

NO JUSTICE IN OK TEDI SETTLEMENT

By Stuart Kirsch

During the first two weeks of January 2004, the Supreme Court of Victoria in Melbourne received an extraordinary series of letters from Papua New Guineans objecting to the pending settlement of their legal case against the Ok Tedi mine and BHP Billiton (formerly BHP).

The letters pleaded with the courts to address their concerns about the impacts of the Ok Tedi mine on their rivers and forests: "Can your Honour tell us who will be responsible for the environmental damage that has been caused?" They disputed claims that their primary concern was to increase the amount of monetary compensation that they will receive: "[BHP Billiton] has deceitfully diverted the minds of the people and the Papua New Guinea Government from the real issue – the effects of the mine pollution and the cleaning of the river system." And they beseeched the courts for sympathy, "Your Honour, we pray that this Honourable Supreme Court may save our lives in the type of decision or verdict that is favourable to us."

Yet their requests were ignored when the judge approved the out-of-court settlement on January 16, with no action taken to reduce the environmental impact of the mine. Inmet, the Canadian

mining company that owns 18 percent of the Ok Tedi project, was so confident of this outcome that it issued a press release in late December indicating that all parties had agreed that BHP Billiton and Ok Tedi Mining had not violated their 1996 commitment to make a "good faith" effort to stop riverine tailings disposal.

However, the letters from Papua New Guinea tell a very different story. One of them asks: "Where is the evidence that [the mine has] complied with all environmental standards of the state of Papua New Guinea and international standard[s]? ... Where is the evidence that the water is safe to drink? Where is the evidence that there is no factual or scientific proof of environmental degradation and the aftermath [of] endangerment by [acid mine drainage]?"

The letters received by the Melbourne courts represent the remaining plaintiffs in a long-running legal saga that began a decade ago, in May 1994, when claims representing more than 30,000 Papua New Guineans were filed against BHP, the majority shareholder and operating partner of the Ok Tedi mine.

The original claims focused on the environmental impacts of the mine on the Ok Tedi and Fly Rivers. While the case was being adjudicated, BHP insisted that the problems caused by the mine were negligible. However, after

the out-of-court settlement in 1996, BHP acknowledged that the impacts were far greater than originally predicted. The affected area now covers more than 1,500 square kilometers and is expected to increase substantially.

Yet the mine did not stop dumping tailings into the river even after committing to implement the "most practicable form of tailings containment" in the 1996 settlement. This failure prompted the prime minister of Papua New Guinea to ask the World Bank to evaluate the project. As the letters to the court explain, the "World Bank found the mining impact destructive to the environment, condemned the mining operation and recommended its ... closure."

Instead of facilitating the early closure of the mine, BHP Billiton transferred its 52 percent ownership stake to an independent trust company that will support development projects in Papua New Guinea, allowing the mine to continue operating as before. The letter-writers from the affected communities are critical of the Australian company's departure, alleging that "BHP conspired and forced the government" to implement legislation that allowed them to leave the country without addressing the problems caused by the mine. They reject the implicit trade-off between development



Pastor Kirine reads his objections to the Settlement at a Kiunga meeting in February

and the right to a healthy environment, concluding that "we can never and will never agree" to the settlement of their claims against BHP Billiton.

It was the mine's failure to fulfill the commitments that it made in the 1996 settlement that led the original plaintiffs to return to court in April 2000, alleging that BHP Billiton and Ok Tedi Mining had breached the terms of the earlier agreement. This action was brought to a halt when the landowners were advised by their lawyers to settle the case on the grounds that there was insufficient evidence to find BHP Billiton in default of the 1996 agreement. With the court's approval of the settlement on January 16, BHP Billiton has avoided liability for the damage it has caused. The Australian legal system has failed to provide a remedy for the environmental destruction caused by one of its largest corporations. Meanwhile, the lack of expenditure on environmental controls enables the Ok Tedi mine to operate with "profit margins ... running at an astonishing 60 percent" (Garnaut 2004). Profits before taxes are expected to reach US\$250 million this year (Garnaut 2004).

The number of persons who object to the settlement is far greater than the number of persons represented by the letters sent to the courts in January. The interests of nearly 30,000 people are questionably represented by signed agreements to opt-out of the legal action that were obtained by the Ok Tedi mine in 2002. In a review sponsored by Oxfam Australia, Lawrence Kalinoe, dean of the University of Papua New Guinea Law School, criticized the agreements for failing to meet the legal threshold for informed consent (Kalinoe 2003). Lawyers for the plaintiffs assembled numerous affidavits challenging the validity of the opt-out notices. A constitutional challenge to the opt-out notices had been pending before the Supreme Court of Papua New Guinea, but was withdrawn as part of the January settlement. Consequently that settlement does not accurately represent the will of the people and the communities that it purports to represent.

It is clear from the letters sent to the courts in Melbourne that many of the people living downstream from the mine object to both the recent settlement and their compromised future along the river. Yet they stand defiant: "We will not be intimidated by the

Company nor succumb to their bully tactics," says one. "We will not succumb to the company's wishes, even in the event that the Honourable Supreme Court makes [the] final verdict to dismiss the case," another states.

While the courts may be satisfied with the settlement of the long-standing case against the Ok Tedi mine, the authors of these letters express an alternative interpretation: that an Australian corporation has evaded its responsibility for the devastated environment they now inhabit, and that the Australian courts have rejected their last opportunity to receive any recognizable form of justice.

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References and further reading

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