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1.0 Introduction

The construction of the proposed Alaska pipeline project in the Yukon will impact the Aboriginal and treaty rights of the First Nations located along its route. Although the project may bring negative impacts to the First Nations along the pipeline route, it could also provide great social and economic opportunities and benefits to those First Nations, their members and businesses.

Developing respectful and positive working relationships between First Nations, government and industry is critical in ensuring that everyone is involved in the planning, development and operation of the pipeline. Such relationships may prevent delays in the project and provide opportunities and benefits to the First Nations. In particular, positive relationships may reduce the need for the First Nations to go to court or use political methods to protect their rights. These relationships must be consistent with principles established by our courts and the Yukon First Nation Final and Self-Government Agreements.

The Final Agreements set out obligations for the government to “consult” with self-governing Yukon First Nations on various matters. However, the courts have said that those duties go beyond the terms of the Final Agreements. In addition to the requirement to consult with First Nations, sometimes the government must also attempt to accommodate the concerns raised by the First Nations during consultations.

Legally, only the government has a duty to consult with First Nations. While the government may hand over some aspects of the duty to consult to other bodies, the courts have said that industry has no legal obligation to participate in consultation or accommodation. Consultations or negotiations between First Nations and industry proponents may not fulfill or replace the government’s duty to consult or accommodate First Nations’ concerns.

Nevertheless, many industry proponents recognize the need to establish positive relationships with First Nations. For the First Nations, the development of positive relationships may lead to agreements which provide invaluable community opportunities and benefits stemming from the project.

2.0 Why consult?

First and foremost, meaningful consultations may stop or reduce impacts on Aboriginal and treaty rights. Through consultation, the First Nation is given an opportunity to raise its concerns about proposed projects or activities, and work with industry and government to reduce potential impacts on Aboriginal and treaty rights. These concerns may be environmental, social, economic or cultural. Consultations may promote the participation of the First Nation in the economic development of the lands and resources within its traditional territory and this can create benefits to the First Nation and its members.

Secondly, effective consultations foster trust and positive partnerships amongst the parties. Ultimately these positive relationships may help establish a foundation for a prosperous

economic and investment environment for the Yukon Territory. This will benefit all parties involved.

Bringing matters before the courts has proved to be an effective way for First Nations to protect their rights and interests in some circumstances. But court is often expensive and drawn-out and the outcome is uncertain. In many cases, court damages the relationships between the parties. Because of these reasons, it is usually more effective and efficient for a First Nation to make efforts to develop respectful relationships and address its concerns through the consultation and accommodation processes. But all parties must be willing to create these relationships.

3.0 What do the Yukon First Nation Final Agreements say?

The Final Agreements are based on the occupation and use of the lands and resources of the First Nation members in their traditional territories. The Final Agreements provide self-governing First Nations to have a substantial role in managing the lands and resources in their traditional territories. It is important that all parties, including industry proponents, respect and understand the meaning of the provisions of the Final Agreements, as well as their spirit and intent.

3.1 The meaning of “Consult” or “Consultation”

The Final Agreements define consultation as giving notice of a matter to be decided, giving the party to be consulted enough time to express its views on the matter, and to fully and fairly consider those views.

3.2 Limitation of rights under the Final Agreements

Although the Final Agreements set out specific rights, such as the right to fish, hunt, trap, gather and trade, they also allow for the limitation of those rights by other laws made by the territorial or federal governments for the purpose of conservation, public health or public safety.

3.3 The existing pipeline easement

In the Final Agreements, the parties agreed that Foothills has the legal right to use identified portions of Settlement Land along the Alaska Highway. The Yukon First Nation will retain ownership of the Settlement Land, but certain federal laws, including the *Northern Pipeline Act*, will apply to those portions.

3.4 Pipeline property tax

Under the Self-Government Agreements of the First Nations located along the route of the Alaska pipeline project, the First Nations are entitled to a share of the property tax that is paid to the government for those portions of pipeline located on Settlement Land. The government must also consult with the First Nation on the taxation regime for the pipeline project and how the taxes will be divided between themselves.

3.5 Project agreements

The Final Agreements provide that, where the territorial government has the authority to approve a project, the government may require that the First Nation, industry, and Yukon government negotiate a project agreement. This project agreement would set out employment, business and investment opportunities for the First Nation, and other methods to reduce impacts of the project.

3.6 Yukon asset construction agreements

If the territorial government intends to construct a building or other facility at a specific cost, it may be required to negotiate an “asset construction agreement” with the First Nation. If no agreement can be reached, the Yukon will make the final decision.

4.0 Duty to consult and accommodate

In addition to the Final Agreements, the courts have established that the government has a duty to consult with First Nations and, in some cases, accommodate their concerns.

4.1 What is the duty to consult and accommodate?

In order for the federal, provincial and territorial governments to fulfill their duty to consult and accommodate, they must engage in a meaningful consultation process with the First Nation in good faith. The government must consult with the First Nation as soon as it knows that any Aboriginal and treaty rights of the First Nation may be impacted by a project or activity that it is considering.

The government must provide the First Nations with enough notice and full information about the proposed action and its potential to impact their rights. The government must take First Nations rights into account during both the planning and strategic decision-making processes. Governments must listen and be willing to change an original proposal before a final decision is made. If a government refuses to change its position with respect to a proposed project or activity, it may not be fulfilling its duty to consult. Governments should always provide feedback during the consultation process and provide reasons for a decision.

The government may authorize another body, such as an industry proponent, to carry out aspects of consultation. But the ultimate duty to consult remains the sole responsibility of the government. Since permits, licences and authorizations granted to industry can be challenged in court if the government does not fulfill its duties owed to the First Nation, industry wants to ensure that the government fully carries out its duty to consult. Otherwise, the First Nation may oppose a project or activity which could lead to delays.

Accommodation is not always part of the duty to consult. Whether accommodation is necessary depends on how strong the First Nation's claim is with respect to its Aboriginal and treaty rights, and also on the level of the impacts of the project on those rights.

Accommodation will usually be required when the consequences of the government's decision will affect an Aboriginal and treaty right in a significant way and steps are required to prevent those effects. When accommodation is necessary, the government must balance First Nations' concerns with the interests of others.

The consultation process does not provide the affected First Nation with the power to veto the proposed project or activities. The government does not have to reach an agreement with the First Nation. Instead, the consultation process is meant to reconcile or balance the rights and interests of the First Nation with the interests of others. Courts will often look at the actions of the parties to decide whether reasonable attempts have been made to achieve this balance. Because of this, a First Nation cannot avoid or refuse to participate in the consultation process and then later claim that it has not been consulted.

4.2 Scope of the duty

The scope of the duty depends on the strength of the First Nation's claim and the level of risk that the First Nation's Aboriginal and treaty rights will be negatively impacted. In some cases the government may only be obliged to give notice about the project, disclose information and discuss any issues raised. If the First Nation's claim is strong, the potential infringement is significant, additional consultation and possibly accommodation may be required.

4.3 Requirements for meaningful consultation

In order for consultation to be meaningful, it must be initiated early and all necessary information must be disclosed in a timely manner.

If government failed to consider the strength of the First Nation's claim or the project's impacts on the First Nation's Aboriginal and treaty rights, it would not be fulfilling its duty to consult. Although providing funding to First Nations has not been held to be a requirement of meaningful consultation, it is common for the government to provide funding during consultations so that the First Nations can prepare for and participate meaningfully in the consultation process.

5.0 First Nation readiness: the need for an internal policy or guideline

Before participating in a consultation process with government or industry, the First Nation should develop an internal consultation policy that guides the First Nation in preparing, reviewing and considering consultation matters.

Guideline I Establishing Respectful Relationships with Yukon First Nations on the Alaska Highway Pipeline Project

Increased land and resource development has led to an increase in consultations. This increase in the number of consultations has challenged the capacity and resources of First Nations and their ability to participate meaningfully. A consultation policy or guideline may assist First Nations in focusing their staff and resources in order to have a more meaningful and productive consultation experience.

It is important that First Nations educate their communities and staff regarding the duty to consult and accommodate as early as possible. Once the community is informed, a policy or guideline should be established, which addresses the following matters.

5.1 Community vision and goals

Prior to engaging in consultation and accommodation processes, there is a need for the community to set out its vision and goals. Without a clear statement of its vision and goals, the First Nation may find itself responding inconsistently from one project to another.

All members of the First Nation, including elders and youth, should be involved in the development of the community vision and goals. If there is broad participation and input into the development of the vision and goals, it is more likely that there will be community endorsement and support for the work done in accordance with that vision and those goals.

5.2 Who has the authority to represent the First Nation?

It is important that the First Nation confirm who is responsible to represent it in consultations and make decisions on its behalf. This prevents the consulting party from entering into discussions with political leaders before they are properly informed about the project and its impacts.

The First Nation must also define roles internally, assess its capacity to participate in the consultations, evaluate its skills and resources, and identify any gaps in capacity. A team should be established to provide technical, legal and financial advice and recommendations to the First Nation for specific projects or activities. All members of the team must understand the expectations of the community and be familiar with the community and its values and perspectives. In some cases, a community caucus may be formed that will participate in the consultations and make recommendations to the First Nation's political leadership.

If accommodation measures are being discussed, it may be wise to delegate authority to the First Nation's economic development body to negotiate economic development issues. This would ensure that political issues are kept separate from economic development issues. It would also ensure that the negotiations remain focused on specific economic development measures for the First Nation, such as equity investment opportunities or employment and business opportunities, and not on other issues.

5.3 Reporting responsibilities.

It is important that the First Nation's representatives seek input and direction from community members with respect to any projects or activities. Designated representatives must provide regular reports to the political leadership and the rest of the community that gives updates and outcomes of the consultation and accommodation processes.

Effective and timely communication of this information within the First Nation is crucial in order to identify concerns and issues. This also ensures that negotiations are consistent with the community's goals and vision.

If a project affects one or more families in particular, those people should perhaps be consulted directly. Where a project or activities are on a bigger scale, it may be appropriate to create community workshops or information sessions. It may also be valuable for government and industry representatives, or even independent experts, to participate or attend such workshops or sessions.

5.4 Template agreement or model for the consultation process

The First Nation should develop a template or model agreement for the consultation process. This would allow the First Nation to establish the agenda and ensure that the consultation process is designed to suit community needs. A template agreement could be developed for each individual First Nation or jointly with other Yukon First Nations.

A template consultation agreement could organize the design and structure of the consultation process, outline important steps and address other matters, including funding for the First Nation to participate.

The purpose of tabling a template agreement would be to promote dialogue for the design and implementation of a consultation agreement tailored to the circumstances of a specific project. If the First Nation and industry design a consultation agreement together, their relationship would likely be strengthened and they would be more committed to the success of the consultations.

The use of a template agreement should speed up the design of the consultation agreement and the negotiation of accommodation agreements. This means that the costs should be lower for the parties and the timelines shorter.

5.5 Template accommodation agreement

A template agreement could also deal with some accommodation measures such as employment provisions, business and training opportunities, and equity investment rights for the First Nation.

6.0 Consultation and accommodation with government and industry

The First Nations should participate in consultation and accommodation discussions not only with government, but also with industry, municipalities and any other appropriate parties. The government or any other interested party must be clearly informed with respect to the duty to consult and accommodate and the purpose and objectives for engaging with the First Nation.

Any consultation process should be based on the following steps and principles.

6.1 Notice to affected First Nation

If the government is considering any action that could have an impact on the Aboriginal and treaty rights of a First Nation, it must start consultations with the First Nation as soon as possible, even if details of the project or activity are not yet available. The government has a duty to find out about the impacts of the proposed project upon the First Nation. Industry should also initiate dialogue with the First Nation. Notice to the First Nation should include all relevant information and studies related to the proposed project or activity.

6.2 Initial response from the First Nation

When the First Nation receives notice for a consultation, its political leadership or designated official should acknowledge the notice by sending a letter. This initial response letter should address the following matters:

- expectations for the consultation;
- design of the consultation process;
- tabling of any template agreement;
- specific self-governing agreements that need to be addressed; and
- responsible contact/representative.

This letter could be developed as a template to ensure consistency and completeness.

6.3 Initial meetings

Following the initial response from the First Nation, the parties should meet face-to-face. Senior officials and designated representatives of government, industry and the First Nation should attend this meeting and any subsequent meetings.

At this time, the First Nation should not express support or opposition of the project or activity. The parties should agree beforehand that these initial meetings will be about information sharing and will not be interpreted as consultation.

These meetings should focus on establishing relationships and gathering materials and information to learn about the proposed project or activity. The First Nation should speak about what consultation and accommodation process would be most suitable and best incorporate its goals and vision.

If the proposed project or activity impacts more than one traditional territory, it is recommended that the First Nations consider working together as a regional group.

6.4 Building a constructive working relationship

Developing a positive working relationship between First Nations and government or industry is key to successful negotiations. But it can only be achieved if both parties are prepared to make efforts to understand and respect each other. Communication is a critical component to developing a positive working relationship that involves trust, transparency, openness and honesty

6.5 Designing the consultation process

During the course of the initial meetings, the First Nation should use its template consultation agreement to guide discussions and lay the foundation for a good relationship. This template should establish the manner in which the First Nation wishes to be consulted, and identify milestones, information needs, and funding requirements. It may also set out a list of possible accommodation measures, include a schedule of meetings, and perhaps set out a dispute resolution process.

The design of a consultation process should involve all parties and not necessarily be delegated to technicians or lawyers. This ensures that the parties have common expectations about the consultation process, and provides certainty for the parties.

6.6 Request for further time, information or funding

The First Nation should indicate as soon as possible if it requires further time or information or any resource or funding needs in order to fully assess and analyse the materials presented to them. The First Nation may need technical advice or more time to consult with community members. Government or industry must respond to such requests in a timely and clear manner.

6.7 Studies and reports to confirm traditional use

It may be appropriate for the First Nation to request funding from government or industry to undertake traditional land use studies with respect to the affected lands or resources. This would be particularly important to First Nations that have not entered into their land claim or self-government agreements.

6.8 Substantive response by the First Nation

After reviewing all relevant information and consulting with the community, the First Nation should provide a written response to government or industry or both. However, the consultation process should continue until the First Nation understands fully the effects of the proposal and is able to make a fully informed decision.

In its response, the First Nation should outline the Aboriginal and treaty rights that may be affected by the proposed project or activity. The First Nation may identify information gaps and the need for further studies or reports. Any specific concerns about the proposed project or activity should be raised and specific measures to accommodate those concerns may be proposed.

6.9 Consideration of the First Nation's response

Government or industry must listen with an open mind to the First Nation's viewpoint and concerns and be prepared to alter the original proposal before making a decision. It must also provide feedback and provide written reasons for any decision made.

6.10 Consultation logs

Throughout the consultation process, it is important that each party maintains a written log or record of all letters, meetings and telephone calls related to the consultation.

If a party resists the consultation or accommodation processes or fails to exercise good faith, it may be important to show a court that that party did not make good faith efforts. In such a circumstance, the records of letters, meetings and calls throughout the consultation process may be used as proof.

7.0 Accommodation

In cases where a project or activities will significantly impact the Aboriginal and treaty rights of a First Nation, the First Nation must state clearly its expectation that accommodation will be required to address its concerns. In most cases, projects and activities will proceed despite opposition from First Nations and even if the project is impacting Aboriginal and treaty rights. Consent from the First Nations will usually not be required.

Accommodation measures may include the following:

- Reducing the impact of the project or activities on Aboriginal and treaty rights.
- Changing decisions or amending plans to address First Nations concerns.
- First Nations participation in the economic development of the lands.
 - Employment, business and training or apprenticeship opportunities.

- Equity investment opportunities.
- Contributions to community infrastructure needs.
- Funding for scholarships and bursaries for members.
- Requiring special management for traditional use areas.
 - Land reclamation commitments.
 - Limit the use of and access to adjacent lands by the industry proponent and its employees and contractors.
 - Establishment of protected areas or parks.
- Requiring industry proponents to meet specific environmental standards.
- First Nation participation in decision-making or environmental assessments.
- Fair compensation for any impacts on Aboriginal and treaty rights (money, land or other forms).
- Sharing of profits.

Effective accommodation agreements must provide benefits to the entire community. The First Nation may have to make decisions and identify priorities during negotiations in order to determine which accommodation measures benefit the whole community. The First Nation must ensure that the accommodation agreement is consistent with the vision and goals established by the community in its consultation policy or guidelines.

The accommodation agreements should set out legal provisions and remedies that legally bind the other party to their commitments.

8.0 Concluding comments

In the end, the parties must develop a positive working relationship with respect to the planning, development and operation of the proposed Alaska pipeline project. The foundation of such a relationship is dialogue and respect based on the principles established by our courts to balance the rights and interests of the First Nation with the interests of others. Of course, any such relationship must also be consistent with and be guided by the provisions of the Yukon First Nation Final and Self-Government Agreements, and the spirit and intent of such agreements.

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1.0 Introduction

In many cases industry will take steps to establish a constructive working relationship with First Nations when they intend to undertake significant projects or activities in the traditional territories of those First Nations. These steps often lead to the development of an accommodation or participation agreement, which can provide certainty to the project for industry and, in return, address social, economic and environmental concerns of the First Nations. In particular, this agreement may provide benefits and opportunities to the First Nations and their members and businesses.

The substance of an agreement will vary depending on the nature of the project or activity. If the project is significant and long-term, it is likely that the provisions of the agreement will be comprehensive.

2.0 Why should government and industry negotiate agreements with First Nations?

There are a number of reasons compelling government and industry to negotiate accommodation or participation agreements with affected First Nations. Firstly, it may be a requirement of the applicable Yukon First Nation Final Agreement or it may be required under territorial or federal legislation. Secondly, the courts have established a legal duty for government to consult with the affected First Nation and, where appropriate, accommodate their concerns. In some circumstances, a participation agreement may partly fulfill that duty.

It is “good business” for industry to reach agreement and secure the support of the affected First Nation with respect to the project in order to, among other things, provide certainty to the project’s timelines. It may also promote the development of a partnership between the First Nation and proponent with respect to the project or other matters.

If government fails to discharge their legal duty to consult and, where appropriate, accommodate, the First Nation may legally challenge any government permit or licence with respect to the project in order to have its concerns addressed. This may delay the project, and therefore industry has an incentive to ensure that government fulfills its duties to the First Nation.

3.0 What do the Yukon First Nation Final Agreements say?

The Yukon First Nation Final and Self-Government Agreements acknowledge the rights, titles and interests of the First Nations based on their use and occupancy of the lands and resources of their traditional territories since time immemorial. The Final Agreements address the need to ensure that benefits and opportunities are provided to the First Nations and its members with respect to the development and use of the lands and resources in the Yukon Territory. The Final Agreements also provide a meaningful role to First Nations and their members to participate in the management and development of those lands and resources.

It is important that all parties respect and understand not only the provisions of the Yukon First Nation Final and Self-Government Agreements, but also the spirit and intent of those Agreements.

It may be appropriate to use the obligations that are set out in the Final Agreement as a basis for the negotiation of a project agreement, an asset construction agreement or a participation agreement.

4.0 Requirement under the *Oil and Gas Act* to negotiate a benefits agreement

The territorial *Oil and Gas Act* provides that, in most cases, oil and gas activity estimated to cost more than \$1 million in any one year cannot be carried out unless a benefits agreement is in effect. A benefits agreement contains undertakings by a proponent to provide First Nations, local residents and other Yukoners employment, training and business opportunities related to the project.

5.0 Accommodation

Accommodation measures will vary from project to project. A participation or benefits agreement may establish measures to reduce any impacts on the First Nation's Aboriginal and treaty rights, or it may include provisions to promote the economic participation of the First Nation in the project. Any measures must address the concerns of the First Nation and be consistent with its vision and goals.

The Alaska pipeline project is expected to have significant impacts on the First Nations and, as a result, they want to develop participation agreements with industry that addresses their major concerns, and provides benefits to their communities. Otherwise, it may be difficult for the First Nations to gain meaningful benefits and opportunities related to the construction and operation of a given project.

5.1 The duty to accommodate

In some cases, the duty to consult includes a duty to accommodate. The duty to consult and accommodate is dependent upon the strength of the First Nation's claim to Aboriginal or treaty rights and the potential of those rights to be impacted by the project.

If the First Nation's claim to Aboriginal or treaty rights is weak or the project will likely only affect those rights in a minor way, the Crown may only be obligated to give notice, disclose information and discuss any issues raised. If the claim is strong, the potential affects to the First Nation's rights are significant and the risk of loss is high, deep consultation is required and the need for accommodation is more likely.

In most cases, the First Nations will not be able to veto or terminate a proposed project or activity as part of the consultation process. The government is not obligated to reach an agreement with the First Nation. Instead, the consultation process is meant to balance the

interests of the First Nation with interests of others. Courts have tended to look closely at the conduct of the parties to determine whether reasonable attempts have been made to balance the conflicting interests. A First Nation cannot avoid or refuse to participate in the consultation process and then argue later that it has not been consulted.

While the government may authorize another body to carry out certain aspects of consultation, industry has no legal obligation to engage in consultations or negotiations with the First Nation. Most industry, however, recognize the benefits of doing so.

Accommodation may include the following:

- Taking steps to reduce any effect on the First Nation's treaty or Aboriginal rights;
- Changing decisions or amending plans to address the First Nation's concerns;
- Allowing for First Nation participation in the economic development of the land and resources;
- Requiring special management for traditional use areas;
- Requiring industry to meet specific environmental standards;
- Allowing First Nation participation in decision-making or environmental processes;
- Compensating the First Nation for impacts on its Aboriginal or treaty rights with money, land or other forms of compensation;
- Revenue-sharing with the First Nation; and
- Other matters that the parties agree to include.

Effective accommodation must benefit the entire community and be consistent with its vision and goals. Otherwise, members of the First Nation may not support the project or any related agreements.

5.2 Substantive provisions of an agreement

First Nations, government and industry must have a common understanding of the purpose and objectives of their negotiations. To this end, accommodation or participation agreements typically address the following matters.

5.2.1 Purposes, principles and preambles

The project agreement should expressly set out its purposes in a preamble section. These provisions may be referred to later by the parties themselves or by courts trying to determine the meaning of provisions in the agreement or the intention of the parties. A preamble may not be given much weight by a court. Therefore, the purposes and objectives of the agreement should also be set out in the main body of the agreement.

5.2.2 First Nation support for the project

Industry enters into participation agreements with affected First Nations in order to gain certainty for the project. In exchange for industry providing social and economic opportunities to the First Nation, the First Nation may consent to the project and agree not to bring any legal claims against industry or try to halt or delay the project in any way.

But the First Nation must ensure that it can still take legal action to deal with any environmental impacts caused by the project or non-compliance by industry with respect to its obligations under agreements, licenses or permits.

5.2.3 Non-derogation

Any First Nation consent or support for a project should be specific and limited to that particular project. This reduces the possibility that the support will not conflict generally with the First Nation's Aboriginal and treaty rights.

This issue may be addressed through a "non-derogation" clause in the agreement confirming that the agreement will not affect any of the First Nation's Aboriginal and treaty rights. The First Nation should insist on the inclusion of this provision, especially if it has not entered into a treaty.

5.2.4 Employment

The Alaska pipeline project could provide significant employment opportunities for First Nation members and local residents, in all of its different phases.

Industry should confirm in the participation agreement that it intends to maximize the project-related employment opportunities for the First Nation's members and local residents, including those that lack the required skills and training. The agreement may also obligate industry to hire employees in accordance with a specific priority for First Nations or local residents. Or it may direct industry to try to hire a certain number or percentage of First Nation members and local residents.

Project agreements often allow industry to have the sole discretion to employ officers and senior management, retain professional consultants, and make final decisions with respect to a variety of employment matters (qualifications, wages, training requirements, etc). Nevertheless, industry should commit to review and revise, if necessary, its employment practices and policies with the First Nation to ensure consistency with the commitments in the agreement.

A fundamental issue in implementing these agreements is whether or not industry will ensure that their contractors, who may not have any legal obligations to the First Nation, will respect and follow the employment commitments of those agreements. Therefore, it

is critical that any participation agreement sets out a commitment from industry that it will require its contractors to adopt its recruitment and employment policies.

5.2.5 Training

Many First Nations members may lack the skill and training required for the employment opportunities related to the Alaska pipeline project. In order to achieve the employment objectives of the agreement, industry must be required to make specific commitments to provide training and apprenticeship opportunities to the First Nation members.

Providing training and apprenticeship opportunities to First Nation members and local residents is beneficial for industry, because it will develop a local labour market and reduce its reliance on distant labour markets, ultimately reducing its employment costs.

For the First Nation, such training can lead to well-paying and stable employment located close to home. Also, such training will often develop skills that are transferable to other fields or jobs.

The agreement must direct industry to upgrade and train existing employees so that they have opportunities for promotion and advancement to skilled, technical or managerial positions and are not restricted to “pick-and-shovel” positions.

Industry may commit under agreements to employ and provide training to apprentice positions, and to hire, where reasonable, these apprentices upon the successful completion of their apprenticeship.

Often a proponent will agree to provide funding for scholarships or bursaries for First Nation members to pursue post-secondary education related to the project, or to create a training fund for the affected First Nations.

5.2.6 Business

The proposed Alaska pipeline project has the potential to provide significant business benefits for First Nations throughout its various phases. Agreements should commit industry and any associated contractors to develop and implement policies that maximize those business opportunities.

The goods and services provided by First Nation businesses to the project may be limited initially by the structure and capacity of the territorial or local economy. However, the agreement should direct industry to undertake the following measures to maximize business opportunities for First Nation businesses:

- Prepare an annual business opportunities forecast, which will identify anticipated requirements of the project to allow the First Nation businesses to meet those needs.

- Work with all territorial and federal agencies to achieve significant participation of First Nation businesses in the project.
- Support and assist First Nation businesses in accessing sources of capital.
- Where possible, divide contracting opportunities into multiple smaller contracts to allow First Nation businesses to participate and bid.
- Establish a local procurement office.
- Conduct business opportunity seminars and workshops.
- Facilitate subcontracting opportunities for First Nation businesses.
- Identify possible opportunities for joint ventures with First Nation businesses.

Similar to the employment commitments, the agreement could establish specific purchasing targets for goods and services from First Nation businesses during the construction and operation of the project. Or industry could agree to give First Nations businesses priority when considering bids for procurement opportunities.

Industry will likely insist that it retains the right to make independent decisions relating to qualifications for contractors, contractual terms and the assessment of criteria. The First Nation and industry may agree to review the industry's procurement practices and policies to ensure they are consistent with the commitments of the agreement.

5.2.7 Reporting and monitoring

The First Nation and industry should establish a process for annual monitoring and evaluation of the implementation of industry's commitments set out in the agreement. This evaluation would include the collection of information related to employment, training, procurement, cultural well-being and community wellness.

Industry should also provide annual reports that identify the activities and initiatives that have been undertaken to achieve the commitments and objectives of the agreement.

5.2.8 Project or advisory committee

A project or advisory committee would formalize the communication between the parties and play an important role in overseeing and monitoring implementation of the agreement. If the committee has the power to make recommendations to the First Nation and industry, they must be directed to respond in writing to any recommendations made by the committee and to provide periodic updates with respect to the implementation the recommendations.

The First Nation and industry would appoint representatives to the committee. Sometimes government representatives may also be a part of such committees.

Government and industry may see the funding of such a committee as a wise investment because often a committee will streamline communications between the parties and speed up the timelines of the project. This often reduces costs for industry.

The agreement should set out key rules for the administration of the committee, including the requirement for quarterly meetings and the establishment of a committee chair and his or her specific responsibilities.

The parties must agree to provide relevant reports, plans and data to the committee, as well as agree to meet with the committee. The agreement should also provide that the parties will review annually the mandate and function of the committee to ensure that it is operating effectively and in a manner consistent with the purposes and principles of the agreement.

5.2.9 Cultural and community well-being

The parties should agree to take steps to protect First Nations cultural and community well-being from the potential impacts of the Alaska pipeline project.

The agreement could direct industry to develop and implement measures to assist employees who are First Nation members and local residents to perform well in their employment and provide assistance to their communities to address the potential effects of the project. Such measures could include the following:

- Address cultural sensitivity and cross-cultural awareness in all orientation.
- Provide substance abuse rehabilitation programs, money management workshops and other individual support measures.
- Maintain an employee and family assistance program.
- Employ community relations personnel, on the project site and in the communities, who are familiar with the conditions and circumstances in the communities that may affect employees at work and vice-versa. The community relations personnel would act as a liaison between industry, the employee and the communities.
- Enforce a sexual harassment policy at the project site and maintain an alcohol and drug free workplace policy.
- Encourage the development of sustainable business that will not be exclusively dependent on the project. Industry should work closely with First Nations and government to diversify the local and regional economies.
- When the project's construction nears completion, reduce employment at the project site gradually.
- Provide outplacement counselling, family adjustment and money management (ie. savings and pension plans) seminars in the communities.

- Ensure that First Nations language interpreters attend community meetings, if required. It is important that elders are involved and able to participate in these discussions.

The agreement should direct industry to seek the input and assistance of the project committee regarding ongoing review and assessment of these measures and the particular requirements of the affected communities.

5.2.10 Equity investment

In some agreements, the First Nation obtains an ownership interest in the project.

5.2.11 Revenue-sharing

In some mining projects, First Nations have reached agreements with industry with respect to sharing the profits of the project or a percentage of the minerals processed.

The Yukon First Nation Final and Self-Government Agreements provide self-governing First Nations with a share of the revenue collected by the territorial government in relation to projects located in the Yukon Territory. The self-governing First Nations are entitled to a share of the royalties generated on public lands throughout the Yukon Territory related to oil and gas or mining activities. Those self-governing First Nations whose traditional territory includes portions of the existing pipeline easement are entitled to a share of the property tax payable to the territorial government for the portions of the pipeline located on the settlement land of that First Nation.

5.2.12 Compensation

Industry or government may agree to provide compensation to a First Nation if the project's impacts on First Nation's treaty or Aboriginal rights are significant or permanent. In some agreements industry will agree to provide a signing bonus to the First Nation on the date that the agreement comes into legal effect or provide minimum annual payments to the First Nation.

Some agreements establish a process for industry to provide compensation for damages arising from the construction or operation of the project. The agreement usually states that a claimant would still have other remedies to pursue a claim, such as going to court.

5.2.13 Traditional knowledge

Traditional knowledge means the knowledge accumulated by First Nations through generations living in close contact with the local environment. Often parties agree to collect, consider and review traditional knowledge in order to avoid or reduce any impacts on cultural matters or fish and wildlife.

Sometimes the agreements also deal with the treatment, use and ownership of the traditional knowledge collected and used.

5.2.14 Environmental protection

Some agreements include a meaningful role for First Nations in the environmental assessment and regulatory processes, including monitoring related to the project. Perhaps it may be suitable to deal with these matters in a separate agreement.

5.2.15 Definition of “project”

The agreement should set out a complete and broad definition of “project” to ensure that the commitments of the agreement apply to all phases of the project.

5.2.16 Dispute resolution

The agreement should establish a process to resolve any disputes about the interpretation or implementation of its provisions. The process should provide an alternative to having to go to court, such as mediation or arbitration.

5.3 Who negotiates on behalf of the First Nations?

Although each affected First Nation could establish a negotiation team and engage directly with industry and government, it may be advisable to also consider a collective negotiation approach. Under such an approach, the affected First Nations could come together and establish a single negotiation team with a mandate to negotiate a single agreement that would be subject to individual review and consideration.

A collective approach may benefit all parties since it would be less costly and require less time than separate negotiations with each First Nation. A collective approach would allow the sharing of technical and legal costs. It would also increase the First Nations’ bargaining strength and ensure that no one First Nation would agree to a weak or unsuitable agreement that could be used against other First Nations.

A collective approach will only be effective if the negotiation team is provided a clear mandate from each First Nation and its mandate combines the visions and goals of each First Nation. If the traditional territories of the affected First Nations have overlapping areas, those First Nations should reach an agreement with respect to sharing of benefits and opportunities related to the project.

5.4 Ratification of the agreement by the First Nation

Any agreement must be consistent with the vision and goals identified by the community and be based on the community mandate provided to the First Nation’s negotiation team.

During the course of the negotiations, the negotiation team should provide updates and workshops to the First Nation leadership and members and seek feedback and direction.

Since it is likely that the agreement would affect the First Nation's Aboriginal and treaty rights, it is important that the members have an opportunity to review the agreement and approve it, if appropriate. In other words, it may not be appropriate for the First Nation leadership to approve the agreement without support from the members.

But the members must understand the provisions of the agreement in order to make an informed decision about the agreement. This means that there must be an information campaign so that First Nation members understand the project and the provisions of the agreement. As part of an information campaign, there could be workshops, community meetings, summary materials and explanatory aides to the members.

In some cases, the ratification process could be a vote by secret ballot of the members. In other cases, it could be a general assembly or other community meeting, with adequate notice, to review and approve the agreement.

5.5 Implementation

Before the agreement is approved or comes into legal effect, there are a number of related matters that should be undertaken to speed up the implementation of the agreement. Such matters may include the following:

- Corporate and tax planning and the development of structures for taxation and liability issues. For instance, the First Nation may decide to establish a trust, which may require advanced tax rulings from the federal government.
- Development of training proposals and plans and the collection and organization of data related to human resources and businesses. For example, the parties may wish to develop a business development strategy. The First Nation and other parties will have to take steps in order to achieve the employment and business objectives of the agreement.
- Identification and development of joint venture opportunities related to the project.
- Identification of persons to be appointed as representatives to the project or advisory committee.

The parties may also wish to discuss and develop a plan to guide the implementation of the agreement and provide direction to the parties.

6.0 Concluding comments

The negotiation of an agreement by the First Nation and government or industry, or both, may not only be a legal requirement under a land claim agreement or legislation, but also an investment into the development of a constructive working relationship. The

agreement should serve to focus the commitment of the parties to implement the objectives and commitments of the agreement.

The parties will face challenges during the negotiation and implementation of an agreement but those challenges can be overcome. The negotiations may be challenging until the parties develop a positive relationship and understand and respect each other. Government and industry must be willing to contribute negotiation funding to the First Nation so that it is able to prepare and participate fully in the negotiations. If the First Nation is unable to prepare fully for the negotiations, including meeting periodically with its membership to provide updates and seek direction, the community may not have faith in the negotiations and, as result, it may not support the agreement.

All involved in the project, including industry's contractors, must make efforts to implement the agreement. There must be oversight and monitoring, including reporting, to ensure that there is compliance with the commitments of the agreement. There will be struggles during the implementation of the agreement, but the parties must be committed to deal with those issues and address them quickly.

In the end, a positive working relationship amongst the First Nation, government and industry should lead to the development and implementation of an agreement that addresses the socio-economic and environmental concerns of the First Nation and provides meaningful economic benefits and opportunities to the First Nation and its members and businesses. This relationship should also benefit industry by providing certainty to the project that the First Nation will support the project in accordance with the agreement.

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1. **INTRODUCTION**

The proposed Alaska Gas Pipeline (the “Project”) will begin at Prudhoe Bay, Alaska, parallel the oil pipeline to Fairbanks, follow the Alaska Highway through the Yukon and then continue through northeast B.C. and into Alberta.

There are currently two proponents competing to develop a gas pipeline along the Alaska Highway. One is TransCanada Pipelines Ltd. (“TransCanada”); and the other is a partnership of ConocoPhillips and BP (“Denali”).

- Foothills Pipe Lines Ltd. (“Foothills”) is a wholly-owned subsidiary of TransCanada. TransCanada proposes to utilize the existing easements granted to their subsidiary company Foothills under the federal *Northern Pipeline Act* (“NPA”) to construct and operate the line in accordance with the NPA.
- Denali was formed in June 2008 and is equally owned by ConocoPhillips and BP. Both of these companies own rights to significant natural gas resources on the North Slope of Alaska. Denali proposes to undertake a completely new project for the construction of the pipeline to be regulated under the traditional National Energy Board (“NEB”) process. Under this scenario, the NPA would not be applicable to Denali’s project.

2. **KEY FEDERAL REGULATORS**

There two key federal regulators, the NEB and the Northern Pipeline Agency.

- The NEB will be the key federal regulator for a Denali project. One of the main purposes of the NEB is to oversee the construction and operation of pipelines in Canada.
- The Northern Pipeline Agency (“NP Agency”) will be the key federal regulator for a TransCanada project under its subsidiary TransCanada. The NP Agency will facilitate the regulatory review of the planning and construction of the Canadian portion of the proposed Alaska Highway Gas Pipeline Project. The NP Agency, like the NEB for a Denali project, will co-operate with other agencies to reduce regulatory and assessment overlap and provide more efficient review.

Foothills has been granted Certificates of Public Convenience and Necessity and related rights of easement that have been incorporated into the Umbrella and Yukon First Nation Final agreements and provide rights of access to Settlement Land for the construct and operate the line. Denali does not have easements in place at this time. Foothills will still be required to obtain approvals relate to socio-economic and environmental factors, routing issues, technical design, and other matters.

3. ASSESSMENT PREPARATORY PHASE

Regulatory Agencies

Guidance on Preliminary Information Package set out the requirements in order for the Proponent to fully describe the project that they will be submitting. Numerous regulatory agencies will be requested to participate in preparing the Guidance on Preliminary Information Package.

- First Nations with Final Agreements are decision bodies under the Yukon Environmental and Socioeconomic Assessment Act (“YESAA”) and the regulatory authority for their settlement lands,
- NEB/NP Agency - until there is a decision regarding the project proponent, it is unclear which agencies will play key roles in regulating the project.
- Both the Yukon Government and the Yukon Water Board have authority to issue a number of permits associated with the activities related to the planning and construction of the pipeline project.

Assessment Agencies

Canadian Environmental Assessment Agency

The Canadian Environmental Assessment Agency is a key federal agency responsible for the coordination of environmental assessment. Along with legislation establishing the Agency, there are a number of resource materials that can assist in understanding the role of the Agency and other federal departments including the Responsible Authority’s Guide and the Canadian Environmental Assessment Act Procedural Manual.

Yukon Environmental and Socio-economic Assessment Board

YESAB is responsible for implementation of the YESAA assessment regime. YESAB’s role will most likely be limited to the preparatory phases of the process and not in the actual hearing process.

4. PRELIMINARY INFORMATION PACKAGE

The preliminary information package provides information on the project components, including scale, location, and potential environmental and socio-economic issues. The primary purposes of the preliminary information package are to determine the need for an environmental assessment and to promote efficient coordination.

Yukon First Nations (“YFN’s”), as regulators, need to ensure that there is sufficient information in the preliminary information package in order to ascertain their role in the assessment and licensing of the project. YFN’s should assess their regulatory requirements and responsibilities to determine what types of information that they will require in order to proceed with participating in the assessment and licensing. YFN’s along the proposed corridor should consider how they can collaborate with each other with respect to regulatory responsibility for this Project.

Components of the Preliminary Information Package

The Canadian Environmental Assessment Agency's Operational Policy Statement, 'Preparing Project Descriptions under the Canadian Environmental Assessment Act' provides guidance to Proponents on the content of their submission. These include:

- Description of the Project Components/Structures
- Project Location and Activities
- Environmental Features
- Social, Economic and Cultural Features
- Key Environmental and Socio-economic Issues

The Preliminary Information Package also gives a proponent the opportunity to facilitate the environmental assessment scoping process by presenting the environmental issues it has identified through its own analysis and through its initial public consultation process.

Environmental and Socio-economic Impact Statement

This impact statement should include all information necessary for a full review of the Project and to ensure that the outcome will cover all issues required for First Nations to exercise their regulatory functions. Currently it is not clear what guidelines will be used in for preparing the impact statement. As regulatory bodies, YFNs have an opportunity to provide direction on the scope of impacts to be considered in the design of the Guidelines for the Impact Statement. First Nations should ensure that Traditional Knowledge is fully utilized in the statement and also ensure that the Impact statement fully considers the socio-economic impacts.

5. PANEL ESTABLISHMENT PROCESS

Yukon First Nations will play a role in the establishment of the Panel that will review the project. There are procedural steps that must be undertaken in accordance with the Canadian Environmental Assessment Act and YESAA in order to reach the point where the Minister of Environment will formally propose the establishment of the panel. There are roles for both the Council of Yukon First Nations ("CYFN") as well as YFN's, such as having input into the process through the nomination of a portion of the members to a panel. The vetting of potential nominees and consensus as to the list of nominees will ensure the timely response to any request from CYFN or the Minister of Environment

6. ASSESSMENT PROCESS

The assessment and public hearing phase will require significant preparation to ensure that the necessary information is available to make informed submissions. First Nations can participate as intervenors, members of technical committees, and as decision bodies and regulators.

- First Nations will have to apply to become an intervenor. This will require setting out the reason for the intervention and the issues that they intend to address.
- Technical Committees are generally established to discuss specific technical issues. First Nations will need to determine how they will participate in these

committees. Early identification of technical experts will assist in timely and effective participation.

- Each First Nation with settlement land that the Project will cross will be a decision body for this project. Given the multitude of decision bodies, a coordinated review of Panel recommendations by First Nation decision bodies and where possible consensus on whether to accept, reject, or vary the recommendations of the Panel will ensure a level of consistency.

7. **ENVIRONMENTAL ASSESSMENT CONCEPTS & TERMS**

There are a number of concepts and terms that Yukon First Nations should become familiar with.

"cumulative environmental effects" means the effect on the environment as a result of a project when combined with those of other past, existing and imminent projects and activities.

"significant adverse environmental effects" is central to the concept and is whether a project is likely to cause significant adverse environmental effects.

"mitigation" means the steps taken to reduce or limit the potential impacts of the project.

"socioeconomic conditions" means how the project will effect a communities quality of life; the economy, commercial opportunities, or employment; the availability of recreational opportunities or amenities; home life or personal security; future land uses; the future use or future production of commercial species or resources;

Factors to consider in assessing for effects on heritage include:

- ensure the preservation and protection of sites and objects formally recognized at the international, national, provincial, and municipal levels;
- ensure that the consideration of heritage resources in the EA is consistent with existing laws and policies on heritage relevant within the project area;
- recognize that a heritage site may have a cultural value greater than the apparent value of the site's physical components;
- take into account the unique cultural interests and values of aboriginal peoples.

The assessment process should consider:

- cumulative environmental effects on physical and cultural heritage resources;
- the significance of the effects on these resources;
- technically and economically feasible measures that would mitigate any significant adverse effects on these resources.

8. YUKON FIRST NATIONS CHALLENGES AND OPPORTUNITIES

A key challenge for YFN's will be managing the information produced. The significant volumes of information produced through the planning and construction of the project will require First Nations to determine how best to manage this information and data.

By gathering and having effective information management tools YFN's will not only be able to develop their own positions more efficiently but also be able to provide consistent information to both potential proponents during community consultations. Some of the areas of data collection for consideration include:

Ecological Data

A significant part of the project assessment will be focused on the ecological impacts during the building of the project. First Nations need their own database of ecological information within their traditional territories. This will assist First Nations when analyzing and comparing information prepared and presented by the proponent, governments and stakeholders. As well, having independent information helps First Nations to present their own findings and analytical assessments of the ecological impacts of the project. Ecological data may include both scientific data and traditional knowledge.

Cultural/Heritage Data

First Nations need data to establish baseline assessments and to be able to monitor impacts to the culture. As well as, this data can assist in analyzing options that can help to limit or mitigate cultural impacts. This information again needs to be managed in a manner that is efficient to use. Some cultural/ heritage data may be sensitive. YFN's will need to assess how or if they will utilize sensitive information.

Community and Social Data

Developing information on YFN communities and social conditions will help all parties to better anticipate potential impacts to the community. This information will also assist in the negotiation of benefit sharing agreements that include provisions to support communities.

Human Resource Data

Many YFN's already have significant data associated with the skills and training level of their citizens. This information can assist in assessing employment opportunities for First Nation citizens but also help in assessing labour pool gaps.

Traditional Knowledge

There is a significant opportunity to incorporate Traditional Knowledge (TK) in to the assessment of the Alaska Highway Pipeline Project. While at this time it is not clear how a review panel will be constituted, both the YESAA and CEAA require the use of TK in the assessment process. Most YFN's have significant amounts of data which is considered TK. As well, all YFN's have elders with vast amounts of knowledge that will be important information during the assessment process and they need to assess how they will want to collect and utilize this information. Traditional Knowledge will be required to incorporate into the Impact Statement. How this information is collected and used is largely up to the discretion of the First Nations.

9. RECOMMENDATIONS:

Below are recommendations that YFN's are advised to consider well in advance of the Project as part of their preparedness planning:

1. **Environmental and Socio-economic Assessment Process:** YFN's need to engage in discussions with Yukon Government, the federal government, CEAA, and the NEB/NP Agency to ensure that the interests of Yukon First Nations are reflected as the assessment process is developed.
2. **Information and Data Management:** the scope and size of the pipeline project will create a significant amount of information and data. YFN's should develop effective management tools to track information so that it is easy to access and utilize in the assessment process.
3. **Governance Capacity Assessment** – YFN's need to assess what capacities they have and where there may be gaps. This includes assessing how a Yukon First Nation government will be able to address other environmental and socio-economic assessment issues while participating in the pipeline assessment process.
4. **Compliance Measures:** Most of the discussion and focus has been on the review process. YFN's should consider how to address the compliance side of the project once it has been approved and is constructed and operational.
5. **Collaboration with other First Nations:** First Nations should consider when collaboration with other First Nations is beneficial.