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Ms. Gélinas,

Doig River First Nation (DRFN) appreciates the opportunity to make this submission to the Expert Panel for the Review of the federal Environmental Assessment Process. The written submissions expand on our presentations from December 7th, by myself and on behalf of the DRFN Chief and Council.

DRFN, formerly known as the Fort St. John Beaver Band, are Danne-za (Beaver) people. Our First Nation is a signatory to Treaty 8, and the traditional territories of our members extend across much of the Peace Country in northeast BC and northwest Alberta. Our recent experience with the federal environmental assessment process includes the proposed Site C Dam assessed under the *Canadian Environmental Assessment Ac*t of 2012 (*CEAA 2012* or the *Act*), and the NGTL 2017 System Expansion Project assessed by the National Energy Board under the same Act. Neither process has lessened our fears that federal EA does not take our cumulative effects context or Treaty 8 rights seriously.

Our written submission to the Panel, attached below, focuses on our experiences and concerns with the federal EA process, including the results of a community workshop in November 2016, and is focused in every instance on recommending proactive and implementable solutions. We include one appendix; a list of cumulative effects assessment principles DRFN endorses for the conduct of federal EA.

We trust that you will carefully consider and hopefully reflect our inputs in your report, and to you providing similar recommendations that will assist the Government of Canada in reaching its stated goal of creating a more respectful, Nation-to-Nation relationship with Canada's indigenous peoples. Please do not hesitate to request follow-up information from myself on behalf of DRFN.

Sincerely,

Cec Heron, Site C Coordinator, DRFN Lands Department

Doig River First Nation's Written Submission to the 2016-17 Federal EA Review Panel

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Introduction

Who is Doig River First Nation

Doig River First Nation (Doig River or DRFN) is a Danne-za community whose present residential reserve, the Doig River Reserve (I.R. No. 206), is located approximately 40 km northeast of Fort St. John.

As noted in our Dec. 7th presentation to the EA Review Panel, our ancestors have used the land base in North-Eastern BC and north-western Alberta for over a millennia as part of their traditional seasonal round, a pattern of land use predicated on hunting, trapping, gathering, and other subsistence-related activities. Our way of life on the land has always required access to large uninterrupted forested areas, and access to large areas of territory, to harvest fish, game and plants from the land.

Our predecessor Band, the Fort St. John Beaver Band, signed Treaty No. 8 with the federal government in 1900 with the aim of preserving our lands and the resources we rely upon from outside interests. In recent decades, our territory has become increasingly overrun by development (i.e. oil and gas, agriculture, forestry, residential and hydroelectric activity) to the point where our cultural survival is at ever-present risk. The promises of the federal government have not been kept and our rights, culture, lands and well-being have all suffered as a result.

This fundamental cumulative effects context is rarely a factor in federal environmental assessment (EA) processes or decision-making, however. This inability – this myopia – by the federal Crown has led to continuation of a "death by 1000 cuts". Doig River's First Nation recent experience with the federal environmental assessment process (federal EA or EA hereafter) includes the proposed Site C Dam, and the NGTL 2017 System Expansion Project assessed by the National Energy Board, both assessed under the *Canadian Environmental Assessment Ac*t of 2012 (*CEAA 2012* or the *Act*). Neither process has lessened our fears that the federal EA system does not currently take our cumulative effects context or our Treaty 8 rights seriously.
The time is now to fix the system.

Doig River First Nation held a community workshop on November 24, 2016 to discuss the EA Review. The overarching concern expressed by members was the exclusion of the Nation from decision-making. Many members felt that the federal EA system overrides Doig River's concerns, as projects are often approved or remain unchanged

despite Doig River's protests. Many also felt that their traditional knowledge (TK) is overlooked and that the long term impacts of projects are not seriously considered. Members want to see their Treaty rights protected by the process and assurances that they will remain protected for future generations.

DRFN's understanding of the intent of EA

The present environmental assessment process does not live up to Doig River First Nation's understanding of what the intent of EA is. Good EA should be about investigating impacts and finding solutions for issues that may often fall outside of standard regulatory permits. Furthermore, good EA must focus the most attention on the most sensitive receptors – for example the highly vulnerable cultural landscape, resources and people of First Nations in areas with high industrial development. Unfortunately it has not been our experience that either of these expectations is met through the federal EA process.

We have seen regulators focus more on what "they can do" with most federal Conditions fitting inside the standard regulatory toolbox rather than overcoming what they don't typically deal with, turning the process into a "tick the box" exercise. In addition, in our experience, few assessments, decisions or conditions focus on protecting the most vulnerable receptors in the human environment. Elements that regulators are not comfortable with – such as Aboriginal and Treaty rights, traditional land use and occupancy by indigenous peoples, and semi-to-intangible elements of culture, are often ignored almost completely. As a First Nation, Doig River must be considered a sensitive receptor with priority rights but this has not been the case. The inadequate resources and level of effort demonstrated in assessing impacts on us as an indigenous group and the resources we rely upon tells us that we are not a priority. Factors critical to our way of life – indeed, our priority Constitutional rights - are not being adequately assessed or considered. This must change.

Issues That Are A Symptom Of This Flaw

The following issues are symptoms of the failure of federal EA to live up to its intent and will be addressed in this written submission:

- Crown Consultation
- Cumulative effects
- Traditional knowledge and traditional land use information
- Substitution
- Aboriginal and Treaty Rights

- Impacts to Current Use and Culture
- Post EA: Certificate Conditions, Monitoring and Adaptive Management of projects

Our focus is not on re-highlighting the problems, but rather solutions. Numbered and **bolded** recommendations are provided for each theme. At the end of the document a list of additional recommended changes is also provided, for issues that go beyond these topics.

Crown Consultation

Issues with Crown Consultation

One of our current issues with Crown Consultation in EA is the tight timelines. We recently were involved in the EA for Site C, a major project with extremely compressed assessment timelines. We have found that lack of time puts a strain on First Nations that are already constrained by capacity and funding. We find it exceedingly difficult to provide quality and informed input on the multitude of technical materials filed for review and the numerous pages of environmental impact statements in such limited time frames.

When First Nations are rushed into such a fast-paced process, relationships with the Crown and the Proponent are also harmed. Expedited timelines make it difficult to confirm whether input and information provided by us has been received and understood and vice versa. Short timelines also interfere with our ability to keep our leadership and community members informed about potential impacts to our rights and interests. The fact that Proponents rarely engage us early in the process exacerbates this issue. The delegation of procedural aspects of consultation to Proponents is therefore a problem. Doig River First Nation would like to be able to "stop the clock" when the speed of the process impairs our participation and consideration of our rights. We would also like to see Proponents engage us as early as possible.

The amount and how funding is awarded in EA is also an issue for consultation. As noted, with tight timelines capacity is required in order to respond to engagement opportunities quickly. Because funding for First Nations engagement is woefully inadequate in federal EA we must turn to Proponents. The negotiation of funding arrangements with Proponents takes time and effort thereby delaying our engagement. This lack of early access to engagement funds needs to change because it constrains our ability to meaningfully engage in EA.

Doig River First Nation also has concerns with the current post-environmental assessment consultation process by the federal government. The new Liberal

government recently promised that, "Indigenous peoples will be more fully engaged in reviewing and monitoring major resource development projects."[1] Despite Liberal commitments for post-environmental assessment consultation and accommodation, the recent process undertaken by the Major Projects Management Office (MPMO) for the NGTL System Expansion provided no new and meaningful accommodation for the concerns extensively reiterated by DRFN throughout the EA and after the EA.

DRFN Recommendations to Improve Crown Consultation

In order to improve Crown Consultation during and after federal EA, Doig River First Nation proposes the following solutions:

1. **The federal government needs to develop Early Community Engagement Guidelines for Proponents in consultation with aboriginal groups.[2]**

2. **The federal government needs to live up to the spirit and intent of its Interim Measures for federal EA, and give its ministries and Ministers more latitude to adopt additional compensatory and accommodation measures for adverse impacts and rights infringements of projects during post-EA consultation.**

3. **The federal government needs to provide a substantial increase in the amount of guaranteed federal funding to indigenous groups for projects likely to face federal reviews, and fund early community engagement processes.**

4. **Develop a "Collaborative consensus" Nation-to-Nation approach, incorporating spirit and intent of FPIC, for federal EA; entrench federal Crown and affected indigenous groups as joint decision-makers.**

5. **Joint Review Panels should be empowered to provide their informed opinions on the adequacy of consultation; asking the federal government to gauge the adequacy of its own consultation is self-evidently fraught with problem.**

Cumulative Effects

Lack Of Adequate Consideration Of Cumulative Effects

Large scale levels of industrial, agricultural and residential development within Treaty No. 8 territory, throughout what is now known as the Peace Region, have put increasing

[1] Government of Canada. (2016, January 27). *Government of Canada moves to Restore Trust in Environmental Assessment*. Accessed at: http://news.gc.ca/web/article-en.do?nid=1029999

[2] Wherever DRFN refers to consultation with aboriginal groups, this must include individual First Nations, where Aboriginal rights are held and protected specific to a defined membership.

pressure on our traditional activities promised by the Crown to be protected by Treaty No. 8. Our members' traditional knowledge has recorded – and western science has also identified - significant changes to the land base. Despite publicly available data by independent parties showing that already too much of our traditional territory has been fragmented by industrial and other human caused clearing effects[3], the current federal EA process do not put front and centre these pre-existing and inarguably significant cumulative effects on our lands, resources, rights and culture. Instead, cumulative effects assessment is treated as an afterthought in federal EA, and assessed with minimal effort and little rigour.

Cumulative effects loading is under-assessed in our territory because of the present fragmentation of our land base by development. The use of a "damaged baseline" or current conditions, instead of trend over time data, leads to underestimation of total effects loading on Valued Components (VCs) both in the biophysical and human environment. The lack of inclusion of at minimum a pre-industrial baseline leads to inaccurate assessment and this needs to change.

We are also seeing many sub-threshold projects not being assessed by federal EA in our territory. This is in part due to the removal of screening level assessments with *CEAA 2012.* As our territory is surrounded by development even incremental changes can be significant and must be assessed.

Upstream effects assessment in Cumulative Effects Assessments is also an issue. Upstream effects assessment (when they are undertaken) is limited to Greenhouse Gas Emissions, meaning in widely spatially distributed sectors like natural gas the vast majority of effects are not being subject to federal assessment.

DRFN also takes exception to how "rigorous" present cumulative effects assessments are. Many environmental impact statements treat cumulative effects as a qualitative exercise, without any actual data collection or analysis, but rather the provision of "professional opinion" – inevitably that no significant adverse cumulative effects are likely or that the Project's contribution will not be large, even if there are significant cumulative effects. Conclusions and determinations of significance must be supported by sufficient evidence and analysis.

DRFN Recommendations to Improve Cumulative Effects Assessment in Federal EA

We propose the following solutions in order to ensure that cumulative effects are seriously considered in our territory during federal EA:

[3] For example, work by Lee and Hanneman in 2012 showed large portions of Doig River territory – in some watersheds over 90% - that have been disturbed by industrial development, primarily but not exclusively oil and gas and agriculture. Available at http://www.davidsuzuki.org/publications/downloads/2012/Peace_region_20120812_HR-optimized.pdf

6. **The federal government needs to adequately invest in regional cumulative effects management systems (not just assessment frameworks) which can then be used to inform the environmental assessment of individual projects. These programs must define socially and scientifically defensible thresholds of acceptable change against which total cumulative effects can be gauged. Projects that cause them to be exceeded must not be allowed to proceed.**

7. **We call on the federal Crown to actually implement its regional environmental assessment clauses, already available in Section 74 of *CEAA, 2012*, to conduct a proper regional study of existing and likely future growth scenarios in the Montney gas play and associated cumulative effects on the human and biophysical environment.**

8. **Any changes to legislation or practice of federal EA must include more than simply the assessment of Greenhouse gas emissions in upstream assessments; e.g., expand to effects on the biophysical environment and indigenous rights.**

9. **Federal EA to require back-casting to pre-industrial, pre-contact, or some other reasonable longer temporal depth, when assessing baseline conditions; strong efforts must be required to establish a natural range of variation for VCs prior to major anthropogenic disturbance.**

10. **Bring back federal screening process for smaller projects, with joint federal-indigenous group regional standing committees reviewing whether Projects should be sent to a higher level of assessment.**

11. **Adoption by the federal government of principles for effective cumulative effects assessment in federal EA, as discussed in Appendix 1.**

Traditional Knowledge (TK) And Traditional Land Use (TLU) Information

Lack Of Meaningful Consideration Of TK And TLU Information In EA

There are many barriers in the present Federal EA process to the meaningful inclusion of Traditional Knowledge (TK). Doig River members have experienced the ignorance of and disregard for their Traditional Knowledge in recent EAs. The process as it stands does not adequately support or properly encourage the effective use of TK at any stage. In the November community workshop, DRFN members expressed the importance of our stories and their disheartening experience when they are ignored. Due to the intimidating and alienating nature of the process it is not easy for our members to

engage in and share their oral testimony, and when it consistently doesn't lead to better outcomes, the value of providing this information is undermined.

A fundamental flaw with the process is that often the research scope, context, and interpretation of TK is delegated to the hands of the Proponent, the party with the least capacity to understand and access TK. Proponents have come to us with specific research questions already established and only seek the results that support their desired outcomes, ignoring our Elders and TK holders when what they wish to share contradicts the Proponents worldview. The federal EA process also allows for Proponent's to reinterpret our elders' and land users' traditional knowledge and traditional land use data with impunity. And they often disregard the context in which that traditional knowledge is generated. Guidance needs to be clear that not only should the Proponent work with communities to collect TK but that they must be open to the research priorities of the community and findings that contradict their understanding. While the existing CEAA guidance (March 2015)[4] is a step in this direction, further guidance using input from actual TK holders needs to be developed.

Federal decision-makers (i.e. panel members) also interpret TK without the background and context and are not transparent in how TK informs their decisions. Having non-indigenous people, who lack the knowledge base, reinterpreting TK is wrong and should not be allowed.

The false assumptions Proponents make about TK also impair its meaningful inclusion. Often there is an inaccurate characterization of all engagement with indigenous peoples as being TK. For example, indigenous peoples' engagement in field studies is often inappropriately characterized by Proponents as TK, even when this assertion is rejected by these indigenous groups. The existing CEAA guidance does not correct this assumption as it states that TK "could be collected during consultation efforts" (p. 5). Federal guidance needs to be updated to make clear that consultation does not equal high quality TK research. In addition, there is a strong misguided focus on site specificity by the Crown and Proponents when interpreting our traditional land use information. This too is a fundamental misreading of what traditional land use entails and means to DRFN. Our land use occurs within larger cultural landscapes that are reflective of our Aboriginal culture and are valued for many reasons.

TK is presently not a critical input or lens in federal EA and is often an afterthought. In our experience, it is primarily used to inform baseline data collection and is not part of decision making and significance determination. Traditional Knowledge is not just

[4] CEAA. March 2015. Reference Guide Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the *Canadian Environmental Assessment Act, 2012* . Available at: https://www.canada.ca/content/dam/canada/environmental-assessment-agency/migration/content/c/3/c/c3c7e0d3-8db1-47d0-afc2-a8d4d1efaab3/atk-20reference-20guide-20-20en-20-20march-202015.pdf

information, and it should not be considered below or after the emphasis has been put on western science. It is a way of knowing and interpreting cause and effect relationships and measuring change. This information is rarely used in data collection and especially, in effects assessment itself. We spoke of the importance of the need for TK in significance determination in one of our presentations to the EA Review Panel (7 Dec 2016):

> "I ask you: who will have a better insight into the significance of a change to the Danne-za cultural landscape – myself and my elders, or a consultant from Calgary? And now I ask you – who under the current federal EA system is in charge of making these estimations of significance, which are meant to underpin decisions by the Crown, your Ministers, on whether Projects can go ahead and under what conditions? That's right: exactly the wrong people are informing Crown decisions. Our people need to be involved in determining significance."

Traditional Knowledge must be seriously considered in determining significance.

In Danne-za culture, the oral history of our elders is our canon of proof. Our oral history is not being seriously considered through the federal EA process. This requires a fix beyond the creation of guidance documents. The current oral testimony system in federal EA can be intimidating and culturally inappropriate for our Elders and Land-users due to its adversarial nature. Hearings need to be redesigned with Aboriginal groups and new opportunities for receipt of oral history need to be explored, such as meeting with TK holders on the land or in their communities and allowing the submission of audio and video recordings.

Traditional Knowledge is currently not adequately part of - and needs to be included in - follow-up and monitoring. Traditional Knowledge can and should inform the development and implementation of mitigations. DRFN would also like to see measures beyond our members being hired as monitors. Elders who know the land and its stories need to be involved in training and going out on the land with First Nation and Non-Aboriginal monitors for Projects.

DRFN Recommendations to Improve Meaningful Consideration Of TK And TLU In Federal EA

Both legislative and process changes need to be made in order for TK to be meaningfully included in federal EA.

12. **The federal government to work with Aboriginal Groups and TK holders to strengthen the existing CEAA Guidance on this topic (March 2015).**

13. **The federal government to reject the idea that traditional knowledge is a baseline input rather than a knowledge framework that can inform decisions.**

Any proposed Project primarily to exclusively in indigenous territory must include an actual culture holder, an actual land user, on the Panel of assessors.

14. **Change legislation to explicitly require the effective inclusion of oral history and Traditional Knowledge in federal EA, alongside western science.**

15. **Allow audio and visual submissions as evidence in future so that Traditional Knowledge can be provided in context as evidence in whatever manner is preferred by indigenous peoples.**

16. **Increase visits to the land by Federal decision-makers (including panel members).**

17. **Commitment to support Elders who know the land and its stories to be involved in training and going out on the land with First Nation and Non-Aboriginal monitors.**

18. **Require evidence of active engagement of Aboriginal groups and consideration and inclusion of their TK in mitigation planning beyond simply reviewing completed plans.**

19. **Re-design federal EA hearing processes in consultation with indigenous groups. Changes could potentially include requirements for less legalistic community hearings, to give a comfortable location for oral testimony, with other community members present and supporting.**

20. **In order for TK to be used in decision-making, not merely baseline data collection and current conditions characterization:**
    a. **EA process managers must be aware of and understand the TK expectations for each stage of the EA; this requires extensive upgrading in the knowledge base of CEAA staff;**
    b. **All EIS Guidelines to include requirements/guidance for interpretation of TK, jointly determined by federal and indigenous representatives;**
    c. **Development of thresholds and indicators that can be informed by TK (e.g., more observable changes to the environment using the five senses) for each Project; and**
    d. **CEAA and Panels must have a requirement of reporting on how TK was weighted, considered and reflected in final decisions.**

Substituted EA

Failures of Substituted EA thus far

Doig River is greatly concerned with the new substituted EA process enabled by the Memorandum of Understanding between the federal government and BC.[5] Our concern is with the delegation of authority to the Province for federal issues, without our input. Under substitution, where both federal and provincial environmental assessments are required, there can be a single review process (the provincial one) and two decisions (federal and provincial). Other than what is included in the Memorandum of Understanding between CEAA and the province of BC (2013), there are no clearly defined guidelines on how this approach can be as effective as the two separate assessments it replaces.

From what we have seen of assessments undertaken through Substitution, certain elements of federal EA, such as Section 5(1)(c) of *CEAA, 2012*, and the adoption of Current Use of Lands and Resources for Traditional Purposes (CULRTP) by indigenous peoples as a rigorously assessed VC, are not being assessed properly (in some cases, at all) in EAs where the Province takes the lead. The absence of proper assessment of effects under Section 5(1)(c) of *CEAA, 2012*, is a critical gap, given this is the section of the federal legislation, despite its flaws, that most strongly requires consideration of spin-off effects of environmental change on individual First Nations' social, economic, cultural and land use environments.

Substitution is also commenced without input from Aboriginal groups. The Province makes a request in writing and the Federal Minister of the Environment makes the decision, with neither seeking input from Aboriginal groups on this important process decision. Doig River and other Aboriginal groups need to be able to respond to and comment on provincial requests for this approach.

The quality of consultation from the Substitution approach does not meet federal standards. It is troublesome to see the responsibility of consultation passed from the federal government to the BC Environmental Assessment Office (EAO), who then delegates procedural aspects (in practical terms, the vast bulk) of this consultation responsibility) over to Proponents. Substitution thereby dilutes effective consultation by its twice over outsourcing of consultation.

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[5] BC EAO. 2013. *Memorandum of Understanding between the Canadian Environmental Assessment Agency (the Agency) and the British Columbia Environmental Assessment Office (EAO) on Substitution of Environmental Assessments.* Available at: http://www.eao.gov.bc.ca/pdf/EAO_CEAA_Substitution_MOU.pdf

As the EAO has no authority over federal officials to compel them to participate in the EA, gaps in expertise can also occur. Federal departments, including but not limited to CEAA and the Department of Fisheries and Oceans, are not meaningfully engaging in province-led EAs. Their expertise, their accountability to indigenous peoples, and the requirements under federal EA, are thus being undermined, making for less effective EA.

DRFN Recommendations re: Substituted EAs

21. **Doig River First Nation would like to see the current Substituted EA process abandoned and, if necessary, re-negotiated with the presence of indigenous groups at the table.**

If the current substitution model is not abandoned, we recommend the following:

22. **Development with Aboriginal groups of more stringent guidelines for Substituted EA. For example, we need guarantees that the expertise of federal agencies will be involved and that the honour of the Crown is maintained in its duty to consult.**

23. **When the Federal Minister has approved substitution, require that Aboriginal groups are involved in the development of the consultation plan and have access to a Federal liaison for consultation instead of having to go through the Proponent to the EAO and finally to CEAA to resolve disputes.**

Aboriginal and Treaty Rights

Lack Of Proper Definition Of What Treaty Rights Are

Governments have a tendency to think that the only Treaty rights are hunting, trapping and fishing. In reality, Treaty rights are so much more than that. The text of Treaty No. 8 provides for the protection of the Indians' "usual vocations of hunting, trapping, and fishing" throughout the Treaty territory. To assure the Indians that their way of life would not be negatively affected, the Crown made a number of oral promises to the signatories of Treaty No. 8, including:

> (a) the same means of earning a livelihood would continue after the Treaty as existed before it, and that the Indians would be expected to continue to make use of them;
>
> (b) they would be as free to hunt and fish after the Treaty as they would be if they never entered into it; and

(c) the Treaty would not lead to "forced interference with their mode of life" (see *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 39).[6]

In *Mikisew,*[7] the court held that in view of the Crown's oral promises, Treaty 8 rights protect the continuity of traditional hunting practices. These practices were complex and required a variety of enabling factors to be in place – for example, peace and quiet, the ability to cover large areas of un-impacted forested land, freedom from competition, the ability to stay out on the land for long periods (requiring access to clean water, fuel for heat and habitation sites), and the ability to harvest plants for food and medicines. These other elements of the meaningful practice of rights are generally ignored in federal EA.

Inadequate Assessment Of Effects On Aboriginal And Treaty Rights In EA

Not only are Treaty rights too narrowly conceived of in federal EA, they are often completely ignored in terms of significance determinations. In the case of the largest federal EA Doig River has ever gone through – the Site C Dam - the Joint Review Panel was explicitly instructed NOT to look at Treaty rights in its Terms of Reference. The absence of the ability of the Joint Review Panel process to address Treaty rights (and, notably, the adequacy of consultation, which was also exempted from the Panel's purview) was not supplemented through any meaningful Crown consultation process, leaving these critical issues effectively orphaned by the federal EA process.

In addition, any assessment of effects on Aboriginal or Treaty rights tends to be the purview of federal authorities, without meaningful engagement of affected indigenous groups.

DRFN Recommendations to Improve Successfully Incorporating Aboriginal and Treaty Rights in Federal EA

24. Develop requirement in law to assess impacts on Aboriginal and Treaty rights into federal EA, adopting an appropriately broad definition of Aboriginal and Treaty rights that includes incidental rights as well.

25. Require that impacts on individual aboriginal groups' rights be assessed jointly at a Nation-to-Nation basis, with Proponent providing information to fuel assessment but not conducting the assessment.

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[6] *West Moberly First Nations v. British Columbia (Ministry of Energy, Mines and Petroleum Resources),* 2011 BCCA 247 [2011], para. 130.

[7] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* [2005] 3 S.C.R. 388, para. 47. In *Mitchell v. Canada (Minister of National Revenue – M.N.R.)*, 2001 SCC 33, [2001] 1 S.C.R. 911, that "[a]n aboriginal right, once established, generally encompasses other rights necessary to its meaningful exercise."

26. **Any project with potential for serious irreversible impact on rights should be subject to a panel review, where impacted indigenous groups have representation.**

27. **Guidance must be developed with Canadian indigenous groups on how Treaty and Aboriginal rights can be meaningfully assessed.**

28. **Federal law, policy and practice all must be revised to recognize indigenous groups as most sensitive receptors and the only groups with priority rights under the Constitution. Policy to be developed on how decisions must balance priority indigenous rights and "public" rights and interests.**

Impacts to CULTRP and Culture

Current Problems in Environmental Assessment Assumptions

Doig River is concerned with the adequacy of assessment of the Current Use of Lands and Resources for Traditional Purposes ("CULRTP") in federal EA. In particular, are the problems associated with false assumptions Proponents often make and repeat in these assessments. One is the false but commonly used assumption that a Project will have minimal impacts to our traditional land use because practices could be readily transferred elsewhere or we could always "go somewhere else." BC Hydro made this assumption for Site C, characterizing and minimizing the impacts to DRFN's land use on the basis that there were many other places that Doig River members could go, and completely ignoring two key facts:

- not all places are of equal value and importance (rights are tight to preferred practice areas), and
- for Doig River and other Treaty 8 Nations, there are demonstrably fewer and fewer places left to go, given widespread alienation from cumulative effects causing agents – BC Hydro made inadequate efforts to establish this cumulative effects context.

Another assumption that is problematic is that EIS' often call First Nations "adaptable". **This can never be accepted as if it is some form of mitigation for Project effects.** First Nations' ability to adapt may be a positive cultural trait in general, but it cannot be used as an excuse to put more and more impacts on us. "Adaptation" is never a costless transaction, as DRFN's cultural continuity and way of life are under constant threat due to both the weight of recent history of Crown decisions that have allowed for industrial and other changes to our Treaty territory.

In light of the prevalence of these assumptions, a new principle needs to be reflected in the federal EA process - that effect significance for things like CULRTP is best understood

through perspectives of culture and rights holders themselves. For example, DRFN members know from experience we are running out of places to "go" and that we have reached our limits in "adapting" to impacts. Significance determinations are properly subjective value judgments[8] ; therefore, affected parties need to be involved in assessment of significance, not merely impartial "experts."

Lack Of Consideration Of Effects On Semi- And Intangible Elements Of Culture

The present federal EA process has also failed to adequately consider effects on the semi- and intangible elements of Doig River's culture. In our experience, the focus for assessment has been on site-specific locations and areas with known physical cultural heritage. Proponents and EA practitioners have not understood semi- and intangible elements of culture in a DRFN context – things like how we share knowledge, the importance of stories written upon the land, our laws and norms, our sense of place, and cultural continuity factors like the Danne-za language.

For Doig River, cultural resources include any element of the cultural environment that adds meaning and value to the practice and identity of our members, and which they wish to protect in a relatively intact state. Intangible cultural heritage is defined by UNESCO and means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. Semi- and intangible culture for DRFN includes our cultural values, expressions, and ways of knowing, such as our transmission of TK, and also includes specials places that have meaning without built environments. Our special places include spiritual sites, places with ancestral meaning, historically important areas, gathering places and important harvesting grounds.

We have noticed an extreme lack of understanding of Danne-za culture in general, by both Proponents and federal government departments. Where this understanding is absent, and especially given the federal focus on physical cultural heritage such as burial sites and archaeological sites, the implications of a Project on our culture are underestimated to completely ignored in federal EA.

Not only have these key elements of our culture been ignored and under-assessed but it has not been defined, included, or considered in environmental management plans. For Site C, BC Hydro has ignored our attempts to have these values protected in their Cultural Resource Mitigation Plan and Heritage Resource Management Plan.

[8] This reality is recognized by EA practitioners the world over – see Erlich, A. & W. Ross (2015). The significance spectrum and EIA significance determinations. *Impact Assessment and Project Appraisal*, 33(2), 87-97.

DRFN Recommendations to Improve Assessment And Consideration Of CULRTP and Culture In Federal EA

29. **The federal government to reject outright any "go elsewhere" argument that does not include a full-scope assessment of the ability of affected First Nations to: a. access preferred locations for meaningful rights practices; and b. "go elsewhere", by identifying the total cumulative effects loading across the territory of that Nation.**

30. **The federal government to outright reject arguments of "adaptability" and refuse to accept this assumption as a form of mitigation for Project effects.**

31. **CEAA to develop with Aboriginal groups enforceable guidelines on assessment of impacts to semi-tangible and intangible culture.**

32. **Revise federal EA legislation to require the assessment of semi-tangible and intangible culture in all federal EAs, including but not limited to critical factors such as connection to & knowledge of land base, language & cultural practices, spiritual values, and cultural continuity.**

33. **Federal EAs to require Cultural Resource Management Plans that include case-specific relevant protections for semi-tangible to intangible elements of culture, and a requirement that the culture holders themselves are to be involved in drafting Cultural Resource Management plans.**

34. **Conditions to EA decisions need to include Elders Advisory Committees to inform planning and interpretation of results of monitoring programs.**

35. **Parties with vested interests but no responsibility (Proponents) will not be arbiters of significance; have a Nation-to-Nation group of decision-makers or advisors determine significance of effects on culture and CULRTP, not inviting Proponent to do so.**

Post EA: Conditions, Monitoring, & Adaptive Management

Lack of evidence of likelihood of mitigation success

Conditions that are attached to certificates often lack evidence that they will address or resolve the priority impacts of indigenous groups. The likely effectiveness of measures (proposed by proponents) and final conditions (developed by federal officials) are rarely

demonstrated prior to approval. Proponents also rarely share the track record of mitigations recycled from previous Projects. Federal EAs should require more ample evidence of the likelihood of mitigation success, including consideration of the adequacy in the specific receiving environment, modeling of outcomes, and use of proxy studies, where appropriate.

Lack of involvement of Aboriginal Groups in Monitoring and Adaptive Management

To date, DRFN has not been adequately engaged in post-EA monitoring and adaptive management. In particular, there is a need for the involvement of Aboriginal groups in pre, during, and post-construction monitoring. An example of Doig River's frustration with this issue is our consistent call for serious pre-, during and post-construction Indigenous monitoring programs. These are not yet required for major projects, but are essential both for protecting our traditional territory and exercising our inherent stewardship rights and responsibilities. Recently, our request for post-construction monitoring was denied through an NEB assessment despite the project occurring in a highly valued critical area for DRFN culture and traditional use. Despite our reasonable ask, the NEB suggested in its decision that there was no compelling reason to have Doig River members monitoring longer-term effects and rehabilitation of our most critical cultural area!

In addition, it not clear when conditions are not working nor are we asked for our input when conditions go "off-track." DRFN is rarely engaged in adaptive management, in part because current conditions are vague as to the concept. Problems with adaptive management are also a result of the lack of/poor development of thresholds of acceptable change. Adaptive management does not exist without the precautionary thresholds and triggers that indicate it is time to change the plan. "How much is too much?" Is supposed to be a fundamental question in EA, but is currently primarily left to be defined by Proponents and are not clearly laid out in conditions.

DRFN also questions the credibility of enforcement in the post-EA process. CEAA Compliance and Enforcement lacks transparent enforcement mechanisms and credibility at the indigenous community level. Greater involvement of Aboriginal groups in compliance auditing is needed.

DRFN Recommendations to Improve Aboriginal Involvement in Post-EA Implementation Activities

In order for conditions to better reflect the needs of indigenous groups and for the improvement of Aboriginal engagement in post-EA activities we propose:

36. **Federal Conditions to always include requirements for the involvement of affected indigenous groups in pre-, during and post-construction monitoring.**

This should become the norm, the minimum foundation for conditioning for any major project in indigenous territories.

37. **Build an empowered post-EA consultation and accommodation framework that allows for adoption of additional mitigation, monitoring and accommodation measures into federal Decision Statements and regulatory instruments.**
38. **Require joint enforcement and compliance standing committees for Projects, including First Nations and federal partners conducting compliance audits.**

39. **Federal conditions must address adaptive management, including triggering thresholds and response requirements.**

40. **Federal EIS Guidelines to require more ample evidence of likelihood of mitigation success.**

Other Federal EA Improvements Required

The following table identifies some additional issues and DRFN recommendations to improve the federal EA process.

EA Issue	DRFN Recommendations
Human Environmental Baseline Data Lack of adequate human environmental baseline data for affected indigenous groups; lack of minimum standards for project-specific socio-economic, cultural and traditional use/Aboriginal interests and use studies, means that these studies often come late if at all into the process	-In order to collect better human environmental baseline data: • Require Project-specific traditional land use studies, cultural studies and socio-economic studies on a "per affected indigenous group" basis, unless the group specifically agrees not to proceed with them • Require that the results of these studies are in the EIS, not delegated to a later stage
Lack of Access to Technical Expertise: Lack of funding for – and indigenous group access to – independent technical support during federal EA	-Increased federal funding for technical support available to indigenous groups: • Develop a roster of federally-funded Subject Matter Experts available to support indigenous groups via third party review of technical EA submissions • Conduct of more technical sessions on Working Group defined topics during EIS review • Federal funding to environmental assessment training for First Nations members • Funding for First Nations Major Project Coordinators
Decision-Making: Lack of clarity on what adoption of UN Declaration on the Rights of Indigenous Peoples means for decision-making in EA Lack of involvement of indigenous people in decision-making FPIC demands joint decision-making process by	-Define in federal EA legislation and policy how UNDRIP will be adhered to -Have more Joint Review Panels of experts, rather than CEAA, making decisions in federal EA -Involving indigenous people in decision-making by: • Development of a standing roster of certified First Nations Environmental Assessment Experts, available to sit on Review Panels

EA Issue	DRFN Recommendations
both levels of government in a Nation-to-Nation relationship Lack of adequate mechanism to arbitrate/mediate between federal Crown bodies and indigenous groups when there is disagreement over recommendations to Minister Doig River – we would suggest most First Nations – have little faith that the Canadian Environmental Assessment Agency has the technical capacity, knowledge of indigenous values, or independence to make informed decisions on environmental assessments affecting our people. We need more independent panels and more indigenous people on panels in the federal EA system.	• Joint drafting of Reports of Environmental Assessment/Decision Statements between a revamped CEAA and affected indigenous groups • Opportunity for direct Nation-to-Nation access to Ministers on Major Project decisions -Ensuring joint decision-making requirements of FPIC met via: • Jointly drafted federal guidance is required on what FPIC means & how it will be implemented in EA • Federal EA legislation and practice needs to move to a co-management system to be defined in consultation between indigenous groups and the federal Crown -Indigenous groups need direct engagement opportunities with minister in cases where feds and indigenous groups do not agree on the EA process outcome
Lack of Transparency: Lack of transparency in how federal decisions are made and lack of credibility that CEAA is independent is linked to power dynamics of perception that Proponents are meeting with CEAA behind the scenes and lobbying the government Lack of transparency and comprehensive public record. It is hard to stay apprised of the status of issues when the public registry is not comprehensive or up to date. For example, in many cases, CEAA IRs are not online	-Behind the scenes Project lobbying by Proponents, whether to CEAA or the Ministers, needs to be forbidden in law and practice. -Improving transparency with the public record: • Adopt a comprehensive online public registry of all documents filed in an EA, with placeholders for any confidential documents • Include Notes to File for any federal engagement with Proponent outside an open public forum, including meeting notes
VCs and Indicators: Currently, the Proponent receives some minimal guidance from the federal government on what VCs and indicators are required for assessment. Most of these VCs and indicators are biophysical in nature, and many different VCs and indicators relevant to the indigenous lifeworld are ignored. Final VCs and indicators thus often don't reflect Aboriginal priorities or values.	-In order to ensure that VCs are relevant to indigenous groups: • Need to require federal scoping sessions with affected indigenous groups • Indicators for each VC should be developed with the affected indigenous groups to ensure indicators, such as sufficiency of resources and cultural impact assessment indicators, are included • The federal EA process must make room to require more indigenous-focused VCs and indicators, including but not limited to: 1. Extent of territory alienated from traditional use and "catch per unit of effort" (indicators of effects on traditional land use and rights, among other linked VCs) 2. Indigenous defined Visual Quality Objectives and "% highly annoyed by change to visual environment" (indicators) and associated visual quality assessment incorporating indigenous values 3. Food security and country food consumption (and desired consumption) levels need to be included as part of economic effects assessment 4. More indicators of observable change conducive to traditional knowledge inputs: e.g., soundscape, lightscape, and changes in smells and tastes in the receiving environment 5. Perceived risk associated with traveling through and harvesting from the receiving environment 6. Specific indicators that can assist with identifying

EA Issue	DRFN Recommendations
	"gendered" impacts are critical • In cases where these VCs and indicators are sought but not adopted, EIS should be deemed incomplete
Lack of Multi-year studies: Lack of multi-year studies - doesn't account for seasonal variations, wildlife cycles etc.	-Requirement for multi-year studies: • Minimum requirements for baseline data collection on the immediate (Project Footprint and LSA) biophysical environment should include at least two full, all-season years

Conclusions

At base, it is time for the federal government to remember that environmental assessment is meant to deal with issues over and above those manageable through existing regulatory instruments, to treat indigenous people as both the most sensitive receptors to change and the only holders of priority rights under the Constitution and thereby focus the environmental assessment more on us, and to recognize that decisions on projects in our territory must be co-managed through a Nation-to-Nation arrangement.

We appreciate the considerations of the Panel and look forward to your recommendations to the federal Crown.

Appendix 1: Establishing Principles for Meaningful Cumulative Effects Assessment in Federal Environmental Assessment

The principles identified in this particular instance are not context-specific, but should be applied more generally – and liberally – in the conduct of cumulative effects assessment in Canadian environmental assessments.

For the purposes of this discussion, cumulative effects on Aboriginal rights are defined as:

> **Cumulative effects from all sources on land, water, wildlife, fish, and human receptors, which cause or contribute to adverse effects on the ability of indigenous peoples to practice their Aboriginal or Treaty rights, or which impact on their title or other related interests.**

It is important for the federal government to establish principles for what would constitute meaningful assessment of cumulative effects, especially as they relate to Aboriginal and Treaty rights. We canvassed the available cumulative effects assessment literature to identify appropriate principles (e.g. Noble 2013, 2014; Hegmann et al 1999; Duinker and Greig 2006; Rees 1995). The following is a list of identified principles drawn from these academic and other sources.

- Cumulative effects on Aboriginal rights must be measured separately for each First Nation or culture group and take into account the quality (e.g., distribution, population) of the VC within the relevant spatial unit and temporal boundaries.

- Cumulative effects assessment on Aboriginal rights and interests must include Western scientific knowledge and traditional knowledge inputs, description, observations, stories, and narratives of change, gain, and loss.

- The significance of total cumulative effects must be examined against past conditions or lesser-disturbed conditions in order to clearly describe the sensitivity and resilience of the VC, and not the current or accumulated state, which represents a "damaged baseline" that masks total change rather than illuminating it.

- Cumulative effects assessment must include identification of all agents that cause cumulative effects, rather than limiting the focus to a narrow conception of what is "reasonably foreseeable" and ignoring many causes of past change.

- Knowledge of historic changes – trends over time – to a VC is essential for determining a threshold or limit and whether it may already be passed or is approaching a limit. Cumulative effects assessment must therefore include trend

analysis and must focus on establishing rates of change over time.

- Infringements of Aboriginal rights result from agents causing multiple impacts and across multiple pathways, many of which act in mutually reinforcing ways to compound effects.

- Thresholds of acceptable change must be defined and agreed upon by all parties, including for resources that underlie Aboriginal and treaty rights (following Noble, 2014). Thresholds should be precautionary.

- Cumulative effects assessment must entertain the possibility that there may be significant adverse impacts or serious infringements already in existence, prior to the project case being added to total effects loads.

- Sufficient evidence and analysis must be provided to support conclusions about potential cumulative effects and their significance. Currently, cumulative effects assessment is typically a weak appendage inserted at the end of a project-specific effects assessment, and this is especially true in the difficult-to-assess case of effects on Aboriginal VCs and rights.

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