

Aboriginal Perspectives on Environmental Damage

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Environment in the Courtroom:
Key Environmental Concepts and the Unique
Nature of Environmental Damage
March 23, 2011



1: FRONT LINES OF ENVIRONMENTAL DAMAGE

- Indigenous Peoples live at the “frontlines” of environmental damage, are profoundly affected, but are often alone, without resources to address environmental damage.
- Environmentalists face the same challenges, yet there is surprisingly little cooperation between them.



- A fundamental assumption is that the lands and resources are Crown or public lands, notwithstanding unaddressed Aboriginal Title – this assumption prevents blockages to working together.
- Aboriginal law contains some of the legal principles that environmental law practitioners advocate for, and Aboriginal law and reconciliation of Aboriginal Interests provides an opportunity for environmental protection.



4. ABORIGINAL LAW PRINCIPLES

- It is fairly beyond dispute that Aboriginal title vested in First Nations in Canada long before the Crown acquired sovereignty there, and thus before there was any possibility of the Crown gaining or granting such title. *Guerin v. Canada*, [1984] 2 S.C.R. 33; *Calder v. British Columbia*, [1973] S.C.R. 313.



- Just as Aboriginal Title pre-existed and survived the assertion of sovereignty, indigenous – and Haida laws – pre-existed and survived the assertion of sovereignty.
- The Supreme Court has confirmed that Aboriginal Title and Rights do “not depend on treaty, executive order or legislative enactment”. *Calder*; see also *Guerin*.



- The Content of Aboriginal Title:
 - Aboriginal title encompasses the **right to use the land** for a wide range of purposes, including for modern purposes that need not be related to integral aboriginal practices, customs or traditions prior to sovereignty.
 - Aboriginal title is a **property right**, entitled to stand on an equal footing with other property rights, including fee simple title.
 - Aboriginal title confers the **right to the land itself**, extending to the exclusive possession, occupation, use and enjoyment of aboriginal title lands.



- Aboriginal title extends to the exclusive possession, use and enjoyment of the **natural resources** attached to Aboriginal title lands.
- Lands held pursuant to Aboriginal title have an **inescapable economic component**.
- Aboriginal title also has a significant non-economic component. It **preserves a relationship** of central cultural significance between a First Nation and their land.
- Accordingly, Aboriginal title is directed at the **preservation of distinctive aboriginal societies** by securing their culturally integral relationships to the lands that sustain them.



- Aboriginal title is subject to an **inherent limit** – **essentially a sustainability limit** – that prohibits the use of the land in a manner that would destroy the Aboriginal group's special bond to the land. This limit safeguards the culturally integral relationship between the First Nation and its lands for future generations.
- Aboriginal title confirms for the aboriginal nation holding title the right to **determine the uses** to which the land will be put – a right to be involved in land management.



Reconciliation

- The Supreme Court of Canada has placed reconciliation at the heart of the purpose of section 35 of the *Constitution Act, 1982*; it seeks to provide a constitutional framework for the protection of the distinctive cultures of aboriginal peoples, so that there can be recognition and reconciliation (*R. v. Sappier*; *R. v. Gray*; *Mikisew Cree, Taku River, Haida*)
- An aspect of reconciliation is the imperative to recognize, respect and accommodate Aboriginal Title and Rights.



- Before we turn to how those principles are applied in a case study, it is helpful to examine the worldviews which I hope will continue to inform the development of Aboriginal Law, and continue to shape land and resource management into the future.



3. ABORIGINAL WORLD VIEWS

Place in Canadian Law

- Canadian Aboriginal Rights are *sui generis*, meaning that they cannot be explained by reference to either common law rules of real property. The “aboriginal perspective” informs the rights specific to each nation.
- This provides the ability of Aboriginal law to adopt and protect the core of values that integral to culture Nation.



Introduction to Aboriginal Worldview

- Centers on a much different social, economic and political environment.
- Hallmarks: individual is only part of the whole; trans-generational organic entities of family and community; interconnectedness; culture and social structure derived from the richness of land and resources; bio-regional self-sufficiency; extended notion of “personhood”.



- Indigenous “environmental ethic”: family bonding and cross-generational communication and care-taking; self-sufficiency; restraint in taking of resources; respect for all nature and beings.
- One of the roots of environmentalism is a belief common to all First Nations: the interconnectedness of ALL beings and the environment. Falls short in recognizing valuing First Nations *peoples* and their connections.



- “Personhood”: embraces more than humans, and all are equal, including non-human life; often this concept is embedded in everyday language.
- Animals play a key role: (1) as teachers or agents of reward or penalty for human actions: Raven, Coyote; Magpie; and (2) providing teachings about how to live on this earth, social and material culture.
- Illustrate this worldview with reference to the Haida Nation.



Haida Worldview

Forests

- Culture is a direct reflection of the land, the richness of the land is mirrored in a “culture of abundance”:
 - Cedar Tree as everywoman’s “Sister”
 - Extensive use of forests, old-growth dependent species and plants in the forests.
 - Creek Women – who are brought gifts of salmon from the bears to nourish the “Sisters” – which dictates that an ecosystem or watershed approach be taken with land and resource management.



- Deep and rich relationship with the forests that is multi-dimensional. Some aspects of this relationship are highly visible, as is evident from the early photographs of Haida villages taken in the late 1800s.
- In addition to utilitarian and artistic uses, the forests are important for ceremonial uses: they bring to life, make visible and strengthen Haida identity and social order through the use of crests and the “bringing out” of intangible cultural heritage at potlatches and ceremonies – which further affirms important histories and embeds Haida connections to the land, waters and ocean, other peoples and other places.



- Drawing upon the Haida perspective of the forests and the recurrent theme of transformation between the forests, ocean and human realms, we learn that the forests are inter-related and dependent upon the rest of the land and the ocean.
- From this worldview, we learn that we need to take a watershed approach to resource management, rather than the site-specific approach inherent in current Western resource management regime and policies. We also learn that we need to adopt new management regimes which protect cultural keystone species such as ancient cedar trees.



Ocean Environment

- Similarly, the richness of the oceans are also mirrored in “cultures of abundance”:
 - Halibut as “Uncles” – providing sustenance.
 - Salmon, herring and fish are “People” who live in the undersea world
 - Killerwhales are “Chiefs of the Undersea World”, that occupy every prominent rocky outcrop on Haida Gwaii.
- The richness of the land and sea supported a rich artistic tradition.



- “The One in the Sea”, is the foremost marine supernatural being – what goes into the ocean goes directly into his home – and care is taken to respect this being.
- “Low Tide Women” guards the tidal zones, and respect must be given to them to harvest resources.
- Transformation between realms is common in our oral traditions.
- Oceans are the Birthplace of Haida People.



Traversing this Landscape

- How do we ‘uphold’ Aboriginal worldviews and perspectives? We need ensure continuity of Aboriginal rights; take stock, and assess:
 - Inventory the cultural keystone species and species with high cultural profiles.
 - The role of these species in the natural ecosystems and in culture.
 - The cumulative impacts of past and proposed developments on the land and waters, especially those resources with high cultural profiles.
 - The ability of the land to recover, and continue.



THE HAIDA GWAII EXAMPLE

A. Overview

- The Haida Nation unilaterally designated and protected areas beginning in 1981 – almost a decade before BC began land use planning.
- These early designations provide a context for evaluating the successes of the recent interim agreements.
- The designations were simple, but powerful and effective.



COUNCIL OF THE HAIDA NATION

Box 589

Masset, B.C. V0T 1M0

7MA
MINISTRY OF FORESTS

DEC 9 1981

VICTORIA, B.C.

LET IT BE KNOWN

AGBC
DEC 08 1981

1807.001

The Haida Nation has designated a portion of the Queen Charlotte Islands (HAADA GWAI) a Tribal Park. (*1) (October 30, 1981). This is in the watersheds on the Northwest Coast of "Graham Island and Langara Island" (see map), including the immediate intertidal zones within that area.

At the most Westerly edge of the "Canadian" coast, this area has been changed only by relentless seas and pounding rain since ancient times.

The Tribal Park is a part of the full comprehensive claim of the Haidas, that we are the rightful Heir to the entire Haada Gwai (Queen Charlotte Islands) the surrounding waters and airspace.

The Tribal Park has been declared as a necessary interim measure to protect our life source and to sustain our Cultural Identity.

The move was prompted by recent logging interests in that area.



- This designation was made during a time when there was increasing logging in Haida Gwaii.
- The elders were clear that the cultural mandate of the Council of the Haida Nation was to protect the land.
- Their direction set the course for future, interim land protection measures.
- The first such agreement was the Gwaii Haanas Agreement.



- Important elements of the Gwaii Haanas Agreement:
 - Specific recognition of divergent viewpoints of sovereignty and jurisdiction, thereby not recognizing or conceding Crown sovereignty.
 - Agreement to work co-operatively to manage the area through consensus decision-making.
- This same approach was taken with the Bowie Seamount Marine Agreement (2007) and the marine component of the Gwaii Haanas Marine Agreement (2010).



- Haida traditional teachings of the value of working together has guided the development of relationships between local non-Haida communities, which have been formalized through Protocol Agreements.
- The Haida Nation has carefully protected its inherent authority, avoiding use of Crown authority and acting under it authority – which in the land use planning context, has resulted in 14 land designations since 1981.



B. Haida Laws Ground Land Use Plan and Shared Management

- The Haida developed a Land Use Vision (“HLV”) in 2004 (*Yah’gudang*), which set the priorities for future land use planning (cedar, salmon, black bears, birds, plants, beaches).
- The HLV took a three-part approach:
 - Well-being of the land and the life inhabiting the land.
 - Condition of the land.
 - Natural ability of the land to function and provide.



- From this plan, a technical team examined indicators of environmental condition relevant to land use decisions in Haida Gwaii, such as old growth forests, marbled murrelet habitat and riparian forest/watershed condition.
- The latter was especially instructive in developing ecosystem based management guidelines for Haida Gwaii which respect the connection between forests, salmon and bears.



- The land use process was derailed briefly in 2005, but ultimately litigation (the *Haida* case) and direct action provided fertilization to fast-track the negotiations towards the recent interim agreements.
- A Letter of Understanding was reached in 2005 to stand-down peaceful blockades, provide interim revenue sharing, and instigate a unique land-use planning process.



- In 2007 a Haida Land Use Plan was jointly approved by both Parties (Haida Nation and BC), which addressed land uses, rate of logging, EBM, and protection of cultural and ecological values.
- In 2009, BC established conservancies over the land areas that protects all of the 14 Haida designations that were made beginning in 1981.



- The final establishment of conservancies in 2009 resulted in:
 - Protection of 52% of the land base (about 500,000 hectares and 74% of the shoreline.
 - Areas to protect cultural and environmental values: cedar areas, marbled murrelets, streamside forest habitat important for salmon, bears, and bear den sites.
 - Ecosystem-based management over the remaining land base.



C. Kunst'aa guu – Kunst'aayah Protocol: **First Steps of Reconciliation**

- With land protection in place, negotiations shifted to management of these areas.
- The Protocol adopts the “Gwaii Haanas Agreement” approach.
- Recognizes that reconciliation will take an incremental approach.



- Commits to legislative change for new decision-making structures (BC's current legislative regime reflects the law pre-*Haida*, and requires amendments).
- This Protocol takes a step forward with the implementation of joint decision-making in not only operational matters, but also strategic level matters.



- Unique in Canada, in that together BC and the Haida Nation are creating an on-the-ground example of what reconciliation is.
- Built upon the Haida Land Use Vision in 2004 (*Yah'gudang*), which set the priorities for land use planning in Haida Gwaii, and guided by a Haida Stewardship Law.



- Identifies a three-tiered framework for decision-making:
 - Solutions Table: Joint and technical analysis of operational matters for recommendation to the Management Council
 - Management Council: Joint decision-making body, operating by consensus. Strategic-level decisions.
 - Executive government to government
- Both Parties commit to work together to arrive at the best decisions for Haida Gwaii.



Management Council

- Five strategic areas:
 - HG Strategic Land Use Agreement
 - Land Use Objectives for forestry
 - Determination of Allowable Annual Cut (first determination underway)
 - Approval of Management Plans
 - Policies/standards for conservation of heritage sites
 - Other strategic matters delegated to it.



D. Implementation of the Protocol

- In May, 2010 BC passed legislation to implement the protocol and restore the name of Haida Gwaii. The Land Use Objectives were legally established in December 2010. BC's legislation come into effect in 2011.
- CHN passed it's first piece legislation, the *KaayGuu Ga ga Kyah ts'as – Gin 'inaas 'laas 'waadluwaan gud tl'a gud giidaa* (Stewardship Law) in October 2010 to bring the management bodies into effect under Haida law.



Haida Stewardship Law

- A grounding principle is the responsibility to protect the land for future generations, found in the Haida Constitution and Haida Laws (ss. 1, 3)
- Haida laws are directly incorporated through recognition of the inherent responsibilities of Haida people to protect all living things, as set out in section 3 (a) of the Law:
 - [T]o ensure the well-being of our environment and create an economy that is respectful of the land and culture and people through establishing structures to manage the forests, the lands and the manner in which humans interact with the natural world.



- Directly incorporates the Haida Gwaii *Yah'guudang* and the principles outlined in the Haida Land Use Vision (May 2004) to respect the life systems of Haida Gwaii, as per s. 4”, which also guide the Haida appointees to the Solutions Table (s. 6)
 - **“Guiding Principles:** The Haida appointees to the Haida Gwaii Management Council and the Solutions Table shall be guided by Haida Gwaii *Yah'guudang* and the principles outlined in the Haida Land Use Vision (May 2004) to respect the life systems of Haida Gwaii.”



Haida Gwaii Oceans

- Similarly, the Haida have also completed a marine use vision for the management of the oceans.
- This plan will build upon co-management successes in both Gwaii Haanas and the rest of the land base, and the nascent efforts to manage the recently established Marine Conservation Area.

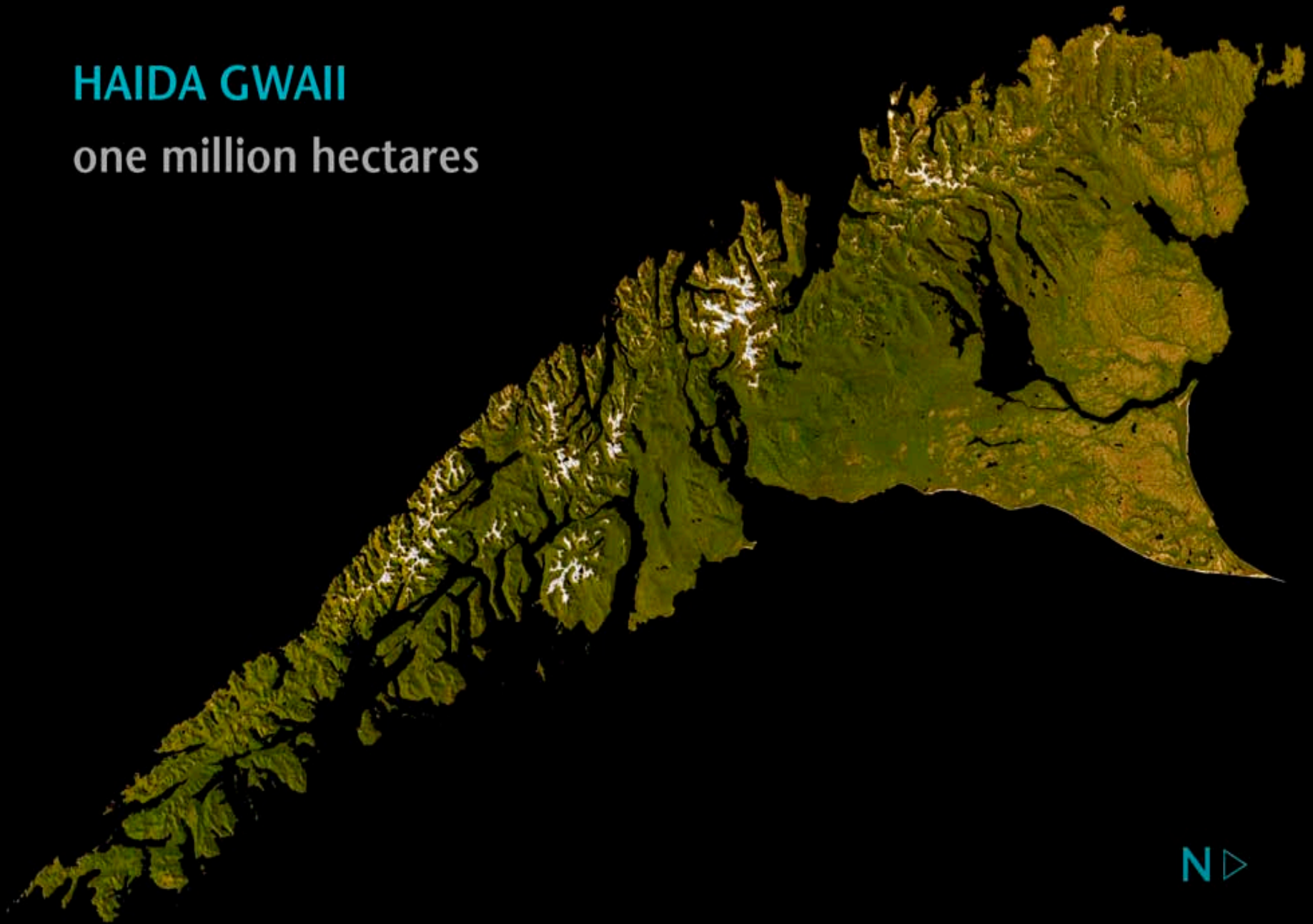


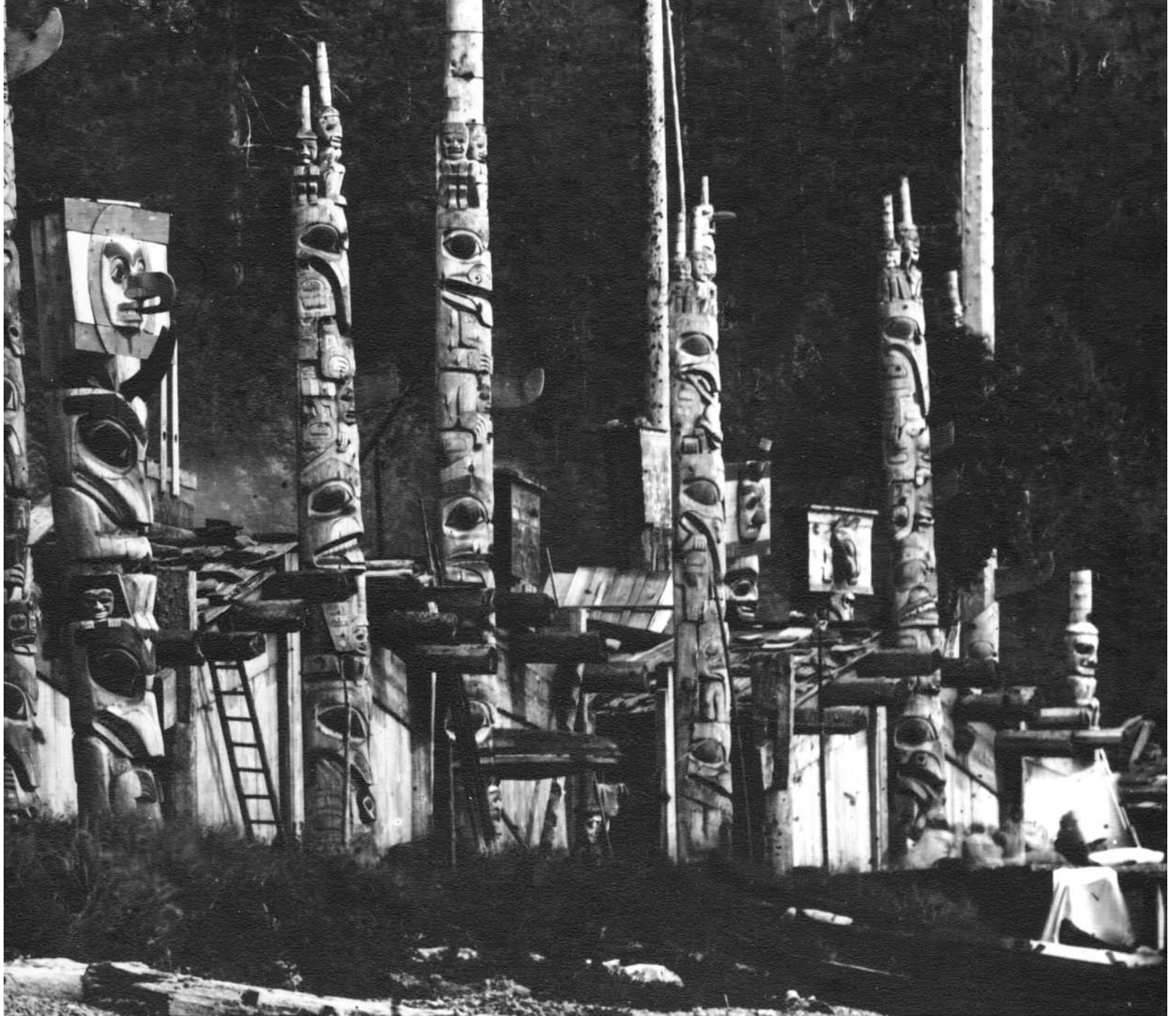




HAIDA GWAI

one million hectares



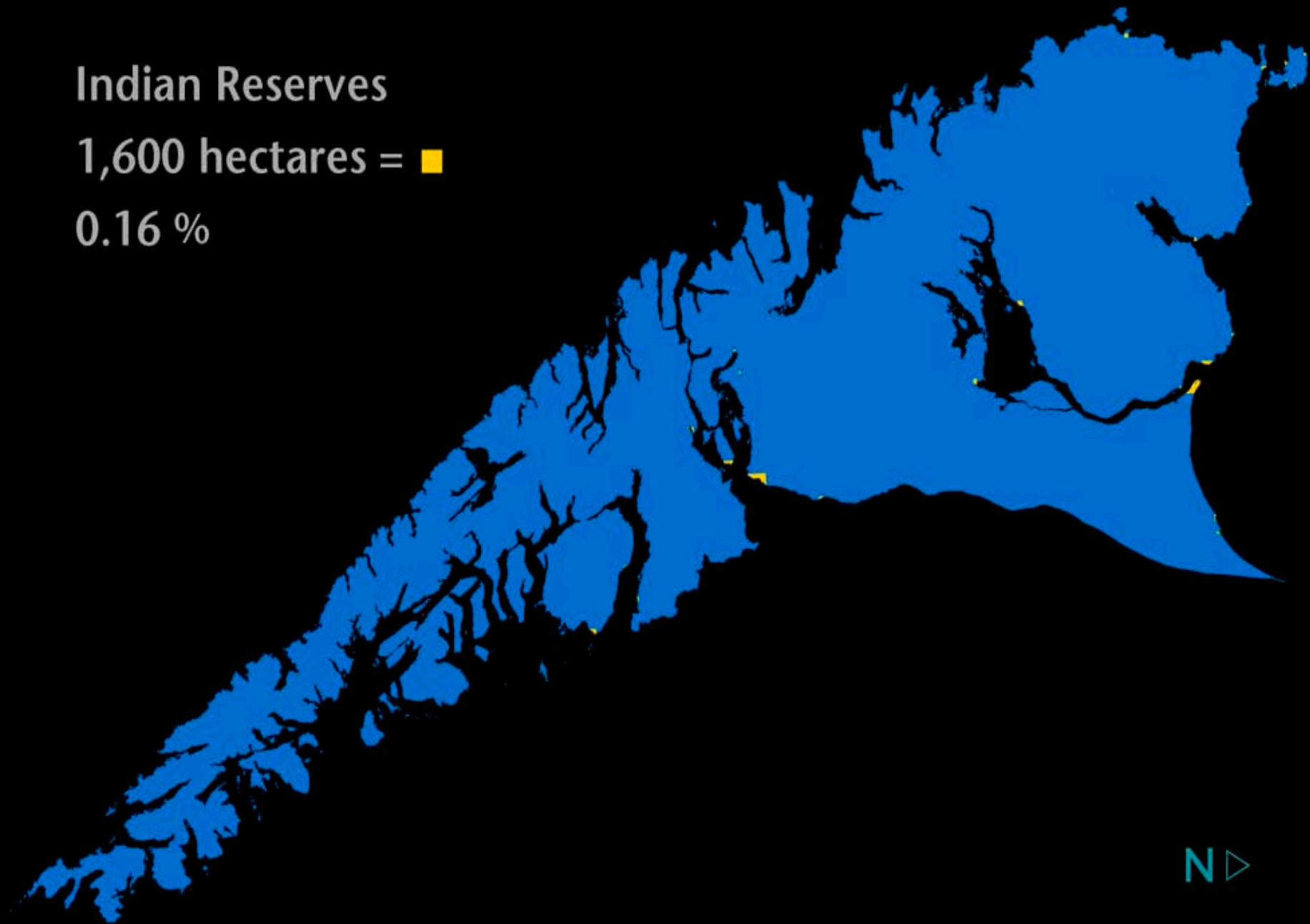


Skidegate. Photo by George M. Dawson, 1878. P.A.C. No. 255 (enlg.).

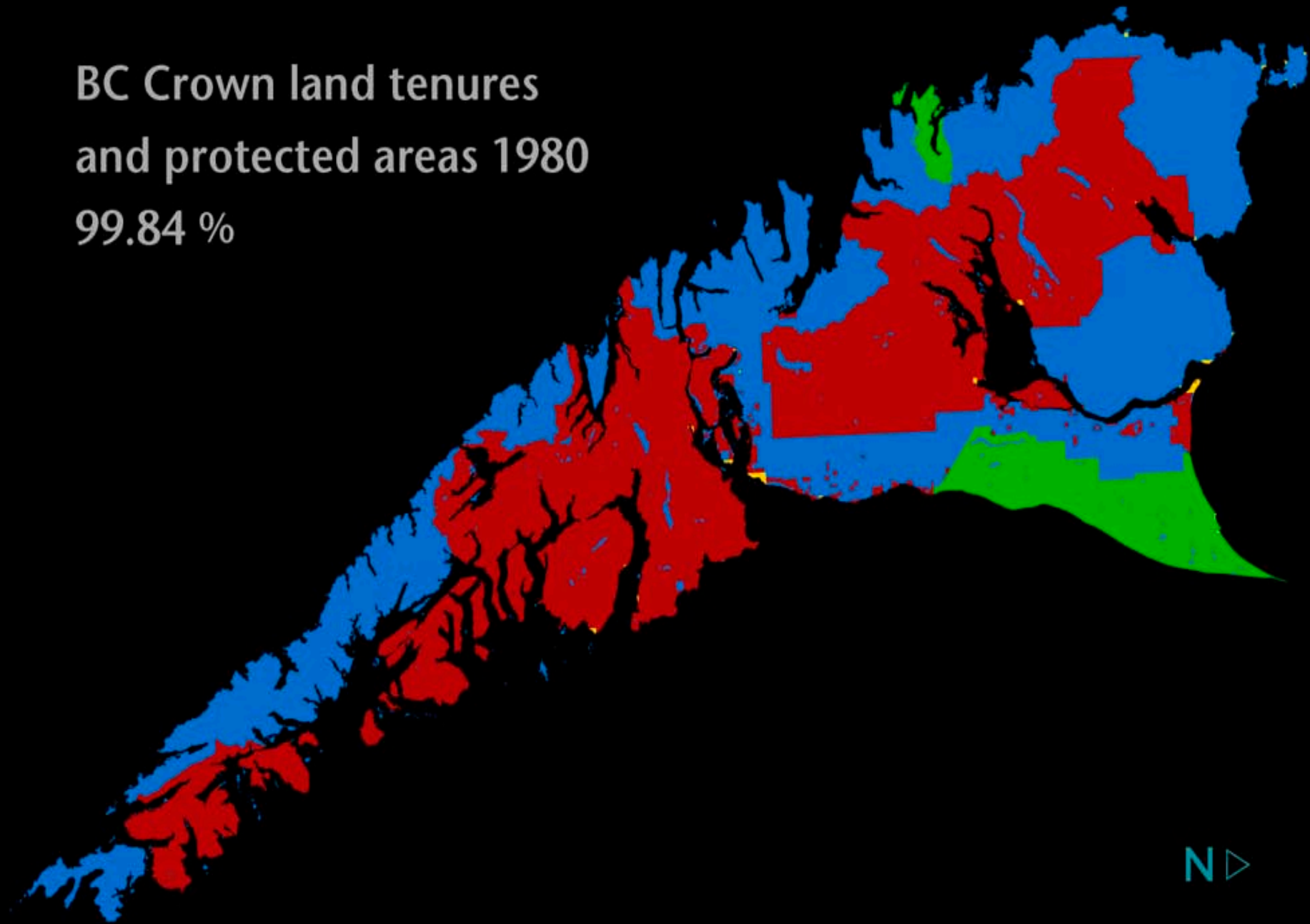
Indian Reserves

1,600 hectares = ■

0.16 %



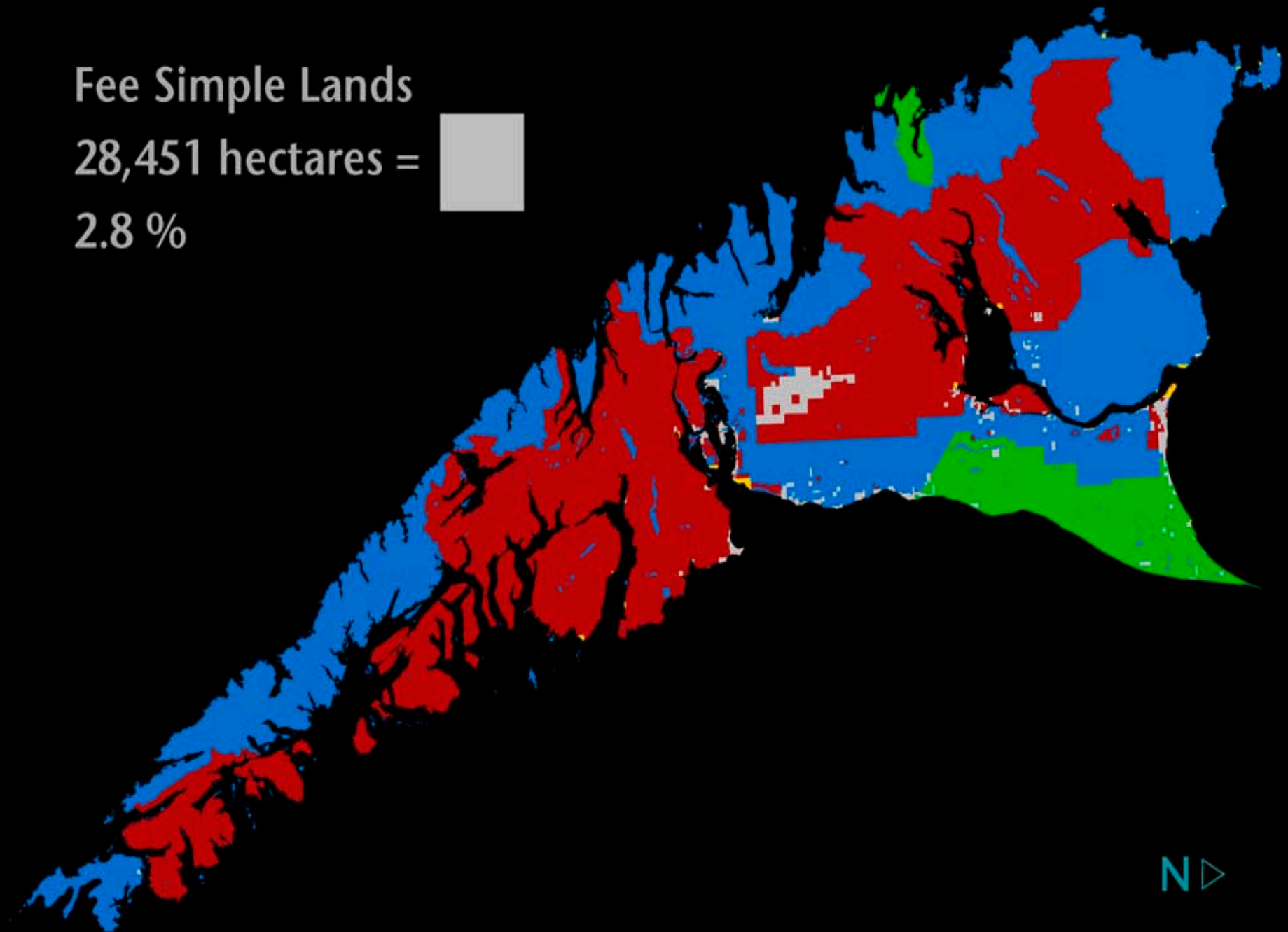
BC Crown land tenures
and protected areas 1980
99.84 %



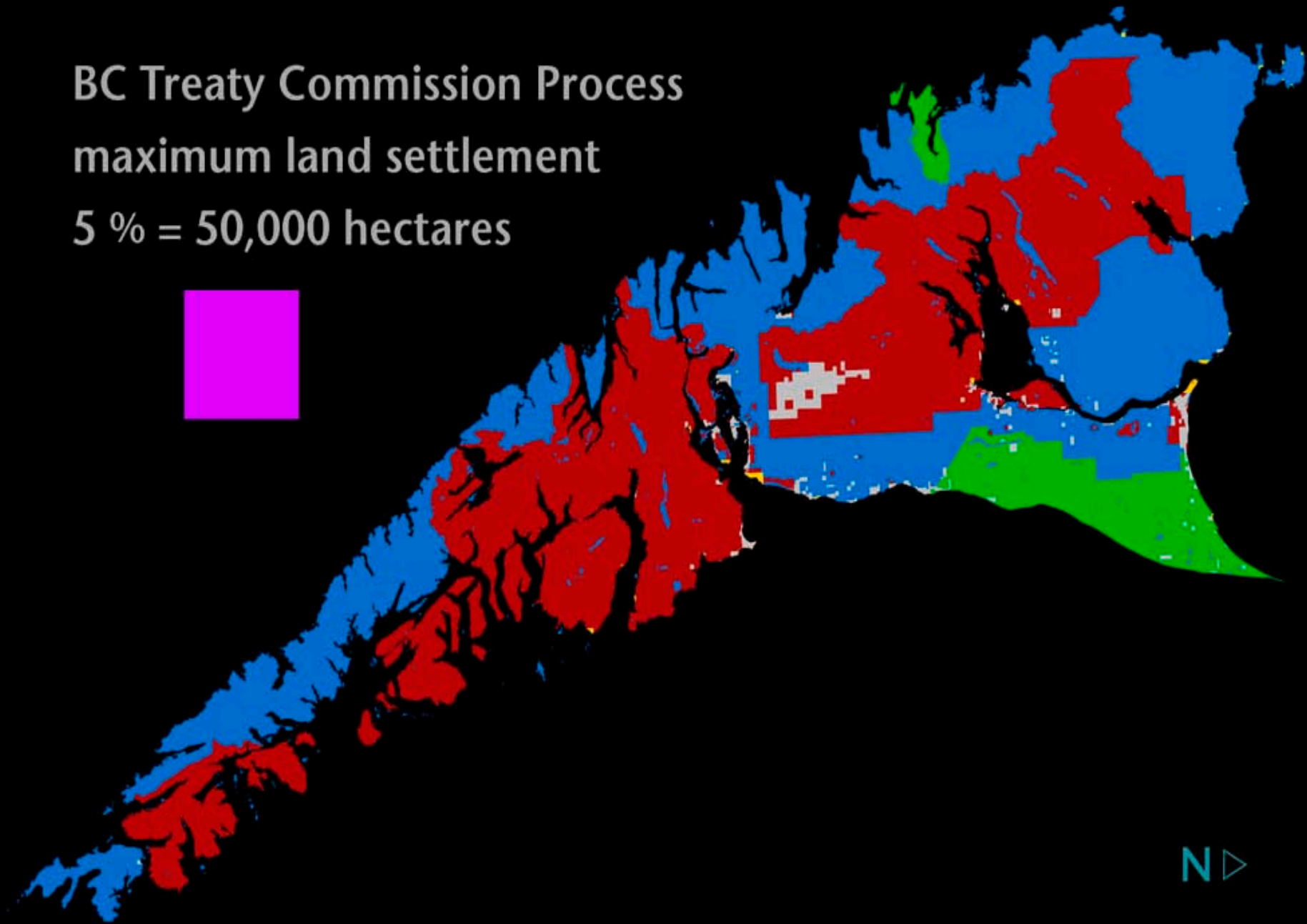
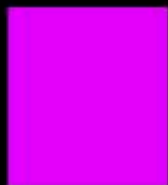
Fee Simple Lands

28,451 hectares =

2.8 %



BC Treaty Commission Process
maximum land settlement
5 % = 50,000 hectares

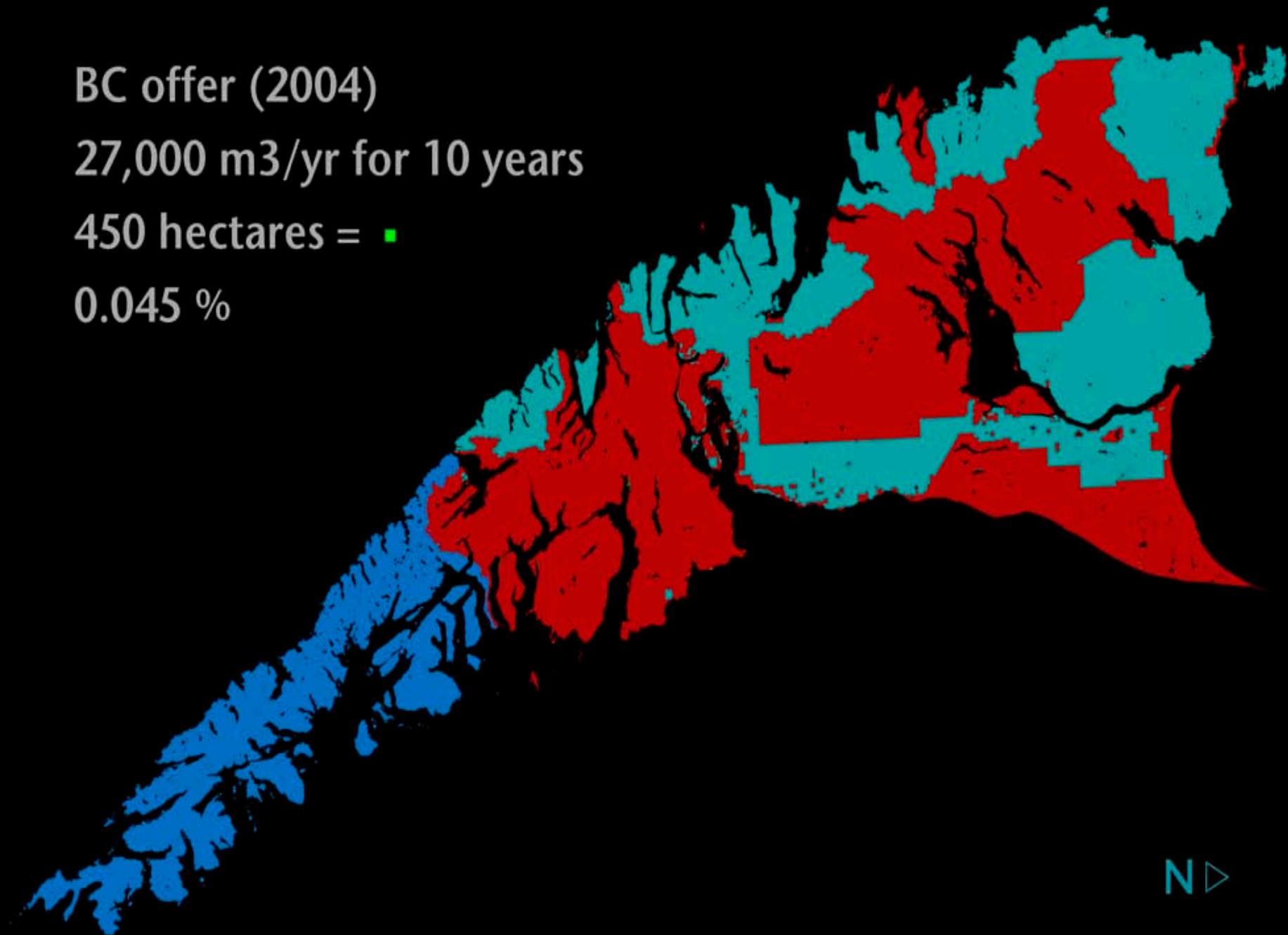


BC offer (2004)

27,000 m³/yr for 10 years

450 hectares = ■

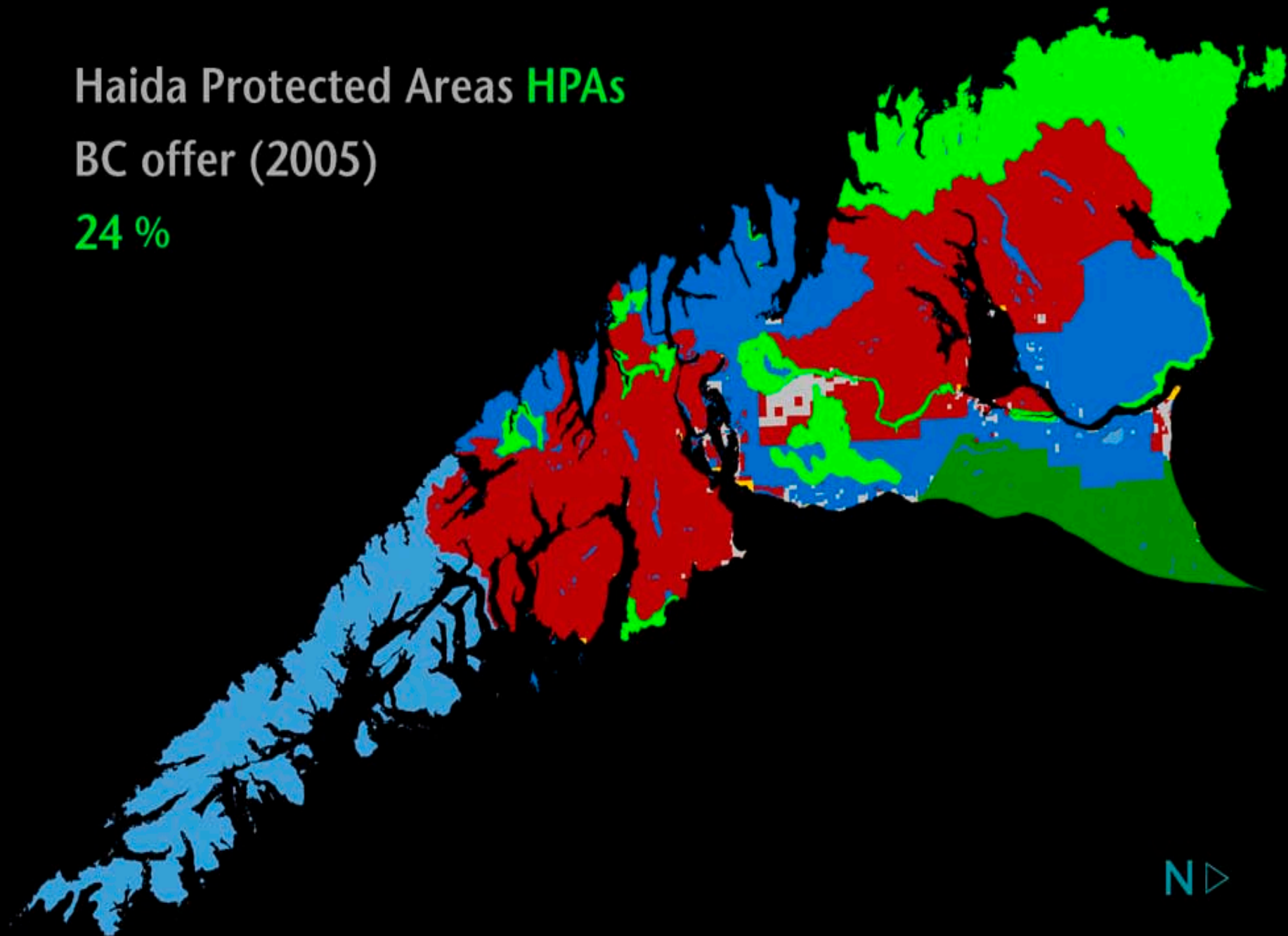
0.045 %



Haida Protected Areas **HPAs**

BC offer (2005)

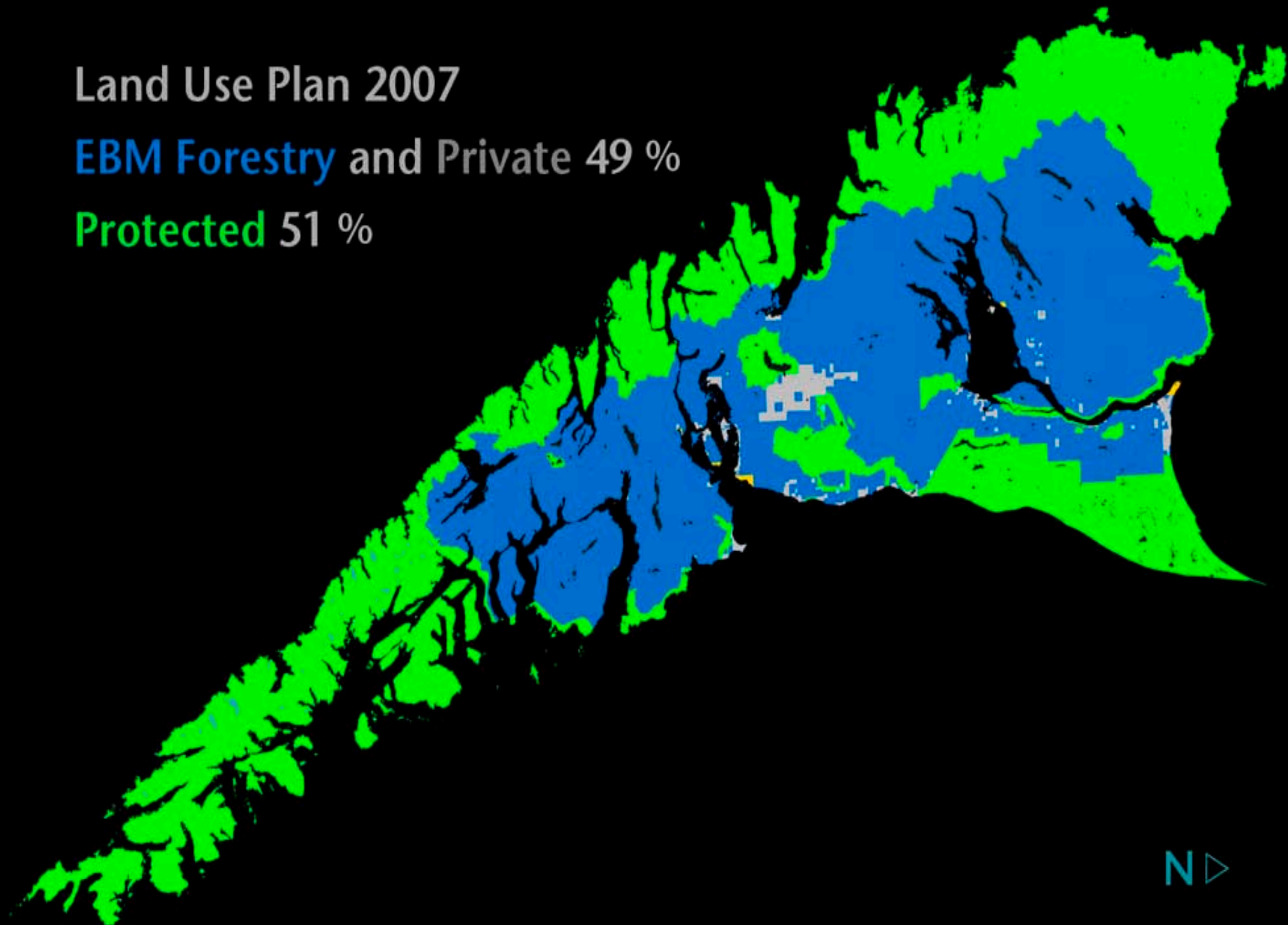
24 %



Land Use Plan 2007

EBM Forestry and Private 49 %

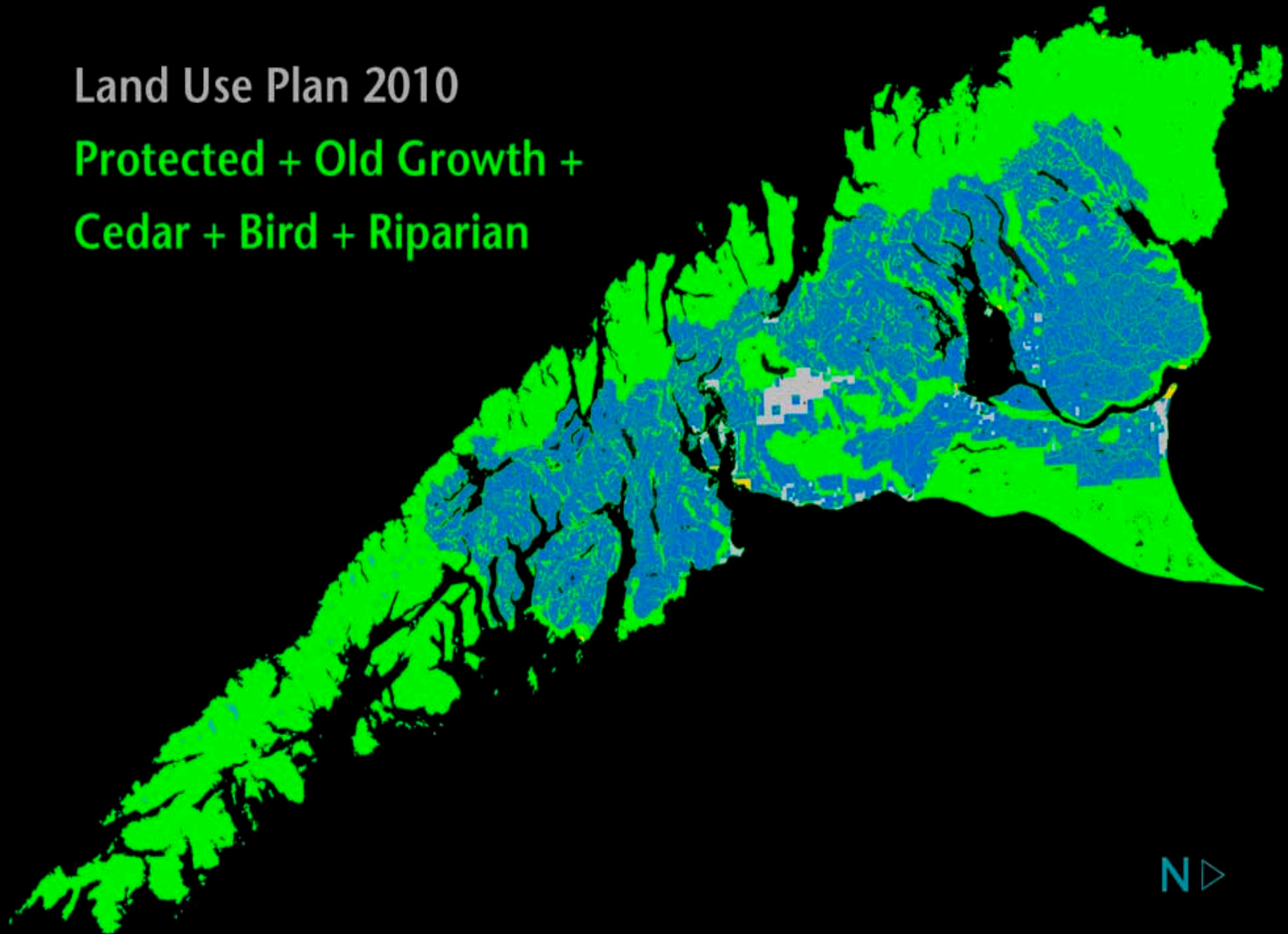
Protected 51 %



Protected + Old Growth + Cedar + Bird + Riparian

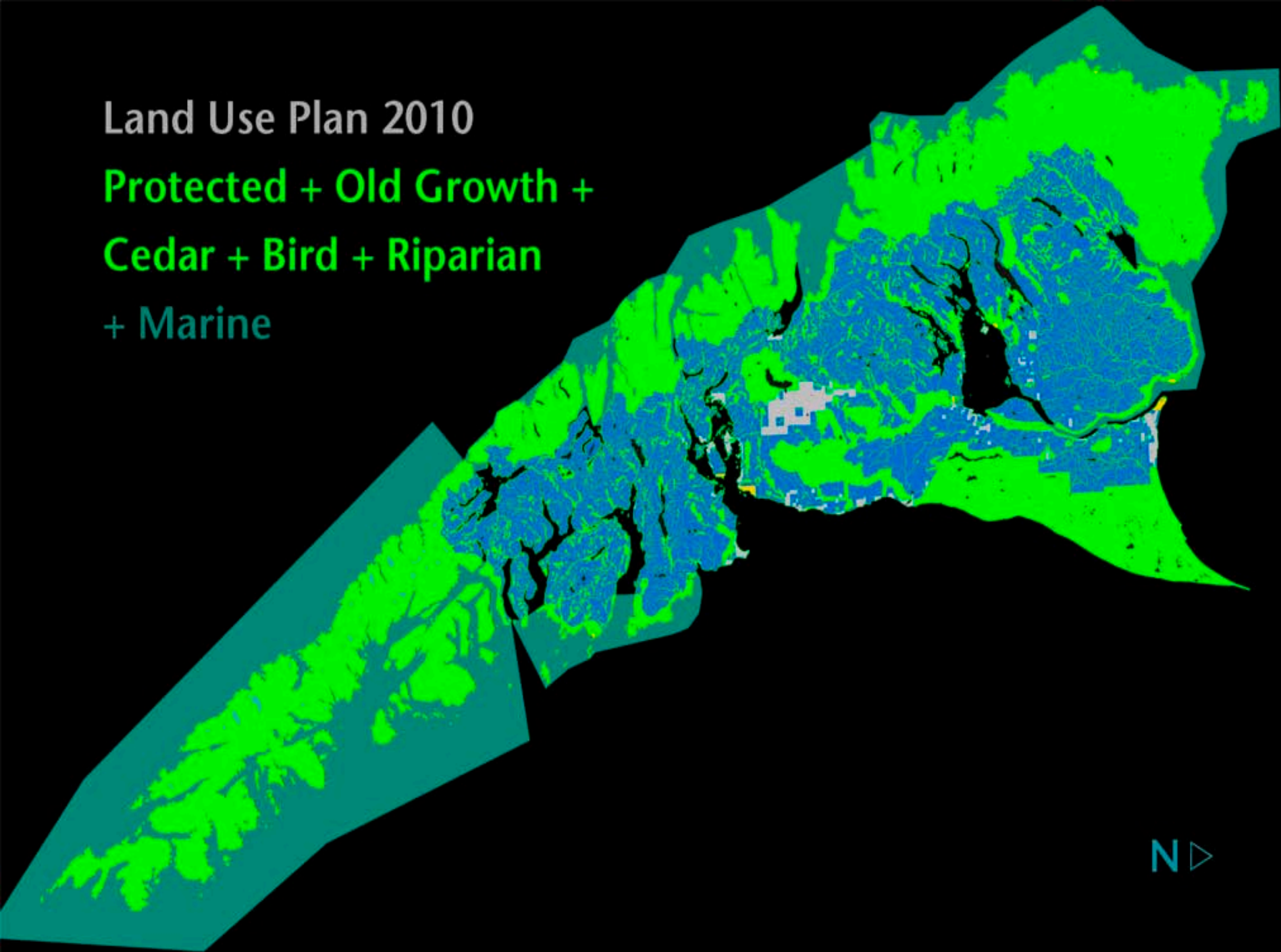
Protected + Old Growth +

Cedar + Bird + Riparian

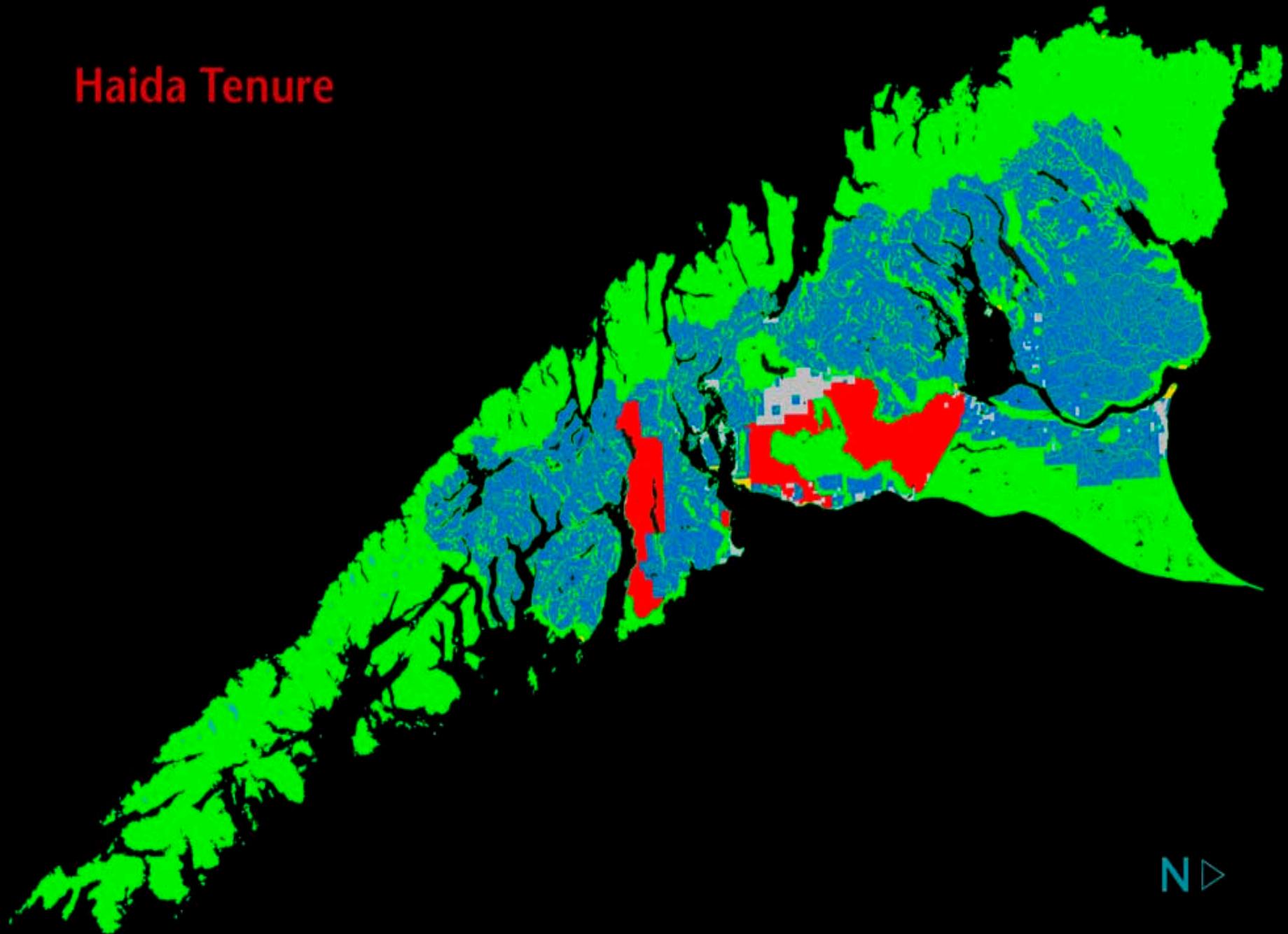


Land Use Plan 2010

Protected + Old Growth +
Cedar + Bird + Riparian
+ Marine



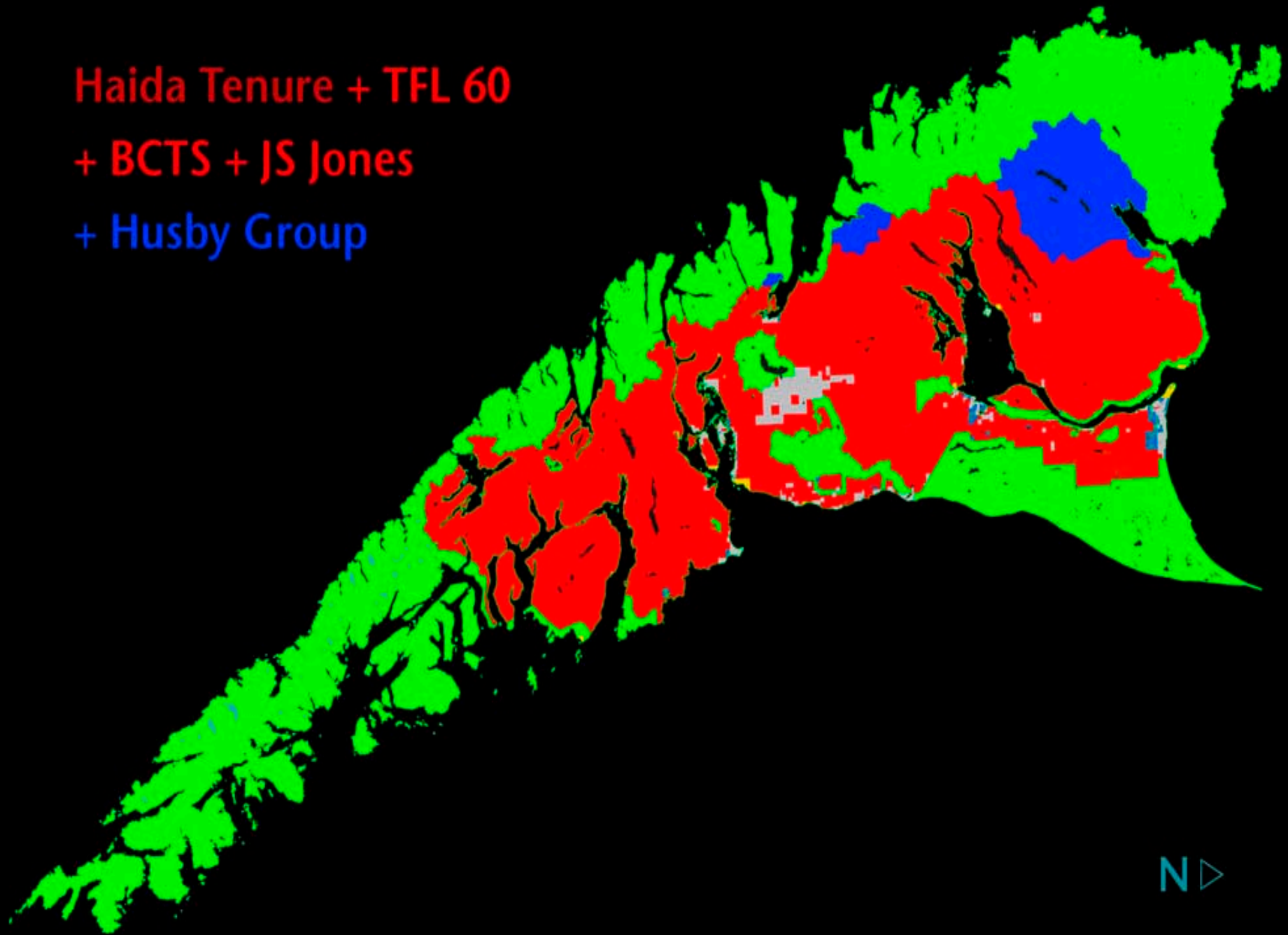
Haida Tenure



Haida Tenure + TFL 60

+ BCTS + JS Jones

+ Husby Group

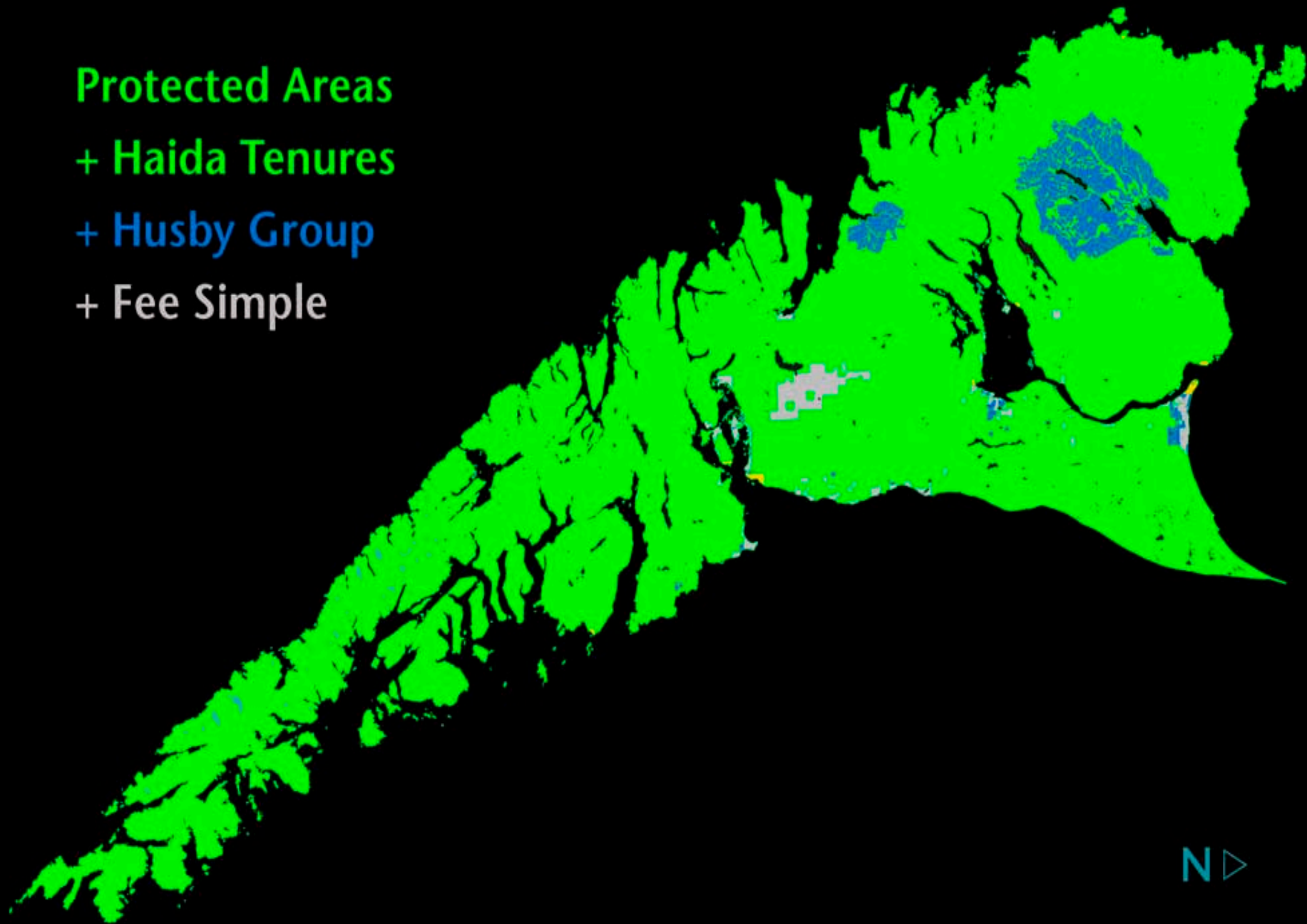


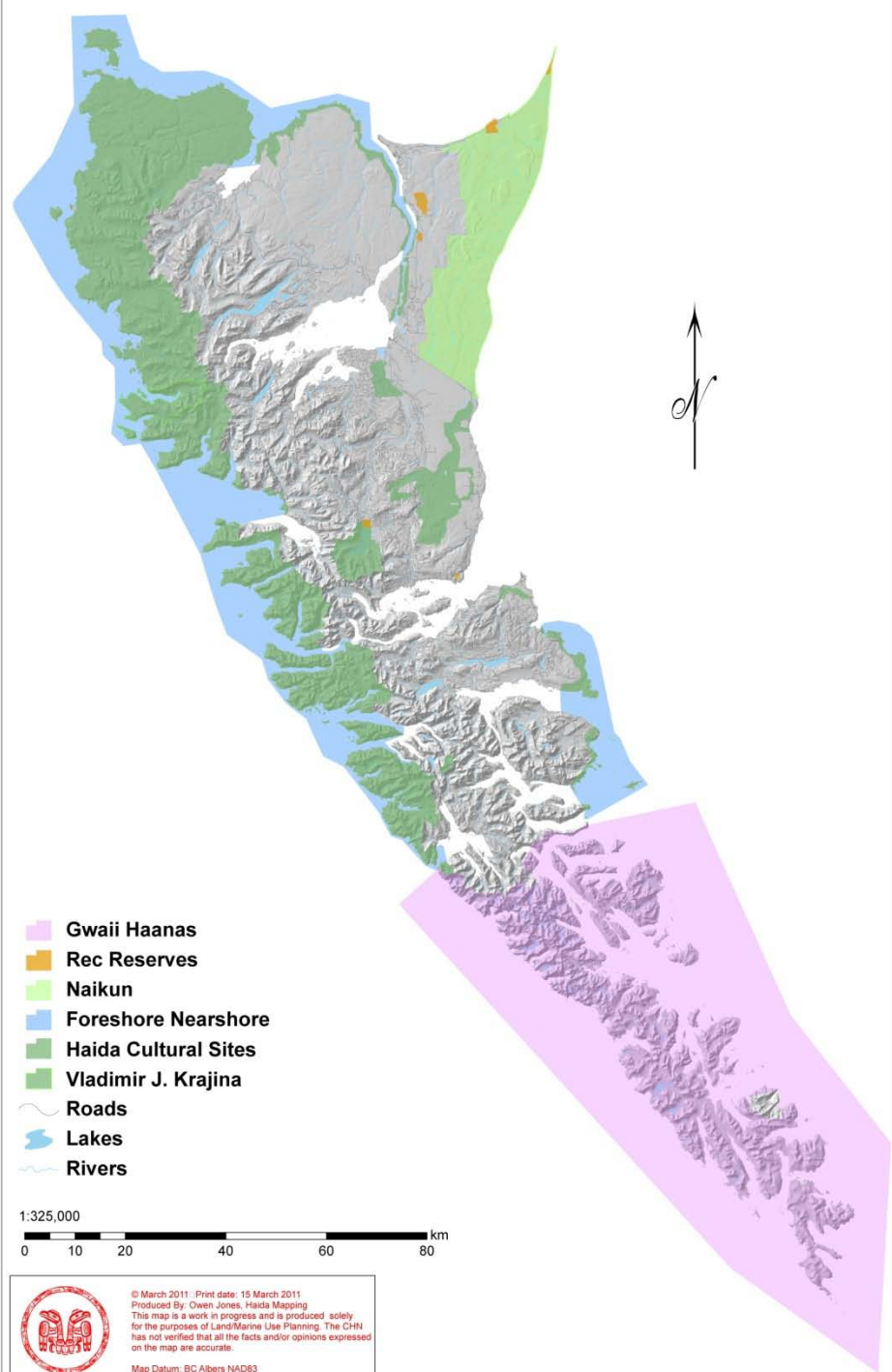
Protected Areas

+ Haida Tenures

+ Husby Group

+ Fee Simple





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Produced By: Owen Jones, Haida Mapping
This map is a work in progress and is produced solely
for the purposes of Land/Marine Use Planning. The CHN
has not verified that all the facts and/or opinions expressed
on the map are accurate.

Map Datum: BC Albers NAD83

IV: CONCLUSION

- Success Factors in addressing environmental damage:
 - Directly proportional to the degree of advance preparation
 - Early and consistent land use decisions and designations
 - Robust technical and cultural analyses of the condition of the land and future sustainability
 - Relationships with other communities and environmental organizations



- Test of Success
 - 100% protection of areas the people directed be protected.
 - Genius in the boldness of taking the first step of “Letting it be known” in 1981, but the ultimate test is the ability and commitment of a nation to follow-through and ensure protection of areas designated for protection.
- Other factors relate to the balance between land use planning, litigation and negotiation.



- In 2002 the Haida Nation filed an Aboriginal Title lawsuit. In 2008 the Parties agreed to put the litigation into abeyance, after meeting the Haida's pre-condition of agreement to conduct and share the costs of depositions of elders.
- Case preparation continues should the negotiations fail, thereby contributing to the will of the Parties to reach solutions outside of litigation – which is important given the emphasis in Aboriginal law on reconciliation.



- *Kunst'aa guu* and *Kunst'aayah* means “The Beginning” in the Haida language – the Haida view the Protocol as:
 - An initial step towards an ultimate Reconciliation Agreement”.
 - An on-the-ground example to help guide declaratory relief and other remedies in the Title case.
 - A tool to build the infrastructure to exercise title.



- Through these interim agreements, the Haida have assessed the environmental (and cultural) damage, and arrived at ways protect, restore and manage the land, waters and resources.
- I hope that this example provides an example of one way to transform our work of viewing environmental damage, restoration of the land, to arrive at better decision-making structures.



Notes

- These materials and opinions contained herein are solely those of the author and do not necessarily represent in whole or in part the position of the Council of the Haida Nation.
- *Haw7aa*, thank you to the Gowgaia Institute and the Council of the Haida Nation for the maps.

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“White Raven” by Robert Davidson

