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## Appendix

### Treaty 8 First Nations' Report on Stage 2 Consultation

#### 1. Introduction

In June 2009, the Treaty 8 First Nations (“T8FNs”) requested that they have an opportunity to make a presentation to the Board of Directors (the “Board”) of the British Columbia Hydro and Power Authority (“BC Hydro”) on the status of Stage 2 Consultation when the Board called for a Stage 2 Report in the fall of 2009. BC Hydro did not agree to allow the T8FNs to present in person to the Board, but did agree that the T8FNs could report to the Board in the form of an Appendix to be appended to the BC Hydro First Nation Consultation Report. As such, this Appendix is the only opportunity the Board has to hear from the First Nations most directly affected by the proposed Site C Project. Most importantly, while BC Hydro’s report may provide general information on its understanding of the process to date, this Appendix reports specifically on the status of the important work being undertaken pursuant to the *Stage 2 Consultation Agreement* that was entered between BC Hydro and six Treaty 8 First Nations (Doig River First Nation, Fort Nelson First Nation, Halfway River First Nation, Prophet River First Nation, Saulteau First Nations and West Moberly First Nations) in December 2008. The T8FNs believe that the information contained in this Appendix should be afforded serious consideration in any deliberations the Board undertakes regarding the potential advancement to Stage 3 of BC Hydro’s Five Stage Process.

The Appendix first provides background information on the position of the T8FNs with respect to BC Hydro’s five stage approach to the proposed Site C Project. It then summarizes the *Stage 2 Consultation Agreement* purpose, scope, structure and process concluding with an assessment of the status of activities to be conducted under the Consultation Agreement’s three-phased consultation process. The assessment also includes the rationale supporting the T8FNs’ request that the Board not recommend to the provincial government that the proposed Site C Project advance to Stage 3 (Regulatory – Environmental Assessments) until the T8FNs and BC Hydro complete the consultation process as agreed and set out in the *Stage 2 Consultation Agreement*.

As explained more fully below, the T8FNs are concerned that BC Hydro may take the position that further progress cannot be made under the *Stage 2 Consultation Agreement* unless the proposed project proceeds to Stage 3. The T8FNs would object to any such suggestion and emphasize that BC Hydro agreed that the Consultation Agreement processes developed under the *Stage 2 Consultation Agreement* included the assessment of impacts and the development of

mitigation measures with the T8FNs. If BC Hydro is assuming that this work cannot be done until Stage 3, the T8FNs are concerned that BC Hydro may have misrepresented the purpose of Stage 2 to the T8FNs and may have entered the *Stage 2 Consultation Agreement* in bad faith. The T8FNs believe that there remains significant work to be done with respect to the identification of impacts and the development of mitigation measures, much of which will follow from the completion of the T8FNs' Traditional Land Use Study (TLUS), and this work can and should be addressed prior to any decision being made with respect to the commencement of the environmental assessment and regulatory approval processes.

The T8FNs strongly believe that, until the consultation process set out in the *Stage 2 Consultation Agreement* is completed, information provided to support a government decision to move to Stage 3 will not have adequately considered the T8FNs' cultural and traditional practices and Aboriginal science. As a result, the T8FNs will be severely prejudiced in their ability to participate in Stage 3.

Should the Board have any questions or require any further information about the submissions in this Appendix, the T8FNs respectfully request that such inquiries be directed to the attention of Tribal Chief Liz Logan, who will ensure that the Board will receive a timely response to any inquiry.

## 2. Background

BC Hydro, in considering the feasibility of expanding its hydroelectric production by building a new hydroelectric facility on the Peace River near Fort St. John, established a five stage approach:

**Stage 1** - Review of Project Feasibility (Completed)

**Stage 2** - Project Definition and Consultation

**Stage 3** - Regulatory – Environmental Assessments

**Stage 4** - Engineering

**Stage 5** - Construction

The proposed Site C dam is to be located in an area over which the T8FNs, collectively and individually, have and exercise constitutionally protected rights. These are not claimed rights, but are rights established pursuant to Treaty No. 8. The Crown has an obligation to consult and accommodate the T8FNs about the potential impacts of the proposed Site C Project on these rights and BC Hydro acts as an agent of the Crown and exercises the Crown's obligations when engaging with the T8FNs with regard to this project.<sup>1</sup>

The T8FNs have consistently raised concerns about the five stage approach being implemented by BC Hydro. They have questioned BC Hydro's decision to conduct Stage 1 without any involvement of First Nations and to make significant progress on Stage 2 before engaging at all with the T8FNs, including the completion of public Stage 2 pre-consultation. In fact, BC Hydro did not approach the T8FNs about the proposed Site C Project *at all* until Stage 2 had been underway for several months. Ultimately, the *Stage 2 Consultation Agreement* was ratified in

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<sup>1</sup> *Kwkwetlem First Nation v. British Columbia (Utilities Commission)*, 2009 BCCA 68.

December 2008, at the same time as the conclusion of Round 2 of Project Definition Consultation with the public. In short, the T8FNs' engagement in Stage 2 did not commence until BC Hydro was already more than halfway through Stage 2. This was and continues to be problematic.

The T8FNs have consistently informed BC Hydro since first commencing negotiations on the *Stage 2 Consultation Agreement* that BC Hydro's engagement with the T8FNs came late in the process and that adequate time needed to be provided to the T8FNs to allow them to participate in the consultation process on the basis of free, prior and informed consent.<sup>2</sup> The T8FNs cannot be reasonably expected to provide community feedback related to the proposed Site C Project prematurely without the full disclosure of BC Hydro Stage 2 reports and studies. To assume otherwise would be to allow BC Hydro to adhere to a timeline that does not recognize the late start that was afforded to the T8FNs in the first place.

### 3. *Stage 2 Consultation Agreement*

The *Stage 2 Consultation Agreement* between BC Hydro and the T8FNs established a structured consultation process to address various issues and concerns of the parties, including the following:

- T8FNs' collective and individual rights under section 35(1) of the *Constitution Act, 1982*;
- T8FNs' demands that the province engage in a structured consultation process;
- T8FNs' concerns respecting the five staged approach to the proposed project and the associated timelines adopted by BC Hydro with respect to meaningful consultation with the T8FNs about the proposed project and its potential effects and impacts on their section 35(1) rights;
- BC Hydro's desire to consult with the T8FNs to gain an understanding of potential effects or impacts of the proposed project on the T8FNs and their section 35(1) rights;
- The establishment of a structured consultation process by which BC Hydro provides financial capacity to the T8FNs to participate meaningfully in Stage 2 and any environmental or other regulatory processes associated with or relating to the proposed project that arise in Stage 2.

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<sup>2</sup> "The principle of free, prior and informed consent is central to indigenous peoples' exercise of their right of self-determination with respect to developments affecting their lands, territories and natural resources. The substantive and procedural norms underlying free, prior and informed consent empower indigenous peoples to meaningfully exercise choices about their economic, social and cultural development, particularly in relation to development proposals by States and other external bodies in their ancestral lands and territories." United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, Twenty-second session, 19-23 July 2004. [Accessed on October 5, 2006: <http://www2.ohchr.org/english/issues/indigenous/docs/wgip22/4.pdf>].

## 4. *Stage 2 Consultation Agreement – Purpose and Scope*

### (a) Purpose

BC Hydro and the T8FNs entered into the *Stage 2 Consultation Agreement* with the intention of identifying potential impacts of the proposed project on the rights of the T8FNs and identifying potential mitigation and accommodation measures. These purposes were clearly set out in the Purpose section of the Agreement, which states as follows:

6. The Parties agree to participate in the Consultation Process pursuant to this Agreement in respect of the subjects or matters described herein in regards to the Proposed Project and the Treaty Rights of the T8FNs, and the Parties will endeavour using best efforts to complete such Consultation Process prior to any decision being made on whether the Proposed project will proceed to Stage 3.

7. The Parties acknowledge that BC Hydro may decide that the Proposed Project may not proceed to Stage 3 (Regulatory – Environmental Assessment) of BC Hydro’s five-stage approach. However, the Consultation Process is designed to assist the Parties in identifying potential effects and impacts of the Proposed Project and potential mitigation and accommodation measures with respect to T8FNs’ Treaty Rights for the purposes of Stage 2.

As discussed below, if BC Hydro is recommending that the proposed project advance to Stage 3 at this time, such recommendation is being made without the completion of the consultation process set out in the *Stage 2 Consultation Agreement*. Without adequate time to complete the work agreed to in the *Stage 2 Consultation Agreement*, the T8FNs have not been able to provide meaningful feedback that incorporates the T8FNs’ community concerns about the impact of the proposed Site C Project on the exercise of their rights. If the timelines in the *Stage 2 Consultation Agreement* are ignored and BC Hydro recommends to the provincial government to advance the proposed Site C Project to Stage 3, such recommendation will have been made without BC Hydro having first made best efforts to complete the consultation process as required by paragraph 6 of the *Stage 2 Consultation Agreement*. Whatever understanding or knowledge that BC Hydro has about its ability to fulfill its commitments to the T8FNs pursuant to the *Stage 2 Consultation Agreement* in light of its own five-stage approach can be no different today than it was in December 2008 when it entered into the *Stage 2 Consultation Agreement*. BC Hydro should not have agreed to include the identification of potential effects, impacts, mitigation and accommodation measures in Stage 2 if it was unable to provide the information necessary for the parties to address these matters in Stage 2.

### (b) Scope

The parties agreed that the scope of the *Stage 2 Consultation Agreement* included consultation with respect to potential effects or impacts of the proposed project on the section 35(1) rights of the T8FNs, and where appropriate, mitigation and accommodation measures with respect to the proposed project. The following particular subjects were identified:

- Potential impacts and effects of the proposed project on the aquatic, atmospheric, terrestrial, and subsurface environments;

- Potential environmental impacts pertaining to the proposed project including resource use, historic resources, health, pollution, land use, systems/cycles and all measures that could be taken to avoid, prevent, mitigate and/or minimize such effects/impacts;
- The potential socio-economic effects or impacts pertaining to the proposed project;
- The potential scope, baseline information, study design and methodology pertaining to the proposed project;
- The potential effects/impacts of infrastructure pertaining to the proposed project including selection, location design, planning, construction, operation, decommission, reclamation, effects/impacts of environmental on such infrastructure, and all measure that could be taken to avoid, prevent, mitigate, and/or minimize effects/impacts;
- The appropriate methods or means for meaningful mitigation and accommodation of the T8FNs' concerns to address potential effects/impacts on T8FNs' treaty rights for the proposed project;
- Compensation for the anticipated impacts on treaty rights for the proposed project.

At the request of the T8FNs, BC Hydro agreed to discuss additional issues and topics with the understanding that the inclusion of such items in the Consultation Agreement was not an acceptance or admission by BC Hydro of the rights asserted by T8FNs set out in the additional subjects or that such subjects were valid inclusions in the consultation process at law or otherwise. The additional subjects are listed on pages 5 – 7 of the *Stage 2 Consultation Agreement*. Those pertaining directly to this submission are noted below as a reiteration of the ongoing concerns of the T8FNs regarding BC Hydro's five stage approach that was established without consultation or engagement with the T8FNs:

- The timeline and scheduling of the decision as to whether the proposed project will proceed, *to enable an adequate opportunity for T8FNs to assess the information provided by the Province and BC Hydro against the T8FNs' own land use information and traditional ecological knowledge*;
- The criteria that BC Hydro will use to make the decision as to whether the proposed project will proceed, and what topics will be considered relevant by BC Hydro in preparing the Stage 2 Report;
- How T8FNs participation will be integrated and utilized in the decision-making process as to whether the proposed project will proceed;
- Completion of a T8FNs needs assessment by the Province, or as delegated to BC Hydro, in collaboration with T8FNs, to inform decision-makers on the needs of T8FNs people related to their section 35(1) rights to trap, hunt, and fish, for both subsistence and commercial purposes, and their other section 35(1) rights, including spiritual practices;

- How BC Hydro, either on its own or through coordinated efforts with the Province and Canada, will meaningfully accommodate the T8FNs’ concerns, such that the priority of their treaty rights will be protected and preserved respecting the proposed project;
- Exploratory discussions for the purposes of identifying from the perspective of the T8FNs what their concerns, issues and potential claims are with respect to the construction, operation, and maintenance of the existing Peace River facilities (i.e. the Peace Canyon Dam and Dinosaur Reservoir, and the W.A.C. Bennett Dam and the Williston Reservoir) and their impact on the T8FNs and their section 35(1) rights.

As discussed below, the vast majority of the subject matters agreed to be addressed under the “Nature and Scope of Consultation” in the *Stage 2 Consultation Agreement* have not been addressed, including the environmental, socio-economic and infrastructure effects or impacts of the proposed project and mitigation and accommodation. It was clearly the understanding of the parties entering into the *Stage 2 Consultation Agreement* that these matters would be addressed in Stage 2, and BC Hydro raised no concerns at the time about its limited or non-existent ability to address these subject matters in Stage 2.

## **5. Consultation Structure and Process - Summary**

### **(a) Three-Pillared Structure**

The parties agreed to adopt a three-pillared approach in the consultation process as follows:

1. Consultation Table for the purposes of administering and overseeing the work contemplated in the Agreement, coordinating the consultation process between the parties and communicating information between the parties.
2. Technical Advisory Representatives and Committee to liaise with their respective counterparts regarding technical issues, review all studies to understand and evaluate the potential environmental, cultural and social effects/impacts, report efforts to Consultation Table and Community Outreach Teams.
3. Community Outreach Teams for each of the First Nations to disseminate and explain the technical aspects of the proposed project and to gather input and information from each First Nation community respecting the potential effects/impacts of the proposed project on their section 35(1) rights and other community concerns. The Community Outreach Team is also to liaise with the First Nation representatives at the Consultation Table and with the Technical Advisory Representatives.

### **(b) Three-Phased Process**

The parties agreed that the consultation process would be carried out in a three-phased approach, as follows:

1. Phase 1 - Dissemination of Information (approximately 6 months). During this phase:

- a. BC Hydro would provide all scientifically credible information about the potential effects or impacts of the proposed project on the environment; the socio-economic effects or impacts of the proposed project; the potential scope, baseline information, study design and methodology pertaining to the proposed project; the potential effects or impacts of infrastructure pertaining to the proposed project; the appropriate methods or means for meaningful mitigation and accommodation of potential effects or impacts on section 35(1) rights; and compensation for the anticipated impacts on section 35(1) rights;
  - b. The T8FN Technical Advisory Representatives would analyze and digest the information in order that it may be explained to the T8FN communities;
  - c. The Community Outreach Teams would disseminate and explain the technical aspects to each T8FN community, and gather input and information from each T8FN community respecting potential effects or impacts of the proposed project on section 35(1) rights and other community concerns to be used in the identification of concerns and potential effects in Phase 2 of the consultation process; and
  - d. The parties would prepare a needs assessment setting out how the priority of section 35(1) rights will be protected and preserved respecting the proposed project were it to proceed;
2. Phase 2 - Identification of Concerns and Potential Impacts (approximately 6 months).  
During this phase:
    - a. T8FNs would provide BC Hydro with relevant information concerning potential effects or impacts of the proposed project on section 35(1) rights, including concerns, issues or comments identified by the Community Outreach Teams;
    - b. At the Consultation Table, the parties would identify and discuss any past, present and future potential effects or impacts of, and community concerns with, the proposed project as identified by the Technical Advisory Representatives and the Community Outreach Teams; and
    - c. The parties would work together to draft a terms of reference for the environmental assessment process.
3. Phase 3 - Mitigation and Accommodation (approximately 3 months). During this phase:
    - a. At the Consultation Table, the parties would attempt to identify and implement strategies to avoid, mitigate, manage, address and/or otherwise accommodate interests, concerns or potential adverse effects/impacts of the proposed project on section 35(1) rights; and

- b. At the Consultation Table, if appropriate, the parties would prepare for the negotiation of applicable impact benefit agreements in Stage 3.

## 6. BC Hydro's Technical Advisory Committee (TAC)

The T8FNs believe it is important that they clear up any question regarding their objections over participating in the TAC.

The TAC was established by BC Hydro well in advance of the conclusion of the negotiations between BC Hydro and the T8FNs over the *Stage 2 Consultation Agreement*. An aggressive meeting schedule had been established and participants were meeting regularly while the T8FNs were fully engaged in negotiations over the development of their own consultation process with BC Hydro. The TAC process was a structure pre-conceived by BC Hydro to bring parties together to discuss the studies that were already underway. Accordingly, the T8FNs had concerns with the structure and timing of the process.

The T8FNs also knew that as First Nations they were legally entitled to a separate process designed in consultation with them. This was the very process they were developing at the negotiation table with BC Hydro. They also knew that until the *Stage 2 Consultation Agreement* negotiations were concluded and the consultation process was underway, they would not have the resources to retain the appropriate people with the technical capacity to begin to review technical studies. They also had been advised by participants in the TAC process that they were not provided with the actual studies themselves, but were given overview presentations that included summaries of the studies. The T8FNs are entitled to the studies, and were concerned that participation in the TAC process would prevent them from developing a more suitable bilateral process directly with BC Hydro that respected their unique position as First Nations.

The T8FNs consistently raised concerns with BC Hydro throughout the negotiation of the *Stage 2 Consultation Agreement* about the need to work collaboratively with them on study design and the need to incorporate Aboriginal science. BC Hydro representatives' only response was that the T8FNs were welcome to participate in the TAC and, in fact, often expressed their frustration that the T8FNs did not see eye to eye with them on the importance of participating in that broader process.

As a result, the T8FNs have been questioned by BC Hydro representatives for their insistence on their right to their own process to engage with BC Hydro on the environmental and technical studies. Whenever T8FNs' Site C technical representatives have raised any concerns about the Stage 1 and 2 BC Hydro technical studies they were told that they failed to take the opportunity to participate. The T8FNs believe that it is important that the Board consider the T8FNs' perspective and better understand the legitimate concerns that the T8FNs continue to have with respect to a new process that meaningful engages T8FNs versus the completed TAC process.



## 7. Stage 2 Consultation Agreement – Implementation

### (a) T8FNs’ Assessment of the Three-Phased Consultation Process

The following table outlines the rationale for the T8FNs’ objection to any proposed recommendation by BC Hydro for the proposed Site C project to proceed to Stage 3 – Regulatory/Environmental Assessment until the work required by the *Stage 2 Consultation Agreement* is completed:

<b>Phase 1 - Dissemination of Information (approximately 6 months)</b>	
<b><i>Phase 1 Activity</i></b>	<b><i>T8FNs’ Assessment and Comments</i></b>
<p>BC Hydro would provide all scientifically credible information about the potential effects or impacts of the proposed project on the environment; the socio-economic effects or impacts of the proposed project; the potential scope, baseline information, study design and methodology pertaining to the proposed project; the potential effects or impacts of infrastructure pertaining to the proposed project; the appropriate methods or means for meaningful mitigation and accommodation of potential effects or impacts on section 35(1) rights; and compensation for the anticipated impacts on section 35(1) rights.</p>	<p>Despite having retained its Technical Advisory Representative in March 2009, and making repeated requests for access to all BC Hydro studies, the T8FNs only began to receive BC Hydro Stage 1 and 2 studies and reports in <u>July 2009</u>. Now well into October 2009 T8FN’s have not received the raw earth engineering data, the Archaeological Predictive Model and the Social Economic report. Without this data, the intent of the Consultation Agreement and data dissemination and community feedback cannot occur.</p> <p>None of these reports pertain to the cumulative socio-economic-ecological effects or impacts of the proposed project, the potential effects or impacts of infrastructure relating to the proposed project, and no information has been provided to assist with the development of appropriate methods or means for mitigation, accommodation or compensation.</p> <p>With respect to the limited information that has been provided, it will be loaded onto the Treaty 8 Web Portal that is scheduled to be completed by December 2009. The reports that have been provided are not in a form that is user-friendly or otherwise accessible by non-technical readers. This Web Portal will provide T8FNs members with opportunities to research the Site C project in greater detail but, of course, will be dependent on receiving the relevant information from BC Hydro.</p>
<p>The T8FN Technical Advisory Representatives would analyze and digest the information in order that it may be explained to the T8FNs communities.</p>	<p>The delay in receiving the BC Hydro reports has created a significant backlog in the analysis and synthesizing for presentation to Treaty 8 First Nation communities. A timely release of the BC Hydro Stage 1 and 2 reports would have allowed for this task to be completed on schedule.</p> <p>The Treaty 8 First Nations Technical Team and Community Outreach Coordinators are only now</p>

	<p>able to make semi-informed presentations in communities.</p> <p>The T8FN members require time to digest the information and be given opportunities to pose questions and raise concerns.</p>
<p>The Community Outreach Teams would disseminate and explain the technical aspects to each T8FNs community, and gather input and information from each T8FNs community respecting potential effects or impacts of the proposed project on section 35(1) rights and other community concerns to be used in the identification of concerns and potential effects in Phase 2 of the consultation process.</p>	<p>The T8FNs have been limited in their ability to review and communicate the BC Hydro information to the First Nation communities due to BC Hydro's delays in providing the Stage 1 and 2 reports. Currently, the T8FNs have not received all the BC Hydro Stage 2 reports.</p> <p>Despite these challenges, preliminary community forums were held in each of the T8FNs communities (May – June 2009) without the presentation of any studies and a second round is scheduled for October. In addition, a Site C Information Package was developed and distributed (May and June) and Site C Newsletters were being published and distributed to the First Nations in July and September.</p> <p>A T8FNs Site C gathering was held in June at Bear Flats and a second gathering, the Site C Summit, was held in October in Fort St. John.</p>
<p>The parties would prepare needs assessment setting out how the priority of section 35(1) rights will be protected and preserved respecting the proposed project if it were to proceed.</p>	<p>This needs assessment has not yet commenced. It was anticipated that the foundation for this important work would be the results from data dissemination and community feedback concurrent with a Traditional Land Use Study (TLUS), but there have been significant delays with reaching agreement over the structure and oversight of the study. Although the T8FNs sent out an RFP and interviewed several consultants to assist with this work in July 2009, BC Hydro took over a month to respond to the draft TLUS Agreement that had been tabled by the T8FNs and it is likely that agreement will not be reached and may be too late in the fall to complete any field work.</p> <p>The value that the TLUS would bring to both BC Hydro and the T8FNs must not be underestimated. It is the main tool that the parties need to assess the potential impacts the proposed Site C Project will have on the T8FNs' rights as well as to develop and discussion mitigation and accommodation measures, both of which were subjects to be addressed in Stage 2.</p>

<b>Phase 2 - Identification of Concerns and Potential Impacts (approximately 6 months)</b>	
<b><i>Phase 2 Activity</i></b>	<b><i>T8FNs' Assessment and Comments</i></b>
<p>T8FNs would provide BC Hydro with relevant information concerning potential effects or impacts of the proposed project on section 35(1) rights, including concerns, issues or comments identified by the Community Outreach Teams.</p>	<p>The T8FNs were not able to engage meaningfully in the provision of information concerning potential effects or impacts of the proposed project on their section 35(1) rights until they received the information owing to them from Phase 1. Even without this information, in June 2009 the T8FNs provided BC Hydro with a preliminary list of 97 concerns and questions respecting the proposed project and its potential effects or impacts on their section 35(1) rights, which they believed they were entitled to in Phase 1. BC Hydro only started to respond to these questions in phases in the first week of October 2009 and many responses remain outstanding. Accordingly, the T8FNs strongly believe that BC Hydro's delays in providing information that was required in Phase 1 of the <i>Stage 2 Consultation Agreement</i> has effectively prevented the T8FNs from commencing Phase 2.</p> <p>Now that the T8FNs have received the Stage 1 and some of the Stage 2 studies and reports from BC Hydro, there are more questions from the T8FNs' community presentations. Unfortunately, this reporting to the communities and the posting of this information on the Treaty 8 Web Portal has been significantly delayed, given the delays in receiving the reports and studies from BC Hydro. Perhaps more significantly, however, is the delay in the commencement of the Traditional Land Use Study (due to BC Hydro's protracted negotiations respecting a TLUS agreement). As emphasized above, the TLUS will be the T8FNs' key tool for providing BC Hydro with information on the potential effects or impacts of the proposed project on the section 35(1) rights of the T8FNs and in discussing mitigation and accommodation.</p>
<p>At the Consultation Table, Parties would identify and discuss any past, present and future potential effects or impacts of, and community concerns with, the proposed project as identified by the Technical Advisory Representatives and the Community Outreach Teams.</p>	<p>Given the difficulty the T8FNs have had with obtaining relevant information from BC Hydro and presenting it to the First Nation communities, they have faced significant challenges in bringing substantive concerns to the Consultation Table. Partly as a result of these challenges, the T8FNs continue to raise concerns about the timing of BC Hydro's Five Staged approach, believing strongly that the timeframe prevents them from completing key components of the Consultation Agreement that would ensure membership have a meaningful opportunity to participate in the process and to express their concerns and issues regarding the</p>

	<p>potential effects or impacts on their section 35(1) rights.</p> <p>As noted above, in June 2009, the Community Outreach Team submitted a list of 97 initial questions to BC Hydro during the Consultation Table meeting. The 97 questions were compiled by the T8FNs' Site C Management Team from concerned T8FNs members during preliminary meetings in the First Nation communities about the proposed project, prior to the T8FNs receiving the Stage 1 and 2 reports and studies from BC Hydro.</p> <p>BC Hydro sent an incomplete set of responses in the first week of October 2009. The T8FNs are concerned about BC Hydro's current efforts to address these initial questions and concerns in a timely and meaningful way.</p> <p>Additional questions will arise from the answers provided by BC Hydro. A submission and recommendation to move to Stage 3 without providing ample time for the T8FNs' questions and concerns to be addressed will be perceived by the T8FNs as BC Hydro moving forward with its own agenda with no regard for the T8FNs' concerns about the effects or impacts of the proposed project on their section 35(1) rights.</p>
<p>The Parties would work together to draft a terms of reference for the environmental assessment process.</p>	<p>Joint development of the draft terms of reference for the environmental assessment process has not commenced. The T8FNs believe that it is important not to develop the draft terms of reference until after the consultation process in the <i>Stage 2 Consultation Agreement</i> has been completed.</p>
<p><b>Phase 3 – Mitigation and Accommodation (approximately 3 months)</b></p>	
<p><b><i>Phase 3 Activity</i></b></p>	<p><b><i>T8FNs' Assessment and Comments</i></b></p>
<p>At the Consultation Table, the parties would attempt to identify and implement strategies to avoid, mitigate, manage, address and/or otherwise accommodate interests, concerns or potential adverse effects/impacts of the proposed project on section 35(1) rights and, if appropriate, would prepare for the negotiation of applicable impact benefit agreements in Stage 3.</p>	<p>As noted above, the T8FNs have received the Stage 1 and most of the Stage 2 studies and reports. The TLUS has still not been commenced, due to BC Hydro's delay in completing a funding agreement (and notwithstanding BC Hydro's clear acknowledgment that a TLUS is a critical study to be undertaken as part of the process to understand the feasibility of the proposed dam project).</p> <p>Until the Technical Advisory Representative has the opportunity to fully review and analyze the studies and reports and take into consideration the results of the TLUS, the T8FNs cannot properly utilize the Community Outreach Teams to</p>

	<p>disseminate the information about potential impacts to community members, and to receive responses from community members about those potential impacts. This in turn has prevented the Consultation Table from discussing the potential impacts and what can be done about them. Consequently, identification and implementation of mitigation factors to accommodate interests, concerns and potential impacts is premature at this time.</p> <p>Perhaps more importantly, the T8FNs are concerned that BC Hydro has assumed these processes and discussions will continue seamlessly if the decision is made to advance to Stage 3. This assumption also implies that discussion with respect to mitigation and accommodation measures will occur with the T8FNs as a group should the project advance to Stage 3.</p> <p>The T8FNs have also raised the issue of the need (during Consultation Table meetings) and importance of a larger cumulative impact assessment of the W.A.C. Bennett, Peace Canyon, and potential Site C Hydroelectric Dams. There needs to be agreement on how to appreciate and account for the cumulative effects of multiple hydroelectric facilities on the Peace River on the treaty rights held by the T8FNs, in order to assess properly the potential impacts of the Site C Project on those same treaty rights. Until that assessment is undertaken, the T8FNs cannot say what measures could mitigate and accommodate their concerns.</p>
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**(b) Prejudice to the T8FNs**

As set out above, the T8FNs will be significantly prejudiced if the decision is made to advance the proposed Site C Project to Stage 3 before the consultation processes initiated under the *Stage 2 Consultation Agreement* are completed.

- (i) Due to the delay by BC Hydro in providing results from the Stage 1 and 2 studies and reports, the T8FNs have not been able to disseminate this information effectively to First Nation community members and land users as required in the *Stage 2 Consultation Agreement* to seek their input and understand their concerns.
- (ii) Due to the protracted negotiations over a funding agreement, BC Hydro has not allowed the T8FNs to commence the TLUS, notwithstanding that BC Hydro has admitted the TLUS is a key factor not only for BC Hydro as a base-line study for the assessment of the feasibility of the project as a whole but also for the T8FNs to understand the effects or impacts of the proposed project on their rights.

- (iii) As a result, the Consultation Table has not been able to fulfill its mandate or purpose, apart from the initial list of 97 questions tabled by T8FNs in June 2009, which were brought forward by First Nation community members without the results from the Stage 1 and 2 reports and studies being first provided to them and which have only been answered partially by BC Hydro and only then in the first week of October 2009.
- (iv) This in turn has prevented the start of any discussion at the Consultation Table about potential mitigation and accommodation measures.
- (v) This has also prevented the T8FNs from understanding, as a group, the potential impacts of the proposed project and from having the opportunity to determine whether they will continue to demand consultation from the Crown as a group if the proposed project moves into Stage 3.

There is no reason to believe that the three-phased process jointly developed and agreed to in the *Stage 2 Consultation Agreement* cannot be completed in Stage 2 of BC Hydro's five stage process. The completion of the TLUS will provide both BC Hydro and the T8FNs with valuable information to allow them to enter into a constructive dialogue over the potential effects or impacts of the proposed project on the section 35(1) rights of the T8FNs and to address potential mitigation and accommodation measures. The T8FNs are concerned that BC Hydro may now be attempting to use the fact that the parties have not engaged in discussions over potential impacts and mitigation and accommodation for moving ahead to Stage 3 with the suggestion that these matters cannot be addressed until the proposed project enters into the environmental assessment process. If this is the case, the T8FNs do not agree and request government work with the T8FNs to address these outstanding issues prior to the initiation of the environmental assessment process.

Furthermore, by not completing the processes begun or envisioned under the *Stage 2 Consultation Agreement*, ongoing meaningful engagement and future consultation is threatened. The T8FNs could potentially lose the very institutions that they negotiated to create with BC Hydro to enable them to understand the project fully and to engage the Crown about this important and large project i.e. the Consultation Table, the Technical Advisors and the Community Outreach Liaisons. There is no guarantee that any of those institutions would continue, either as presently staffed and resourced, or at all, if the project is moved into the regulatory process.

## **8. Conclusion**

To reiterate, the stated purpose of the *Stage 2 Consultation Agreement* is to allow the parties to participate collaboratively in the assessment of the feasibility of the proposed Site C Project. Additionally, the parties are to endeavour to use best efforts to complete the consultation process that was agreed by the parties to include the identification of potential impacts and accommodation and mitigation options prior to any decision being made on whether the assessment will proceed to Stage 3.

The T8FNs submit that, to date, BC Hydro has not made best efforts to complete the consultation process as agreed and documented in the *Stage 2 Consultation Agreement*. There have been excessive delays in providing the results of the reports and studies to the T8FNs, delays in

responding to written questions regarding potential impacts of the proposed project and delays in allowing the commencement of the TLUS. Collectively, these delays have prevented the T8FNs from fully participating in the *Stage 2 Consultation Agreement* on the basis of free, prior and informed consent and, accordingly, the only conclusion that can be reached is that efforts have been inadequate and commitments under the *Stage 2 Consultation Agreement* remain unfulfilled. As a result, the parties have not been able to fulfill the purpose of the *Stage 2 Consultation Agreement* in identifying the potential effects and impacts of the proposed project or identifying potential mitigation and accommodation measures.

While the T8FNs maintain their commitment to fulfilling their obligations under the *Stage 2 Consultation Agreement* and will continue to move forward in good faith, they must strongly register their objection to BC Hydro making a recommendation to the provincial government to proceed to Stage 3 (Regulatory – Environmental Assessments) at this time. The T8FNs submit that this decision can only be made once the *Stage 2 Consultation Agreement* has been completed. As fully explained above, until the consultation process established under the *Stage 2 Consultation Agreement* is complete, BC Hydro will not have sufficient information on which to base any recommendation to the Province and the rights of the T8FNs will be severely prejudiced as a result.

The T8FNs request that BC Hydro consider the importance of honouring the terms of the *Stage 2 Consultation Agreement*, which is scheduled to conclude on March 31, 2010.