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GOLDMINING, DISPOSSESSING THE COMMONS AND MULTI-SCALAR RESPONSES

The case of Cerro de San Pedro, Mexico¹

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Introduction

In 1996, Minera San Xavier (MSX), a Mexican tributary of the Canadian mining company Newgold Inc., announced it wanted to start a large open-pit gold and silver mine in the municipality of Cerro de San Pedro, in the state of San Luis Potosí. The mining site occupies 373 hectares of *ejido*² community land. This was highly controversial as the scale and type of the mining operation would impose a heavy burden on the available land and water and generate many adverse social and environmental impacts. Resistance was fierce, and several opposition groups united to form the *Frente Amplio Opositor* (Broad Opposition Front; BOF). Despite the opposition, however, MSX started operations in 2007. To date, its presence is still disputed.

Even though mining is a highly profitable business for some privileged actors, the downsides of mining activity for the majority and the environment are becoming more and more clear. Environmental degradation, illegal land acquisition, water contamination, corruption, violence, resistance and conflict are commonly associated with mining development (e.g. Perreault, 2014). Likewise, in Cerro de San Pedro, campesino communities are dramatically affected by the mine's activities (see Figure 11.1), and the livelihood strategies of mine-adjacent communities are endangered through, among other issues, decreased access to and control over land and water. As in most large-scale mining projects, the economic benefits promised by government and mining companies in the form of, for example, temporary employment are outweighed by the losses suffered (van de Sandt, 2009). And, as elsewhere, these negative effects give rise to deep societal conflicts (e.g. Zwarteveen and Boelens, 2014).

This chapter elaborates how conflict arose over common land and water resources between the inhabitants of Cerro de San Pedro and MSX, causing severe environmental impacts and affecting local communities at large. We argue that this

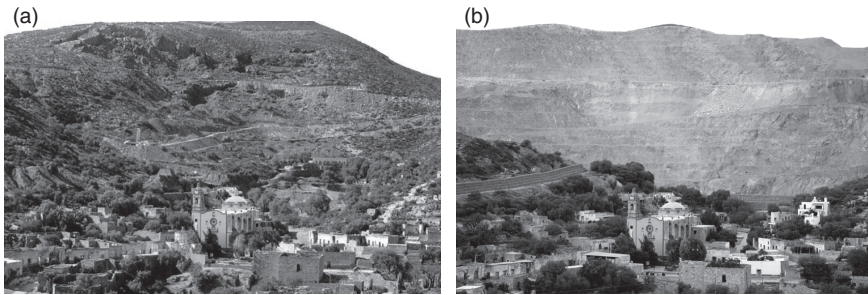


FIGURE 11.1 (a) Cerro de San Pedro in 2007, just before mining operations began; (b) the situation in 2013 – the open-pit mine, which is just 200 metres from the village centre, has destroyed the land and the waterscape, generating dispossession and significant conflict

Sources: (a) BOF (2013); (b) photograph by Jesse Samaniego Leyva, 2013

‘natural resources conflict’ is not just about the right to access resources, but also about underlying injustices in local, national and international rules and regulations and about the legitimacy and authority to shape these rules, and the implications of this for social justice. It describes not only how the role and characteristics of the commons were changed by external forces (mining, in this case), but also how local communities fight back through resistance and social mobilization. It explains how these communities redefine and reshape their level of engagement in the management of the commons, and how they create multi-actor and multi-scalar opposition networks strategized to defend the commons by interlinking the local with the national and global.

The background: Mexico, a protectionist state takes a neoliberal path

After the revolution of 1910, Mexico created a protectionist state in which land and water rights were non-commodities (i.e. they could not be bought, sold or transferred to third parties). After years of unequal division of land and water under the *hacienda* system, the Mexican government expropriated large landowners and reallocated most of the land to former day-labourers. These labourers formed farmer groups that often, to date, collectively manage the resources: so-called *ejidos* or the social property sector. Under the *ejido* system, the main part of the allocated land is often managed collectively while a small part of it can be cultivated for private purposes (Assies and Duhau, 2009). Under the law of *ejido* tenure, land was a non-negotiable resource. It could not be transferred to third parties, land rights could not expire, and nor could they be seized through an injunction (Herman, 2010). Water rights were linked to agricultural property rights under *ejidal* law, so they could not be sold, rented out, used on other lands or used for other purposes than stated in the grant.

After 1992 the legislation on land and water rights changed. Following a severe economic crisis in the 1980s, the World Bank, the International Monetary Fund and the Inter-American Development Bank demanded the adoption of neoliberal policies if the country wanted access to money-lending possibilities. The main aim of restructuring the economy was to open the Mexican market for foreign investment. The social property sector and its regulatory framework of the time did not allow for private ownership as *ejidos* could not legally be privatized. This collided with the aim for increased foreign investment in Mexico as land/water could not be converted into private and transferable commodities. Among others, the Agricultural Law, the Mining Law and the Foreign Investment Law were profoundly changed. In opening up the mining sector to foreign companies, the Mining Law was amplified, for instance with an amendment to Article 6 that enabled land to be alienated through 'temporary occupancy'. This provision allowed mining operations to occupy land, and prioritized mining above any other form of land use. The temporary occupancy permits are granted by Mexico's Ministry of Economics.

The 1992 market-based revisions paved the way for the North American Free Trade Agreement (NAFTA), which Mexico joined in 1994. Through NAFTA, foreign direct investment was greatly stimulated. For Canadian/US mining companies it became very profitable to invest in Mexico due to the relatively low tax rates, low labour costs and less severe social and environmental regulations. It was shortly after the signing of NAFTA that MSX announced its interest in mining for minerals in Cerro de San Pedro.

NAFTA has received criticism that environmental standards are easy to circumnavigate, due to the so-called investor-state mechanism that the agreement encompasses. NAFTA aims to have investors of different countries treated equally and protected from expropriation by all levels of the (host) government. The agreement's Chapter Eleven gives an investor the right to challenge the government on the grounds of failure to comply with NAFTA in an international court, superseding national law. At the design stage, this mechanism was meant to protect foreign companies against arbitrary and unreasonable government actions. However, it has several deeply problematic aspects. First, in the event of a dispute, foreign companies can go directly to the international arbitration process and entirely bypass the domestic courts. Second, as launching this procedure is relatively cheap and easy it is an attractive option for foreign companies that wish to protect themselves against restrictions imposed by new environmental laws or social security policies, which could have a negative impact on their businesses (Mann and von Moltke, 1999). Third, the option of appealing to the international court is available only to companies operating under NAFTA, and not, for example, to communities or other non-business stakeholders who fear injustice, unequal competition or socio-environmental costs.

Effect of mining activity on common land and water resources

Cerro de San Pedro has a long mining history. Yet, unlike the traditional tunnel-based mining operations, the current open-pit mining practices have had a

tremendous impact on the land and the waterscape. The Hill of Saint Peter has been completely excavated (63 hectares); to its sides, two new hills have emerged out of waste material (145 hectares); and a newly constructed hill two kilometres to the south comprises the lixiviation area (120 hectares) (Reyna Jiménez, 2009). The 'new' hills have altered the natural drainage pattern, blocking a dam and a river in the village. Great amounts of dust cause severe pollution (Gordoa, 2011), and farmers in the area complain that this causes crop failure (personal communications, October 2013).

Opposition against the project started soon after MSX's announcement in 1996. The different opinions within the village drove a wedge between the residents, and a fully fledged conflict started in Cerro de San Pedro. Opponents of the project still talk about cases of severe intimidation, aggression and violence against them, inflicted by both MSX employees and pro-MSX villagers. Economic interests in the realization of the mining project were enormous, and the national government also put significant pressure on the local authorities to issue the required permits. When the mayor of Cerro de San Pedro was murdered after openly opposing the mining project (Vargas-Hernández, 2006), the town's next generation of officials, who had initially announced that they would not ratify the municipal permits, changed their minds. They were put under great pressure by MSX, the state and even the (former) national president (Vicente Fox). Many felt that they had no choice since their lives were at risk (Stoltenborg and Boelens, 2016).

There are multiple reasons for the conflict:

1. Land rights were falsely obtained by MSX and a large litigation process followed.
2. The government granted MSX large water concessions, which was sure to cause conflict in an area where water is a scarce resource.
3. Several existing governmental decrees and land use plans were overruled or ignored, altering the land use in favour of MSX.
4. Cyanide, one of the main compounds used in the extraction process, is extremely toxic and widely present in the area.
5. Local village society, culture and eco-tourism developments have been dramatically impacted by the minescape.
6. Life-threatening intimidation of villagers became common practice.

Below we explain in more detail the causes and consequences of Mexico's legal system for the common land and water resources in Cerro de San Pedro.

Land rights

After the arrival of MSX in Cerro de San Pedro, the process of land acquisition began and MSX tried to arrange a lease contract for the land with the village *ejido*. Mexican law holds that the land surface belongs to the land title-holders,

in this case the *ejidatarios*, but the subsoil remains the property of the government. This meant that for MSX to obtain access to the land both a mining concession for the subsoil from the Mexican government and a rental agreement with the *ejidatarios* were required (Herman, 2010). Obtaining the mining concession from the government was not a problem. However, since the majority of land title-holders had left Cerro de San Pedro after 1948, MSX instead persuaded a number of neighbours to sign a lease contract. But these people did not own the land and therefore could not legally lease it to MSX. In March 2000 a court duly ruled that the people who had signed the lease had no right to do so. However, this decision led to a long legal battle during which various courts abjured responsibility and referred the case to other courts, which enabled MSX to continue its operations. Several BOF members felt that the Mexican government was happy to allow the legal impasse to rumble on as this gave MSX an opportunity to continue to operate in the area. Herman (2010: 85) quotes BOF lawyer 'Esteban', who stated: 'the legal processes are so poorly managed and the regulations are so vague that there are lots of ambiguities around the Agrarian Registry ... So the *ejidatarios* are not only litigating against the mine, they are also litigating so that the courts recognize their rights.' Despite the lack of a legal permit to access the land, MSX continued its construction activities between 1996 and 2004. Eventually, in 2005, the Mexican Ministry of the Economy granted the company a temporary occupancy permit, overturning a government ruling on the illegality of the land lease contract that had finally been reached the previous year.

The inconsistencies between the Agricultural Law and the Mining Law were eagerly exploited by MSX and government supporters. Mexico's Mining Law considers mining a top priority that benefits the whole society. This means that any kind of exploration, exploitation and beneficiation of minerals should 'get preference over any other types of land use', including agriculture and housing (GAES Consultancy, 2007). However, Article 75 of Mexico's Agrarian Law states: 'in cases where lands have been proven to be of use to the *ejido* population, the common land uses in which the *ejido* or *ejidatarios* participate may be prioritized' (Herman, 2010: 84). To ensure that MSX could override all other forms of land use, Article 6 of the Mining Law was strategically deployed, enabling land to be alienated through 'temporary occupation' (Herman, 2010). Yet the Agricultural Law does not recognize this temporary occupation instrument. Moreover, as was mentioned earlier, according to the Mexican Constitution, land given to *ejidos* cannot be transferred to third parties or seized through an injunction. Nevertheless, these fundamental rights have been ignored in Cerro de San Pedro. The threat of having their common land expropriated in the name of 'public interest' is ever present for villagers who resist MSX's operations. The temporal occupancy ruling meant that if small-holders did not agree with the lease contract, they risked losing everything, without compensation. So, *de facto*, Cerro de San Pedro's farmers were forced to accept the unfair lease contracts (Clark, 2003; Ochoa, 2006).

Water rights

The city of San Luis Potosí and Cerro de San Pedro are located in the hydrological watershed of the Valle de San Luis Potosí. This stretches over approximately 1,900 square kilometres and supplies about 90 per cent of the San Luis Potosí population (more than 1 million people) with drinking water. The Valle de San Luis Potosí aquifer is therefore a crucially important water commons, but it is overexploited. As a way of mitigating this overexploitation the government installed a *zona de veda* in the area. A *veda* is a policy instrument, designed to prevent uncontrolled and unlimited water extraction from the deep aquifer, with the aim of obtaining a sustainable equilibrium between human activities and the environment. Since 1961 the mining area in Cerro de San Pedro has been subject to a *veda*.

The neoliberal policies that have converted water rights from a non-commodity into a tradable asset have generated considerable conflict, not least because they have helped MSX to operate in San Luis Potosí. These changes allowed the purchase and sale of 'out-of-use water permits' and the proliferation of well perforations within the *veda* zone (considered under the new laws as a 'relocation' of the old well), despite the clear objective of *reducing* exploitation of the aquifer. By making use of this regulation, MSX obtained twelve concessions totalling 1.3 million cubic metres annually (Newgold Inc., 2009; Santacruz de Leon, 2008).

Opponents of the project state that tradable water rights put extra pressure on the overexploited aquifer and have now endangered future water provision for the San Luis Potosí residents. Moreover, opponents claim that the granting of 1.3 million cubic metres of a 'scarce resource' for mining purposes shows that the so-called 'scarcity' is not an environmental condition, but rather the result of priorities that the government assigns to certain uses. They argue that the government decides that water is 'abundant' for some uses (i.e. commercial ones), whereas water is 'scarce' for others (i.e. livelihood and health security) (Peña and Herrera, 2008). 'Scarcity' in this sense is a social construction and political phenomenon rather than a natural state of the environment.

Trespassing on the *veda* was not the only way of manipulating water access and control rights in the Valle de San Luis Potosí. Another decree, issued in 1993, designates the municipality of Cerro de San Pedro as a *zona de preservación de la vida silvestre* (zone for the preservation of wildlife). This decree was issued a few years before MSX announced its interest in exploiting the gold and silver reserves of the area (BOF, 2013). State Congress assigned the area a protected status due to its ecological function and importance for watersheds. This implied that in 75 per cent of the municipality of Cerro de San Pedro:

- no changes were to be made in the subsoil for a period of twenty years;
- the area was not suited for industrial activity with high water consumption; and
- it had an important function for wildlife preservation (Gordoa, 2011; Vargas-Hernández, 2006).

However, in 2005 the Federal Fiscal and Administrative Justice Tribunal declared that mining can be considered a 'primary activity', rather than an 'industrial activity', so it is not subject to the decree (Herman, 2010).

International legislation

International legislation has also made its mark on developments in Cerro de San Pedro. This raises the question of which legislative framework (national or international) has precedence. While the issuing of permits remained locked in a domestic legal battle and no clear decisions were forthcoming, MSX opted to take another route in the hope of obtaining them. On joining NAFTA, Mexico had agreed to the 'equal treatment' principle on which the treaty is based (Mann and von Moltke, 1999). Chapter Eleven of NAFTA allows a foreign company to file a complaint with the NAFTA Commission against a host government if it feels that the government is obstructing the economic development of its business. On more than one occasion, this instrument has been used against governments that have revoked permits on environmental grounds, and some of these cases have resulted in heavy penalties for the host government. For instance, in 2001, NAFTA imposed a \$16.5-million penalty on the state of San Luis Potosí for obstructing the development of a chemical waste transfer station in the city of San Luis Potosí. Just five years later, in October 2006, MSX threatened to invoke Chapter Eleven if the Mexican government refused to let it move forward with its Cerro de San Pedro project. Although there is no proof that this threat had a direct impact on any government decisions, it demonstrates that large international companies are prepared to use such instruments to influence decision-making, and as such have a say in ensuring that economic interests prevail over environmental concerns.

The UN's former Principal Water Lawyer Miguel Solanes explained how NAFTA helped MSX proceed with its Cerro de San Pedro project:

Only investors have legitimacy to request the intervention of investment arbitration courts, and to initiate suits and legal actions. They create the arbitration market, which depends on investors for their existence – the risk of capture and bias is strong. Since they are based on international agreements, investment courts trump national jurisdiction. In addition, other fora such as human rights courts lack the enforcement powers of the decisions of arbitration courts.

(Personal communication, 20 December 2014)

Hence, NAFTA gave MSX a very powerful position vis-à-vis the national and local governmental authorities in Mexico. Local communities have no authority to object to NAFTA resolutions, even though they often face the greatest consequences of those resolutions. Denying local inhabitants and communities the right to file a complaint with NAFTA repudiates their legal status and stake in the conflict (see Solanes and Jouravlev, 2007). As in Cerro de San Pedro, this can

create enormous power differentials between the local inhabitants and the foreign company (Ochoa, 2006). Miguel Solanes continued:

International investment agreements and their arbitration courts have made a travesty of local interests and power devolution. An arbitration court, at international level, beyond local and national judges, ends up adjudicating on conflicts between public local interests and global companies and investors. The international investment court performs not only beyond local reach, but also outside the limits of public interest at local level. Its mandate is to protect investors' interests, disregarding local problems.

(Personal communication, 20 December 2014)

Opposition to the destruction of the common land and water rights

A number of protest groups have been formed in opposition to the mining project in Cerro de San Pedro. Opposition to MSX began in 1996, after the company announced it wanted to dig an open-pit mine in Cerro de San Pedro. Initially, the opposition consisted of a number of small resistance groups, such as the National Union of Agricultural Workers (*Unión Nacional de Trabajadores Agrícolas*) and the Blue Collective (*Colectivo Azul*). However, in 2003, most of these groups acknowledged that one large, well-organized front was necessary, so they amalgamated into the Broad Opposition Front (BOF), which continues to put the local case against the mine to this day. The BOF's objective is clear: 'The only objective we have is to make MSX leave Cerro de San Pedro. The company is operating illegally and we will not stop until MSX is forced to abandon the site' (personal communication from BOF member Eduardo da Silva, November 2013). The group attempts to protect Cerro de San Pedro's environment, local livelihoods and culture by employing a number of strategies, and as such it has created a multi-level and multi-actor network in opposition to MSX. On the local level, this entails disseminating information about the ongoing litigation process to local newspapers, using social media, organizing anti-MSX rallies and so on. In addition, BOF offers information and practical help to anti-mining groups in other parts of Mexico. Another important strategy is forging alliances with local, national and international environmental organizations and universities, such as Pro Ecológico San Luis, Greenpeace México, the Canadian religious organization KAIROS and Amnesty International. BOF has also objected to MSX's mining activities in several national and international courts, where it has achieved a number of notable successes. Nevertheless, at the time of writing (late 2016), MSX was still operating in Cerro de San Pedro as the lengthy and complex litigation process had not yet reached a conclusion (see Stoltenborg and Boelens, 2016).

Mining conflicts, such as those in Cerro de San Pedro, the rest of Latin America and elsewhere, generally share one common feature: the mining companies' positions of power are reinforced by large state backing and forceful international

investment agreements, which results in profoundly unequal negotiating positions for the affected communities. For the latter to obtain fairer access to litigation, the mining companies should be forced back to the negotiating table and government institutions should be obliged to perform their key role as public service entities. If they are to have any chance of success, the local communities must forge *multi-actor* alliances that work on *multi-scalar* levels (see Chapter 4, this volume) in order to create civil society networks that are internally complementary while also connecting local, national and global actors. For example, by linking local village initiatives, women's groups, journalists and newspapers with provincial indigenous and peasant federations, national ombudsman and civil rights offices, international research centres and environmental and human rights NGOs, access to research, information dissemination and international arbitration can become more balanced, and biased discourses can be challenged. Getches (2010), among others, describes important opportunities for these multi-actor networks to use international norms and laws that can counterbalance powerful NAFTA-type agreements. Thus, besides more localized resource struggles, marginalized mining-affected communities may find important support by diversifying their allies and upscaling their action network. Actors at interlinked-scale levels can seek to bend discriminatory rules or apply (inter)national protective regulations, and can try to balance skewed decision-making powers. Such multi-actor network strategies may also contribute to building an alternative discursive framework that is able to challenge the 'official' regimes of representation and may generate broader support for socially and environmentally friendly alternatives.

At present, the BOF is working on proposals for a new Mining Law, based on more equitable and ecologically sound management of land and water resources. Persuading the Mexican government to accept this will require forceful lobbying skills, a large network of influential partners and a well-balanced discourse. The above-mentioned local-national-global alliance that BOF is forging provides access to new strategic-political opportunities, not only in Cerro de San Pedro but also in other mining arenas in Mexico. In the Cerro de San Pedro case, where extraction is approaching the final stages, the main focus now is to try to reduce the damage done to the environment. Demanding ethically and ecologically responsible mining practices and waste cleaning, and enabling alternative local livelihood opportunities, such as ecological and cultural tourism, might provide the villagers with improved future job opportunities while also reducing the environmental impact.

Conclusions

As is often seen in water governance disputes, the mining conflict that we have described in this chapter goes beyond the obvious struggle over accessing or defending land and water resources. In Cerro de San Pedro, an exemplary struggle has been fought over material land and water resources, with underlying struggles over the disregard of rules and rights, and disputes over the legitimate authority to

make those rules, which in the end seek to distribute resources in particular ways (see Boelens, 2015). The discourses that have been developed to sustain or challenge these distributive patterns, rules and decision-making structures are not just weapons in this struggle. They also seek, in accordance with each party's interests and worldview, to depoliticize and naturalize MSX's minescape or, alternatively, show its profound contradictions as well as its politically motivated mining truth, and arrange for 'alternative truths'.

As the Cerro de San Pedro case illustrates, transformations in land and water commons can result from complex interplays between different actors, in which court systems, officials and governments at various levels play double and deeply troubling roles, and where multinationals cleverly exploit loopholes in the law and deploy their economic and discursive power. In addition, international agreements, such as NAFTA, can have a profound unethical impact on the litigation process, sidelining social and environmental rights. In Cerro de San Pedro, the only real victims of this interplay are the *ejidatarios*, who lost their alternative income-generating activities and access rights to land and water, and who, once MSX leaves the area, may be left in a polluted, distorted environment with few job opportunities. On the other hand, the mine's profound impact may be diminished and perhaps even reversed in the future. Through multi-actor networks that creatively engage in multi-scalar action, mining-affected population groups together with a variety of mutually complementary advocacy and policy actors have worked hard to balance the two sides' negotiating power and force MSX to clean up the mining residue and facilitate alternative local livelihood opportunities. In this way, environmental justice struggles frame, deploy and entwine diverse scales and engage a plurality of complementary actors. They link the local and global commons.

Notes

- 1 This chapter is partly based on our article for *Water International* (see Stoltenborg and Boelens, 2016).
- 2 In the Mexican governmental system, an *ejido* is an area of communally owned land used for agricultural purposes. In this system, designated parcels are farmed individually, whereas communal holdings are collectively managed.

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