BI-POLE 111 CLOSING COMMENTS TO THE CEC
PEGUIS FIRST NATION

GOOD MORNING MR. CHAIRMAN AND COMMISSIONERS OF THE CLEAN ENVIRONMENT COMMISSION. THANK YOU FOR PROVIDING PEGUIS THIS OPPORTUNITY TO MAKE CLOSING COMMENTS ON THE BI-POLE 111 HEARINGS.

THE DUTY TO CONSULT AND THE ENVIRONMENTAL IMPACT STATEMENT (EIS)

WHEN THE EIS WAS CONTEMPLATED AND BEING DEVELOPED THERE WAS LITTLE OR NO THOUGHT TO ENGAGE FIRST NATIONS IN THE DEVELOPMENT OF THE EIS NOR WAS THERE ANY POSITIVE DUTY EXERCISED BY THE PROVINCIAL CROWN TO ENSURE THAT THE DUTY TO CONSULT AND ACCOMMODATE FIRST NATIONS WAS ENGAGED. THE SUPREME COURT OF CANADA CASE OF HAIDA NATION STATED, THE CROWN'S DUTY TO CONSULT WITH FIRST NATIONS IS ENGAGED (TRIGGERED) 'WHEN THE CROWN HAS KNOWLEDGE, REAL OR CONSTRUCTIVE, OF THE POTENTIAL EXISTENCE OF THE ABORIGINAL RIGHT OR TITLE AND CONTEMPLATES CONDUCT THAT MIGHT ADVERSELY IMPACT IT'. FURTHERMORE, WHERE TREATIES ARE AT ISSUE, THE COURT HELD IN MIKISEW THAT THE CROWN WILL ALWAYS HAVE NOTICE OF THE TREATY'S CONTENTS. ON SURRENDERED LANDS BEYOND THE RESERVE'S BOUNDARIES, THE COURT STATED THAT THE CROWN HAD A DUTY TO ACT HONOURABLY WHICH INCLUDED THE DUTY TO CONSULT AND ACCOMMODATE.

IN ANOTHER CASE FROM THE SUPREME COURT OF CANADA IN R.v.ADAMS THE COURT STATED THAT IN A LEGISLATIVE SCHEME, CROWN POLICY OR CROWN PRACTICE AND ACTIONS, THE RIGHTS OF ABORIGINAL PEOPLES MUST BE TAKEN SERIOUSLY. SUCH A SCHEME MUST DO MORE THAN SIMPLY ESTABLISH A LICENSING OR OTHER RESOURCE MANAGEMENT SYSTEM IN THE PUBLIC INTEREST. SPECIFICALLY, ANY LEGISLATIVE OR REGULATORY SCHEME MUST BE DEVISED IN CONSIDERATION OF WHAT ABORIGINAL OR TREATY RIGHTS MIGHT BE AFFECTED. THERE MUST BE EVIDENCE OF ANY ATTEMPT BY THE CROWN TO ACCOMMODATE AND GIVE EXPRESSION TO THE RIGHTS IN QUESTION. IN ABSENCE OF SUCH ACCOMMODATION, THE CROWN RISKS A FINDING THAT AN INFRINGEMENT CANNOT BE JUSTIFIED.

AFTER AN INORDINATE TIME HAD LAPSED, THE PROVINCIAL CROWN MADE A HALF HEARTED ATTEMPT TO ENGAGE PEGUIS IN THE CONSULTATION PROCESS AND THIS WAS AFTER THE ENVIRONMENTAL IMPACT STATEMENT HAD BEEN ISSUED CLEARLY BREACHING THE STANDARD SET OUT IN HAIDA NATION. THE CAPACITY TO ENGAGE IN MEANINGFUL CONSULTATION WAS SEVERELY COMPROMISED WHEN THE PROVINCIAL CROWN DRASTICALLY REDUCED THE CONSULTATION BUDGET TO A MERE NOMINAL AMOUNT AFTER A SIX MONTH WAIT.

UNILATERAL ACTION BY THE CROWN

MOST ABORIGINAL RIGHTS COURT CASES WERE INITIATED AS A RESULT OF THE UNILATERAL ACTION BY THE CROWN. THE SUPREME COURT OF CANADA IN MIKISEW HAD SOME HARSH LANGUAGE WHERE THE CROWN ACTED UNILATERALLY OR WITH THE ARGUMENT THAT THE CROWN IS ENTITLED TO ACT UNILATERALLY:

> THERE IS IN THE MINISTER'S ARGUMENT A STRONG ADVOCACY OF UNILATERAL CROWN ACTION (A SORT OF 'THIS IS SURRENDERED LAND AND WE CAN DO WITH IT WHAT WE LIKE' APPROACH) WHICH NOT ONLY IGNORES THE MUTUAL PROMISES OF THE TREATY, BOTH WRITTEN AND ORAL, BUT IS ALSO THE ANTITHESIS OF RECONCILIATION AND MUTUAL RESPECT.

FURTHERMORE, IN HAIDA THE COURT ADDRESSED THE UNACCEPTABILITY OF THE CROWN ACTING UNILATERALLY IN MAKING DECISIONS AFFECTING THE RIGHTS OF INDIGENOUS PEOPLES. CROWN DECISIONS MUST NOW BE MADE TOGETHER WITH FIRST NATIONS IN AN EFFORT TO GOVERN FUTURE INTERACTION BETWEEN THE PARTIES. THE COURT TOOK EXCEPTION TO THE TREATIES AS 'A FINISHED LAND USE BLUEPRINT' AND DESCRIBED THE TREATIES AS VEHICLES TO EXPLAIN THE RELATIONSHIP TO GOVERN FUTURE INTERACTION BETWEEN THE CROWN AND FIRST NATIONS. IT UNDERSCORED THE REQUIREMENT FOR THE CROWN TO CONTINUE THE PROCESS OF RECONCILIATION AND THE NEED FOR ONGOING CONSULTATION AND ACCOMMODATION OF TREATY RIGHTS.

NO EXTINGUISHMENT CLAUSE IN TREATY ONE 1871

THE PEGUIS FIRST NATION IS A MEMBER OF TREATY ONE SIGNED IN 1871 AND THE TREATY ONE AREA COVERS MOST OF SOUTHERN MANITOBA. WHAT IS UNIQUE ABOUT TREATY ONE IS THE LACK OF AN EXTINGUISHEMENT CLAUSE TO OTHER LANDS OUTSIDE THE BOUNDARY OF TREATY ONE. ACCORDINGLY, PEGUIS HAS ASSERTED AND CONTINUES TO ASSERT THAT IT STILL POSSESSES THE RIGHTS OF ABORIGINAL TITLE, ABORIGINAL RIGHTS AND INDIGENOUS RIGHTS IN THOSE LANDS OUTSIDE OF TREATY ONE TERRITORY. THE SUPREME COURT OF CANADA IN ADAMS MADE THE FOLLOWING STATEMENT ON ABORIGINAL RIGHTS:

> WHERE AN ABORIGINAL GROUP HAS SHOWN THAT A PARTICULAR PRACTICE, CUSTOM OR TRADITION TAKING PLACE ON THE LAND WAS INTEGRAL TO THE DISTINCTIVE CULTURE OF THAT GROUP THEN EVEN IF THEY HAVE NOT SHOWN THAT THEIR OCCUPATION AND USE OF THE LAND WAS SUFFICIENT TO SUPPORT A CLAIM OF TITLE TO THE LAND, THEY WILL HAVE DEMOSTRATED THAT THEY HAVE AN ABORIGINAL RIGHT TO ENGAGE IN THE PRACTICE, CUSTOM OR TRADITION.

FURTHERMORE, IN ADAMS, THE COURT CONCLUDED THAT THE CROWN CANNOT USE SECTION 1 OF THE CONSTITUTION ACT 1982 AS AN OVERRIDE TO JUSTIFY INFRINGEMENT OF SECTION 35 RIGHTS.

THE PEGUIS TREATY ENTITLEMENT AGREEMENT 2008 AND THE NATURAL RESOURCES TRANSFER ACT OF 1930

ARTICLE ONE OF THE NRTA HAS TRUST PROVISIONS THAT STATE ‘SUBJECT TO ANY TRUSTS, AND TO ANY INTEREST OTHER THAN THAT OF THE CROWN’. PEGUIS AND OTHER FIRST NATIONS VIEW THESE TRUSTS THAT APPLY TO FIRST NATIONS ARE BASED ON ABORIGINAL TITLE, ABORIGINAL RIGHTS AND UNFULFILLED TREATY RIGHTS. DESPITE THE SACRED NATURE OF THE TREATY AND THE HONOUR OF THE CROWN IN RESPECTING AND IMPLEMENTING THE TREATY, THERE ARE INSTANCES WHERE TREATY AND ABORIGINAL RIGHTS HAVE BEEN ABROGATED OR INFRINGED. ACCORDINGLY, PEGUIS IS OF THE OPINION THAT THOSE INFRINGEMENTS ARE A BREACH OF THE TRUST CONDITIONS FOUND IN NRTA.

ARTICLE 11 OF THE NRTA PUTS THE ONUS ON THE PROVINCIAL CROWN TO SET ASIDE LANDS FOR TRANSFER SO THE FEDERAL CROWN CAN MEET ITS OBLIGATION UNDER TREATY AND TREATY ENTITLEMENT AGREEMENTS. ARTICLE 13 REFERS TO THE RIGHTS OF FIRST NATIONS TO HUNT, TRAP AND FISH. THESE RIGHTS ARE NOW ENSHRINED IN SECTION 35 OF THE CONSTITUTION.

THE FEDERAL CROWN, THE PROVINCIAL CROWN AND PEGUIS FIRST NATION CONCLUDED A TREATY LAND ENTITLEMENT AGREEMENT IN 2008. ONE OF THE MAJOR OBLIGATIONS IN THE AGREEMENT IS FOR THE PROVINCIAL CROWN TO PROVIDE CROWN LAND TO PEGUIS UP TO 55,000 ACRES. DESPITE THIS PROVISION IN THE AGREEMENT, PEGUIS VIEWS THE ACTIONS, INCLUDING BI-POLE 111 ACTIONS OF THE PROVINCIAL CROWN AS AN ATTEMPT TO FRUSTRATE THE IMPLEMENTATION OF THE AGREEMENT. LANDS THAT SHOULD BE AVAILABLE FOR SELECTION ARE CONTINUALLY BEING ENCUMBERED BY THIRD PARTIES AND INDEED CROWN CORPORATIONS. THE SPIRIT AND INTENT OF THE AGREEMENT IS SADLY LACKING ON BOTH GOVERNMENTS. IF THESE MATERIAL BREACHES IN THE AGREEMENT CONTINUE, THEN PEGUIS WILL TAKE THE POSITION THAT IT IS NOT BOUND TO THE RELEASES FOUND IN THE AGREEMENT. THE TLE NOTIFICATION AREA DESCRIBED IN THE AGREEMENT IS IGNORED AT TIMES, LIKE BO-POLE 111 PLANNING, REVIEWS, PROCEEDINGS AND POSSIBLE LICENSING THUS PREJUDICING PEGUIS'S EFFORTS TO IMPLEMENT THE 2008 AGREEMENT.

UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

THE UNITED NATIONS DECLARATION WAS ADOPTED BY THE UN GENERAL ASSEMBLY ON SEPTEMBER 13, 2007 AFTER MANY YEARS OF DRAFTS AND NEGOTIATIONS. CANADA REFUSED TO SIGN THE DECLARATION AND FINALLY THREE YEARS LATER ON NOVEMBER 12, 2010 CANADA ENDORSED THE DECLARATION. LIKE OTHER INTERNATIONAL HUMAN RIGHTS DECLARATIONS, THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES PROVIDES AN AUTHORITATIVE SOURCE OF GUIDANCE FOR ALL INSTITUTIONS OF SOCIETY, INCLUDING LEGISLATORS AND GOVERNMENT DEPARTMENTS, COURTS, HUMAN RIGHTS BODIES, AND PUBLIC INSTITUTIONS SUCH AS UNIVERSITIES. IN SIGNING THE DECLARATION CANADA COMMITTED THE FEDERAL GOVERNMENT AS WELL AS THE PROVINCIAL GOVERNMENTS TO UPHOLD THE DECLARATION. MANITOBA

HAS NEVER OBJECTED, AND PEGUIS ASSUMES THE MANITOBA CROWN UNDERSTANDS IT IS PART OF CANADA'S ENDORSEMENT OF THE UN DECLARATION.

THE UN DECLARATION SETS STANDARDS FOR MEMBER STATES TO MEET. THE UN DECLARATION HAS 46 ARTICLES AS WELL AS THE PREAMBLE. FOR PURPOSES OF THIS HEARING SOME ARTICLES WILL BE REFERENCED:

ARTICLE 19

STATES SHALL CONSULT AND COOPERATE IN GOOD FAITH WITH THE INDIGENOUS PEOPLES CONCERNED…IN ORDER TO OBTAIN THEIR FREE, PRIOR AND INFORMED CONSENT BEFORE ADOPTING AND IMPLEMENTING LEGISLATIVE OR ADMINISTRATIVE MEASURES THAT MAY AFFECT THEM.

ARTICLE 24

INDIGENOUS PEOPLES HAVE THE RIGHT TO THEIR TRADITIONAL MEDICINES AND TO MAINTAIN THEIR HEALTH PRACTICES, INCLUDING THE CONSERVATION OF THEIR VITAL MEDICINE PLANTS, ANIMALS AND MINERALS.

ARTICLE 26

1. INDIGENOUS PEOPLES HAVE THE RIGHT TO THE LANDS, TERRITORIES AND RESOURCES WHICH THEY HAVE TRADITIONALLY OWNED, OCCUPIED OR OTHERWISE USED OR ACQUIRED.

2. INDIGENOUS PEOPLES HAVE THE RIGHT TO OWN, USE, DEVELOP AND CONTROL THE LANDS, TERRITORIES AND RESOURCES THAT THEY POSSESS BY REASON OF TRADITIONAL OWNERSHIP OR OTHER TRADITIONAL OCCUPATION OR USE, AS WELL AS THOSE WHICH THEY HAVE OTHERWISE ACQUIRED.

3. STATES SHALL GIVE LEGAL RECOGNITION AND PROTECTION TO THESE LANDS.

ARTICLE 28

INDIGENOUS PEOPLES HAVE THE RIGHT TO REDRESS, BY MEANS THAT CAN INCLUDE RESTITUTION OR, WHEN THIS IS NOT POSSIBLE, JUST,

FAIR AND EQUITABLE COMPENSATION, FOR THE LANDS, TERRITORIES AND RESOURCES WHICH THEY HAVE TRADITIONALLY OWNED OR OTHERWISE OCCUPIED OR USED, AND WHICH HAVE BEEN CONFISCATED, TAKEN, OCCUPIED, USED OR DAMAGED WITHOUT THEIR FREE, PRIOR AND INFORMED CONSENT.

ARTICLE 29

INDIGENOUS PEOPLES HAVE THE RIGHT TO THE CONSERVATION AND PROTECTION OF THE ENVIRONMENT AND THE PRODUCTIVE CAPACITY OF THEIR LANDS OR TERRITORIES AND RESOURCES.

THE UN DECLARATION PROVIDES GUIDANCE TO MEMBER STATES AND TO GOVERNMENT DEPARTMENTS ON THE RIGHTS OF INDIGENOUS PEOPLES.
IT ALSO PROVIDES A FRAMEWORK FOR JUSTICE AND RECONCILIATION, APPLYING EXISTING HUMAN RIGHTS STANDARDS TO THE SPECIFIC HISTORICAL, CULTURAL AND SOCIAL CIRCUMSTANCES OF INDIGENOUS PEOPLES.

ANISHINABE WORLD VIEW AND MASHKIKI (MEDICINE)

CULTURE, TRADITION AND TEACHINGS OF THE ANISHINABE ARE TRANSMITTED AND SHARED IN A NUMBER OF WAYS. ONE OF THESE WAYS IS THE AADIZOOKAAN OR SACRED NARRATIVES. PLANTS AND ANIMALS ARE USUALLY REFERRED TO AS 'OUR GRANDFATHERS'. THE ANISHINABE HAVE A FUNDAMENTAL BELIEF IN THE CREATOR WHO HAS MADE ALL THINGS. ACCORDINGLY, ALL OF THE CREATOR'S CREATION IS CONSIDERED SACRED. WHEN A PLANT IS HARVESTED, TOBACCO IS OFFERED TO THE SPIRIT OF THE PLANT. THAT PLANT WHICH IS USUALLY A MEDICINE IS ASKED TO HEAL THE PERSON WHO IS IN NEED OF HEALING. THE MEDICINAL PLANTS AND TREES ARE THE PHARMACY OF THE ANISHINABE. SOME PLANTS AND TREES ARE USED IN CEREMONIAL PURPOSES SUCH AS SAGE, SWEETGRASS, CEDAR AND TOBACCO. THESE FOUR ARE THE MAIN CEREMONIAL MEDICINES USED IN CLEANSING AND PURIFICATION.

THE BALANCE BETWEEN PRESERVATION AND DESTRUCTION OF THESE SACRED MEDICINES AND PLANTS IS A VERY FRAGILE ONE. DEVELOPMENTAL PROJECTS MUST BE COGNIZANT OF THE ANISHINABE WORLD VIEW ON THE SACREDNESS OF THESE PLANTS AND TREES. THE ANISHINABE ALL STRIVE TO ACHIEVE

BIMAADIZIWIN WHICH IS A LONG, PRODUCTIVE AND HEALTHY LIFE. IN DOING SO, THE ANISHINABE STRIVE TO WALK THE RED PATH AND MAINTAIN THE RED CIRCLE, THE CIRCLE OF LIFE. THIS JOURNEY IS A LEARNING JOURNEY WHERE THE ANISHINABE RESPECTS THE SACREDNESS OF LIFE INCLUDING PLANTS AND ANIMALS. IF A PLANT OR AN ANIMAL IS HARVESTED TOBACCO IS OFFERED TO THAT 'GRANDFATHER' AND TO THE CREATOR.

IT IS INCUMBENT UPON THE ANISHINABE TO PROTECT THESE PLANTS AND TREES FROM INDISCRIMINATE DESTRUCTION. THE USE OF HERBICIDES ALONG THE CORRIDOR OF BI-POLE 111 WILL EXACERBATE THAT DESTRUCTION.

CONCLUDING STATEMENT

- THE CROWN HAS MATERIALLY FAILED IN ITS DUTY TO CONSULT AND ACCOMMODATE PEGUIS AND THE CROWN DUTY WAS PERFORMED IN AN INADEQUATE AND IMPROPER MANNER.
- PEGUIS WAS CONSTRUCTIVELY EXCLUDED FROM PARTIPICATING IN THE DESIGN OF THE EIS.
- THE EIS WAS NOT A COMPLETED STATEMENT AND BECAME A ROLLING DRAFT WITH AMENDMENTS AND ADDITIONS THAT CAUSED UNDUE HARDSHIP ON THE PARTICIPANTS.
- THE CROWN AND THE CLEAN ENVIRONMENT COMMISSION DID NOT ADEQUATELY ACKNOWLEDGE THE ABORIGINAL AND TREATY RIGHTS OF PEGUIS FIRST NATION.
- THE CAPACITY OF PEGUIS FIRST NATION TO FULLY PARTICIPATE IN THE BI-POLE111 EIS, REVIEWS AND CEC HEARINGS WAS PREJUDICED BY LACK OF ADEQUATE FUNDING THAT IS SEEN AS DISPARATE TREATMENT.
- THE INORDINATE LOW NUMBER OF FIRST NATIONS AT THE CEC HEARINGS IS A REFLECTION OF THE LACK OF DUE DILIGENCE ON BEHALF OF THE CROWN.
- THE CROWN AND THE CEC MUST BE MORE INCLUSIVE ESPECIALLY WHERE ABORIGINAL TITLE AND ABORIGINAL RIGHTS ARE ASSERTED.
- THE BI-POLE 111 PROJECT CANNOT FOCUS ONLY ON THE TRANSMISSION LINE. IT MUST CONSIDER AND INCLUDE THE CONVERTER STATIONS AND GROUND ELECTRODE SITES THAT ARE INTEGRAL TO THE OVERALL PROJECT. TO OMIT THE CONVERTER STATIONS WILL IMPUGN THE

INTEGRITY OF THE PROJECT AND BRING THE CEC HEARINGS INTO DISREPUTE.

- BASED ON THE FOREGOING, AND BASED ON JUST AND FAIRNESS, PEGUIS IN ALL CONSCIENCE CANNOT RECOMMEND THE BI-POLE 111 FOR LICENSING. PEGUIS FIRST NATION RECOMMENDS THAT THE CEC RECOMMEND THAT MANITOBA HYDRO RETURN TO BI-POLE 111 AND DO ALL THE WORK IDENTIFIED DURING REVIEWS AND THESE HEARINGS. PEGUIS FIRST NATION RECOMMENDS THE CEC NOT RECOMMEND A LICENCE UNTIL ALL DEFICIENCIES INCLUDING THE FULFILLMENT OF OUR LAND RIGHTS.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

CHIEF GLEN HUDSON ON BEHALF OF PEGUIS FIRST NATION
ON THE 13TH DAY OF MARCH 2013 AT WINNIPEG IN THE PROVINCE OF MANITOBA.