat must conduct his mining operation in accordance with the mining methods, plans, operating schemes and conditions prescribed in the issue of the Prathanabat; for any addition to the kinds of minerals which may be mined or any alteration in mining methods, plans, operating schemes and conditions aforesaid, the holder of a Prathanabat must first obtain a written permission from the Director-General.

<sup>19</sup> **Section 88/12** The underground mining in any area within the mining zone in the following nature shall be considered an act inflicting injuries to the right in the immoveable properties within that area. The injured parties shall be entitled to demand the holders of the underground mining concession to cease mining operation and make necessary remedies in order to prevent contingent hazard.

(1) The underground mining at the depth level from the ground surface less than prescribed in the underground mining concession conditions and not over one hundred meters. (CONT on p.12)

(2) The underground mining at any depth level using mining method in accordance with the mining engineering principle to guarantee the solidity of the underground mining concession.

<sup>20</sup> **Section 88/13** In the case where the ground in any area within the underground mining concession zone subsided causing damages to persons, properties or environment, the following rules of liability shall apply to all incurred damages:

(1) It shall be presumed in the first place that the subsidence of the ground is caused by the underground mining.

It is necessary to note that any penalties paid for violating laws go to the state, and the state distributes funds as it so chooses. Personal damages go through a civil lawsuit process.

Thus, this covers the extent to which any of the Mineral Acts have relevance in analyzing the mining process for APPC. Further examination of the process will continue with an analysis of the Environmental Quality Act.

## **THE ENVIRONMENTAL QUALITY ACT**

The Enhancement and Conservation of National Environmental Quality Act (from now on referred to as Environmental Act or EQA) came out in 1992. APPC conducted much of its activity after the enactment of this environmental law, and therefore it must be understood. Other than the Mineral Act, this is the most critical act relevant to APPC's mining project. To understand the concerns of the people it is necessary to understand not only the processes that have already taken place, but also the legal provisions that would protect the people should the mine be constructed. The important definitions to know in discussing this act include the following terms (Section 4, EQA):

**“Environment”** means natural things, which form the physical and biological conditions surrounding man and man-made things.

**“Environment Quality”** means the balance of nature, being composed of animals, plants, natural resources and man-made objects which is for the benefit of subsistence of mankind and the sustenance of human-being and nature.

**“Pollutant”** means wastes, hazardous substances and other polluting substances as well as residues, sediments or the remainder of such matters, which are discharged from point sources of pollution or naturally occur in the environment, that have or are likely to have impacts on environmental quality or to cause conditions poisonous or harmful to the health and hygiene of the public, and shall mean to include radiation, heat, light, noise, odour, vibration or other nuisances emanated or discharged from point sources pollution.

**“Pollution”** means the state of the environment that has been affected, changed or contaminated by pollutants, resulting in deterioration of environmental quality, such as water pollution, air pollution, and soil pollution.

**“Point Source of Pollution”** means any community, factory, building, structure, vehicle, place of business, activity, or any other thing from which pollution is generated.

**“Waste”** means refuse, garbage, filth, dirt, wastewater, polluted air, polluting substances or any other hazardous substances which are discharged or originate from point sources of pollution, including residues, sediments, or the remainders of such matters, either in the state of solid, liquid or gas.

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- (2) If it is final that the underground mining is the primal cause of the subsidence of that ground, the holders of the underground mining concession and government agency responsible for verification of the mining shall jointly liable to the injured parties for the damages in all cases and if said government agency has already indemnified the injured parties, it shall be entitled to exercise the right of recourse against the holders of the underground mining concession therein.

“**Hazardous Substance**” means explosive substances, inflammable substances, oxidising and peroxidising substances, toxic substances, pathogenic substances, radioactive substances, genetic transforming substances, corrosive substances, irritating substances, or other substances, whether chemical or not, which may cause danger to human-being, animal, plant, property, or the environment.

“**Monitoring Control Operator**” means a person licensed to monitor, control, assess, operate and maintain a wastewater treatment or waste disposal facility, or equipment, instruments, tools, appliances for control, treatment or disposal of any other pollution, which the owner or possessor of a point source of pollution manages to constructs and brings into operation by his own investment and expense for the treatment of wastewater or disposal of wastes or any other pollutants.

“**Service Contractor**” means the person licensed to render for hire the services of wastewater treatment or waste disposal or monitoring of environmental quality.

“**Local Official**” means (Summary):

- (1) President of the Municipal Council within a municipality;
- (2) President of the Sanitary District Board within a sanitary district;
- (3) Changwat Governor within a local administration organisation;
- (6) Head of a local administration in the administration of the local administration organization other than (1) to (5) above, established under the specific law governing thereof, within such local administration organization.

“**Pollution Control Official**” means the person appointed by the Minister to perform functions concerning pollution control under this Act.

“**Competent Official**” means the person appointed by the Minister to have the power and duty to take action under this Act.

“**Minister**” means the Minister of Science, Technology and Environment.

General oversight, decision-making, and enforcement powers related to this act are given to the National Environment Board. It is useful to know the details of the NEB because it does have so much power. This board consists of up to 21 members, most of which are the heads of various ministries in the government, and at most 8 of whom are environmental specialists (4 of which must come from private sector) (Section 12). Decisions are made by a majority vote, and a meeting requires at least half of the Board Members (Section 17). The Chairman of the NEB is the Prime Minister, and the highest level member in attendance will have an extra vote to break a tie.

The Environmental Quality Act makes an attempt to recognize the inherent value of the environment as well as its direct relationship to the livelihood of many Thai people, and for these reasons the act also recognizes that the environment needs to be managed, monitored, and protected to the greatest possible

extent. According to the law, the people have the right to participate in any projects or issues related to the enhancement and conservation of the environment by virtue of Section 6, which states <sup>21</sup>:

(Summary) For the purpose of public participation, people have the following rights and duties:

- (1) To be informed and obtain information and data from the government in matters concerning the environment, except for officially classified or protected data
- (2) To be compensated or remedied by the State for pollution damages in caused by a State-supported project
- (3) To petition against an offender if a person witness a violation of the environmental protection laws
- (4) To assist government officials in carrying out duties related to this Act
- (5) To observe all provisions of this Act

This Act seems to fall in line with the principles of the Constitution, but later this paper will examine how it functions in real life.

### *EIA PROCESS*

The most important section of the Environmental Quality Act is the establishment of the Environmental Impact Assessment procedures. The actual guidelines for conducting an EIA are laid out in a notification in the Government Gazette (which was not accessible in English for this report). The Environmental Act does describe that for projects requiring an EIA, they must prepare their report at the stage of the feasibility study (Section 47). In addition to that, the Ministerial Regulations dictate that the EIA for any mine is to be submitted at the step of “Application for “Concession””.<sup>22</sup> It remains unclear whether this should be the initial submission to the Office of Natural Resources and Environmental Policy and Planning (from now on referred to as ONEP), or if it is the final submission to the Ministry of Industry for signature. For the approval of its report, the company must file the EIA with ONEP. Sections 48-51 further describe the process of creating, submitting, and approving the EIA. The steps are as follows (also see attached diagram of EIA process):

1. For the preparation of the EIA, the Minister and the NEB must approve of a person licensed to be a specialist in environmental impact assessment. This person may be hired by the mining company, so long as the government approves of them.

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<sup>21</sup> For the purpose of public participation in the enhancement and conservation of national environmental quality, the following rights and duties may be accorded to individual persons as provided by this Act or governing laws related thereto:

- (1) To be informed and obtain information and data from the government service in matters concerning the enhancement and conservation of environmental quality, except information or data that are officially classified as secret intelligence pertaining to national security, or secrets pertaining to the right to privacy, property rights, or the rights in trade or business of any person which are duly protected by law;
- (2) To be remedied or compensated by the State in case damage or injury is sustained as a consequence of dangers arising from contamination by pollutants or spread of pollution, and such incident is caused by any activity or project initiated, supported, or undertaken by a government agency or state enterprise;
- (3) To petition or lodge a complaint against the offender in case of being a witness to any act committed in violation or infringement of the laws relating to pollution control or conservation of natural resources;
- (4) To co-operate and assist government officials in the performance of duties relating to the enhancement and conservation of environmental quality;
- (5) To strictly observe the provisions of this Act or other laws concerning the enhancement and conservation of environmental quality.

<sup>22</sup> Ministerial Regulations, EQA, Attachment No. 1. (See APPENDIX)

2. Submit EIA to ONEP, who has 15 days to conclude whether all necessary information and documents are in order and filed correctly.
3. Upon confirming all documents required are in order, ONEP has 30 days to review the EIA and make preliminary comments, which it then passes to the committee of experts (in this case, the Technical Review Committee).
4. The Committee of experts has 45 days to review and consider the EIA; after 45 days the committee must reject the EIA or it will automatically be deemed approved. The Committee does not have to wait 45 days to approve or reject it.

The last point, part (4), is interesting, and worth emphasizing. If no decision is made in 45 days, the DEFAULT procedure is to approve the document. This issue will be discussed in detail later.

In any case, once approved, the EIA and all attached conditions and mitigation measures shall be deemed the active laws governing the project by virtue of Section 50 of the Environmental Act and Section 88/7 of the New Mineral Act. Whatever is stipulated in the EIA report becomes the highest standard by which the company can legally be held, save a civil lawsuit by any persons who receive damages they feel are caused by the project but are not covered by the EIA.

One last significant point about the EIA process; if an EIA is approved for one project such as the Somboon Mine, an EIA is not necessary for a similar project, as Section 46 (EQA) <sup>23</sup> specifies:

(Summary) If an EIA concerning a project of any type, size, or site selection and such assessment can be used as a standard assessment applicable to another project of similar nature, then the Minister may, with NEB's approval, exempt such project of similar nature from doing an EIA, as long as they agree to comply with the old EIA's conditions.

Most of the EIA process is clear, but two uncertainties remain: when is the feasibility study stage, and who is the EIA submitted to in the application for a concession. In any case, this sums up the EIA process as specified in law.

#### *MONITORING/ PUNISHMENT*

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<sup>23</sup> Section 46 For the purpose of environmental quality promotion and conservation the Ministers shall, with the approval of the National Environment Board, have the power to specify by notification published in the Government Gazette types and sizes of projects or activities likely to have environmental impact, of any government agency, state enterprise, or private person, which are required to prepare reports on environmental assessment for submission to seek approval in accordance with Sections 47, 48 and 49.

In the notification issued according to the first paragraph, procedures, rules, methods, and guidelines shall be laid down for the preparation of environmental impact assessment reports for each type and size of project or activity, including related documents that are required to be filed together with the report.

In case there has been an environmental impact assessment concerning a project or activity of any particular type or size, or site selection for such project activity in any particular area and such assessment can be used as a standard (Cont. on p. 17) assessment applicable to the project or activity of the same type or size or to the site selection of such project or activity in the area of similar nature, the Minister may, with the approval of the National Environment Board, issue a notification in the Government Gazette exempting such project or activity of the same or similar nature from the requirement of environmental impact assessment, provided that the proponent of such project or activity shall express its consent to comply with various measures prescribed in the environmental impact assessment report which is applicable as the standard for assessment of such project or activity in accordance with the rules and methods specified by the Minister.

If the mine goes ahead, the critical aspects of environmental protection fall to the monitoring and enforcement mechanisms laid out in the EQA.

The first step in protecting the environment comes at the stage of setting standards. The body in charge of this task is the National Environment Board by virtue of EQA sections 33, 34, and 35.

The second level of defence for the environment is the Environmental Quality Management Plan (EQA Section 35, 36), followed by Changwat Action Plans (EQA Sections 37, 38) and local action plans (EQA Section 37). These plans all set specific rules, regulations, and standards for their respective areas, as well as create laws and rules for implementation and enforcement, therefore they hold weight.

Most powers over the monitoring of the environment and projects like the Udon Thani potash mine fall in the hands of the National Environment Board. Essentially, the NEB can survey any activity which may affect the environment (EQA Section 20) and can request any information, documents, or data related to conservation and protection of the environment, which includes any activity by a mining project (EQA Section 19).

Daily oversight of project operations is the responsibility of the Monitoring Control Operator, who submits detailed reports and data to local officials at least once a month. The mining company, with the approval of the NEB, can hire its own Monitoring Control Operator (Section 94). Numerous duties and powers are given to a pollution control official (second only to the official empowered by the law on industrial plants), appointed by the Prime Minister and the 2<sup>nd</sup> person in charge of this Act (also designated by Prime Minister)<sup>24</sup> who is responsible for inspecting the factory and issuing orders to correct problems and pay penalties (Section 11, 82, 86. In response to the orders of the pollution control officer, the company has the right to appeal any orders by virtue of Section 87, which states:

The owner or possessor of the point source of pollution...is entitled to challenge such order by petition to the Pollution Control Committee (PCC) within thirty days from the date of receiving the order...If the petitioner does not agree with the decision of the PCC, he shall appeal to the Minister within 30 days the date of receiving notification of the Pollution Control Committee decisions. The decision of the Minister shall be final.

Emphasizing the last point, any complaint about pollution or other violations in the project can be challenged by the company directly to the Prime Minister, who can independently make a ruling on the issue. This gives him a lot of power.

In case violations do occur, Sections 96-110 spell out penalty measures for the liable parties.

There are a few significant Sections to expand on. Specifically addressing the limitations of the public, Section 101 proclaims:

Any person who spreads or disseminates false information about the danger from any point source of pollution with the intention to destroy its reputation or to undermine public trust on the lawful operation of its business or activity shall be punished...

It is significant to note that nowhere in the EQA are penalties spelled out for violations of the EIA or its procedures (section 82 EQA).

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<sup>24</sup> Refer to Section 12, EQA

Also of significance, the Environmental Act does not specify the requirement of a baseline study, which is needed in order to determine how much damage has taken place so that the company may be liable.

### **Have the Government and the Company Followed the Law?**

Now that the laws are clear and understood, it is possible to look at the sequence of events as they have actually occurred in this case, and then examine the legality of such actions.

#### *CONTRACT AND SURVEYS*

As mentioned earlier, it was the government who first began looking for potash in the Isan region. After some initial discoveries about Udorn Thani, the Ministry of Industry signed a contract for exclusive exploration rights with Thai Agrigo Potash Co in 1984. Essentially, this contract gave TAPC the rights to do the government's work, which exempted the company from having to apply for an Atchayabat in order to conduct its surveys for Potash. Nothing happens until 1994 when TAPC changed its name to APPC and made additions to the contract (not available for this report) before starting to begin to survey.

The surveying consisted of drilling bore holes, some of which caused damage to villagers' land for which APPC later paid compensation. Bore holes are one of the survey methods allowed by the Ministerial Regulation No. 70 (for the OMA) (see APPENDIX). During this time villagers were generally not aware of the reason for the bore holes. Some reports have suggested that the villagers were told that the surveys were for oil, but generally speaking there was no mention that this activity was for potash. However, there is no law that required them to do so. In either case, it has been established in reading the initial contract that the company was fully aware that it was exploring for Potash, and not oil. These surveys were conducted in 1997. No laws were broken by these activities.

#### *NEW CONSTITUTION and ATCHAYABAT*

On October 11, 1997, Thailand enacted its new Constitution. On September 8, 1997 an Amendment to the Minerals Act of 1967 was proposed in order to specify regulations for underground mining<sup>25</sup>. It was passed in November of 2002. This Amendment sparked heated debates with regards to its constitutionality, which will be discussed in detail later.<sup>26</sup>

In 1998 the company applied for a Special Atchayabat requesting 53 plots of land totaling 528,750 rai<sup>27</sup>. According to the head of the Ministry of Industry, Nagon Sampoon, the Atchayabat was not legally required of the company before applying for a Prathanabat.<sup>28</sup> The best speculation for this action is that by virtue of the OMA no one other than the Atchayabat holder can apply for a Prathanabat on the same land, so this essentially provided needed security for the company to attract more investors. The government issued the 3-year Atchayabat on November 3, 2000. Although the New Mineral Act had not yet passed to allow mining below 100m without land owners' permission, this Atchayabat which covered people's property did not necessitate permission either because, according to Nagon Sampoon, an Atchayabat is only used for bore holes and surveys, the fact that the bore holes were for an underground mine is irrelevant and therefore people do not need to be notified. The Atchayabat process

<sup>25</sup> Aerts, Ruthie and Pearl Pari. "An Economic, Social, and Cultural Rights Analysis: A Case Study on the Proposed Udorn Thani Potash Mine in Northeast Thailand." 7 May 2004.

<sup>26</sup> Aerts, Ruthie and Pearl Pari.

<sup>27</sup> Gulonbwong, Suwit. "Potash." Green law and research office.

<sup>28</sup> Interview with Head of Industry Ministry in Udon Thani: Nagon Sampoon. Udon Thani Province. 24 Nov. 2004. Translated by Ajan Adisak.

does not require any notification, information, or other action related to public consultation. No laws were broken in this process.

On Dec. 9, 1998, APPC held its first broadly based public consultation in the Udorn Thani province. The meeting of 70 people comprised of District Chief, Deputy District Chiefs, Sub-district chiefs, Village heads, Sub-district Council members, Provincial officials and media (APPC appendix, also Paw Bunya). The content of the meeting included general information about the project: what type of operation is was, for what resources, how long it will last, the benefits to the community and Thailand, etc. According to Paw Banya the villagers' questions about the potential negative impacts of the mine were glazed over. The community leaders then spread the word to others. No laws were broken during this process.

### *ENVIRONMENTAL IMPACT ASSESMENT*

In 1999, Team Consulting Engineering and Management Co. began conducting its independent survey in the project area.<sup>29</sup> TEAM was hired by APPC, and they had already been approved to conduct such work as required by law by the Thai government<sup>30</sup> According the EQA, the Environmental Impact Assessment is conducted at the feasibility study stage in the process; however, it remains unclear in the laws when a feasibility study is supposed to take place in the process to develop a mine. As far as anyone can tell, the EIA occurred at an adequate time. The EIA was submitted in 1999 (FIND A SOURCE). One significant question about this is when the EIA is supposed to be submitted. According to the EQA Ministerial Regulation mentioned previously in the report, an EIA should be submitted for approval at the stage of "application for the "Concession""<sup>31</sup> Either this refers to the submission to ONEP or to the Ministry of Industry, but the difference is significant. If the former interpretation is true, then the EIA was illegally submitted and approved. It is necessary also to mention that in the EIA study, TEAM included no community members, NGOs, or other qualified persons who could represent the needs of the people living in the mining area. Moreover, few, if any villagers in the community were even notified that the EIA was being prepared. Also of significance, TEAM had done previous work in Thailand which included preparing the EIA approved and used for the construction and operation of the Pak Mun Dam, which became an environmental and human rights disaster.<sup>32</sup> In conclusion, it is unclear whether laws were broken during this process.

The EIA was approved either on December 26, 2000. It has been confirmed by 3 sources that ONEP and the TRC definitely approved it; officials in the Ministry of Industry, the Ministry of Natural Resources and Environment, and APPC. However, it is also confirmed by Mr. Sampoon that the EIA was not signed by his ministry, which is the final stage of approval. Essentially, the EIA is not completely finished with the approval process but only needs one signature, not another review. There have been questions raised about whether the passing of the New Mineral Act requires a new EIA to be done, but that will be discussed in detail later.

In any case, the approval of the EIA is questionable for three reasons: first, the EIA had several major weaknesses which were later exposed by an independent committee of expert scientists and academics; secondly, the technical review committee lacked adequate specialists (such as for water, underground mining, and geography) and even had some members who were paid by APPC (CHECK ON THIS); and thirdly, it seems ONEP should not even have looked at the EIA before the stage of application for a Prathanabat as specified in ministerial regulations for the EQA. However, the fact remains that

<sup>29</sup> Aerts, Ruthie and Pearl Pari.

<sup>30</sup> Aerts, Ruthie and Pearl Pari.

<sup>31</sup> Ministerial Regulation for EQA, No. 3 appendix 2

<sup>32</sup> Interview with Suwit Gulapwong. 24 Nov. 2004.

somehow this EIA passed through both ONEP and the TRC, and therefore currently stands approved as long as someone can confirm that it was submitted at an appropriate time. As far as anyone can tell, this EIA has been legally approved and will be used by the Government to issue a concession to APPC. It remains unclear as to whether a supplement will follow, or even is required. The Ministry of Industry, APPC, and Ministry of Natural Resources and the Environment have suggested that some sort of amendments will need to be included, but they have not clarified the legal channels through which a supplement must pass. According to the laws, it appears the EIA is approved and awaiting signature from the Ministry of Industry, which occurs after the 20 day review period for the Atchayabat.

To recap the EIA approval process, it is doubtful that the EIA should have legally been approved; however, it appears that the document went through the correct channels, and any blame for mistakes falls directly on the government, especially ONEP and the TRC. As it stands now, it seems the government will uphold its decision to approve the EIA. A supplement may be pending, but it is unclear whether the supplement will go through any approval process. The only persons legally able to cancel an EIA are the members of the technical review committee, so the responsibility falls on their shoulders. Essentially, the EIA is approved and there is no clear evidence that laws have been broken.

As far as public participation in the EIA process, no villagers had received any information about it being conducted or approved. This information was protected by virtue of Section 15.1 of the contract signed between APPC and the MoI, as well as Section 6.1 of the EQA which allows for certain information to be protected business secrets. Nothing about this violated any laws.

In order to receive a copy of this EIA, approximately 900 villagers had to protest in front of the Udorn Thani Provincial Government's office in April of 2002 along with the National Human Rights Commission in order to receive copies of the EIA and the government contract with APPC.<sup>33</sup>

In a concessionary gesture for the failure of the EIA, the Ministry of Natural Resources and the Environment eventually put together a 6-member team of experts, including government officials and academics, to review the EIA in its entirety and to submit their official findings. They came up with a list of 26 serious flaws in the document.<sup>34</sup> A supplement is unofficially in the works, and the legality of such supplement being introduced into the process is pending a decision by the government.

#### *MINERAL ACT AMENDMENTS (2002)*

One of the most significant moments of this case came at the passing of the 2002 amendments to the Mineral Act. First of all, the central reason for passing this law was related to Section 88/3 (NMA). Because underground mining was already covered by the Old Mineral Act, theoretically it did not need any additions for APPC to construct its mine. However, APPC would never have gotten permission from all the land owners to build under their property so the new law was essentially passed to enable APPC to build its mine without their permission. The other significant change made in the amendment related to public consultations. It will be discussed in detail later.

The process of getting the new law passed was equally as important as the law itself. As mentioned earlier, the amendments were hotly contested. On September 7, 2000, a special commission was put together by the National Assembly to consider the constitutionality of the proposed Mineral Act amendments. No community representatives from the proposed mining area were included on the committee. On November 19, 2001, representatives from the mining area presented a petition to the government commission. More petitions were made by the Environmental Conservation Group of

<sup>33</sup> Aerts, Ruthie and Pearl Pari.

<sup>34</sup> ENGAGE. "Preserving Life and Land: A Community's struggle Against Mining." May 2004

Udon Thani on January 28-28, 2002, and given to the Prime Minister of Thailand, the head of the government commission, the Canadian Ambassador, and the Office of Environmental Policy and Planning. The Conservation Club sent yet another petition on April 4<sup>th</sup> of that year, as well as joined in a meeting which included senators, academics, and the Thai media to discuss the Amendments to the Old Mineral Act. On June 13, 2002, following a conversation with the Conservation Club, the National Human Rights Commission sent the Prime Minister their opinion about the Udon mining project, along with a proposal to dismiss the Amendments to the Old Mineral Act. After it was approved by the House of Representatives on August 21, 2002, 77 senators sent in a petition to the constitutional court arguing against the constitutionality of the amendments. In November of 2002, the Constitutional Court found in favor of the approval of the amendments to the Old Mineral Act. The New Mineral Act then became a law.<sup>35</sup> Clearly, the constitutionality of this law remains skeptical in many people's minds.

#### PRATHANABAT APPLICATION

Since the passing of the New Mineral Act, the only significant moves made have been in regards to the Prathanabat application. APPC submitted its application on May 29, 2003.<sup>36</sup> As it currently stands, the Government and APPC are awaiting the opportunity to place the benchmarks and make the necessary measurements of the land. At that point there will be a 20 day public review period, followed by the granting of the license, and then a final public hearing. Once all of this is completed and all recommendations have been "considered", the mining may commence.

In an update of current events in the mining process, recent developments have unfolded which have heightened tensions between all parties involved. On August 4, 2004, a conservation club member caught two men placing a benchmark on his property and taking measurements of the land without the presence of government officials as required by law. Later that week, a TAO official found the same two men and had them detained and questioned at the police station. They claimed to work for CB Survey Company, and said they were hired by APPC. The TAO asked many government officials about these men, including the local land property department, provincial level land property department, and Ministry of Industry, and none of them were aware of any surveys or survey companies placing benchmarks. This covers the local, Provincial, and National levels of government. It can be safely assumed that they were hired by APPC to conduct illegal operations. By the time they got caught, they had already placed 10 of the 34 markers needed to complete the task. Currently, villagers have taken all the marks out that were on private property and APPC has removed a few, but some marks still remain in place illegally. The government refuses to remove any markers because it says it is not responsible for putting the markers down in the first place. The 2 men have disappeared and their company no longer exists either. They did not provide any specific names about who hired them, only that it was APPC.<sup>37</sup>

In response to this event, as well as recent efforts by the government do more demarcations while farmers are busy with the rice harvest season, the Conservation Club demanded a meeting. In the letter to the governor which requested the meeting, the Conservation Club also demanded that (1) a meeting be held in every village, (2) the meetings take place after harvest season, and (3) that representatives from MOI, MoNRE and DPIM, as well as the Provincial Governor should attend the meeting in order to clarify the steps for getting a mining license and conducting an EIA.<sup>38</sup> They also requested that the government stop trying to put in markers during the harvest season. Because none of these four requests

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<sup>35</sup> Aerts, Ruthie and Pearl Pari.

<sup>36</sup> Aerts, Ruthie and Pearl Pari.

<sup>37</sup> Interview with Jeem. 25 Nov. 2004

<sup>38</sup> Interview with Suwit Gulabwong. 3 Dec 2004.

were met, the Conservation Club members refused to stay and talk at the meeting, which took place at Rajapat University on November 26, 2004. This is where things stand now.

Thus summarizes the real-life events which have occurred during this mining process. Aside from the recent illegal land demarcations, it can be concluded that everything done in the process so far seems to have conformed to Thai laws. It must also be concluded that the villages frustrations cannot be argued on the basis of legality either, save the two points about the EIA. The subsequent sections of this report will analyze the extent to which these practices have stayed in line with the Thai Constitution.

### **HOW DOES IT FIT IN WITH THE CONSTITUTION?**

The Government created a new Constitution in 1997 in order to reaffirm its commitment to democracy and to the people of Thailand. Broad steps were taken to lay a foundation of participation for the people. It strives to protect the people's rights to make choices over their own lives, and it gives the State responsibilities ensure that people achieve those ends. The strengths of the Constitution are its foundational democratic principles of transparency, participation, and accountability. The weakness of the Constitution is its lack of specificity. The meaning of transparency, participation, and accountability can be broadly interpreted by the powers that be. Herein lies the conflict of drawing on the Constitution to argue this case- one has to defend the argument using the spirit of the Constitution because the provisions are not very specific. One other complication in this analysis is that the Constitution did not get created until 1997, but the mining process began in 1984. This problem will be remedied by presuming that because Thailand's government labeled itself as democratic in those years, it should still be held strictly to the three core principles necessary for the empowerment of the people. The government still derived its power from a popular election, therefore the same principles of transparency, participation, and accountability should be applied. The formal documentation of those principles in 1997 only affirmed what should have been in practice already. That said, the following is an analysis of the extent to which the mining process conforms to the democratic principles established in the Constitution of 1997.

#### *INFORMATION*

The most reasonable starting point to look at the process is 1984 when the government signed a contract with TAPC. The relevance of this document continues today because the contract remains intact. From the outset, the democratic spirit of the Constitution was lost when the government included the confidentiality chapter, Article 15<sup>39</sup> in the contract. Essentially this section makes all information, data,

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<sup>39</sup> Section 15.1 Treatment of Information. The Government and the Company shall treat as strictly confidential any and all plans, maps, drawings, designs, data, scientific and technical reports and other information of any kind whatsoever relating to the Company's operations pursuant to this Agreement, so that their entire or partial contents shall under no circumstances be disclosed by the Government or the Company to any third parties without the previous written consent of the other, provided that the provisions of this Section 15.1 shall not apply to:

- (i) any disclosure respecting areas released pursuant to section 3.3; or
  - (ii) any disclosure by the Company reasonably necessary to the furtherance and accomplishment of the operations of the Company as contemplated herein (including disclosure for the purpose of raising finance required by the Company); or
  - (iii) any disclosure required by applicable law to which the Company or its shareholders may be subject; or
  - (iv) any disclosure by the Company to its shareholders; or
  - (v) such disclosure as is required to be made in the performance of the Government's agencies or persons who have duties to perform in accordance with the law; or
- any disclosure in scientific, technical or statistical reports or records with the prior approval of the Minister of Industry, provided however that disclosure of commercial information shall be avoided to the utmost extent and

documents, or anything else related to this project confidential between the two parties. The only time information will be given out is if a law expressly requires it. Furthermore, if the contract expires, the confidentiality clause remains in place.

This is not a positive contract if you are a villager living on the potential mining area. In essence it says the government will tell the public nothing about the project unless they have to by law. This is undemocratic in spirit because the government's intentions have shifted away from serving the people of Thailand and towards serving the secrecy of a foreign company who wants to make money off of another country's resources. Information is a key ingredient to have power, and so by taking away the people's right to have information, the government also takes away their power. Furthermore, it contradicts the principles of transparency and participation as expressed in the Constitutional provisions 58, 59, 76, and 290.<sup>40</sup> Specifically, sections 58 and 59 guarantee the right to receive information; section 76 gives the right to participate in the State's decision-making; and section 290 gives right of local governmental organization to participate in activities affecting their area.

This is the first example of how the Constitutional wording allows for leeway in its interpretation. Section 58 protects the government's right to withhold information at its discretion, and is the reason this contract could have a confidentiality clause. Section 59 is vague in describing how soon people should receive information before a project begins, including when the public hearing takes place. It could be a day before groundbreaking if the government so chooses. Sections 76 and 290 (3) do not specify at what point in the decision making process participation takes place, although it would seem logical that they would be involved from the beginning when the contract was first signed. That is why the contract is in violation of the spirit of the Constitution.

Despite this contract, there have been efforts on the part of the company, and to a much lesser extent the government, to provide information to the communities. However, the information provided did not comply with the principles set forth in the Constitution. In an ideal setting, the spirit of these provisions is to give the people a chance to have full and accurate knowledge about activities that will affect their

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provided further that such disclosure will not place the Company or the Government in breach of any secrecy or confidentiality obligation to a third party.

15.2 Survival. The provisions of Section 15.1 shall survive the termination of this Agreement in respect of any process or technology in which the Company or any of its shareholders holds property rights.

<sup>40</sup> **Section 58.** A person shall have the right to get access to public information in possession of a State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of the State, public safety or interests of other persons which shall be protected as provided by law.

**Section 59.** A person shall have the right to receive information, explanation and reason from a State agency, State enterprise or local government organisation before permission is given for the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning him or her or a local community and shall have the right to express his or her opinions on such matters in accordance with the public hearing procedure, as provided by law.

**Section 76.** The State shall promote and encourage public participation in laying down policies, making decision on political issues, preparing economic, social and political development plans, and inspecting the exercise of State power at all levels.

**Section 290.** For the purpose of promoting and maintaining the quality of the environment, a local government organisation has powers and duties as provided by law.

The law under paragraph one shall at least contain the following matters as its substance:

- (1) the management, preservation and exploitation of the natural resources and environment in the area of the locality;
- (2) the participation in the preservation of natural resources and environment outside the area of the locality only in the case where the living of the inhabitants in the area may be affected;
- (3) the participation in considering the initiation of any project or activity outside the area of the locality which may affect the quality of the environment, health or sanitary conditions of the inhabitant in the area.

lives so that they may consider the activities and give feedback on it. Otherwise, there is no reason why they need information at all. Thus, it is necessary to understand how and what information has actually been shared with the public in order to evaluate the extent to which the Constitutional principle of transparency have been realized.

It is generally agreed upon that until 1998 no effort was made to inform the villagers of anything. After that, there were some meetings held by APPC in order to inform villagers of the mine. The government did not make any efforts to communicate, but the company definitely did. For the most part these meetings took place before 2001 because the villagers began refusing to speak to the company, which will be explained later.

The chief complaint from villagers about these meetings is that the company did not sufficiently answer the questions about the negative aspects of the mine. Paw Prajaub, TAO member of Samboon Village and leader of the Conservation Club recalls the first time he attended one of the company's meetings in 1998, as he describes:

“At that time the company was talking about the benefits and the royalties that the villagers would get that the country and the people in this area would get. But there were questions about the potential problems... what about the environment, will there be any affect on the environment? But the company avoided talking about it.”<sup>41</sup>

Even APPC Director John Bovard affirmed the communication failure between the company and the villagers prior to 2001 (also prior to his employment in the company). When asked about the possibility of gaining the trust of the villager in order to improve communication, he replied:

“With great difficulty... basically the company didn't do a good job, end of story. I wasn't here. I can't tell you why that was the case. But the company didn't do a good job.”<sup>42</sup>

Evidence of the poor consultation is recorded in APPC's own EIA. In Appendix K, they list all public consultations about the Potash mine on record until the year 2000 when the EIA was submitted and was being approved. There are 4 sub-districts over the mining area, Nong Phai being the sub-district with the surface mine sight. In the records, there are only 2 accounts in 3 years in which APPC had any contact at all with anyone outside of the Nong Phai sub-district. One of those times was with a single headman.<sup>43</sup> If people are to have power to participate in the decision making process, they need more consultation than this.

Unfortunately, certain recent actions have not helped establish better communication. Koi, of the Conservation Club explains:

“Sometimes, when they know of conservation activity, the company will put out fliers which say all the great benefits of the company... And sometimes people hand out the fliers at night, quietly, and we found out. And so we took it and went to the ministry of industry and asked them why they gave it out at night like that? Is it yours, why didn't you indicate which organization gave it? If it's the State's paper we'll go straight to them and ask straight away. If it is the company's we will keep them and wait until the right time when there is an open floor.”<sup>44</sup>

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<sup>41</sup> Interview with Paw Prajaub. 24 Nov 2003.

<sup>42</sup> Interview with John Bovard. 16 Oct. 2002.

<sup>43</sup> Aerts, Ruthie and Pearl Pari.

<sup>44</sup> Interview with Koi Ryan. 26 Nov. 2004.

Secret fliers that mention the benefits of the mine may not upset those who agree with the project, but there are many villagers who feel like the negative affects of the mine have not been addressed sufficiently in an open forum, so such propaganda only exacerbates the divisions and mistrust, as well as violates the Constitutional principle of transparency.

The incident of the illegal benchmarking by the CB Survey Company hired by APPC further exemplified the lack of openness and communication. To make things worse, the government refuses to help remove the markers. Furthermore, the government officials are currently trying themselves to place the markers without having gone through the steps of notifying and informing villagers about the mining process. Villagers' resentment has grown because of these events.

So although APPC continues to send in representatives to have discussions with villagers, the damage has been done; the villagers will not listen anymore because they do not have faith in the information the company or the government provides. Those against the mine must fend for themselves. Only the NGO helps keep them informed. The Constitution does not suggest that the public should receive *half* of the information related to their lives; they should get to hear everything. The poor information shared by APPC and the government clearly contradicts the intentions of the Constitution. Furthermore, it handicaps the people's ability to partake in meaningful discussions. The meetings held with the government are spent trying to get the right information, rather than debating the content itself. This is not participation.

Only a week ago the government responded to a demand by the Conservation Club to hold a meeting. This meeting was not required by law, so it showed an effort on the part of the government to finally provide information to the public. Unfortunately, they only gave a half-hearted effort. The villagers requested for certain people to attend, such as MNRE representatives to answer questions about the EIA; they wanted the meeting to be held in all the villages, and they wanted the meeting to take place after the harvest season. These requests were made so that all villagers could be involved, and so that all information could be presented at once. None of these requests were met. Furthermore, the meeting held was strictly to be informative, rather than having an open forum for the people to speak (although villagers asserted themselves anyway). The Conservation Club left the meeting because these demands were not met. The main issue was the timing of the meeting during the harvest season which prevented more people from attending, as Koi explains:

“The reason why we are here is because we want to know why the Department of Primary Industries and Mining of Udon Thani won't wait for after the rice season. We have made a written agreement with the governor that said the gov would wait until rice season is over and then you can arrange any kind of meeting like this. You see, although you sent letters inviting people to come, they cannot come because they are busy with their rice farm. They know it, but they cannot come. Is this arranged for whose benefit if the people cannot come? And those who came are the representatives of the villagers, but I think everyone is important, they all should be able to come, we are all involved with this issue. Do you know how many hundreds of families there are, I think they have the right to participate. And we came up with a time already you know, all the people should be able to participate here, we have already made this agreement, why doesn't DPIM understand this point?”<sup>45</sup>

The actions taken by the government in this meeting and in refusing to remove the illegal benchmarks, as well as the distribution of mining propaganda at night by unknown people all contributes to a cloud of skepticism on the part of the villagers. Is it understandable that they will not let people come to give them information anymore? Is it understandable that they left that meeting? This does not represent the spirit of democracy embedded in the words of the Constitution. Access to information is one of the most

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<sup>45</sup> Koi Ryan. Meeting at Rajapat University. 26 Nov. 2004.

basic rights, and it is the most essential tool people have to defend their rights. But in this case, the people feel like they are working against the government, not with them. The government is supposed to bring justice, fairness, and equality to the legal processes. It has not. Democracy means power for the people. They have had none. These actions by the government and the company violate the true spirit of the Thai Constitution.

*THE PRE-MINING PROCESS: ISSUES WITH THE ENVIRONMENTAL ACT*

Next, this report will look at the Environmental Quality Act to evaluate how the laws and processes associated with it have affirmed the principles of transparency, participation, and accountability.

The Environmental Act is one of Thailand's most progressive laws in terms of its democratic spirit. It dedicates a full section (Section 6) for public participation in the preservation and enhancement of the environment, especially as it pertains to their life. It guarantees the right to receive information, lodge complaints, and give assistance to the government in carrying out the duties of the act.

This seems to enforce the democratic principles for participation laid out in the Constitution, especially Sections 46, 56, 58, 59, 76, and 79<sup>46</sup>. Collectively, these provisions ensure public participation in maintenance, preservation, exploitation, and decision-making processes regarding natural resources or anything that may affect an individual's livelihood. Access to information is a part of that participation, as is the right to preserve and pass on traditional knowledge, culture, and livelihood.

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<sup>46</sup> **Section 46.** Persons so assembling as to be a traditional community shall have the right to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced fashion and persistently as provided by law.

**Section 56.** The right of a person to give to the State and communities participation in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and preservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his or her health and sanitary condition, welfare or quality of life, shall be protected, as provided by law.

Any project or activity which may seriously affect the quality of the environment shall not be permitted, unless its impacts on the quality of the environment have been studied and evaluated and opinions of an independent organisation, consisting of representatives from private environmental organisations and from higher education institutions providing studies in the environmental field, have been obtained prior to the operation of such project or activity, as provided by law.

The right of a person to sue a State agency, State enterprise, local government organisation or other State authority to perform the duties as provided by law under paragraph one and paragraph two shall be protected.

**Section 58.** A person shall have the right to get access to public information in possession of a State agency, State enterprise or local government organisation, unless the disclosure of such information shall affect the security of the State, public safety or interests of other persons which shall be protected as provided by law.

**Section 59.** A person shall have the right to receive information, explanation and reason from a State agency, State enterprise or local government organisation before permission is given for the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning him or her or a local community and shall have the right to express his or her opinions on such matters in accordance with the public hearing procedure, as provided by law.

**Section 76.** The State shall promote and encourage public participation in laying down policies, making decision on political issues, preparing economic, social and political development plans, and inspecting the exercise of State power at all levels.

**Section 79.** The State shall promote and encourage public participation in the preservation, maintenance and balanced exploitation of natural resources and biological diversity and in the promotion, maintenance and protection of the quality of the environment in accordance with the persistent development principle as well as the control and elimination of pollution affecting public health, sanitary conditions, welfare and quality of life.

However, this section has no specific mechanism for participation, only broad general statements, and therefore it is difficult to enforce. It does not say when, where, who, or how public participation takes place. Take, for example, the fact the surveys and the EIA could be done without any information given to the villagers. The law says the villagers have the right “to be informed”, which suggests more than just having access to information. It means the government should have been proactively explaining the contract, the surveys, and the EIA. This act seems to encourage the government to reach out to the people, but it does not have teeth to enforce that, and so the government was able to get away with offering very little public participation. The democratic principles of the Constitution are established in this act, but the government has to make an effort for the goals of the Constitution to be realized. Putting forth the least effort as required by law is not the spirit of the Constitution.

The Environmental Act created the most important legal measure in terms of ensuring attention to the people and the environment in any project: the EIA. It is a tangible product of Section 56 of the Constitution. For the potash mining case, it has been the main tool that the villagers against the mine have been able to use to fight the government and the company with any success. Therefore, involving people in the EIA process is crucial for upholding the principles of the Constitution during the development of mining plans.

The first stage of the EIA is the preparation. The preparation of the EIA began in 1999 by TEAM, as mentioned earlier. The question is: how involved were the villagers? TEAM included no community members within its research group. The EIA was prepared without notifying villagers. Not only did most villagers have no clue that an EIA was being made, many did not even know someone had the intention to build a mine near their land. The most basic prerequisite to participation is information, as stated many times already. Information was not provided. If villagers are to be able to intelligently discuss the project and consider its affects on their lives, both good and bad, they need much more access to information than what APPC provided. Furthermore, APPC does not have as much obligation as the Thai government towards the Thai people. If anyone should have informed villagers about an EIA, it should have been the government.

If analyzing this from the perspective of the Constitutional principles, the preparation of the EIA would be the obvious step to involve the community as commanded by the Constitutional Sections 46, 56, 76, and 79. Even the local government should be involved by virtue of Section 290 (Con). But this is not the case in reality even though no laws have been broken. The lack of participation in this phase of the process epitomizes the government’s failure to uphold the democratic principles affirmed the Constitution.

The EIA approval process for the potash mine had terrible flaws as well. The document got submitted to ONEP, but the main people who approved it were those on the Technical Review Committee. The Committee had no people appointed by community members and no one knowledgeable in community livelihoods and lifestyles. No one could truly evaluate how lives may be affected by having one of the world’s largest Potash mines located within walking distance from people’s farms, homes, and schools. When the EIA finally did get approved, it was not even shown to the villagers to review. When villagers first inquired about an EIA, the Provincial Government claimed that it did not exist.<sup>47</sup> The villagers could get nothing from their Provincial Government, so they had to go to Bangkok to protest for the EIA, as well as other documents including the contract between MoI and TAPC. When they were finally given the EIA, it was in English! They had to have it translated. By the time the villagers were able to read a copy of the EIA, almost 2 years had passed, and if it had not been for the NGO from the Network

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<sup>47</sup> Interview with Suwit Gulabong. 24 Sept. 2004.

of Environmental Resources informing them of their rights, they may still not have seen the EIA until the project was approved and ready to break ground.<sup>48</sup>

The Environmental Act had good laws but they were too vague and allowed for unjust actions to go unpunished. The failure to include villagers in the EIA process directly violates Section 60 (Constitution.) which guarantees participation in decision-making processes affecting a person's rights, such as their property right or right to conserve their livelihood and environment. It also violates the Sections 58 and 59 (Constitution), which guarantee the right to receive information affect one's rights. Lastly, it violates the local government official's rights to participate in considering any project in their area. Again, the problem with bringing justice to these violations is that each of these Sections in the Constitution is too vague to argue in a courtroom. Participation happens, but not in a meaningful way that really has a significant effect on the outcome of decisions.

The final major flaw of the Environmental Quality Act, specifically about the EIA procedure, comes in section 46. By virtue of this section, it is possible for a project of similar size, type, or site selection to another project already underway or completed to be exempted from conducting a new EIA. Instead the company doing the new project can simply staple on the other's EIA. As if there were not enough difficulties for the people to be involved in such projects, this section totally undermines the purpose for having EIA procedures, which is to protect the people and the environment in each project area.

This seems to violate the intention of Section 56 of the Constitution, which is designed to force projects to undergo close scrutiny before being allowed. Cut-and-pasting an EIA onto another large-scale, destructive project does not embody the meaning of democracy.

Clearly, the actions of the government in accordance to the Environmental Act, although legal, did not live up to the standards in the Constitution for transparency, participation, accountability.

#### *THE PRE-MINING PROCESS: ISSUES WITH THE MINERAL ACT*

Next, the mining processes as they have complied with the Mining Acts, Old and New, will be evaluated against the benchmark (no pun intended) of the democratic principles of the Constitution.

##### Land Surveys:

The first endeavor taken by APPC which had relevance to the Mineral Act was the borehole drilling for land surveys. This was also the first occasion for public participation to occur. As stated earlier, the surveys were taken throughout the 1990's. They were conducted in accordance with Section 48 (OMA). Not only did the people have no say, but they also were required to "render reasonable assistance" to these surveyors who had the right to damage the land. Additionally, neither the company nor the government told the people the purpose of the surveys. Some have even accused that the company of claiming they were searching for oil. As far as compensation is concerned, the company did pay 3000 Baht to anyone whose property was damaged, but land owners say it cost them around 8000 Baht to make repairs.<sup>49</sup>

For one thing, these actions appear to go against the Constitutional provisions for information distribution to the public, which has previously been discussed. How can the law obligate people to give assistance to drilling on their property, yet they are not even informed about the project's purpose? This violates the spirit of the Constitution.

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<sup>48</sup> Interview with Suwit Gulabong. 24 Sept. 2004.

<sup>49</sup> Interview with Paw Prajaub. 24 Nov. 2003.

Secondly, there are land rights issues here. The Constitution has two provisions on land rights, Sections 48 and 49, which guarantee the protection of property and fair compensation for damage done to property if work must be conducted on private land.<sup>50</sup>

Again, the spirit of these provisions is to emphasize that property is personal, and people should have the right to protect their land and their homes. However, both Constitutional provisions have loopholes that give some power to the government to violate people's property rights. It is seen clearly in the survey cases, where damaging private land is allowed. The Constitution lacks the force to prevent that from happening. Furthermore, it does not clarify what percentage of the damages gets compensated. If it costs 8000 Baht to fix a hole, why does the company only pay 3000 Baht? This contradicts the intentions of the Constitution, but does not actually violate it.

#### Mining Depth Controversy:

Another land rights issue stems from Section 88/3 of the New Mineral Act, which gives anyone the right to dig 100 meters or more below someone's property without permission. There is not much to say in terms of analysis for this. It is straightforward, and it is a matter of opinion whether one believes 100m is enough distance underground to justify not involving the owners of the land. It would seem that the constitutional provisions for participation in Sections 46 and 59 both would give the land owner rights to at least be consulted before a mine concession can be granted under their land. Seventy-seven senators signed a petition against the constitutionality of this law, hundreds of villagers came out to protest, but somehow the majority of Constitutional Court judges approved it. To add insult to injury, the New Mineral Act completely prohibited any mining under National Parks, thereby declaring that people's lives are worth less than National Parks. This does not mean to say that mining should occur under forests either, but it should not be allowed under people's homes either. This law contradicts the democratic principles for land rights and participation as laid out in the Constitution.

#### The Objection Period:

The second instance of participation designated by the Mineral Act comes during the Prathanabat stage after the demarcation and measurements are taken. Here is a perfect example of how words in the Constitution do not necessarily fulfill its intention. The law provides for a 20-day review period during which the people can raise objections. At first this seems to follow the mandate of Section 59 in the Constitution which calls for participation and a public hearing, as well as Section 79 (Constitution) which obliges a state to promote public participation. In reality, this is far from the truth.

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<sup>50</sup> **Section 48.** The property right of a person is protected. The extent and the restriction of such right shall be in accordance with the provisions of the law.

**Section 49.** The expropriation of immovable property shall not be made except by virtue of the law specifically enacted for the purpose of public utilities, necessary national defense, exploitation of national resources, town and country planning, promotion and preservation of the quality of the environment, agricultural or industrial development, land reform, or other public interests, and fair compensation shall be paid in due time to the owner thereof as well as to all persons having the rights thereto, who suffer loss by such expropriation, as provided by law.

The amount of compensation under paragraph one shall be fairly assessed with due regard to the normal purchase price, mode of acquisition, nature and situation of the immovable property, and loss of the person whose property or right thereto is expropriated.

The law on expropriation of immovable property shall specify the purpose of the expropriation and shall clearly determine the period of time to fulfill that purpose. If the immovable property is not used to fulfill such purpose within such period of time, it shall be returned to the original owner or his or her heir.

The return of immovable property to the original owner or his or her heir under paragraph three and the claim of compensation paid shall be in accordance with the provisions of the law.

The flaws in this section consist of the following: (1) the notification is only posted at government offices. Most working people, whether in cities or in farms, do not often go to government offices. The chances of them going to the local office in that 20 day period are slim, and even slimmer are the chances of seeing the sign early enough to consider the issue and raise an objection. If the TAO or local officials are in opposition to the project then it makes this less of a problem, but in many cases the local officials do not have the same opinion as everyone in their area, especially if the government or company pays them off. It is no wonder why almost all of APPC's meetings have been with village headmen and local officials, and not large meetings with average villagers. Moreover, if people have not read this Mineral law, they may not even know they can make an objection; (2) In law, no information has been needed to be given out until this stage, so for instance if there is an EIA to read over, the people have 20 days to go through hundreds of pages of a highly technical document, conduct research to disprove it, and raise an objection. Furthermore, most rural villagers only have a 4<sup>th</sup> grade education, which makes it even more difficult. And as a side note, it remains unclear as to whether the EIA and other documents are actually submitted for public review at this point anyway, so this may not even be an issue; (3) Even if an objection is raised, there is no provision that describes what the Local Official has to do about it. It is perfectly reasonable to assume that he or she can just take a note of it and sign off for the application to proceed; (4) No notifications are placed in localities outside the mining area even though the mine potentially may affect them. The people in these areas are given no meaningful influence whatsoever in any part of the process.

The spirit of the Constitution, as said many times over, is based on the notion that people should have real opportunities to have control over their lives. This means that they can have the time to receive information, make opinions, and share them in a way that matters. This 20-day hearing fails in all of those respects.

The Opinion Hearing:

The next opportunity for public participation is specified in Sections 88/9 and 88/11 of the New Mineral Act. However, at least two very different interpretations of these provisions have been argued. The first interpretation asserts that there is a guaranteed opinion hearing procedure that takes place within 60 days after the government has issued the mining license by virtue of Section 88/11. In this case, section 88/9 also offers the company the option to hold an additional "preliminary discussion" for the project based on guidelines set by the Director General of the Department of Mineral Resources. In sum, there would be the guarantee of one opinion hearing, and the option for another before that.

The second interpretation contends that Section 88/9 is the only section stipulating that an opinion hearing can occur. The would give the mining company full discretion as to whether an opinion hearing will be held or not. Section 88/11 therefore would simply be an addition to 88/9 to further explain the steps of the opinion hearing if one is so requested by the company. This would have serious implications on the participatory rights of villagers.

In either case, this hearing is a tangible means of upholding the democratic principles of the Constitution. However, as has been evident throughout the process, the hearing does not guarantee true democratic action in line with the Constitution.

In both cases, some facts are known. If there is an opinion hearing, all of the relevant data, documents, and reports will be presented to the participants in the opinion hearing. That includes the EIA. However, a few significant questions are left unsettled, namely: (1) how much time will be allocated between the receiving of the information and the beginning of the opinion hearing so that participants have the chance to review them; (2) who exactly can or has to be invited? It is a fact that anyone without land rights, which is about three-fourths of the villagers living on the Somboon mining area, will not be allowed to participate. There is a greater question about who can participate, because in certain cases

like the hearing for the Pak Mun Dam project, no villagers living within 60 km of the river were invited to the hearings, even though they were the ones most affected; (3) No matter what public hearing procedure does occur, who goes, or what is said, by virtue of Section 88/7 paragraph 6, the Minister (who's department is not specified in law) shall have the final say, taking into "consideration" all of the opinions in the hearing, including any objections raised. Therefore, the public hearing procedure would most likely be useless as a tool to stop a project from occurring. It guarantees nothing. Their participation is not real, decision-making remains at the discretion of high level government officials who can choose whether or not they want to listen to the people. The opinion hearing process is a formality, not a vehicle for change. This contradicts the spirit of the Constitution in Section 59 which guarantees a public hearing in order to address concerns in a meaningful way.

#### *POST-MINING ISSUES: PROTECTION, MONITORING, COMPENSATION*

Democracy does not end with the license granting, there is also the monitoring and compensation to consider as opportunities for participation and, particularly, accountability.

Based on Sections 46, 56, and 69 of the Constitution, people have the right to participate in the preservation, management, and maintenance of their natural resources. Section 79 (CON) compels the State to encourage participation in controlling and eliminating pollution. Therefore, it can be assumed that the spirit of the Constitution encourages the public to have power over the monitoring processes of a project near their homes.

Environmental protection begins with the setting of standards and establishment of pollution prevention plans, referred to as 'action plans'. The National Environment Board has the sole responsibility for setting and adjusting the environmental quality standards (Section 32-34, EQA) for Thailand. No public participation occurs for this process. As for the action plans, there are three levels: national, district, and local. The NEB, district governor, and local officials respectively have the duty to come up with such plans for the area under their authority (Sections 35-41). No public participation is designated for this task, although it is possible that local officials may consult residents to help create local action plans. These plans can include legally binding regulations and provisions for treatment of the environment; therefore they appear to be important tools for protection. It remains unclear, however, whether an action plans have officially been implemented.

In terms of monitoring procedures, the Environmental Act spells out specific mechanisms and guidelines; however none explicitly give people opportunities to participate. Most of the facts are covered previously in this report under the Monitoring Section, but it is worth expanding on the significant points.

The Mining Control Operator is in charge of overseeing operations on a day to day basis and collecting the necessary data. This person can be either hired by the company or the government, but not by the communities. Many powers are given to the pollution control official, who is 2<sup>nd</sup> in command behind the official designated by the law on industrial plants, but even their powers are undermined by Section 87 of the EQA, which gives the company the right to appeal any orders to the Pollution Control Committee, and then to the Minister who will have the final say on the matter. Essentially, this law gives decision making power to one person in the government. If he or she for whatever reason is partial to the company, he can deny any orders to adjust harmful practices.

An example of ineffective monitoring regulation is the case of the Pulp and Phoenix Pulp and Paper factory in Nompong. Certain regulations specified that monitors would come on weekends when the factory was closed. On the weekdays it dumped loads of pollution into the river, but no inspectors ever

saw that happening because they came on weekends.<sup>51</sup> If this seemingly obvious blunder could occur undetected, who knows what tricks can be done in the potash mine or anywhere else?

By not including the public in monitoring procedures, the Environmental Act directly violates the democratic principles established in the Constitution for participation.

There are penalties prescribed in the final sections of the EQA for various violations related to the Act; however it is significant to note that the steepest penalty is 5 years in prison OR 500,000 Baht. This punishment is at the discretion of the government. Therefore, the company can violate all the EIA conditions, pollute all of the water and land, and essentially make it up by paying 10,000 US dollars, which quite frankly is not worth a thought in a 6 billion dollar project. This hardly enforces accountability, which is a virtue of good democracy. Hence, the law itself is in violation of the principles of the Constitution.

There are provisions in the New Mineral Act that give people some leverage in regulating mining operations, specifically Sections 88/12 and 88/13. The first section allocates powers to the general public to stop mining operations if one of two things occur: (1) The underground mining is less than 100m from the surface, (2) The underground mining method used to prevent subsidence is not in compliance with the mining conditions set in the concession. The next section, 88/13 gives the benefit of the doubt to the people, not the company, if subsidence occurs, and the company will be liable to the injured parties.

The problem with the first section is that it does not give powers to stop the project if damage occurs in general, but only if the company disregards one of the two points. If the EIA is inherently flawed, for example, then damage could occur even though the company is following all conditions. In the second section, it does not include people outside the mining area. It also only addresses the issue of subsidence. Finally, it does not specify the amount of money to be paid.

A summary analysis of the monitoring mechanisms is that from beginning to end, the people are left out of the process. They have no or little participation in setting standards, creating action plans, or monitoring the compliance of potentially harmful operations. The local officials who collect monthly statistics are the closest thing to direct participation for the people. This exclusion adds to the insecurity and distrust felt by the people towards the mining process, this goes against the spirit of the Constitution.

Of course, there are compensation penalties for personal damages, but even those do not bring justice to the people. First of all, anyone without land rights will not receive compensation unless they fight a long and complicated legal battle, which is beyond the capabilities and means of any farmer. Even land owners have to fill out many legal documents that some villagers have said are very difficult to understand and complete, and that the process of getting compensation is very time consuming. A 10,000,000 baht bond will supposedly be posted by APPC for compensation, but it will be at the discretion of the local government officials who gets what amount. In an area occupied by 350,000 people, 10,000,000 Baht suddenly becomes a very small number. By no means will it come close to covering losses if there is widespread damage. Moreover, the company has not even done baseline studies, so evaluating or proving damages may be very difficult. Furthermore, villagers value the environment differently than city people, as Mae Sah Sampong explains, "If there is no farm, where does the food come from? We cannot buy if there is no food to buy. If we have a million Baht a month, and we have no food to buy, that is no good for us. And we cannot eat only salt! I think it is more

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<sup>51</sup> Interview with Suwit Gulabong, 3 Dec. 2004.

sustainable to have a farm then to have a million Baht a month, and then you have to retire, but this thing will never be gone.”<sup>52</sup>

Koi Ryan makes a good summary of the compensation problems:

“The company told us ‘On the compensation stuff, we will be responsible for that’ but that is not written down. It is just what they say. And then they said, ‘if there is any compensation to be made, you have to fill in the form and this and that and process it later.’ And for us, the normal villagers, that is too complicated for people like us. And so that time, when we heard about the 100 meter thing, we felt that...only 25% of people here have their land licenses so if they don’t have any land license, then they are not able to ask for any compensation for that and that would be troublesome for us. And most of us only have fourth grade education and don’t know anything about the law or legal stuff that will make it hard for us to deal with this.”<sup>53</sup>

If the farms are damaged, they lose more than an income. They lose culture, tradition, local knowledge, community values, and the freedom to choose their own occupation as farmers. All of these are protected in the Constitution (Sections 46, 69, 50)<sup>54</sup>, and all would be lost if the mine caused damage to the environment. That is why people need participation. That is why the company and the government need accountability, but it does not exist.

An important side note to mention as well is that no baseline studies are required by the EQA or the Mineral Act, and they have not been conducted by APPC either, so it will be nearly impossible for villagers to determine how much damage as occurred to their land and water.

To conclude, the people are not protected in any real way by compensation provisions. The financial risks put on the company and the government are too small to enforce accountability. A farm cannot truly be compensated with money anyway, so it matters less how much the company gives to the people and more how much the company stands to lose because profit is the only thing that can hold them accountable. Even worse, the legal procedures to collect that compensation will alienate, frustrate, and confuse the villagers to the point where they may not get any compensation at all. To summarize, the compensation mechanisms provided in the Mineral Act and the Environmental Act do not meet the standards of participation and accountability as established in the Constitution.

Thailand has more or less been democratic government for about seven decades. By giving itself that title, the Thai government assumed certain standards that it had to meet. The Constitution of 1997 was created to reinforce those standards and give more power to the people. It aimed at lofty goals for equality, participation, openness, and justice. It gave rights to Thai citizens and responsibilities to the State in order to build a foundation for democracy. The principles it represents stand above the laws the

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<sup>52</sup> Interview with Mae Sah Sampong. 27 Nov. 2004.

<sup>53</sup> Interview with Koi Ryan. 26 Nov. 2004.

<sup>54</sup> **Section 46.** *Persons so assembling as to be a traditional community shall have the right to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced fashion and persistently as provided by law*

**Section 69.** *Every person shall have a duty to defend the country, serve in armed forces, pay taxes and duties, render assistance to the official service, receive education and training, protect and pass on to conserve and the national arts and culture and local knowledge and conserve natural resources and the environment, as provided by law.*

**Section 50.** *A person shall enjoy the liberties to engage in an enterprise or an occupation and to undertake a fair and free competition.*

government creates, but in reality those principles have not had the power to effect real change, as shown in the case of the Somboon Potash mine. The fine line between principles and actions resides in the people. Only from within the hearts and minds of the government officials and the Thai citizens can these goals be realized. As said before, a democratic government can make the laws, but laws do not make democracy. This has proven true so far, and will be fleshed out further. The next section will analyze the actualization of democracy in the Potash mining process by listening to the experiences of the villagers involved in the case, the people whose lives reflect democracy in action.

### **Is this process democratic?**

The premise of democracy is empowerment of the people. The Constitution and laws of Thailand attempt in various ways to enforce that principle, with limited success. It has been shown that the process has not been in line with the Constitution. To the extent that the Constitution is democratic, the process has likewise been undemocratic. This much can be said with certainty. Nonetheless, there is something missing in this discussion which anyone attempting to understand this case must know. So far the discussion has been a top-down analysis; that is to say an analysis of how well the government has promoted the democratic values it represents. In other words, we have critiqued the extent to which the government *empowered* its people. But the whole point of democracy to give people the tools to empower themselves. In fact, if a government is responsible for empowering its people, then democracy is already lost. Democracy begins, not ends with the people. Before the potash mine came to their community, villagers had no understanding of their rights, of the laws, of the Constitution, or of democracy altogether. Therefore, by virtue of the fact that democracy is a system ruled by the people, it cannot exist if the people do not understand and demand it. The entire concept of democracy is a worldview unto itself, not inherently a universal truth. People have to be educated about it so that they can create democracy for their own society. Democracy builds from the ground up.

The following section will illustrate these arguments with the villagers words. It will show the evolution of villagers' understanding of democracy. By virtue of the fact that they had no understanding before the potash issue began, it will be asserted that democracy in Thailand did not exist, and that only now, as villagers begin to learn and demand their rights, is democracy beginning to take shape.

### USING THE LAW

Before moving forward, it is necessary to step back and put oneself in the place of the villagers. What did the world look like before APPC came knocking on the door? What sense did this whole process make? Answering these questions begins to reveal the truth about the democratic failures in the Potash issue.

The following are accounts of villagers' experiences with constitution and law. They describe the challenges of understanding the laws and rights with which they have had to fight. Keep in mind that all the while APPC and the government were moving forward on the project without ever informing the villagers about what they were doing, much less about the rights they were violating.

Village life was much different without the law to think about. Their minds were focused on living day to day. Mae Sah Sampong portrays how her worldview developed, as she reflects:

“Let's say, I don't remember when I has born (\*laughing\*). There was no school yet in those days, so I went to study at the temple. There is no computer, no technology, nothing we could do with it. Just learned the local things. My teacher was a good teacher. We learned statistics, how to measure things. We did running back and forth. It was good. So we learned general stuff about life. We studied until the

fourth grade. And then after finishing the fourth grade, I went to help my parents raise the buffalo and do rice farming and didn't do any further study. I never saw anyone from the big cities. Once in a while I actually went to the city to buy some stationary or things like that. Only once in while though.”

Life in the country was a world unto itself. No city people, no business people, no legal issues, no mines.

As far as her experience with democracy or law, Mae Sah added:

“I have never seen it. People have told us the thing. We can read it, but we don't understand it. We can read the letters, but they do not make sense.”<sup>55</sup>

She has lived seventy-four years in a democratic country, and she has never seen the Constitution, yet it poses as a symbol of democracy. Only the people can bring such documents to life. If she cannot understand it, then democracy is dead in one person. She was not the only one who did not read it.

In a concrete example of the clash of worldviews, Koi describes the villagers' struggle to understand the legal processes for compensation, as she explains:

“For us normal villagers, that is too complicated for people like us... When we heard about the 100 meter thing, we felt that only 25% of people here have their land licenses so if they don't have any land license, then they are not able to ask for any compensation... And most of us only have fourth grade education and don't know anything about the law or legal stuff that will be hard for them to deal with anyway because the government officers are scary for us. If there is a case with the big businessmen, it is really hard to get compensation too. If there are no legal documents for the house, getting a land license will be hard to do. The government doesn't try to review the information that the people should know. The people don't know if they are within the mining or not. And all the legal stuff, the government normally closes it down and keeps it there in the book. They didn't inform or let the villagers learn about it that much.”<sup>56</sup>

This world did not make sense to the villagers. It had rules, but they knew none. They were powerless beyond their ability to complain amongst each other, but not to the government because they did not know they could. They have no knowledge of their rights, nor of the tools they must use to defend those rights. They knew that they would suffer if their lands get damaged. They do not have documents, they do not know the rules of the courtroom, they do not know who the company is or whether it will give them anything for ruining their fields. All power lies at the discretion of the government. The government has chosen not to bother with land rights in the past, but now it uses those rights as the basis for villagers receiving compensation. They have made the rules of the game to fit according to their desires, which contradicts the principle feature of democracy giving power to the people. No villagers asked for land rights, so why does the government make that decision? The people did not ask for a mine, but they cannot make a decision to stop it. They do not have information, but they do not know it is their right to have. Even if they did know their rights, they would not know how to go about forcing the government to honor them. The villagers' lack of understanding of their rights proves that democracy did not exist. The Thai government had imposed its own self-serving system onto the villagers and then declared it fair without explaining why. Ultimately, this was a totalitarian government falsely calling itself democratic. There is no way for the people to enforce accountability, and without accountability, there is no democracy.

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<sup>55</sup> Interview with Mae Sah Sampong. 27 Nov. 2004.

<sup>56</sup> Interview with Koi Ryan. 26 Nov. 2004.

## UNDERSTANDING THEIR GOVERNMENT

For many decades villagers have voted for their government officials. This is supposed to be the defining indication of democracy- empowered people giving their consent to government officials to be the people's representatives. But the presumption is that villagers know what they are voting for and what the government is supposed to do for them, since it is representing them. Villagers in Udorn Thani, however, did not know about their government, nor why they voted. They did not understand the concept that in a democracy the government works for its people, who are the real one's with the power.

Mae Sah Sompong provides a perspective on the relationship with the government in the past, as she explains:

“We rarely [interacted with the government]. We didn't have to go and see the government officers very often. They were very normal. Only when there was an election we would go and drop our votes for the representative of the province. We lived our life as the country people.”

Conservation Club member Paw Nai elaborates on the perceptions villagers had of the government officials before Potash:

“No, we never had to see them. When we heard government officers, we were afraid, we didn't even want to be near those people. In the past, when we heard that the officers were over here, we all ran away. And then, when the government would call someone to be the soldier, then we would have to go and do that. We were really afraid. If we see someone dressed like that, we were afraid. When we had to go get the house registration or ID card, we would go along with the headman of the village.”<sup>57</sup>

This fear may have come from the fact that the government was part of a society much different than from that of the villagers, and officials had fancy uniforms, (perhaps) carried guns, and spoke their legal jargon. Whatever the case, fear can dramatically inhibit the potential for democracy. Democracy first and foremost entails communication. The government maintained its untouchable image because no one every attempted to go to the rural communities to explain the ways of the government or how it functions in relation to the villagers' lives. The villagers' fear gave the government power over them, which contradicts the meaning of democracy. After years without communication, suddenly an official could summon villagers to fight a war, and there would be little resistance. This is not good for democracy. People should feel empowered to challenge these kinds of orders, but first they must overcome the fear. In any case, this was the relationship with the government before the mining issue began.

## TRANSFORMATION

The potash case has forced a change in awareness. Before, the villagers were satisfied that their government stayed away except to build roads, or bring electricity, etc. For these reasons, the villagers voted. From their understanding, a vote did not represent power going to the people, it was merely a formality of selecting the most compassionate or generous person to rule over their lives. The perception of power makes all the difference between democracy and totalitarianism. Once the potash issue imposed on the villagers lives and they felt threatened, they had to reconsider their relationship with the government. A young Conservation Club member, Tata, describes this change taking place:

“The role of the government, well, in the past, villagers never asked for their rights, the law is for rich people. We only think we are country people, we will have no chance to use it at all. But when the mine

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<sup>57</sup> Interview with Pah Nai. 27 Nov. 2004.

came people stood up and asked for their rights. Actually I suggested to the people that law is not for government only, it's for everyone."<sup>58</sup>

This is a hugely significant change. This statement in a sense gives birth to democracy. The potash issue transformed the villagers' way of thinking from "laws are for rich people" to "give me my rights". It is a collision of worldviews. Democracy, and all the laws and rights which the people should be empowered to defend, did not exist in the minds of the villagers. Before Potash, the communities were self-sufficient; they could functioned independently from the rest of society using time-honored value systems instead of democracy. Community members knew each other and could sort problems out on their own. When the Potash mine came, suddenly they had a problem with someone from the world of laws, and the villagers' values did not make sense to the government. The significant problem with this situation is that villagers were not equipped to deal with the government on a legal or Constitutional level, but the mining continued to push through the various bureaucratic channels. Villagers were unprepared to challenge this. First they had to learn that laws were not just for rich people.

Now, because of the potash issue, the villagers look at the government much differently than in the past.

Mae Manee Bonrod, a Samboon village TAO and Conservation Club representative, expresses the meaning of democracy as she understands it today, declaring:

"Give the rights to the people, fully. If they say no, then respond to that. That's what it means to do democracy. So although the government says it will bring prosperity to our life, if the people say this will create a burden to our life then you shouldn't do it...If the other people agree [with the mine], then go over there and do it. For us here, we disagree, so the government should listen to us. So for the real democracy, since there is much potash in Isan, go do it where they don't care about it, but don't do it here. If you are going to say this is democracy, then listen to us. We don't want it here. We really don't want it."<sup>59</sup>

Because villagers now understand their rights and the role the government should have in defending those rights, a dialogue on democracy can begin. Whereas before the law did not exist in the villagers world, now they see it as a tool to use to protect their rights. Having an understanding of their relationship with the government gives the people power to demand change. The old saying, 'knowledge is power' rings true here.

Another positive indication of democracy getting stronger is the fact that villagers have less fear than they did before. Listen to Tata talk about her experience confronting the Prime Minister of Thailand:

"Once Toksin came to Udorn Thani...I was the one who handed the letter against the mine to Toksin with my own hands. When I handed the letter to the Prime Minister, officials tried to take it, they said it would reach PM, but I said no, we handed ours directly to him. Then the PM asked me who are you? Where do you live? Do you hand the letter as pro or against the mine? I said we are against APPC. Could you use your fair judgment on it, think about the people of the country?"<sup>60</sup>

Disregarding orders from a government officer to directly confront the Prime Minister signifies a huge step for the villagers and for democracy. One by one, their fear is diminishing. Others have expressed the same feeling of confidence. Koi, in response to a question asking why people were scared in the past and why that has changed, explains:

<sup>58</sup> Interview Wisuda Balisri (Tata). 27 Nov. 2004.

<sup>59</sup> Interview with Manee Bonrod. 24 Nov. 2004.

<sup>60</sup> Interview with Wisuda Balisri (Tata). 27 Nov. 2004.

“[In the past we were scared] because we had very little education. Now the people have learned some more and don’t seem as afraid because they know more.”<sup>61</sup>

An essential flaw in Thai democracy in the past is exposed here. If democracy will ever truly exist in Thailand, it must begin with education. The education offered by the government did not equip villagers with the confidence to demand their rights. Since democracy begins with the people, that is a serious dilemma. Confidence begins with understanding, and understanding comes from education. As the villagers in Udon Thani have slowly gained a perspective about their government, the opportunities for democracy have grown as well. Their knowledge and confidence has opened doors for communication with the government. The myth the government hid behind for so long gave it power. Fear gave the government control. In Udon Thani, this fear is fading, but in many other villages around Thailand, the fear still very well may exist. As long as it does, democracy remains just an unfulfilled dream.

The education of villagers about this new worldview filled with complicated laws and abstract concepts has not been easy, and readers should appreciate the effort the villagers have made in this case to learn about their rights and the laws and how to use them. Much talk has already been made about democracy being denied, the rights of the people undermined, arguing that ‘such and such’ law is not constitutional, and ‘X’ policy is not democratic, but when the villagers became aware of the word potash, they knew nothing. This case has truly been a test of intelligence and rationality, and I am speaking from the personal experience of an American, college-educated young adult raised with a dad who has a background in law. Furthermore, I have had more access to communicate openly with various representatives in the government and APPC than villagers have. Based on my experience, the legal aspects of this Potash case are nearly impossible to untangle, so I cannot comprehend the difficulty of understanding this issue from the point of view of a farmer with a 4<sup>th</sup> grade education.

Suwit Gulabwong, the leader of the NGO who first brought this issue to the attention of the communities, sums up the progression of the villagers’ experience well:

*“In the beginning, their knowledge was limited to aspects of life they used daily to survive. They know not to cut the whole tree, only the branches, so that it may continue to provide for them. They know to throw the big fish back so they may reproduce. They didn’t know the word ‘environment’, but only how to use nature for their life. ‘Environment’ is not just about land, but about the entire structure of the political, social, and economic system. The villagers have gone from no knowledge of law and democracy to being able to fight for themselves and argue with the government and draw their own political routes. They can describe what their environment should look like.”<sup>62</sup>*

A large share of the credit for this evolution goes to Pee Suwit and the NGO volunteers. They brought the villagers information, documents, and an education on the meaning of democracy. When looking back at the case, realizing that the NGO did not come until 2001, until after the surveys had finished, after the EIA got approved, one cannot but wonder how the government could consider this democracy. The project was moving into the final stage of approval, and villagers were reading the Constitution for the first time. Until this point, villagers knew no rights, had never discussed about the ‘environment’, and had never read through any laws. Without knowledge, villagers had no power. The government never made an effort even to explain Constitutional rights, much less discuss the mine going under villagers’ land that would potentially destroy their way of life. Even if the government had made a flawless effort to act in the spirit of the Constitution, democracy could not exist before villagers had

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<sup>61</sup> Interview with Koi Ryan. 26 Nov. 2004.

<sup>62</sup> Interview with Suwit Gulabwong. 3 Dec. 2004.

even understood its meaning, and no justice would be found until villagers first knew that they had rights.

## CONCLUSION

This report has examined this case thoroughly and found numerous instances in which the laws, the constitution, and actions of the company and the government have been inconsistent with one another. The EIA process is highly dubious, and there have been concrete laws broken with respect to the land surveys. There are an abundance of instances in which the laws and the actions of APPC and the government have failed to abide by the principles of the Thai Constitution. Which respect to the implementation of democracy, the case has illuminated vast gaps between principles and practice. The government needs to take a stronger initiative to develop democracy at the grassroots level, otherwise it does not work when the people need it most.

And as a final aside, I believe that understanding this case from strictly a legal perspective fails to portray exactly what the mine has been about. The villagers' history extends beyond the day they heard about potash. Besides concerns about salt and subsidence; the mine has brought the burdens of an entirely foreign world of legal jargon, multinational corporations, environmental degradation, and political philosophy, and stuck them directly into the heart of the villages. Rice farming, clean water, freedom. All may be lost forever. Villagers, once brothers and sisters, now will not speak. Students and teachers spend class fighting rather than learning. To put it simply, their world has turned upside down.

## APPENDIX

Section 48 (OMA)- For the purpose of undertaking a survey, the competent official and his labourers are empowered to enter, during the daytime, upon land over which a person has rights or possession. But he must notify the landowner or the occupier before hand and the landowner or the occupier shall render reasonable assistance as the case may require...In the case where it is necessary to erect map posts on the land of any person, the competent official and his labourers have the power to erect the map posts as is necessary. In carrying out the work of surveying when it is necessary and reasonable, the competent official or his labourers shall have the power to dig, cut down trees or branches or do anything to the things that obstruct the work as is necessary, taking care, however, that the landowner will receive the least damage.

Section 12 (NMA)- (replace Section 50 OMA) If the mining concession area is not all empty land, the requester must produce evidences to competent official that the requester has a right for mining in such area.

Section 88/3 (NMA)- An underground mining, if it is at the depth not exceeding 100 meters from the surface of the ground, through the underground of any area which is not an empty land, shall require the requester for mining concession license to produce the evidences to competent official that they shall have the right for mining in such particular area.

Section 88/6 (NMA) A request for the underground mining concession must consist of mining details, plan, and comprehensive project in accordance with the rules announced in the Ministerial Regulation by the Minister which at least shall consist of the following data:

- (1) Data in brief indicating the depth and technical measures in accordance with Section 88/2.
- (2) A map indicating a boundary of the mining area in brief together with the environmental quality effect evaluation data in the various areas to support the consideration under paragraph two of Section 88/4.
- (3) Technical data on the method of mining and touching up the ore in brief, both of the existing general mining engineering option or the one which the requester for mining concession license deems suitable to be put in use along with the reasons why aforesaid option is chosen.
- (4) Data, plan, steps and method of mining, touching up the ore and revival of the area after the underground mining is winding up, in brief, which can be expressed on the matter of measures on environmental effect decrease or related environmental quality preservation which may affect both the beings of the nature and community.
- (5) A proposal to allow a participation of the representatives of the person having interests, in checking the underground mining under Section 88/9 (2) which indicates the number of support funds and mining checking procedures of which the requesters.
- (6) Transportation routes and water resource, both in existence and to be developed, for use in the project together with the details on the use of such water resource throughout the period of the project which shall be sufficient enough to be evaluated that the underground mining in the project will not affect the beings of both the community and nature.
- (7) A proposal on liability of insurance under Section 88/13, which clearly indicates the insured amount and period of insurance.

Environmental Act Ministerial Regulation No. 3, Appendix No. 2: Guidelines for Making Report Concerning Environmental Impacts Shall be Composed of the Following Features.

*Ministerial Regulation No. 70 for OMA  
Environmental Act- Standards and Management plans*

A company conducts its EIA within the framework of environmental standards and environmental quality management plans already in place. The National Environment Board has the responsibility of prescribing the standards for inland water sources, coastal water sources, groundwater, atmospheric air and noise, and other matters. The NEB also approves the EQMP, which will consist of work-plans and guidances for action on the following matters (section 36):

The Environmental Quality Management Plan developed pursuant to Section 35 may be a short, intermediate or long-term plan, as appropriate, and should contain work-plans and guidances for action on the following matters:

- (1) Management of air, water, and environmental quality and any other area of concerns;
- (2) Pollution control from point sources;
- (3) Conservation of the natural environment, natural resources, or cultural environment pertaining to aesthetic values;
- (4) Estimation of financing to be appropriated from the government budget and allocated from the Fund which is necessary for implementation of the Plan;
- (5) Scheme for institutional arrangements and administrative orders by co-operation and co-ordination among government agencies concerned and between the public service and private sectors could be further promoted and strengthened, including the determination of a manpower allocation scheme necessary to implement the plan;
- (6) Enactment of laws and issuance of regulations, local ordinances, rules, orders, and notifications necessary for implementation of the Plan;
- (7) Scheme for inspection, monitoring, and assessment of environmental quality by which the results of implementation of the Plan and enforcement of law related thereto can be evaluated objectively.

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