

**THE ALASKA HIGHWAY GAS PIPELINE EASEMENT:  
A KLUANE FIRST NATION CASE STUDY**

by

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## **Abstract**

The Alaska Highway Gas Pipeline (AHGP) is a major industrial development project proposed within the Yukon since 1977, which remains unconstructed. The AHGP Easement represents the most significant aspect of the AHGP in the Yukon and remains a long-standing land tenure right impeding southern Yukon First Nations. This applied research project partnered with Kluane First Nation (KFN) to identify and address potential consequences associated with the AHGP Easement that are currently relevant to KFN as a self-governing Yukon First Nation. Community-based, decolonizing qualitative research methodologies were employed to gather understandings of the AHGP Easement from key KFN citizens, as well as Yukon and federal government officials and industry representatives. Findings emerging from the research highlight issues of jurisdictional complexity among Indigenous peoples and the Crown, the need to consider contextual change, and problems with the existing regulatory, assessment and consultation framework for the AHGP.

## **Keywords**

Indigenous peoples of Canada; Kluane First Nation; Yukon First Nations; Alaska Highway Gas pipeline; industrial development; environmental assessment; consultation; resource management; easement

## Glossary

The following key terms used throughout this thesis are:

***Alaska Highway Gas Pipeline:*** A natural gas pipeline proposed by TransCanada Pipelines Ltd. (previously Foothills Pipe Lines (South Yukon) Ltd. that would carry gas from Prudhoe Bay, Alaska through the Yukon and northern British Columbia, eventually linking to existing Alberta pipeline infrastructure, referred to historically as the ‘Foothills Pipeline System’ (NPA, 2012).

***Alaska Highway Gas Pipeline Easement:*** A 240-metre wide, 760 km long right-of-way held in legal land title (‘Certificate of Title’) between TransCanada Pipelines Ltd. (previously Foothills Pipe Lines Ltd.) and the Government of Canada to construct a natural gas pipeline through the Yukon (NPA, 2011).

***Consultation:*** The process through which federal, provincial and territorial governments and industry proponents consult Indigenous peoples regarding proposed development projects.

***First Nation:*** “A term that came into common usage in the 1970s to replace the word “Indian,” which some people found offensive. Although the term First Nation is widely used, no legal definition of it exists. Among its uses, the term refers to Indigenous peoples in Canada, both Status and non-Status. Some Indigenous peoples have adopted the term “First Nation” to replace the word “band” in the name of their community” (AANDC, 2015). In this thesis, usage of “First Nation” is excluded to direct quotations and the organizational nomenclature of Kluane First Nation and other Yukon First Nations.

***Encumbering Right:*** Every license, permit or other right, and every right, title or interest that existed prior to the land becoming KFN Settlement Land under section 5.4.2 of the *Kluane First Nation Final Agreement* (2003)

***Environment:*** The territory in which a community lives, including biophysical and socio-ecological systems.

***Environmental Assessment:*** The formal process in Canada through which a proposed development project is reviewed and decision-making is justified. This process occurs through distinct regulatory institutions at the federal, provincial and territorial government levels (CEAA, 2015).

***Environmental Impact:*** Any adverse environmental effect, whether real or potential, resulting from a proposed development (CEAA, 2015).

***Final Agreement:*** A comprehensive land claims agreement signed between a Yukon First Nation, the Government of Canada and Government of Yukon (Council of Yukon First Nations, 2015).

***Indigenous peoples / groups / communities:*** “‘Indigenous peoples’ is a collective name for the original peoples of North America and their descendants.” “Aboriginal peoples is also used.” (Crown-Indigenous Relations and Northern Affairs Canada, 2017). Globally, the term Indigenous peoples has been used by the United Nations (UN General Assembly, 2007) to describe the range of original peoples of varying regions and their descendants. In Canada under the *Canadian Constitution* (1982) three groups of Indigenous [Aboriginal] peoples are recognized: Indians, Métis and Inuit. The terms Indigenous groups and communities are used relatively interchangeably, but usage of the term Indigenous group may refer to the higher nation-level organizations composed of distinct individual Indigenous communities. For the purposes of this thesis, the terms ‘Aboriginal’ and ‘First Nations’ are only used where derived from a direct quotation or organizational nomenclature including those employed by Yukon First Nations in Yukon Territory. This is in recognition of the evolving nature of

societal interpretations aligned with the United Declaration for the Rights of Indigenous Peoples (UN General Assembly, 2007).

***Industrial Development:*** A type of land use that involves the extraction, transport or consumption of natural resources, and may pose significant environmental and socio-economic impacts on the Environment.

***Land Claims:*** For the purpose of this research, Lands Claims refers to comprehensive land claims that occurred in the Yukon between 1990 and the early 2000's, based on the assessment that there may be continuing Indigenous rights to lands and natural resources. Comprehensive claims arise where Indigenous title has not previously been dealt with by treaty and other legal means. The claims are called 'comprehensive' because of their wide scope. They include such things as land title, harvesting rights and financial compensation (AANDC, 2010).

***Northern Pipeline Agency:*** The Northern Pipeline Agency is established under the Northern Pipeline Act (1985) as the primary regulatory overseer of the Alaska Highway Gas Pipeline Project.

***Resource Management:*** Resource management is the process through which decisions regarding natural resources and land use are made through a variety of jurisdictions.

***Settlement Land:*** Land that has been granted from the Crown in title "equivalent to fee simple" to Yukon First Nations under Land Claims.

## Table of Contents

<b>ABSTRACT .....</b>	<b>II</b>
<b>GLOSSARY .....</b>	<b>III</b>
<b>ACKNOWLEDGEMENTS.....</b>	<b>XII</b>
<b>CHAPTER 1: INTRODUCTION AND CONTEXT.....</b>	<b>1</b>
<b>1.0 INTRODUCTION.....</b>	<b>2</b>
1.1 RESEARCH PURPOSE .....	4
1.2 RESEARCH PROBLEM .....	7
1.3 RESEARCH QUESTIONS .....	10
1.3.1 Primary question.....	12
1.3.2 Sub-questions.....	13
<b>2.0 CONTEXT .....</b>	<b>13</b>
2.1 KLUANE FIRST NATION .....	15
2.2 ALASKA HIGHWAY GAS PIPELINE .....	17
2.2.1 History .....	17
2.2.2 Pipeline Characteristics and Route .....	18
2.3 REGULATORY FRAMEWORK .....	19
2.3.1 Northern Pipeline Act / Agency (NPA).....	20
2.3.2 Yukon Land Claims and Devolution .....	23
2.4 EASEMENT .....	27
2.5 ENCUMBERING RIGHTS.....	29
2.6 ENVIRONMENTAL IMPACTS .....	32
2.7 ENVIRONMENTAL ASSESSMENT .....	35
2.8 CONSULTATION.....	38
2.9 ECONOMIC CONSIDERATIONS .....	40
2.9.1 Natural Gas Market.....	40
<b>CHAPTER 2: THEORETICAL AND PRACTICAL FOUNDATIONS .....</b>	<b>43</b>
<b>1.0 INTRODUCTION.....</b>	<b>44</b>
<b>2.0 ENVIRONMENTAL AND SOCIO-ECONOMIC ASSESSMENT .....</b>	<b>49</b>
<b>3.0 EASEMENT AS ENCUMBERING RIGHT .....</b>	<b>56</b>
<b>4.0 CONSULTATION .....</b>	<b>61</b>
<b>5.0 RESILIENCE OF SOCIAL-ECOLOGICAL SYSTEMS.....</b>	<b>66</b>
<b>6.0 GOVERNANCE IN RESOURCE AUTHORIZATIONS .....</b>	<b>68</b>
6.1 RESOURCE MANAGEMENT PERSPECTIVES .....	70

6.2	DECOLONIZATION AND RECONCILIATION .....	80
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## **CHAPTER 3: METHODOLOGY.....83**

<b>1.0</b>	<b>INRODUCTION .....</b>	<b>84</b>
<b>2.0</b>	<b>METHODOLOGY.....</b>	<b>87</b>
<b>2.1</b>	<b>DECOLONIZING FRAMEWORK.....</b>	<b>95</b>
2.1.1	CREDIBILITY .....	98
2.1.2	ETHICS .....	99
2.1.3	CRITICAL REFLEXIVITY .....	102
2.1.4	OPEN DIALOGUE .....	103
2.1.5	RECIPROCITY .....	104
2.1.6	RECOGNITION .....	105
2.1.7	RESPECT.....	108
2.1.8	FLEXIBILITY .....	109
2.1.9	TRANSFORMATION.....	110
<b>2.2</b>	<b>METHODS .....</b>	<b>111</b>
2.2.1	CASE STUDY .....	111
2.2.2	DATA COLLECTION.....	112
2.2.3	DATA ANALYSIS .....	117

## **CHAPTER 4: RESEARCH FINDINGS..... 123**

<b>1.0</b>	<b>INTRODUCTION.....</b>	<b>124</b>
<b>2.0</b>	<b>KEY THEMES AND RELATED CONCEPTS .....</b>	<b>126</b>
<b>2.1</b>	<b>INDIGENOUS AND TREATY RIGHTS .....</b>	<b>127</b>
2.1.1	LÙ’ÀN MĀN KU DĀN/ KLUANE LAKE PEOPLE .....	127
2.1.2	LEGAL CONTEXT.....	128
<b>2.2</b>	<b>ALASKA HIGHWAY GAS PIPELINE EASEMENT AS AN ENCUMBERING RIGHT .....</b>	<b>129</b>
2.2.1	LOCAL DEFINITIONS AND UNDERSTANDING .....	129
2.2.2	LAND CLAIMS NEGOTIATIONS.....	131
2.2.3	CONSENT / ACCEPTANCE .....	134
2.2.4	ALL-ALASKA GAS PIPELINE ROUTE AND EASEMENT EXTENSION.....	137
2.2.5	“GRANDFATHERED IN” / ENCUMBERING RIGHT .....	140
2.2.6	LAND USE PLANNING CONSIDERATIONS .....	141
2.2.7	MANAGEMENT SYSTEM.....	142
<b>2.3</b>	<b>GOVERNANCE.....</b>	<b>148</b>
2.3.1	INDIGENOUS SELF-GOVERNANCE.....	149
2.3.2	NORTHERN PIPELINE AGENCY (NPA) .....	151
2.3.3	DECISION-MAKING AUTHORITY .....	152
<b>2.4</b>	<b>CONSULTATION .....</b>	<b>154</b>
2.4.1	INDIGENOUS AND PUBLIC RELATIONS .....	154
2.4.2	PROCESS ISSUES.....	155
2.4.3	SOCIO-ECONOMIC IMPACTS AND BENEFITS.....	159

2.4.4	SELF-GOVERNING AND NON-SELF-GOVERNING INDIGENOUS COMMUNITIES .....	160
2.4.5	INDIGENOUS YUKON ALLIANCE .....	160
<b>2.5</b>	<b>ASSESSMENT .....</b>	<b>161</b>
2.5.1	COMMUNITY CONCERNS.....	162
2.5.2	PREFERRED ROUTE OPTIONS AND THE L' N MAÑ/KLUANE LAKE CROSSING .....	164
2.5.3	OTHER COMMUNITY CONCERNS .....	171
2.5.3.2	Fish and Wildlife Impacts.....	171
2.5.3.3	Access Impacts .....	172
2.5.3.4	Permafrost.....	173
2.5.3.5	Seismic / Earthquakes.....	174
2.5.3.6	Drawing upon Past Impacts .....	175
2.5.4	SOCIO-ECONOMIC ASSESSMENT PROCESS.....	176
2.5.4.1	Minimal Local Benefits .....	176
2.5.4.2	Natural Gas Access.....	178
2.6.1	WORLDVIEWS .....	180
2.6.1.1	First Nation Homeland.....	180
2.6.1.2	Traditional Knowledge .....	181
2.6.1.3	Corporate Interest .....	182
2.6.2	CHANGE .....	182
2.6.2.1	Outside Influences .....	183
2.6.2.2	Timeframe.....	183
2.6.2.3	Awareness.....	184
2.6.2.4	Empowerment.....	186
	<b>CHAPTER 5: DISCUSSION, RECOMMENDATIONS AND CONCLUSION .....</b>	<b>188</b>
<b>5.0</b>	<b>INTRODUCTION.....</b>	<b>189</b>
<b>5.1</b>	<b>DISCUSSION .....</b>	<b>200</b>
5.1.1	FRAGMENTED LEGISLATIVE FRAMEWORK / JURISDICTIONAL OVERSIGHT.....	200
5.1.2	PROBLEMATIC TIMEFRAME .....	209
5.1.3	INADEQUATE CONSULTATION .....	213
5.1.4	BROKEN ENVIRONMENTAL ASSESSMENT PROCESS .....	223
<b>5.2</b>	<b>RECOMMENDATIONS.....</b>	<b>232</b>
5.2.1	RESTRUCTURE OR DISSOLVE THE NORTHERN PIPELINE AGENCY (RECOMMENDATION #1).....	233
5.2.1.1	<i>Consultation Clarification .....</i>	<i>234</i>
5.2.2	CHANGE THE “BUSINESS-AS-USUAL” APPROACH FOR THE UPCOMING NEXT EASEMENT EXPIRY DATE. (RECOMMENDATION #2) .....	235
5.2.3	MODERNIZE THE ASSESSMENT PROCESS (RECOMMENDATION #3) .....	240
5.2.4	ESTABLISH AN INDIGENOUS YUKON ALLIANCE ON PIPELINES (RECOMMENDATION #4).....	245
<b>5.3</b>	<b>CONCLUSION.....</b>	<b>252</b>
	<b>REFERENCES.....</b>	<b>255</b>
	<b>APPENDICES .....</b>	<b>267</b>
	APPENDIX I: SUPPLEMENTAL RESEARCH FINDINGS .....	267



APPENDIX II: SURVEY INSTRUMENTS .....	269
A. Participant Information Letter/Consent Form .....	269
B. Researcher Ethics Statement .....	273
C. Confidentiality Agreement .....	275
D. Semi-structured Interview Guide (for KFN citizens) .....	277
E. Semi-structured Interview Guide (for KFN Elders) .....	278
F. Semi-structured Interview Guide (for federal or territorial government, industry and organizational participants) .....	279
APPENDIX III: RESEARCH ETHICS .....	281
A. UNBC Research Ethics Board (REB) Protocol for Research with Human Participants.....	281
B. Consent from Kluane First Nation .....	285
C. Consent from Yukon Government .....	287
APPENDIX IV: NORTHERN PIPELINE AGENCY CORRESPONDENCE EXAMPLE .....	289
APPENDIX V: KFN CORRESPONDENCE EXAMPLE .....	291
APPENDIX VI: COPY OF EASEMENT AMENDING AGREEMENT (2012) .....	295

## List of Tables

Table 1. NPA Consultation Schedule, 2011 - 2014 .....	39
Table 2. Connections between research and semi-structured interview questions.....	90
Table 3. Most repeated nodes from the interview data. ....	267

## List of Figures

Figure 1. Alaska Highway Gas Pipeline Route: red line; Ł ’ n Mǎn Keyi/Burwash Landing: yellow star (Yukon Government, 2013).....	19
Figure 2. The AHGP Easement, outlined in a double black line (e.g. south Ł ’ n Mǎn/Kluane Lake watercrossing), with circle showing location of Ł ’ n Mǎn Keyi/Burwash Landing (Yukon Government, 2014). ....	28
Figure 3. Survey Plan showing an example of Encumbering Rights: the Alaska Highway Gas Pipeline Easement and a Pipeline Land Reservation (outlined in red) surveyed over KFN Category A Settlement Land parcels R-1A and R-47A, just west of Ł ’ n Mǎn Keyi/Burwash Landing (Yukon Government, 2014). ....	31
Figure 4. Key themes and concepts derived from the interview data. ....	126
Figure 5. Original registered Foothills PipeLines (South Yukon) Ltd. Atlas alignment sheets (Foothills PipeLines (South Yukon) Ltd., 1982).....	145

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## **CHAPTER 1: INTRODUCTION AND CONTEXT**

## **1.0 INTRODUCTION**

This graduate-level applied thesis, conducted in partnership with Kluane First Nation (KFN), focuses on identifying the possible impacts of a long-standing Easement for the Alaska Highway Gas Pipeline (AHGP) Project from the perspective of Kluane First Nation, whose Traditional Territory and Settlement Lands this pipeline crosses in southwest Yukon. The particular Easement in question is a specific and exclusive right, owned by TransCanada Pipelines Ltd. (“TransCanada), to build and maintain a natural gas pipeline. The Easement became registered under the Yukon territorial Government’s Land Titles Office via a Certificate of Title in July 1984. This registration followed the 1983 project approval by the Northern Pipeline Agency and National Energy Board of Canada.

This thesis will demonstrate the AHGP Easement is the most important factor enabling the yet unconstructed Alaska Highway Gas Pipeline Project to continue for the past thirty-five-plus years. The Easement has been amended and renewed three times since its initial 1984 registration, most recently in September 2012 when the Northern Pipeline Agency (NPA) approved a ten-year extension until September 2022. NPA’s decision to renew the Easement raised significant concern among Kluane First Nation and other Yukon First Nations (KFN, 2012).

Research examining the consequences of the continued existence of a pipeline Easement through a self-governing Yukon First Nation’s traditional territory and established Settlement Lands is an important topic of consideration that currently remains unexplored in the scientific literature. This thesis seeks to inform Kluane First Nation, in addition to other Yukon First Nations, Yukon Government, the federal government, and TransCanada

Pipelines Ltd. of this practical problem by elaborating on the outstanding issues that KFN has raised and which remain unresolved. Scientific literature and popular media about environmental and socio-economic assessment, Indigenous consultation and resource management indicate continued issues with such systems in Yukon, other areas of Canada and more broadly from the perspective of Indigenous Rights frameworks, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (UN General Assembly, 2007).

Recent literature (e.g. Booth & Skelton, 2011; Yakovleva, 2014; McCreary & Milligan, 2014) has addressed issues of environmental justice regarding Indigenous communities' perspectives of proposed pipeline developments. However, little is known about the perspectives of Indigenous communities relating to potential consequences that could emerge from the perpetuation of long-standing pipeline easements authorized within their traditional territories. Such issues are paramount to Indigenous peoples and the fabric of Canadian society, linking the social, economic, environmental and political rationales for decision-making into natural resource development projects.

Resource management systems have evolved throughout Canada since the beginning of the Alaska Highway Gas Pipeline Project. In the Yukon, land claims have predominately been settled between the Government of Canada, Yukon First Nations and Government of the Yukon, resulting in substantial legislative and policy changes. Changes include a new environmental and socio-economic assessment process unique to the Yukon under the *Yukon Environmental Assessment Act* (2003). Canadian case law has also expanded to demonstrate the nature, extent and scope of Indigenous rights and Treaty rights, protected under Section 35 of the *Constitution of Canada* (1982). Yet, outdated environmental assessment and

resource management systems based in colonialist and liberal capitalist foundations continue to exist in Canada, and it is worth unraveling and transforming the dysfunctional components of such systems (Asch, 2011; Dokis, 2015; Berkes et al., 2000). In doing so, there is great opportunity to enhance the social and ecological resilience of resource management systems and communities that rely upon the land and resource base (Berkes et al., 2000).

## **1.1 Research Purpose**

This research focuses on the possible effects of the Alaska Highway Gas Pipeline (AHGP) Easement from the perspective of Kluane First Nation and within the context of a specific administrative, consultative and regulatory review process, and a framework of environmental and social justice and social-ecological resilience. Why does this registered Easement remain in existence solely in Yukon, and how can it still be justified under present environmental, social and economic circumstances? While the research seeks to identify past, present and future consequences of the Easement across the lifetime of the AHGP project, it focuses on the decision to renew the Easement and the key consequences emerging from the research related to the Crown's legal duty to consult adequately with Indigenous peoples of Canada.

Aiming to center key issues and develop practical recommendations, this research sought to identify a collaborative resolution to a real-world research problem, focusing on an existing long-standing pipeline easement for the following reasons:

- As an applied case study, it aims to examine and address a real world problem, providing practical solutions and recommendations that are useful to the local Indigenous community around which the research project developed.
- This case study examines why Kluane First Nation (KFN) took significant issue with



the Alaska Highway Gas Pipeline Project and 2012 extension of the AHGP

Easement resulting from what KFN viewed as an inadequate consultation process led by the federal Northern Pipeline Agency.

- A pipeline easement by design grants its pipeline company owner an exclusive right to construct a pipeline, following an environmental assessment and regulatory review process. An easement represents potential future impacts to lands through which it crosses during pre-construction, construction and operation phases (National Energy Board, 2010).
- Pipeline easements typically carry set terms, but from a pipeline company's perspective they are intended to last indefinitely until a pipeline can be constructed (National Energy Board, 2010). In the case of the Alaska Highway Gas Pipeline, the Easement has been renewed three times since it was first registered, enabling an initial term of three years to construct a pipeline that was then extended for twenty-five years (from 1983 / 1987 to 2012), and then again for another ten years (2012 – 2022) (NPA, 2012; Yukon Land Titles, 1984).
- There are several examples of pipeline easements that have been registered for decades in Canada, such as the Kinder Morgan's TransMountain Expansion Project.<sup>1</sup> Both the Alaska Highway Gas Pipeline and the TransMountain Expansion Project demonstrate how a pipeline company can hold an easement for decades, leading to possible consequences for local communities. This includes Indigenous concerns about potential project impacts to lands and resources where communities hold

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<sup>1</sup> The controversial, now federally approved "twinning" or expansion of the company's already-constructed oil pipeline largely was proposed within the existing registered easement.

strong constitutionally protected Indigenous rights, which may have historically been overlooked. It is outside the scope of this research to determine how many pipeline easements are currently registered in Canada nor how long they have been registered; however, this would be an interesting and relevant subject to further pursue as a research project.

- Therefore, it is relevant to examine the process and structures through which an easement such as the Alaska Highway Gas Pipeline Easement came into existence, and how it is administratively managed.

The research will provide KFN with useful knowledge which government and citizens can use to assess ongoing consultation issues around the AHGP Easement. At present, the Easement Agreement is due to expire in September 2022 (NPA, 2014). Before its expiry, if TransCanada applies to renew the Easement Agreement, the Northern Pipeline Agency and TransCanada will be required to carry out community consultation as part of a regulatory review process. Additionally, TransCanada could elect to proceed to the construction phase for the AHGP prior to September 2022. The research also expected to raise awareness of issues related to the AHGP Easement within the KFN community, and among the federal and territorial governments, TransCanada and other pipeline industries, the academic community and the public.

Broadly, the research aims to deepen the understanding of practical First Nation concerns, experiences and views regarding industrial development in Canada. As Booth and Skelton (2011) suggest regarding industrial development: "...additional case studies, particularly case studies that are developed by the Indigenous peoples' themselves, are crucial in expanding our understanding of the issue" (p. 686). As such, the research intends

to recognize and provide recommendations for the Alaska Highway Gas Pipeline (AHGP) Easement, based upon Kluane First Nation's environmental and socio-economic perspectives. The AHGP Easement, as a perpetual precursor to constructing an actual pipeline within KFN Traditional Territory, poses several potential significant consequences to KFN that this research focuses on addressing prior to the Easement's current expiry date of September 2022.

Although the research utilizes a case study approach, as described in Chapter 3 – Methodology, it may also be relevant and possibly transferable outside of the local KFN community context. There are seven other Yukon First Nations through whose Traditional Territory the AHGP Easement crosses who may also be interested in the findings that emerge from this research (including those who like KFN have ratified modern comprehensive treaty agreements, and those who have opted not to engage in treaty). Additionally, there are several other large-scale, controversial pipeline projects involving Indigenous Rights issues likewise carry long-standing easements towards which this thesis may provide relevant insights, including the Mackenzie Valley Pipeline (Dokis, 2015; Fontaine, 2017), TransCanada's Energy East and Keystone XL Projects, and Kinder Morgan's TransMountain Expansion Project (Kinder Morgan, 2016; National Energy Board, n.d.). The need for greater responsibility in recognizing the environmental and socio-economic concerns of Indigenous nations, particularly by federal regulatory and territorial bodies and industry, makes this topic well worth studying within the interdisciplinary field of environmental science.

## **1.2 Research Problem**

Kluane First Nation (KFN) holds Indigenous rights (including title) and Treaty rights (collectively, Indigenous Interests) protected under Section 35 of the *Constitution of Canada*.

KFN signed a *Final Agreement* in 2003 and in this comprehensive modern treaty agreement the Easement is described as an Encumbering Right, meaning it is a restrictive right overlapping KFN *Settlement Lands* (refer to Appendix B of the KFN *Final Agreement*). The AHGP Easement is the primary mechanism granting its owner, TransCanada Pipelines Ltd., the authorization necessary to construct a large-scale natural gas pipeline through Yukon Territory. KFN has lived since time immemorial in the Kluane Region, through which a significant portion of the proposed Alaska Highway Gas Pipeline passes, in an area recognized to be of national conservation significance (KFN, 2015; Wildlife Conservation Society Canada, 2015).

The Easement covers 1042.7 hectares of Kluane First Nation Settlement Lands that were established in 2003 under the KFN *Final Agreement* via a comprehensive land claims process that began in 1973, prior to the proposal for the Alaska Highway Gas Pipeline (AHGP). The Easement has been amended and renewed three times since 1984, most recently in September 2012. During the timeframe of the AHGP Easement, indications of the Government of Canada's shifting political positions towards reconciliation with Indigenous peoples of Canada have emerged. Milestones include the legal recognition and protection of Indigenous and Treaty Rights defined under Section 35 of the Canadian *Constitution* (1982), the culmination of Yukon Land Claims (circa the early 2000's), the federal Liberal Government's affirmation (Fontaine, 2016) to fully support, adopt and implement the United Nations (2007) Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Truth and Reconciliation Commission of Canada's (2015) *Calls to Action*. Such movements demonstrate the high degree of relevance this research carries for all parties involved.

The research aims to examine the unique administrative structure and processes in

place for a particular pipeline project (i.e. Alaska Highway Gas Pipeline Project, previously known as Foothills Pipeline). While specific in scope, this research also considers the wider context of pipeline Easements in our current era, which is marked by climate change and heightened controversy over further development of oil and gas resources globally, nationally, regionally and locally. News surrounding the U.S. Army Corps of Engineer's granting of the final easement for the Dakota Access Pipeline on February 8, 2017 (Reuters, 2017), the Kinder Morgan TransMountain Expansion Project, and various other pipeline projects, brings to the forefront the importance of registered pipeline easements as the final steps necessary to authorize construction. For Indigenous peoples whose traditional territories proposed pipeline routes cross, authorizations to construct pipelines may carry significant concerns around the potential adverse impacts the pipeline presents to their lands, resources and communities.

Indigenous Rights and Treaty Rights issues remain highly active and evolving in Canadian courts, and Indigenous peoples have won and continue to win a substantial number of court decisions (Gallagher, 2012). Related to such legal battles, significant resource management issues exist in Canada among Indigenous governments, federal, territorial and provincial governments, industry stakeholders and the public. Kluane First Nation members are well-aware of the emergent legal determinations in favour of Indigenous peoples in Canada over the past few decades, founded upon Section 35 of the *Canadian Constitution* (1982).

While Kluane First Nation citizens hold diverse views of the Alaska Highway Gas Pipeline project, the research questions sought to address how KFN citizens have experienced and perceived past, present and future potential consequences of the AHGP

Easement. In turn, data gathered from interviews and literature review as based upon the research questions determined the issues of focus for KFN and the researcher within the assessment and consultation process. This ultimately led to the development of recommendations for the next upcoming AHGP Easement expiry in September 2022.

### **1.3 Research Questions**

At the outset of this study, I hypothesized the establishment and continuation of the Alaska Highway Gas Pipeline Easement involved a flawed environmental and socio-economic assessment, Indigenous consultation and federal decision-making process, which could demonstrate past, present and possible future adverse effects to Kluane First Nation. Consequences of the Alaska Highway Pipeline Easement, I continued to hypothesize, would be perceived and experienced by KFN research participants, and that KFN's perceptions of consequences would differ significantly from those presented by federal and territorial government representatives and industry. These expectations were based upon my current knowledge of the research context and a review of relevant literature. I considered the AHGP review process to be outdated, as evidenced by the entrenched bureaucratic structure of the Northern Pipeline Agency. Initial conversations with the KFN Chief and Director of Lands, Resources and Heritage further highlighted the need for an independent review of the lack of adequate consultation on the part of the federal government for the Easement extension decision, in light of the potential ongoing adverse effects from the Easement experienced by KFN.

Initially, I reflected that a review of possible consequences associated with the AHGP Easement could be ascertained by developing questions around the following issues, including:

- Possible past, present and future consequences of the Easement to Kluane First Nation;
- Outstanding concerns from Kluane First Nation citizens about the AHGP Easement;
- How has / has not the AHGP environmental and socio-economic assessment process incorporated Kluane First Nation's perspectives;
- The Crown's rationale for the Easement extension, especially given TransCanada's 2012 declared route preference solely through Alaska, and the current economic circumstance for LNG in North American and global markets; and
- Whether and how Kluane First Nation's views and interests have been recognized as part of the federal government's review and decision-making process around the extension of the AHGP Easement.

The research questions are flexibly-designed around the pivotal problem of the Easement as it pertains to the procedural issues of environmental and socio-economic assessment, Indigenous consultation and regulatory review. These key questions can be viewed as interwoven in that they are part of the same overall framework of a major industrial project's multi-phased authorization process. Yet, these streams of questions are also distinctive, as they explore different time periods, contexts and governance structures throughout the lifetime of the AHGP Easement.

What has transpired over time with the AHGP Easement is particularly relevant given the implementation of KFN's *Final Agreement* (2003), and KFN's outstanding concerns around the decision to extend the timeframe of the Easement's authorization until September 2022. KFN considers this long-standing issue necessary to resolve prior to then, prior to which time TransCanada is expected to again submit an application to the Northern Pipeline

Agency for another extension of the Easement.

KFN has been affected by the consultation, assessment, and decision-making process since the Alaska Highway Gas Pipeline was first proposed in the Yukon in 1977. This pipeline has never been built—largely due to economic conditions of both global and North American markets driving down the price and demand of natural gas. In the thirty-five years since the AHGP was granted federal approval, Kluane First Nation has been resilient in the face of socio-ecological change and the community has continued to challenge elements of the pipeline project and push for greater co-management and collaborative planning between KFN and the territorial and federal governments.

This research is highly relevant to Kluane First Nation and as this thesis will discuss, to Yukon Government and Northern Pipeline Agency of Canada representatives, who may also carry a significant interest in the questions posed by this research. Critical questions remain regarding the Easement from the perspective of implementing modern land claims agreements and protection of Indigenous rights and Treaty rights under Section 35 of the *Canadian Constitution*.

The research questions are listed briefly below. Chapter 2 – Theoretical and Practical Framework, places each question within its appropriately themed theoretical framework. Chapter 3 – Methodology, describes in detail the information sought via the research questions, and Appendix 1 provides a complete list of the semi-structured interview guide questions.

### **1.3.1 Primary question**

- I. *What potential consequences of the Alaska Highway Gas Pipeline (AHGP) Easement may be experienced and perceived by Kluane First Nation?*



### 1.3.2 Sub-questions

- i. From Kluane First Nation's perspective, have any possible consequences for the AHGP been left unaddressed in the environmental assessment process to date?*
- ii. From Kluane First Nation's perspective, has the consultation process been adequate to address possible consequences from the AHGP Easement and associated land reservations for the pipeline? Why or why not?*
- iii. From Kluane First Nation's perspective, should the Northern Pipeline Agency allow the AHGP Easement to be continually renewed if the pipeline may never be built? Why or why not?*
- iv. From the perspective of relevant industry, territorial and/or federal government representatives, have Kluane First Nation perspectives related to possible consequences from the AHGP been recognized by their respective organizations as part of their project decision-making within KFN Traditional Territory?*
- v. How have the environmental, social and economic perspectives of Kluane First Nation been recognized through the regulatory review and consultation processes involved in establishing and continuing the AHGP Easement?*

## 2.0 CONTEXT

This section describes the background and foreground through which the proposed applied case study emerged. It will begin with a brief description of the following organizations and project elements:

- Kluane First Nation

- Alaska Highway Gas Pipeline Project (AHGP)
- Regulatory agencies and processes involved
- Relevance of Yukon Land Claims and Devolution
- Establishment and continuation of the Easement
- Environmental and socio-economic context of Kluane First Nation and associated potential AHGP project-related impacts
- Environmental assessment process
- Consultation process, and
- Economic considerations.

The research is situated amid a complex, multi-scaled arrangement of government bodies (Kluane First Nation, Yukon Government and Government of Canada) and the administrative, corporate, and public realities and processes embedded within them. These contextual realities and processes, as described below and further anchored and elaborated in Chapter 2's Theoretical Framework, will be viewed as part of a social-ecological system wherein differing governance systems interact via resource management and environmental assessment frameworks that shift over time.

The theoretical framework of social-ecological resilience systems theory (Berkes and Folke, 1998) enables us to better understand Indigenous perspectives of resource management within their traditional territories. In terms of this case study, this framework will provide an assessment of impacts related to Settlement Lands from the Kluane First Nation *Final Agreement* (2003) as a negotiated, comprehensive modern treaty. It is important within this context to consider how Indigenous perspectives and systems may continue to be impacted by Western bureaucratic systems (and ideologies) (Nadasdy, 2003).

Legislatively, this research is situated within legal agreements and regulatory mechanisms designed specifically for the Alaska Highway Gas Pipeline Project (AHGP) and overseen by a particular agency, the Northern Pipeline Agency (further described in Sections 2.2 and 2.3.1, respectively). The legislative context for the AHGP overlaps the establishment of finalized Yukon Land Claims agreements between Yukon First Nations, Government of Canada and Yukon Government. The resulting process of Devolution, i.e. delegation and transference of powers from the federal government to Yukon First Nations and the Yukon territorial government, is also relevant to the case of the AHGP Easement. Economically, the research is situated within the context of a volatile natural gas market operating at a range of scales. Socially and ecologically, the research is also situated around scientific critiques of and recent improvements to the environmental assessment process in Canada, and questions around the continued development of pipelines in an era of heightened climate change concerns, geopolitical pressures, and legislative requirements around the Crown's fiduciary duty to Indigenous peoples of Canada.

## **2.1 Kluane First Nation**

The Ł' n Mǎn/Kluane Lake area is the traditional territory of the Ł' àn Mǎn Ku Dǎn, the Ł' n Mǎn Ku Dǎn/Kluane Lake People. The majority of the First Nation people from this area identify themselves as descendants of Southern Tutchone speakers and follow a matriarchal moiety system of two clans, *Khanjet* (Crow Clan) or *Águnda* (Wolf Clan). Other ancestors of the Kluane First Nation came from nations such as the Tlingit, Upper Tanana and Northern Tutchone. (Kluane First Nation, 2015)

Kluane First Nation's community is based in Ł' n Mǎn Keyi/Burwash Landing in the southwest Yukon, between the Alaska Highway and the northwest shores of Ł' n Mǎn/Kluane Lake, the largest natural lake in the Yukon. Ł' n Mǎn Keyi/Burwash Landing is located 276 road kilometres west of Kuanlin/Whitehorse via the Alaska Highway, which

was only connected by a wagon road until the Alaska Highway was built in 1942 (KFN, 2015). The current population of Ł ’ n Mǎn Keyi/Burwash Landing is approximately 95 people (Statistics Canada, 2015). At present, there are 230 registered KFN citizens, with approximately half of KFN citizens residing in Ł ’ n Mǎn Keyi/Burwash Landing, and other citizens residing in Kuanlin/Whitehorse or elsewhere in Canada and Alaska (KFN, 2015). Basic services in Ł ’ n Mǎn Keyi/Burwash Landing include KFN administration, public works, meeting hall, recreation facility, library, post office and bank, and cell phone service. The nearby community of Destruction Bay has a hotel, gas station, restaurant, nursing outpost, and grade school.

The main sources of employment in the community are with the KFN Government and Kluane Community Development Corporation. Other community members work locally for Yukon Highways and Public Works in the nearby community of Destruction Bay, or are self-employed (primarily in the guide outfitting, mining, and light industrial sectors) (KFN, 2015). “Commercial businesses... within KFN Traditional Territory are primarily focused on highway commercial use (local and seasonal) and tourism (seasonal). Housing demand has been high in Ł ’ n Mǎn Keyi/Burwash Landing over the past several years, and KFN continuously works to upgrade and expand services offered to KFN Citizens” (KFN, 2015).

KFN citizens actively harvest animals, fish, and plants from their traditional territory, and Kluane First Nation strives to sustain its traditional culture while building modern economic and community development opportunities. KFN culture and traditions remain integral to the community, as does the KFN *Self-Government* and *Final Agreements* signed between Kluane First Nation, Government of Canada and Yukon Government in 2003. Kluane First Nation is a legislated self-government under *the KFN Self-Government*

*Agreement* (2003), with Indigenous and Treaty rights protected under Section 35 (1) of the Constitution of Canada (1982). KFN has made significant strides in implementing the *KFN Final Agreement* (2003), the comprehensive modern treaty agreement described further in Section 2.3.2 – Yukon Land Claims and Devolution.

## **2.2 Alaska Highway Gas Pipeline**

### **2.2.1 History**

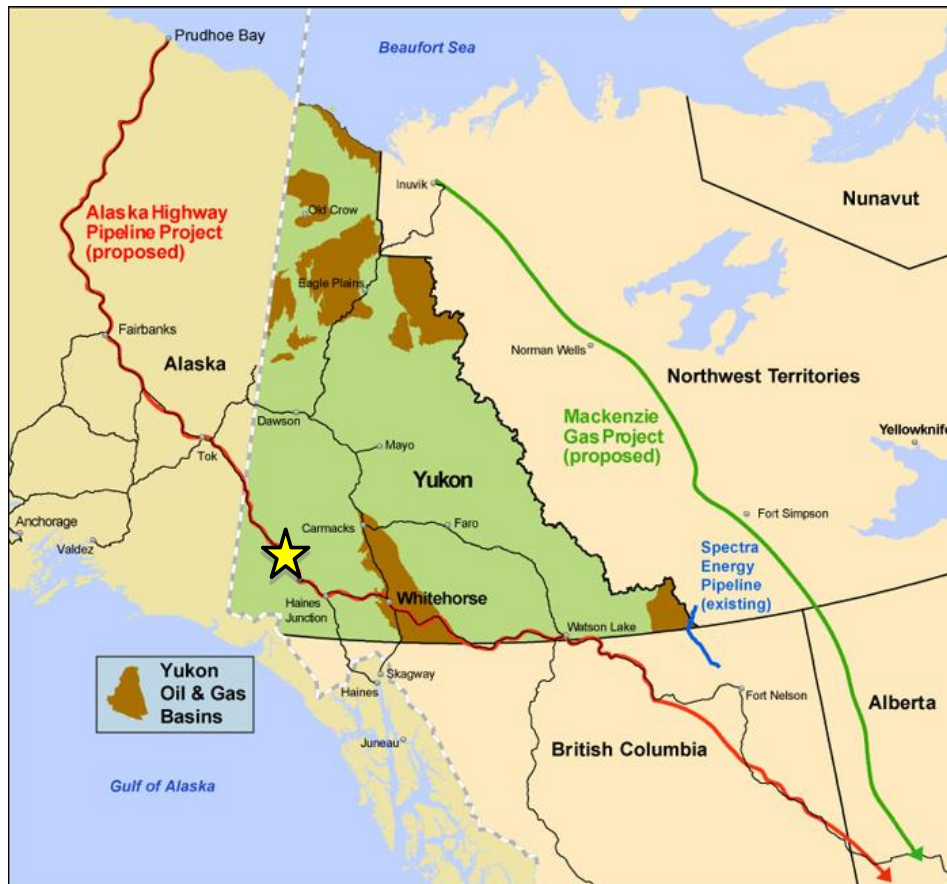
The Alaska Highway Gas Pipeline (AHGP) was first proposed in 1976, four years after the Yukon Land Claims process began. The period leading up to this date marked a turning point in Canadian history for pipelines and Indigenous peoples in the Yukon and Northwest Territories, with vast oil and gas reserves having been discovered in the late 1960's and early 1970's in Alaska and the Canadian Arctic (NPA 2012). In the famous Commission of Inquiry by Thomas Berger, conducted from 1975 – 1977, he recommended that a pipeline through southern Yukon would be acceptable whereas the Mackenzie Valley Pipeline route through northern Yukon would not be environmentally acceptable (NPA 2012). The Berger decision "...ushered in a new era in the relationship between indigenous people, governments in Canada and corporations that wished to develop resources on traditional indigenous lands" (Anderson et al., 2006).

While several companies had interest in pursuing a pipeline through the Yukon, Foothills Pipe Lines (South Yukon) Limited (now wholly owned by TransCanada Pipelines Ltd.) won the opportunity, following the National Energy Board's determination of the proposals through 214 days of hearings from 1975 – 1977.

### **2.2.2 Pipeline Characteristics and Route**

In 2004, TransCanada Pipelines Ltd. purchased full ownership of the Alaska Highway Gas Pipeline (AHGP) Easement and project, originally owned by Foothill Pipe Lines (South Yukon) Limited (NPA, 2012). The original 1976 pipeline proposal for the Easement was to construct a large-scale pipeline that would extend from the North Slope of Alaska through Alaska, Yukon and British Columbia before connecting with existing pipeline infrastructure in Alberta (NPA, 2012). Such a pipeline would primarily service U.S. markets.

The Yukon section of the Alaska Highway Gas Pipeline Project is a proposal by Foothills Pipe Lines (South Yukon) Limited. It involves the construction of a large-diameter, buried, gas transmission pipeline and ancillary structures in southern Yukon. The pipeline is a part of a larger system intended to carry natural gas from Alaska to the lower 48 States. The Canadian portion of the system would pass through Yukon, British Columbia, Alberta and Saskatchewan. The proposed route in Yukon is approximately 818 km long and parallels the Alaska Highway from Beaver Creek (Yukon-Alaska border) in the north, to Watson Lake (Yukon-British Columbia border) in the south (refer to Figure 1 showing map of proposed AHGP route through Yukon). (Federal Environmental Assessment and Review Office, 1982, p. 3)



**Figure 1.** Alaska Highway Gas Pipeline Route: red line; L ' n M̃n Keyi/Burwash Landing: yellow star (Yukon Government, 2013).

## 2.3 Regulatory Framework

The regulatory framework for the Alaska Highway Gas Pipeline is rather complex given the cross-jurisdictional nature of the project (including an international agreement between Canada and the United States) and the number of diverse Indigenous groups, in Alaska, Yukon, and British Columbia that need to be consulted. For the purposes of this research, the regulatory framework focuses on two key elements and interactions that have and continue to exist within Yukon: the *Northern Pipeline Act* / Agency and the Yukon Land Claims and Devolution processes. These frameworks link to the theoretical framework for this research, described in Chapter 2.

### 2.3.1 Northern Pipeline Act / Agency (NPA)

The Northern Pipeline Agency (NPA) is a small, single Canadian federal agency that was originally recommended for establishment in the *Lysyk Report* (1977), with unique powers transferred from the “traditional supervisory responsibility” of the National Energy Board of Canada, due to the regulatory complexity of the Alaska Highway Gas Pipeline Project (AHGP) (Lysyk et al., 1977, pp. 134-135). Following the *Lysyk Report* (1977), the NPA was established in 1978 through the *Northern Pipeline Act* to act as a single window through which to federally manage the regulatory process for the Canadian portion of the AHGP.

The Northern Pipeline Agency’s Mandate reads:

The Agency's mandate is twofold. It is required to carry out federal responsibilities in relation to the pipeline and facilitate the efficient and expeditious planning and construction of the pipeline taking into account local and regional interests, in particular those of native people. It is also responsible for maximizing the social and economic benefits from the construction and operation of the pipeline while at the same time minimizing any adverse effect on the social and environmental conditions of the areas most directly affected by the pipeline. (Government of Canada, 2016)

In addition, the NPA’s “proposed two-stage regulatory process” is described as carrying the following objectives:

- Meet or exceed modern environmental and socio-economic standards
- Ensure safe pipeline design and construction
- Secure maximum socio-economic benefits
- Contribute to the Government of Canada’s duty to consult Indigenous people
- Offer opportunities for public engagement and interaction
- Respect existing federal approvals and commitments



“Regulatory submissions relating to engineering, environmental and socioeconomic matters under the Northern Pipeline Act” (NPA, 2012) must be processed and assessed by the NPA, under the authority of a ‘Designated Officer’ as defined under the *Act*. Regulatory guidance and screening is also a function of the Northern Pipeline Agency (NPA, 2012). The Minister of Natural Resources of Canada under the *Act* has the authority to make decisions regarding the review of Plans. Additionally, “While the project has valid certificates and an easement through Yukon, more regulatory approvals are required before construction [of the AHGPP] could begin” (NPA, 2012). TransCanada requires approval from the federal Minister of Natural Resources, who is responsible for management of the Northern Pipeline Agency, before construction of any pipeline construction may begin (Boughton Law Corporation, 2011).

The NPA (2012) describes its “proposed two-stage regulatory process” below:

- In the first stage of the regulatory process, Advisory Councils established under s.19 of the *Northern Pipeline Act* will hold community meetings along the pipeline route in Yukon and B.C., to review updated environmental and socio-economic information and identify gaps and seek views from the public and Indigenous people directly affected by the project.
- The results of the Advisory Council review would inform the second stage of the process, the regulatory phase, led by the Designated Officer, a National Energy Board member appointed by Governor in Council as a regulatory official under the *Act*.
- The Designated Officer would consider these reports in determining whether to add, amend or rescind any environmental and socio-economic terms and conditions. The

reports would also go to the Minister and be relevant to a broad spectrum of federal, provincial, territorial and Indigenous government regulators.

- The Designated Officer would also review the environmental and socio-economic plans and programs submitted by TransCanada, and would have broad authority with respect to compliance monitoring and enforcement. As is the case with any pipeline project, federal representatives will be present in the field during construction to inspect and verify compliance with the federal regulatory approvals and any applicable federal requirements. Authorizations from other regulators would potentially be applied for and reviewed during this second stage of the regulatory process. (NPA, 2012)

These additional regulatory requirements prior to final approval for construction of the Alaska Highway Gas Pipeline can be summarized as follows: an environmental and socio-economic update/review by Advisory Councils; review by an assigned Designated Officer and others of regulatory filings and consideration of Advisory Council reports, including updated terms and conditions, pipeline specifications and design, approval of use of the AHGP Easement for pipeline construction, environmental and socio-economic plans and programs, assessment of major watercourse crossings, and route finalizations and modifications.

The NPA was created solely to administer a particular pipeline project and route, namely the Alaska Highway Gas Pipeline, due to the complex nature of this particular pipeline project, particularly the transnational jurisdictional elements and the project's consultation with potentially affected Indigenous peoples. The rationale for the creation of the NPA appears to have been largely jurisdictional, given the cross-national development

and commitment to a route between Canada and the United States. Significantly, the *Canada-U.S. Agreement on Principles Applicable to a Northern Natural Gas Pipeline* was signed in 1977, affirming a route between Canada and the United States. This agreement stands to this day. Additionally, cross-jurisdictional relations between Canada and Indigenous peoples in both Yukon and British Columbia had been recognized as a significant issue. Hence, the Northern Pipeline Agency became a special agency for administering the regulatory review process for the AHGP, which also stands to this day for that purpose. Why a federal agency exists solely to meet the purpose of one pipeline project that remains unconstructed after thirty-five years remains unclear, except that it had been created to address a problem specific to that time period in Canada – where large-scale pipelines were first being configured in the national arena.

The AHGP is technically pre-approved following the environmental and socio-economic assessment process occurring in the late 1970's / early 1980's, the Certificate of Public Convenience and Necessity issued for the project by the National Energy Board in 1982, and subsequent registration of the Easement with Yukon Land Titles in July 1984 (NPA, 2012). The legal agreements and amendments that have ensued appear to maintain the Northern Pipeline Agency's existence to oversee the remaining regulatory review necessary for the AHGP to ever be constructed, so long as the Easement remains in place.

### **2.3.2 Yukon Land Claims and Devolution**

The Yukon Land Claims process began around the same time as other Indigenous rights movements in Canada in the late 1970's. Prior to the 1970's, legal and political confrontations had occurred between Yukon First Nations and federal and territorial governments. For example, in the 1950's Kluane First Nation community members fought

for hunting rights following the creation of the Kluane Game Sanctuary that originally restricted KFN members from hunting within the sanctuary. Such early legal confrontations as *Kluane First Nation: Kluane National Park and Kluane Game Sanctuary Inquiry* addressed the right of KFN Citizens to hunt in the Kluane Game Sanctuary and Kluane National Park and Reserve (Indian Claims Commission, 2007).

As Lambrecht (2013) and Anderson et al. (2006) describe, an interesting historical correlation occurred between the comprehensive land claims policy developed by Canada, as this followed on the heels of the final report of the Berger Inquiry, which had recommended no pipeline should be built through the Mackenzie Valley until the land claims issue was settled, and the 1973 *Calder* decision by the Supreme Court of Canada, the unprecedented case that recognized the existence of Indigenous title in Canada.

Anderson et al. (2006) describe how the 1973 *Calder* decision led to a federal land claims policy, whereby:

...the Supreme Court of Canada recognized that Canada's indigenous people have an ownership interest in the lands that they and their ancestors have traditionally occupied, and the resources that they have traditionally used. Further, the Court held that this right had not been extinguished unless it was specifically and knowingly surrendered. As a result, the federal government adopted a land claims policy "to exchange claims to undefined Aboriginal rights for a clearly defined package of rights and benefits set out in a settlement agreement" (DIAND, 1997). Since this decision, there has since been a series of land claims agreements and treaties that have moved indigenous people in Canada a considerable distance toward their goal of control over their traditional lands and resources (Anderson et al., 2006).

The *Calder* decision has been followed by amendment of Section 35 of the *Canadian Constitution* to recognize and affirm the existence and protection of Indigenous rights (including Indigenous title) and Treaty rights in Canada. The *Delgamuukw* decision (1997) and *Tsilhqot'in* decision (2014) have further built upon and affirmed the existence of Indigenous title in Canada, and the provinces, territories and federal governments have

negotiated and continue to negotiate modern treaty processes and reconciliation agreements to clarify Indigenous rights and title.

Modern comprehensive treaty agreements, such as the *Yukon Umbrella Agreement* (1993) – the framework that established the Yukon Land Claims process – and the *Kluane First Nation Final Agreement and Self-Government Agreement*, clearly define a comprehensive set of rights among Yukon First Nations, Yukon Government and Government of Canada. This includes the creation of several natural resource planning and management councils and boards, a modern and unique environmental assessment process under the *Yukon Environmental and Socio-economic Assessment Act*, and other facets that essentially provided jurisdictional clarity over land and resource management in Yukon, including socio-economic components. Lambrecht (2013) discusses that while Yukon Government considered such agreements to provide the “written rule”, this has not been the case in reality and several grey areas have emerged around implementation of Yukon modern land claims agreements.

The Yukon Land Claims process occurred over nearly thirty years of negotiations between KFN and the federal and Yukon territorial governments, and is considered a comprehensive modern treaty process, protected under Section 35 of the *Canadian Constitution*. Eleven out of fourteen Yukon First Nations have signed land claims agreements, with the exception of White River First Nation, Liard First Nation and Ross River Dena Council. White River First Nation (WRFN) neighbours and has historic links to Kluane First Nation. However, WRFN’s assertion of 100% overlap with KFN Traditional Territory has created consultation and development-related challenges between the two Indigenous communities, project proponents and the Government of Canada. For example,

the *KFN Final Agreement* (2003), Schedule C, Resolution of Overlapping Claims identified a KFN Core Area for consultation purposes that WRFN has since contested. This unresolved overlap issue among KFN, WRFN and the Government of Canada remains highly relevant for all projects within KFN's Core Area and overall Traditional Territory, including the Alaska Highway Gas Pipeline, until such time as KFN receives assurance its development interests and investments will be protected.

The land claims process involved the devolution of federal responsibilities to Indigenous communities, including self-government, such as the ability of self-governing Yukon First Nations to develop and implement their own laws for their citizens and for their specifically granted rights, including surface (Category B) and subsurface (Category A) rights to lands, referred to as Settlement Lands.

The Yukon became the first territory in Canada to experience Devolution, the transfer of jurisdictional powers from the federal government to Indigenous groups under comprehensive land claims agreements (AANDC, 2013). As Natcher (2007) describes, Devolution involves the "...reimplementation of self-governing institutions and administrative processes" (pp. 271-272) and has been occurring to varying degrees throughout the world. In 2014, the Devolution process for the Northwest Territories became finalized, and Nunavut is currently working on a Devolution Agreement-in-Principle (AANDC, 2013). For Kluane First Nation (KFN) land claims culminated in the *Kluane First Nation Final Agreement* (2003), which provides KFN jurisdictional powers over 901.33km<sup>2</sup> of Settlement Lands, equivalent-to-fee simple land title. Devolution has affected administrative processes in the Yukon, including KFN's views of potential consequences of the AHGP Easement, as will be further described in Chapter 2, Theoretical and Practical

## 2.4 Easement

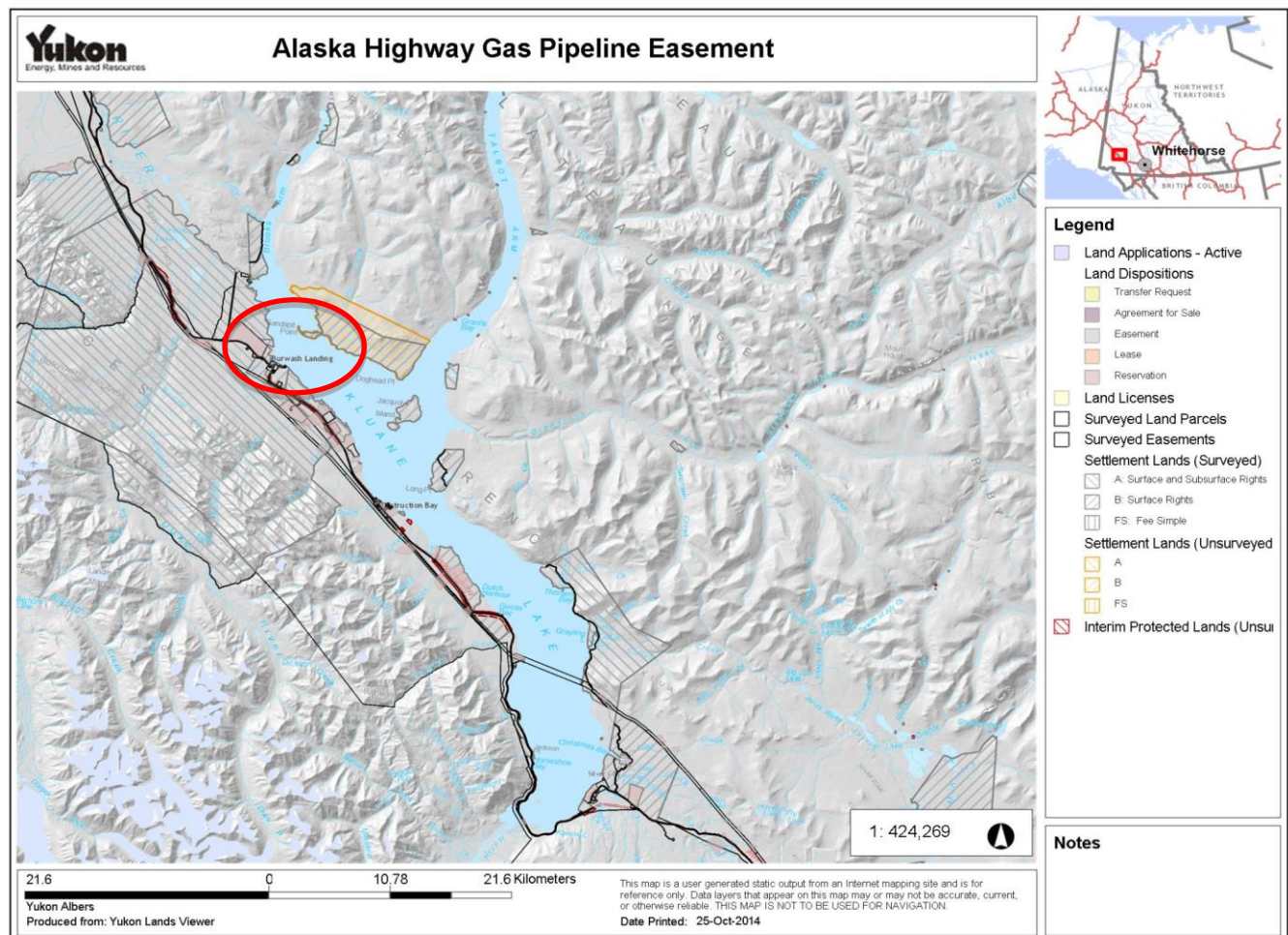
An easement agreement is a written agreement between the pipeline company and the landowner. Usually an easement agreement allows the company to construct and operate the pipeline while the landowner still owns the lands. An easement agreement sets out the rights and obligations of both the company and the landowner in regard to the use of the lands for the location of the pipeline and will often specify restrictions on the use of the land...An easement agreement will usually contain a clause about how long it lasts. The pipeline company usually keeps its right to the right-of-way indefinitely unless it abandons the pipeline and releases (ends) its easement rights. Until the company removes the easement from the land title or deed, or it is removed by an order of the court, the land remains subject to the easement agreement. (National Energy Board, 2010, p. 22)

The Alaska Highway Gas Pipeline (AHGP) Easement is a land tenure (property) right held by the pipeline company TransCanada Pipelines Ltd. to construct and operate the pipeline through the Yukon (NPA, 2011). Following conditional approval of the Alaska Highway Gas Pipeline (AHGP) in 1983, the AHGP Easement came into legal effect through the *Canada-Foothills Easement Agreement* (NPA, 2011); a land title certificate for the Easement was registered with the Yukon Land Titles Office in 1984. The 240 metre wide AHGP Easement runs 760 km through the Yukon, from Beaver Creek to Watson Lake, generally paralleling the Alaska Highway<sup>2</sup>. The AHGP Easement crosses through 100% of Kluane First Nation traditional territory. Since 1983, TCPL has applied for renewals and received approval from the NPA to amend the Easement Agreement three times (1987, 1992 and 2012).

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<sup>2</sup> An interesting aspect of the Alaska Highway Gas Pipeline remains that no easement was ever registered in British Columbia, though an environmental and socio-economic assessment and inquiry did occur over the same late 1970's and early 1980's time period there. Negotiations and agreements may still need to be reached with First Nations in British Columbia.

For greater clarity, under the *KFN Final Agreement* (2003), the AHGP Easement is called “the easement described in Certificate of Title 84Y726”. The Alaska Highway Gas Pipeline (AHGP) Easement is 240m wide right-of-way for the AHGP along the proposed pipeline route through the Yukon. The AHGP Easement is generally located parallel to the Alaska Highway and would cross through KFN Settlement Lands. The proposed pipeline would also cross through rivers and streams, including a proposed water crossing that would involve drilling under Ł ’ n Mǎn/Kluane Lake (see Figure 2). The *Easement Agreement*’s most recent extension in 2012 is next due for expiry in September 2022.



**Figure 2.** The AHGP Easement, outlined in a double black line (e.g. south Ł ’ n Mǎn/Kluane Lake water crossing), with circled location showing Ł ’ n Mǎn Keyi/Burwash Landing (Yukon Government, 2014).



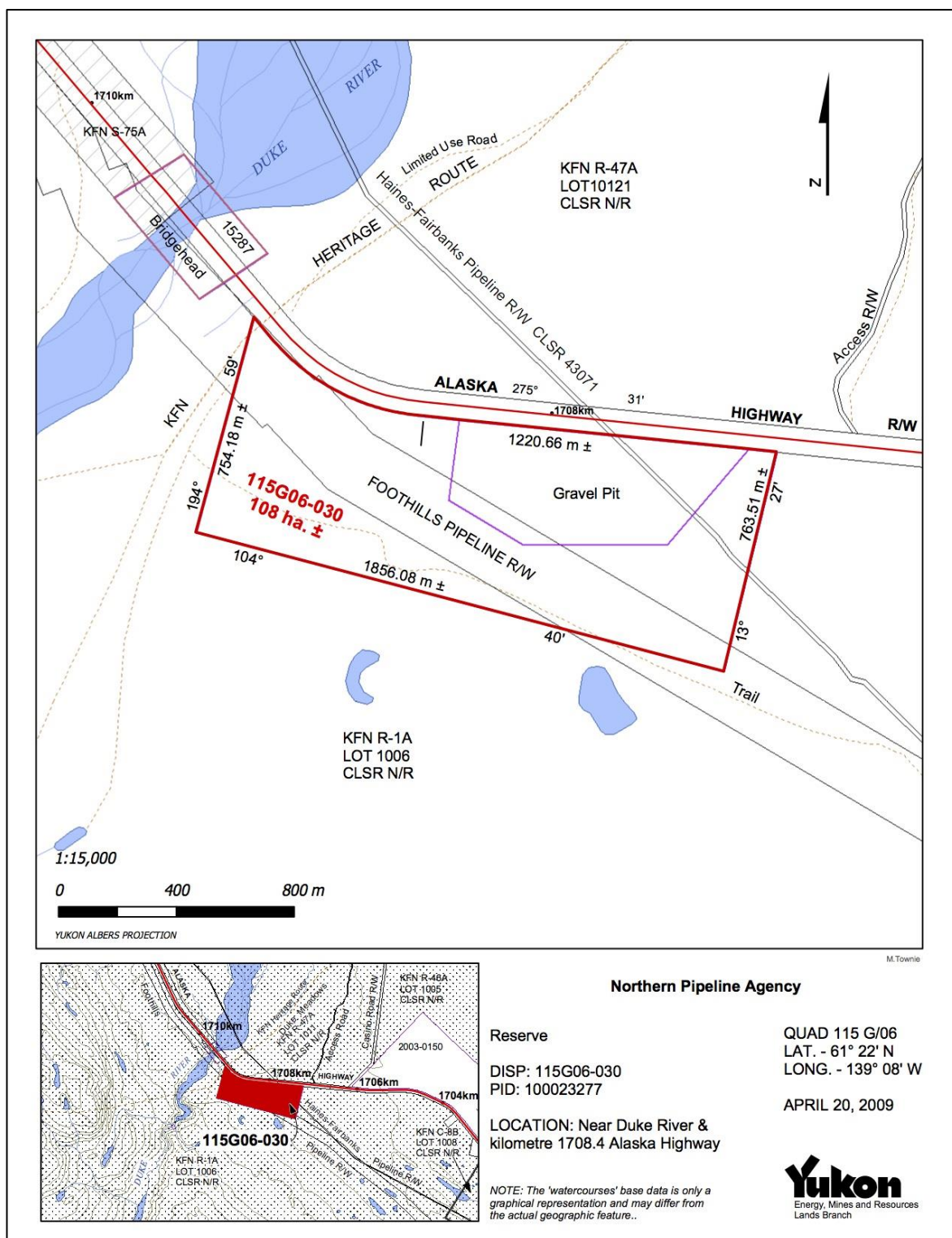
Therefore, having engaged in an environmental and socio-economic process in the late 1970's, the Easement became registered under Yukon Land Titles prior to KFN's *Final Agreement* (the Yukon land claims process began in the 1970's and became finalized in 2003, taking around 30 years of negotiation to complete). Hence the Easement represents an "Encumbering Right" over many KFN Settlement Lands, meaning the lands themselves are subject to the right for the owner of the Easement, TransCanada Pipelines Ltd.

## **2.5 Encumbering Rights**

The AHGP Easement is 32 years old at present, existing before and after the culmination of Land Claims. The AHGP Easement and its additional "ancillary" pipeline reservations carry legal land tenure rights for the holder to construct and operate the pipeline. Such rights are referred to as Encumbering Rights under Section 5.4.2 of the KFN Final Agreement (2003), as they supersede and exclusively restrict the land rights Kluane First Nation holds through the ownership of its Settlement Lands. Natcher, Hickey and Davis (2009) describe encumbering rights in Yukon as those wherein "government's" interests are not necessarily excluded or extinguished within Settlement Lands. Hence, under the KFN Final Agreement (2003), the Easement and additional pipeline reservations are an Encumbering Right over specific KFN Settlement Land areas, which exclude KFN's rights to use a portion of its Settlement Land in conflict with the specified Encumbering Right. Both the AHGP Easement—and land reservations set aside to support development of the AHGP—represent the cumulative impact of a large-scale Encumbering Right over KFN Settlement Lands. The exclusion of KFN's rights to Settlement Lands under the Kluane First Nation Final Agreement (2003) may affect KFN's land management and planning system, which is discussed further in subsequent chapters of this thesis.

Encumbering rights such as pre-existing licenses or permits, or sub-surface mineral claims on Category B Settlement Lands, enable the Crown to maintain “...the administrative and regulatory responsibility for those specific areas” (Natcher et al., 2009). However, any changes or applications for renewal are subject to review by Indigenous group administration (Natcher et al., 2009).

Figure 3 below demonstrates the potential impacts of Encumbering Rights on the landscape, where the AHGP Easement and reservations for the pipeline overlap KFN Settlement Lands under the Final Agreement (KFN, 2003).



**Figure 3.** Survey Plan showing an example of Encumbering Rights: the Alaska Highway Gas Pipeline Easement (Foothills Pipeline R/W) and a Pipeline Land Reservation (115G06-030) surveyed over KFN Category A Settlement Land parcels R-1A and R-47A, just west of L ' n Mān Keyi/Burwash Landing (Yukon Government, 2014).

## 2.6 Environmental Impacts

Kluane First Nation's core Traditional Territory is located in the Kluane Region. This region is recognized for its conservation importance (Kluane First Nation, 2015; Yukon Government, 2015; Wildlife Conservation Society Canada, 2015); a portion of the Kluane National Park and Reserve, as well as the Kluane Wildlife Sanctuary and the Asi Keyi Natural Environment Park, have been established within KFN Traditional Territory. Many key habitat areas for wildlife and fish species exist throughout the territory (Yukon Government, 2015). An ecological overview of KFN Traditional Territory is provided below, as taken from the *KFN Phase 2 Land Use Plan* (2015):

Ł' n Mǎn/Kluane Lake is the largest lake in the Yukon. As part of the Chu N ikw n/Yukon River watershed, Ł' n Mǎn/Kluane Lake drains to the northwest via the Ł' a Mǎn Tǎg /Kluane River, joining the greater D n Zhǔr Ch /Donjek River and Ät'ayat Ch /White River before finally joining the Chu N ikw n/Yukon River. Sh r Nd Ch /Duke River is located to the west of Ł' n Mǎn Keyi/Burwash Landing, and there are several creeks and smaller lakes in its watershed area.

KFN Traditional Territory is located within the mountainous Boreal Cordillera Ecozone and the Ruby Ranges Ecoregion Number 174. This ecoregion includes the Kluane, Ruby, and Nisling ranges, Shakwak Valley (Trench), and Kluane Plateau. The Saint Elias mountain range blocks coastal precipitation, and the region experiences a dry climate.

Northern boreal forests composed of white and black spruce occur on lower slopes and valley bottoms. Balsam poplar, paper birch, and trembling aspen also grow in the area, though less commonly (Smith et al. 2004). Shrubs present include willows, dwarf birch, soapberry, kinnikinnick, highbush cranberry, lowbush cranberry, and Labrador tea, with mosses and lichens also present. In poorly drained sites, black spruce, scrub birch, birch, and mosses occur. Alpine fir and lodgepole pine occur in higher subalpine areas, and mountain avens, willow, birch, shrubs, grasses, and mosses occur in the sparsely vegetated alpine.

Wildlife characteristic of the KFN Traditional Territory and the Ruby Ranges Ecoregion include Dall sheep, moose, grizzly bear, black bear, caribou, wolf, coyote, red fox, wolverine, lynx, marten, mink, muskrat, weasel, beaver, hare, raven, ptarmigan, gyrfalcon, and golden eagle. Coyote, wolf, wolverine, and grizzly bear densities in the region are among the highest in the Yukon.

Approximately 118 bird species inhabit the Greater Kluane Region, including the peregrine falcon, gyrfalcon, trumpeter swan, great grey owl, bald eagle, and golden eagle. The Ł' n Mǎn/Kluane Lake area is located along the Pacific Flyway zone, and migratory birds gather on Ł' n Mǎn/Kluane Lake and other areas within the Shakwak Trench during the spring.

The Ł' n Mǎn/Kluane Lake area experiences very high winds, and wave action has created terraces around the lake. Discontinuous permafrost is widespread over most of the ecoregion. Land suitability is constrained by permafrost, slope, material composition and stoniness, bedrock depth, flood hazards, and drainage. (KFN, 2015)

The Alaska Highway Gas Pipeline (AHGP) proposed for the Yukon is an industrial development project of significant environmental concern to Kluane First Nation (KFN). Potential environmental (biophysical) impacts of AHGP construction to KFN's Traditional Territory include habitat disturbance, wildlife displacement, hydrological and fisheries impacts, erosion, climate change, and cumulative effects (Taggart & McCracken, 2002). Additionally, as Haluza-DeLay, O'Riley, Cole, & Agyeman (2009, p. 10) have suggested, the environment is not as simple or straightforward as is assumed by conservative and liberalist thinkers. Environmental impacts relate to social and economic factors; in Canada, environmental impacts are being considered more than ever within the context of Indigenous rights and Treaty rights as defined by Section 35 (1) of the *Constitution Act* (Government of Canada, 1982).

In addition to the 240m wide Easement that crosses through 1042.7 hectares and approximately 150 kilometers of KFN Traditional Territory, pipeline land reservations authorized by the Northern Pipeline Agency associated with the Easement include large industrial-use areas for compressor stations, construction camps, storage yards, and borrow

pits. In the context of this research, KFN research participant responses relating to these land reservations have been considered relevant to the AHGP Easement so as not to impose restrictions on how KFN community members perceive environmental impacts directly and indirectly associated with the AHGP Easement. These industrial land reservations are located adjacent to the Easement and are also described as Encumbering Rights under the *KFN Final Agreement* (2003).

Potential adverse environmental and socio-economic Impacts, as considered within the scope of this research project, will refer to a broad range of possible socio-ecological effects. These include:

- Direct and indirect impacts to water, wildlife, fish, plants, soils, noise, aesthetics;
- Direct and indirect impacts to land use areas of importance to KFN;
- Environmental perceptions of the landscape by KFN community members;
- Land use planning-related impacts including potential land use conflicts;
- Long-term impacts to KFN's tenure rights to Settlement Lands;
- Uncertainties regarding the effects of landscape change over time; and
- Climate-change related impacts
- Encumbering Rights as defined under the *Kluane First Nation Final Agreement* (2003)
- Socio-economic impacts including upon the social fabric of the community, and possible economic development opportunities and constraints.

Social-ecological resilience theory considers factors such as the ability of a system to withstand outside disturbance and remain in a stable state. Many impacts occurring within

Kluane First Nation traditional territory have been noted as tipping the ecological balance. For example, in 2016 the Kaskawulsh Glacier receded, causing the mighty Á-äy Chù / Slims River to dry up significantly. Ł ' n Mǎn/Kluane Lake, the largest lake in the Yukon, suffered dropping water levels, with scientists predicting that lake levels could drop by at least one meter (Tukker, 2016). Sudden ecological shifts related to climate change in sensitive northern environments, like the recent Á-äy Chù / Slims River example, may significantly affect the social-ecological resilience of communities and regions (Yukon Government, 2016; Wildlife Conservation Society Canada, 2015).

## **2.7 Environmental Assessment**

Following the Alaska Highway Gas Pipeline (AHGP) proposal—as part of the federal regulatory process in which the National Energy Board of Canada determined it to be the preferred route—public hearings for the AHGP were held in local communities throughout the Yukon, including Ł ' n Mǎn Keyi/Burwash Landing, resulting in a report documenting the potential socio-economic impacts of the AHGP entitled *Alaska Highway Pipeline Inquiry* (also referred to as “the *Lysyk Report*”) (Lysyk, Bohmer, & Phelps, 1977). Yukon First Nations voiced multiple concerns regarding the proposed pipeline, but the paramount apprehension expressed in the *Alaska Highway Pipeline Inquiry* related to construction of the pipeline prior to the settling of Land Claims. This is a central principle in this research thesis, given that the AHGP has yet to be constructed despite being approved prior to Land Claims, and has therefore become embedded within Yukon First Nations Land Claims agreements. The research questions address how identifying past possible consequences from the registration of the AHGP Easement can provide insight into how this process occurred and whether it was equitable.

Below, a KFN Elder explains her apprehension during the Lysyk Inquiry, in Ł' n Mān Keyi/Burwash Landing, Yukon:

...If a decision is made to construct the pipeline, and the land claims settlement is not settled, you will be denying us one of our basic rights as human beings. You will also be denying us the opportunity to plan and determine our future as we see fit. The pipeline has, and will create, a rift between the two cultures in the Yukon. (Mary Easterson, Kluane First Nation Member, as cited in Lysyk et al., 1977, p. 117)

Fortunately, Yukon land claims were settled prior to pipeline construction. However, a federal Environmental Assessment and Review Panel Technical Report for the AHGP was completed in 1982 (Northern Pipeline Agency, 2012), and the proposed pipeline was conditionally approved within the Yukon by the Northern Pipeline Agency (NPA). The AHGP is now considered exempt from further environmental assessment under the CEAA (2012), sub-section 74(4), as a project initiated prior to 1984.

The federal Environmental Assessment and Review Panel reviewed the Project between 1977 and 1982. Hearings were conducted in nine Yukon communities including Ł' n Mān Keyi/Burwash Landing. In 1982, the Northern Pipeline Agency (NPA) submitted its final assessment report for the AHGP and granted approved certificates for construction and operation of the pipeline, including the Easement certificate issued in 1983.

The *Environmental Assessment and Review Panel (EARP) Technical Report* (Federal Environmental Assessment and Review Office, 1982) documents and provides recommendations for potential environmental impacts of the Alaska Highway Gas Pipeline. Environmental impacts identified in the report that followed the environmental assessment—conducted from 1979-1982—are biophysical in nature. This report was referenced during interpretation of the research data to compare possible differences in perceptions of environmental impacts among Kluane First Nation community members.



In the EARP Technical Report, the Panel "...concluded that the preliminary environmental planning on the project is adequate" (Federal Environmental Assessment and Review Office, 1982). The Report is 28 pages in length and contains many generalized and specific statements regarding requirements and recommendations for the AHGP project.

For example, under Section 3, Specific Recommendations, Physical and Engineering Concerns, 'The Integrity of the Pipeline in the Event of Earthquakes', (p. 7), it is stated:

Foothills [now wholly owned by TransCanada Pipelines Ltd.] is aware of the Panel concerns on the technical aspects of the Ł' n Mǎn/Kluane Lake crossing, including the possibility of general slope failures of the west and east banks leading to failure of the pipe within its restricted environment of protective or improved fill... The computer approach of Foothills is a probabilistic one which is not in wide use in the profession, because its verification indicates that one out of seven slopes which are classified as safe would actually fail under disturbance. Foothills understands these concerns.

The Panel assumes that the Ł' n Mǎn/Kluane Lake Crossing is technically feasible. However, if the crossing route is found to be unacceptable because of engineering or economic reasons, the alternative would be to follow the land route along the south-west shore of Ł' n Mǎn/Kluane Lake, through or adjacent to Kluane National Park and across the Ä-äy Chù / Slims River delta. The Panel concludes that a route change of this dimension and sensitivity would require a further technical and public review.

It is noteworthy that there is no recognition of potential adverse impacts on Indigenous rights and Treaty rights in this report, nor is there clarity regarding the level at which further technical and public review has occurred. The research questions address this potential issue. For example, I learned from Research Participant 19 that the true meaning of what the Elders stated during the Lysyk Inquiry was not captured in the Report, based on her experience of the hearings and listening to the Elders; this participant expressed issues with translation during hearings, particularly on the part of bureaucrats (Research Participant 19, 2015).

## 2.8 Consultation

Consultation for the Alaska Highway Gas Pipeline follows a particular process prescribed under the *Northern Pipeline Act* (1985). This consultation process, as outlined in Table 1, occurs when the Easement is due to expire, whereby consultation is required to occur with all Yukon First Nations and the public. The Northern Pipeline Agency oversees this consultation process, but TransCanada Pipelines Ltd. has been designated to lead the engagement procedure. The NPA, as federal regulator, carries the responsibility of determining if consultation has been adequate as per the legislated guidelines, and whether approval of the “amendment / renewal” proposed by the pipeline company will be granted. It should be noted that the planned consultation process by TransCanada Pipelines Ltd. originally engaged with Yukon First Nations and the public but did not follow through with this process after the collapse in natural gas markets in 2012 (NPA, 2012; U.S. Energy Information Administration, 2013).

In 2011, the Northern Pipeline Agency / Governor in Council of Canada established the structure of Advisory Councils. The Yukon Advisory Council is cited under the Northern Pipeline Act, Section 19(2) as including members representative of areas and interests, including native interests. In Yukon, the NPA recommended structuring the Advisory Council to comprise two representatives from all the affected Yukon First Nations, two federal government and two Yukon territorial government representatives to carry out consultation activities with the intent to review updated information, seek insight, and identify gaps in the assessment process. However, the Advisory Councils never came to fruition as TransCanada pulled out of developing the pipeline in 2012. Community meetings were held between June 2012 – September 2013 with an intent to update Yukon First

Nations, local and regional governments, and the general public in communities potentially affected by the Project. An Advisory Report was prepared for the Minister following this public review period, which has not been publicly released.

**Table 1.** NPA Consultation Schedule, 2011 - 2014

<b>Consultation Process</b>	<b>Timeline</b>
Consultation on amendment to easement agreement	May 2011 – December 2011
Consultation on implementing Advisory Councils	November 2011 – February 2012
Consultation and engagement with environmental and socio-economic public review by Advisory Councils*	June 2012 – September 2013
Consultations during regulatory review process*	October 2012 – June 2014

Adapted from NPA, 2012.

\*Did not occur as scheduled due to TransCanada delaying regulatory filings.

Kluane First Nation did not view this consultation process as adequate, in contrast to the opinion of the Northern Pipeline Agency, Yukon Government, and TransCanada Pipelines Ltd. In fact, KFN obtained legal advice related to this topic and Yukon Government and Northern Pipeline Agency also sought legal counsel regarding jurisdictional uncertainties between these two government agencies, which had emerged since Devolution (Research Participant #18, 2015).

Where there is disagreement regarding consultation processes between Indigenous peoples and the Crown, it has often been left to the highest courts in Canada to decide if consultation processes have adequately met the obligation of the Crown to consult meaningfully with Indigenous peoples on potential adverse impact to their constitutionally protected Indigenous and Treaty rights (Asch, 2011).

In 2011, Kluane First Nation had been negotiating an *Impact and Benefit Agreement* with TransCanada Pipelines Ltd. for the AHGP. At this time attention was focused on proceeding with construction of the pipeline (NPA, 2012). Kluane First Nation may have

experienced concerns around the negotiation of this agreement as part of the consultation process.

## **2.9 Economic Considerations**

### **2.9.1 Natural Gas Market**

This research must first be understood within the context of the historical time period, with significant oil embargos occurring between the United States and Arab States that created energy crises in the U.S (i.e. 1967 Oil Embargo, 1973 oil crisis, and 1979 energy crisis). During the same period, large oil and gas reserves were discovered in Alaska and the Canadian Arctic, and a North American market for these interests opened and developed. Canada continues to supply a significant portion of oil and gas reserves to the United States, and a substantial quantity of natural gas flows from the constructed Phase 1 of the Alaska Highway Gas Pipeline, then forenamed “Foothills Pipeline”, which was completed in 1982, with gas sources from BC, AB and SK (NPA, 2012). The Phase 1 “pre-build” to the remaining AHGP route proceeded in order to build infrastructure in Alberta that facilitated the movement of natural gas reserves to United States markets, which is still operational today. However, the remainder of what had been considered part of this route, linking the existing pipeline infrastructure in Alberta through northern BC, Yukon, and Alaska, has yet to be built.

In 2007, the State of Alaska passed the *Alaska Gasline Inducement Act* (AGIA), intended to promote the development of natural gas reserves from Alaska’s North Slope. Calgary-based TransCanada was the sole company awarded approval under the Act, and received a \$500 million subsidy from the State of Alaska in exchange for finding customers for the pipeline and pursuing regulatory approval. The estimated monetary value of the

pipeline was \$27 billion in 2007. “In 2009, ExxonMobil, the gas producer with the largest natural gas holdings in the North Slope region, joined TransCanada to form the Alaska Pipeline Project (APP)” (NPA, 2012). At this time, favorable global economic conditions in the natural gas market were at play in North America.

“Unfavorable economic conditions [have] led to delays in the completion of the [AHGP]” (NPA, 2014). Currently, TransCanada Pipelines Ltd., and its affiliate North Slope natural gas producing partners ExxonMobil and BP, are pursuing a regulatory review process within Alaska to develop the pipeline route solely through Alaska for export to Asian markets (Office of the Federal Coordinator, 2014).

Natural gas provides approximately 1/4 of the total North American energy requirements and 19% of the electricity supply (Gabriel et al., 2005). At the time of this writing the North American natural gas market is anticipated to remain at lower levels, while global gas demand projects a continual rise (particularly demand from developing Asian markets such as in China and India), mixed with uncertainty. Nevertheless, there remains substantial monetary investment value represented by the existing LNG proposals already approved in Canada, including the Alaska Highway Gas and Mackenzie Valley Pipelines. In British Columbia, beginning construction of TransCanada’s Coastal GasLink project that would feed the approved LNG terminal in Kitimat has been stalled by continued Indigenous-led resistance movements like the Unist’ot’en camp blockade.

Within the context of this research this is relevant because: 1) the exploitation of natural gas as a resource has become increasingly contentious politically, economically, ecologically and socially due to growing Indigenous rights and climate change concerns, and 2) the existing registered Alaska Highway Gas Pipeline (previously known and registered

under “Foothills Pipeline”) Easement is due to expire in September 2022.

A substantial consultation process for TransCanada’s proposed renewal occurred for the proposed 10-year Easement extension between May 2011 – December 2011, at a time when the natural gas market seemed promising, although it subsequently collapsed again by 2012 with corporate interests redirected to an all-Alaska route with export to Asian markets. As discussed throughout this thesis, the volatility of the natural gas market has played a significant role in the current situation with the AHGP Easement.

In May 2012, TransCanada notified NPA it would not be submitting its October 2012 major regulatory filing as originally scheduled. In September 2012, TransCanada aligned with North Slope of Alaska gas producers ExxonMobil, BP, and ConocoPhillips to conduct feasibility studies for development of the all-Alaska Liquid Natural Gas (LNG) option route. However, TransCanada has not lost interest in the Alaska Highway route, and the potential of the Easement to be a significant corporate asset is recognized on the Northern Pipeline Agency website:

TransCanada, with the support of Alaska gas producers, intends to maintain the AHGP option pending the outcome of their study of the LNG alternative. TransCanada has indicated to the Agency that work completed to date will be used to support any future activity relating to the AHGP (NPA, 2012).

Since the NPA’s July 2012 approval to extend the Easement Agreement, the overall NPA regulatory review process has been placed on hold (NPA, 2012). NPA communicated this information to all potentially affected Indigenous groups: “This amendment takes account of the extra time TransCanada requires to make a study of the liquefied natural gas (LNG) option and to conclude contracts with Alaska gas producers” (NPA, 2012).

## **CHAPTER 2: THEORETICAL AND PRACTICAL FOUNDATIONS**

## **1.0 Introduction**

This chapter presents the theoretical and practical elements of the research problem and questions, challenging the administrative decision to perpetuate the Alaska Highway Gas Pipeline (AHGP) Easement from an environmental and social justice lens. The crux lies in the established constitutional protection of Indigenous rights and Treaty rights and the Crown's duty to consult Indigenous peoples in Canada. Additionally, the United Nations Declaration on the Rights of Indigenous Peoples (2007) highlights the need for greater focus on related principles of “free, prior and informed consent”.

The 2012 Northern Pipeline Agency (NPA) decision to extend the AHGP Easement for an additional ten years supports the federal government's existing “status-quo” assessment process. The historical environmental and socio-economic assessment and consultation process largely justifies the 2012 Easement renewal decision and protects TransCanada's right to build a pipeline over the existing registered Easement route. This thesis argues that the Crown assessment and consultation process with affected Yukon First Nations should have formed a crucial part of this decision yet appears inadequate for a number of specific and significant reasons.

This research project therefore focuses on an environmental and socio-economic assessment process for a large-scale pipeline project through the lens of Indigenous engagement in resource planning, development, and management, in addition to principles of consultation and reconciliation. The project examines the nature of exclusive land tenure rights extended for pipelines and how the timeframes stretched for these rights may exceed their legal and ethical applicability.



On an ethical level, the research problem is rooted in environmental and social justice and the constitutional protection of Indigenous, Treaty and human rights, in Canada and globally. Constitutional protections included within the *Constitution of Canada* (1982) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (UN Office of the High Commissioner, 2007) continue to push the boundaries of Crown sovereignty in Canada. For example, the current New Democratic Party (NDP) / Green Party Alliance in British Columbia is focused on implementation of the UNDRIP declaration, Truth and Reconciliation Commission (2015) *Calls to Action* and the *Tsilhqot'in* decision and has reaffirmed the Government of Canada's (2018) *Ten Principles Respecting the Crown's Relationship with Indigenous Peoples*.

Discourses around consequential (multi-staged) decisions for pipeline authorizations processes have shifted substantially since the Alaska Highway Gas Pipeline Easement was first granted in 1984. As the current era marks one of increasing social, economic, and environmental concerns and impediments related to major oil and gas industry projects in Canada, expanding discussions around Indigenous rights, climate change and spill mitigation require greater attention, and action.

Section 35 of the Canadian *Constitution* (1982) has been applied by the courts in a wide array of progressive cases establishing legal precedents in Canada. Controversial resource development projects, particularly those related to the oil and gas industry, have been challenged by the need to acquire social license, particularly support from Indigenous communities. Moving further towards this trend arises the recent pledge from the Government of Canada and provincial BC government to fully adopt and implement UNDRIP, as reflected in their respective principles to guide the Crown's evolving

relationship with Indigenous Peoples of Canada. Indigenous Nations whom the project may impact are particularly crucial to gain social license with via an engaged, negotiated process that aims for consent and respects the traditional knowledge and practices of distinct communities.

There is an unprecedented burden this resource governance reality inclusive of Indigenous rights-based Interests collectively places on self-governing Indigenous communities, the Crown, industry, and stakeholder organizations. Society is pressing to determine the best courses of action to reach mutually desired outcomes, and to resolve conflicts where objectives, worldviews or values may diverge. The thesis argues this collective burden remains embedded within some particularly outdated Canadian federal governance bodies, namely the Northern Pipeline Agency and National Energy Board. These interlinked legacy colonial organizations continue to constrain the Canadian federal and Yukon territorial governments from embarking on a process of real decolonization and reconciliation in structured natural resource decision making, where Indigenous Nations' voices can be fairly heard at the table.

The extension of the Alaska Highway Gas Pipeline Easement exemplifies how the federal regulatory review process remained “behind closed doors”, with values assessed without explanation to Kluane First Nation. Consultation processes themselves need frequent review and modernizing over time, particularly in an era of continually evolving case law. In Canada, such due process is being initiated at the federal level and by some Territories and Provinces; however, real signs of reconciliatory action through the reorganization of legacy colonialist structures and processes remain slow to reach fruition.

The legal successes of Indigenous communities over proposed natural resource development projects, the economic markets and political influences that affect the progression of such projects, and the environmental changes that have occurred since the Alaska Highway Gas Pipeline (AHGP) project was first proposed in the late 1970's make this research topic relevant today. The thesis' research questions (see Appendix II) focus on Kluane First Nation's views of unresolved issues to seek to answer whether and how the previous environmental assessment and consultation process should be considered adequate compared with modern standards. And, for those aspects of the process and outcomes that may no longer be considered adequate, this research has sought to address the need to clarify the process and framework for how to fill in existing gaps.

The Alaska Highway Gas Pipeline Easement provides a particularly interesting case study, given the Easement's current lifetime and the legal, administrative, environmental and socio-economic changes that have occurred since land claims and Devolution in the Yukon. It seeks to answer whether the Indigenous Interests of Kluane First Nation have been recognized and affirmed through the process of establishing and continuing the AHGP Easement, as the Northern Pipeline Agency (and Yukon Government under delegated Crown authority) carries an obligation to uphold. Kluane First Nation (no date) has also drafted a Traditional Knowledge Policy in order to protect KFN TK and move towards greater respect and understanding of the implications of the sharing and use of such knowledge in light of resource activities occurring within KFN Traditional Territory.

The Alaska Highway Gas Pipeline (AHGP) project is less than straightforward. It was registered following the project's regulatory approval, during the beginning era of land claims negotiations. As an Encumbering Right, the Easement is described as such under

Section 5.4.0 of the KFN *Final Agreement* (2003), which states that land tenure rights and interests are exempted from the Settlement Lands where such rights existed prior to the land claims agreement being finalized.

Section 5.4.0 of the KFN *Final Agreement* reads:

5.4.2 The rights and titles described in 5.4.1 of a Yukon First Nation in Settlement Land are subject to the following exceptions and reservations:

5.4.2.1 any right, title or interest less than the entire fee simple therein existing at the date the land became Settlement Land;

5.4.2.2 any license, permit and other right issued by Government for the use of land or other resources existing at the date the land became Settlement Land; and

5.4.2.3 any renewal or replacement of a right, title or interest described in 5.4.2.1 or a license, permit or other right described in 5.4.2.2.

The Easement is therefore a legally determined priority land title right owned by TransCanada Pipelines Ltd. as an “Encumbering Right” over Kluane First Nation’s Settlement Lands. This was a standard clause in the *Umbrella Final Agreement* (1993) included in the land claims agreements with Yukon First Nations. The theoretical and practical foundations of this chapter explore the linkages between the original 1984 AHGP Easement Agreement and the clauses above from Chapter 5 of the KFN Final Agreement. These foundations are then further described and discussed in Chapter 4, Research Findings, as they emerged as themes throughout the interview data, and concluded in Chapter 5 along with recommendations for the upcoming date the Easement Agreement is due to expire, in 2022.

## **2.0 Environmental and Socio-economic Assessment**

Issues of environmental and social justice arise when Indigenous communities are faced with outdated, colonialist legacy institutions and corporations rooted in liberalism and capitalism. Concerns and questions around process fairness emerge in this context, in this case exemplified by the discretion and power placed upon the decision of the federal Minister of Natural Resources, who heads the Northern Pipeline Agency.

Environmental and socio-economic assessment is the foundational process through which the potential impacts and benefits of a proposed project are reviewed and regulated. Environmental and socio-economic assessment (“EA”) in Canada has undergone significant changes over the past few decades. As EA processes continue to receive criticism from various institutions and organizations, Indigenous self-governments have often led movements to stand up against further pipeline development in their traditional territories.

Many researchers have pointed to the shortcomings of the modern environmental assessment process, including expedited timelines, shortcomings in panel member representation, and limited monitoring and enforcement post-decision (Booth and Skelton, 2011; Dokis, 2015; Haluza-Delay et al., 2009; McCreary and Milligan, 2014; Notzke, 1994; and Yakovleva, 2014). This research seeks to question why and how the processes and systems established to manage the pipeline project remain valid today. Prior to “modern” assessment processes, the scope of engagement with both Indigenous groups and environmental considerations and requirements was arguably significantly more limited than in current practices.

The modern *Canadian Environmental Assessment Act* only came into force in 1992, and it was last amended in 2012 (CEAA, 2015). Prior to 1992, the environmental assessment

process was established and administered by the federal Environmental Assessment and Review Office. In the case of the Alaska Highway Gas Pipeline, this office established a Panel (EARP) to oversee the environmental assessment and review process described in Chapter 1, Section 2.7 – Environmental Assessment.

The Environmental Assessment and Review Panel (EARP) process corresponds to a centralized federal bureaucratic framework by which the Alaska Highway Gas Pipeline was (and continues to be) reviewed, authorized and managed. Hence The EARP process was historically employed when a federal government decision was required to review and determine the potential environmental effects of proposals. The federal Minister of Natural Resources carries rather unlimited authority to determine at their discretion whether an EARP assessment must be required as a precondition of any decision to authorize the project (Notzke, 1994, pp. 264 - 265).

The socio-economic Lysyk Inquiry and environmental assessment process for the Alaska Highway Gas Pipeline followed the structure established by EARP, consisting of two phases: 1) initial assessment and 2) public review by the EARP panel (Notzke, 1994). The process never actually made it to the final public review stage. However, the Lysyk Inquiry occurred over a period of 22 days of formal hearing in Kuanlin/Whitehorse, “at which experts testified and were cross-examined” ... and “27 days of informal hearing in Whitehorse, and in the 16 other Yukon communities” (Lysyk et al., 1977).

Therefore, the EARP Guidelines generally require that the department initiating the assessment is responsible for it, and as such, it is regarded as a “self-assessment” process (Notzke, 1994). The EARP and Lysyk Inquiry did consider local perspectives. Such perspectives can be described as both detailed but also as lacking in the diverse and

distinctive cultural and ecological views held by Yukon First Nations. Additionally, the assessment process was rooted in Western knowledge, which as Smith (1999, p. 59-69) extols, is problematic in its exploitative, liberalist, and hegemonic ideology.

This issue becomes heightened in consideration of the dynamic environmental assessment regimes that have emerged in the Yukon during the thirty-five year existence of the Alaska Highway Gas Pipeline project. Clementino (2005, p. 7) describes how the Yukon and northern environmental assessment regimes have changed several times over the past four decades, historically originating from a nationalist perspective that shaped “...environmental and resource management policy” but provided few opportunities for Indigenous s groups’ participation in the process and exclusion from decision making. This leaves the question of whether local issues and concerns were accounted for appropriately as a key aspect of the assessment process, particularly by Indigenous groups who make up a significant portion of the population in Yukon. A key piece of this question links to the decision to extend the Alaska Highway Gas Pipeline Easement based on its existing, and notably archaic regulatory review framework. Clementino (2005, pp. 25-26) highlights how the Yukon underwent significant shifts in environmental assessment processes that were directly influenced by federal control in the process, until Devolution occurred.

The Yukon has had 5 different EA regimes in effect over the last four decades. The shifts in the regimes mirror changes of the federal EA regimes, due to extensive federal control and authority over land and resources in the past... the Environmental Assessment Review Process (EARP)...[was] the earliest EA regime in the Yukon... The major changes in the Yukon to EA processes have come about from the land claim agreement ratified in the Umbrella Final Agreement (UFA), as well as the devolution process, introducing the *Yukon Environmental Assessment Act* (YESAA)... [Including] provisions that address the failings of past EA regimes, such as providing First Nations with...greater decision making powers and participation in the EA process.

This passage concisely summarizes the replacement of EARP with the Canadian Environmental Assessment Act in 1992, well after the approval under EARP of the Alaska Highway Gas Pipeline in 1982. It also highlights the emergence of the Yukon Environmental and Socio-economic Assessment Act (YESAA) through Yukon Land Claims and Devolution. Currently in Canada, projects that cross-jurisdictional boundaries often trigger assessment under the *Canadian Environmental Assessment Act*, and projects within provinces and territories are subject to those jurisdictions' assessment and regulatory requirements. The *Yukon Environmental and Socio-economic Assessment Act* (2003) was established as part of the land claims process to act as a third-party body between Yukon Government and Yukon First Nations, whose decision-making authorities are jointly described in the final agreements.

YESAA represents stronger decision-making authority and participation for Yukon First Nations than EARP and even the CEAA. It provides the appropriate system for cross-jurisdictional authorities among Yukon First Nations and Yukon Government, the result of Devolution and land claims. The YESAA process is known for its thoroughness and transparency in the assessment and decision-making process, with Yukon Government, Indigenous communities and public comment submissions built into its online web platform.

The Alaska Highway Gas Pipeline is considered exempt from the Canadian Environmental Assessment process and Yukon Environmental Assessment processes as an “existing” project one that was approved prior to these two modern assessment processes being established and therefore considered as “grandfathered in”. Since the Yukon Liberal Party came into majority government in 2016, a bill known as Bill C-17 was submitted for First Reading in Summer 2016. Bill C-17 could be relevant to renewal applications of



currently exempted “existing projects”, by adding to the requirements a new assessment under the *Yukon Environmental and Socio-economic Assessment Act* (Parliament of Canada, 2017). This bill, formerly known as bill S-6 and promoted by Yukon First Nations, had been controversially opposed by the previous Yukon Conservative government. It could be significant if this bill is able to proceed into passing in the federal legislature under the Yukon Liberals; this could affect existing major projects in the Yukon, including the Alaska Highway Gas Pipeline project.

It is crucial to the health and integrity of KFN’s culture and environment to ensure socio-ecological sustainability, which may be threatened by the AHGP Easement’s long-standing place in space and time across the landscape of KFN Settlement Lands and Traditional Territory. Institutions are complex and often operate at cross-scale levels – multiple rather than singular temporal or spatial scales, and management rights that are “...nested in ascending levels of authority” (Berkes et al., 2000, p. 1258). Co-management involves the sharing of resource management power and responsibility (Berkes et al., 2000). This thesis argues that such responsibility includes the need to direct attention to the “urgent need to monitor and understand the phenomenon of change” given that the “North is undergoing rapid social and environmental change” (Berkes et al., 2007, p. 145).

Natural gas is a highly debatable topic in terms of climate change, with impacts measured at multiple, complex, and uncertain scales. For example, one could argue that further exploitation of natural gas presents a considerable risk to global climatic change through the energy costs of extraction and further burning of a fossil fuel resource. Natural gas extraction and development also present risks to other environmental resources, particularly water. However, the advantages and detriments of natural gas development

remain arguable, among scientists, Indigenous communities, politicians and the public. While natural gas, largely composed of methane, is a significant greenhouse gas (typically four times that of carbon dioxide), the burning of natural gas for electricity produces far less greenhouse gas equivalent emissions to coal-fired power plants that are continuing to develop, particularly in Southeast Asia (Burnham, 2011; Howarth et al., 2010). However, it is also important to consider the greenhouse gas footprint of conventional and unconventional (typically, shale gas) reserves. The Alaska Highway Pipeline project was originally proposed to source natural gas (unspecified whether from conventional and unconventional sources), and the proposal appears to be limited to gas transport as such under existing legislated agreements.

#### *Socio-economic Assessment*

Anderson et al. (2006) describe how lands and resources are the foundation upon which Indigenous communities intend to rely, to rebuild their own economies and socio-economic status of their people. This is important to understand within the context of the Alaska Highway Gas Pipeline Easement and the project's and proponent TransCanada's (previously "Foothills") long-standing socio-economic relationship with Kluane First Nation. One of the key socio-economic drivers of large-scale pipeline projects is often touted as job creation, economic and social capital building opportunity. These proclaimed benefits of a pipeline may be seen to be juxtaposed or complementary to Indigenous perspectives of economic development and socioeconomic goals, as they are linked to the definition of social entrepreneurship above and its extension to the meaning of Indigenous rights.

Anderson et al. (2006, p. 51) suggest:

...Aboriginal people in Canada... are pursuing a strategy of economic development with social entrepreneurship at its core. They believe they can attain their

socioeconomic objectives which include (i) greater control of activities on their traditional lands, (ii) self-determination and...economic self-sufficiency, (iii) the preservation and strengthening of traditional values and their application in economic development and business activities, and... (iv) improved socioeconomic circumstance for individuals, families, and communities through social entrepreneurship.

Participation in the economy, at many scales but particularly at the local level, has become an important aspect of Indigenous self-reliance, self-determination, self-government, and improved socio-economic circumstances worthy of consideration (Anderson et al., 2006). While such a view may be theoretically shared and supported among Indigenous and non-Indigenous people in Canada, and the Crown, there are varying levels of socio-economic capacity building provided under final (land claims) agreements, while social entrepreneurship opportunities remain challenging to Indigenous communities, particularly in remote and northern areas.

#### *EARP Review*

The recent July 2017 landmark Supreme Court of Canada (2017) decision *Clyde River (Hamlet) vs. Petroleum Geo-services Inc.* highlights the shortfalls in the federal Government of Canada's modern assessment process' reliance on the National Energy Board's consultation process which is the Crown's duty to ensure. In this case, the judge determined that the test of constitutional protection of Indigenous rights and Treaty rights of the Clyde River Inuit had not been met; the National Energy Board had not adequately responded to the Clyde River community's concerns, particularly around seismic testing and the impact on seals, which the community relies on for sustenance. The community's access to appropriate and adequate information had been lacking in the consultation process. For example, the petroleum company had provided a very lengthy technical report (approximately 2000 pages) only in digital format; the file size was so large the community was unable to even open the

attached document, given the remote community's slow internet speeds (Supreme Court of Canada, 2017).

In consideration of the large body of research and recommendation already compiled on the Canadian environmental assessment process, Chapter 2 focuses on potential shortcomings in this process from the perspective of Indigenous, environmental and social justice research. The sections that follow highlight the Indigenous peoples' conception of environmental science and management, linked integrally to their societies and cultures. Understanding the socio-economic aspects of the assessment process is integral when carrying out work with Indigenous communities. Following the past and ongoing impacts of colonization, there remains a strong need and importance for non-Indigenous people to better listen to, learn from and understand Indigenous traditional knowledge and viewpoints.

### **3.0 Easement as Encumbering Right**

The AHGP Easement is listed in the *Kluane First Nation Final Agreement* solely within Appendix B where all the Settlement Land selection parcels are individually listed with all the other overlapping land rights defined as included within, excluded from (e.g. a road right-of-way) and 'subject to' the Settlement Land parcel. The Easement appears under the statement 'subject to' meaning the land ownership of KFN is "subject to" the encumbering right labeled under many of KFN's land parcels. This encumbering right was and continues to be perceived by the Government of Canada and then Foothills Pipelines Ltd. to exist prior to when KFN retained ownership of the overlying and in some cases subsurface lands. The Easement is described in this appendix to some KFN Settlement Land selections as "the easement described in *Certificate of Title 84Y726*". In my capacity as a

land use planner for KFN, I found this a strange and surprising way to list a large-scale pipeline easement through KFN territory. Very few if any KFN citizens I spoke to knew this was how the Easement is labeled in the Final Agreement (2003). Kluane First Nation perspectives of the AHGP Easement are rooted in an analysis of Indigenous local-level and co-management systems that have been established and continue to be implemented between Indigenous groups and the Crown.

While the perpetuation of pipeline easements occurs throughout Canada, I have yet to find any direct reference to this research problem within the academic literature. However, Yakovleva (2014) has stated "Consideration of Indigenous peoples' rights and involvement of Indigenous peoples in planning and development of hydrocarbon projects and specifically pipeline development is of particular interest in academic circles" (p. 147). Other authors such as Lambrecht (2013), Natcher (2007), Dokis (2005), and Notzke (1994) describe the importance of the 1970's era and compare the national significance of two northern pipeline projects through Yukon (one being the Mackenzie Valley Pipeline Project and the other the Alaska Highway Gas Pipeline (AHGP), then known as the Foothills Pipeline).

Pipeline easements may be seen to encumber a broad spectrum of land ownership rights and responsibilities (Indigenous communities', Crown, municipal and private lands in Canada) (Dokis, 2015). An easement is framed within a dominant discourse in Canadian society around property rights under the Canadian *Constitution Act* (1867). "Property rights arrangements in a given area may be complex because resource tenure often involves 'bundles of rights', including use rights, rights to exclude others, rights to manage, and the right to sell. Determining the actual rights is often a challenge..." (Schlager and Ostrom, as cited in Berkes and Folke, 1998, p. 7). While Canadian law and legal discourse define

property rights, Indigenous peoples in Canada, including some Kluane First Nation Citizens, do not necessarily or fully accept this construct as a given; in fact, property rights have been and continue to be challenged in the Canadian courts by Indigenous peoples in Canada\.

Bell and Asch (2014) suggest that “the concept of Indigenous rights is in the process of evolution,” in that ... “the recognition and affirmation of Indigenous rights in section 35 of the *Constitution Act*, 1982 acted as a catalyst for the reconceptualization of these rights in legal and political discourse” (p. 38). Constitutionally established and asserted Indigenous and Treaty rights have become heavily interpreted in governmental institutions including Indigenous case law in Canada, given the continued presence of land and resource management and governance-related conflicts between Indigenous peoples and the Crown.

This research thesis frames the influences of a specific land tenure / property right, the Alaska Highway Gas Pipeline Easement, as it has become embedded from the project’s proposal stage through a federal environmental assessment process. The outcome of this process was the binding legal Easement Agreement, which translates into the AHGP Easement’s registration over all lands along the approved route over which the Easement is located, whether the lands are Indigenous Settlement Lands, Crown Lands or private lands. During the time an Easement is registered, the landowners’ use of the land is impeded and the risk of future impacts increased.

However, under Chapter 5 – Tenure and Management of Settlement Land, **Section 5.6.0** – Administration by Government in the *KFN Final Agreement* (2003) there are further directions for the Crown administration of Encumbering Rights, as follows:

- 5.6.9 Government shall Consult with the affected Yukon First Nation before exercising any discretion to renew or replace an Encumbering Right, to issue a new Encumbering Right...
- 5.6.10 If Legislation is amended to authorize Government to increase the term permitted for an Encumbering Right, Government shall not increase the term of that Encumbering Right pursuant to that amendment without the prior consent of the affected Yukon First Nation.

What these clauses mean, based upon the opinion of KFN's legal counsel (Boughton Law Corporation, 2011), is that the federal government would have required the consent of Kluane First Nation and other Yukon First Nations to renew the AHGP Easement. The question may come down to a legal nuance over the meaning of a Legislative amendment in this situation. A letter of response to Kluane First Nation on May 3, 2012 from the Minister of Natural Resources, Joe Oliver, states the federal government's position that the renewal was not considered a legislative change, but rather an administrative one. The letter reads:

The Agency does not share the view that the consent of the KFN is required before Canada can amend the Easement Agreement to allow additional time for Foothills to obtain the Agency's approval to begin construction of the pipeline. The proposal is not to amend "legislation" as defined in the KFN Final Agreement but a term of the Easement Agreement itself through the execution of an amending agreement. An Order in Council would indeed be required but for the sole purpose of enabling the Minister responsible for the Agency to execute the amending agreement. It would be procedural in nature, not substantive. Such an Order in Council would be a new, stand-alone Order in Council. It would not amend previous Orders in Council that had been made in the past for similar purposes. (Office of the Minister of Natural Resources, 2012)

Such issues of disagreement between KFN and Canada as two sovereign nations are vital to resolve and may require further legal clarification and advice from the parties involved in this research. The consultation process with local communities throughout the Yukon in the late 1970's did not recognize the need to consult with Indigenous communities

specifically nor as autonomous Nations. Given legislative authority regarding “grandfathered-in” clauses, the research questions focus on present-day consequences of the Easement, although they also remain open to considering the entire lifetime of the AHGP Easement.

The continuation of pipeline easements protects the land for future pipeline development indefinitely (National Energy Board, 2010, p. 22) in the pursuit of a large-scale resource development of significant impact and influence. This situation occurs simultaneously alongside growing social, ecological and Indigenous concerns surrounding pipeline development that mark the current era. Concerns related to pipelines often include potential adverse impacts to Indigenous and Treaty rights from land and resource development and climate change related impacts (Prowse et al., 2009). While potential impacts vary in scale and type, they have been controversial for a variety of environmental, social, and economic reasons. Northern pipelines in particular may hold sensitive environmental and socio-economic risks (as well as opportunities) due to the sensitive vegetation and ecosystems and remote communities, including many autonomous Indigenous communities with settled land claims agreements.

In the 1982 Final Environmental Assessment and Review Panel Report (EARP, p. 11), the Panel conclusion required further evaluation of this crossing, including “an analysis of the effects of a major gas leak on aquatic biota of Ł ́ n Mǎn/Kluane Lake under worst-case conditions” and recommended “close scrutiny should be given to the installation procedure to minimize environmental effects on fish and fish habitat”, given that “the Panel was given only a very general assessment of the probable effects of the installation procedure...” (EARP, 1982, p. 14). The Panel also recommended in terms of geotechnical aspects and



pipeline integrity that “the technical feasibility of the Ł’ n Mǎn/Kluane Lake Crossing should be given on-going review to ensure the integrity of the pipeline, and the subject of lake sediment liquefaction potential should be more rigorously analyzed” (p. 19). The Panel also stated that “a technical and public review would be required if the lake crossing route is dropped in favour of a land route through or adjacent to Kluane National Park” (p. 19).

The topic of the registered Easement crossing underneath Ł’ n Mǎn/Kluane Lake will be explored in greater depth as it emerges from the research findings in Chapters 4 and 5.

#### **4.0 Consultation**

Founded upon the reconciliation of Indigenous and Treaty rights, landmark court cases and corresponding legal precedents established in Canada, current structures and functions of land and resource management between Indigenous peoples and the Crown are becoming more and more challenged to adapt a reconciliatory approach to business. The importance of precedent-setting judicial considerations and decisions within the constitutional rights framework acts as a legal anchor and catalyst influencing future decision rationales made by political leaders, resource managers and judges. The extent to which Indigenous communities have succeeded in Canada’s highest courts demonstrates the strength of the Section 35 constitutional rights that Indigenous peoples hold in Canada today (Gallagher, 2012). Gallagher (2012) coined the term “resource rulers” to describe the implications of the culmination of legal decisions that have strengthened Indigenous groups’ protection of their constitutionally protected section 35 rights.

Indigenous consultation is a specific process in Canada that has been progressively defined by several landmark court cases. Subsequent guidelines have been developed by Indigenous communities and the Crown related to the use and management of natural

resources between the Crown and Indigenous peoples. Assessment and consultation with Indigenous communities occurs throughout Canada to varying extents, depending on the jurisdictional authorities a pipeline may overlap (e.g. Indigenous, territorial, provincial, municipal, federal and international government bodies). Indigenous communities are often located along the routes of pipeline projects extending extensively across Indigenous territories. For some communities, like Kluane First Nation, Indigenous traditional territories are proven and their related titled lands have been selected as defined under modern comprehensive treaty (land claims) agreements.

Jurisdictional issues emerge within this model of governance. The research problem is rooted in issues of procedural fairness and adequacy in the Crown's consultation and reconciliation process with a self-governing Indigenous community. This thesis supports the *sui generis* (unique) and constitutionally protected nature and extent of Indigenous and Treaty rights and through this context, the continued evolution of Crown consultation obligations with Indigenous communities. There continues to be an urgent need for greater attention paid to improved environmental and Indigenous (i.e. traditional) resource management and decision-making processes. Such decision-making should certainly extend to the consideration of providing a legal renewal to a land tenure right that has been practically held in abeyance by a pipeline company owning a large-scale industrial Easement registered throughout the Yukon Territory since 1983.

Both the Mackenzie and Alaska Highway Gas Pipelines were proposed in the 1970's, with Judge Thomas Berger providing advice on both projects simultaneously that the AHGP was the preferred route (NPA, 2012). Subsequently, the AHGP route was approved in 1982, while the Mackenzie Valley Pipeline underwent additional review processes due to the

Indigenous Interests that Berger had noted were at stake, while only receiving final federal approval in 2011. The projects were some of the first and most significant participatory research projects with Indigenous communities (Kovach, in Brown and Strega, 2005, p. 23). In northern Canada, Indigenous communities have now largely settled comprehensive modern land claims agreements with the federal and territorial governments that strike a co-management tone.

In the *Haida Nation v. British Columbia (Minister of Forests)* decision, which continues to be the foundation for the Crown's duty and honour in consultation with Indigenous communities, the court stated, "...reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution" (Supreme Court of Canada, 2004). This statement is highlighted for its demonstration of the Crown's obligation to continue to consult with and accommodate Indigenous communities even following the resolution of modern treaties, such as in the case of Kluane First Nation. The *Haida* decision also provides a test of adequacy and appropriateness of the Crown's Duty to Consult (and where appropriate, Accommodate) Indigenous peoples, where such rights could potentially be adversely impacted by a proposed land or resource development or use. This test will be utilized within this research thesis to analyze whether the environmental and socio-economic assessment process should continue to be sufficient for the AHGP to remain an existing approved pipeline project, in terms of upholding a justifiable consultation process as interpreted by the *Haida* test and under the *Kluane First Nation Final Agreement* (2003).

Therefore, it is important to build understanding of Kluane First Nation's experience with the consultation process to better determine how it may need to be improved in meeting the test established in the *Haida* and other Indigenous law precedents.

The *Tsilhqot'in v. British Columbia* decision (SCC, 2014) established that the constitutionally protected Section 35(1) Indigenous and Treaty Rights (including Title) should be viewed beyond a limited or site-specific scope to include traditional activities as hunting, fishing, trapping and gathering, and the cultural and spiritual worldviews of the Indigenous peoples and communities. This broad-spectrum perspective of Indigenous and Treaty rights is relevant to many land and resource management issues and particularly where Indigenous communities in Canada hold strong, proven Indigenous title and / or rights.

This thesis contests there are possible consequences to Kluane First Nation's proven Indigenous and Treaty rights, which exist within a modern treaty implementation context. The thesis also extends this argument to demonstrate how other Yukon-based Indigenous communities may consider themselves adversely impacted by the decades-long-registered Alaska Highway Gas Pipeline (AHGP) Easement. At this time in history, potential adverse impacts from a pipeline "as-yet-to-be-built" may appear primarily of an administrative and legal nature, but this thesis will direct attention to several tangible examples of perceived and real impacts as derived from the interview data. The AHGP project presents the potential for real adverse impacts beyond those of an administrative scope to environmental and socio-economic impacts and remains representative of colonialist power imbalances between western and Indigenous societies in Canada.

The dynamic and complex bureaucratic nature of the AHGP, coupled with the "complexity of concerns Indigenous peoples hold with regard to the consequences of industrial resource extraction" must also be better understood, demonstrated and "...incorporated into existing consultative processes" (Booth & Skelton, 2011, p. 686).

Indigenous peoples are participatory agents in the global economy in a self-determinative, socially enterprising way.

This research focuses on several social institutions that have existed and interacted with Kluane First Nation as part of the Alaska Highway Gas Pipeline consultation process, namely:

- Kluane First Nation (as governed by KFN Council)
- Northern Pipeline Agency (NPA)
- Yukon Government Department of Energy, Mines and Resources (YG)
- TransCanada Pipelines Ltd. (TCPL)
- Alaska Highway Aboriginal Pipeline Coalition (AHAPC)

In northern Canada, natural resource management decisions are often made outside of the mainstream media limelight, thereby drawing less attention from social-ecological justice movements (Natcher et al., 2005). Still, major pipeline projects remain proposed or approved, yet un-built, through subarctic regions sensitive to social-ecological disturbances, including the approved Alaska Highway Gas Pipeline through the Yukon and Mackenzie Valley Pipeline through the Northwest Territories.

There have been a series of recent events challenging other long-standing major pipeline projects, including the Enbridge Northern Gateway, Mackenzie Valley Gas, Energy East and TransMountain Expansion Projects. On October 5, 2017 and December 28, 2017, respectively, the Energy East and Mackenzie Valley Projects were announced canceled.

The media often frames such events as a project being terminated due to investment issues; however, projects such as the Mackenzie Valley Pipeline also have an associated Easement that like the AHGP had already been granted federal authorization until 2022

(Fontaine, 2016). How can a project be “cancelled” by one of its major proponents, yet the Easement for that project remain viable and considered to be in the national interest? In this type of situation, where is the justification for the Easement’s perpetuation, when there is not an economic climate to proceed?

Consultation processes may become less intelligible and adequate when industry goals tend toward the “market-driven and outcome oriented”, and “they do not entail cementing long-term relationships with Aboriginal groups or addressing their wider cultural, spiritual, economic or social needs” (Dokis, 2015, p. 135). Eventually, some companies may be forced to concede, as occurred with the Enbridge Pipeline project proposed through northern British Columbia after the Federal Court of Appeal overturned the federal National Energy Board’s approval (subject to 209 conditions), based on the federal government not meeting its duty to consult with Indigenous peoples (Proctor, 2016). Continued Indigenous opposition to the Enbridge project inevitably led the newly elected Liberal federal government to reject the project and court challenges led the federal government to reject the project because of inadequate consultation.

## **5.0 Resilience of Social-Ecological Systems**

Despite Kluane First Nation’s and other Yukon First Nations’ concerns regarding the 2011-2012 consultation process for the AHGP, the Northern Pipeline Agency (NPA, 2011) renewed the AHGP [*Foothills-Canada*] *Easement Agreement* (1983). The NPA’s 2012 renewal decision marks a central question of the research. This was the first time a federal government decision concerning the AHGP took place since KFN’s land claims were finalized. KFN provided me with two confidential documents from September 2012

outlining substantial concerns following the AHGP *Easement Agreement* renewal decision. KFN's concerns at that time related primarily to inadequate consultation on the part of the NPA, and the fact that the project is exempted from assessment under the *Yukon Environmental and Socio-economic Act* (2005) and the *Canadian Environmental Assessment Act* (2012). The NPA's 2012 Easement renewal decision extended the AHGP *Easement Agreement* until September 2022.

Research sub-question iii. explores information that may remain inadequately considered in the existing decision-making process for continually renewing the AHGP Easement. Unless this process and framework is adjusted, the upcoming 2022 Easement expiry will likely continue to be reviewed under the current, faulty regulatory system for managing natural gas projects in Canada. Meanwhile, the risk only increases with time, particularly in an era where natural gas markets are sunken and predicted to remain low. This presents the legal question: what is the basis for justifying the continued existence of the AHGP Easement?

Berkes and Folke (1998) describe how newly created local knowledge can simultaneously validate cultural values and link to more resilient resource management applications. As such, it can be argued that there is a greater need to develop traditional knowledge into the environmental and socio-economic assessment process for this project moving forward. Currently there is a risk of overlooking key information that could potentially adversely affect the rights of Indigenous communities related to this project, as has been discussed in this chapter. Resilience may suggest many different meanings. For the purpose of this research, resilience will simply be defined as:

*...a measure of robustness and buffering capacity of the system to changing conditions...* (Berkes and Folke, 1998, p. 12)

Reimagining this definition of resilience in terms of a linked social-ecological system provides insights into the bureaucratic decision-making processes for natural resource projects. Calls for change have emerged within Canadian federal administrative processes as adaptive management implies human societies must rely upon the functioning of resilient social-ecological systems (Trosper, 2009). Such exclamations recognize the dynamic and unpredictable changes occurring across varying human geographical scales, including climate change and other environmental and socio-economic challenges the continued development of and reliance on non-renewable fossil fuel resources present.

## **6.0 Governance in Resource Authorizations**

Research sub-question v. spans the lifetime of the Alaska Highway Gas Pipeline provides insight into the social-ecological changes occurring during this time, from 1976 - present. It seeks to build awareness and understanding of how informed responses to changes in social-ecological systems should be incorporated into bureaucratic regulatory review processes through an enhanced lens on resilience, reconciliation and truth. This position supports the Truth and Reconciliation Commission (TRC) (2015) and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (UN General Assembly, 2007). There is value in assessing resource authorization processes through the roles institutions play – cultural, social, economic, ecological and political. Examination of the governance systems involved in authorizing the Alaska Highway Gas Pipeline Easement required review of the historical, present and anticipated future consequences to Kluane First Nation's social-ecological governance system.



In addition to the needed implementation of UNDRIP and the TRC Recommendations, there are possible adaptive and mitigating values to be gained by increasing attention to Indigenous perspectives of resource development projects affecting their traditional territories. Trosper (2009) recommends future management of resources seek lessons garnered from sustainable resource management principles of Indigenous societies. Berkes (1998) suggests, “Indigenous systems have come under scholarly inquiry in recent years for a number of reasons, including their potential survival value and the adaptations they represent, and for the design of sustainable ecosystem management strategies” (p. 98). Concurrently, sovereign Indigenous nations continue to demand greater opportunities for truly collaborative involvement and resource co-management with the Crown.

As a case study, this thesis reflects upon Berkes et al.’s (2007) suggestion that “collaborative processes for integrated management are more transparent and easier to implement in the Canadian North because of the relatively recent resource and environmental governance regimes established under aboriginal land claim agreements” (p. 145). Participatory decision-making processes, as a key component of the co-management provisions of government-to-government agreements between the Crown and Indigenous peoples in Canada, have continued to shift and challenge the shared environmental governance of the North. Such challenging social-ecological contexts should offer opportunities for Indigenous peoples’ input into a range of short- and long-term resource resilience and management issues within their traditional territories.

The advisory committees established as part of the final assessment process for the AHGP are incorporated in the Northern Pipeline Agency’s “phase 1 and 2” regulatory review process to update the final approval of the Alaska Highway Gas Pipeline. As part of this

process, Yukon First Nations would be able to select **two** representatives within the Yukon to sit on this committee with Yukon and federal government representatives also each composing two seats. At a glance, this arrangement can be viewed as immediately problematic, since there are eight affected Indigenous communities within the Yukon through whose traditional territories the AHGP crosses, and only two representative seats.

While the Yukon Government and Northern Pipeline Agency each maintain their respective agency mandates, Yukon First Nations are self-governing nations and their positions may vary. Where TransCanada negotiates on individual terms with a First Nation, such interests may become involved in the collective process.

## **6.1 Resource Management Perspectives**

Many authors have demonstrated how land and resources are viewed and managed distinctively between Indigenous and Western societies. Potential differences may include conceived levels and scope of impact, weighed beside valued project benefits. Northern environments like the Yukon exemplify some of the world's most at-risk locations experiencing notable climate change-related impacts. Additionally, Indigenous governance systems and communities are strongly organized in such regions around environmental stewardship principles. Yakovleva (2014, p. 147) states, "Regulation of access to and use of natural resources, including issues pertaining to land tenure, are central to Indigenous peoples' rights...Oil and gas projects that enter into territories of Indigenous peoples can significantly influence the livelihoods and wellbeing of local populations."

Western resource management systems tend to spread a "mass loyalty" that accepts the assumption of a "low risk future". This conceptualization of [science-based] resource management, based on the ideological foundations of coloniality (e.g. ecological stability /

equilibrium based), has “frustrated and co-opted” Indigenous peoples (Dokis, 2015, p. xix). Understanding the roots of Western resource management elucidates how proposed resource development projects may receive approval based upon ideological foundations held by government decision makers and scientists “on behalf of” the public. Modern terms such as government’s need to uphold a “compelling and substantive” legislative objective to justify infringement of Proven Indigenous Rights or Title, link to historic statements such as the Alaska Highway Gas Pipeline being labelled in the “national interest”.

While the past decision stands upon the historical EARP review by way of the legacy legal contract granted in the “Certificate of Public Convenience and Necessity”, it could be challenged in terms of its assessment and consultation process which the thesis’ research questions seek to reveal. Berkes and Folke (1998) provide insight regarding how and why the AHGP project continues to be viewed by the Government of Canada as in the “national interest”. How have Indigenous Interests, including traditional knowledge been accounted for within this assessment process? My review of the original environmental assessment report (EARP, 1982) found that such information was not documented sufficiently or practically in the original environmental and socio-economic process and remains lacking from the record.

From the Western science definition, “resource management is a complex decision-making process which ideally involves inventory, assessment, goal formulation, policies, programs, legislation, administration and managerial strategies. It comprises biophysical, economic, social, political, legal, institutional and technological perspectives as well as temporal and spatial dimensions” (Krueger and Mitchell, 1977, p. 6f as cited in Notkze, 1994, p.2). Dokis (2015, p. xi.) has suggested Western resource management objectives are no longer succeeding. This point is further demonstrated by the following passage from

Berkes et al. (2000) describing the downfall of conventional resource management in terms of resilience theory:

[Conventional] Resource management...may be characterized in terms of rules and regulations made by technical experts, often from a central bureaucracy, and enforced by agents who are not themselves resource users; emphasis on steady states and the maintenance of predictable yields...the use of primarily quantitative techniques... Such management appears to cause a gradual loss of resilience as well as reduction of variability and opportunity, thus moving the ecosystem toward thresholds and surprises ... Loss of resilience is often masked by the development of fossil-fuel-dependent technologies to maintain yields... support from socioeconomic infrastructures...make it possible to maintain a business-as-usual strategy when faced with ecological disturbance. (p. 1259)

The above quotation marks the crux of why this thesis examines how Kluane First Nation's perspectives have or have not been accounted for during the lifetime of the Alaska Highway Gas Pipeline Easement. There are differing views of resource management among Indigenous and Western bureaucratic systems.

Traditional knowledge, in contrast to Western science and bureaucracy, has been described as:

...a cumulative body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment... [As] an attribute of societies with historical continuity in resource use practice (Berkes et al., 2000, p. 1252).

The extension of traditional and local knowledge rooted in observation and lived experience (Dokis, 2015, p. xiii) can over time direct attention to environmental indicators:

... This accumulated experience with the environment may be used to detect long-term trends. Evaluation of indicators over time allows users to receive feedback from the ecosystem, enabling them to assess various aspects of it (Berkes et al., 2007, p. 152).

Therefore, traditional environmental knowledge derived through trans-generational observations could (and should) be a valued component of environmental assessment

processes where projects cut through the hearts of traditional territories, *especially* where long-term trends of environmental change may require consideration.

Traditional knowledge systems provide insights into “...the qualitative (as opposed to quantitative) management of resources and ecosystems, and for parallels to adaptive management” (Berkes et al., 2000, p. 1259). The Alaska Highway Gas Pipeline may be seen to undermine Kluane First Nation’s social-ecological resilient system to the extent that the assessment process may have neglected to effectively bring KFN’s Traditional Knowledge and adaptive management expertise into the assessment and regulatory review process to date. This line of thought also presents gaps in how the current condition of the lands and resources within KFN Traditional Territory has been examined by the Crown.

Industrial development concerns between the Canadian government and Indigenous nations present fundamental challenges to modern society (Booth & Skelton, 2011, p. 687). Indigenous peoples have experienced a long colonial and racialized history of marginalization that is ongoing, which often denies Indigenous rights, perspectives and interests (Booth & Skelton, 2011, p. 687; Haluza-DeLay et al., 2009, p. 11). Indigenous peoples in Canada have defended their sovereignty as self-governing nations, and the Indigenous rights and Treaty rights that are now recognized and affirmed constitutionally under Section 35 of the *Canadian Constitution*. However, research has shown that “...little has been done in Canada to address First Nation concerns regarding industrial development, from their perspective...” (Booth & Skelton, 2011, p. 686). Issues surrounding the disregard for Indigenous peoples’ perspectives and concerns regarding the impacts of resource development continue to occur in Canada and worldwide (Booth & Skelton, 2011, p. 686).

Environmental justice is a useful conceptual framework for understanding issues of inequality facing minority Indigenous communities in Canada, and will be employed throughout this research to assist in understanding the research context. Environmental justice focuses on the “recognition of those affected by environmental policy or change, fair processes to involve them, and equitable outcomes of environmental decisions over time, over space, and across different social groups” (Reed, 2009, p. 164). It highlights the systemic injustices facing Indigenous peoples in Canada that include land claims processes, situating energy projects on their traditional territories, and air, water, and land pollution (Haluza-DeLay et al., 2009, p. 12). Recognizing such injustices is a key step to achieve more equitable social-ecological outcomes among Indigenous peoples, resource industries, and the state.

Haluza-DeLay et al. (2009, p.16) describe how recognition within the context of environmental justice research also includes “... the *recognition* of [Indigenous] difference, that is, that Indigenous peoples hold practices and epistemologies and relations with the land that bear little relationship to that of contemporary, *Westernized* Canadian society”. Therefore, the research questions focused on how potential consequences of the Easement are perceived and experienced by the Kluane First Nation community, and how this relates to the need for a just consultation and regulatory review process for the AHGP.

An environmental and social justice framework also recognizes the importance of accepting differing cultural worldviews from those dominant in Westernized society. Such a framework is particularly important to this research in terms of the need for hegemonic institutions of power (e.g. the federal and territorial governments, TransCanada Pipelines Ltd.) to listen to the concerns of marginalized communities (McCall, 2011, p. 49).

“Environmental matters and justice matters are to a large extent about who gets to ask the questions, who gets to be heard (and listened to), and who benefits from how and if the questions are answered, researched, or considered relevant” (Haluza-DeLay et al., 2009, p. 9). In the case of the socio-economic Lysyk Inquiry and Environmental Assessment and Review Panel (EARP) process for the Alaska Highway Gas Pipeline, it remains in question whether the voices and concerns of Indigenous communities were recorded, and how these voices were considered in decision-making and planning for the pipeline route and registration of the Easement. The foundations of social and environmental justice were only beginning to undergo change and transformation at that time. The Lysyk and Berger Inquiries did make significant steps towards recognition of the need to resolve Indigenous land claims in Yukon and Northwest Territories, respectively, prior to the building of a northern pipeline (Lysyk et al., 1977; Notzke, 1994).

However, a step in the right direction does not mean an issue has reached resolution. Dokis (2015, p. xiii.) highlights the significance of contemporary participatory processes in environmental assessment within northern Canada, such as the Mackenzie Gas Project Joint Review Panel hearings, and the failure of even this modern participatory process to appropriately consider and address Indigenous views on the impacts of pipeline construction, stating: “...recent hearings have turned participatory processes into handmaidens of the state” (p. xvi). It has been argued that such environmental assessment hearing processes, both past and present, were and continue to be designed to serve state and corporate interests (Dokis, 2015; Nadasdy, 2003). There is substantial work still ahead to better incorporate Indigenous forms of understanding and cultural distinctions into the assessment process. Environmental justice concerns inevitably extend across time and space to the issue of

cultural longevity for Indigenous communities when faced with industrial development activities “...in lands they utilize to preserve and perpetuate their culture” (Booth and Skelton, 2011, p. 686).

This thesis addresses a research problem of a legal and administrative nature, that of jurisdictional processes, including the transfer of jurisdictional authorities and the management of legislative changes across governing bodies who uphold legislative land and resource decision-making authority. It aims to be inclusive of the cultural understandings that frame such processes (Natcher et al., 2005).

The context of Yukon land claims and the historical, archaic federal regulatory review process and uncertainty related to natural gas pipeline development in the region all factor into this thesis’ analysis and recommendations, provided in Chapter 5. For example, the Crown began to view “...the settlement of Aboriginal claims less as a cost and more as a vehicle for improving Aboriginal socio-economic circumstances, a view long held by indigenous people” (Anderson et al., 2006, p. 49). There are implications to the distinctive representations and perspectives of resource management among Western and Indigenous societies; such distinctions have been demonstrated by the courts and modern government-to-government models for shared natural resource decision making between the Crown and Indigenous communities.

The case study research is relevant to the evolving social-ecological context of one self-governing Yukon First Nation community where the re-implementation of administrative processes is still unfolding since Devolution. As the first territory to establish Devolution (AANDC, 2013), focusing this study on the Yukon offers possible insights into the organizational consequences of Devolution relating to industrial development and



Indigenous communities, particularly in northern Canada.

Devolution resulted in administrative responsibilities being transferred from the federal to territorial Yukon government in 2003, following agreements established in the *Umbrella Final Agreement* (1993) ratified between the Council of Yukon First Nations and the Crown, during which time the Yukon government assumed management responsibility for a variety of public lands and resources, in addition to the environmental assessment process in Yukon. Problematically, Natcher and Davis (2007, p. 275) describe how non-Indigenous employees carry their own cultural frames and ideologies to land management processes, grounded in Western traditions of resource management. Dokis (2015, p. xv) also discusses how “time and again, Nadasdy shows how environmental understanding and cultural values of Kluane people are devalued unless they can be translated into forms familiar to the Western educated minds of government servants.”

As Natcher and Davis (2007) discuss, a potential failure of Devolution “...has been most observable in the context of natural resource management,” particularly in Yukon, “...where despite having settled comprehensive land claims, state institutions for land and resource management (and the ideologies that support them) remain deeply embedded within First Nation administration” (p. 272). They add, “...Despite the rhetoric of local-level decision making, real authority remains concentrated in government administration (Natcher and Davis, 2007, p. 277). This problem is exemplified by the administration of the Alaska Highway Gas Pipeline Easement by the federal government, long past the implementation of Devolution in Yukon in 2003. Perhaps the past fifteen years remains representative of the earlier stages of a restructuring of governance authorities among Indigenous groups and the federal and territorial governments.

However, Nadasdy (2003) points to how the land claims process itself was built on an unequal power structure. Likewise, Natcher and Davis (2007, p. 277) have argued that “before entering into [treaty agreements] it will be imperative that First Nation leaders think critically as to whether devolution, as currently implemented in Canada, can create conditions of empowerment and autonomy for First Nation governments or merely represents the de-concentration of preexisting forms of state management and the perpetuation of values that support them”. If this argument is accepted, it would mean that Devolution would be bound towards such a failure of true sharing of management and decision-making inevitably. This phenomenon, he argues, is tied to Michel Foucault’s arguments that knowledge and power are inseparable (Foucault 1982), insofar that “...institutional power arises at least as much from the ability to shape discourse as it does from the use (or threat) of coercive force”. The research questions posed in this thesis are conceptualized within this context of institutional powers, given the nature of the Easement for a specific pipeline under examination as an Encumbering Right in KFN’s *Final Agreement* and registered land title through Yukon.

While the legitimacy and authority of Indigenous management systems remain grounded in community-based systems, comprehensive land claims for Indigenous communities, particularly in northern regions, have created a highly complex bureaucratic and legal landscape (Nadasdy, 2003). These juxtapositions are explored throughout this research thesis to clarify issues around land tenure rights and environmental impacts related to the AHGP Easement. There is a political and bureaucratic history linking the Alaska Highway Gas Pipeline to the history of Yukon land claims and Kluane First Nation’s *Final Agreement* (2003).

Institutional structures, like culture, are dynamic, and as such, “environmental management regimes are not uniform or stable across time or space” (Reed, 2009, p. 166). Environmental management regimes are also “...influenced by changing economies and environmental circumstances, shifting socio-cultural relations, as well as by governance practices and institutional capacities across scales” (Reed, 2009, p. 166). Berkes and Folke (1998) also identify how ecological knowledge is embedded in institutions. The structure and dynamics of institutions are critical for implementation of management practices based on ecological understanding in any society (Berkes and Folke, 1998). They describe how the interrelationships between local and traditional knowledge, land and resource management systems and social institutions overlap (Berkes and Folke 2000, p. 1257). “...Local knowledge may be organized and used in a way which, in effect, amounts to a traditional management system” (Berkes and Folke, 1998, p. 17). Berkes and Folke (1998) state:

... can resource management be improved by supplementing scientific data with local and traditional knowledge? Can information from resource users themselves broaden the base of knowledge necessary for decision making for sustainable resource use? (p. 13).

This definition is more in line with Indigenous systems of environmental and local knowledge that transfer into land and resource stewardship practice (Berkes and Folke, 1998). The traditional management practices and systems through which Kluane First Nation has survived since time immemorial are derived from the lands, fish, wildlife, water and air throughout KFN Traditional Territory, and the continued uses of these elements are directly linked to KFN’s Indigenous and Treaty Rights. KFN research participants pointed to the lands and resources tied to their homeland and KFN’s proprietary interests in such elements; for example, KFN traditional territory surrounds Ł’ n Mǎn/Kluane Lake with a strong focus on fish and water resources and the necessity of its conservation and protection for the Lù’àn

Mǎn Ku Dǎn/Kluane Lake People's continued way of life. Traditional management systems are also tied to issues of Indigenous title, which link to the legal context of "ownership" (or proprietorship) of the lands.

There are social factors at play that cannot be ignored in this case study and across natural resource development projects in Canada where Indigenous groups, proponents and provincial/territorial and federal governments interact, often on a project-by-project basis. For example, "the ontological assumptions of liberal theories are defined in universalist terms, which assumes that all members of society... are motivated by self-interest as they pursue their right of individual freedom," hence privileging the concept of social relationships as "atomistic" over being "interconnected and interdependent" (Moosa-Mitha, 2005, p. 41). This lies in stark contrast to the ontological systems of Indigenous groups, who have fought to maintain these perspectives and political positions to manage the social-ecological sustainability of their territories.

## **6.2 Decolonization and Reconciliation**

The research highlights outstanding issues of reconciliation between a self-governing Yukon First Nation and the Crown in managing a resource development project where different perspectives are held among Indigenous groups, federal and territorial governments regarding if and how the project should proceed. Such views are rooted in the colonial legacy and the continued hegemonic power relations from past colonial structures of power, such as the Northern Pipeline Agency. This thesis examines this continued problem and consideration of what sovereignty and reconciliation between Indigenous peoples and the Crown government of Canada truly means in relationship to a pipeline project that crosses these precise realms (Asch, 2011; Dokis, 2015, p. xix).

This thesis argues that there is importance in examining the impacts of scales that occur at the local level, such as the Kluane First Nation community, with those that occur on wider scales such as natural gas projects. As Smith (1999, p. 186) describes, there is a need to represent a localized theoretical positioning that enacts “...the emancipatory goal and practice of critical theory, in a specific historical, political and social context”.

The Yukon land claims process is linked to the bureaucratic influences of knowledge production, power relations and the illusion of objective discourse rather than subjective reality (Foucault, 1980). Knowledge integration is a “[political] process occurring through land claims and co-management processes throughout the Canadian North...that cannot be understood except in relation to these forms of state power” (Nadasdy, 2003). There is also a difference between Kluane First Nation’s (KFN’s) traditional view of land as something that cannot be owned to KFN’s selection of lands as mandated under the land claims process (Nadasdy, 2003). Land selections were required to be selected, their boundaries surveyed and mapped, following this Westernized structure of private land ownership. KFN now bases its land and resource management system upon these boundaries and limitations of KFN Settlement Lands as defined by the *KFN Final Agreement* and extensive Canada Lands Survey Program required to verify their boundaries.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (UN General Assembly, 2007) is also a key factor in the assertion that the objective of obtaining “free, prior and informed consent” from Indigenous peoples is required before a state can take actions that may adversely affect their lands and territories (Asch, 2014, p. 66). This has taken on a substantive meaning among Indigenous communities in Canada, with many asserting UNDRIP rights to the federal, provincial and territorial governments. The

mechanisms for ensuring UNDRIP, while endorsed politically among the current federal government and NDP/Green Party led British Columbia Government, remains murky in terms of implementation and monitoring to align the Crown's duty to consult and existing decision-making processes.

## **CHAPTER 3: METHODOLOGY**

## 1.0 INTRODUCTION

This chapter will describe how I determined the research topic, methodology and methods employed in this thesis, including the rationale for its design. Inevitably researchers bring their own subjectivity into the research approaches they propose and implement. As such, self-reflexivity is an important tool to bring into the research process. Chapter 3 speaks more from a first-person perspective than other chapters for this reason, while describing a credible research methodology supporting the findings presented in Chapter 4 – Results, and the conclusions drawn in Chapter 5 – Conclusions and Recommendations.

### *Researcher Positionality and Approach*

My interest in the Alaska Highway Gas Pipeline Easement research topic is framed by past and ongoing professional experiences with many distinct Indigenous communities on resource development and management issues. Being a researcher and a professional can require differing approaches, perspectives, opportunities and constraints. For example, I considered it an important opportunity to promote a decolonizing approach in this research project's design, given my ability to carry out this type of research and analysis. My professional position with BC Government is often significantly more limited, as I am required to follow the higher mandates of the BC Executive Council (i.e. Cabinet).

Such perspectives of research design supported my realization that I needed to position myself within the research and understand how my subjectivities would frame the research design, while also recognizing the subjective positionings of KFN as a research partner as well as the possible subjectivities carried by other research participants, including the federal Northern Pipeline Agency, Yukon Government and TransCanada Pipelines Ltd. This led me to develop a decolonizing framework as part of the qualitative methodology.



However, I recognized the need to be thoughtful in my approach to ethically safeguard the different roles and confidentialities I carried through my varied subjective positions. I sought to accomplish this primarily through the vetting and protection of confidential information with all research participants prior to its use in this research thesis. As a qualitative researcher pursuing a research subject along a spectrum of cultural, scientific, environmental, and socio-economic interests, I do not perceive it as possible to completely separate my professional, academic and personal realms of subjectivity from the research. But I recognized the substantial importance of reflecting on the complex relationships between such worlds and most significantly for the purpose of this research, how these linkages could impact the collaborative intent of this research project with Kluane First Nation (KFN).

Therefore, I kept my professional work practically separate from, yet theoretically connected to, this thesis. My professional career carries significant linkages, for example, in my expertise in Crown consultation obligations and procedures with Indigenous peoples, as defined under the *Constitution of Canada* and via an abundance of landmark Supreme Court of Canada decisions now significantly influencing how projects are assessed and decisions are determined with consideration of the assessment of potential adverse impacts to Indigenous rights and Treaty rights (collectively, Indigenous Interests).

My ten years of career experience informed therefore the theoretical and practical analysis of the research. Below is a brief summary of my professional expertise relevant to the research topic, which I argue provides greater credibility to this research project and anticipated outcomes.

- I began working for Kluane First Nation in 2011 as a Lands Technician where

I worked on finalizing the KFN Settlement Lands survey project and reviewing the KFN Lands and *Natural Resources Act* and draft *Lands Policy*.

I was the lead land use planner for Kluane First Nation from 2011-2012 and 2014-2015 for the *Phase 1 Community Land Use Plan* and *Phase 2 Settlement Land Use Plan*. I have looked in detail at each of KFN's 89 Settlement Land parcels from the *Final Agreement* and developed a database and planning objectives and strategies for each area through land use designations and other strategic recommendations.

- I am currently employed as a Land and Resource Specialist with the Province of British Columbia (BC), Ministry of Forests, Lands and Natural Resource Operations. In this role, I lead land and resource planning initiatives in collaboration with Indigenous communities.
- Previously, I worked for a medium-to-large scale consulting firm as an Indigenous Engagement / Traditional Ecological Knowledge Facilitator with communities across Northern BC and Alberta, for some of the largest and controversial pipeline projects proposed in the past decade, including TransCanada's Coastal GasLink Project and Kinder Morgan's TransMountain Expansion Project.

My former role working for Kluane First Nation shaped my existing connections with the KFN Lands, Resources and Heritage Department, Economic Development Department, KFN Chief and Council and other community members. It is extremely important for me to respect and maintain these existing connections with the KFN community, including my knowledge of KFN's land use planning processes and land and resource management

system. This relationship provided me with some insight into the potential land and resource management conditions and issues within the community that would be useful to research.

I approached Kluane First Nation (KFN) as my research partner given the interest in developing my thesis research into a case study that would directly and practically benefit the community. Subsequently, I discussed possible research topics with the KFN Chief and Director of Lands, Resources and Heritage (LRH), who confirmed that researching the Alaska Highway Gas Pipeline was at the time the most beneficial topic of interest to the KFN community. From this stage, I developed a draft research proposal framing the research background, problem and questions, and collaboratively we determined to focus on the Easement issue of the proposal with KFN's Chief and LRH Director. In October 2014, the Kluane First Nation Chief and Council formally approved the research topic by a Resolution-in-Council. As an applied community-based case study carried out in partnership with Kluane First Nation (KFN), the research sought out literature on decolonizing methodologies, particularly by Indigenous authors and knowledge holders.

## **2.0 METHODOLOGY**

This section will describe the methodological tools I deemed appropriate given the thesis scope and objectives to build practical recommendations and targeted outcomes for KFN. I outline first why I chose to use a qualitative methodology and case study method; I then demonstrate the utility of developing a defined decolonizing framework tool when working with Indigenous people(s), communities and self-governments to guide myself as the primary researcher as well as the overall research process.

### *Why Qualitative Research?*

Qualitative research's usefulness lies in its ability to situate itself within historical, social, and political moments that frame contextual and often indeterminate realities (Marcus & Fischer, 1986, p. 8). Qualitative research frames reality as subjective, linking this understanding to research practices tending to focus on "observing and interpreting the meanings of social reality as various groups and individuals experience them" (Brown and Strega, 2005, p. 9). In this way, qualitative research can provide greater flexibility to represent complex, dynamic, and uncertain realities than a more rigid quantitative methodological approach (Hodge & Lester, 2006, pp. 46-47). Qualitative research methodologies provide meaning and depth of understanding to the data collected in this thesis. This includes how data emerges from the research context and construct, and how research design can accurately represent and interpret knowledge originating from an Indigenous community and shared in a culturally appropriate, safe and respectful manner.

As such, I saw it as imperative to ensure my own perspective shifted towards that of a decolonizing framework, to best represent KFN's viewpoints within the institutionalized graduate research program framework (timeframe, funding, protocol agreement, Research Ethics Board approval, etc.) I was bound by. I tried to keep these administrative aspects of the research as minimal as possible for KFN in recognition of their human resources capacity. The literature review also framed Chapter 2—Theoretical and Practical Framework, and further connects with the literature review on decolonizing methodologies (Smith, 1999) in development of a decolonizing framework.

I conducted an extensive literature review of searchable Kluane First Nation documents (Lands and Natural Resources Department Files) and archives, published academic journals and books, public media including newspaper articles and websites,

Yukon Archives, and confidential KFN communications and negotiations information provided directly from research participants. This literature review was carried out within an identified context of Indigenous and Treaty Rights in Canada, through the representational lens of Kluane First Nation. It focused on subjects and authors relevant to Indigenous and Treaty Rights, land and resource development, assessment and management / co-management with Indigenous peoples, environmental and social justice, including decolonization, social-ecological systems and resilience, and the linked case specific documentation from the existing environmental and socio-economic assessment process and Kluane First Nation's internal / confidential files for the Alaska Highway Gas Pipeline Project and Easement.

My role as researcher was to provide an explanation of the research process, facilitate questions and discussion with research participants, safeguard ethical considerations including confidentiality and safekeeping of the data, and to "write-up" and analyze the data. I held myself accountable to all research participants. An information sheet describing the research was provided to participants and reviewed prior to the start of the interview. Research participants were guided through a series of questions (Appendix II) to identify and describe potential past, present, and future environmental impacts they perceive from the AHGP Easement, and related issues that address the central resource problem and research questions. The introductory semi-structured interview questions were designed to open the conversation by inquiring into the research participant's involvement with the Alaska Highway Gas Pipeline Project, to situate the research topic within the participant's own experience. Subsequently, the remaining semi-structured interview guide questions were developed to answer the overall primary research question and sub-questions. All interview

questions relate to the primary research question *I.*, and to a range of research sub-questions as summarized below in Table 2.

**Table 2.** Connections between research and semi-structured interview questions.

Research Questions	Semi-structured Interview Questions	Research Sub-questions
<i>Primary Research Question</i>		
	<p>2. Are you aware of the Alaska Highway Gas Pipeline (AHGP) Easement? If so, please describe what you know about the Easement. (Link to ii, &amp; iii).</p> <p>8. Could you describe whether you think the AHGP will proceed given the current circumstances in Alaska? If not, do you think the Northern Pipeline Agency should approve any future request by TransCanada to renew</p>	<p><i>ii. From Kluane First Nation's perspective, has the consultation process been adequate to address possible consequences from the AHGP Easement and associated land reservations for the pipeline? Why or why not?</i></p> <p><i>iii. From Kluane First Nation's perspective, should the Northern Pipeline Agency allow the AHGP Easement to be continually renewed if the pipeline may never be built? Why or why not?</i></p>

<p>I. <i>What potential consequences of the Alaska Highway Gas Pipeline (AHGP) Easement may be experienced and perceived by Kluane First Nation?</i></p>	<p>the AHGP Easement? (Link to ii &amp; iii).</p> <p>3. Do you have any thoughts or concerns about environmental impacts with the Alaska Highway Gas Pipeline that may have been documented in the past? If so, please describe. (Link to i, iii, &amp; v).</p> <p>4. Do you have any thoughts or concerns about present environmental impacts with the Alaska Highway Gas Pipeline, including those discussed during the most recent consultation process in 2011-2012? If so, please describe. (Link to i, &amp; v).</p> <p>5. Do you have any thoughts or concerns about future</p>	<p><i>i. From Kluane First Nation's perspective, have any possible consequences for the AHGP been left unaddressed in the environmental assessment process to date?</i></p> <p><i>v. How have the environmental, social and economic perspectives of Kluane First Nation been recognized through the regulatory review and consultation processes involved in establishing and continuing the AHGP Easement?</i></p> <p><i>iv. From the perspective of relevant industry, territorial and/or federal government representatives, have Kluane First Nation perspectives related to</i></p>
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	<p>environmental impacts with the Alaska Highway Gas Pipeline? If so, please describe. (Link to i &amp; iii).</p> <p>7. Do you have any thoughts or concerns about the most recent consultation process for the AHGP in 2011-2012? (Link to ii &amp; v).</p> <p>6. Do you have any thoughts or concerns about how the Alaska Highway Gas Pipeline (AHGP) Easement is described under the <i>Kluane First Nation Final Agreement</i> as an exclusive right to surveyed areas within KFN Settlement Lands? (Link to i, ii, &amp; iii).</p>	<p><i>possible consequences from the AHGP been recognized by their respective organizations as part of their project decision-making within KFN Traditional Territory?</i></p>
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	<p><i>[For non-KFN research participants]</i></p> <p>9. What environmental views has KFN presented you with regarding the Alaska Highway Gas Pipeline? Can you describe how your organization, company or agency has recognized and/or incorporated KFN's views into the consultation, regulatory review and/or decision-making process? (Link to iv &amp; v).</p>	
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I made maps available showing the AHGP Easement and its associated pipeline land reservations within Kluane First Nation Settlement Lands and Traditional Territory. The map provided visual reference for research participants when discussing the research topic and questions. Maps were obtained from the KFN Lands, Resources and Heritage Department and the online mapping platform 'Yukon Lands Viewer' (Yukon Government, 2012).

As part of the research project, I also determined it would be useful for better understanding the research problem to calculate the approximate physical areas of land encumbered by the AHGP and other land reservations for the pipeline project. The Easement calculation was obtained from the KFN GIS department, whereas the pipeline reservations were more difficult to determine, given the way these reservations are not specifically labelled by project or holder's name in GeoYukon's digital spatial data / mapping system. Unfortunately, this information was not obtained prior to holding the semi-structured interviews, in part as this was a recommendation derived from interview discussions with research participants and in part due to the capacity issues of KFN staff and myself as primary researcher. Eventually, I determined the area of Encumbering Rights associated with the pipeline reservations by reviewing the final Settlement Land Survey approval documents submitted and reviewed by the KFN Lands Committee and recorded within the Kluane First Nation Lands Files.

Interviews were organized at various locations, dependent on the preferences of participants. Interviews in the KFN community occurred in the KFN Administration Building and in the homes of research participants. Fieldwork for interviews occurred throughout July 2015. I held previous acquaintance with most of the KFN research participants interviewed, which supported the ease of communications and locating research participants. Safety and confidentiality issues focused on protecting research participants and the approaches were outlined in a UNBC Research Ethics Board application approved in May 2015 and subsequently renewed twice, in October 2016 and January 2018.

The rationale supporting the decolonizing framework I developed is described in the next section of this Chapter, and further description can be found in Chapter 2—Section 7.1—Decolonization.

## **2.1 DECOLONIZING FRAMEWORK**

As introduced in the preceding section, I realized early in the design stage of the research proposal (which was methodologically and research question-focused) the need to incorporate a decolonizing lens and framework. In part this recognition emerged from discussions with KFN Government and citizens, Lands, Resource and Heritage Department members, Lands Committee, Crown government and academic community members, and my University of Northern British Columbia supervisor and two research committee members, course instructors and fellow graduate students based in Prince George. I recognized an urgent and ongoing need to maintain direction for and discretion of the research objectives to directly benefit and practically be understood by Kluane First Nation. The case study approach and decolonizing framework form the methodology. The research design sought to appropriately match the capacities of KFN and the researcher as part of a collaborative process, which continues to challenge the Westernized academic communities.

The ‘crisis of representation’ period of the late 1980’s arose “...from uncertainty about adequate means of describing social reality” (Marcus & Fischer, 1986, p. 8). This intellectual period framed the discourse around how, for example, colonialist academic researchers, such as early anthropologists, had misrepresented Indigenous societies by interpreting their work as “objective”, rather than recognizing their own subjective biases and resultant exploitation of the societies they examined. During and since the crisis of representation period, post-colonial perspectives and approaches have emerged, in addition

to decolonizing methodologies (Hodge & Lester, 2006; Howitt & Stevens, 2010; Smith, 1999). Decolonizing methodologies recognize issues of social inequality, founded in relations of power, perception and interpretation, and the omission of Indigenous perspectives from Western ways of knowing (Smith, 1999), which I argue in this thesis link to contexts of environmental justice (Booth & Skelton, 2011, p. 687).

As Smith (1999, p. 176) writes:

Research in itself is a powerful intervention, even if carried out at a distance, which has traditionally benefited the researcher, and the knowledge base of the dominant group in society. When undertaking research, either across cultures or within a minority culture, it is critical that researchers recognize the power dynamic which is embedded in the relationship with their subjects. Researchers are in receipt of privileged information. They may interpret it within an overt theoretical framework, but also in terms of a covert ideological framework. They have the power to distort, to make invisible, to overlook, to exaggerate and to draw conclusions, based not on factual data, but on assumptions, hidden value judgments, and often downright misunderstandings. They have the potential to extend knowledge or to perpetuate ignorance.

Smith (1999, p. 78) describes how Western researchers have developed westernized constructions of the “Other”, which are problematic and misrepresentative in terms of both the knowledge generated and the power dynamics involved. This is linked to the movement towards accurate and ethical research methodologies to develop during and following the ‘crisis of representation’ (Marcus and Fischer, 1986).

In working with an Indigenous community as a non-Indigenous person, it was necessary to recognize and develop a culturally appropriate decolonizing methodology (Smith, 1999) as a guide to assess and establish a research design that directly benefits Kluane First Nation; in addition, the research needs to respectfully, ethically and verifiably represent KFN’s perspectives throughout the research process. This was also with the

awareness that traditional research approaches have failed in recognizing and addressing Indigenous voices.

Brown and Strega (2005, p. 11) state:

Traditional social science research, whatever its intentions, has silenced and distorted the experiences of those on the margins.... those on the margins have historically been devalued, misinterpreted, and omitted in the academy, where...only certain conceptualizations of information are counted as “valid” (objective and therefore authoritative) knowledge.

Recognizing the need for greater focus to continue to be shifted to those communities living on the margins I committed to the objective of presenting the perspectives of KFN, as this self-governing Yukon First Nation’s historical experience and views on the Alaska Highway Gas Pipeline Project are highly significant to the process of reconciliation between Indigenous peoples and the Crown. Indigenous peoples had been historically marginalized but in many places in Canada, the Yukon being one of the forerunners, Indigenous communities have become more and more empowered through the courts and the highest governance assemblies. The Alaska Highway Gas Pipeline is a project of national and international significance that has potentially impacted Kluane First Nation since the project’s initial proposal in the late 1970’s.

Kovach (2005, p. 32, as cited in Brown and Strega) suggests that:

Because Indigenous ways of knowing are intricately connecting to Indigenous ways of doing, I propose that epistemology, theory, methods, and ethical protocols are integral to Indigenous methodology. I refrain from narrowly defining an Indigenous methodology because...it is as much a conceptual framework as a recipe.

The decolonizing methodological framework developed for this thesis aims to bring these key interwoven elements of Indigenous praxis into the execution of the research methodology and analysis of the results, thereby guiding an interpretation of the research process. Each of nine key elements supporting the decolonizing framework is described

below. It is noted that these elements are the researcher's subjective interpretation of readings on decolonizing methodologies literature. As a non-Indigenous person, my understanding of marginalization rooted in Indigeneity is limited to information I have observed and heard from Indigenous peoples.

Marginalization, as Brown and Strega (2005, p. 6) define, "refers to the context in which those who routinely experience inequality, injustice, and exploitation live their lives". This suggests recognizing the need to transform such arrangements through a decolonizing research process and focused outcomes that directly benefit Indigenous research partners. In the research context, integrating the conceptual understandings of marginalization and lived experiences of marginalized peoples and communities acknowledges that knowledge production has long been organized and controlled. Studies on the ways knowledge production is legitimized in Western society demonstrates that only certain information, generated by certain people in certain ways, is accepted or can qualify as "truth." The intent is for this decolonizing methodological framework to move beyond this narrowed vision of the research process in consideration of colonial and post-colonial realities and the need for further decolonizing research related to industrial resource development and Indigenous perspectives and realities. These elements may be adapted over time as this subject progresses.

### **2.1.1 Credibility**

Credibility is crucial for qualitative research to be taken seriously (Baxter & Eyles, 1997, p. 516). The research should be interpretable by all audiences, most importantly the Kluane First Nation community, but also the academic community, government, industry, and the public. Verifiability of research data was carried out thoroughly to confirm with

research participants that the information collected, particularly that to be used in the research findings, was accurately representative of the meanings the participants have shared through their narratives during interviews. Such review focused particularly on Elders, as the knowledge keepers in the community.

In addition, a systematic method was employed throughout the research process, involving “...explicit reporting on every stage of the research process,” and a “synthesis of...thinking” (Bailey, White, & Pain, 1999, p. 170). For example, after each audio-recorded interview, I fully transcribed the recording (to be shared and archived within KFN), provided the transcription to the research participant for review, revised the transcript where requested, then analyzed (coded) each transcript, which is stored in a software program as well as a summary document. I then provided another opportunity to review the results closer to the completion stage of the research, in addition to interim progress reports to KFN Chief and Council. KFN Council and Elders Council were provided the opportunity to review the initial research findings, and the results were adapted following feedback I received at these meetings. One KFN Councilor noted the importance of the recommendations and summary report I would be providing to KFN at the completion of the research. Another KFN Elder suggested upon initial review of the research findings in February 2017 that I submit a book for publication following completion of the project, to bring awareness to the issues and serve as a source of important history for Kluane First Nation. This thesis is now a public document available through University of Northern British Columbia (UNBC) Library.

### **2.1.2 Ethics**

Ethics refers to “the conduct of researchers and their responsibilities and obligations to those involved in the research” (Dowling, 2010, p. 28). I ensured the research design met

the ethical standards of Kluane First Nation and UNBC. This included how I interacted with research participants, ensured culturally appropriate informed consent, made shared decisions with KFN, recognized relations of power and subjectivity tied to the research, and ensured the validity of the research project to both KFN and UNBC.

Shaw, Herman and Dobbs (2006) assert “It is now well recognized that doing work with Indigenous communities requires a high-level of responsibility in order to avoid exploitative or damaging outcomes for the people involved” (as cited in Fondahl et al., 2009, p. 21). It is also important to recognize that “the academy has existed for 150 years or so within the Canadian context and has been based on an unbalanced [Indigenous/non-Indigenous] power differential, with the latter being treated by the former as a source of data” (Haluza-DeLay et al., 2009, p. 5). Indigenous communities are often distrustful of academic research and Western researchers for this reason (Smith, 1999, p. 1). While recognizing the limitations of the research as situated primarily within Western systems of knowledge, the research context and questions focus on providing clear and tangible benefits for Kluane First Nation. As such, I aimed to build trust among research participants by clearly explaining the intent of the research, and committing to follow up with research participants and Kluane First Nation Government during and after fieldwork and thesis completion, as part of a long-term commitment to sharing knowledge (Smith, 1999, p. 16).

Ethical considerations may shift during the course of a research project, and hence I intended to maintain a critically reflexive approach regarding my moral conduct as researcher (Dowling, 2010, p. 30). It was extremely important to adopt a “...flexible, adaptive, and reflexive [approach] when working cross-culturally” (Fondahl et al., 2009, p. 21). For example, Fondahl et al. (2009, p.21) describe how informed consent must be



flexible when working with Indigenous communities. Elders and other community members may consider it culturally inappropriate to request informed consent prior to being provided “...the opportunity to begin developing trust, communication, and relationships with the researchers with whom they would be formally consenting to work.”

*A Research Protocol Agreement* between KFN, UNBC and myself as researcher, outlining co-managed frameworks for community participation, informed consent, confidentiality, intellectual property rights, access to data and publication and presentation of research results was reviewed and signed by KFN’s Chief and UNBC. Additionally, I received UNBC Research Ethics Board (REB) approval prior to conducting fieldwork. The ethics plan included a description of the research project and its intended purpose and use, information regarding consent to participate and the return of research data and results to the community. I also obtained a Yukon Scientists and Explorers License prior to conducting fieldwork, which Yukon Government requires of scientists and researchers to conduct studies in the Yukon.

I maintained a flexible, adaptive approach regarding informed consent with research participants, while still upholding the requirements of the UNBC Research Ethics Board. I presented three options to research participants regarding informed consent: 1) they could sign a written informed consent form (see Appendix 5); 2) they could provide oral informed consent that was audio recorded; or 3) they could elect not to provide written or oral informed consent until a later stage of the research process, or not at all. In all three cases, I read over and signed an ethical statement (see Appendix X) outlining my responsibilities to all research participants as the researcher.

I was and intend to remain committed to a fair, transparent and sustainable process and relationship with KFN and by request of the Elders Council, have agreed to share equally any future financial benefits derived from this research.

### 2.1.3 Critical Reflexivity

When we self-locate, we represent our own truths. We represent our own reality. In Indigenous circles one rarely sees an Indigenous person speaking on behalf of another nation or another person. Instead, we generally hear people stating up front that they are expressing only their own experiences and opinions. They represent only themselves because, as the old cliché goes, you do not know another person's journey unless you have travelled in his or her moccasins. **You cannot speak about or represent something that is not yours.** To do so would be perceived in Indigenous communities as arrogant, audacious, and disrespectful. (Abolson and Willett, p. 110, 2005, in Brown and Strega).

As the primary researcher, I engaged in critical reflexivity to ensure that my research design, interpretations and communications with all research participants were justifiable, relevant, ethical, respectful, and rigorous (Dowling, 2010, pp. 30-31). Critical reflexivity means I self-consciously scrutinized my own perceptions based upon my own self-location, experiences and behavior throughout the research process (England, 1994, p. 82). All I could truly control during the study was my own questions, interpretations of responses and observations. This process of reflecting upon the happenings transpiring throughout the research, particularly in the real-life interactions with the voluntary research participants, provided the structure for my analysis and self-reflections. Reflexivity and self-reflexivity is particularly important in decolonizing research, because in order to acknowledge the power relations inherent in research, the researcher should not obscure their positionality but rather "...the need and necessity for researchers to not only acknowledge but also examine their location and how that location permeates their inquiry at every level (Brown and Strega, 2005, p. 10).

Smith (1999, p. 42) writes that:

From an indigenous perspective Western research is more than just research that is located in a positivist tradition. It is research which brings to bear, on any study of indigenous peoples, a cultural orientation, a set of values, a different conceptualization of such things as time, space and subjectivity, different and competing theories of knowledge, highly specialized forms of language, and structures of power.

What this means is that I recognized and reflected critically upon how the competing forms of knowledge involved in this research were informed by my own perspectives of reality and my cultural background derived from Western research institutions. I attempted to balance this awareness with my knowledge, however limited, of the Kluane First Nation community, the traditional knowledge and cultural education that occurs within KFN, and the differing perspectives community members and leadership may hold in the community compared with that of Western research.

I kept a field journal reflecting upon my research practices, experiences and perspectives throughout the research process (Dunn, 2010, p. 124); field journaling began when I arrived in the community at the end of June 2015 and continued until fieldwork research was completed. Participant observation was utilized and documented in field notes during interviews. These methodological tools enabled me to reflect critically on my experiences in communicating with research participants and the community about the research, and supported my ability to provide a thick description (Baxter & Eyles, 1997, p. 512) of research experiences and data.

#### **2.1.4 Open Dialogue**

Clear and open communications was of utmost importance for effective collaboration and credible representation of the KFN community (Baxter & Eyles, 1997, pp. 506, 511). It can be challenging to maintain transparency amidst institutional frameworks and easy to

misinterpret communications, such as emails, in which language is constrained by the lack of personal expressions that help to determine meaning and understanding in open dialogue. Transparency required that I clearly separate my dual roles in the community as researcher and employee, explaining my role as a researcher with UNBC, the intent of the research, and providing a clear description of the research context, problem and questions. This is vital so that research participants understand what their informed consent to participate in the research means, what the information gathered from interviews was used for and how the research aims to benefit the KFN community.

It is also imperative that the research provides benefits directly to Kluane First Nation, both for practical reasons and to resist historical and present forms of colonial research that result in exploitative relationships that do little if anything to benefit the Indigenous communities participating in research (Smith, 1999, p. 191). As Kovach (2005, p. 32, in Brown and Strega) describes, research is an important tool simply as a process of learning, rather than through the entanglement of hefty theories. Meeting the needs of the community is crucial to the success of Indigenous research (Hodge & Lester, 2006, p. 45). Hence, the methods I employed with Kluane First Nation needed systematic and explicit documentation, collaborative discussion, clear communication and ethical soundness (Baxter & Eyles, 1997; Bailey, White, & Pain, 1999).

### **2.1.5 Reciprocity**

Reciprocity has been described by Hart (2010, p. 8) as a key element of an Indigenous ontology, a decolonizing understanding of reality. Reciprocity is “...the belief that as we receive from others, we must also offer to others” (Hart, 2010, p. 7). It “...reflects the relational worldview and the understanding that we must honour our relationships with

other life” (Hart, 2010, p. 7). I aimed to ensure a reciprocal relationship of power between KFN and myself, which involved continual negotiation and patience throughout the research process (Smith, 1999, p. 159). Inter-subjectivity and reflexivity are key elements of developing reciprocity in research (England, 1994, p. 82).

Additionally, reciprocity offers insight into a key component of resilience, in that it “...creates linkages...resulting in reasons for humans to pay attention to the linkages in production in the system” (Trosper, 2009, p. 66). Hence, reciprocity is about linking ideas and worldviews together to attempt to create a cohesive whole, which fosters stability in the system.

Deriving mutual benefits, as well as direct benefits for Indigenous communities, is also a key aspect of reciprocity. Therefore, the researcher identified opportunities to increase the capacity of the research project, such as the provision of a separate research summary report upon completion of the research, obtaining external grant funding for Elders honorariums and hiring of a local research assistant. These strategies supported the involvement of KFN community members in learning more about the research while also receiving financial compensation for their time and effort in participating. For Elders, providing honorariums shows respect for community customs and expectations, and honors the wisdom they choose to share.

#### **2.1.6 Recognition**

Recognition links with respectful protocol and includes an acknowledgement of cross-cultural differences and potential power imbalances, including recognition that among Indigenous communities, the word ‘research’ is often “...inextricably linked to European imperialism and colonialism” (Smith, 1999, p. 1). Recognizing the importance of language

has also been important for this research, and the challenges and limitations non-Indigenous researchers face to accurately represent Indigenous perspectives in this regard (Smith, 1999, p. 188). At the request of Kluane First Nation's Lands, Resources and Heritage Department, I have added to this thesis the equivalent Southern Tutchone (KFN's native language) Place Names where they appear with English place names.

Limitations of the research also need to be acknowledged. Smith (1999) suggests that "spelling out the limitations of a project, the things that are not addressed, is most important" (p. 140) to the development of an Indigenous research paradigm. Limitations of this research project included time, funding, bureaucratic structures, geographical distance between the researcher and research participants, and community capacity to participate in the research (Fondahl et al., 2009, p. 7). "Every meeting, every activity, every visit to a home requires energy, commitment and protocols of respect...Idealistic ideas about community collaboration and active participation need to be tempered with realistic assessments of a community's resources and capabilities..." (Smith, 1999, p. 140). KFN's community is small, and the capacity for community members to participate in this research project may be limited due to busy work and personal schedules, and the fact that this research may not have been considered a priority to community members (Hodge & Lester, 2006, p. 44; Fondahl et al., 2009, p. 6).

As the primary and sole researcher, I have acknowledged the limitations of full collaboration between the researcher and Kluane First Nation, in terms of KFN's limited involvement in the research design, data analysis and the interpretation of research findings. Fondahl et al. (2009, p. 2) describe community-based participatory research as that which involves the Indigenous community in every stage of the research process. Constraints

including time, funding, and geographical distance presented challenges to building a research process whereby the KFN community was involved fully at each stage. However, I have remained committed to establishing and following this case specific framework for decolonizing research, which includes acknowledging such limitations of the research process.

Additionally, recognition involves acknowledging the conflicting worldviews involved in this research (Booth & Skelton, 2011, p. 687). For example, Indigenous perspectives have critiqued positivism as an exploitative epistemology within traditional Western research (Smith, 1999, pp. 164, 189-190), and for purporting to be an objective, value-free and scientific process. Smith (1999, p. 59) writes about how the production and validation of knowledge in Western institutions became "...as much commodities of colonial exploitation as other natural resources." Indigenous perspectives that incorporate traditional knowledge may view the environment in a much more holistic framework than "objective", positivist Western science-based frameworks (Hart, 2010, p. 3). The latter can be exemplified through the federal Environmental Assessment and Review Panel report for the Alaska Highway Gas Pipeline in the 1970's, which describes the environment as separate from human relationships (Federal Environmental Assessment and Review Office, 1982).

The three additional concepts described below were added to this decolonizing framework as the research design and its implementation progressed. These concepts emerged as important factors contributing to this framework, in part informed by my readings of the work of Trosper (2009).

### 2.1.7 Respect

“Respect calls upon us to consider how [Indigenous people] are represented by others, the expectations that others have of [Indigenous people], and how we represent ourselves” (Abolson and Willett, 2005, p. 108 in Brown and Strega). This statement suggests that disrespect is caused by inaccurate representations of Indigenous peoples, and inappropriate expectations existing today (ibid). This also recognizes the dangers of having Indigenous representations misappropriated and used to the detriment of Indigenous peoples. Such considerations reflect the “crisis of representation” period in its identification and support of the need for more respectful dialogues with and reflections of traditional societies and communities.

Here are some of the ways I attempted to practice meaningful respect:

- During late summer 2016 to October 2016, Kluane First Nation elected a new Chief and Council. Due to the shifting KFN leadership structure, I recognized the need to wait until the new KFN leadership became elected to receive a signed one-year extension of the Resolution-in-Council and *Research Protocol Agreement* from September 2016 to September 2017. As part of this process, I offered to provide the newly elected KFN Chief and Council a presentation updating them on the status of the research project. I also scheduled in-person meetings with KFN in Ł ’ n Mǎn Keyi/Burwash Landing, Yukon in February / March 2017 to review my preliminary analysis of the data with KFN Elders Council, Chief and Council, and Director of Lands, Resources and Heritage.



- I intentionally applied for and obtained grant funding to support the research rather than requesting KFN consider providing resources towards the project. I sought and acquired funding to provide Elders honorariums, which totaled \$1,000 in total.
- I honoured the structure of KFN leadership and community (e.g. I ensured whenever I met with the Chief & Council I also met with the Elders Council).
- I ensured KFN research participants were representative of the overall KFN population, including gender, class and age representation.

### **2.1.8 Flexibility**

The researcher was consciously aware of KFN's capacity to manage the multiple established and proposed research project interests within KFN Traditional Territory. As such, the researcher supported flexible scheduling and offered KFN opportunities to extend timelines where necessary, including during the KFN leadership reorganization following the 2016 election.

Larsen and Johnson (2012) support the need for flexibility in one's social place within Indigenous research design. Out of respect for Kluane First Nation Elders, culture and community, when presenting to the Elders Council or interviewing Elders who chose to participate in the research, I provided space and flexibility for them to tell stories and interweave their associations with the pipeline and experience with Western researchers into the discussion and research findings. I remained flexible in my research methods by scheduling my trips around KFN's regularly scheduled meetings, particularly monthly Chief and Council, and Elders Council meetings. I also remained in the vicinity of the community (Kuanlin/Whitehorse, and a couple of weeks in Ł' n Mān Keyi/Burwash Landing), for two months during the summer of 2015 while carrying out the majority of interviews.

### **2.1.9 Transformation**

Land (2015, p. 27) writes about the value of seeking to “... interview and be guided in the research by Aboriginal community members who had engaged politically with and worked to educate non-Indigenous people...” Such an approach transforms the hegemonic system through its recognition of the need for and pursuit of transformative change. This recognition seeks to identify how power is strategically bridged between Indigenous and non-Indigenous communities.

Transformation involves critical research, which “...positions itself as about critiquing and transforming existing social relations. Critical researchers view reality as both objective and subjective: objective in terms of the real forces that impinge on the lives of groups and individuals, and subjective in terms of the various individual and group interpretations of these forces and the experiences they engender” (Brown and Strega, 2005, p. 9). This concept also involves the need to connect research with praxis, including transformation of research practices based on knowledge construction and how relations of power are involved in the context of knowledge (re) production (Brown and Strega, 2005, p. 9). Therefore, a transformative, critical research approach challenges relations of power, dissects how such power relations are structured and recognizes systems of oppression (Brown and Strega, 2005, p. 7).

Promoting transformation as part of the research approach also empowers resistance and contributes to changing the lives of those on the margins of Western society (Brown and Strega, 2005, p. 10). Transformative research focuses on research processes as much as research products, and fosters a basis for political action (Brown and Strega, 2005, p. 10). It “...involves reclaiming these knowledges while simultaneously moving away from the

binary conceptualizations fostered under existing research paradigms” (Brown and Strega, 2005, p. 11).

Larsen and Johnson (2012) emphasize that Indigenous research is transformative in recognizing the “...significance of Indigenous research as intellectual praxis consisting of concrete, place-based encounters and relationships oriented toward the creation of ethical social and ecological worlds”. The dynamic through which Indigenous research occurs, from my experience, necessitated myself as researcher to develop a research project that was as practically oriented towards such place-based encounters and relationship dynamics as possible. This is why I developed a case study approach that focused upon a real world problem for Kluane First Nation.

## **2.2 METHODS**

### **2.2.1 Case Study**

I chose a case study approach, utilizing semi-structured interviewing methods to illuminate present perceptions of the Alaska Highway Gas Pipeline (AHGP) Easement from KFN research participants’ perspectives, to the greatest degree possible *through their own lens* and *in their own words*. Modern perceptions and experiences of the AHGP Easement and overall pipeline project among Yukon First Nations are largely undocumented at present, and public perceptions regarding pipeline easements generally remain largely unknown and undocumented in academic literature.

A case study approach aims to provide a “close or otherwise in-depth understanding of a single or small number of “cases,” set in their real-world contexts...to produce an invaluable and deep understanding – that is, an insightful appreciation of the ‘case(s)’ –

hopefully resulting in new learning about real-world behavior and its meaning” (Yin, 2012, p. 4). Case studies produce empirically based knowledge inquiries about contemporary phenomena within a real-world context (Yin, 2012, p. 4).

A case study approach complements this research project, as it focuses on the complex environment presented by the Alaska Highway Gas Pipeline Project within a contextually multi-scaled governance and resource management system. Haluza-DeLay et al. (2009) have suggested that “since environmental effects are primarily experienced in localities, case studies are useful to uncover these effects, including a grounded understanding of local places, their regional or global context, and the relations that link them” (p. 15). Hence, this research project fit well with a case study given the relevance of a local level examination of a broader social-ecological issue.

This case study aimed to build substantial depth of understanding in regard to the perpetuation of the AHGP Easement within KFN Traditional Territory. It has provided Kluane First Nation with empirical evidence and analysis, and the academic community with a new depth of knowledge and insight into a crucial topic within the fields of natural resource management and environmental justice: that of large-scale pipeline projects, the easements that legally bind them to the land and their relatable environmental impacts on local communities.

### **2.2.2 Data Collection**

I determined to carry out qualitative data collection methods including purposive (selective) sampling (Bradshaw & Stratford, 2010, p. 75) through semi-structured interviews. The semi-structured interview method “...is organized around ordered but flexible questioning” that “employ[s] an interview guide” (Dunn, 2010, p. 110). Semi-structured

interview guide questions (included in Appendix II) were developed in relation to the primary research question and sub questions, as described in Chapter 1 – Introduction, and further described in Chapters 2 – Theoretical and Practical Framework, and Chapter 5 – Discussion and Conclusion. The interview method allows for the representation of “...a diversity of meaning, opinion, and experiences” and “...shows respect for and empowers the people who provide the data” (Dunn, 2010, p. 102). This method therefore created an open space for guided discussion around the research topic and key thesis questions. As the researcher, I was responsible for redirecting the discussion when necessary to ensure conversation remained focused on content related to the research problem and questions (Dunn, 2010, p. 110). An identification and analysis of KFN’s perceptions of impacts from the AHGP Easement using semi-structured interviews has greatly contributed to building knowledge about the AHGP, and community-based perceptions of pipeline easements in general, as described in Chapter 4— Results.

I considered the questionnaire method but decided it was inappropriate for this research. My subject positionality as a KFN staff member provided me insights into the community, and I had doubts that the dissemination of a questionnaire would yield many KFN respondents, due to the relatively impersonal nature of this type of data collection. I also believed semi-structured interviews would offer a greater richness and depth to the data, which I anticipated would enable a thick description of responses for the research questions.

Bradshaw and Stratford (2010, p. 69) describe that the primary considerations in qualitative research are given to “the *quality* of who or what we involve in our research and *how* we conduct that research.” So, I endeavored to carry out individual interviews with all willing and interested KFN citizens who carried perspectives regarding potential impacts

from the Alaska Highway Gas Pipeline (AHGP) Easement, as well as past members of the Alaska Highway Aboriginal Pipeline Coalition, and Yukon, federal government and industry representatives. The latter groups were chosen to represent their perspectives based on their direct experience and/or knowledge of potential impacts relating to KFN and the AHGP. Thus source triangulation (Baxter & Eyles, 1997, p. 514) was employed to corroborate KFN responses; these interviews serve as a “snapshot in time” of KFN statements and responses for evaluation and interpretation. In consideration of the research project timeline of a targeted two years, I aimed to complete interviews with between fifteen to twenty-five research participants in total.

If permitted by research participants, all interviews were audiotape recorded. Three interviews were not audio-recorded with Elders as per their stated preference, and out of respect for their level of comfort with the interview process. I also did not require any research participants to sign the consent form, but I did always sign the form declaring my researcher ethics responsibility to the participants (see Appendix 3). Overall, 20 interviews were carried out. The classification of research participants is described in Chapter 4—Results.

I employed the method of full transcription (Cameron, 2010) to record the interview data so that it could be analyzed and archived. I captured the audio-recordings verbatim using a digital audio recorder, which took a period of several months to complete. I attempted to convert all interview notes into typed format and transcribed all recorded interviews as soon as possible following an interview (Dunn, 2010, p. 120). (Unfortunately, a backlog developed as I began a new employment position during this time.)

I contacted the KFN Youth Councilor to determine which KFN youth would have potentially been available to participate in the research through individual interviews. Unfortunately, all the recommendations for potential KFN youth participants and my attempts to schedule interviews with KFN youth resulted in only one interview with a KFN youth representative. From my own place of reflection and experience with attempts to schedule interviews, the KFN youth who would have been the most likely to provide insight from past experiences with the Alaska Highway Gas Pipeline Project were primarily past KFN Youth Councilors. They were in the later stages of the “youth” category, young Indigenous leaders who had moved away from the Ł’ n Mǎn Keyi/Burwash Landing community for educational and career pursuits and busy with their own lives. Given the limited time period I provided during summer 2015 for interviews, it was not feasible for them to participate in the project. In hindsight, I would have designed the project differently by creating more flexible opportunities and incentives to increase KFN youth research participation.

A representative sample is still relevant to the research analysis, and I intended to ensure that research participants from the KFN community emerged within an appropriate community range of gender, age, and experience. If interest was expressed, an information package (as reviewed and approved by the UNBC Research Ethics Board) describing the research project (see Appendix 3) was made available to potential research participants. While I focused on the purposive sampling list of research participants, I also remained open to providing interview opportunities for any KFN citizens I encountered while in the community of Ł’ n Mǎn Keyi/Burwash Landing.

Many KFN citizens hold multiple roles in the community, such as Councilor, staff member and community member. These roles were categorized to identify research participants based upon their highest level of “status” within the KFN community. For example, if an individual is an Elder, a Councilor and a community member, that individual was distinguished through the constituency groupings as an Elder, since this grouping represents the highest level of status in KFN culture. All KFN staff members interviewed are also KFN citizens, and so they were assigned the grouping of Staff Member. I ensured the safety and confidentiality of research participants by not identifying singular roles that would enable an individual to be easily identified (except in the case of the former KFN Chief, Math’ieya Alatini, who provided consent for her identity to be made known in the research).

#### *Honorariums*

Fondahl et al. (2009, p. 42) describe the importance of compensation to community-based research participants in recognition of their expertise, such as Elders’ in-depth knowledge and understanding of the traditional territory. The KFN Elders Council and KFN Lands Committee members typically receive honorariums from KFN Government for participation in their meetings. This financial limitation was discussed with KFN Chief and Council to recognize the uncertainty of acquiring external funding to support research. KFN generously provided some financial support for Elders honorariums for their interview time over the summer 2015. Subsequently, I obtained funding support for a Research Assistant from the KFN community to assist with project communications and review the research findings with the Elders, in particular the Elders’ quotations transcribed from interviews, and provide them each with honorarium funds for their additional time.



### 2.2.3 Data Analysis

For the proposed case study research, data analysis was critical for deriving useful meaning and interpretation from the raw data (interview transcripts from recordings) that connects to the research questions and broader theoretical framework of the study. As recommended by Corbin & Strauss (2008, p. 163), I read through all the data, without taking any notes, to familiarize myself with the data in its raw form prior to placing my own perceptions and interpretations upon it. This was an important first step in assisting my reflection upon the dataset as a whole before I began to break apart and connect concepts and themes in the data. I also began coding as soon as possible following the completion of the first interview, since "...the first data serve as a foundation for further data collection and analysis" (Corbin & Strauss, 2008, p. 163).

Direct quotations were then used in the analysis of the data collected, labeled by constituency groupings (e.g. Kluane First Nation [Elders, Chief, Councilor, Professional Staff, Community Member], Alaska Highway Aboriginal Pipeline Coalition, Government]) (Booth & Skelton, 2011, p. 690). A distinguishing number was attached to each individual response, along with the respondents' constituency grouping (Booth & Skelton, 2011, p. 690). Reporting of research findings was provided to Kluane First Nation in textual form, initially on May 28, 2018 in a draft summary document describing the key themes.

Bradshaw & Stratford (2010, p. 76) have stated that the analysis of meanings within a specific research context is the primary aim of qualitative research, and therefore there is less need to ensure the sample is "representative." As such, sample size is "...more relevant in quantitative research because representativeness is important" (Bradshaw & Stratford, 2010, p. 76). A reliable sample of the KFN community was developed through the following

methods. Firstly, as the principal researcher I contacted KFN citizens identified in a purposive sampling list reviewed with KFN, to inquire whether they may be interested in participating in the research project. Given my existing relationship with KFN, I was already aware of several key contacts within the community who I thought could be interested in participating in this research project, within the context of a meaningful representative sample (Bradshaw & Stratford, 2010). KFN reviewed this list and recommended additional contacts that had represented TransCanada, the Alaska Highway Aboriginal Pipeline Coalition and Yukon Government.

### *Coding Process*

Coding involves "...searching for the right word or two that best describe conceptually what the researcher believes is indicated by the data" (Corbin & Strauss, 2008, p. 160). I utilized latent content analysis, the type of coding employed to determine key themes and concepts in interview texts directly from the underlying content and contextual information provided by research participants (Dunn, 2010, p. 125). Characteristics of the raw data that was collected informed the development of concepts as the interpretive products of analysis (Corbin & Strauss, 2008, p. 159). Morse and Field (1995) describe data analysis as "...a process of fitting data together, of making the invisible obvious, of linking and attributing...of conjecture and verification, of correction and modification, of suggestion and defense" (as cited in Corbin & Strauss, 2008, p. 195). In this manner, the primary method of data analysis I utilized for this case study was "In Vivo" coding, which implies the use of participants' actual words (in this research, derived from the interview dataset) to develop the key concepts and themes.

This analytical approach contrasts the method of deriving such concepts directly from naming by the analyst (Corbin & Strauss, 2008, p. 65). In practice, this meant I initially developed the key concepts and themes by highlighting the most frequently repeated words spoken word-for-word by the research participants' themselves, as captured verbatim through the transcription. I then arranged common words and phrases into "bibbits", or "nodes" (Kirby and McKenna, 1989; NVivo, 2017), drawing greater connections the further into the analysis of transcriptions and key passages, to eventually arrive at the development of key themes and concepts. I then organized the most repeated key words into linked key concepts and themes as they emerged intelligibly through my researcher lens. I reviewed each interview transcript in detail, so there were multiple relatable phrases and concepts generated.

I used the software program NVivo to assist with organizing the coding of the data. This program enabled me to import each research participant's transcription, select specific statements within the overall interview transcription, and label each statement with a key word. Refer to Table 3 in Appendix I for examples of some of the most referenced key words (i.e. nodes) derived from the raw data analysis.

The use of the NVivo software and latent content analysis enabled me to interpret meaning from the data in a determinative way. "Because...codes emerge in vivo, produced from the interviews, they offer insights grounded in the lived experiences of...participants" (Galletta, 2013, p. 125). Codes emerged directly from the interview transcripts as words, phrases or metaphors, and from my interpretation of the data (Galletta, 2013, p. 125). Particular statements from research participants drew my attention from an analytical perspective anchored to the research questions. These key phrases I then arranged into key

themes and concepts, and thematic and conceptual patterns became apparent as the interview analysis built on each other and became recorded in the NVivo software as “Nodes” (Galletta, 2013, p. 126; Corbin & Strauss, 2008, pp. 159-160; NVivo, n.d.).

I remained aware of my reliance on computers / technology to assist me in organizing the data, and the need to mitigate this by writing descriptive journal memos to track what I was thinking as I analyze the raw data (Corbin & Strauss, 2008, pp. 192-193).

The combined analytical process of both axial coding (“the act of relating concepts/categories to each other”) and open coding (“breaking data apart and delineating concepts to stand for blocks of raw data”) was utilized (Corbin & Strauss, 2008, p. 198). I inevitably removed or reorganized repetitive themes and concepts through the process of pulling apart and piecing together the strings of the participants’ words I interpreted to most reflect the intent of the research questions. I then identified those that occurred the most frequently in the overall dataset, and transferred these key themes into an initial research findings summary report, which I eventually transformed into Chapter 4—Results. Categories, or themes, are higher-level concepts that develop from the connections and relationships among lower-level concepts. All such concepts and themes emerged from the raw data (Corbin & Strauss, 2008, p. 160), which is how I initiated and refined the categorization of the coded interview data.

Corbin and Strauss (2008) describe “identifying the essence or meaning of data” (p. 160) as the most important aspect of data analysis. In order to land as close as possible to the true meaning in the data, I utilized “member checking” with research participants to verify how my interpretations of the emerging themes fit with the intended meaning described by research participants’ (Galletta, 2013, p. 127). From March to April, 2016, I provided the

Research Assistant directions to review specific quotations from a list of KFN research participants (especially Elders). The quotations had been chosen to demonstrate the key themes described in Chapter 4 – Research Findings. The intent of this data review process was to confirm accuracy of the transcribed quotations, and the research participants’ informed consent to use the data in the published, publicly available version of the thesis. I recognized the importance of ensuring appropriate review of the quotations, with the decolonizing framework highlighting the past colonial misrepresentations and exploitation of Indigenous peoples

During this review, some requested changes and additions made to their quotations, and I have attempted to integrate these in the final version of the research findings. Ongoing, systematic and in-depth studying of the data is crucial to developing a rigorous analysis (Galletta, 2013, p. 127). Iteration was necessary, meaning the process of content analysis was repeated until desired outcomes are reached – in this case, until codes and categories become fully developed from the data to describe the narratives of research participants, as related to the research questions (Galletta, 2013, p. 119). Data analysis was considered completed as I developed “...a gradual sense of having exhausted thematic possibilities at the level of coding and clustering codes into categories related to the research question” (Galletta, 2013, p. 149). Corbin and Strauss (2008) define this stage of the data analysis process as “conceptual saturation,” “the process of acquiring sufficient data to develop each category/theme fully in terms of its properties and dimensions and to account for variation” (p. 195).

Once such thematic patterns had been developed, I was ready to draw upon connections and meanings within the data to interpret and respond to the research questions

(Galletta, 2013, pp. 149-150). This interpretive process reflects the “inductive power of qualitative research” (Galletta, 2013, p. 150). At this stage, I also reengaged with the theoretical framework of the research problem, and synthesized connections between existing theory and the thematic categories developed during coding. Doing so enabled me to develop a conceptual framework used to interpret and explain the research findings with greater depth and complexity, allowing for the “conceptualization across...patterns toward articulating study results” to a wider public (Galletta, 2013, p. 158). This process framed the development of the final chapter of this thesis, Chapter 5—Conclusions and Recommendations.

The non-confidential summary report of the research with the key research recommendations is enclosed in Chapter 5 – Discussion and Conclusion, and a final summary report with strategic recommendations and a one-pager of key messages was provided to KFN in July 2018.

## **CHAPTER 4: RESEARCH FINDINGS**

## **1.0 INTRODUCTION**

This chapter summarizes the results derived from the semi-structured interviews, focused on an analysis of key themes and concepts that emerged from the research questions and problem. Additional background documentation is also incorporated into the research findings. As described in Chapter 3 – Methodology, these themes and concepts have been analyzed using NVivo software to code specific key words into more substantial thematic content. Linkages between Chapter 2 – Theoretical Framework, and the emergent data and analysis in this chapter provide the backbone for the thesis' key recommendations and conclusions described in the subsequent final Chapter 5.

Chapter 3 – Methodology, discusses the importance of recognizing my researcher positionality as a non-Indigenous person of settler colonialist background in gathering and analyzing the research data. The researcher has attempted to gain substantive feedback on the research results from Kluane First Nation to minimize such effects, but they remain present due to the project's design.

Twenty individual semi-structured interviews were carried out, fully transcribed, and coded into key themes and concepts using NVivo software. The composition of participants interviewed included:

- KFN citizens:
  - 16 participants, represented by:
    - 7 men
    - 9 women
    - 5 Elders
    - 1 youth



- 5 past KFN Government (staff or Chief and Council)
- 5 current KFN Government (staff or Chief and Council)
- 6 current members of KFN committees and boards

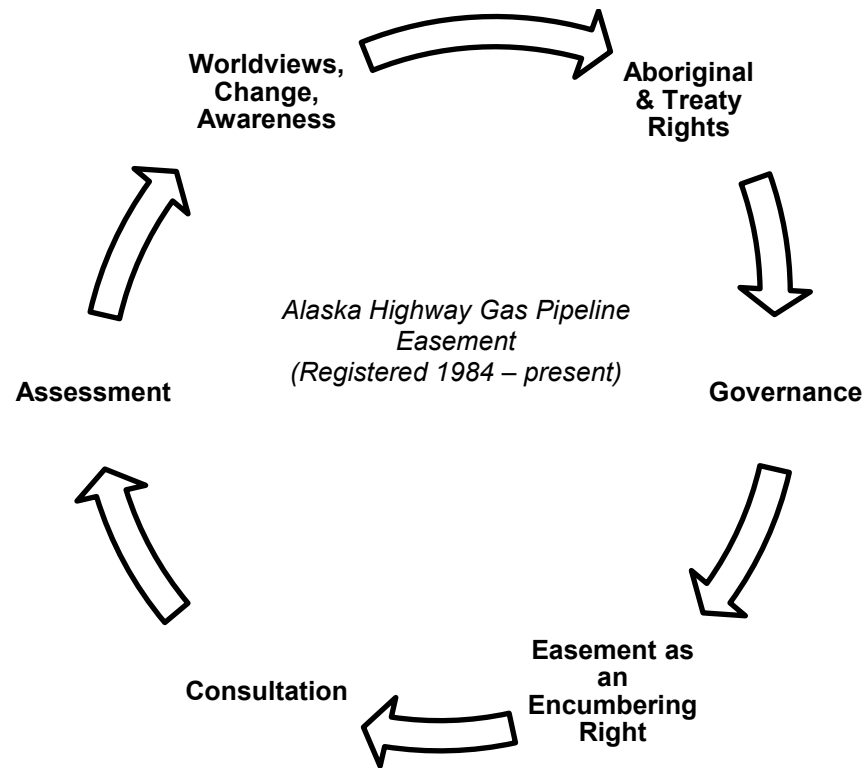
Some of the KFN research participants interviewed have worked for the Yukon Government, the federal government and KFN Government at different times during their careers.

- Age distribution:
  - Dominant sub-group: approx. 30 – 60 years
  - Elders: 60 – 85 years
  - Youth age range  $\leq 30$  years was the most underrepresented sub-group

One interview each was also completed, transcribed and coded with representatives from Northern Pipeline Agency, Yukon Government, TransCanada, and Aboriginal Pipeline Coalition. All of these representatives were involved in the Alaska Highway Gas Pipeline project during the 2000's, leading up to the 2012 Easement extension. The age distribution and gender of these four research participants was represented by:

- 3 men approx. age 45 – 65
- 1 woman > age 60

## 2.0 KEY THEMES AND RELATED CONCEPTS



**Figure 4.** Key themes and concepts derived from the interview data.

Pertaining to the primary research question, the above graphic demonstrates the cyclical considerations that represent the key themes derived from this research, and how they are interlinked components of the same or related systems. These six themes are linked to Chapter 2 – Theoretical and Practical Framework and the conclusions and recommendations drawn from Chapter 5. These key themes that emerged from the research questions and participants’ responses provide evidence towards these final thesis recommendations and conclusions.

Examples of some of the most referenced key words derived from the raw data analysis, synonymous with codes, or “nodes” that are summarized into core concepts and themes in Chapter 4 – Research Findings, included those listed in Table 3, Appendix I. The table includes all nodes with over 20 reference markers from the overall data set recorded in the NVivo software. Nodes referenced at least 50 times are highlighted in grey.

## **2.1 Indigenous and Treaty Rights**

This theme focuses on the recognition of Kluane First Nation’s Indigenous and Treaty Rights as outlined in Section 35 of the Canadian Constitution and the KFN Final and Self-Government Agreements. These unique and special rights touch on several important and connected concepts that emerged in the interview data. This includes the significance of Indigenous people’s relationship to the land, the legal context through which this relationship is protected, and the distinctions between concepts of land ownership and proprietorship.

### **2.1.1 Lù’àn Mǎn Ku Dǎn/ Kluane Lake People**

The Lù’àn Mǎn Ku Dǎn/ Kluane Lake People are an Indigenous community autonomously governed by Kluane First Nation (KFN), who has established Indigenous and Treaty Rights in the case study area of KFN Traditional Territory, linked to the Lù’àn Mǎn Ku Dǎn/Kluane Lake People’s continued use of the territory. Such Rights are significant to KFN research participants, with over 30% of participants explicitly mentioning this theme.

Lù’àn Mǎn Ku Dǎn/Kluane Lake People describe themselves as living through the wisdom of their Elders. They look to their Indigenous homeland to provide directions for the future.

Participant #3 [KFN Elder]:

We.... are the Lù'àn Mǎn Ku Dǎn/Kluane Lake people, we live here for the fish. You have to know where you're coming from before you know where you're going...the Elders told us that...and we were raised up with that concept that you have to look after your resources because if you don't, when the world starts changing we're not going to have...who's going to accommodate us if we don't have fish there, and if our water is ruined...we'll have nothing.

KFN Elders and several other KFN research participants described themselves as caretakers of their homeland. Their understanding of KFN lands is that of providing the Lù'àn Mǎn Ku Dǎn/Kluane Lake People their continued sustenance, and the value of carrying KFN Traditional Knowledge as a form of social-ecological resilience.

### **2.1.2 Legal Context**

KFN research participants described how the Alaska Highway Gas Pipeline project and associated Easement have, from the project's early stages, encumbered *KFN's Final Agreement* (2003). The Easement had been registered thirty years prior to the Agreement's completion and because of its existence under an existing land title registration; KFN Research Participant #10 stated that this was not open to negotiations during the land claims process, and Research Participant #8 suggested for this reason KFN "...just has to live with the repercussion".

The legal context, as explained by the Northern Pipeline Agency representative, is also significant in terms of how the pipeline "company is expected to comply with all federal and territorial legislation involved in both the construction and operation of the pipeline system" (Participant #20). This point highlights that the federal government considers the burden of professional reliance to be on the company to follow all applicable legislation appropriately.

## **2.2 Alaska Highway Gas Pipeline Easement as an Encumbering Right**

This theme highlights local perspectives of the Easement and its potential and existing impacts on the community; how the Easement is managed, and legal issues of consent described within *the KFN Final Agreement* related to the decision to authorize renewal of Encumbering Rights overlapping KFN Settlement Lands. It also describes, through participants' own memories and views, how the Easement was transferred into the land claims negotiations process.

### **2.2.1 Local definitions and understanding**

KFN citizens possess a range of understandings about the Easement. The following conceptual understandings of what the Easement means to Kluane First Nation emerged from the interviews:

Participant #19 [KFN staff]:

I'm trying to remember what Encumbering Right is again... Encumbering Right is a right that has been carried forward, in the likes of a grandfathered in clause, is that what it is?

When interviewing participant #19, it appeared to the researcher that she had not been faced with the question of Encumbering Rights under the *Final Agreement*, and the Alaska Highway Gas Pipeline, for some time. However, her definition is accurate; a “grandfathered-in-clause” implies a priority right to use the land (whether Crown land, Settlement Land or private land). This participant compared the Easement's impact to that of previous large areas of land, the Kluane Game Sanctuary and Kluane National Park and Reserve, where KFN was restricted from hunting, fishing, and trapping access. This participant asks why, if KFN is no longer restricted from accessing these areas freely for traditional purposes, the Easement should remain as a comparably restrictive element on the landscape.

Participant #19 [KFN staff]:

... Back in the 1940's... they removed the people from hunting, on the whole Kluane Game Sanctuary, and in through the National Park area.... So in reality, without even considering the full long-term impact of what this pipeline Easement did, is doing, it is doing the same thing, maybe not to the huge massive extent that the Kluane Game Sanctuary hunting, fishing and trapping restriction did, but what it's doing right now, it's cut in through the heart of this Traditional Territory, it's cut like a big band, right in the heart of our Traditional Territory again. So where the... Kluane Game Sanctuary and the National Park left off, this became another... form of governmental and business colonial priorities overriding First Nation homeland. Are you seeing where I'm going with this?

Statements such as Participant #19's, related to the history of the area and past infringements on KFN's Indigenous rights, are contrasted by the Crown's understanding of the Easement in terms of its value within the sphere of "public interest and significance". Participant #18 shares this perspective, confirming in interviews that the "pipeline is for the greater good / in the public interest", a perspective that remains supported by Yukon Government and TransCanada. Participant #18 also provided a general analogy for the significance of an easement.

Participant #18 [Yukon Government representative]:

We all deal with Easements – this just happens to be a long linear one of some national significance...or international significance... I understand the merits of how [easements] can get in the way of planning and design, but...again, there are processes in place to sort that through, to try and meet everyone's interest... People had to realize, 'oh, you might have to plan around this for quite some time', if not live with it forever, had it been constructed...it would be there...but again, we shouldn't lose sight of substantial benefits that were coming to the owners of the land and particularly the prime example being property taxation. Kluane First Nation, as I recall, was the largest...Settlement Land holder that inherited...or chose to inherit this encumbering right, so they would have been the largest beneficiaries of property tax.

There was confusion among everyone I interviewed regarding the actual timeframe under which the Easement was registered, about the renewal of the pipeline Easement and particularly the route across Ł' n Mān/Kluane Lake. The research confirmed the most recent renewal was a 10-year renewal, but prior to this, the *Easement was in place for 25-years*, from 1987 - 2012.

Participant #19 commented that the AHGP Easement "was a really big concern and then it sort of fell off the wayside, and I think that people need to pick it back up," referring to appreciation for this research project to rebuild KFN awareness of the Easement. Other

KFN research participants expressed surprise or shock upon discovering the encumbering nature of the Easement in the *KFN Final Agreement*.

Participant #8 [KFN staff]:

... Because when I found that in the Agreement, I was just like, 'What is this?!... This [other KFN member mentioned] "... we couldn't do anything about it... we tried, but... it's embedded, by the time they even started negotiating...'

### **2.2.2 Land Claims Negotiations**

During land claims negotiations, KFN opted to select lands overlapping the Easement, both for economic reasons and in consideration of greater potential control for KFN if they became landowner to more of the lands the Easement encumbered.

Participant #10: [KFN citizen]

... We made a conscious decision at the end to select some of those pieces of land, more as an economic type thing. Like initially I think we avoided it cause we didn't want to deal with those kinds of things...but then towards the end...it was a bit of a stab in the dark, saying well 'this pipeline is going to happen...when they decide ... and there's very little we can say about it'...so try to position ourselves in a way to take the most advantage of it as we can, and maybe even have a bit more influence by actually being the landowners.

*Researcher: So it was mostly economics that oriented that decision, but also...wanting a bit more control if possible as well?*

Participant #10: Yeah...it definitely increases our influence I think, by being actual landowners...we can crank up the lease and all that...I don't know...like I said it was a shot in the dark and we felt like...definitely at that point in time, it really looked like the pipeline was going to happen, and I think we were looking for...every opportunity to get us a better foothold, to have some control when that happened, both economically and as a government...

It should be noted that TransCanada [previously known as Foothills] does not have control over which Yukon First Nations Settlement Lands the AHGP Easement crosses, and such negotiations and determinations occurred solely between the Indigenous communities and the federal government.

Participant #10 [KFN citizen]:

We didn't ask [Foothills] because ...they don't have any control over that, right...like the UFA's clear, 'you can select the land'...we just had to agree it was subject to the Easement...so, if the pipeline happened we knew it would happen regardless, but it could happen on our land...but we would own it so we would still be able to lease it, and could take any kind of advantage of it...

Participant #10's above assertion also speaks to the desire to retain proprietorship of the land and retaining shared power in decision-making with Yukon Government, as discussed in Chapter 2, Section 5 – Easement Extension and Encumbering Rights. This participant acknowledges that KFN's decision to accept portions of the Easement within KFN Settlement Land selections was a "gamble" (transcription #10), based on the existing "encumbering" nature of the Easement that fell outside of the scope of tabled items during land claims negotiations.

Participant #10:

...I do remember deciding to change all those [land selections] to take in the Easement... I don't think we went much further, most of them, it was a pretty calculated adjustment we made... [and a] gamble I guess.

... So right towards the end of the development of our [settlement] package, there was a decision made ...it was during a period of time where it looked like the pipeline was going to happen, for sure ...and, so there was lots of discussion about the types of lease, the revenue that you might be able to generate by leases or royalties or however, by having the pipeline go across Settlement Land...so we knew, clearly that we couldn't stop the pipeline, the Easement was there...but, there was a conscious decision to move a lot of those [land selections] the ones that abutted up to the pipeline, to...go into the Easement so that there may potentially be an opportunity at some point to charge a lease fee or a royalty fee or something. So that was...done pretty late in the game and it was done with...that in mind...so you'll see a lot of them, they used to abut right up to the pipeline but then we just sort of pushed it up a little bit more to take in the Easement... we didn't change selections around, we didn't select large chunks of the Easement, just if we were already abutted to it, we just extended it over top the Easement... like I said I don't know ... whether it was a good decision or a bad decision...

*Researcher: So...is [KFN] able to lease land that the Easement crosses, or ...a royalty sort of arrangement?*

Participant #10: Yeah... there would be a lease... there would be a cost to this and that.... I don't know if it would be set by.... [Yukon Government] (YG) overall...but we would collect it for that portion that was on our land...so we would have to advocate... it was a set rate, but YG would have to flow that to us ...but also I think with that we'd have more influence...as far as economic opportunities and maybe more influence when it came to environmental concerns, if we actually own the land.

The Yukon Government representative interviewed (interview transcription #18) provided perspective on the uncertainty of the length of the term of the encumbering right for the Easement, which was unpredictable even at the land claims negotiation table.

Participant #18 [Yukon Government representative]:



And I mean... you also have to have the consideration...I mean nobody at the negotiation table was like I was on this particular claim as well as working on advancing...this northern pipeline...at the negotiations, it was registered as an encumbering right, and...nobody at the table, not a single person could predict...you kind of go in with 'well, it could be a really long term encumbering right', and it could be a lot shorter than many of us think, but...so there was that uncertainty, and if you decided as a First Nation to select land, I guess you went in there with your eyes wide open that at least it existed, you just didn't have a sense of its...the length of time it will exist. And I mean this isn't the only encumbering right, but this is a big one.

The Yukon Government representative's explanation of the pipeline as a long-term encumbering right relates to the concepts of land administration and KFN's proprietary interests in KFN Settlement Lands.

Participant #10's statement below also speaks to the desire for KFN to retain proprietorship of the land, even while faced with the adverse limitations of Encumbering Rights, as discussed in other sections of this thesis.

Participant #10 [KFN citizen]:

We... could select land on top of the Easement, but they were always [Encumbering Rights] ...so there was no...negotiation as far as... like some of the other gravel...selections, we could negotiate back and forth and say, 'we want you to release that Easement or that selection' and we're going to select it...with the NPA ones, that wasn't there... we always could select over top of them, but they would always be subject to... and they weren't up for... negotiation as far as lifting that subject to status...it was agreed to in the UFA and... I don't think KFN had specific ability to negotiate in that manner, it was basically a condition in the UFA.... from what I knew anyways.

Several KFN participants were unaware of the Easement's registration under *KFN's Final Agreement*. Other KFN research participants are aware that the Easement was a "grandfathered in" right that may not have been negotiable during land claims but are still adamant that this fact remains an injustice to the intention behind land claims, which is thwarted when it comes to the Alaska Highway Gas Pipeline and Gladstone Hydroelectric Dam Projects as large-scale hydroelectric projects within KFN Traditional Territory.

Participant #8 [KFN citizen]:

You know the idea of land claims... the whole intention of protecting this landscape for the future and making sure that you have control and a say over what happens here; it's great, and we do have /much more of that, but *those two big projects* [referring to the Alaska Highway Gas Pipeline and the Gladstone Hydroelectric Expansion Project], *basically totally remove that whole intention from the land claim ...* And, *we're in a completely different climate now; First Nation governments are at-par with the rest*; and all of this, when it was decided on, [we] weren't even at the table to really have a say

at, so *somebody else signed over our rights*, like a long time ago, and that just irks me; just on that kind of intention behind the whole agreements... the land claim was.... to give the voice to the First Nation and give them the management... and these two projects just seem like, ‘*we’ll talk to you if we want to but we will still put it through if we want, because we can*’. So, that’s...unfortunate.

### 2.2.3 Consent / Acceptance

As discussed in Chapter 2 – Theoretical and Practical Foundations, a decolonizing legal and policy movement is taking place in Canada and globally, including greater conceptualizations and recognition around “consent” from Indigenous peoples pushed forward in such recognized examples as UNDRIP (UN General Assembly, 2007) and the *Tsilhqot’in Nation v. British Columbia* (Supreme Court of Canada, 2014) decision regarding Indigenous title.

From KFN’s perspective, preparations of the TransCanada Indigenous engagement / relations team in carrying out the consultations did not meet the level of expectation that KFN considered appropriate, nor did it allow for the provision of informed consent interpreted as required for a renewal of the AHGP Easement as an Encumbering Right under Section 5.6.0 of the *Final Agreement*.

Participant #9 [former Chief Alatini]:

Yeah, ‘the proposed two-stage regulatory framework’ [reading over letter from NPA] ... They were flying by the seat of their pants, they didn’t know what the heck was going on, and we also had the Alaska Highway Aboriginal Pipeline Coalition, which had all the First Nations involved....

Since the Easement became established as an Encumbering Right in the *Yukon Umbrella Final Agreement* (1993) and *KFN Final Agreement* (2003), twenty-five years have passed. During this time, the “free, prior and informed consent” of Indigenous peoples has become an increasingly-recognized goal of reconciliation processes involving land and resource developments in core Indigenous territories. KFN has provided the position to the Northern Pipeline Agency that KFN’s consent should be required to amend the term of the

Easement as an Encumbering Right, pursuant to the KFN *Final Agreement*, Section 5.6.10.

The consent requirement goes beyond the mutually agreed upon requirement of consultation pursuant to Section 5.6.9. Section 5.6.10 of the *Final Agreement* (2003) specifies:

If Legislation is amended to authorize Government to increase the term permitted for an Encumbering Right, Government shall not increase the term of that Encumbering Right pursuant to that amendment without the prior consent of the affected Yukon First Nation.

A letter response, dated May 3, 2012 from the Honourable Joe Oliver, P.C., M.P., addressed to all Yukon First Nations Chiefs, reads:

The Agency does not share the view that the consent of the KFN is required before Canada can amend the Easement Agreement to allow additional time for Foothills to obtain the Agency's approval to begin construction of the pipeline. The proposal is not to amend "legislation" as defined in the KFN Final Agreement but a term of the Easement Agreement itself through the execution of an amending agreement. An Order in Council would indeed be required but for the sole purpose of enabling the Minister responsible for the Agency to execute the amending agreement. It would be procedural in nature, not substantive. Such an Order in Council would be a new, stand-alone Order in Council. It would not amend previous Orders in Council that had been made in the past for similar purposes.

The proposed amendment is not a matter of "changing the rules" related to the terms of this encumbering right location on KFN settlement lands. This grant of the easement to Foothills predated the Kluane Final Agreement, and as reflected in the Final Agreement, the negotiations were undertaken with full knowledge of the presence of the easement. The original purpose of the easement (construction and operation of a gas pipeline) has not changed, nor has the location.

The Agency has sought First Nations' input on the proposal to amend the Easement Agreement, and I can assure you that the KFN's views will be given full consideration.

The crux of this issue was that differing interpretations emerged among Kluane First Nation and the Northern Pipeline Agency on whether the Easement Agreement should be considered as Legislation, which is defined under the *KFN Final Agreement* (2003) as including "Acts, Regulations, orders-in-council and bylaws". The NPA responded that the Agency did not consider this Easement Agreement to be Legislation because its amendment extension required only a stand-alone order-in-council. However, KFN has noted that due to the unique history of the Alaska Highway Gas Pipeline, the Easement is the key piece of legislation authorizing the continued existence of the AHGP.

KFN's legal counsel advised that "there is a strong argument the [TransCanada] pipeline proposal, even if it is "amended" rather than recreated, should nevertheless be subject to these new environmental laws", in reference to the updated Canadian Environmental Assessment Act (CEAA, 1992) and Yukon Environmental and Socio-economic Assessment Act (YESAA). The Alaska Highway Gas Pipeline is currently considered exempted from this modern environmental assessment legislation as it is considered an existing route rather than a new proposal (Boughton Law Corporation, 2011).

Thus, KFN and the NPA clearly hold differing views regarding the nature and terms of the Easement amendment process; KFN considers the amendment of an Encumbering Right as defined under the *Final Agreement* to be more than solely administrative in nature, given that an order-in-council is required to extend the term, whereas the NPA argues that such an amendment is merely "procedural" in nature.

Relatedly, some KFN research participants questioned the difference between legality and ethics on the issue of the Easement amendment, and the responsibility of the Northern Pipeline Agency and TransCanada to make their best efforts to obtain consent from Indigenous groups.

In the passage below, Participant #10 speaks to the need for governments and proponents to work with *all the landowners* to the greatest extent possible, including making best efforts to reach consent, because this is the most ethical option, even if it is not a legal requirement. Participant #10 recalled that when land claims were being negotiated, consent and control by Indigenous peoples over a resource development affecting KFN and their lands, as related to UNDRIP (UN General Assembly, 2007) was not even on the radar.

Participant #10 [KFN citizen]:

... I understand why a First Nation can't have a veto over an entire pipeline... I think if it's coming across your Settlement Land, and they're redoing the Easement, I think consent is.... the right thing to do...is it the legal thing? ... No ...we signed a deal that said it's subject to, right...so, on that hand...we were limiting...but I mean if there were huge concerns, and they were big issues, I would think that any proponent would consider making amendments to the Easement to meet the interests of the parties whose land it belongs to ...so it's kind of like, what's the right thing to do and what's the legal thing to do are two different things, right... I think the right thing to do would be for the proponent to work with the owners of the land to find the best route possible for everybody... ...and if I could have negotiated the deal a different way I would have required consent, but I mean that was our deal of the day, right...so we didn't have that option.

The Yukon Government representative provided a useful perspective of a core element of the issue of proponents or governments gaining the consent and acceptance from Indigenous communities. Recognizing that minds may not be changed, the vision of consultation involves providing Indigenous communities appropriate time to build a mutual relationship of trust and acceptance.

Participant #18 [Yukon Government representative]:

We see that to this day, whether you're Vuntut Gwitchin, Kluane First Nation...you really have to spend the time, and maybe you won't change minds, but that's the only way you're going to get some acceptance...

#### **2.2.4 All-Alaska Gas Pipeline Route and Easement Extension**

The third research sub-question focused on the continued extension of the Easement, and KFN research participants expressed definitive 'No' responses regarding the perpetual renewal of the Easement's existence. Part of this sub-question related to the alternate all-Alaska route that is being pursued by the State of Alaska (whom TransCanada sold its share in the project to in November, 2015) and Alaska gas producer partners Exxon Mobil Corp, Conoco Phillips Co., and BP PLC (Cryderman, 2015).

Former KFN Chief Alatini responded that if TransCanada opts to pursue the only Alaska option, then this Easement should be pulled (transcription #9); several other KFN research participants echoed this perspective. Related to the question of whether TransCanada should be allowed to extend the AHGP Easement farther if the alternate route

proceeds, KFN Research Participant #10, who had been heavily involved in the land claims negotiations process for KFN, shared their perspective:

Participant #10 [KFN citizen]:

No, not if the other route is happening... because...that Easement was intended to get that gas through, and if they found an alternative route to get it through, then...I mean at some point it's got to be considered a new project, right...30 years in, I mean at some point it's...they got to start anew...use current laws and legislation.

KFN Research Participant #8 expressed disappointment regarding the Easement's grandfathered-in, embedded-in-an-agreement nature resulting in the project remaining "earmarked", and that it is "really sad" there is a "...possibility they could just keep up with this Easement forever...".

These responses elucidate that the thirty-plus year timeframe associated with this Easement, and the fact that an alternate route for the same gas resource may proceed, are key concerns for KFN research participants.

It should be noted that several KFN participants also view the Easement as beneficial, and it is not of unanimous opinion that the Easement should be expired once the next renewal period arises.

*Researcher: So you don't think [the Easement] needs to be gotten rid of, is that what you're saying, like you think it's ok to stay there...?*

Participant #11 [KFN citizen]:

Well I mean, if you get rid of it, where do you pick up the pieces once it's disbanded? I think if they get rid of it it's gone, it's toast, the whole project's toast.

*Researcher: So you think it's still providing potential benefits, or asset to KFN?*

P11: I just don't think it's doing any harm by having the Easement at this point. But...I look at things a lot more from a development side of things than from what other people may [view] the Easement as.

In a letter dated May 15, 2012 to the Northern Pipeline Agency Commissioner, Karen Etherington, Manager of Environment, Regulatory, Land, Aboriginal and Community Relations for the Alaska Pipeline Project, states:

This shift in focus of the project has affected the scope and schedule of work in Canada on the Alberta Option. At this time, Foothills does not intend to make regulatory filings with the NPA in late 2012 as originally planned. It is the APP's intention, with the support of the major North Slope Gas Producers, to maintain the Alberta Option pending the outcome of their investigation of LNG alternatives. However, the timing of a decision on the preferred option is unclear at the present time. The amendment of the Easement Agreement is the key element in maintaining the viability of the Alberta Option.

Perspectives by KFN research participants are contrasted with that of TransCanada, both in consideration of the Alaska Pipeline Project and their economic interests in pursuing as much of the gas resource within a geographical area as would be fiscally and geologically feasible.

Participant #2, the sole TransCanada representative interviewed further, explains at least part of the possible rationale behind Karen Etherington's statement:

...so at the moment...there is sufficient gas proven, you're familiar with proven gas vs. probable and potential?...so there's sufficient proven gas for one of the projects not both of them...however, what usually happens once you start...once you have a pipeline in the ground and...you have access to a market, which there isn't today...people go out and drill, find lots more...prove up lots more gas, that's what normally happens, I can't say that would happen in Alaska but that's what happened in Alberta, that's what's happening in Pennsylvania...Ohio...Louisiana...so...I wouldn't want to tell you that if the Alaska LNG project goes, there'll never be a pipeline through Canada...that would be once again, difficult to predict...but normally you would see...once there's a market, normally you'd see more drilling.

This information was surprising to the researcher, who asked a follow up question regarding whether anything in the existing agreements could prevent the Alaska Highway Easement from remaining in place if development were to go ahead in Alaska. Participant #18 confirmed that the two events are not mutually exclusive:

Participant #18 [Yukon Government representative]:

My understanding is...the Easement could remain in place, even if an all-Alaska route is built and the current resource that they have is exported to Asia, so...one's not dependent on the other... There are sound reasons why they both could be in place, and there are sound reasons why perhaps it should be considered that the Easement is lifted. And that encumbering right on Settlement Land or on Yukon Land is removed.

Many KFN research participants did not consider it sensible for the Easement to remain in place indefinitely, even while recognizing the economic driver involved in the pipeline reaching fruition.

Participant #13 [KFN citizen]:

... they've had 30, 40 years here to do something and they haven't really done anything except those first few years... you know it's the same as a chunk of property, you've only got so much time to make your improvements on it or else you're going to lose it...no, they're just playing games. I mean, it's the economy and it's the fuel prices and all that... And if they could all get rich at it they'd be laying pipe tomorrow.

This statement was in part confirmed and in part juxtaposed by the Yukon Government, Department of Energy, Mines and Resources representative.

Participant #18 [Yukon Government representative]:

I wouldn't foresee that if the all-Alaska route is constructed, that dispenses with this route... [Since just] a decade [ago], the whole world of oil and gas has been turned on its head, and far be it for me or anybody else to suggest that where it is today is the way it's going to be in 2022. ...I'd be reluctant to focus on what's going on in Alaska, we're talking about a global resource, and in this case it was natural gas. And market conditions vary wildly, and right now, North America has a lot of natural gas. The only foreseeable market is an offshore market. That's not to say in 2022 that Canada or more so the US won't have a demand for natural gas again, and...therefore be looking for a long distance pipeline, so...if the question is, should it expire in 2022, I would just say, it depends, and that's a discussion that should occur a year or more in advance of the expiry, as part of another consultation process.

### **2.2.5 “Grandfathered in” / Encumbering Right**

KFN research participants used the term “grandfathered in” to describe the AHGP Easement and its environmental and socio-economic assessment process. The interviews made clear that KFN had intentionally selected Settlement Lands in areas the AHGP Easement overlapped, due to the Easement's “grandfathered in” nature, which prevented KFN from having any options to negotiate this encumbering right.

The following responses speak to the lack of negotiation when the Easement was registered under *KFN's Final Agreement*.

Participant #1 [KFN citizen]:

...When we were starting our negotiations, we were just told this is the way it is, that it was grandfathered in and there was no conversation that could happen about it...it is what it is... and...we've always just been told that that...

Participant #8 compared the Alaska Highway Gas Pipeline project to the proposed Gladstone Dam, another long standing, controversial encumbering right under the *KFN Final*



*Agreement* (2003). Both projects arose in the 1970's, during the era of growing energy development interests in the Yukon.

Participant #8 [KFN citizen]:

... I mean even the [Gladstone] Dam, I keep going back to that, but it's like... how many dams are around the world, and you can watch how many documentaries on the impacts and the lessons learned, and how devastating it's been; and here we are, I know the Yukon's behind, but we're just talking about damming... no, forget what you agreed to 30 years ago; this is today; and the lessons you could learn from the rest of the world, why are we not applying that here before we do the same thing? .... Again, it's easy for those companies because [the Encumbering Right's] there; they don't have to go through the whole new process, which would be a big pain in their butt. But even that dam project gives me hope, because Gladstone is not a given anymore, and there's a lot of protest now... the First Nations [have] much stronger voices... and you know Yukon Energy probably is less likely to piss off the Yukon, because this is their home base. Whereas this is an *international project*, we're just one little tiny spot along the way, but...at least it gives you some encouragement [Gladstone Dam Project is delayed] because they're hearing [it] is going to be devastating for their PR.

KFN Research Participant #19 added during the review stage of the thesis that KFN is the only self-governing Yukon First Nation with formally registered Heritage Routes under a *Final Agreement*. This participant questioned why, given the much longer time periods that these trails have existed compared with the AHGP Easement, how such traditional linear features were not and continue not to be considered “encumbering rights” held by Kluane First Nation. This issue was not discussed during the land claims negotiations process.

## **2.2.6 Land Use Planning Considerations**

KFN is a leader in Yukon First Nation land use planning initiatives, and for this reason, along with the researcher's experience working as a land use planner for KFN directly, concepts linked to potential impacts to KFN land use planning interests came up frequently in interview discussions. Land use planning was coded in 10 of 19 interviews, with 16 references overall.

Compatible land use planning requirements are described within the KFN *Final Agreement*, Chapter 11. Land use planning considers such issues as adjacent land uses and users. KFN Traditional Territory is primarily composed of KFN Settlement Lands and

Crown lands that, since devolution, are mostly administered by Yukon Government, with only a handful of Crown lands still administered federally (including the Alaska Highway Pipeline Easement, associated pipeline quarry and camp reservations and Kluane National Park and Reserve). Scattered private land parcels also exist throughout KFN Traditional Territory. KFN Research Participant #4 [KFN staff] speaks to compatibility of land uses, stating “Yes, and our land use planning, our land use designations, and ...yeah, you might have the Easement, but we have everything around the Easement, so...you’re going to have to work with us, they’re going to have to understand that.” KFN Research Participant #1 [KFN citizen] described the evolving nature of KFN land use planning, and anticipation that land use conflicts will become more of an issue in the future. Additionally, KFN Research Participant #19 [KFN staff] drew a connection to the community engagement process for KFN’s 2011-2012 *Phase 2 Settlement Land Use Plan* development, inquiring how clear the issue of the pipeline was brought out to the community (especially an explanation of the restricted uses and that the pipeline is federal land), given “the swath of land through our Traditional Territory by this pipeline is huge.”

### **2.2.7 Management System**

The Alaska Highway Gas Pipeline Easement is nested within a management system that KFN research participants question, given their detailed knowledge and interests in the area through which the Easement crosses.

Participant #19 [KFN staff]:

So we have this huge swath of land, this huge area. How is this area managed? Everywhere else, we’ve got to manage our activities around waterway, on land, we’ve got to be respectful of doing things that would endanger the enjoyment of the land by whoever owns it. And with the pipeline Easement, all they said is that, ‘you have this huge pipeline Easement that is coming from Alaska down through to Alberta’, and this Easement is for the pipeline’. They didn’t say anything more about what or how...what mechanisms and how they were going to manage that pipeline Easement. [TransCanada] said they were going to put that pipeline underneath the waterways, they were going to put it down

underneath through Ł' n Mǎn/Kluane Lake ... But the Easement itself, how are they manage it, are they going to go in there and cut the trees down, are they going to mow the lawn or are they going to use Agent Orange as a defoliant? Where are their compressor stations going to be located? ... There's a whole bunch of questions that were just left right out in the open when they just...when the Government of Yukon and Government of Canada of the day, said we agreed with the Northern Pipeline Agency to have this land as an Easement for the pipeline... There may be some obscure report.... that my concerns might have been addressed in some obscure report. But it should right up there in the front.

Participant #19 voiced the need for further answers regarding how the Easement would be maintained and managed. She also identified the significance and need to address the Easement area in the KFN land use plan, given the fact that the Easement is in fact equivalent to federal Crown land. It remains that the “Government of Canada remains responsible for maintaining that land” even though “KFN retains ownership over its land that is situated under the Easement” (Boughton Law Corporation, 2011, p. 6).

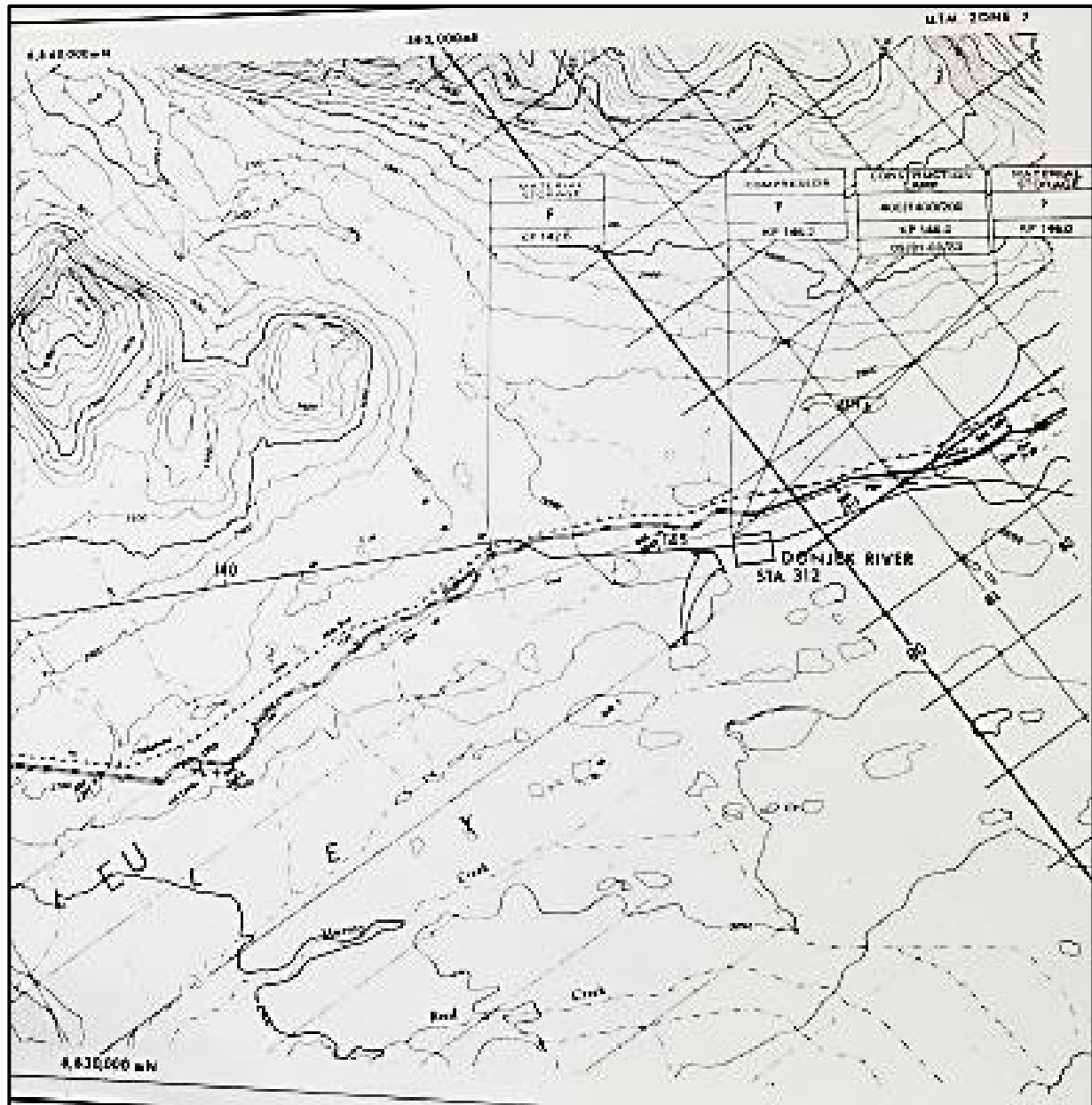
Land use planning impacts are linked to the impacts of the Easement as an Encumbering Right, and, as described by Research Participant #7 [KFN citizen], directs attention to specific areas of Settlement Land of interest for use by KFN Citizens, and the greater need for the Northern Pipeline Agency (and to a lesser extent, TransCanada) to review these areas with the KFN community. This participant described a couple community areas in the *Phase 2 Settlement Land Use Plan* designated for future land development for new subdivisions the Easement is located adjacent to. When the TransCanada representative [Research Participant #2] was asked about KFN's land use planning interests and potential impacts, the response was that he was not familiar with such KFN –specific interests.

Participant #7:

It does tie up land, right...the Easement does go through this whole area, and it ties up a lot of land...I guess it would just be certain areas that have...more potential than others...like near the lake, along the highway easement, near Khār Sh n Nji/Congdon Creek there's a big section where it gets near the lake...we don't know the rules...are we allowed to even go on the easement and get firewood? Or...what are the rules? ... We've had some meetings and stuff, but...they need to actually sit down with us and look at the Easement, and the places that it crosses certain creeks and watersheds, or...like Nines Creek, or Bock's Brook, none of that was addressed, how does the pipe go over that?

The 1982 federal approval of the Alaska Highway Gas Pipeline resulted in valuable resources being “taken up” for the pipeline, such as the most viable gravel / quarry reserves along the Alaska Highway. This was discussed on November 22, 2017 with KFN Council and recommended by KFN Chief Bob Dickson. The areas of gravel quarrying reserves set aside for the Alaska Highway Gas Pipeline are notably adjacent to the Easement and most highway-accessible areas in proximity to KFN’s community of Ł ’ n Mǎn Keyi/Burwash Landing. The approximate areas for quarry reservations for the AHGP, as well as other pipeline reservations for camps, staging areas, compressor and pump stations collectively comprise an area of 491.8 hectares directly overlapping and encumbering KFN Settlement Lands. The overall pipeline-related reservations and Easement areas overlapping KFN Traditional Territory outside Settlement Land parcels represents an even larger area of impact.

Former Chief Alatini [identified KFN Research Participant #9] described the pipeline reservations (gravel pits) by the D n Zhǔr Ch /Donjek River as one of noteworthy concern, due to its large size, and location within a key area of traditional and recreational use by KFN Citizens. In reviewing this particular area on the original registered Foothills Pipelines (South Yukon) Ltd. Atlas, which can be found at the Yukon Archives in Whitehorse, there are a substantial number and area of pipeline reserves, including a construction camp and compressor station (shown in the below image).



**Figure 5.** Original registered Foothills Pipelines (South Yukon) Ltd. Atlas alignment sheets (Foothills Pipelines (South Yukon) Ltd., 1982).

Other participants expressed frustrations with how the land is “reserved” as an Encumbering Right for a project that may never come to fruition. They overwhelmingly viewed this reality as insensible since KFN cannot make use of the area of land registered under the Easement and associated reservations that overlap KFN Settlement Lands, until the

Easement is released (either following the construction and operation of the pipeline or from the removal of the Easement's Yukon Land Titles registration). KFN Research Participant #14 expressed frustration with the encumbrance the Easement places on KFN Settlement Lands.

Participant #14 [KFN citizen]:

I say give it up! ... Why should we own land that we can't do anything with? You can't do anything with that land because it's reserved. Reserved for what? Reserved for something that's not going to happen? It's ridiculous. We want to use any of that Easement, we can't. And it's our own land, we can't even use the damn thing! It's stupid. And what gives them the right to hold that land? Nothing!

KFN Research Participant #14 [KFN citizen] also brings attention to the ability of KFN members to use and access land that KFN owns but that is held under pipeline reservations that were registered during the same time period as the AHGP Easement.

*Researcher: ...so you think it does impact the way KFN can use and manage KFN land?*

Participant #14:

Well yeah, I mean, like at R-2 down there [KFN Rural Settlement Land parcel along the Alaska Highway nearby to KFN community], what can we do with that? I mean they've [TransCanada] got a big reservation for their camp there... So we can't use any of that land, so...what does ownership mean?

It is important to note that KFN's land use planning is influenced by a dynamic combination of *future* development plans, *existing* interests and uses, and *past* traditional uses and cultural ways carrying into the present. There is significance to KFN citizens in the constant overhanging presence of the AHGP Easement through KFN's lands. So long as the current pipeline Easement route continues to be allowed time extensions, the potential impacts from pre-construction, combined with the eminent potential of construction and post-construction of the pipeline remain important to KFN.

KFN Research Participant #10 described how there have been little impediments to KFN's land and resource management system to date, while recognizing that a pipeline's actual construction would certainly present a significant shock and concern to this

Indigenous governance system. One of the key ways a pipeline could pose possible *future* land use-related impacts to KFN citizens is in considering the multitude of traditional use and recreational cabins and camps scattered throughout the area. There are important references by several KFN research participants that if and / or when the pipeline construction is given the green light to proceed, the construction phase would roll through quickly and there is little faith consultation will be provided an adequate timeframe.

Participant #10 [KFN citizen]:

... I have a cabin [abutting] right up to that [Easement area]... so ... right now it's not a big deal cause nothing's happening, but if that pipeline were ever to go through... everyone agrees it will go quick... you know it will just kind of hit us as hard as it can... when it happens I think it's going to be pretty significant ... but right now... I'm not aware of any situation where land and resources haven't been able to do what they want to do because there's an Easement on it...

In addition to the findings described thus far in this section, KFN Research Participant #4 indicated a concern within the KFN Lands, Heritage and Resources Department due to the AHGP camp reservation blocking an access road to one of KFN's Settlement Land parcels and community-use sites located along the shores of Ł' n Mān/Kluane Lake between the Alaska Highway.

Participant #4 [KFN staff]:

... They had their camp set up, and they had everybody there, pulled out of there now, it's their Easement, and they've blocked the road off...there's a piece of land, out on the point on the lake [S-71B] we can't get to, because there's no access anymore.

The researcher inspected this area and observed two rudimentary concrete blocks blocking the access road beside the highway.

KFN Research Participant #11 [KFN staff] spoke to potential impacts regarding KFN's planned mineral exploration program. The researcher subsequently confirmed with this participant that only some relatively small areas of KFN's identified areas of interest for mineral exploration are overlapped by the Easement. However, it does cross through Settlement Parcel R-1A, where KFN owns subsurface rights and has focused its interests in

potential mineral development. Research Participant #18 [Yukon Government representative] explained that KFN would likely require special permissions from TransCanada and Northern Pipeline Agency to build any roads or temporary infrastructure on the Easement. This was noteworthy in that KFN's Kluane Development Corporation is planning to develop mining opportunities in that area, which may require the construction of access roads, trails and / or temporary infrastructure.

Not all KFN research participants agreed the Easement is a burden. In contrast, KFN Participant #13 [KFN citizen] suggested that the location of the pipeline Easement is beneficial, and its development could be leveraged to expand parallel infrastructure along the Alaska Highway corridor, both via the AHGP and a railroad.

### **2.3 Governance**

The governance theme demonstrates the juxtaposition between Indigenous self-governance, the federal and territorial governance models for regulating pipelines under the Northern Pipeline Agency and National Energy Board and the legal context establishing such systems. This theme raises questions regarding who and what ultimately considers information and determines resource management decisions of large-scale magnitude, with a great deal of social, economic, and environmental realities and interests at stake. It suggests ongoing issues with co-management, such as how Indigenous Rights and Interests are weighed in decision-making with those of industry stakeholder interests. The governance theme highlights the shifts that occurred in the past—when the Alaska Highway Gas Pipeline was first introduced—to the present, and how these shifts may be considered within the context of Indigenous and Treaty Rights.



### 2.3.1 Indigenous Self-Governance

Indigenous self-governance is an important concept linked to questions surrounding jurisdictional authority that arose from the Yukon Land Claims process. As Nadasdy (2003) and others have highlighted, modern forms of self-government and co-management have absorbed significant elements from westernized, liberal colonialist bureaucratic structures. There are internal struggles within Indigenous communities that can emerge, such as the need to protect their traditional governance system from external social, economic, and environmental influences within a westernized Canadian society. Several KFN community members still carry their experiences of discriminatory and hegemonic behaviours from colonialist outsiders, perhaps more blatant in the past yet continuing into the present. KFN Elders, in particular, expressed the importance of maintaining KFN's own government, decisions, and internal focus. The need was expressed to maintain some degree of insularity from negative outside influences, while referencing roots of cultural revitalization and sustainable economy.

Participant #3, an Elder with substantial experience working with both Yukon Government and Kluane First Nation Government, provided insight into the transitional social economy occurring since the culmination of land claims in the 1990's and 2000's:

Participant #3 [KFN Elder]:

I mean we haven't even established...what we're going to do, and they're going to have this big area where they're going to have a *pipeline*, they're going to have *money*, they're going to have *jobs*, and they're going to be driving up and down the highway. It's not just culture shock that people want to live the old way... it's the discrimination is too much. The world is so different outside...

Concepts of more respect for Indigenous governance occurring in the past also emerged frequently in the research data.

Participant #5 [KFN Elder]:

In the past, Ł' n Mǎn Ku Dǎn /Kluane Lake people would get permission from each other to use different areas, e.g. trap line areas; there was respect among the people in this way; now, there isn't any respect.

Participant #3 [KFN Elder]:

We would go for the Lands Committee, the first thing we'd do, we wouldn't go talk amongst ourselves, we would go and have a community meeting every month before we did land claims...our Lands Office, we met every month and said, "what can we do...to be successful in our future?" ... "And what is important to us?" ...the only thing that was important to us was to take care of our land, and the most number one was our water, the glacier water that comes from up there.

KFN Elders specifically voiced discontent with the current structure of the internal KFN government system, changes they had observed over time in the emphasis on governance over economic development of the community. All Elders interviewed emphasized the importance of bringing more job opportunities into the community.

Participant #3 [KFN Elder]:

... They had 40 people working on how to set up self-government, but they don't have anybody doing the labour, doing labour jobs, like building a community.... KFN should be dropping the government stuff and focusing on the people and building the people back up.

Some participants (particularly Elders) expressed frustration with changes to self-governance following land claims. Research Participant #5 [KFN Elder] stated that she does not think land claims were good for KFN as there is now less control over the land and more laws and restrictions; in the past, she said, "...there was no borderline, it was all open". Additionally, this participant expressed that KFN *staff* are the ones who have been and continue to be aware of the content of the land claims agreement. Also, she said there was a large amount of information regarding the implications of the treaty that KFN citizens learned *after* the KFN Final and Self-Government Agreements had already been signed.

Participant #6, another KFN Elder, stated that she and a group of KFN citizens were opposed to the land claims process; they predicted that changes to the existing INAC structure would create better opportunities.

Participant #6 [KFN Elder]:

...Yeah, I didn't have too much to do with the...the land claims, because I was...lobbying against land claims (chuckles)...and a lot of these meetings, didn't take place here, a lot of these meetings took place in Ottawa, took place in Canadian cities, took place in Kuanlin/Whitehorse, and we didn't even see any negotiators, a lot of the times ...

### **2.3.2 Northern Pipeline Agency (NPA)**

This research questions the legitimacy of the Northern Pipeline Agency (NPA) following the historic context of Yukon Land Claims and Devolution. The NPA's original purpose, according to one KFN research participant, was to deal with territorial and jurisdictional development issues prior to the establishment of a formal process (i.e. prior to Devolution).

Since this time, formal processes have been more clearly established through Yukon Land Claims. However, the AHGP Easement and project remain exempted from the modern assessment regime, and this is considered a primary concern as described by several KFN research participants.

KFN legal counsel wrote a memo in April 2011 regarding the *Northern Pipeline Act* and associated Agency, describing how the *Northern Pipeline Act* was included in the drafting in 1978 of "...joint Canadian-American legislation and subsequent domestic legislation" to facilitate construction of the natural gas pipeline. The *Northern Pipeline Act* "became the [Alaska Highway Gas Pipeline's] primary regulating document". KFN legal counsel has noted that the Northern Pipeline Act is unusual in that the project, through this legislation, "...was granted an easement and given approval to construct the [pipeline] without having to obtain formal authorization from the [National Energy Board], as was usually required for energy projects of this scope" (Boughton Law Corporation, 2011).

Participant #19 [KFN staff]:

I think that the Northern Pipeline Agency ...it was really a backroom deal ... at this day in age, it's really a grandfathered in dinosaur. It served its purpose during the time...at this point in time the

Northern Pipeline Agency is...it should be defunct. We have the Yukon Environmental and Socio-economic Assessment Act (YESAA) process to deal with large major companies, and their development. The Northern Pipeline Agency [was established when] they didn't have any government department to deal with this kind of a thing, because previously they...didn't have pipelines [on unsettled territorial Crown land, only within provincial lands] that's my understanding of why the Northern Pipeline Agency came about. The Yukon is a territory, it's not a Province; it's Crown Land up here. Northwest Territories is Crown Land, Nunavut is Crown Land.

Participant #13 observed that Canada does not want to “piss off the Americans” regarding the standing international agreement that has been in place since 1978 for the Alaska Highway Gas Pipeline. This comment links to KFN research participants' awareness (cited by 25% of those interviewed) of the binding international agreement and demonstrates their consideration of such historic influences, in addition to the situation for Indigenous communities in neighbouring Alaska.

### **2.3.3 Decision-Making Authority**

Some participants also described issues of devolution and need for clarity around territorial and federal responsibilities.

Participant #4 [KFN staff]:

Ultimately, we don't have any authority... [They say] it's for the greater good of Canada.... so it's going to happen if they want it to happen...

Participant #18 [Yukon Government representative] raised a key issue that needs to be resolved, ideally prior to the next assessment process for the AHGP or, as this participant suggested, before the problem of clarifying jurisdictional authority becomes a crisis, stating:

The biggest question from Yukon Government's perspective was, 'who's responsible for administering that Encumbering Right, Canada or Yukon? Yukon Government had ended up with federal employees after devolution, but legal clarity around administering encumbering rights didn't come with devolution. Both federal and territorial government lawyers got to about the same points, but there would be one sticking point at the end that they disagreed on. The question around administration of encumbering rights between federal and territorial jurisdiction needed judicial review, that is to say a decision.

This participant viewed the legal question of jurisdiction as the key unresolved issue in terms of the uncertainty around how aspects of the project would be reviewed and thought it

should have been addressed urgently had the final review process not been placed on hold in 2012. Related issues appear in KFN's concerns about not being notified effectively for the geotechnical assessment work that occurred on Ł ' n Mān/Kluane Lake. Participant #18 indicated there had been some confusion between Northern Pipeline Agency and Yukon Government regarding where authorization should come from and who was monitoring the work.

*Researcher: And was that Northern Pipeline Agency who was responsible, or was Yukon Government involved in recommending any necessary updates?*

Participant #18 [Yukon Government representative]:

I mean in our view, this was a federal project, so, they... were the regulator. So, they should be the indicating to the proponent what they were looking for in terms of information or surrounding an environmental assessment. That doesn't mean that we were asleep at the switch. ... We're on record as supportive of the project provided it's done responsibly, and responsibly means proper EA, proper regulatory terms and conditions, monitoring and oversight, and so forth ...

KFN research participants also had jurisdictional concerns around the AHGP regarding devolution, particularly in terms of the scale of decision-making at the federal level, which may not trickle down to incorporate the views of smaller jurisdictions such as KFN and the Yukon Environmental and Socio-economic Assessment Board. Devolution is an important topic for KFN research participants, in its relation to awareness of the jurisdictional issues between the federal and Yukon territorial governments.

KFN research participants recognize the role of the federal government in overseeing such a project, but there is still a significant need to include the voices of Indigenous peoples and others in the decision-making process.

Participant #8 [KFN citizen]:

... I get it ... it's bigger than us. It's not just the Yukon ...so you do need the federal government... looking at the bigger picture... the pipeline from end to end. But you also need to have each little jurisdiction have a voice, and that's what's missing when you just give it over to the feds.... they get to make all the decisions, and nobody's actually given a voice along the pipeline; and then you ruffle feathers, people get pissed off, and they don't understand, and.... it's just not good for anybody really when you decide to do it that way.

Some of the information related to the AHGP management system is available publicly, but KFN may not have been aware of this nor should it necessarily be viewed as KFN's responsibility to obtain such information without assistance from TransCanada, Yukon Government, a consultant or a university researcher. I found a wealth of information available in Yukon Archives related to the history of the Alaska Highway Gas Pipeline [also known as Foothills Pipeline] that included detailed survey maps of the registered Easement and reservations, with labelled compressor and pump stations, but it is unlikely KFN would have had the time to research and examine such information.

## **2.4 Consultation**

The theme of consultation is critical to answering research sub-question ii. and understanding the thesis' foundational critiques of the authorizations process that perpetuates the continued existence of the Alaska Highway Gas Pipeline Easement. It demonstrates responses to outstanding concerns raised by Kluane First Nation about the AHGP Easement and overall project, and impacts identified by KFN research participants related to the consultation process as experienced over several years with this project. Consultation-related concepts that emerged from the interview conversations included Indigenous and public relations, the framework of the consultation process itself, and political voice.

### **2.4.1 Indigenous and Public Relations**

KFN former Chief Alatini noted in a letter to the Northern Pipeline Agency on February 11, 2011 that there was a need for KFN and TransCanada to “engage immediately and take steps to develop a positive and respectful working relationship” (KFN Pipeline Files, 2011). This need was documented at this time due to several concerns raised by KFN

staff and citizens related to TransCanada's approach to engagement. Based on the responses of KFN research participants, this concern remains today, possibly stronger than ever given the bad experience during the last round of engagement and consultation. From KFN Research Participant #11's perspective, TransCanada "...had the wrong people in there, promoting the wrong message," and now because of this "their PR is in damage control".

*Researcher: ... Inevitably [TransCanada's] going to come back... because they're still holding the Easement, and...if the natural gas prices go up significantly they might want to build that route again, so...do you have concerns about them coming back now after you have already [noted] a bad taste from your past experience with how KFN was dealt with?*

Participant #11 [KFN staff]:

Yeah... memories don't fade that fast ... if they want to come back, if they're going to have the same type of attitude and the same type of strategy to get things to done, They're in trouble if they do because the First Nations that I've talked to, they all felt that they were treated in the same type of manner, and...their consultation process needs some fine tuning, it needs to be more open and more...respectful, and treat the Nations that they're equal partners and not to be given a token agreement that doesn't add up to anything.

#### **2.4.2 Process Issues**

Several KFN research participants expressed discontent regarding the inadequacy of the consultation process and the minimal consultation provided. From their perspectives, the primary reason for inadequate consultation has been and continues to be due to the "grandfathered-in" nature of the Easement. For example, the KFN community did not feel adequately notified prior to TransCanada doing testing on Ł' n Mān/Kluane Lake. Several KFN participants stated that they were not notified prior to TransCanada's environmental assessment work (e.g. to test sediment samples at the bottom of Ł' n Mān/Kluane Lake), although this work was visible to anyone driving along the Alaska Highway near Tachāl Dhāl/Sheep Mountain. Overall, it appears insufficient notification and engagement time were part of the consultation process, at least from KFN's perspective.

Participant #8 [KFN citizen]:

... there was no notification or anything, it was just again local people inquiring because you live here, and you wonder what the heck's going on... I think there is a really big lack of any consultation that's required, because it is embedded already... they're just keeping up with this thing because it's grandfathered in, you don't have to follow the current process, you don't have to tell anybody really what you're doing.

Statements such as Research Participant #8's above counter statements provided in letters to Yukon First Nations Chiefs by the Northern Pipeline Agency and Minister of Natural Resources. For example, in a May 3, 2012 letter, the Minister of Natural Resources, the Honourable Joe Oliver, clarifies that "...any work on the easement by Foothills is subject to all applicable regulatory requirements", including the requirement by "Foothills and/or the Agency...to notify the appropriate First Nations of any physical land use activity on the easement lands, even if the activity is such that it does not require a federal authorization" (KFN Pipeline Files, 2012). The key word "notification" stands out in this statement. Notification often implies a lower level of consultation, rather than full engagement on a proposed use or development, to follow regulatory requirements.

This minimal consultation level *could* have occurred, as KFN Research Participant #8 recognized, by a notification letter to the KFN office that had not managed to reach the broader community. However, in letters KFN has addressed to the NPA, there is evidence that KFN was *not* provided notification or consultation in a timely or sufficient manner for "investigatory" activities occurring by TransCanada on Ł' n Mǎn/Kluane Lake. For example, in a letter dated February 14, 2011, former KFN Chief Alatini expresses frustration with the 'Geotechnical Borehole Program and Access – Ł' n Mǎn/Kluane Lake to AK-YT Border', stating:

In our view, the initial notice to the KFN was not provided in a timely manner and the information was incomplete and inaccurate. In fact, it appears that certain activities on Ł' n Mǎn/Kluane Lake proposed by TransCanada, including the detonation of 10 blasting caps in 10-20 boreholes along the bed of Ł' n Mǎn/Kluane Lake, were approved by the Department of Fisheries and Oceans without any consultation with the KFN since it determined there would be no impacts on fish or fish habitat. It does not appear the Department of Fisheries and Oceans considered if these activities would impact



the aboriginal and treaty rights of the KFN. This is unacceptable and contrary to the Crown's legal obligations to the KFN. (Former Chief Alatini, KFN Pipeline Files, 2011).

KFN former Chief Alatini specifically requested clarification of the consultation process between KFN, the federal and territorial governments, and the NPA and NEB, "...in accordance with the provisions of the *KFN Final Agreement* and the legal principles established by the courts". This request included the need for the establishment of a consultation protocol and noted "...confusion related to the roles of the various parties and their authorities and responsibilities with respect to the assessment and approval of activities proposed by TransCanada in the pipeline easement located across several parcels of KFN's settlement land" (former Chief Alatini, letter dated February 14, 2011, KFN Pipeline Files, 2011).

The culmination of this letter writing campaign from 2011 – 2012 could be summarized by KFN Research Participant #19's statement provided below, exemplifying a lack of faith in the consultation process based on the perceived weight federal government decision makers give to Indigenous organizations.

Participant #19 [KFN staff]:

They'd [the Northern Pipeline Agency] already decided...I don't think their...consultations and meetings with the First Nations were useful...it's just an obligatory thing; it's not something that was a primary factor in their [overall logistical and strategic] planning. Their planning is basically, they meet with the Energy Minister, they meet with the oil and gas people, and with the Government of Yukon, and the First Nations are just... "Oh, I guess we have to meet with them too" ...

Other KFN research participants shared their experiences that procedural information sharing was the focus of "consultation" meetings, rather than meaningful engagement and consultation. Research Participant #8 described how TransCanada had a scale model of what the L' n Mān/Kluane Lake crossing would look like at one of the community meetings, which was helpful in providing real perspective to the construction plans for the most sensitive area of the pipeline route. While expressing an affinity for the visual model display,

most KFN research participants interviewed voiced discontent with the level of information provided by TransCanada during consultation.

Participant #7 [KFN citizen] alludes to the information sharing sessions led by TransCanada providing information on specific topics while not addressing several questions raised by KFN citizens.

... I didn't feel like there was enough information about...the safety of [pipelines going under water] .... they didn't really go through the procedures, how it's built or...when it needs to be fixed or how they're going to monitor it ...cause I think a lot of it was just assessment work, for what they were doing, but as far as, if it was to go through...I don't think those concerns were met...especially with a lot of the community...especially with Elders...Elders have a hard time getting across to big projects like this...

Safety concerns were a significant concept raised in interviews, with 7 KFN research participants and the Yukon Government research participant describing this concept.

Participant #7 [KFN citizen]:

...I mean, for a basic question for like, 'oh, the pipe is going to go across the lake?' .... What [KFN members] ...want to hear is that yes, it is safe, and this is why it is safe, and that wasn't addressed... ... A lot of [everybody's reason] they still don't want to see it go across is safety concerns...

The Yukon Government representative, Participant #18 did state all this testing information was provided to Kluane First Nation, which if utilized could have provided increased assurance the lake crossing was safe.

As related to the consultation process over the lifetime of the AHGP project thus far, timelines have frustrated KFN, both in terms of their short-term frenzy periods where it appears the pipeline may proceed followed by extended time periods with minimal progress towards construction of the pipeline.

KFN Research Participant #10 summarizes how this consultation process has typically transpired and at the end of this quotation suggests a level of doubt regarding the process:

...There would always be a lot of activity...industry sort of courting KFN to do things, and we'd...start to look on the economic development side, there was always concern on the

environmental side, there was always lobbying to have a different route considered so that a new environmental assessment would happen rather than using the existing Foothills Easement. So, there was always a ton of activity whenever there was always a drive to... whenever they were sure it was going to happen, which happened more than once and didn't happen, so...

KFN participants spoke of a “frenzy of activity” in terms of consideration of the development of the pipeline that occurred during periods of favourable economic conditions, and the subsequent long lulls of inactivity whenever the AHGP project freezes as the LNG markets collapse. This is the current reality of this pipeline project, apparent in both the consultation process led by TransCanada and the environmental assessment process.

### **2.4.3 Socio-economic Impacts and Benefits**

KFN research participant #11 described how even the Cooperation Agreement signed between KFN and TransCanada in August 2011 was disappointing, due to the intense bureaucracy that created difficulty in KFN's ability to gain any substantial financial benefits from the agreement.

Participant #11 [KFN staff]:

... We got a Cooperation Agreement [signed]... the agreement was ok, but I found that... it was hard to get any funding for what they promised. They'd just kind of send us running around in circles, providing quotes and saying certain costs weren't acceptable, weren't eligible, and we had to produce all these financial statements... their bureaucracy put all these unreasonable pressures on our small government, and they weren't forthcoming with [payments]...

Participant #11 equated this experience to feeling like KFN was treated like “...this speck on the map” with similar “we'll deal with them” attitude described by other KFN research participants. This participant was suspicious about how TransCanada's cooperation agreements were being developed and established with other affected Yukon First Nations, as each agreement was individualized this created a “divide and conquer” approach. Participant #11 viewed this approach to be flawed, as only a few jobs and a couple of payments would be created in each community, before the pipeline company moved on.

Participant #11:

I said, no, collectively the First Nations of Yukon need to...the ones along the corridor, we all need to get together, form an agreement... [as] an alliance.

#### **2.4.4 Self-Governing and Non-Self-Governing Indigenous communities**

In this case study, there is a significant distinction among those Yukon First Nations who signed self-government and final agreements and those who have not signed treaties, and fairness issues regarding how Indigenous communities, Yukon and federal governments and proponents consult and negotiate with each other. There is a significant difference between the certainty of Indigenous rights among self-governing and non-self-governing Yukon First Nations. “For those Yukon First Nations that are not self-governed, the effect of the Easement for them is as it is set out in the NPA: the Easement may not contradict existing Indigenous rights and titles with respect to easement land, but it does not specify what those rights are that must be respected” (Boughton Law Corporation, 2011, p. 6). This may be, at least in part, the reason non-self-governing Indigenous communities may have received greater attention from TransCanada, but from KFN’s perspective, this becomes a fairness and justice issue.

*Researcher: Do you think they’re treating the assessment process differently because TransCanada feels like it’s grandfathered in, so it’s already practically approved?*

Participant #9 [former KFN Chief Alatini]:

Yes. I think that was a big assumption, when they came in, and they were kind of like, ‘oh, you guys want what’? And, they gave White River [First Nation] \$100,000 to sit down and talk with them, and we got nothing out of them, at all, and we sat down and talked with them a lot...

#### **2.4.5 Indigenous Yukon Alliance**

A few research participants, particularly Participant #11 suggested that a greater alliance between Yukon First Nations would provide a stronger forum for Indigenous groups to raise their issues and interests at the government-to-government level.

I think we need to have an alliance [and] agree that yes, [the AHGP] ...distributes benefits widely to the whole Yukon. It makes sense at that point; but doing these segmented agreements ... I've got a really bad taste in my mouth on how we were dealt with, with APP, and...I don't have any more time of day to go about that type of arrangement ever again. I mean why, waste our time, send / give us this huge lawyer bill to cover, run around chasing funding, when the agreement's signed off, when we ask for the things that were promised, all this bureaucracy you have to run through. You get rejection letters, and we don't get employment, we don't get financial benefits, we don't get the contracts, so what, we got nothing, it just wasted our time. So...that's my main frustration with it and I'm glad it ended, I'm glad it stopped the way it was going it was not in a good way.

The Alaska Highway Aboriginal Pipeline Coalition representative interviewed also suggested the concept of a greater Indigenous alliance and more effective information sharing, arguing that since KFN was a leader on this issue and had the biggest concern regarding the Easement, it would be in the interest of and benefit to KFN to host a forum to discuss this research thesis project (the researcher could provide a presentation), issues remaining and the abrupt "closure" of the pursuit of the AHGP that occurred in 2012.

## **2.5 Assessment**

The theme of assessment focuses on the legitimacy of an historic environmental and socio-economic assessment process, particularly the early 2000's – 2012 context and present realities in consideration of research sub-question i. While Canadian law, under the Environmental Assessment Act, currently protects historic projects reviewed prior to 1984, community concerns raised by KFN research participants described the holes in this process both currently and historically. The Northern Pipeline's 2012 decision to extend the AHGP Easement has become a focal point for KFN over concerns with the existing, established route for its crossing underneath Ł' n Mān/Kluane Lake. The research results described in this section demonstrate the continued relevance of critiquing environmental and socio-economic assessment processes; particularly those administered federally where Indigenous communities carry key interests in resource development and management.

### 2.5.1 Community Concerns

Kluane First Nation has stated multiple times that the exemption of the Alaska Highway Gas Pipeline project from the Yukon Environmental and Socio-economic Assessment process is extremely frustrating, given the modern legislative requirements in Yukon for environmental and socio-economic assessment. For example, former KFN Chief Alatini and KFN research participants representing the Lands, Resources, and Heritage Department voiced strong opposition to the exemption of the Easement amendment from a modern environmental and socio-economic assessment process by today's evolved standards, rather than relying on "...generally-accepted environmental standards that were recorded thirty years ago without any public participation" (Boughton Law Corporation, 2011).

In part, the consultation process is frustrating due to disparities in scale and corresponding lack of fairness (i.e., smaller projects receive unnecessarily high attention, whereas larger projects such as the AHGP can receive a "bypass").

Participant #8 [KFN citizen]:

It's frustrating because [what we see in] a YESAB application... could be this small little minor [development proposal] and oh my goodness that goes through a consultation process for everybody and their dog to have a comment, and everybody and their dog does comment; and that could affect that one person's operation; Why, on a big grander scale, you know this massive company, why do they get to bypass all that? ...I don't think that's fair at all, and...almost makes it feel like it's a token consultation for all those minor little tiny operations...we're not even given a chance to comment on the really big one, that people have comments on... imagine what you could get back if you put out this kind of thing for public consultation...

Former KFN Chief Alatini confirmed that TransCanada and the Northern Pipeline Agency reiterated the exemption of projects prior to 1984 from the Canadian Environmental Assessment Act. In fact, she recalled a time that TransCanada representatives had "...seriously come to the table and said, 'well, we don't have to do anything' [and her response being]: 'are you out of your mind!'

KFN research participants also expressed concern there has been an absence of fairness in the assessment process, related to contrasting scales of political and economic influence. KFN Research Participant #4 [a representative of the Lands, Resources and Heritage Department] repeated that the AHGP should be assessed in the Yukon.

*Researcher: Do you think there's an issue of scale in terms of them being a big huge global company?*

Participant #4 [KFN staff]:

Oh, hell yeah, that's why Ottawa rubber stamped it and said 'go, here's another ten years'...it's because who they are and the government of the day...

I think that they [TransCanada] should go through YESAA, the Yukon assessment process. It is going through the Yukon, it is going through [KFN] Category A and B lands...we should have a say on how that's going to look, and not just rubber stamped in Ottawa.

During KFN's review of the final draft thesis in May, 2018, a representative from the Lands, Resources and Heritage Department commented that the Yukon is an anomaly in terms of land rights established over only the surface but not the subsurface (as in the case of Category B Settlement Lands). Such an arrangement of land rights occurs nowhere else in the world and it remains somewhat perplexing in terms of the concept of "ownership" and proprietorship, according to this KFN representative.

Participant #10 also provided interesting insight that the NPA environmental assessment process is not an independent process, whereas the modern environmental assessment process in Yukon, YESAA, is an independent assessment body.

KFN research participants also directed attention to the potential need for KFN to pursue an environmental and social justice movement founded upon challenging Ottawa's "rubber stamp" approach regarding this issue by shifting to a larger scale public arena, including the potential for a court case that would create much greater publicity.

Participant #8 [KFN citizen]:

And it's up to Kluane First Nation as well too...the climate is really different...and if they really want to dig their feet in and spend a bunch of money and get a court case going and make a big publicity

thing out of this, then maybe you can get enough strength behind you that it's not just this little tiny place's voice, it's now on a lot of people's radar.

*Researcher: Yeah, if other First Nations are also against it...*

That's right, yeah. And other, you know just like, Canadians, I mean ...the world realizes that you're getting this pipeline through this pristine area and it's right next to Kluane National Park, and you know there's a lot of environmental –minded people I think who would agree that...this doesn't sound like a good idea. But right now it's a very small discussion, and it's not really open for comments, and the world doesn't know about it, so it's just local ...

KFN research participants described several potential environmental impacts related to concerns of original route and corresponding environmental assessment process. Such issues may not have been considered to date, fully or partially, in the environmental assessment process for the AHGP. These impacts are characterized by KFN's Traditional Knowledge system, as well as modern scientific information.

### **2.5.2 Preferred Route Options and the Ł' n M n/Kluane Lake Crossing**

Preferred route options can be linked to considerations around the environmental assessment and regulatory review process, and are viewed distinctively among Kluane First Nation, Northern Pipeline Agency and TransCanada. For example, there are several references in the research findings to TransCanada's resistance to changing the existing route because of the potential for this action to trigger a reassessment under a modern environmental assessment process such as under YESAA (KFN Research Participant #8).

Nevertheless, all KFN research participants expressed a preference to route the pipeline around rather than underneath Ł' n M n/Kluane Lake. They provided a range of perspectives regarding the rationale for TransCanada and the Northern Pipeline Agency thus far refusing to commit to change the established route registered in 1984 that crosses the lake. Primarily, the reasons described related to the route around the lake costing more given its slightly longer distance, and that Parks Canada would present challenges to this proposed



route option as they have a “big voice” whereas for KFN “...there’s only a handful of people [around 120 citizens] so you don’t really get a strong voice” (KFN Research Participant #8).

KFN Research Participants #8 and #19 described the issue of KFN being such a small group of people standing up against such a massive project. They also exemplified awareness of wider public and political perceptions that could stir substantial controversy, such as the “public interest” in the protection of National Parks from industrial resource development that would likely be raised if considering an alternate Easement route around Ł ’ n Mān/Kluane Lake that would cross through a small section of Kluane National Park. However, Participant #8 considers KFN to have been gaining a stronger voice, and the opportunity for change and political flexibility is still seen as viable, particularly in terms of the preferred routing option between KFN and Parks Canada.

Participant #8 [KFN citizen]:

Since self-government has been in effect now for a bit, Kluane First Nation does have a stronger voice than they did, when this first came to the table...a lot of local people want to know, ‘why wouldn’t you just put the pipeline where the existing pipeline cutline is, it’s all Agent Orange, there’s nothing that’s going to grow there anyhow...why would you run it through the lake when there’s the cutline over there?’ [I heard] the pipeline people are willing to move it but it’s more the sticking point with the National Park, because if you go over there now it’s National Park, and Parks don’t allow pipelines. But, Kluane First Nation is now self-governing too and they don’t really want to allow pipeline in their lake, so where are you going to go? Who’s going to bend? I don’t know what the end of that discussion was, but at least it gave me a little bit of hope that the pipeline people were bendy, and it was more like ok, is the National Park going to be bendy? Everybody’s got to do a little bit of bending, I think...

A potential amendment to the Easement is also contrasted with the advantage that TransCanada holds in safeguarding the original route granted in the Easement, as any change to the existing route could trigger a new environmental assessment under the CEAA.

Participant #10 [KFN citizen]:

Well they didn’t want a new route, right, because they own that old route ... they had a very big advantage, so they were most definitely were advocating for the existing route, and trying to convince people that it was safe.

Participant #10 describes KFN's historic interests in negotiating a new route and their realization that this was not a negotiable term. KFN therefore determined to select more pieces of Settlement Land that overlapped the Easement. This was the approach that KFN determined, at the near-end stage of land claims negotiation, could warrant the greatest self-determinative control by KFN, and the greatest economic benefits (through tax revenue sharing) if the pipeline is built in the future.

Participant #10 [KFN citizen]:

... [with a new route] they wouldn't have all the cards, right...so we'd have a lot more to negotiate with, there'd be an up-to-date assessment, it just all-around made more sense...

KFN's advocacy for the new route was also related directly to the Ł' n Mǎn/Kluane Lake crossing, of greatest concern to the community, and a request for a better environmental assessment.

Participant #10:

There was lots of concern about that pipeline going underneath the ice, across the lake...and there was.... I think there was a feeling that... a better environmental assessment should happen, so that's why people were advocating for a new route.

Of KFN's issues noted with the Easement, the primary concern (16 out of 19 participants expressed these perspectives) focused on the Ł' n Mǎn/Kluane Lake crossing, which is the existing AHGP route registered under the Easement.

*Researcher: Ok, did you have any concerns around that consultation process?*

Participant #9: [former KFN Chief Alatini]:

Our biggest concern... with the Easement was the intention to put the pipes through Ł' n Mǎn/Kluane Lake, which I thought was absolute bullshit...

Key concerns relating to the crossing included the following:

- Gas being trapped under ice in wintertime
- Constrained access to the pipeline under the lake if there is a rupture/leak
- Access to KFN land selections and roads have been / could be impacted

- Noise pollution from pump stations (e.g. at either side of the lake crossing to control shut off in case of a leak)
- Impacts to traditional livelihoods
- Impacts to fish and wildlife
- Impacts to water quality
- Disturbance to pristineness of Ł ' n Mǎn/Kluane Lake
- Silt as a dynamic substance and unpredictable/poor construction medium (silt deposits into the lake system quite rapidly from the nearby mountains)
- Significant seismic activity in the area
- Lack of information / clarity / unanswered questions.

While there was some general understanding and support for the Easement and pipeline by several KFN participants, there was near-unanimous (excepting KFN Research Participant #14) opposition to the Ł ' n Mǎn/Kluane Lake crossing route. Concerns around the Ł ' n Mǎn/Kluane Lake crossing related to various aspects of the design and geomorphology of the area, and the alternative route option around the south end of the lake. The proposed crossing is located, according to KFN interviewees, in an area of unstable seismic activity (along the Shakwak Trench), and several responses indicated that a rupture in the pipe could create ecological sensitivities.

Participant #11 [KFN staff], who throughout the interview generally spoke in favour of the development of the AHGP pipeline due to the economic benefits it could provide, stated: “I don’t like the location through the lake, at all. I think that’s a bad move. I think they should run it on solid ground, not on this premonition that it’s going to be a good idea to have it on the bottom of the lake forever. How are they going to get it out?”

The Alaska Highway Aboriginal Pipeline Coalition representative interviewed, Participant #12, recognized too that the Ł' n Mǎn/Kluane Lake crossing was in fact *the biggest concern amongst all Yukon First Nations* throughout the Yukon, and amongst the Aboriginal Pipeline Coalition Board (APCB). The APCB wanted to know more about the effect of the project on Ł' n Mǎn/Kluane Lake (Participant #2 transcription, 2015). The KFN Youth Representative interviewed also echoed the primary concern of the existing Easement placed underneath the lake.

Participant #17 [KFN youth]:

...my main concern is...to actually install the pipeline down below Ł' n Mǎn/Kluane Lake ... I don't think most people would actually approve of that.

Other KFN Research Participants vehemently oppose any reality where the pipeline would cross underneath the lake.

Participant #4 [KFN staff]:

.... As long as I'm a resident here I'll probably always keep my finger on this...it is such a contentious issue for Kluane First Nation, with the fact of them wanting to go under the lake. That was the biggest concern...was them wanting to put that pipeline under the lake, without any studies about what could potentially happen, and the same, 'just trust us we know what we're doing'...and we don't trust them and we don't think they know what they're doing, so no, you will not be running that pipeline underneath the lake.

KFN Research Participant #4 also alluded to a lack of overall understanding of the established Easement route and a consultation deficiency with regards to a lack of transparency in KFN's related questions and TransCanada's responses.

Participant #4:

...tell us right up front you're planning to go under the lake, don't say you're considering going around, and then finding out it was going to be under it...

The route itself was also questioned since there is an obvious land-based route around the south shore of the lake that KFN research participants unquestionably favoured to the underwater crossing. KFN participants viewed the reasons TransCanada elected to route the

Easement across the lake as related to jurisdictional and anticipated assessment challenges that could be presented by routing the pipeline adjacent to or within Kluane National Park as overseen by Parks Canada; additionally, issues of cost-savings “shortcuts” were ascribed to the Easement’s registered route underneath Ł ’ n Mǎn/Kluane Lake.

Participant #15 [KFN citizen]:

I mean, I can see if you had to do it across the lake, but they don’t have to.... Go around! The other pipeline [referencing the old Haines-Fairbanks oil pipeline] went around... so what’s wrong with this one? It’s... not that much difference in distance.

Participant #8 [KFN citizen] provides emphasis that KFN community members are opposed to the Ł ’ n Mǎn/Kluane Lake crossing but this does not necessarily imply they are opposed to the pipeline project itself.

Participant #8:

...For the most part, the only concern I feel coming from people is going through the lake. You know people can live [with]...the idea of a pipeline being through here is not new. And there are a lot of people who see the benefit and the need for it, so, it’s just really the sticking point of ‘why do you have to run it through the pristine Ł ’ n Mǎn/Kluane Lake’, right? It’s just the shortcut, you guys are just taking a shortcut, and...take the long way.

The Yukon Government representative, Participant #18, provided confirmation that the Ł ’ n Mǎn/Kluane Lake crossing was the primary project-related concern for Kluane First Nation. Yet divergently, this participant saw Kluane First Nation’s concern regarding the Ł ’ n Mǎn/Kluane Lake crossing perplexing.

Participant #18:

There was no question, out of all the meetings I attended with any First Nation, the crossing of Ł ’ n Mǎn/Kluane Lake was a substantive issue for Kluane First Nation. Now having said that, to this day I don’t understand it. I’ve got a long relationship with Kluane First Nation... I don’t understand this concern, I really don’t. Pipelines go under the ocean, they go under lakes all over the world.

This participant elaborated on the technical reasoning for Yukon Government’s position that the established Ł ’ n Mǎn/Kluane Lake crossing carries continued legitimacy:

... there’s a reasonable amount of evidence... this isn’t the only northern pipeline... there are many in existence in the world...I mean first of all...despite what you might hear in the media, it’s fairly rare that... pipelines are, I would argue, safer than ever before ...but that doesn’t mean...that incidents don’t happen, but...I can’t recall hearing Siberia, Scandinavia, other parts of the circumpolar world

where methane has been trapped under the ice and created a substantial [problem] in the fishery and other aquatic life, so...somehow, it seems to manage to work its way through.

...Having said that...a variety of routes were contemplated that went around that lake, and it arrived that crossing was the preferred route and the one that garnered the Easement, and all of that testing that went on late before that project died away again... confirmed that the lakebed and the crossing that was chosen... seems still to be a pretty good place to put it across the lake. Having said that, in the second go-round, to my knowledge they didn't spend much time looking at alternatives anymore, it was: 'is this still the best place to cross the lake recognizing the Ä-äy Chü / Slims River is depositing massive amounts of sediment', so...

Only one KFN Research Participant #14 supported the Yukon Government representative's views described above. Participant #14 did not carry significant concerns re: the Ł ' n Mǎn/Kluane Lake Crossing. During the interview, this participant made several references to global information regarding pipelines, including construction techniques, resource development, and politics.

Participant #14 [KFN citizen]:

Yeah, the lake crossing.... Christ, they crossed the ocean for...2000 miles from Norway to England...74-inch pipe...so what the hell is this here? ...It's just a little...it's nothing!

*Researcher: So, you're not concerned about it?*

I'm not concerned at all. Development is development.

*Researcher: ...would you feel like you trust the engineering they use in pipelines?*

P14: Well yeah. Look at the... stuff they're doing across the world.

Such perspectives that lessen KFN's concerns of the Ł ' n Mǎn/Kluane Lake crossing are countered by arguments such as KFN Research Participant #10's:

Participant #10 [KFN citizen]:

... that was always a big thing for Foothills, 'oh it's just gas, it'll just dissipate, even if the pipeline breaks, it's not a big deal'...and that's where a lot of... the questions around well... 'What kind of research do you have about gas being released under 5 feet of ice?'...I remember the discussion being 'we fish in this lake', 'what's going to happen to the guy that, you know is...checking his fish net and he opens up the ice and...you know I don't know how long natural gas should take to come out of, come through five feet of ice...and they didn't know either, there was no sort of reassurance or anything, so...I remember a couple meetings where...the community had really good questions, and they weren't able to answer them...

Some KFN research participants were steadfast in their determination to not allow the pipeline to be built beneath the lake, including Participant #13 [KFN citizen], who

recommended KFN should try to renegotiate the terms of the Easement as an Encumbering Right under the *Final Agreement*, so that “...whatever happened back then, you can’t go through the lake...”.

### **2.5.3 Other Community Concerns**

#### **2.5.3.1 Traditional Livelihood Impacts**

Participant #12 [AHAPC representative], as well as several KFN participants, described how the pipeline presents significant economic and environmental impacts to vegetation, animals, harvesting, and Indigenous peoples’ traditional livelihoods. She noted that the Yukon is still at the stage of all Indigenous peoples living off the land, with their livelihoods dependent on the land, and this is why Indigenous groups are so protective of their territories. The pipeline Easement’s crossing of several KFN Heritage Routes (existing physical trails and wagon roads), and potential related impacts of any future pipeline construction disturbing these registered Heritage Routes was also noted as a concern by Participant #19 [KFN staff].

#### **2.5.3.2 Fish and Wildlife Impacts**

Concern regarding potential impacts to wildlife and habitat were cited by 12 research participants and was considered an important issue related to some of the locations of the pipeline Easement. For example, Participant #8 described the pipeline Easement’s location at Fox Point as a moose calving area, and expressed concerns regarding noise disturbance.

Concerns about the out-dated nature of the wildlife impacts assessments were also raised, and knowledge of changing wildlife habitat and potential impacts to KFN hunting practices.

Participant #7 [KFN citizen]:

I think it would all have to be kind of revised, and looked at again... even the moose change their habitat, and it's a lot of our hunting grounds...are we allowed to hunt on the easement? There's a lot of places in the fall time, where moose rut...is it a rutting area... there's a lot of wildlife that it impacts...

### **2.5.3.3 Access Impacts**

Access concern was one of the most heavily coded concepts to arise from the data set (24 references from 13 out of 19 participant sources). KFN concerns voiced during the most recent consultation period included anxiety that KFN citizens' access could be impeded if the pipeline were built (for example, across existing KFN hunting grounds or heritage trails), while also recognizing the need to ensure that access created for the pipeline remains restricted to the general public. For example, there was concern expressed by KFN regarding increased access from linear corridors created for the pipeline that could increase non-Indigenous hunting pressure in the area. Access concerns are linked to the land use planning considerations described in Section 4.1.5 – Assessment, and express KFN's uncertainty regarding the restrictions imposed by the Easement as an Encumbering Right.

Participant #19 [KFN staff]:

...some people came in from the pipeline and we were just doing land claims discussions, having interim protected lands, settlement lands were being selected, and we asked, what happens when you need to get to your Easement, but you need to get through our Settlement Lands? You're putting in an access route that wasn't there previously, so how are you going to be dealing with that in this pipeline Easement?

...You know for us, if we want to put a road, from the other end of the airport across over toward the mountain, we're going be crossing over this pipeline Easement...If we want to go from the Alaska Highway, if we want to up to Burwash Uplands and up to the Plateau there between Duke and Burwash Creek, we're crossing the pipeline. We're crossing the pipeline down there at the Donjek. You know we want to go hunting, we want to fix up that road there, we want to fix up our Settlement Land. How close is that Settlement Land to that pipeline Easement thing? This pipeline, it cuts right through the middle of our Traditional Territory.

Participant #11 commented that if KFN's economic development related access for mineral exploration were to be impeded, there would be serious issues. KFN is actively pursuing mineral exploration initiatives that have been approved under KFN's *Phase 2*



*Settlement Land Use Plan* across areas the AHGP Easement crosses, particularly Settlement Land parcels R-1A and R-49B.

#### **2.5.3.4 Permafrost**

Six KFN research participants expressed concerns regarding construction of the pipeline in areas of permafrost, such as doubts that the pipeline company could successfully construct a pipeline across such difficult ground.

Participant #4 [KFN staff]:

... They can't figure out how to build a bloody highway over it in all these 100 years, how do you guys think you're going to build a pipeline over it in no time...it's not going work.

Participant #11 [KFN staff] also alluded to the concern of permafrost, particularly from Ł' n Mǎn Keyi/Burwash Landing to Ät'ayat Ch /White River, Yukon. TransCanada has an established testing site near Tl' w K' Ch /Burwash Creek known as the 'Tl'el Nji Ch /Quill Creek Test Site', as specified in the original Easement Agreement, where a test pipeline was installed to assess how it responded to freeze / thaw patterns. Several KFN citizens and research participants, including the current Chief Bob Dickson (personal communication, May 31, 2018) recalled working in the 1980's clearing this area for the test site. The test facility is a bizarre fixture on an otherwise pristine landscape, spanning several hundred square metres between Tl' w K' Ch /Burwash and Tl'el Nji Ch /Quill Creeks close to the community. It includes several "tests" of how to best bury the pipe in the discontinuous and dynamic permafrost conditions. The tests, which remain on the site today, include burial of the pipe in above and below ground options, using an array of materials including combinations of ice (chipped from Ł' n Mǎn/Kluane Lake), styrofoam, cement, and gravel. Chief Dickson (personal communication, May 31, 2018) pointed out the large quantity of black "tech" wire strewn about the ground around the test site. He expressed

concern that moose trip and get caught in this wire; he has come across dead moose caught in another type of similar looking wire from telecommunications.

The company completed relatively extensive permafrost testing along the pipeline route that was being updated in 2011 – 2012. KFN research participants did not think the results of these tests had been provided by the company during or following these studies, nor was KFN notified of this planned work prior to it beginning. The test facility demonstrates the uncertainty surrounding the discontinuous and rapidly changing permafrost conditions in the Burwash Landing area, and a remnant physical disturbance on the landscape overlapping KFN Settlement Land parcels R-1A and R-49B. This site also raised questions and concerns from KFN around access rights and notification obligations when TransCanada was planning work on the site.

#### **2.5.3.5 Seismic / Earthquakes**

Six KFN research participants also described concerns and inquired as to the precautions TransCanada planned to undertake regarding earthquakes given the location of KFN territory in a seismically active area, particularly around the Kluane trench. These research participants recalled that these concerns could not be alleviated. Only one participant (transcription #15) expressed trust in the automatic shut off valve systems and ability to control pipeline operations using a computer (this participant had participated in a meeting outside of the Yukon where such information was provided). Some KFN research participants described the seismic volatility of the specific area where the pipeline is to be constructed under Ł' n M̃n/Kluane Lake, and the risk of a pipeline of this nature.

Participant #8 [KFN citizen]:

...And honestly, where they plan to put what five years ago that was, there was a 5.7 earthquake that was right there, that was the epicenter, right where they're planning on putting it. And I wonder if you

had your pipeline there, would it have snapped then? And then what, you know? Then it's really put to the test, like 'oh yeah, they're right, nothing happened', or there're fish floating...

### **2.5.3.6 Drawing upon Past Impacts**

Several research participants related the AHGP to the Haines/Fairbanks pipeline, which was constructed through KFN Traditional Territory in the 1950's (Hollinger, 2003).

Participant #13 [KFN citizen]:

The leak from the old Haines / Fairbanks oil pipeline near Swede Johnson [Creek] is still affecting the water system.

A couple of research participants alluded to increased cancer in the community from the legacy of the Haines/Fairbanks pipeline, attributed to often travelling along its corridor when young as that was the easiest travel route at that time (Chief B. Dickson, personal communication, May 31, 2018). This contamination impact was compared with the Alaska Highway itself, which KFN described as being built atop heaps of garbage (since during its 1950's construction, any broken or unneeded materials were buried as the highway was being built, including such items as oil barrels, old vehicles, etc.). A KFN Elder reviewing the final draft thesis also noted the Alaska Highway itself is considered by KFN to be built atop an Indigenous heritage trail.

Interestingly, some participants did not express substantial concern for the potential environmental impacts of the pipeline, as rooted in their past experience and their view that nature will take care of itself.

Participant #15 [KFN citizen]:

Look at oil spills, you know, where's the oil come from? The ground. So what's the difference? There's oil spills all through this country, when they built the Alaska Highway. There's equipment buried all the way up the highway. And...you never heard nothing. Over time it heals itself, nature looks after itself. It's just that [Haines-Fairbanks] pipeline, they sprayed that Agent Orange or something on there [Haines Fairbanks] to keep the willows down, and nobody died yet, no poison, animals still alive.

This was not a very common response from the interviews; in fact, only three of the KFN research participants out of sixteen in total (or approximately 19%) indicated general support and a lack of concern regarding the technical aspects of the project. Two of these participants were older adult men who had experience working for the pipeline assessment in the 1970's and 1980's; the other participant was a KFN Elder (also male).

## **2.5.4 Socio-economic Assessment Process**

### **2.5.4.1 Minimal Local Benefits**

KFN research participants spoke of capacity difficulties related to industry and governments expectations, including that KFN felt forced to expend its own human and financial resources towards reviewing the project given its significance to the community, without any compensation. KFN received minimal funding and community employment opportunities at the end of the consultation period, less than had originally been offered by TransCanada and therefore anticipated by KFN.

Participant #11 [KFN staff]:

We didn't get anything out of this. It was a complete waste of time. We spent money on lawyers. We spent money going to the Yukon Government to help us get funding for our lawyers. We sat down with them. We signed this agreement. They go ahead and complete a contract, don't notify us, keep the lid on it. We get a few scraps and one paycheque. I mean we got maybe \$15,000 maybe...if I count correctly, no more than \$20,000 worth of work, in a project that was like 1.5 million dollars, and we weren't notified. We didn't set up any of the camps, we didn't do any of the roads, we didn't build any of the ice bridges. They built roads, they built temporary bridges, they set up camp, they sold fuel. They had accommodations.

I recorded 45 references to employment, contracting, and training opportunities throughout discussions with 12 research participants. Several KFN participants identified a community need, interest and, potentially, an expectation of more economic opportunities related to the AHGP. As described further in the next section, participants noted that not only

would there be a lack of jobs but also no additional natural gas access providing a local benefit.

Participant #8 [KFN citizen]:

I think, Kluane First Nation, local people in general are just always wondering ‘what’s the local benefit?’ other than short-term employment...and then in the long term you might have one or two people hired to check those monitoring stations once a month. Like, really minimal benefit...and whenever the question’s been posed, when I’ve been there, about ‘well will we have cheaper natural gas available for Burwash and Destruction Bay and locally?’ it’s like, ‘Nope. Kuanlin/Whitehorse will have a station, but you guys won’t really get that benefit from it’. And I think that’s more what local people are looking to see...if it’s going to come right through our front yard, then ‘can’t you tap into that?’... But, yeah the answer seems to be ‘No, not really’.

Several KFN participants [particularly Elders] expressed trust issues and awareness of the differing perspectives between KFN and “outsiders”. This issue related to interactions and relations experienced by KFN citizens of outsiders who have visited or stayed in the community over time.

Participant #3 [KFN Elder]:

They’re not going to come to the community and spend in our store, and get to know the people. They’re not, because that’s not where they were raised up. They’re going to put their money back into where they came from, and then take their money out. They have nothing to do with us! So why have anything to do with them!

KFN has made strides in community economic development pursuits, including the development of a gas bar and store/café in 2016 - 2017. The key, according to KFN Chief Bob Dickson (personal communication, May 31, 2018), is local capacity building. He thinks there must be priority economic and employment opportunities granted to KFN when industry enters the traditional territory. Not only for trades-focused jobs – he thinks KFN can and should actually lead development of the territory as a self-governing First Nation. But, this would require better training options targeting higher level education and employment opportunities. Another KFN reviewer also expressed the need for more advanced training, such as opportunities in welding, engineering and decision making, and underscored the importance of considering what kind of legacy the boom and bust economy will leave KFN

to manage.

There are additional social and cultural risk factors to consider when outsiders enter Indigenous communities. The Firelight Group (2017), a consulting company specializing in cultural impact assessments for industrial development projects, have documented shortfalls of the assessment process for industrial development projects to consider socio-cultural impacts, including: sexual assault and other health-related impacts including substantial increases in STI rates. This clearly has not occurred in the Alaska Highway Gas Pipeline case study. A key aspect is allowing the community to choose the camp location, which had been a contentious issue between Kluane First Nation and TransCanada.

#### **2.5.4.2 Natural Gas Access**

In terms of socio-economic benefits from the AHGP, KFN members carried interests and concerns regarding the ability to access natural gas from a pipeline adjacent to their community.

*Researcher: The energy, the natural gas, that wouldn't be going to use by KFN at all...?*

Participant #11 [KFN staff]:

[TransCanada] said they wouldn't ...take any of that product out of the line; it doesn't make any financial sense, because the amount of product that we use is so miniscule. They would never ever pay back the cost of building it. And even in Kuanlin/Whitehorse, to have the product come out of here, I don't know if that was certain whether they said they would. I mean if that was what it was, is if we could get low cost fuel out of the line, and it provided great economic sense for everyone in the territory, then for sure let's all work to get it done. And that's... a big question... is that part of the agreement with the Yukon?

Participant #13 [KFN citizen], generally in favour of the pipeline for economic development of the Yukon, stated he would not carry such support if the gas benefit would not be provided to the Yukon. I confirmed with the Yukon Government representative that it is highly unlikely that any direct access points would be provided to the Ł' n Mān Keyi/Burwash Landing community.

Participant #18 [Yukon Government representative]:

Well the commitment... I think there were seven... there was a gas take-off point at every community...the devil was certainly in the detail from the proponent's perspective. They would provide a valve off of the large diameter pipeline and the distribution lines going into a community, such as a small one like Burwash was somebody else's...you know, problem.

*Researcher: [Burwash] was too small?*

Well it's too small, but...the proponent... said we'll give you access...to natural gas and here's your valve, the rest is up to you Yukon Government or Canadian Government or First Nation Government to make this work, and do something with it...whether it was distribution... even experts will tell you only the downtown core of Kuanlin/Whitehorse is economic for a natural gas distribution system ... you do need a critical mass to make it economic to cover those costs of installing that infrastructure. ...And... if you read further... the gas wasn't free either. One could make the argument, out of a 40-some inch diameter pipeline, annual use by Burwash would be [negligible], so...what would it matter? But...the provisions in those agreements certainly indicated that...whatever entered the pipeline, the same amount would be exiting the pipeline, or someone would be paying for that amount used, so... there were trade-offs in that early socio-economic settlement. And it's good news that access was going to be provided ...but it came at a cost...

It should be noted that according to KFN legal counsel's memo in April 2011, the terms and conditions of the Yukon Certificate (1978-1979) (as granted under Section III of the Northern Pipeline Act) included mandates for both employment and procurement and "the provision of natural gas to remote communities" (Boughton Law Corporation, 2011, p. 4).

However:

The Yukon Terms & Conditions were supposed to be reviewed and commented on by Yukon residents and other interested parties. These comments were meant to be incorporated into the final draft which was then to be formally legislated. To the contrary, the Yukon Terms & Conditions have remained in their original draft form and the public was never formally consulted. Further, the Certificates were granted to Foothills before any environmental or socio-economic reviews were undertaken. The validity of the Yukon terms & Conditions remains uncertain today based on their incomplete status. (Boughton Law Corporation, 2011, p. 5)

Supporting this information, there appeared to be a disparity between older generation KFN members' perceptions of local/regional access to natural gas compared with contemporary information; this could be attributed to historical differences in approaches between the two companies that have owned the Easement, Foothills and TransCanada, as

well as changes in perspectives related to the Yukon Terms & Conditions for the Easement, and possible natural gas market factors.

Participant #14 [KFN citizen]:

My impression, if that pipeline goes through, every community along the highway was going to get hooked up to those services, and have [cheap] gas...

...and that's the reason why everybody went for it. That was one of their selling, their major selling points. That was the selling point...

## **2.6 Awareness, Change and Differing Worldviews**

This theme brings together the variety of responses regarding possible consequences of the AHGP Easement among research participants, both within the Kluane First Nation community and among the Crown government and industry representatives. Issues seemed to return to the differing perspectives difficult to reconcile, such as the reliance on a traditional worldview tied strongly to a specific First Nation homeland area, that of the corporate worldview linked to the North American and global natural gas industry, and that of a conventional western resource management system.

### **2.6.1 Worldviews**

#### **2.6.1.1 First Nation Homeland**

Participant #19 [KFN staff]:

And we tried at one point...I remember talking with the pipeline to entreaty the people working at the pipeline agency to look at each of us as human beings, to look at this area here as homeland, to look at it as an area that we need to continue to survive as a people, and that thing there was for naught. You know, it went in one ear and out the other...the decision-makers said, 'we're going to make a pile of money', and the pressure from the oil companies that sponsor the federal parties, like the Conservative and the Liberal parties, these oil companies they donate...millions of dollars to their political parties, and these are the guys that they're sitting with at...the table, and these are the guys that their Energy Ministers are sitting with. And, you think that it's going to matter...if a small group of people say 'hey, we need this land to continue to survive as a people', 'we need this land to continue our way of life'. Do you think that it's going to really matter when it comes down to a 120-billion-dollar project?

Well, the First Nation homeland priorities are...they are...considered so low that...we're not even a factor in the overall decision-making that happened in Ottawa, within these Northern Pipeline Agency people. So who was the Yukon representative on this Northern Pipeline Agency, who was



our...sponsor...who was our...advocate on this Northern Pipeline Agency? There was none... If they said there was somebody from the Yukon, it would have been somebody designated from the Yukon Government, who was all “yeah, we’re going to bring this pipeline and we’re going to make a pile of money”.

KFN research participants are strongly joined in perceptions of the environment that are rooted in KFN Traditional Territory, which was also referenced as a “homeland”.

Pipeline representatives, both from TransCanada and the Northern Pipeline Agency, are described as misunderstanding and disrespecting the deep meaning of this concept to KFN. KFN research participants provided evidence they are well aware of and experienced with the disparities between KFN’s homeland, an area of over 33, 000 km<sup>2</sup>, and the large-scale, federally administered functions of government that have not to date been well-represented by local Indigenous interests at the political scale.

Participant #16 [KFN Elder]:

How can you put your mind here when you don’t live here?

### **2.6.1.2 Traditional Knowledge**

Traditional knowledge was not a subject heavily coded in the research data, appearing in interviews with 5 research participants, particularly in reference to knowledge of fish, water, best routes, wildlife patterns, and habitat impacts. It also references the connection Lù’àn Mǎn Ku Dǎn/Kluane Lake People hold to Elders and the land / the “bush”, linked to the Indigenous homeland concept, and the transitions that occurred because of residential schools. Additionally, it is important to recognize, especially as related to the L ’ n Mǎn/Kluane Lake Easement crossing, that KFN Elders have emphasized the critical importance of water and the people, fish and wildlife it provides life for as part of Kluane First Nation’s worldview and homeland.

Participant #6 [KFN Elder]:

... I know most of the old people, like the really old ones...and I spent a lot of time with them, I spent a lot of time in the bush with them...I was born here in Burwash but a lot of my younger years we did a lot of living in the bush, different areas, and then residential school started when I was 7, and then from there I was in public school...

There was also a substantial contrast between the views of the TransCanada pipeline representative and KFN's views of how traditional knowledge was accounted for in the environmental assessment process.

Participant #2 [TransCanada representative]:

"...if their concerns had to do with us meeting the environmental norms of today, that's absolutely what we intend to do...if they had to do with traditional knowledge ... we absolutely would take that into account...we did originally, and we would continue to do that".

Yet, Participant #2 noted that the company could not have dealt with the concern, raised by some Yukon First Nations, who had requested that TransCanada be required to start afresh, and that the government should allow the Easement to lapse.

### **2.6.1.3 Corporate Interest**

Corporate interest plays a substantial role in TransCanada, Yukon Government and the federal government's interest in pursuing the completion of the Alaska Highway Gas Pipeline project. As described in Chapters 1 and 2, the volatile natural gas market influences whether oil and gas companies determine if projects are feasible to proceed.

Participant #2 [TransCanada representative]:

If you believe that natural gas prices are going to be 3 bucks forever, I don't believe that we would be extending that Easement...if on the other hand they were going to be 13 dollars, I think we very much would want to extend...

KFN research participants were well-aware of the corporate interests involved in these projects and are frustrated by the extended timelines and uncertainties the economic volatility of the natural gas market has meant for the AHGP.

### **2.6.2 Change**

Participant #19 [KFN staff]:

I just have a hard time to see that there has been significant change. And I think the [Yukon] Government itself has to change before we're going to see significant changes.

### **2.6.2.1 Outside Influences**

Like the section describing outsider threats as a possible socio-economic impact that may not have been factored into the original Lysyk Inquiry socio-economic assessment process, KFN research participants are aware of and concerned about the changing dynamics of the outside world and ensuring their reliance on the resources from the land to remain resilient in the face of such change.

This led KFN Research Participant #8 to even worry about the extent to which economic uncertainties inherent in the project could lead to the pipeline being shut down prematurely even if it were constructed, causing greater environmental and socio-economic disturbance. This participant also described in her interview how wind and solar renewable energy initiatives are moving forward. She explained how KFN is proactive about such initiatives as self-government but has experienced resistance from Yukon Government to support wind and solar initiatives who consider such initiatives as unfeasible. Participant #8 expressed confidence KFN will prove everyone wrong about the feasibility of moving forward with renewable energy.

### **2.6.2.2 Timeframe**

Participant #1 [KFN citizen]:

...And I think we're not the same community we were in 1970, we're not the same community we were in 1980...

Related to the timeframe for construction, participants expressed frustration with both the long and short timelines involved in the project. For example, Participant #14 stated, "I got no problem with the pipeline going through, but if you're going to put the damn thing through, you know?"

Several participants also noted the fast timelines for the construction process.

Participant #10 [KFN citizen]:

...They didn't have a lot of evidence to back up their claims... like [stating] pipelines today rarely break...or I remember being at one [meeting] where Foothills was telling us that only old pipelines break, and I'm like 'well, it's going to get old, you know, eventually!'... And then what? ...Some of their reasons didn't make any sense...

Participant #8 [KFN citizen] drew attention to the observations of dynamic change over time by Kluane First Nation citizens and other local community members, and the lack of confidence in government and industry scientists' and bureaucrats' abilities to effectively predict and assess conditions experienced in the KFN community, economically, socially, culturally, and environmentally. The participant described how Ł' n Mān/Kluane Lake "...used to flow in the opposite direction 400 years ago" ...and drawing from this uncertainty regarding what conditions will be like 50 years from now. Accordingly, climate change affects everything more rapidly. This concept relates to considerations of changing circumstances within the environmental and socio-economic assessment process (i.e. the lengthy timeframe during which the assessment process has been in place, contrasted with changing circumstances within the KFN community). Change also relates to the building of greater empowerment within the KFN community more so now than in past time periods.

### **2.6.2.3 Awareness**

Awareness of the Easement's history and potential present and future implications varied among KFN Citizens interviewed. Generally, KFN members were aware of the AHGP Easement, and some KFN Citizens interviewed held a detailed knowledge of the project.

However, issues also became apparent with the younger generation's capacity to build awareness of traditional, historical, and modern political knowledge. Several KFN

participants, particularly Elders, described concerns regarding KFN youth not being involved or knowledgeable of traditional practices such as hunting and being on the land.

Participant #5 [KFN Elder]:

Young people are not interested in the land or even to go hunt; anyone below their 40's is not interested in the land; it does not mean anything to them because they have not been out on the land.

The sole youth representative interviewed as part of this research project (Participant #17) recognized the need to educate other KFN youth on issues with the AHGP. However, even this participant had not been aware of the pipeline easement extension prior to being presented with this research's background materials. Nor had Participant #17 been aware of the all-Alaska option before the interview period where I asked the relevant question from the semi-structured interview guide.

However, other KFN members spoke to youth being more empowered than ever before.

Participant #1 [KFN citizen]:

...and I don't think that my son takes the words 'it is what it is' as easily as I did, and I don't think...I don't take it as easily as my mom did...that always changes...

...and there's way more of us now, that are educated, that are leading healthy lifestyles, that are empowered...

A complex dynamic appears to exist in the community, wherein some KFN research participants feel that youth are more empowered due to the enhancements in education and promotion of a healthy lifestyle, while at the same time it is recognized that KFN youth may not be as engaged and aware of issues as KFN citizens were in the past (i.e. many older KFN citizens were involved in the land claims process with the federal and Yukon territorial governments for decades). Also of significance, a KFN thesis reviewer noted that while youth may seem more empowered, they are less empowered in terms of their ability to know and live off the land.

#### 2.6.2.4 Empowerment

Empowerment is a theme that came up often during interviews with KFN research participants. This is related to awareness of the cumulative legal achievements of Indigenous peoples in defense of their constitutionally protected Indigenous and Treaty rights (Gallagher, 2012; Asch, 2011). For example, Participant #1 [KFN citizen] states:

As a self-governing Nation, we would take whatever measures we needed to...  
I mean the First Nations in this country have a 92% success rate in the Supreme Court of Canada. And, if we had to go that way we'd go that way to get the injunction, right...

It was evident in the interviews that several KFN community members are aware of KFN's political and legal positioning in relation to the AHGP issue, and of environmental and social justice movements in Canada and globally. In the future, if KFN determined it to be in the community's interest to fully contest this pipeline project or aspects of it like the Easement extension, such an empowered understanding of changes having taken place in the justice system carries the potential to support KFN in this action.

Participant #8 [KFN citizen]:

...Yeah, it's on the books [i.e. grandfathered in]; but you know, how environmentally minded were people before 1984? I mean it's such a different shift in mindset, now...

In community meetings, the theme of empowerment also emerges within the research data:

Participant #1 [KFN citizen]:

[There were] Lots of concerns when they came and said they were going to put it under the lake... that was a big moment of pride for me... everybody that was in that room, everybody, it didn't matter what [TransCanada] said, every single person in that room said there is no hope for you, to do this...you will never get us to say otherwise...like this is not happening.

I think we've been empowered – I mean the intent behind self-government is self-determination and that my generation absolutely... we no longer accept someone from Ottawa telling us that this is going to happen...

From empowerment, comes change. The research findings described throughout this fourth chapter of the thesis frame the answers to the research questions and lead into the

final, fifth chapter that follows. Chapter 5 seeks to position the key themes and concepts within the research findings into concluding thoughts and practical recommendations, serving to address and resolve this real-world problem of a pipeline Easement's perpetuation.

## **CHAPTER 5: DISCUSSION, RECOMMENDATIONS AND CONCLUSION**



## 5.0 INTRODUCTION

“The world is changing, you know, and the reason they are doing the pipeline thing, it’s for power.” (KFN Elder, Research Participant #3)

Within the context of this thesis, power can be viewed through both the political and thermodynamic (gas as an electricity source) lens, yet both are linked to socio-economic and environmental issues at global, regional and local scales. The research has examined foundational issues around the federal Government of Canada’s assessment and consultation processes for a large-scale, historic natural gas pipeline that remains within the spectrum of an existing pre-approved, yet still unbuilt project. Focusing upon a long-standing pipeline Easement highlights the importance of considering the rationale utilized to support extended timeframes for land tenure rights that may impose adverse effects upon Indigenous communities. Such indirect considerations of potential adverse effects *should* be employed by the Crown in natural resource management and decision-making, within the spectrum of the Government of Canada’s Duty to Consult Indigenous peoples on resource development projects that may impact them. This thesis has provided evidence directly from research participants representing Kluane First Nation, the Alaska Highway Aboriginal Pipeline Coalition, the Government of Canada/Northern Pipeline Agency, Yukon Government, and TransCanada regarding the perspectives and considerations that have been provided for the decision to date to extend the lifetime of the Easement since its original Yukon Land Titles registration in 1983. These foundations are rooted within the constitutionally protected rights of Indigenous peoples of Canada.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (UN General Assembly, 2007) emphasizes the modernized roles that governance institutions

should convey with Indigenous peoples and their self-governments, towards a reconciliatory approach to consultation. Alongside the empowerment of Indigenous peoples and communities through their high level of legal successes in the Supreme Court of Canada involving resource development-related cases (Gallagher, 2012), emerging environmental and social justice calls from political, social and academic corners movements have also been growing in western Canada and North America. Throughout the research findings, governance issues around the Alaska Highway Gas Pipeline were described as Kluane First Nation research participants viewed them. The research findings support the scientific and academic literature, and they also bring new information into vision, as described in the chapter sections that follow on the key conclusions and recommendations.

The conceptual themes described in Chapter 4 – Research Findings are now employed to frame a closing discussion of these results, and the recommendations that follow. This chapter is divided into a discussion section with key conclusions and recommendations tailored to each of the research questions and supporting the theoretical and practical foundations described in Chapter 2. The results explore the primary question: what are the core issues and potential consequences with the Alaska Highway Gas Pipeline Easement from Kluane First Nation's perspective?

All six key themes described in Chapter 4 – Research Findings ('Indigenous and Treaty Rights', 'Governance', the 'AHGP Easement as an Encumbering Right', 'Consultation', 'Assessment' and 'Worldviews, Change, Awareness') were integrated within this primary research question and the findings that followed. Building upon these thematic references were the broader theoretical frameworks of environmental and social justice and social-ecological resilience, which are supportive reference markers for understanding

Kluane First Nation's knowledge and interests in the AHGP Easement. These are linked to KFN research participants' unique perspectives of the research problem.

The research findings confirmed the hypothesis that Kluane First Nation has experienced past impacts, continues to experience present impacts and likely will continue to experience future impacts from the AHGP Easement, unless adaptive management occurs to address the issues of uncertainty in the environmental assessment and regulatory review process that are raised in this case study (Armitage, 2005). While these impacts are qualitative in nature, they also represent the distinctive ontologies and epistemologies, essentially, differing worldviews, held between Kluane First Nation and the Crown. Yet, the research findings also can be seen to demonstrate how such worldviews have merged, particularly among the younger research participants.

The key themes derived from the interviews around the research questions support a critique of a conventional natural resource management and governance system, from the perspective of a real and administrative burden experienced by a self-governing Yukon First Nation. The burden, this thesis concludes is also being placed upon the Northern Pipeline Agency and representative federal government in terms of this project's long-standing economic, socio-political and environmental risks, which ought to be weighed alongside its future potential benefits. This burden is fundamentally linked to the fiduciary responsibility the Crown must uphold, and it should also be considered within the context of modern environmental assessment requirements upon industry and regulators (Udofia et al., 2017). The Easement is located at the crux of why so many KFN research participants question the long-term vision and viability of the pipeline. Several KFN research participants wondered: will the lifespan of this pipeline project pay off in the end? and they were concerned about

the ongoing impacts of keeping the Easement and pipeline-related reservations that were registered in 1983 in place as they stand. Long-standing easements such as for the Alaska Highway Gas Pipeline Project are primarily a liability in terms of their risk of infringing upon established Indigenous and Treaty Rights, particularly in the administrative-review-for-decision phase. Bell and Asch (2014) have reminded us that Indigenous and Treaty Rights themselves are constantly evolving, as is the legal and political discourse. This thesis pushes this point a step further by suggesting that the time is ripe in modern political and legal discourses to challenge the existing status quo governance models regulating large-scale, important resource development projects that have been long-assumed to remain in the public interest.

The research raises awareness not only about the AHGP Easement but also the Northern Pipeline Agency (NPA), a unique bureaucratic governance body this research has found constructively exists solely within the context of one pipeline project (the AHGP). What will the next phase of this project bring by September 2022, when the Easement is next due to expire? The recommendations provided in Section 5.2 are intended as a platform for all parties to be better prepared for this upcoming situation.

The research included an examination of the federal assessment and regulatory review process for the Alaska Highway Gas Pipeline, focusing on the problem of the federal Government of Canada's approval and extension of the timeframe of the Easement, which enables this major industrial resource development project. This research supports the idea, linked to a growing social movement in Canada, that there is need for substantive institutional and ideological change in understanding and assessing the potential impacts of

resource development projects in decision making, especially as this assessment can be tied to Indigenous Rights.

Ultimately, questions and examinations in this case study are rooted in determining where the Crown's duty to adequately consult and accommodate Indigenous peoples and communities in Canada may be critically in need of change, as defined by Kluane First Nation, a leading progressive self-governing Yukon First Nation with a great stake in the Alaska Highway Gas Pipeline Project and other projects within their territory. It provides substance to arguments that Indigenous Rights, including Indigenous Title have not been, and may continue not to be, adequately recognized and accounted for in resource management contexts. The research findings also question the timeframes involved in a long-standing resource development project.

By focusing on the Easement as a specifically fundamental aspect of a large-scale industrial development project that has now become embedded within a land claims context, such a study moves beyond research regarding enduring challenges to Indigenous participation that focuses upon the environmental assessment *process* (Booth and Skelton, 2011; Udofia et al., 2017). This thesis demonstrates how even following the conclusion of an environmental assessment, the conditions and outcomes may still lead to increased uncertainty within the extended consultation, regulatory review and decision-making context.

While the AHGP Easement has been a long-standing, unresolved issue for KFN, many resource-related stirrings towards progressive change have more recently been emerging into the forefront of Canadian politics. This has been particularly evident since the federal Liberal Government came into power in 2016. Prime Minister Trudeau announced the government's intention to fully adopt and implement UNDRIP including support for the

New Democratic Party Bill 262 calling for the alignment of Canada's legal framework with the application of UNDRIP (Fontaine, 2016). The federal government's announcement on February 14, 2018 of a new legal framework for how the government recognizes Indigenous Rights and Title (Barrera, 2018) highlights what I have concluded is a core issue of the Alaska Highway Gas Pipeline Easement case study. This is illuminated by Barrera's (2018) statement that "Federal government policy has lagged behind decisions of the high court, creating a situation where Indigenous groups are forced to repeatedly head to the courts whenever their rights are infringed."

Federal policies that have not kept up with self-government agreements can give rise to legal disputes, and KFN research participants were very aware of the empowerment gained through self-governance. Even in the current era of truth and reconciliation (TRC, 2015) Yukon First Nations are continuing to need to remind the federal government that self-governing Indigenous groups are no longer part of the *Indian Act*. This view is supported by the Truth and Reconciliation Commission (2015, p. 12), which states, "For governments, building a respectful relationship [with Indigenous peoples] involves dismantling a centuries-old political and bureaucratic structure in which, all too often, policies and programs are still based on failed notions of assimilation".

This case study provides yet another literature example of the fundamental, well-documented problem of conventional environmental assessment and consultation process, particularly as this relates to the Crown government's relationships and resource development-specific contexts with Indigenous peoples in Canada. Yet, other authors have directed attention to more successful participatory processes that have been emerging, especially since the 2000's in parallel with the settling of northern land claims in Canada and

the circumpolar north (Dokis, 2015; Armitage, 2005; Yakovleva, 2014; Haluza-Delay et al., 2009).

The research dove into the problem from the themes of Indigenous Rights, environmental and social justice, and reconciliation, extending the focus on standardized environmental assessment processes into the grey area of long-standing administrative impacts from the Alaska Highway Gas Pipeline (AHGP) Easement. Therefore, the research focused on project correspondence among the parties from the most recent regulatory review process for the Alaska Highway Gas Pipeline Easement, while compiling KFN research participant perspectives of the Easement throughout its lifetime.

Such regulatory issues remain in the vision of Kluane First Nation, and they may emerge further into the justice and regulatory system of Canada at large. Trudeau's announcement exemplifies recognition of a long-standing issue, and a potential turning point and advancement of improved preliminary process improvements, such as have already occurred in some cases where special review boards or committees have been established (Armitage, 2005; Dokis, 2015). Yet, even in these cases, government may not act upon the input received (Armitage, 2005). One shared objective of improved federal regulatory and policy regimes would be to reduce the amount of cases Indigenous groups bring to the courts for resolution where there is currently disagreement between their respective self-governments and the Crown (Lambrecht, 2013). It is known that EA process inefficiencies have resulted from Indigenous communities "...legally challeng[ing] EA processes and decisions due to the lack of meaningful participation..." included limited engagement timeframes and the "... lack of clarity between the legal consultation obligations of governments" (Udofia et al. 2017, 165).

On April 9, 2018, Kinder Morgan announced they would be suspending all non-essential work activities due to the climate of uncertainty given Indigenous and BC NDP Government opposition to the project (including a court filing regarding jurisdictional clarity). The company provided a 7-week timeframe for receiving clarity from the Government of Canada that construction of the project will proceed (Tombe, 2018), as it appeared they were reaching their financial risk threshold. At the same time, Alberta (or the federal government) was considering becoming an investor to support, or provide clarification of commitment towards the project, which the federal government decided in May 2018 to move forward with purchasing from the company (Murphy, 2018). This announcement is indicative of the jurisdictional and socio-economic problems that can arise among neighboring provinces (even while ruled by the same political party, as in the case of the BC, AB and federal government dispute over the TransMountain expansion project).

Cases such as the Kinder Morgan TransMountain example demonstrate how political dispute can affect even the final and post-regulatory review stages of controversial pipeline projects. While currently, and over the past three decades, the North American market for natural gas development has declined considerably, this is not a given. Corporations including TransCanada and Kinder Morgan have held onto pipeline easements as assets from their past investments for long time periods. They have followed the federal regulations and guidelines in doing so. Yet, simultaneously, a rise in public concern has now affected most countries, including the ethical treatment in business of Indigenous peoples outlined in UNDRIP, and increased social concerns around environmental sustainability (Lertzman and Vredenburg, 2005; Booth and Skelton, 2011).



Inevitably, time delays, false starts or what KFN research participants referred to as “brief frenzies of activity,” alongside changing regulatory conditions, may challenge companies to proceed with project investments as forecasted. This research project has directed attention to what remains, in the case of an easement, an asset to companies, governments and potentially communities even where most or all other project investments have been pulled. Yet, the Easement has been stagnant, while other economic, social and environmental conditions may have shifted (such as in the Kinder Morgan example). Some pipeline projects, including the Alaska Highway Gas Pipeline, Mackenzie Valley Gas Project and TransMountain Expansion project, all originating well before the modern era, carry with them federally approved easements surveyed and registered for the purposes of constructing those respective pipeline projects. This research has shown how there are real adverse impacts from leaving long-term land tenures and rights in place where Indigenous communities reside and depend upon for economic and community development and sustainability (Dokis, 2015).

I have incorporated the United Nations Declaration for the Rights of Indigenous Peoples (UNDRIP) and Truth and Reconciliation Commission’s (2015) findings into this research, as it is now upfront in the public sphere of progressive Canadian politics. Challenges to oil and gas pipeline projects are expected to continue to rise in the future, alongside economic and political uncertainties around the extraction and development of fossil fuel resources. Climate change concerns and unrest over pipeline projects has been building momentum over the past two-plus decades. From this broader socio-ecological lens, we can see how the juxtaposition of Indigenous and Treaty rights with global and environmental economic uncertainties and insecurities (i.e. climate change, water wars,

UNDRIP, etc.) revives the need to reassesses how these projects are being managed and regulated. Historic pipeline projects demonstrate the inherent tensions in oil and gas resource development and management, often involving extensive and contentious environmental assessment / regulatory review processes. Yet, variations in the assessment process may also be widespread.

This is exemplified by the case of the Mackenzie Valley Pipeline Review Panel, well known as the foundation for modern participatory environmental assessment process with Indigenous communities and whose “...work stands as Canada’s most fully developed approach to the pursuit of enhancement through advanced sustainability-based assessment (Gibson, 2011, p. 243). This process compared with the condensed timelines and assessment requirements in other cases like the Alaska Highway Pipeline’s most recent push towards actual construction in 2011-2012 emphasize the need to reflect upon environmental and social justice criteria around procedural fairness, which the federal government employs within the territories.

Kluane First Nation research participants’ concerns about the Alaska Highway Gas Pipeline project’s now uncertain vision is linked to the gamble KFN chose in selecting Settlement Lands overlaying the existing Easement. Similar risks are reflective of other local remote Indigenous community’s experiences where greater control in investment and entrepreneurship is sought (Anderson et al., 2006). Even where EA processes have been more involved such as the Mackenzie Gas Pipeline, for example, where industry pulls out, local remote Indigenous communities where people gamble on the pipeline may cause many local people to lose (CBC, 2016). KFN research participants described how the intention had always been for great control over KFN’s lands and resources, as was the original intent of

the land claims agreement itself in parallel with the *Together Today for Our Children Tomorrow* (Yukon Native Brotherhood, 1973) document delivered to Ottawa by Yukon First Nations in response to the 1969 White Paper (AANDC, 2010). KFN emphasized during the final thesis review process that the message in *Together Today for Our Children Tomorrow* remains the primary driver for KFN, aligned with the “seven generations” model towards improving the conditions of Indigenous communities for the benefit of the next seven future generations. Along with this message, it is imperative to acknowledge Kluane First Nation’s distinct experience given the relatively recent opening of the Kluane Region to outside development since the 1942 construction of the Alaska Highway and subsequent Haines-Fairbanks pipeline (both built for military purposes). One KFN thesis reviewer reminded me that when the land claims negotiations process began in the 1970’s, the community had no vehicles, water or electricity. These past circumstances were a vehicle for *Together Today for Our Children Tomorrow*, and why KFN continues to strive for better social, economic and environmental conditions for its children.

The intent of this final thesis chapter is to frame the discussion of the research results within an understanding of the problems inherent in the existing legislative and policy reform processes in Canada. This policy arena represents one avenue whereby the greatest practical change could (and should) occur, and where social and political lobbying is already instated through several Indigenous leadership forums and their allies.

Conclusions and recommendations have been drawn over the course of the project. New findings that emerged from this research are also highlighted in this final thesis chapter.

## **5.1 DISCUSSION**

This section will provide an analytical discussion of the core conclusions developed from the themes described in Chapter 4 – Research Findings. The recommendations provided in the final section of the thesis seek to answer the thesis / research questions and draw upon the core elements described in Chapter 2 – Theoretical and Practical Foundations. It is noted there is substantial room for subjective interpretation of the research results. I acknowledge the limitations of one researcher’s analysis, and I attempted to obtain insightful review of the research findings, conclusions and recommendations from all research participants. I have described how I have attempted to mitigate my own interpretative bias in representing Kluane First Nation’s (KFN’s) perspective through a decolonizing framework. This includes ensuring throughout each stage of the research project that KFN has received the opportunity to review and provide input. During the final drafting stage, KFN reviewed this thesis in full and endorsed the final draft (refer to Section 5.3).

### **5.1.1 Fragmented Legislative Framework / Jurisdictional Oversight**

This research illuminated the need for greater regulatory process engagement and clarification recognition by federal, territorial and industry representatives based upon the perspective of Kluane First Nation as a self-determinant Indigenous community in Yukon. Nadasdy (2003; 2012) has written about “territorial jurisdiction” reflecting such “...jurisdiction [as] a government’s ability to exercise power and authority within its territory [as] a fundamental aspect of the sovereignty concept” (501). The territorial jurisdiction concept is relatable to the research problem around the AHGP Easement, in that the exercise of KFN’s sovereignty (existing pre-contact) and jurisdictional authority (post-Land Claims) continue to challenge the limitations that centralized government bureaucracies have

historically placed upon Indigenous communities and continue to exercise. The regulatory approach led by the Northern Pipeline Agency as a centralized, federal bureaucratic organization to date is deeply embedded, like the Easement, within strategic state visions of sovereignty (Nadasdy, 2003). In the Alaska Highway Gas Pipeline case, for example, a great deal of discretion and power is placed in the hands of the Northern Energy Board's Designated Officer and ultimately the Minister of Natural Resources without a clear process around updated / modernized consultation and environmental assessment requirements.

Likewise, the theme of Indigenous rights and Treaty rights illuminates the legal context within which this research project is situated (Dokis, 2005; Lambrecht, 2013). Such court cases have frequently focused on challenges made by Indigenous groups over the colonial, liberal and bureaucratic processes surrounding land and resource management, including environmental assessment and decision-making. Court decisions have resulted in some improvements to these systems over time, such as the Crown's now recognized obligations and processes for consulting Indigenous groups on proposed resource development projects. This thesis asks how evolving changes over time should be accounted for where "prior", "existing" resource development projects may have never been completed; yet remain within the scope of ongoing impacts upon Indigenous communities. What is the obligation level for consultation and accommodation, in such a context alongside an established comprehensive modern Treaty?

Devolution in Yukon Territory following Land Claims has led to some increased confusion regarding the roles and responsibilities among the federal government (including within this study the Northern Pipeline Agency, National Energy Board and Fisheries and Oceans Canada), territorial and Indigenous governments in natural resource management and

decision-making. The Government of Canada's continued legislative and policy influence in Yukon Territory post-devolution has led to significant progressive changes, yet also in lacking some necessary reforms remains a burden on sustainable resource co-management and reconciliation. The research findings support Natcher and Davis' (2007) and Nadasdy's (2003) critiques of the Devolution process's failure to decentralize state institutions such as the Northern Pipeline Agency, which remain embedded within modern post-land claims contexts and may in some respects counter the intent of the land claims agreements.

Conventional resource management systems demonstrate a problematic arrangement, which has been known to reduce jurisdictional resilience over time (Berkes and Folke, 1998). As Booth and Muir (2011) note: "Not including Indigenous peoples in meaningful decision-making about developments on their critical lands has [as cited in Turner et al., 2008] resulted in significant but often invisible (although not to Indigenous peoples) consequences. Such consequences include an overall decline in 'resilience' in individuals, communities and cultures" (p. 427).

The *Northern Pipeline Act* includes as its Schedule 1 the *Canada-U.S. Agreement on Principles Applicable to a Northern Natural Gas Pipeline*.

Section 2, "Expeditious Construction; Timetable" of this international agreement (Government of Canada, 1981) specifies in part (a) that the Yukon, the main laying of pipe should occur by January 1, 1981. Parts (b) and (c) then state:

(b) All charges for such permits, licenses, certificates, rights-of-way, leases and other authorizations will be just and reasonable and apply to the Pipeline in the same non-discriminatory manner as to any other similar pipeline.

(c) Both Governments will take measures necessary to facilitate the expeditious and efficient construction of the Pipeline, consistent with the respective regulatory requirements of each country.

From the research questions and findings this case study explored, it does not appear that the timely, efficient, nor expeditious construction of the pipeline has occurred. Part (b) within the context of Section 5.6.0 of the *KFN Final Agreement* critiques the non-discriminatory approach the Governments of Canada and the U.S. have employed with regards to charges for the terms and conditions of the AHGP Easement as a registered right-of-way through the Yukon. Regarding the timeliness of the project, in the most recently amended version of the Easement Agreement dated July 4, 2012, one of the opening clauses reads, "...and whereas [TransCanada / Foothills Pipelines (South Yukon) Ltd.] remains firmly committed to the timely completion of the pipeline construction, in accordance with the Agreement when the *need for the reserves of natural gas is determined...*". This last line, I noticed, had been added to the 2012 amendment without any consultation with KFN, and the original Agreement instruments had been intended for and referenced as a specific gas reserve and need. The Easement Agreement is executed pursuant to subsection 37(3) of the *Northern Pipeline Act*, which reads:

**Grant of easement to company**

(3) Where Foothills Pipe Lines (South Yukon) Ltd. provides the Minister with a copy of the plans, profiles and books of reference referred to in subsection (2), the Governor in Council may authorize, on such terms and conditions as he considers appropriate, the grant of an easement to Foothills Pipe Lines (South Yukon) Ltd. for the construction of the pipeline and, on the giving of leave to open the last section or part of the pipeline by the Board and subject to subsection (4), for the purpose of the operation and maintenance thereof.

Under the *KFN Final Agreement*, Section 5.6.0 – Tenure and Management of Settlement Land, KFN (2012) argued in correspondence to the Northern Pipeline Agency that the Easement Agreement should be considered Legislation in that it is the primary legislative mechanism through which the term of the Easement as an Encumbering Right is

now maintained. The research findings support this view, given the unique circumstances of the *Northern Pipeline Act* legislation and the Easement.

The research shows how this jurisdictional constraint presents real consequences to Kluane First Nation's land and resource management system, and KFN citizen's ability to exercise their Indigenous and Treaty rights. Such rights may be impeded by the following *pre-construction* consequences, which were identified through the research findings:

- Impacts to use of most viable gravel resources in KFN Traditional Territory
- Impediments experienced by KFN to embark on any significant land use planning in and around the Easement and pipeline reservation areas, given uncertainty of if/when the AHGP will ever be built
- Impacts to uses surrounding or within traditional cabin areas (and overlapping established KFN Heritage Routes)
- Impacts to accessing areas for a variety of purposes, including the site specific and rural Settlement Land parcels: R-1A (quarry reserves); R-20B; S-29B; S-46B (material stockpile site); and S-71 (construction camp site blocked off by large tires)
- Building new roads for economic or rural development
- Human Resource and financial capacity impacts
- Monitoring issues (e.g. permafrost, climate change)
- Lack of adequate, timely notifications and information

Additionally, this research has found the Northern Pipeline Agency is an unusual regulatory organization operating as an independent body yet linked to the National Energy Board, particularly through one individual referred to as the Designated Officer. The research



confirmed the AHGP project is considered for all technical purposes already-approved by the Northern Pipeline Agency and Yukon Government (Research Participants 18 and 19). Yet, the term of the Easement Agreement remains vague, sets exceedingly long terms of ten and/or twenty-five years and is complicated to decipher without a professional legal opinion. What is clear is that the current Easement Agreement (2012), set to expire on September 20, 2022, may mark a turning point in recognizing that if the requirements laid out are not met by TransCanada, including the statement:

...then the easement and rights, licenses, liberties and privileges hereby granted shall thereupon terminate, and the Company agrees thereupon to execute and file at its expense such documents as may be necessary, in the opinion of the Minister, to effect a termination of all its interest in and to the first or second Right-of-Way, as the case may be.

It also became apparent through the research that the project has never received the written ministerial consent under section 1 of the Easement Agreement needed as the last stage prior to construction; this was the stage that would be prescribed to follow the “two-stage regulatory process” involving assessment by a Designated Officer and Advisory Councils as outlined in Chapter 1, Section 2.3 on the regulatory framework for the project.

The research problem demonstrates a clear problem with the federal government’s approach to reconciliation in terms of modern Yukon Land Claims and Devolution processes. The research highlights how even while the Easement became an Encumbering Right under the *Kluane First Nation Final Agreement*, there are now issues in terms of how this Encumbering Right is being managed by the Crown and differing interpretations of Section 5.6.0 of the *KFN Final Agreement* regarding the amendment clause. The research findings determined the federal Northern Pipeline Agency never provided justification of its approach to consultation, and the sole explanation the Agency provided that such an

amendment represented an “administrative, rather than substantive change”. Yet, this research has shown the substantive impacts Kluane First Nation experiences from the Easement and the long renewal timeframes it carries through its three amendments to date.

The Northern Pipeline Agency’s approach counters the Truth and Reconciliation Commission’s (2015) Call to Action 51, which calls upon the Government of Canada “...to develop a policy of transparency by publishing legal opinions it develops and upon which it acts or intends to act, in regard to the scope and extent of Aboriginal and Treaty Rights”. This justification was never provided, and it is recommended that it should be considered by the Northern Pipeline Agency its fiduciary obligation to provide this to all affected Indigenous groups.

While the focus of this research has been on the modern consequences of the Alaska Highway Gas Pipeline Easement, the historic context of how the Alaska Highway Gas Pipeline Easement process and Easement was registered just as the land claims process was being initiated is problematic. The exemption of the AHGP Project from the modern comprehensive environmental and socio-economic assessment process in the Yukon and lack of a finalized Terms and Conditions also evidences the questionable rationale for continuing to extend the Easement.

Finally, the Easement Agreement itself is part of the jurisdictional issue. While it is the Northern Pipeline Agency’s responsibility (under the decision authority of the Minister of Natural Resources) to manage and execute this agreement, there are clauses in question as it stands, including the question of what are the limitations and how does the federal government determine it would be in the “national interest” to decline to amend the

Easement for further decades-long time periods, particularly without the adequate, appropriate and express objective of reaching the consent of Kluane First Nation.

Another recent Supreme Court of Canada decision in Yukon, First Nation of *Nacho Nyuk Dun, et al. v. Government of Yukon* (Tukker, 2017; SCC, 2017) provided an interesting, and relevant description of the Yukon Land Claims process, and the importance of recognizing how those Yukon First Nations who determined to undergo this modern comprehensive treaty process with the Crown did so with the mutual understanding that they were giving up Indigenous title to their overall traditional territories in exchange for a mutually-agreed upon system of co-management. Third-party administrative institutions like the *Yukon Environmental and Socio-economic Assessment Act* and Board were designed specifically to support the Land Claims process. Cases such as the Peel Watershed are relevant to this case study research in exemplifying how the Crown, both Yukon Government and the federal government, are not honouring certain processes established under Yukon Land Claims.

One of the key new findings that emerged from the primary research findings is described within the theme of Awareness, Change and Worldviews in Chapter 4, Section 2.6. This section and theme can also be considered within the theoretical context of Chapter 2, Section 6.1 describing the disparate resource management perspectives among Kluane First Nation and the Northern Pipeline Agency. By the nature of the Government of Canada's progressive recognition and support for the rights of Indigenous peoples hold to self-determination and cultural integrity, there ought to be greater consideration and attention to adjusting the flawed bureaucratic systems represented by the Government of Canada. This case study exemplifies this issue in KFN's descriptions of how the Easement as a legal

mechanism employed by Natural Resources Canada / Northern Pipeline Agency impedes the community's ability to plan and develop their proprietary lands and resources with certainty.

The worldviews and awareness of potential and realized impacts from the Alaska Highway Gas Pipeline Easement presented significant disparities among Kluane First Nation, the Government of Canada, Yukon Government and TransCanada. Disparities were also apparent among the territorial and federal governments, particularly the jurisdictional uncertainties in the environmental and socio-economic and regulatory review processes. Such jurisdictional uncertainties can largely be attributed to the extent of changing circumstances following Yukon Land Claims and Devolution, inclusive of the lengthy timeframe involved. Several letters from KFN to Northern Pipeline Agency (NPA) have raised this uncertainty issue around the regulatory review process. However, the responses from the NPA appear to have promoted a status quo approach and emphasize ambiguity, given aspects of the consultation process had yet to be fully formulated because construction of the pipeline itself was constrained by the uncertainties inherent in the natural gas market at that time. Yet, a decision to renew the Easement was still at stake in 2012, and it took Kluane First Nation and other Indigenous communities by surprise given the short notice of the change in direction from TransCanada not to pursue the Alaska Highway route.

There are ways to envision a large-scale pipeline project's consultation and assessment processes differently. KFN research participants viewed TransCanada and the Crown as relying upon the corporate interest and conventional resource management worldviews. In contrast, natural resource management to KFN is integrally linked to the culture and homeland – as guided by the traditional laws, exemplified by the potlatch system. This system focuses upon the maintenance and redistribution of wealth in terms of resources,

which uphold the traditional laws of the potlatch and moiety system (Easterson, 1992). It also links to differing concepts of land “ownership”, proprietorship, and rights (Dokis, 2015) that cover a wide range of jurisdictional authorities and boundaries (Haluza-Delay et. al., 2009). The AHGP Easement serves as a particularly powerful land use right encumbering the proprietary right of Kluane First Nation to Settlement Land areas the Easement overlays. As Schlager and Ostrom (as cited in Berkes and Folk, 1998, p. 7) have suggested, making determinations of the specific rights involved in resource tenure / property rights agreements can often prove challenging.

### **5.1.2 Problematic Timeframe**

The National Energy Board (2010, p. 22) upholds the position that a pipeline easement “...protects the land for future pipeline development indefinitely.” Yet, this thesis argues that the establishment of extended timeframes for the Alaska Highway Gas Pipeline Easement is problematic from Kluane First Nation’s perspective whose lands and land use planning processes remain encumbered by the Easement.

The timeframe extensions for the Easement and overall pipeline project have led to increased regulatory process uncertainty from the perspectives of Kluane First Nation, the Alaska Highway Aboriginal Pipeline Coalition, and to some extent, Yukon Government. In each Easement Agreement amendment that enabled the extension of the timeframe, long periods of time have passed where minimal to no communications have occurred among the parties.

As hypothesized at the outset of this research, the intended timeframes for the Alaska Highway Gas Pipeline project have not been realized thus far, presenting ongoing impacts to the KFN community. The *KFN Final Agreement* (2003) was mutually negotiated and agreed

upon among KFN, the Government of Canada and Yukon Government, and the findings of this research support KFN's recognition of this mutual acceptance. Yet, there remains the question of how long should be considered reasonable for an Encumbering Right to last given the seriousness of its existing and potential future impacts to Indigenous communities? This thesis has identified real and potential (if the pipeline may ever be built) adverse impacts to KFN's social-ecological resilience and land and resource management system from the extended timeframe for the Easement, as described in the previous section.

The timeframe issue is also described in the research findings as part of the 'Change' concept, where research participants expressed frustration with how long the pipeline project has now been "on the books." As well, the significant dynamic environmental change of the area, as one that lies within an active seismic zone (Kluane Trench), has experienced noticeable climate change related impacts in the past decade in particular (Prowse et al., 2009), including permafrost issues and the Kaskawulsh Glacier recession leading to significant declines in Ł' n Mǎn/Kluane Lake's water levels (as reported through the Traditional Knowledge of Kluane First Nation Elders and citizens, and scientists). KFN's Lands, Resources and Heritage Department now considers the Alaska Highway Gas Pipeline lake crossing issue as even more of a concern because of these uncertain water level conditions.

#### *Rationale for Timeframe Extension*

There has been limited justification provided by the regulatory authority, Northern Pipeline Agency (NPA) regarding how the project has stood practically still for over three decades and there have been no significant changes in the conditions of the Easement. There has been little information provided as to why the project is still supported by the Crown as

one of “public convenience and necessity”. The NPA itself is a unique arm of the federal Natural Resources Canada, and so the Agency’s powers extend beyond those of the National Energy Board and Canadian Environmental Assessment Agency. In fact, the NPA’s jurisdiction links to the international agreement with the United States to construct a pipeline from the north slope of Alaska to the lower 48 states. While this agreement still stands, the research findings show that, from Kluane First Nation’s perspective, there is uncertainty around the NPA’s 2012 decision to extend the Easement in part because at that time TransCanada announced it would be pursuing the different, solely from north to south Alaska to transport the gas resource. Additionally, during the interview with the Northern Pipeline Agency representative, the researcher asked for clarification of the term of the Easement agreement now, as worded in the Minister of Natural Resources Office, and the response was that I would need to follow up directly with that federal office (as he could not speak on behalf of the Minister).

The majority of KFN research participants did not agree with the NPA’s decision to extend the Easement considering the developments occurring in Alaska. They felt the company should choose. Yet, the TransCanada representative explained how the natural gas industry grows as resources become more developed – meaning that construction of an all-Alaska route would only lead to greater exploration interests as infrastructure is laid down and can be expanded upon. Key KFN representatives who reviewed the final draft thesis were aware of this issue and acutely interested in the “1002 Lands” hearings regarding controversial oil drilling within the Alaska Arctic National Wildlife Refuge under the purview of the Trump Administration to open to increased development (House Committee on Natural Resources, 2018).

Administrative decisions are not exempted from the Crown's duty to consult and review potential adverse impacts on Kluane First Nation's Indigenous and Treaty Rights. The 2012 decision extended the Easement for an additional decade, with the core justification provided being this was merely an administrative decision of no substance. This rationale is problematic, given how this research project has demonstrated the continued, real and perceived, practical and theoretical constraints the Easement holds over Kluane First Nation.

There is only so much time a project should reasonably be allowed to remain "grandfathered - in" or "on the books" until the project may need to be fully reassessed in terms of its benefits and potential impacts at multiple scales from the local Indigenous community level to regional, national and international consequences. This thesis argues that time has long since come, and the Easement should not be re-extended past 2022, or at least without adequate consultation with all affected Yukon First Nations.

At what point should long-standing resource development projects be considered so outdated they may no longer carry relevance to the modern society and resource management systems in place? This thesis argues that by September 2022, the time has come to reevaluate the necessity of the AHGP Easement to remain registered within Yukon Territory.

The research questions the validity of the project in terms of an Easement that is solely registered within Yukon, while the gas' egress routes remain unconfirmed. While socio-economic assessment hearings for the AHGP were also held in northern British Columbia, the route has never received authorization approval through BC. In fact, Indigenous communities like Kaska Dena Council are known to carry strong and unceded Indigenous title to portions of areas the pipeline route crosses that will likely require more



extensive consultation and negotiation. Such unceded Indigenous title interests were never recognized by Crown-representative government bodies in Canada to nearly the same extent, if at all, in the 1970's – 1980's as they are today. With the Alaska situation also remaining unclear since 2011, how does the established Alaska Highway Gas Pipeline Easement and route continue to stand with certainty “in the national interest” yet supersede the interests of Kluane First Nation and other Yukon First Nations to their Settlement Lands?

Additionally, the lengthy project timeline may contribute to the transitional awareness of KFN generations. I attempted to interview current and past youth representatives during the interview period, but found it challenging to obtain participation. This is not to say that if I had provided greater effort to access interviews with youth, increased youth participation could not have been reached. However, the researcher's perspective in offering opportunities for KFN youth to participate was that there was a lack of sufficient experience, knowledge and/or awareness of the AHGP project to support fruitful participation in the semi-structured interview the way it was designed for the purposes of this research. Those KFN youth who carried valuable knowledge about the AHGP Easement were busy leading their lives and it was not possible to acquire interviews with them during the interview phase.

### **5.1.3 Inadequate Consultation**

This thesis finds that Kluane First Nation, as a self-governing Yukon First Nation has substantial concerns around being adequately consulted and accommodated in the decision to extend the Easement. Primarily, the consultation question now centers on what will transpire by September 2022 when the Easement's current term is next due to expire. This research has gathered primary qualitative evidence from KFN to exemplify issues with the existing

consultation process that should be considered during the next regulatory review stage for the AHGP Easement.

The Nation's expressed concerns remain outstanding, including uncertainty about the future of the Alaska Highway Pipeline Easement. Multiple concerns of KFN's have not been thoroughly addressed or responded to in a timely manner by the Crown, and this research directs attention to how the AHGP Easement's encumbering legislative scope is continuing to impede KFN's ability to exercise its constitutionally protected Indigenous and Treaty Rights. The regulatory processes for oil and gas development projects have clearly been challenged, particularly within the past decade, as the Supreme Court of Canada has decided several relevant, landmark cases in which Indigenous engagement processes were found to be inadequate in upholding the duty of the Crown to consult with Indigenous peoples.

Ultimately, that is a question only the courts can answer on a case-specific basis.

A key recommendation from the research findings is for the federal regulatory decision maker (in this case, the Northern Pipeline Agency as represented by the Minister of Natural Resources Canada) to consider measures to necessarily improve upon the process leading towards an anticipated extension proposal for the AHGP Easement come September 2022.

This information has already been explicitly requested by Kluane First Nation and other affected Yukon First Nations. Justification should include an explanation of how and why this project remains in the "greater good of Canadians, Yukoners and Yukon First Nations", and how and why the project does not require modern environmental and socio-economic assessment, and the specific updated assessment information that has been gathered to date and would additionally be required. With the level of adverse impacts of the Easement remaining in place described, a single federal letter response may not be sufficient

to meet the appropriate engagement level and method. Rather, in-person meetings should transpire with leadership of Yukon First Nations and the federal and territorial governments.

When there is Indigenous dissatisfaction with the pre-imposed consultation and regulatory review phases / processes of a project, what is the justification for the continued renewal of the project in relation to the implications of the renewal's authorization? In fact, KFN had requested a consultation protocol be developed and established given serious issues in dealings with TransCanada who it appeared from KFN's perspective led the consultation process as they were most present in the community. The Northern Pipeline Agency did respond, and their answer was that their process had already been laid out, but it would consider this suggestion as part of later project stages. KFN members feel they have never received adequate answers to their concerns, from TransCanada and the Northern Pipeline Agency. The entire history of the Easement is rooted in consultation as it has occurred pre- and post- Yukon Land Claims. A letter from the Council of Yukon First Nations (KFN, 2011) sent to the Northern Pipeline Agency emphasizes that "...prior to the commencement of the public hearings [represented by the limited days of the environmental hearings and socio-economic Lysyk Inquiry], the Council of Yukon First Nations announced that it would not participate in the hearings, pending land claims settlement". The subject of native land claims was outside of the mandate of these hearings, yet TransCanada (2011) asserts the Easement and reservations are specifically protected under the Umbrella and individual Yukon First Nations final agreements. This is accurate in legal principle of these agreements, yet from a broader reconciliation and Indigenous Rights perspective it does critically question the continued justification for the project without meaningfully or dutifully expending the Crown's consultation and fiduciary obligations, in this case, to Kluane First

Nation and other affected Yukon First Nations with similar Encumbering Rights clauses for the pipeline.

The TransCanada representative interviewed noted that while he could not place the precise interests and concerns of individual Indigenous groups that had occurred for the project, there was “extensive consultation during the first twelve or thirteen years of this century, where people were **advised** as to how the project was hoping to proceed...”.

I have concluded from these findings that one of the primary factors influencing the inadequate consultation process is the timeframe and corresponding administrative review process involved in the AHGP. The responses to research sub-question ii. show that in extending the timeframe of the Easement, the Northern Pipeline Agency may have disregarded the full extent of Kluane First Nation’s Indigenous and Treaty Rights, Traditional Knowledge and Land and Resource Planning interests.

In fact, the analytical code, “consultation”, was referenced the most times (166) out of any other thematic codes in the interview data (Table 3, Appendix I). This raises the question: when there is Indigenous dissatisfaction with the pre-imposed consultation and regulatory review phases / processes of a project, what is the justification for the continued renewal of the project in relation to the implications of the renewal’s authorization? KFN members feel they have never received an adequate answer to their concerns. As discussed in Chapter 4, there are significant reasons KFN members may hold concerns regarding this crossing that may not have been fully considered to date in the environmental assessment and regulatory review process. Yet, many KFN community members may also not be aware of the location or timeframe of the Easement, and its potential consequences.

Recent case law and government process modifications such as the Supreme Court of Canada 2017 *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* [“*Clyde River*”] decision suggests the need to continue critiquing modern National Energy Board (NEB) consultation process. This case highlights the ultimate responsibility of the Crown to ensure adequate consultation has been carried out based on the standards established by precedent-setting court decisions, even when a resource authorization is led by a third party delegated statutory body or decision maker (in the *Clyde River* example, the NEB). I have discussed in Chapter 2 – Theoretical and Practical Framework how this case holds relevance to the role of the Northern Pipeline Agency. As described in Chapter 2, Section 2.0, the *Clyde River (Hamlet) vs. Petroleum Geo-Services Inc.* (SCC, 2017) case is indicative of concerns that could (i.e. *should*) be considered at the renewal stage of an existing pipeline as much as during the approval stage. Furthermore, this research highlights the risks the NPA, Yukon Government and TransCanada may be undertaking in terms of consultation process with Kluane First Nation, leaving the substantive nature of this consultation open for legal and/or political challenges.

As a direct arm of the federal Government of Canada particularly, who ultimately is assessing and ensuring adequate consultation with self-governing Indigenous communities? Where does the federal Government of Canada locate its accountable decision-making in terms of ensuring the Duty to Consult has been met to the extent now legally required? In consideration of the established Indigenous and Treaty Rights of the Kluane First Nation and other Yukon First Nations, such federal government accountability has not yet been made clear. The *Clyde River* case is but one example of where the courts have evolved to consider

listening and responding to Indigenous peoples' concerns to justify project's being approved.

The judgement reads:

It is open to legislatures to empower regulatory bodies to play a role in fulfilling the Crown's duty to consult. While the Crown always holds ultimate responsibility for ensuring consultation is adequate, it may rely on steps undertaken by a regulatory agency to fulfill its duty to consult. Where the regulatory process being relied upon does not achieve adequate consultation or accommodation, the Crown must take further measures. Also, where the Crown relies on the processes of a regulatory body to fulfill its duty in whole or in part, it should be made clear to affected Indigenous groups that the Crown is so relying. The NEB has the procedural powers necessary to implement consultation, and the remedial powers to, where necessary, accommodate affected Aboriginal claims, or Aboriginal and treaty rights. Its process can therefore be relied on by the Crown to completely or partially fulfill the Crown's duty to consult.

The public interest and the duty to consult do not operate in conflict here. **The duty to consult, being a constitutional imperative, gives rise to a special public interest that supersedes other concerns typically considered by tribunals tasked with assessing the public interest.** A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest. When affected Indigenous groups have squarely raised concerns about Crown consultation with the NEB, the NEB must usually address those concerns in reasons. The degree of consideration that is appropriate will depend on the circumstances of each case. Above all, any decision affecting Aboriginal or treaty rights made on the basis of inadequate consultation will not be in compliance with the duty to consult. Where the Crown's duty to consult remains unfulfilled, the NEB must withhold project approval. Where the NEB fails to do so, its approval decision should be quashed on judicial review. (SCC, 2017)

Similar public discussions and critiques focused on the consultation process as a “special public interest” embedded within an overall environmental assessment and regulatory review process have been underway elsewhere in Canada, particularly in western and northern regions and often under legal claims. Relevant examples are multiple: the Kinder Morgan TransMountain Expansion Project, the Mackenzie Valley Pipeline Project, the *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* (2017 SCC), the Energy East and Keystone XL Projects have all struggled exceedingly in recent years to reach fruition. It could now be argued that a new trend for petroleum companies has emerged whereby social

license to operate is challenged alongside a slew of environmental and social justice concerns. Within this context, this case study has directed attention towards the issue of the Alaska Highway Gas Pipeline Easement remaining in “the national (public) interest” as it currently stands, and in consideration of Kluane First Nation’s concerns and questions. The research findings demonstrate several of KFN’s valid concerns and noted a range of unanswered questions about the project.

The results of this research demonstrate a case, similar to the *Clyde River* judgement, of increased uncertainty around the consultation framework and timeframe for the Alaska Highway Gas Pipeline Easement and corresponding project to construct a natural gas pipeline, past September 2022. Yet, without further concerns and urgings being raised by Indigenous peoples and the public at large, a “business as usual” approach based upon the current regulatory framework, consultation and assessment process is anticipated to again be employed by the federal and Yukon governments and TransCanada leading up to the 2022 Easement Agreement expiry.

During this case, the Court also found that the land use planning and forestry activities of the Province of BC had unjustifiably infringed both Tsilhqot’in Nation’s Proven Indigenous title and rights (SCC, 2014). What this implies is that decisions made by the Crown without the consent of Indigenous communities where Indigenous title and rights have been proven to exist could be challenged. In this case study, for example, differing views of consent emerged among Kluane First Nation and the Northern Pipeline Agency with regards to Section 5.6.0 of the *Final Agreement*, essentially distinctive interpretations of what the Easement Agreement represented. To KFN, the Easement was the key Legislative mechanism (as Legislation is defined under the *Final Agreement* as including “Acts,

Regulations, orders-in-council and bylaws”) enabling the existence of the Easement as an Encumbering Right. To the NPA, the Easement represented an “amending agreement” to the existing term of the Easement, thus being seen as more of an administrative than substantive change.

This thesis has supported this view through the evidence I gathered in confidence from KFN and within the literature and publicly available pipeline project archive. In cases where Indigenous title is established, including via KFN’s *Final Agreement* as a comprehensive modern treaty, consent may be required to fulfill the Duty to Consult. Additionally, the adoption of UNDRIP and the TRC Calls to Action imply that the Crown must embark on a path that strives for consent by affected Indigenous communities. This situation can be applied to the Northern Pipeline Agency’s (NPA’s) 2012 decision to renew the Alaska Highway Gas Pipeline Easement. As this thesis has shown, such a decision, while administrative and minor on the surface, at least from the perspectives of NPA, Yukon Government and TransCanada, may not in fact be considered as minimal impacts to Kluane First Nation.

A Council of Yukon First Nations letter to the Northern Pipeline Agency supporting KFN concerns and confirming that while the Easement Agreement is not a technical issue it “...raises significant legal issues related to the rights, titles and interests of the Yukon First Nations”. Yukon First Nations also expressed serious concerns that the Easement Agreement allows TransCanada to carry out some activities without federal government consultation, so there is no Indigenous consultation requirement even at the notification level.

Additionally, KFN recalled disrespectful attitudes of TransCanada public relations representatives who came to the community, and KFN research participants relate these



attitudes to the established AHGP Easement and fact that, by all accounts, the federal government considers the project to be an “existing”, approved one. The research found this contradicts the Terms and Conditions for the project, which never underwent a required final public consultation/review. More notably even, consultation with Indigenous groups was never carried out to the levels now mandated in the Canadian legal system. The research findings also present new evidence from KFN’s view, that the engagement process employed by TransCanada even among Yukon First Nations differed. For example, Kluane First Nation experienced real problems with the greater attention to socio-economic benefits that White River First Nation (WRFN) received from the company, and the lack of recognition the Northern Pipeline Agency heeded to the ongoing one-hundred percent traditional territories’ overlap dispute among KFN and WRFN, including the history of these communities. From KFN’s perspective, the NPA viewed KFN as one territory shared with WRFN, and that KFN and WRFN would be required to share all economic and employment benefits and opportunities equally (50% each). Yet, this was not practicable for KFN nor acknowledged through mutual agreement among the parties, thereby involving legal counsels.

While such arrangements are at the discretion of the parties to negotiate in confidence, the Northern Pipeline Agency as the lead in reviewing Indigenous consultation should not carry the same liberties. The NPA should have ensured equivalent opportunities were being offered to the overlapping Indigenous communities. Armitage (2005) has recommended that particularly because of the fundamental legal uncertainty in areas where land claims agreements have not been settled, it is crucial that when developing impact and benefit agreements (IBA’s), a “...collaborative vision [of appropriate economic development] and shared goals reflective of multiple values and worldviews [be considered]

paramount in the planning, management and assessment process” (p. 251). Armitage (2005) has added that land use planning carries the potential to provide critical information regarding the development of such a collaborative economic, social and environmental the concerns around the IBA negotiations process and consequences once the agreement had been signed, explained that the disparate IBA negotiations process could be attributed to the fact that KFN had signed a *Final Agreement*. Whereas, WRFN still operates under the Indigenous and Northern Affairs Canada (INAC) system and having never signed onto treaty, and this community’s asserted Indigenous Rights are hence treated by governments similarly to the cautious and involved consultation approach the Province of British Columbia now utilizes, given the lack of established treaties and relinquished Indigenous Rights, including Title, and following upon the heels of the *Calder*, *Haida*, *Delgamuukw*, and *Tsilhqot’in* Supreme Court of Canada decisions, among many other landmark Supreme Court of Canada cases Indigenous peoples have won. The recent British Columbia Supreme Court decision *Gamlaxyełtxw v. BC (FLNRO)* (BCSC, 2018) reinforces the priorities of Treaty agreements over the interests of asserted claims by Indigenous groups. This case demonstrates the errors the Crown could have taken in the approach to enabling the interests of White River First Nation over those KFN’s.

With the case law in mind, what then, besides the Easement and U.S. – Canada Agreements, and the *Northern Pipeline Act*, provides the basis for the project’s long-standing existence and consideration as being in the “national interest”? This question needs to be considered within the context of KFN research participants having highlighted not only the cultural but also the ecological importance and sensitivity of this geographic area, particularly in the vicinity of the Ł’ n Mān/Kluane Lake crossing.

#### 5.1.4 Broken Environmental Assessment Process

The research has located similar findings as other literature with regards to the possible unaddressed consequences belying the modern environmental assessment process, including ineffective, rushed timelines to complete uncertain updated assessment, consultation and regulatory review processes (Booth & Skelton, 2011; Dokis, 2015; Haluza-Delay et al., 2009; Notzke, 1994; Udofia et al., 2017; Yakovleva, 2014). While it is recognized that environmental assessment is one of the most widespread resource management tools employed over the past several decades, which is now relied upon greatly, the effectiveness of the EA process itself has also been questioned widely in the literature (Noble et al., 2012; Booth and Skelton, 2011). Industry proponents, as well as government officials, have been documented as lacking “...understanding about what would work to facilitate First Nations’ engagement during an EA...,” (Booth and Skelton, 2011, 50).

If we knew what it was we were aiming at. Then we would do out darndest to meet it, and to be scored on, and probably go above and beyond, but if the standard, the scale and the expectations are not thoroughly defined up front; are subject to interpretation and criticism, before, during and after, the lack of certainty makes things very, very difficult. (Industry Proponent 1, as quoted in Booth and Skelton, 2011, 50)

Improvements *have* been made to modern EA processes, as exemplified by modernized third-party assessment bodies such as the Yukon Environmental and Socio-economic Assessment Board (YESAB), derived from the Land Claims negotiations. Streamlined, more efficient EA processes have also been targeted by government, yet at times present challenges to achieving sufficient time for meaningful Indigenous participation (Udofia et al., 2017). The findings from this research echo dominant themes located in other research, particularly some of those described by Udofia et al. (2017, 168) including:

- Lack of clarity and understanding concerning participation, the legal duty to consult and the responsibilities of industry and government, and
- Late timing of Indigenous participation and relationship building in the project development cycle.

Other themes that Udofia et al. (2017) described concerning the challenges to meaningful and efficient Indigenous participation in EA process, such as insufficient information available to project proponents, should be viewed as less of an issue in the Yukon, where much information is available regarding the Indigenous communities, including what is contained in the final agreements. For Kluane First Nation, this includes KFN lands, resources and heritage legislation, regulations, policies and plans.

The case study findings found the assessment process employed by the Northern Pipeline Agency exemplified an overall reactive rather than proactive approach to the issue of the Easement. But then, the 2012 extension decision was the first time the NPA was faced with such an issue since the previous federal amendments to the Easement had not been made in the presence of established modern treaties. There was substantial correspondence in the form of written letter responses provided from the NPA in response to KFN's concerns. Yet, the substance of the NPA's responses remains in question in terms of the outstanding issues KFN (and other Yukon First Nations) had regarding the Easement renewal, particularly as it related to the *Umbrella* and *Final Agreement(s)*. The research found how from Kluane First Nation's perspective, there were many outstanding issues from the past stage of pipeline project consultation and jurisdictional regulatory authorities that remain a priority concern to resolve. Supporting this view, Noble (2000), as emphasized in Armitage (2005, p. 241) has described the need for adaptive management principles to become better

incorporated into EA processes. Such principles or indicators include “...a more integrated analysis clarification of the significant issues; [and] an evaluation of alternative options...” (Armitage, 2005, 241).

Now six years (halfway through the 10-year extension term) since the NPA’s decision to extend the Easement has passed, KFN has received no correspondence from the Agency nor Yukon Government regarding the Easement. Nor has the issue been raised specifically to the federal or territorial governments at the level of the Council of Yukon First Nations (CYFN) or Assembly of First Nations Yukon Chapter, although CYFN has asked Yukon Government for updates on what is happening with the project and received scarce information (Chief B. Dickson, personal communication, May 31, 2018). The issue appears to have fallen outside of the scope of current political discussions in Yukon since the Easement’s extension decision in 2012.

Although it is the federal government’s responsibility to ensure Indigenous and Treaty Rights are not infringed, unless a proper justification as pre-defined by the courts can be provided, this burden appears to be placed inequitably upon Indigenous communities themselves to resolve where conflicts have emerged, especially in somewhat murky and untrodden areas of the public spectrum. The Easement is the best-case study example of this phenomenon in that it demonstrates how thus far in the academic literature, environmental assessment processes appear to have been examined more from a pre-project proposal phase, construction phase, operations phase and post-project rehabilitation / reclamation phase. However, this case study demonstrates that some projects have already been stuck in the pre-construction phase for long time periods, and this issue has not been adequately addressed within the EA process or structure.

In a November 2011 letter from the Northern Pipeline Agency to then KFN Chief Willie Sheldon, it states that the environmental assessment process for the AHGP project would “meet or exceed modern environmental and socio-economic standards and outcomes...” Yet, the environmental and socio-economic process that has transpired to date that this thesis examined did not appear robust, nor were they clearly articulated. The EARP Report (Federal Environmental Assessment and Review Office, 1982) itself laid out several uncertainties that would need to be further reviewed and evaluated, including technical and ecological impacts assessments of the L’ n Mān/Kluane Lake Crossing. And, a standing socio-economic assessment report, the Lysyk Inquiry has not been carried out since 1977. Clearly significant changes have been occurring in the Yukon since this time. Bridging social-ecological resilience theory (Berkes and Folke, 1998; Berkes et al., 2000) into this dynamic cultural and ecological scenario highlights the risk of omitting Indigenous perspectives of adaptive management, including monitoring, in any resource development or management system (Berkes et al., 2007).

Adaptive management should be seen as part of reconciliation, in a manner that respects local and traditional knowledge including Kluane First Nation’s social-ecological system. However, Udofia et al. (2017) acknowledge that industry proponents and government representatives have been challenged to locate available traditional knowledge in communities. Even KFN still grapples with the issue of how to share its Traditional Knowledge, and the TK policy has remained in draft form for several years.

What is clear from this research is that traditional knowledge should move beyond a static definition to include the crucial importance of Indigenous Interests and views in community and economic development (Anderson et al., 2006). These considerations are

often intricately aligned with goals of improving socioeconomic circumstances in the community through social entrepreneurship, such as education, training, local business opportunities, and the availability of local resources to a remote community where transport costs are high (Anderson et al., 2006).

KFN had serious concerns regarding TransCanada's approach to supporting local economic benefits from the project, such as involving local contractors in the work that was being carried out during the 2008 - 2012 updated assessment phase. The absence of direct and indirect revenue and community employment and development opportunities were expressed disappointments by KFN research participants. This should be seen to bridge concepts of self-determination and self-sufficiency tied to the traditional livelihood concept described in Chapter 4.

Thus, a likely reason Kluane First Nation found the regulatory and updated modernized assessment requirements so unclear is because there are no specified requirements given the existing exemptions from modern assessment the project receives. There is only the Northern Pipeline Agency's discretion, along with its counterpart organization National Energy Board. It remains unclear what role exactly the Yukon Government carries within this context, a jurisdictional uncertainty issue raised by Research Participant #18 [Yukon Government representative].

These updated assessment requirements did not meet the existing post-Land Claims and Devolution assessment standards in the Yukon under YESAA, given its exemption under the CEAA as an historic project and hence just fitting into that time threshold of being approved prior to 1984. This is problematic considering both the legal implications for the federal and territorial governments, in addition to the intent of Devolution to *decentralize* the

EARP and Canadian Environmental Assessment Act systems (Clementino, 2005). It demonstrates too that even after Devolution, federal control over lands and resources remains relatively intact in the Yukon, counter to the intentions of Land Claims (Clementino, 2005; Natcher and Davis, 2007). Bill C-17 also indicates motions to remove this archaic exemption from the assessment legislation that would be applied in the Yukon (Parliament of Canada, 2017).

Instead, this large-scale pipeline project received a piecemeal (primarily hydrological and geotechnical studies) and rapid (occurring within one field season's timeframe in 2011) updated assessment information approach required by the Northern Pipeline Agency of TransCanada. I learned that given TransCanada's pulling out of the company's and its natural gas producer partners' 2011-2012 push to build the AHGP nearing the eleventh hour of the Easement's expiry meant that the updated assessment information gathered was never required to be filed with the NPA as the federal regulator, and therefore remains confidential and outside of the public record. Evident outstanding concerns and questions from Kluane First Nation outlined in Chapter 4 – Research Findings supports that there were and remain potential downfalls of the assessment approach employed by the NPA to modernize and update the assessment information for the project.

There also remain challenges to determining how to appropriately address Traditional Knowledge in assessment processes. Kluane First Nation citizens, particularly the Elders are concerned about the protection of their Traditional Knowledge. KFN has established a Draft Traditional Knowledge Policy in 2012, which companies should be aware of when working with the community.



The original AHGP Easement registration occurred during an uncertain period economically, politically and socially during which time Yukon Land Claims had begun yet remained in earlier stages of negotiation following upon the heels of the 1973 *Calder* decision (and taking the following two to three decades to complete).

The Canadian Environmental Assessment Act's "grandfather clause" exemption of authorized projects prior to 1984 inhibits Indigenous and other visible minority voices that were initially underrepresented in the assessment process. The consequences of both the historic and modern processes around environmental assessment are significant. The Easement and the pipeline reservations, particularly of interest to KFN in terms of the high value gravel / quarry resources being continually encumbered, has tied up a considerable area of KFN's traditional territory, including Settlement Lands that are legally owned and managed by KFN, except for these "Encumbering Rights". In terms of the pipeline reservations, it remains unclear what the temporal terms of these may be, as they have always been intended to serve the purposes of construction of the Alaska Highway Gas Pipeline. Hence, so long as the Easement stands, it can be interpreted that these reservations also do – yet, if the Easement were to be released, what would happen to the reservations?

Section 2.2.7, Chapter 4 describes the area of quarry reserves for gravel estimated is substantial: approximately a couple of hundred hectares out of the overall 491.8 hectares of pipeline-related reservations that overlap KFN Settlement Lands.

This research has made evident there are important distinctions regarding how the Alaska Highway Gas Pipeline Easement is perceived, both among Kluane First Nation research participants, and between KFN, the federal and territorial government representatives and TransCanada. The Easement has now remained on the landscape from

1984 – present, a period of thirty-four + years. At the time of original registration, the project did not perform any of the modern criteria for sufficient consultation with Indigenous peoples, as defined by the substantial case law described in this thesis. These distinctions and new directions for Canada’s relationship with Indigenous peoples support the need for *recognition*, particularly of Indigenous difference in terms of traditional knowledge, resource management systems and belief systems (KFN Elders Council, 2018; Haluza-DeLay, 2009; Moosa-Mitha, 2005).

The Easement Agreement is written with general language to support the intent of the pipeline to carry Alaska gas reserves. The Yukon Archives contains extensive documentation of the environmental and socio-economic assessment processes that occurred for the AHGP, including recordings. Yet, it is hard to fathom a circumstance where pre-1984 historic industrial projects, exempted as they currently stand under the CEAA from modern environmental and socio-economic assessment projects in Canada, would not have undergone transitions within their previously reviewed and authorized areas over the past three-plus decades. While Kluane First Nation raised the concern that the Terms and Conditions attached to the Easement Agreement remained in draft form and were never given the required final public review stage, the NPA’s position in a letter response was that this document would need to be “reviewed and updated” by the Designated Officer.

Nevertheless, evidence found in this research indicates there are serious concerns outstanding from Kluane First Nation. The issue of the crossing underneath Ł’ n Mān/Kluane Lake emerged throughout the research as being at the forefront of these concerns. Supporting this argument are such events as the 2017 Hilcorp Energy situation where a leaking gas line in Cook Inlet, Alaska in February could not be accessed for repairs.

The pipeline was approximately 80 feet underwater and the ice had been too thick for divers to access and required several weeks of waiting before it could be repaired (Alaska Daily News, 2017).

This thesis argues that even while the risks of natural gas may be viewed as minimal from the positions of federal and territorial governments and pipeline companies, Indigenous peoples' concerns should also be warranted attention and need to be responded to by the Northern Pipeline Agency in a timely, accurate and detailed manner. Additionally, data demonstrates that pipeline ruptures resulting in product leakage occur relatively frequently (Van Hinte et al., 2007). For example, for NEB regulated pipelines from 1992 – 2003, 18 natural gas spill incidents were recorded, at a frequency of 1.8 spills per year (Van Hinte et al., 2007). This number well-exceeded the number and frequency of oil spills during this period (ibid).

In Chapter 2, I have discussed the relevance of social-ecological resilience in environmental assessment and consultation processes. This included a critique of western resource management systems' reliance on decision-making by those who are themselves government agents unlikely to be users of the resource or lands in consideration. Troster (2009) supports this view by demonstrating the wealth of knowledge that could be learned and adapted into modern management practices from the traditional resource governance systems of resilient Indigenous communities. The importance of social-ecological resilience in the face of climate change, cumulative impacts and other ecological instabilities that have yet to be accounted for in the environmental assessment process for the AHGP has been emphasized in this thesis, given the ecological sensitivity and cultural importance of the region.

In January 2016, the federal Government of Canada announced additional requirements as part of the environmental assessment process for proponents to include the “upstream” and direct greenhouse gas (GHG) emissions from the project. While a huge gap exists with downstream GHG emissions still not accounted for, this change did bring about new climate assessment information for consideration. Given the scale of the Alaska Highway Gas Pipeline, there is uncertainty regarding how climate change would be reviewed and mitigated. The Northern Pipeline Agency’s (NPA, 2012) letter to KFN dated July 19, 2012 confirms that “TransCanada Pipelines... intends to maintain the AHGP Canadian option pending the outcome of their investigation of the LNG alternative.” It states the agency will continue to liaise with Indigenous groups as it plans for the future. KFN has not heard from the NPA since this time.

## **5.2 RECOMMENDATIONS**

This section will provide recommendations based upon the key research findings and conclusions discussed in Section 5.1. The recommendations are intended to focus upon adding value and benefit for the Kluane First Nation community and Government, to better understand, prepare for and address the research problem of the perpetuation of the AHGP Easement.

Recommendations flow from the final research sub-question v., as this question identifies how KFN issues have to date been recognized and accounted for within the federal Northern Pipeline Agency’s decision to extend the AHGP Easement. It is clear from the research findings that the environmental, social and economic perspectives of Kluane First Nation and other Yukon First Nations compared with the Crown (federal and territorial) and TransCanada representatives differed substantially. This is no surprise – what is interesting

and a new finding arising from the research relates to the explanation of how these diverging perspectives may be rooted in incongruities in scale and worldview. This is evident, for example, in Kluane First Nation research participants' description of the importance of Ł' n Mǎn/Kluane Lake as the heart of their Indigenous homeland and integral to the cultural integrity of the people. KFN citizens appeared to understand quite well the distinctive corporate views of pipeline companies and the Crown – what is crucial to KFN is the assurance their Indigenous and Treaty Rights will not be impacted. And, as the interview data shows, that assurance was lacking, in a variety of ways but particularly a satisfactory explanation for the Easement's established route underneath Ł' n Mǎn/Kluane Lake.

#### **5.2.1 Restructure or dissolve the Northern Pipeline Agency (Recommendation #1)**

The Government of Canada should consider a review and restructuring of the Northern Pipeline Agency as an organization, alongside its review of the upcoming 2022 Easement amendment decision. The research has found it unusual in delving into how the Northern Pipeline Agency was formed and continues to operate for the sole existence of one specific northern natural gas project, while other pipeline projects have also been proposed in northern Canada. It relates to a “status quo” approach that has been critiqued by authors such as Dokis (2015) and Berkes and Folke (1998) in terms of a contemporary western resource management system.

This recommendation stems also from a review of the Northern Pipeline Act and the mandate of the Northern Pipeline Agency. The research sub-questions examined the current organizational foundations of pipeline regulation in Canada, and found the regulatory process is typically overseen by the National Energy Board. The benefits of the existing international

agreement for the Alaska Highway Gas Pipeline Easement remain unclear and this commitment should be reviewed and revised given the status of the project.

There are other pipeline projects crossing jurisdictional boundaries that have not been regulatory through a “single-window” agency as the Northern Pipeline Agency. The Mackenzie Valley Gas Pipeline is the nearest example. To the researcher’s knowledge, all other pipeline projects in Canada have been authorized through the National Energy Board process.

This recommendation follows from Research sub-questions i, ii and iii. The findings from these research sub-questions have been described in Chapter 4. The findings have led to the conclusion that while KFN accepted the “grandfathered in” nature of the AHGP Easement for some time, there should come a real, definitive deadline for this pipeline project to continue to be allowed such a privilege (after which time there ought to be a requirement for the project to be truly “renewed” through a new application, assessment and ultimately, consultation process).

#### *5.2.1.1 Consultation Clarification*

At a minimum, the uncertain consultation approach linked to the regulatory review process adopted by the Northern Pipeline Agency for the Alaska Highway Gas Pipeline must be redefined. Otherwise, the NPA risks this issue being brought forward in the courts and/or public media.

Enhancement of the consultation process should necessarily include outlining jurisdictional roles and responsibilities of the parties, including how input is being considered and/or addressed in the decision making process and involving Yukon First

Nations to the extent that it should be to support the Crown's legal and fiduciary obligations to consult Indigenous peoples of Canada.

Likely, as recent trends have shown, Indigenous communities will be relied upon to lead this social and environmental justice movement in protection of their constitutionally established and internationally recognized rights under UNDRIP (UN General Assembly, 2007). However, a singular federal agency holding the legislative powers it currently does is clearly problematic. The fact that the Agency is funded by TransCanada demonstrates an additional conflict of interest risks the federal government undertakes in upholding this outdated agency.

Berkes et al. (2000) and Trosper (2009) suggest that local knowledge contributes to adaptive resource management processes and structures. As such, Indigenous systems contribute to the pragmatic and scholarly understandings of sustainable resource management and social-ecological resilience (Berkes et al., 2000). The research findings support Booth and Skelton's (2011) statement that there remains little action taken to address industrial development in Canada from the perspectives of Indigenous peoples themselves. This thesis has highlighted the values that can be derived from the federal government hearing KFN's perspectives on the issue of the Easement, and finally addressing this long-standing regulatory instrument.

### **5.2.2 Change the “Business-As-Usual” approach for the upcoming next Easement**

#### **Expiry Date. (Recommendation #2)**

The federal regulator, as it stands the Northern Pipeline Agency, should not allow a further extension of the Alaska Highway Gas Pipeline Easement, past September 2022 unless the key issues raised in this case study are first resolved. In fact, Kluane First Nation's

preferred outcome by September 2022 is for the Northern Pipeline Agency to cancel the Easement (Chief B. Dickson, personal communication, May 31, 2018).

This research has gathered substantial statements from KFN research participants that seriously question the established Easement's route crossing underneath Ł' n Mān/Kluane Lake. It appears that so long as this route stands through the existing Easement Agreement and survey, the pipeline could (and likely, would) be constructed in that location. Therefore, there is a strong rationale supporting the need to address the route prior to the time the pipeline may ever again look to be built. The existing route appears nearly impossible to amend in any case given the only viable alternate route option not really being so given its crossing through Kluane National Park and Reserve (KNPR). During the final draft thesis review meetings with KFN, one reviewer provided feedback that national parks carry the highest level of land protection in Canada; additionally, given Kluane National Park and Reserve's classification as a wilderness park, it is highly improbable any re-routing through KNPR would be considered. This KFN representative likened the high protections granted by national parks to the reasoning for KFN supporting KNPR's original establishment.

As the Yukon Government research participant noted, these alternative route options were not being explored during the past consultation cycle. There remains reluctance on the part of TransCanada to adjust the existing route, since this could trigger the project's status to change and require the newer environmental assessment procedures. And, from the perspective of the federal regulator Northern Pipeline Agency, the existing route is justifiable based upon the geotechnical, engineering and environmental assessments of the 1970's (EARP, 1982). KFN's perspectives and experiences of the Easement counter TransCanada's view that the construction of the pipeline project poses a "relatively modest" environmental



impact, and indeed, many of the concerns raised are not represented within the Environmental Assessment Report (EARP, 1982). The project lies within one of the most pristine, sensitive northern climate and highest conservation priority regions in North America. The Kluane Region draws dozens of scientists each year, and there is a research station based in KFN Traditional Territory on the shores of Ł' n Mān/Kluane Lake, only a few kilometres from where this pipeline would cross.

I have shown throughout this thesis how the Alaska Highway Gas Pipeline project, while unique in its administrative and regulatory structure through the Northern Pipeline Agency, also bears some stark resemblances to other pipeline projects that have been challenged in the courts, particularly since circa the 2008 *Haida* and 2014 *Tsilhqot'in* decisions. The Crown has yet to embark on a truly new relationship with Indigenous communities around pipeline projects and continues to be embroiled in court disputes, particularly in western and northern Canada. An abundance of challenging claims and evidence related to pipeline projects with long-standing Easements is being charged upon the federal government of Canada to address. Comparable pipeline projects this research has highlighted include the Mackenzie Valley Gas Pipeline, Kinder Morgan TransMountain Expansion Project, TransCanada's Energy East Pipeline, Dakota Access Pipeline, and *Clyde River Hamlet v. Petroleum Geo-services Inc.* court decision involving under-sea seismic testing for an oil pipeline in Nunavut. Therefore, this thesis argues that the Statutory Decision Maker (Minister of Natural Resources) for the Alaska Highway Gas Pipeline Easement must provide a valid rationale for the Easement prior to any further timeframe extension in light of the consultation process that occurred with Kluane First Nation circa 2011-2012, the wording of the terms of the 2012 amendment to the Easement Agreement,

and court decisions occurring since this time.

The recommendation to adjust the “business as usual” approach to administratively managing pipelines rather than more deeply and meaningfully assessing their potential impacts is supported by initiatives framed in Chapter 2 such as Bills C-17 in Yukon, Prime Minister Trudeau’s February 2018 legislative framework announcement that may encompass Bill 262, climate change, renewable energy and other initiatives already underway in Yukon Territory and Canada. From this perspective and building upon the concepts of social-ecological resilience and justice, the Northern Pipeline Agency should not allow the further renewal of the AHGP Easement (expiry upcoming in September 2022) without the project undergoing a more rigorous Indigenous consultation and modernized environmental and socio-economic assessment process. Further legal clarification should also be acquired between the parties regarding the nature of Sections 5.4 – 5.6 of the *Final Agreement*. Administrative clarification of jurisdictional responsibilities is needed regarding legislative responsibilities as part of the assessment process for this project. Such issues may require further legal clarification and advice from the parties involved in this research.

It is also recommended as part of this review process that the other Encumbering Rights associated with the Alaska Highway Gas Pipeline, particularly the quarrying and material stockpile reserves, camps and compressor stations, be renegotiated among KFN, the Government of Canada and TransCanada. This was a key outstanding issue raised by KFN research participants, including Chief Bob Dickson (2016 – 2018), which is impacting KFN’s current ability to exercise their socio-economic interests within the core area of traditional territory surrounding the community.

Since the Easement was registered, for example, the modern Treaty system in Canada has become more and more challenged, particularly in BC where Indigenous Title has never been extinguished through Treaties. Where modern treaties have been established, including notably in the Yukon, Nunavut and the Nisga'a Treaty, there have already been many court challenges that have supported the strength of the treaties. The strengths and limitations of the *KFN Final Agreement* as a modern comprehensive treaty agreement should therefore be more closely examined, possibly by legal experts, to ensure the intent of these agreements are being followed.

In terms of capacity and relationship building, it is recommended for TransCanada and/or the government to provide funding upfront for KFN to participate in the engagement process, rather than for KFN to receive the administrative and financial burdens of implementing a Cooperation Agreement. The issue of local communities including Burwash Landing not receiving access to the gas transported through the pipeline also needs to be reconsidered and equitably addressed. As the KFN Lands, Resources and Heritage Department comments during the final draft thesis review, if the pipeline were to be constructed, Kluane First Nation's peaceful enjoyment would be interrupted with no corresponding benefits to KFN.

As Berkes et al. (2000) document, conventional resource management from westernized, central bureaucracies such as the Northern Pipeline Agency have been shown to reduce social-ecological resilience and alternative approaches based upon adaptive management, traditional knowledge, local and traditional management systems are recommended.

### **5.2.3 Modernize the Assessment Process (Recommendation #3)**

As several authors have recommended, Indigenous peoples' concerns need to be taken seriously, particularly in consideration of Canadian courts' increasing support for Indigenous and Treaty rights since the 1970's when the Alaska Highway Pipeline Project was first proposed (Booth and Skelton, 2011; Bell and Asch, 2014; Lambrecht, 2013). The Alaska Highway Gas Pipeline project was conceived during the same time as the Yukon and northern Indigenous Land Claims negotiations process was just getting underway. While the infamous judge Thomas Berger in his 1974 – 1977 Berger Inquiry recommended the AHGP route a better option to proceed over the Mackenzie Valley route during his 1970's inquiry, he also recommended delaying any project approvals until such time as northern land claims were settled (Armitage, 2005). Inevitably, the AHGP was approved prior to the settlement of Yukon Land Claims.

In the spirit of reconciliation, the federal and territorial governments should consider how to modernize the environmental and socio-economic assessment process alongside reconciliation for “grandfather clause” projects approved prior to 1984 under the Canadian Environmental Assessment Act (CEAA). In the case of the Alaska Highway Gas Pipeline project, this involves determining an appropriate timeframe for assessment under the Yukon Environmental and Socio-economic Assessment Act (YESAA) and Board (YESAB). This research identified that KFN has already specifically requested that YESAA be the most appropriate assessment body on various occasions to the Northern Pipeline Agency, Yukon Government and TransCanada. Yet, there were differing views expressed by research participants among KFN, TransCanada, NPA and Yukon Government representatives regarding YESAA's role in the process.

Particularly, the thesis has critiqued the established Easement's route crossing underneath Ł' n Mān/Kluane Lake. As the Yukon Government research participant noted, these alternative route options were not being explored during the past consultation cycle. There remains reluctance on the part of TransCanada to adjust the existing route, since this could trigger new environmental assessment requirements. It is recommended that regardless of this concern on the part of TransCanada, that as part of the regulatory review process, a new YESAB assessment be required and immediately triggered if the project ever again appears ready to proceed to construction phase. The YESAB assessment would necessarily include (and focus on) referrals to relevant agencies, including Parks Canada, around the alternative route option(s).

It should be noted that from the perspectives of the Northern Pipeline Agency and Yukon Government, any outstanding issues are considered more reflective of the regulatory review process than the environmental assessment process. However, to address the issue of the Easement route of particular concern to Kluane First Nation (to such extent as this was acknowledged by all research participants interviewed), it is recommended a new YESAB assessment necessarily include (and focus on) referrals to relevant agencies, including Parks Canada, around the alternative route option(s). This recommendation is derived from the research findings described in Chapter 4, particularly Section 4.1.5 – Assessment describing KFN's concerns, issues and outstanding questions about the AHGP project and Easement.

For reconciliation to occur, there needs to be recognition of past adverse impacts upon Indigenous communities that may continue to infringe upon their Rights. This may require a “value shift,” involving a fundamental transformation and transitioning of how environmental assessment is practiced in Canada to better integrate different knowledge

frameworks (Armitage, 2005; Booth and Skelton, 2011). The environmental and socio-economic process enabling registration of the AHGP Easement largely occurred in the late 1970's, and it is now nearly 40 years old. Much has changed during this time period and the requirements for modern environmental and socio-economic assessment have substantially increased.

Booth and Skelton (2011) have noted Indigenous peoples' perspectives on EA process may include viewing it as fundamentally flawed in meeting the needs of Indigenous peoples, such that "...tinkering with existing processes will not fix these failings" (p. 56). Therefore, incremental updates to the existing assessment record are unlikely to provide the necessary assurances that the project remains in the public interest. For this reason, it is recommended the standing environmental and socio-economic assessment for the AHGP project should no longer be seen as sufficient to justify the continuation of the Easement today. Additionally, it is recommended that if the AHGP Easement is proposed for extension by TransCanada in 2022, the Terms and Conditions attached to the Certificate of Public Convenience and Necessity first needs to be finalized with Yukon First Nations and the public. Without evidence there is continued public support for the project alongside a rigorous environmental and socio-economic assessment, the Easement should not in itself carry the sufficient justification needed for TransCanada to perpetuate the project.

This research shows how Indigenous and Treaty rights may not have adequately been accounted for during the assessment and consultation processes to date. Recent Supreme Court decisions such as *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.* highlight the shortcomings in the National Energy Board's views of the duty to adequately consult Indigenous peoples. Other recent court decisions including *Gamlaxyeltxw v. BC (FLNRO)*

(BCSC, 2018) demonstrate the priority rights of Treaty Indigenous Nations over those with asserted Indigenous Rights and Title yet unproven. This latter case is particularly relevant to Kluane First Nations in terms of the unequal treatment KFN observed to the benefit of White River First Nation; WRFN has remained outside of the Yukon Land Claims process, yet received greater financial benefits than KFN, who this research found ended up receiving a financial burden from the AHGP.

Apart from this thesis research, the Alaska Highway Gas Pipeline's assessment process has been revisited in neither substantial depth nor completion through its environmental and socio-economic assessment process, both among Yukon First Nations and the Yukon public at large (via the still-in-draft-form Terms and Conditions). It is time for all governments involved (Yukon, BC and Alaska Indigenous communities, Yukon Government, Alaska Government, Government of Canada and the United States Government) collectively re-assess their stakes and continued interests in the project. It is questionable for TransCanada to have such extensive influence on the regulatory environment, e.g. by funding Northern Pipeline Agency's operating budget, or by pursuing separate processes in Alaska that create greater confusion regarding the status of the existing Yukon Easement. Nothing in the media articles suggested what I uncovered during the research, that if the all-Alaska LNG project were to proceed, there would no longer be the possibility of the Yukon route.

The procedural structure and processes that have established the AHGP Easement have changed substantially since the conception of an Alaska through southern Yukon pipeline was first conceived, assessed and registered. There is a need for systems to adapt to change (Berkes and Folke, 1998). This research has demonstrated how such adaptation has

not occurred to levels Kluane First Nation considers adequate to protect KFN's established Indigenous and Treaty Rights and social-ecological resilience. Yet,

Principles of collaboration and learning are somewhat at odds with conventional environmental assessment frameworks that necessarily seek to predict specific impacts at discreet points in time. These principles are also at odds with assessment processes that offer opportunities for participation directed only at technical components of the review, rather than in regards to the broader worldviews, values, and goals that frame decisions... (Armitage, 2005, p. 241)

Further research in this respect would be relevant and could be extended to other Yukon First Nations, as well as other Indigenous peoples in Canada. KFN Elders were interested during the review process in the need to speak with other Yukon First Nations about this issue as well, beginning with the neighboring Champagne-Aishihik First Nations. This is recommended as a follow up to this research, and I aim to seek conference travel funding to continue to spread these research findings and conclusions prior to the 2022 Easement extension deadline.

The research findings are also relevant to non-Indigenous landowners, and the "national interest". I learned through carrying out this research project that the "national interest" remains more a political and economic platform, although of late the platform is being shaken by such stirrings as the BC New Democratic Party challenges to the federally-approved yet still unbuilt TransMountain Expansion Pipeline. While the Yukon is a highly different context, the TransMountain project is comparable to the Alaska Highway Gas Pipeline in that they have both held Easements for long time periods, yet continued Indigenous and allied non-Indigenous resistance, including from municipalities, has threatened the project's continuation. Yet again, this research identifies that the "devil is in the details" (Research Participant #18) when it comes to pipelines, and the details lie in such



tangible legal agreements as registered Easements following initial regulatory approval, as well as the subsequent land ownership rights outlined in Yukon Land Claims Agreements.

This view, challenging pipeline projects both on a fundamental level via the Easement arrangement as well as on a more current, surface context level, is also supportive of the theoretical principles underlining this research. These include social-ecological resilience and justice, particularly within the context of constitutionally-protected Indigenous and Treaty Rights in Canada and the evolving adoption of UNDRIP by the Canadian federal government and some provinces (e.g. the Province of British Columbia announced moving towards this approach in 2017). It may inevitably land upon the courts to determine if the Crown's duty to consult Indigenous peoples has been upheld for this project, as "...a court case often remains the only mechanism to determine if the required consultation is indeed meaningful, adequate and fair to all interests" (Booth and Skelton, 2011, p. 52). However, the preferred governance approach and continued recommendation of the courts themselves is for negotiation and compromise.

As discussed in Section 5.1.4 – Broken Environmental Assessment Process, there is a need to clarify how the process will truly be modernized if the pipeline is ever to be built. This links with the findings from the consultation sections of this thesis. Surely there is a greater need for the Northern Pipeline Agency to provide accurate and updated assessment information of the potential and realized adverse impacts that Kluane First Nation has already been experiencing when it comes the time to again review a proposal to renew the Easement.

#### **5.2.4 Establish an Indigenous Yukon Alliance on Pipelines (Recommendation #4)**

Community-based organizations often face capacity constraints at the same time

researchers have recommended they should be more actively engaged in environmental and socio-economic assessment processes (Armitage, 2005; Booth and Skelton, 2011). The recommendation to establish a Yukon First Nations Pipeline Alliance spans the key themes of consultation, Indigenous and Treaty Rights and governance and the Easement as an Encumbering Right. Yet, it also focuses on the key theme of Awareness, Change and Differing Worldviews described in Chapter 4, and the need to build greater economic and community development capacity in remote northern communities.

This recommendation goes beyond the Indigenous Alaska Highway Pipeline Coalition's focus upon capacity building and trades-related training around the pipeline (Research Participant #12). Today, pipeline development issues have become highly contested within political arenas, on a variety of scales. There is a need at all jurisdictional levels to further reflect upon and adjust to our changing social, ecological and environmental circumstances around pipelines, pollution and climate change, with Indigenous communities providing invaluable input into adaptive management techniques (Berkes et al., 2000, 2007; Trospen, 2009). The crucial need also exists, a KFN thesis reviewer reminded me, to recognize the importance of preserving KFN lands, resources and heritage for the future benefit of KFN generations.

KFN research participants, especially the Elders recommended raising this issue to the attention of other Yukon First Nations and Yukon political party leaders. Yet, there remains uncertainty around the presence of a leader or unified voice for Yukon First Nations. The research summary report provided to KFN as part of the research methodology includes a section of key messages to provide to political party leaders on this issue. These messages could be used in future correspondence to build upon Kluane First Nation's interest in this

unprecedented academic research subject, and identify shared interests and concerns, as well as any contested issues.

An alliance of affected Yukon First Nations groups would be advantageous to address the potential removal or reassessment of the Alaska Highway Gas Pipeline Easement. This recommendation also represents substantial challenges to achieve among all the affected Indigenous communities in the Yukon, Alaska and BC. Even within the Yukon, diverse interests related to governance, Indigenous and Treaty Rights, geography and cultures convey a difficult process ahead to establish an alliance. However, even solely among the two Southern Tutchone communities of Kluane First Nation and Champagne and Aishihik First Nations, would carry some added weight (Research Participant #19 [during final draft thesis review], 2018).

The researcher has not yet followed up with the Office of Natural Resources Canada regarding confirmation of the Easement's term and what it may take to expire it. It is recommended that it would carry more weight at this point for an allied Indigenous peoples force, potentially led by Kluane First Nation, to bring this issue and outstanding questions including ones around the legally interpreted agreements to the federal government to respond to in due time.

There is still time at present to prepare collaboratively in the spirit of reconciliation and co-management among Yukon First Nations, federal government and territorial jurisdictions in this case. These are complex matters that need clarity to resolve, rather than complications through maintaining a process that has not been demonstrated to meet the modern standards in the Yukon under the Yukon Environmental and Socio-economic Assessment Act. This legislation was, in fact, an outcome of the Yukon Land Claims

process, which has developed into a world-renowned, independent third party environmental and socio-economic assessment system designed to function in a resource co-management context. It is also currently under review through the movement of Bill C-17 in the Yukon Legislature to strengthen and widen its scope and breadth further.

This movement was directly recommended by KFN research participants who have been intimately involved with TransCanada's engagement process and the Northern Pipeline Agency's consultation process. A Yukon First Nations Alliance (or potentially a broader alliance inclusive of Alaskan tribes, BC and AB Indigenous communities) would enable Indigenous peoples to heighten their presence in the government-to-government forum on northern pipelines engagement with the federal Government of Canada (and potentially the United States collaboratively). These issues have clearly been described as affecting the "national interest", to which Indigenous peoples are integral and share resource and land management authorities at a jurisdictional level that clearly still becomes confounded in Canada by federal, territorial, provincial and municipal authorities. A Yukon First Nations Alliance on pipelines at minimum would also raise their political lobbying power, which may increase the capabilities of Kluane First Nation and other affected Yukon First Nations to acquire necessary resources to address outstanding issues around petroleum development within and/or across their traditional territories. It was clear from KFN research participants' responses that they felt a sense that they were up against something much larger than their local community could contend with on its own, given the economic sway TransCanada and the pipeline project holds in the national arena. Some KFN research participants view potential benefits to be derived from a wider audience throughout the world becoming more aware of the Alaska Highway Gas Pipeline Easement issue as a resource development

project of significant global magnitude.

If needed, this alliance would benefit from a public media campaign that draws in other Indigenous and non-Indigenous allies seeking greater control and ownership for Indigenous Nations over their lands, resources and territories. Controversial projects like the Dakota Access Pipeline exemplify the public and media attention that Indigenous leaders and organizers can draw to issues sacredly important to them. In the Yukon, the movement to adopt Bill C-17 provides an example of how improvements through greater third party involvement in the consultation, assessment and decision-making processes could be implemented if enough support is garnered for adoption of this new legislation. Other Yukon First Nations should be interviewed via further recommended research to verify and expand upon the research findings. The opportunity to build greater alliance has been identified by some Kluane First Nation members as an important opportunity. This will prove challenging, however, as Yukon First Nations affected by the Alaska Highway Gas Pipeline carry a diverse range of interests and opportunities in the project. Yet, there have clearly already been some demonstrations of support among Indigenous peoples around issues they had been confronting relating to the issues described in this research that were recorded from Kluane First Nation's perspective.

The Alaska Highway Aboriginal Pipeline Coalition had served to support primarily socio-economic aspects of the pipeline project, such as employment and training opportunities. There are benefits in keeping the Aboriginal Pipeline Coalition active. The group should be reformed and reorganized in preparation for the 2022 Easement expiry, to ensure equitable training opportunities are provided to potentially affected Indigenous communities, and to remain up-to-date on the overall pipeline context in Yukon.

Additionally, support from the existing Council of Yukon First Nations and Assembly of First Nations, Yukon Chapter could provide strategic advice to a Yukon First Nations pipeline alliance. This movement was directly recommended by KFN research participants who have been intimately involved with TransCanada's engagement process and the Northern Pipeline Agency's consultation process. This should include addressing the issue of the Advisory Councils that remains outstanding as per the current Alaska Highway Gas Pipeline regulatory framework

It should also be confirmed whether the Mackenzie Pipeline still has federal approval to be built up to 2022. If so, Indigenous communities throughout Northern Canada (Yukon, Northwest Territories and BC) could unite to call upon the federal government to address this Easement issue for both the Mackenzie and Alaska Highway Gas Pipeline by 2022, as these projects originated during similar time periods and bureaucratic evolutions, and draw upon the economic, social and environmental challenges facing today's society.

An Indigenous Yukon Alliance (or potentially a broader alliance inclusive of Alaskan tribes, BC and AB Indigenous peoples) could create a higher level forum to engage the federal government of Canada (and potentially the United States collaboratively) on issues affecting the "national interest", of which Indigenous peoples are integral and share resource and land management authorities. Recommendations on repairing EA processes have often included the necessity to repair the interpersonal and trust-based relationship between Indigenous and Crown governments (Booth and Skelton, 2011). Industry proponents themselves have often found the existing damaged relations between these parties to challenge the EA process.

A Yukon First Nations Alliance at minimum would also raise the political lobbying power, which may increase the capabilities of Kluane First Nation and other affected Yukon First Nations to acquire necessary resources to address outstanding issues around petroleum development within and/or across their traditional territories. Indigenous perspectives have been historically devalued by contemporary western societies (Brown & Strega, 2005).

Where companies can obtain full support from Indigenous communities, it is clear there is greater social license to operate, which this thesis argues should factor more significantly into the Alaska Highway Gas Pipeline and overall natural resource governance and decision-making. Such Indigenous perspectives are also linked to the concept of First Nation homeland that emerged from this research, which has been documented in other research examples. For example, West Moberly First Nation Chief and Council has been quoted as stating, “The whole tone of government is economics and jobs, and training and forcing people into this economy, and there is not an appropriate amount of attention placed on maintaining [our way of life]. We’re the ones fighting. We can see our land base eroding” (Booth and Skelton (2011, pp. 53-54). A better relationship between Indigenous groups and government means the parties should be meeting to jointly discuss where and how engagement has failed, and what crucial improvements could be made (Booth and Skelton, 2011).

This research serves to grow support and awareness for the long-standing adverse impacts the Alaska Highway Gas Pipeline (AHGP) Easement has placed as a burden upon Kluane First Nation’s land and resource management system and social-ecological resilience. KFN also considers the Easement a *potential* asset if the project were ever to be built and a share of revenue could begin flowing to KFN from TransCanada. Additionally, during the

final thesis review process, KFN confirmed an interest to begin receiving the annual taxation payments (estimated during the interview with the Yukon Government representative to be a lump sum of \$30,000 annually) provided from TransCanada to Yukon Government. The KFN Environment Officer indicated a percentage of this pipeline Easement royalty amount would exceed the cumulative royalties that KFN currently receives from mineral tenures overlapping KFN Settlement Land. A recommendation therefore follows that a Yukon First Nation Alliance could lobby to ensure that all affected self-governing Yukon First Nations with Settlement Land overlapping the Easement should receive a portion of the annual taxation payments collected by Yukon Government, and jointly establish criteria for fair revenue sharing. It is also recommended that a review of whether backdated payments should be required ought to be considered by the Crown.

In summary, the recommendation to establish a Yukon or northern Indigenous alliance on pipelines focuses on how to address the issue of the Easement as an Encumbering Right that may now be infringing upon KFN's constitutionally protected Treaty Rights and the legal framework established under the *Final Agreement*. As such, this thesis may also be of interest to the Yukon College's Northern Research Institute.

### **5.3 CONCLUSION**

This case study has focused on a practical research problem of the Easement for Kluane First Nation, and the conclusion is based on the impacts and benefits derived from the research findings as they are consequential for KFN. The Kluane First Nation Elders Council was kept informed since the start of this research project and their wisdom was paramount in composing and focusing the research questions and findings. A final ad hoc committee composed of KFN Elders and Lands, Resources and Heritage Department staff



have reviewed and supported this thesis. From the review, a suggestion was made to add an important quote from Elder Lena Johnson, who in 1977 spoke to the Lysyk Inquiry of what she viewed as the impact of a pipeline upon her cultural, place-based Kluane identity, which she likened to being “planted here like a forest tree” (Johnson, 2014, p. 144). While recorded in the local *Whitehorse Star* (Hume, 1977), it was not included in the final *Lysyk Report* (1977). Over thirty years later, “I feel like I was planted here like a forest tree” is still remembered by Kluane First Nation citizens. It should remind everyone that Kluane people consider their history as a “long-ago story” (Johnson, 2014, p. 137) learned through a landscape pedagogy. Elder Lena Johnson’s words serve as a landmark of the Indigenous landscape from which the Alaska Highway Gas Pipeline has been upheld by federal government decision makers.

The research is intended for dissemination to a wide variety of audiences, including KFN and other Yukon First Nations, Indigenous peoples of Canada, the Government of Canada, Yukon Government, other relevant jurisdictions, academic institutions (Yakovleva, 2014), non-profit organizations and the public at large. It is thought that it may remain relevant for some time to come, as governments continue to grapple with jurisdictional issues in resource co-management and how pipelines now fit into the vision of the “national interest” in light of national commitments and the constitutional recognition and protection of Indigenous Rights in Canada.

Kluane First Nation requests that the Government of Canada, TransCanada and other relevant players and jurisdictions will pay attention to the themes, issues and recommendations presented within this thesis. The need to enact systematic change on historical resource management policies, legislation, procedures and their instruments has

arisen, which the Easement for the Alaska Highway Gas Pipeline makes clear. The next question or step will be how governments can collectively resolve issues around the themes this thesis has studied, and what will be an appropriate resolution to the issue of the next Alaska Highway Gas Pipeline Easement extension period. As Booth and Skelton (2011) concluded in their study of Indigenous peoples' participation and engagement in environmental assessment processes,

“...federal...governments [need] to recognize that in their failure to address First Nation concerns regarding EA processes, they compromise efficient and environmentally sound development...and continue to face court proceedings which are likely to again reiterate the need to address First Nations' concerns and to accommodate constitutionally recognized rights and title and Treaty rights. Further, they perpetuate hostile relations with Indigenous people, risking protests and stand-offs (p. 57).

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## APPENDICES

### APPENDIX I: Supplemental Research Findings

**Table 3.** Most repeated nodes from the interview data.

Name of Node	# of Sources	# of References
Access	14	25
Alaska Highway Route	13	22
Authority	14	27
Awareness	16	67
Change	14	32
Community Concerns	14	47
Construction Procedures	9	20
Consultation	20	166
Corporate Interest	14	25
Easement	18	161
Economic Benefits	11	22
Empowerment	11	25
Encumbering	16	49
Environmental Assessment / Regulatory Review	15	91
Environmental Impacts	18	36
Extend	10	23
Governance	9	23
Jobs / Training	12	45
Ł' n Mān/Kluane Lake Crossing	16	51
Land Claims / Final Agreement Negotiations	14	55
Money	11	28

Natural Gas Market	9	25
Politics	9	21
Timeframe	17	59
TransCanada	10	20
Young Generation	8	20
Yukon First Nations	13	25



## **APPENDIX II: Survey Instruments**

### **A. Participant Information Letter/Consent Form**

*May 15, 2016*

**Project Title:** *The Alaska Highway Gas Pipeline Easement: a Kluane First Nation Case Study*

**Project Lead:** *Kai Peetoom*

University of Northern British Columbia  
Prince George, BC V2N 4Z9  
*peetoom@unbc.ca (250) 983-5674*

Thank you for your interest in this research project, in partnership between Kluane First Nation, the University of Northern BC (UNBC) and the researcher, Kai Peetoom, who is a Master's student in the Natural Resources and Environmental Studies program. The researcher, Kai Peetoom is pursuing this research project as a thesis for a graduate degree at UNBC.

#### **Purpose of Project**

The project aims to provide KFN with useful knowledge about the Alaska Highway Gas Pipeline Easement. The purpose of this research project is to gain insight into possible consequences of the long-standing Easement (registered under Yukon Land Titles) for the Alaska Highway Gas Pipeline within KFN Settlement Lands. The researcher will prepare a summary report for KFN of the research and findings.

You are being asked to participate in this research project because you may have some knowledge, experience and views to offer about possible consequences related to KFN's land and resource management system from the Alaska Highway Gas Pipeline Easement. This research project aims to build knowledge and awareness within Kluane First Nation and the academic community towards better understanding possible consequences over time of the Alaska Highway Gas Pipeline Easement, as perceived by Kluane First Nation community members, KFN staff, and federal or territorial government and industry representatives who have worked with KFN on the Alaska Highway Gas Pipeline. Additionally, this research aims to help prepare Kluane First Nation for the next consultation and regulatory review period for the Alaska Highway Gas Pipeline (the Easement is due to expire in 2022). This case study will also help us learn more about possible consequences related to long-standing pipeline easements in Canada.

Participation in the research is voluntary. You can refuse to answer any questions that make you feel uncomfortable, and you have the right to withdraw from the study at any time, without giving a reason. If you choose to withdraw from the study, any information you have

provided up to that point will also be withdrawn and securely destroyed, unless you explicitly consent that this information can be kept and analyzed as part of the research project.

### **What will happen during the project?**

If you say “Yes” to taking part in this study, your participation would involve answering questions about your views on possible consequences from the Alaska Highway Gas Pipeline Easement. This would be done through an individual interview, which will take about half an hour to complete. You will be asked a series of interview questions that relate to the central research questions of the thesis. An interview guide will be used to keep the discussion focused around the central research questions.

Individual interviews can take place in your home, out on the land within the pipeline easement corridor, at a community space, at another location of your preference, or over the telephone.

Once your interview is completed, the responses will be transcribed, and then grouped with other responses gathered during the research and analyzed to help answer the research questions.

### **Risks or benefits to participating in the project**

We do not expect anything in this study that could harm you. However, risks from the project could include emotional, psychological, legal, and social risks involved in community-based research, such as becoming upset or uncomfortable with research questions, reliving unpleasant memories, risks of presenting information of an illegal nature, and risks related to protecting anonymity and confidentiality. If, at any point in the study, you feel uncomfortable or upset and wish to end your participation, please notify the researcher immediately and your wishes will be respected. If you choose to withdraw from the project, the information you have provided will no longer be used as part of the research and will be properly destroyed, unless you provide your explicit consent to continue to use your information.

Benefits from the project include providing knowledge to KFN for use in future consultation and regulatory review periods for the Alaska Highway Gas Pipeline, raising awareness of this issue within the KFN community, and building awareness of environmental issues related to perpetuating pipeline easements elsewhere in northern Canada.

### **Confidentiality, Anonymity and Data Storage**

The researcher, and if designated the KFN research assistant and/or research coordinator will keep your identity confidential during the research project. Codes will be used to replace the names of research participants, including on transcripts and during analysis of the data. Your responses will only be shown in the final thesis and report through direct quotations from the interview transcripts, with your coded name attached.

We will do everything possible to protect your identity, but due to the small size of the study population, anonymity cannot be guaranteed.

All research data will be stored securely in a locked briefcase (while in the Yukon or during travel), locked computer, and/or filing cabinet (office location at UNBC) and only myself as the principal researcher, and a KFN research assistant or coordinator, if designated, will have access to the raw data until the research has been completed. Currently, no KFN research assistant or coordinator has been designated.

Once the research is completed, all transcripts that have been stripped of personal identifiers will be handed over to the KFN Archives, at the request of KFN. All remaining data, including all recordings, will be destroyed by the researcher by June 2016, by shredding paper files and permanently deleting digital files (including recordings), unless the research participant signs a release form for further use of the recording. Participants can consent to the further use of recordings by selecting “Yes” in the Consent Form below, either in writing or orally.

### **Compensation**

The researcher will provide Kluane First Nation Elders with an honorarium.

### **Study Results**

A final report will be available after completion of the research (by June 2016) and a review of the research results may be given in Burwash Landing. Once completed, a copy of the report can be obtained at the KFN Lands, Resources and Heritage Department. Further distribution of the research may occur at the request of KFN.

The results of this study will be reported in a graduate thesis and may also be published in journal articles and books. The results may also be shared through presentations within and/or outside the Yukon.

### **Questions or Concerns about the project**

In case of any questions about participating in the research, please contact the principal researcher, Kai Peetoom, at 250-983-5674 (cell). The research supervisor, Dr. Annie Booth, can be reached at 250-960-6649. Any complaints regarding this research can be directed to the UNBC Office of Research at 250-960-6735 or reb@unbc.ca.

Thank you for taking the time to read over the information about this research project and to consider your voluntary participation.

## **Participant Consent (Voluntary) and Withdrawal**

Taking part in this study is entirely up to you. You have the right to refuse to participate in this study. If you decide to take part, you may choose to pull out of the study at any time without giving a reason and without any negative impact on your reputation.

This consent form is voluntary and may be completed in written or oral form, or not at all. The researcher will read aloud and sign a Researcher Ethics Statement before the start of all interviews that outlines the ethical requirements the researcher is responsible for upholding as part of this research project.

- Your signature below indicates that you have received a copy of this consent form for your own records.
- Your signature indicates that you consent to participate in this study.

### **CONSENT**

I have read or been described the information presented in the information letter about the project.

YES                      NO

I have had the opportunity to ask questions about my involvement in this project and to receive additional details I requested.

YES                      NO

I understand that if I agree to participate in this project, I may withdraw from the project at any time up until the report completion, with no consequences of any kind. I have been given a copy of this form.

YES                      NO

I agree to be recorded.

YES                      NO

I agree to the further use of my recordings.

YES                      NO

I agree that my name can be used.

YES                      NO

Follow-up information (e.g. transcription) can be sent to me at the following e-mail or mailing address (*if applicable*):

YES

NO

Signature (**or note of verbal consent**):

---

Name of Participant (Printed):

---

Date:

---

## **B. Researcher Ethics Statement**

You have been invited to participate in a study on Kluane First Nation's perspectives regarding consequences of the Alaska Highway Gas Pipeline Easement for KFN land and resource management. All research participants who have been selected to participate carry experience with this pipeline project, and may have knowledge to share and/or views that could help to better understand the possible consequences of long-standing pipeline easements. I, Kai Peetoom, am a Masters student in the Natural Resources and Environmental Studies Program at University of Northern British Columbia (UNBC) will be conducting this research for my Masters thesis at UNBC. My role as researcher is to provide an explanation of the research process, facilitate questions and discussion with research participants around the research issue, safeguard ethical considerations including confidentiality, anonymity and safekeeping of the information gathered, and writing up and analyzing the data.

Your participation in this project is voluntary, and you have the right to withdraw from the study at any point. At any time during the interview you can ask to turn off the tape recorder, choose not to answer a question, or refuse to participate further in the interview.

While the researcher will respect the anonymity of research participants, anonymity cannot be guaranteed when using information from interview transcripts given the small size of the KFN community. All research data (tapes, interview notes, and transcripts) will be stored securely in a locked briefcase (while in the Yukon or travelling), locked computer or filing cabinet (office location at UNBC) and only myself as the principal researcher, and a research assistant or coordinator, if designated, will have access to the raw data during the research. Currently, no KFN research assistant or coordinator has been designated. Once the research has been completed, in June 2016, the raw data, including all recordings, will be destroyed, unless a release form is signed by the research participant recorded for further use. Transcripts stripped of identifiers will be sent to KFN. A copy of the thesis and a final report will also be sent to KFN, as well as federal or territorial government and industry participants, and Alaska Highway Aboriginal Pipeline Coalition participants. The final report will be available by request through the KFN Lands, Resources and Heritage Department.

If you have any questions, feel free to contact the researcher, Kai Peetoom at 250-983-5674 (cell) or peetoom@unbc.ca. The research supervisor, Dr. Annie Booth, can be reached at 250-960-6649. This proposed study has been reviewed by the Research Ethics Board at UNBC. For questions regarding participant rights and ethical conduct of research, contact the UNBC Office of Research by email at reb@unbc.ca or telephone at (250) 960-6735. Any complaints regarding this research can also be directed to the UNBC Office of Research.

I, Kai Peetoom, will be signing this Researcher Ethics Statement form in acknowledgement of my responsibilities as researcher. Informed Consent form signing is optional for research participants, but forms are available if anyone would like to sign. If anyone does not consent to participate in the research at this point, please indicate so orally before we begin.

PARTICIPANT: \_\_\_\_\_ SIGNED \_\_\_\_\_ DATE \_\_\_\_\_

RESEARCHER: \_\_\_\_\_ SIGNED \_\_\_\_\_ DATE \_\_\_\_\_

If you have any questions or concerns about this study, please contact:

Principle Investigator: Kai Peetoom 250-983-5674 peetoom@unbc.ca

Research Supervisor: Dr. Annie Booth 250-960-6649

## **C. Confidentiality Agreement**

### **Confidentiality and Non-Disclosure Agreement**

This study, The Alaska Highway Gas Pipeline Easement: a Kluane First Nation Case Study, is being undertaken by Kai Peetoom at the University of Northern British Columbia (UNBC). The study has two objectives:

1. To examine possible consequences from the Alaska Highway Gas Pipeline Easement as identified by a representative sample of the KFN community.
2. To examine issues related to consultation, regulatory review and environmental assessment processes related to Kluane First Nation and the Alaska Highway Gas Pipeline Easement.
3. To build knowledge and awareness about possible consequences from the Alaska Highway Gas Pipeline Easement that will build preparedness for future consultation and regulatory review process.

Data from this study will be used to interpret the research questions, which focus on KFN's views of possible environmental impacts from the Alaska Highway Gas Pipeline Easement. "Confidential Information" related to this study means to not share any information in any form or format during the research process, and to store and safeguard access to the information while it is in your possession.

I, (*name of recipient*), agree as follows:

1. To keep all the research information shared with me confidential by not discussing or sharing the research information in any form or format (e.g. disks, tapes, transcripts) with anyone other than the Principal Investigator(s);
2. To keep all research information in any form or format secure while it is in my possession;
3. I will not use the Confidential Information for any purpose other than for the purposes of this research project. I will return or destroy all copies of the Confidential Information no later than June 2016.
4. To return all research information in any form or format to the Principal Investigator(s) when I have completed the research tasks;
5. After consulting with the Principal Investigator(s), erase or destroy all research information in any form or format regarding this research project that is not returnable to the Principal Investigator(s) (e.g. information stored on computer hard drive).

Recipient:

_____	_____	_____
(Print name)	(Signature)	(Date)

Principal Investigator:

_____	_____	_____
(Print name)	(Signature)	(Date)

If you have any questions or concerns about this study, please contact:

Principle Investigator: Kai Peetoom 250-983-5674 peetoom@unbc.ca

Research Supervisor: Dr. Annie Booth 250-960-6649

This proposed study has been reviewed by the Research Ethics Board at UNBC. For questions regarding participant rights and ethical conduct of research, contact the Office of Research by email at reb@unbc.ca or telephone at (250) 960-6735



#### **D. Semi-structured Interview Guide (for KFN citizens)**

1. Have you participated in consultation for the Alaska Highway Gas Pipeline? If so, what is/was your involvement?
2. Are you aware of the Alaska Highway Gas Pipeline (AHGP) Easement? If so, please describe what you know about the Easement.
3. Do you have any thoughts or concerns about possible consequences related to the Alaska Highway Gas Pipeline that may have been documented in the past? If so, please describe.
4. Do you have any thoughts or concerns about present consequences related to the Alaska Highway Gas Pipeline, including those discussed during the most recent consultation process in 2011-2012? If so, please describe.
5. Do you have any thoughts or concerns about future consequences related to the Alaska Highway Gas Pipeline? If so, please describe.
6. Do you have any thoughts or concerns about how the Alaska Highway Gas Pipeline (AHGP) Easement, described under the *Kluane First Nation Final Agreement* as an exclusive right to surveyed areas within KFN Settlement Lands, may impact KFN's land and resource management system?
7. Do you have any thoughts or concerns about the most recent consultation process for the AHGP in 2011-2012?
8. Could you describe whether you think the AHGP will proceed given the current circumstances in Alaska? If not, what do you think are possible future consequences for KFN of the Northern Pipeline Agency's decision-making around any future request by TransCanada to renew the AHGP Easement?

### **E. Semi-structured Interview Guide (for KFN Elders)**

1. Related to the pipeline easement as a registered land title over KFN Settlement Lands, do you think there are any consequences related to KFN's land and resource management system? If so, could you describe these consequences?
2. Do you think the pipeline easement being registered in *KFN's Final Agreement* impacts KFN citizens' use of KFN Settlement Lands?
3. What are your memories of discussions and negotiations of the pipeline since it was first proposed in 1977 (discussing the pipeline could have occurred with KFN community members, governments and/or industry)? Could you describe any specific moments that stand out related to how the pipeline easement was negotiated into the KFN Final Agreement during land claims?
4. What concerns, if any, do you have about the pipeline currently?
5. How do you think KFN views and/or concerns relating to the pipeline easement should be assessed by the Northern Pipeline Agency

**F. Semi-structured Interview Guide (for federal or territorial government, industry and organizational participants)**

1. Have you had involvement with the Alaska Highway Gas Pipeline? If so, what is/was your involvement?
2. Could you please describe what you know about the Alaska Highway Gas Pipeline (AHGP) Easement?
3. Do you have any thoughts or concerns about possible consequences related to the Alaska Highway Gas Pipeline that may have been documented in the past within Kluane First Nation Traditional Territory, related to your company's, agency's or organization's involvement in the regulatory review process for this pipeline project? If so, please describe.
4. Do you have any thoughts or concerns about present consequences related to the Alaska Highway Gas Pipeline within Kluane First Nation Traditional Territory, including those discussed during the most recent consultation process in 2011-2012, related to your company's, agency's or organization's involvement in the regulatory review process for this pipeline project? If so, please describe.
5. Do you have any thoughts or concerns about how the Alaska Highway Gas Pipeline (AHGP) Easement, described under the *Kluane First Nation Final Agreement* as an exclusive right to surveyed areas within KFN Settlement Lands, may impact KFN's land and resource management system?
6. What views related to KFN's land and resource management system, including possible concerns, has KFN presented you with regarding the Alaska Highway Gas Pipeline? Can you describe how your organization, company or agency has recognized and/or incorporated KFN's views into the consultation, regulatory review and/or decision-making process?
7. Do you have any thoughts or concerns about the most recent consultation process for the AHGP in 2011-2012, between Kluane First Nation, the Northern Pipeline Agency, Yukon Government, TransCanada and/or the Alaska Highway Aboriginal Pipeline Coalition?
8. Could you describe whether you think the AHGP will proceed given the current circumstances in Alaska? If not, what do you think are possible future consequences for Kluane First Nation of the Northern Pipeline Agency's decision-making around any future request by TransCanada to renew the AHGP Easement?
9. Do you have any other thoughts or concerns about future consequences related to the Alaska Highway Gas Pipeline within Kluane First Nation Traditional Territory,

related to your company's, agency's or organization's involvement in the regulatory review process for this pipeline project? If so, please describe.

## Appendix III: Research Ethics

### A. UNBC Research Ethics Board (REB) Protocol for Research with Human Participants



Please refer to the [UNBC Policy on Research Involving Human Participants](#). Reviews are conducted according to the principles and spirit of the [Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans 2010 \(TCPS2\)](#).

<b>Principal Investigator:</b>	Kai Peetoom		
<b>Program/Department/School:</b>	Natural Resource and Environmental Studies/Environmental Science		
Phone Number:	250-983-5674	Email:	<a href="mailto:peetoom@unbc.ca">peetoom@unbc.ca</a>
<b>Supervisor's Name:</b>	Dr. Annie Booth		

### Project Dates

Project Start Date:	<u>June 30, 2015</u>
Project Completion Date:	<u>June 29, 2018</u>

### Sources of Funding

Northern Scientific Training Program. Government of Canada. 2014 – 2015. Research Project Award. University of Northern British Columbia, Office of Graduate Programs. 2016 – 2017. Research Travel Award. University of Northern British Columbia, Office of Graduate Programs. 2018.
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# UNIVERSITY OF NORTHERN BRITISH COLUMBIA

## RESEARCH ETHICS BOARD

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### MEMORANDUM

To: Kai Peetoom  
CC: Annie Booth

From: Andrew Kitchenham, Acting Chair  
Research Ethics Board

Date: May 15, 2015

Re: E2015.0413.025.00  
Environmental Impacts of the Alaska Highway Gas Pipeline  
Easement: a Kluane First Nation Case Study

---

Thank you for submitting revisions to the Research Ethics Board (REB) regarding the above-noted proposal. Your revisions have been approved.

We are pleased to issue approval for the above named study for a period of 12 months from the date of this letter. Continuation beyond that date will require further review and renewal of REB approval. Any changes or amendments to the protocol or consent form must be approved by the REB.

If you have any questions on the above or require further clarification please feel free to contact Rheanna Robinson in the Office of Research ([reb@unbc.ca](mailto:reb@unbc.ca) or 250-960-6735).

Good luck with your research.

Sincerely,



Dr. Andrew Kitchenham  
Acting Chair, Research Ethics Board

# UNIVERSITY OF NORTHERN BRITISH COLUMBIA

## RESEARCH ETHICS BOARD

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### MEMORANDUM

**To:** Kal Peetoom  
**cc:** Annie Booth

**From:** Paul Siakeluk, Acting Chair  
Research Ethics Board

**Date:** May 19, 2016

**Re:** E2015.0413.025.01(a)  
**The Alaska Highway Gas Pipeline Easement: a Kluane First Nation Case Study**

---

Thank you for submitting a request for renewal and amendments to the Research Ethics Board (REB) regarding the above-noted proposal. Your request has been approved.

We are pleased to issue renewal approval for the above named study for a period of 12 months from the date of this letter. Continuation beyond that date will require further review and renewal of REB approval. Any further changes or amendments to the protocol or consent form must be approved by the REB.

Good luck with continuation of your research.

Sincerely,



Dr. Paul Siakeluk  
Acting Chair, Research Ethics Board

**RESEARCH ETHICS BOARD**

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**MEMORANDUM**

To: Kai Peetoom  
CC: Annie Booth

From: Henry Harder, Chair  
Research Ethics Board

Date: January 11, 2018

Re: E2015.0413.025.02  
The Alaska Highway Gas Pipeline Easement: a Kluane First Nation Case Study

---

Thank you for submitting a request for renewal to the Research Ethics Board (REB) regarding the above-noted proposal. Your request has been approved.

We are pleased to issue renewal approval for the above named study for a period of 12 months from the date of this letter. Continuation beyond that date will require further review and renewal of REB approval. Please note that protocols can only be renewed three times, after which a New Application will need to be submitted.

Also, any changes or amendments to the protocol or consent form must be approved by the REB.

Good luck with continuation of your research.

Sincerely,



Dr. Henry Harder  
Chair, Research Ethics Board



## B. Consent from Kluane First Nation



**Box 20 • Burwash Landing, Yukon • Y0B 1V0**  
**Tel.: 867/841-4274 • Fax: 867/841-5900 • Website: www.kfn.ca**

**NUMBER:** 2014-26 **DATE:** October 23, 2014

**TITLE:** ALASKA HIGHWAY GAS PIPELINE RESEARCH PROPOSAL

### WHEREAS:

- A. Kluane First Nation had concerns about the consultation process with Yukon First Nations as part of the environmental assessment process carried out by the Northern Pipeline Agency for the Alaska Highway Gas Pipeline, and Northern Pipeline's decision to amend the *Canada Footfalls Baseline Agreement* in 2012, extending TransCanada's timeframe to begin use of the easement until September 2022.
- B. A significant portion of the Alaska Highway Gas Pipeline easement passes through KFN Traditional Territory and Settlement Lands, and this pipeline project poses substantial impacts to Kluane First Nation if TransCanada chooses to pursue development of this pipeline easement in the future.
- C. Mr. Kai Peetoom is proposing this research project in collaboration with KFN through his affiliation with University of Northern British Columbia, to evaluate the environmental and socio-economic assessment process carried out to date for the Alaska Highway Pipeline Project from the perspective of KFN. This research would occur between October 2014 and April 2016.

### THEREFORE BE IT RESOLVED THAT:

1. Kluane First Nation Chief and Council hereby agree to participate in the proposed Alaska Highway Gas Pipeline research project with Mr. Kai Peetoom through his affiliation with the University of Northern British Columbia.
2. Kluane First Nation Chief and Council agree to enter into a Research Protocol Agreement, a draft of which will be provided to KFN Chief and Council for review by Mr. Kai Peetoom in November 2014.

	
Chief	Date 23 Oct 14
	
Deputy Chief	Date Oct. 23/14
	
Councilor	Date Oct 23/14
	
Councilor	Date Oct 23/14

Original Order-in-Council endorsement for joint research participation. This OIC was renewed along with the Research Protocol Agreement in 2017.

UNBC File Ref: RC16-3310

**Research Protocol Agreement between**

**Mr. Kai D. Peetoom and the University of Northern British Columbia**

**AND**

**Kluane First Nation**

**Regarding**

**The Alaska Highway Pipeline Basement:  
a Kluane First Nation Case Study**

**Funded By**

**Northern Scientific Training Program (2015 - 2016)  
UNBC Graduate Program Research Project Award (2016 - 2017)**

### **C. Consent from Yukon Government**



Tourism and Culture  
Box 2703, Whitehorse, Yukon Y1A 2C8

**CULTURAL SERVICES BRANCH  
HERITAGE RESOURCES UNIT**

**File No.: 6800-20-1004**

**May 8, 2015**

TO: Kai Pectoom (University of British Columbia)  
Environment, Habitat Management (V-5R)  
Lands Use Section, Lands Branch (K-320)  
ASTIS, Arctic Institute of North America  
Regional Land Use Planning (K-32)  
Kluane First Nation

RE: **Kai Pectoom (University of Northern British Columbia)**

Please be advised that the attached License with revised License number has been issued under the Yukon Scientists and Explorers Act (1958).

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Hunston".

Jeff Hunston, Manager  
Heritage Resources Unit

Enclosure

#### **Appendix IV: Northern Pipeline Agency Correspondence Example**



Northern Pipeline  
Agency

Administration du pipe-line  
du Nord

615 Booth Street  
Ottawa, Ontario  
K1A 0E8

615, rue Booth  
Ottawa (Ontario)  
K1A 0E8

RECEIVED JUL 20 2012

**Copy via email  
Original by Canada Post**

July 12, 2012

Chief Math'ieya Alatini  
Kluane First Nation  
P.O. Box 20  
Burwash Landing, YT Y0B 1V0

Dear Chief Alatini,

**Re: Amendment to the Canada-Foothills Easement Agreement**

I am writing to inform you that the Minister responsible for the Northern Pipeline Agency (Agency) has entered into an agreement with Foothills Pipelines Ltd. to amend the Canada-Foothills Easement Agreement. The purpose of this amendment is to allow an additional ten years, until September 20, 2022, for Foothills to obtain consent to use the easement for construction of the Alaska Highway Gas Pipeline (AHGP). While the amendment extends the timeline for obtaining consent to use the easement for construction, it does not alter any of the other terms of the Easement Agreement. A copy of the agreement is enclosed.

The Agency informed Kluane First Nation (KFN) of the proposal to amend the Canada-Foothills Easement Agreement on May 31, 2011 and requested your input. Over the ensuing months, the Agency and KFN exchanged written correspondence and held a number of discussions to address questions and concerns about the proposed amendment. The results of consultations with all Yukon and B.C. First Nations whose territory is crossed by the easement were considered in making the final decision on the amendment request by Foothills.

The Agency appreciates the input received from KFN on the amendment to the Easement Agreement and we look forward to continuing to work with you on the AHGP.

Sincerely,

Chrystia Chudezak  
Assistant Commissioner

Canada

## Appendix V: KFN Correspondence Example



# KLUANE FIRST NATION

**P.O. Box 20, Burwash Landing, Yukon Territory Y0B 1V0**

Main Ph: (867) 841-4274 Fax: (867) 841-5900 Toll Free 1-866-558-5507

February 14, 2011

Christopher Cuddy  
Assistant Commissioner  
Northern Pipeline Agency  
615 Booth Street  
Ottawa, Ontario K1A 0E4

Dan Begley  
Community & Aboriginal Relations Lead  
TransCanada Pipelines Ltd.  
450 – 1 Street S.W.  
Calgary, Alberta T2P 5H1

Brian Love  
Director, Oil & Gas Resources  
Energy, Mines and Resources  
P.O. Box 2703  
Whitehorse, Yukon Y1A

Gaetan Caron  
Chair/CEO  
National Energy Board  
444 Seventh Avenue S.W.  
Calgary, Alberta T2P 0X8

Dear Sirs:

**Re: Geotechnical Borehole Program and Access – Kluane Lake to AK-YT Border,  
YESAB Project Numbers 2010-0231, 2010-233 and DFO “Letter of Advice”  
dated January 25, 2011, DFO File 11-HPAC-PA5-00010**

On behalf of the Kluane First Nation (the “KFN”), I express frustration about the above-noted activities proposed by TransCanada on the pipeline easement granted to Foothills within our traditional territory.

Our frustration results from concerns about the lack of Crown consultation and the uncertainty relating to the assessment and approval processes with respect to these proposed activities. Unless these concerns are resolved, the KFN will be forced to oppose the proposed activities and take steps to protect its rights, titles and interests. Therefore, we bring the following concerns to your attention and urge you to work with the KFN to address them.

Firstly, we are concerned about the lack of Crown consultation with the KFN in relation to the proposed activities in accordance with the legal requirements of our Final Agreement and the legal principles recently established by the Supreme Court of Canada in the *Little Salmon/Carmacks* decision. As you know, the Crown has a legal duty to consult with the KFN, based on the honor of the Crown, as soon as it has knowledge, real or constructive, of the existence or potential existence of a right of the First Nation and it considers any action that potentially has an impact on those rights. Government must provide affected First Nations with adequate notice and full information concerning the proposed action and its potential impact on their rights.

In our view, the initial notice to the KFN was not provided in a timely manner and the information was incomplete and inaccurate. In fact, it appears that certain activities on Kluane Lake proposed by TransCanada, including the detonation of 10 blasting caps in 10-20 boreholes along the bed of Kluane Lake, were approved by the Department of Fisheries and Oceans without any consultation with the KFN since it determined that there would be no impacts on fish or fish habitat. It does not appear that the Department of Fisheries and Oceans considered if these activities would impact the aboriginal and treaty rights of the KFN. This is unacceptable and contrary to the Crown's legal obligations to the KFN.

Secondly, the KFN is concerned about the confusion related to the roles of the various parties and their authorities and responsibilities with respect to the assessment and approval of activities proposed by TransCanada in the pipeline easement located across several parcels of the KFN's settlement land. What are the respective roles of the National Energy Board ("NEB"), Northern Pipeline Agency ("NPA"), the assessment bodies under the *Yukon Environmental and Socio-economic Assessment Act* (Canada), the KFN and the territorial and federal governments? This must be clarified and, in particular, the role of the KFN must be confirmed.

While the NPA has advised that the easement agreement allows TransCanada to carry out the proposed activities on the easement lands without its further approval, it is our view that these activities must be carried out in accordance with the easement agreement, the certificate of public convenience and necessity and any applicable land, water and wildlife legislation, including such legislation enacted by the KFN. In addition, it is unclear to us if the certificate authorizes the blasting and drilling activities as proposed by TransCanada.

Thirdly, we are concerned that the KFN and TransCanada have not been able to establish a positive and respectful working relationship since my election as Chief and the election of the KFN Councilors in August 2010. This must be a priority. As I stated in the letters to TransCanada on December 1 and 24, 2010, the KFN believes that the parties must establish such a relationship, which may include the negotiation of a participation agreement and a traditional knowledge protocol, before the commencement of the proposed activities.

Although TransCanada asserts that it does not require an authorization from the KFN to undertake the project activities that are proposed to occur on our settlement land, the KFN maintains that the parties must take steps in good faith to establish a mutually beneficial relationship.



In light of our above-noted concerns, we propose the following.

1. Before the approval of the activities proposed by TransCanada, the territorial and federal governments and its regulatory agencies must work with the KFN and other affected Yukon First Nations to confirm the regulatory process for activities related to the pipeline easement and the roles of the various parties and their authorities and responsibilities.

It is unsatisfactory and unacceptable for the federal and territorial governments to determine this matter unilaterally without the involvement of the KFN. This must be addressed now since it is expected that future projects and activities will likely be undertaken in the pipeline easement.

2. The KFN and the federal and territorial government and the NPA and NEB, as appropriate, must set out an appropriate consultation process in accordance with the provisions of the KFN Final Agreement and the legal principles established by the courts. All activities proposed on the pipeline easement would be subject to this consultation process set out in a protocol.
3. The KFN and TransCanada must engage immediately and take steps to develop a positive and respectful working relationship. In particular, we propose that the parties focus on the development of a foundation for our relationship moving forward.

This framework will provide direction and guidance to the parties when TransCanada wishes to undertake projects and activities in our traditional territory.

In closing, we are committed to working cooperatively and collaboratively with you to develop a positive and respectful relationship. However, we have responsibilities to protect our culture and aboriginal and treaty rights and the lands, water and wildlife of our traditional territory and these responsibilities will guide our discussions with you.

We invite you to work with us and look forward to your response.

Sincerely,

Chief Mathieya Alatini  
Kluane First Nation  
[chief@kfn.ca](mailto:chief@kfn.ca)

cc. White River First Nation Chief and Council Fax: (867) 862-7806

Liard First Nation Chief and Council Fax: (867) 536-2332  
Kwanlin Dun First Nation Chief and Council Fax: (867) 668-5057  
Carcross Tagish First Nation Chief & Council, Fax: (867) 821-4802  
Champagne and Aishihik First Nation, Chief & Council, Fax: (867) 667-6202  
Ta'an Kwachan Council, Chief and Council, Fax: (867) 667-4295  
Teslin Tlingit Council, Chief & Council, Fax: (867) 390-2204  
Kaska Dena Council, Chief & Council, Fax: (867) 779-3020  
The Hon. John Duncan, Minister of Indian and Northern Affairs, Fax: 819-953-4941  
The Hon. Christian Paradis, Minister of Natural Resources, Canada, Fax: (613) 996-4516  
Christopher Cuddy, Assistant Commissioner, Northern Pipeline Agency, Fax: (613) 996-5354  
The Hon. Dennis Fentie, Premier of the Yukon Government Fax: (867) 393-6252  
Cassie Doyle, Deputy Minister, Natural Resources Canada Fax: 613-992-3828  
David Montemurro, Vice President, Engineering & Operations, TransCanada Pipelines Ltd., Fax: (403) 920-2419  
Dan Begley, Community and Aboriginal Relations Lead, TransCanada Pipelines Ltd., Foothills Pipe Lines LTD Fax (403) 920-2419  
Trevor Harding – Consultant for WRFN  
Dave Keenan

**Appendix VI: Copy of Easement Amending Agreement (2012)**



CANADA  
PRIVY COUNCIL • CONSEIL PRIVÉ

P.C. 2012-610  
June 19, 2012

His Excellency the Governor General in Council,  
on the recommendation of the Minister of Natural Resources,  
pursuant to subsection 37(3) of the *Northern Pipeline Act*,  
authorizes the Minister of Natural Resources, on behalf of  
Her Majesty in right of Canada, to enter into an agreement  
with Foothills Pipe Lines (South Yukon) Ltd., substantially in  
accordance with the attached agreement, to amend the  
agreement executed on November 24, 1983, as amended by  
agreements dated October 13, 1987, and November 4, 1992.

COPIES TO BE A TRUE COPY (COPIES À VÉRIFIER)

COPIES OF THE PRIVY COUNCIL • COPIES DU CONSEIL PRIVÉ

THIS AGREEMENT made this 4<sup>th</sup> day of Nov<sup>r</sup>, A.D. 2012

BETWEEN :

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, hereinafter called "Her Majesty," as represented by the member of the Queen's Privy Council for Canada designated to act as the Minister for the purposes of the Northern Pipeline Act, hereinafter called "the Minister,"

OF THE FIRST PART

And

FOOTHILLS PIPELINES (SOUTH YUKON) LTD., a company incorporated under the Canada Business Corporations Act, having its registered office in the City of Calgary, in the Province of Alberta, hereinafter called "the Company"

OF THE SECOND PART

WHEREAS the parties hereto have executed an agreement on the 24<sup>th</sup> day of November, 1983, hereinafter called "the Agreement";

AND WHEREAS the Agreement was amended by amending agreement dated October 13, 1987;

AND WHEREAS the Agreement was amended by amending agreement dated November 4, 1992;

AND WHEREAS the Company has not yet received written consent as required by section 1 of the Agreement;

AND WHEREAS the Company remains firmly committed to the timely completion of the pipeline construction, in accordance with the Agreement when the need for the reserves of natural gas is determined;

AND WHEREAS the Minister agrees that it is essential that Canada honour its international obligation with the United States of America as it is incorporated into law in the Northern Pipeline Act;

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the premises and the agreements herein contained, Her Majesty and the Company hereby mutually agree as follows:

1. To amend the Agreement by striking out the words of section 18 and substituting the following words:

"18. (1) Notwithstanding anything in this Agreement contained, in the event that:


- (a) the written consent referred to in section 1, has not been given by September 20, 2022; or
- (b) the Company shall not have forwarded to the Surveyor General for Canada the plan of survey contemplated by subsection 37(4) of the Northern Pipeline Act, within two (2) years after leave to open the last section or part of the Works has been granted by the National Energy Board, or such further period, not exceeding six (6) months, as the Governor in Council may approve; or
- (c) the Works have not been constructed within six (6) years from the date on which the written consent referred to in section 1 hereof has been given;

then the easement and rights, licenses, liberties and privileges hereby granted shall thereupon terminate, and the Company agrees thereupon to execute and file at its expense such documents as may be necessary, in the opinion of the Minister, to effect a termination of all its interest in and to the first or second Right-of-Way, as the case may be.

(2) Notwithstanding anything in this Agreement contained, in the event that the 1977 Agreement Between Canada and the United States of America on Principles Applicable to a Northern Natural Gas Pipeline is terminated prior to the date on which the written consent referred to in section 1 hereof has been given, then the Minister, in his absolute discretion, may terminate the easement and rights, licenses, liberties and privileges hereby granted on six (6) months written notice, and the Company agrees thereupon to execute and file at its expense such documents as may be necessary, in the opinion of the Minister, to effect a termination of all its interest in and to the first or second Right-of-Way, as the case may be.

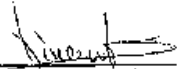
IN WITNESS WHEREOF the Minister, on behalf of Her Majesty, has hereunto set his hand and seal, and the Company has hereunto affixed its corporate seal attested by its proper officers duly authorized in that behalf. ✓

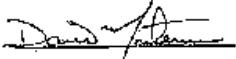
SIGNED, SEALED AND DELIVERED

  
The Member of the Queen's  
Privy Council for Canada  
designated to act as the  
Minister for the purposes of  
the Northern Pipeline Act

FOOTHILLS PIPE LINES  
(SOUTH YUKON) LTD.

Per:

  
VINCENT S. Y. LEE  
VICE-PRESIDENT

  
David Vanlaningham  
Vice-President

208038

Registered this 21 Aug. 2012  
at 10:13 Hours under  
No. 208038 CIT No. 344726  
2012/08/21 REGISTRAR

(21)