



York Factory First Nation

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March 8, 2013

Terry Sargeant
Chair
Manitoba Clean Environment Commission
305-155 Carlton Street
Winnipeg, Manitoba
R3C 3H8

Dear Mr. Sargeant:

**Re: Written Submission of York Factory First Nation
Clean Environment Commission Hearings
Bipole III Transmission Reliability Project**

This letter is to confirm the regrets of the York Factory First Nation in respect of the attendance of York Factory at the previously scheduled appearance before the Clean Environment Commission on March 7, 2013. York Factory acknowledges and appreciates the Commission's earlier accommodation and the assistance of the Secretary to the Commission in this regard.

The letter is to also confirm the request of the York Factory First Nation that the Clean Environment Commission receive and accept the attached written submission of York Factory, with attachments, as the submission of the York Factory First Nation in the matter of the Bipole III Transmission Reliability Project.

Fifteen hard copies (15) of the attached submission and attachments were also hand delivered and PDF files of the attached were also previously emailed to the Commission on November 20 and 21, 2012.

Regards,


Louisa Constant
Chief

cc. Cathy Johnson, Secretary to the Commission
Council, York Factory First Nation

York Factory First Nation

List of Submitted Documents

Clean Environment Commission
November 21, 2012 - Winnipeg, Manitoba
[Deferred to March 7, 2013]

1. Submission of the York Factory First Nation: "Achieving Social, Economic, Environmental and Treaty Justice: Licencing the Manitoba Hydro Bipole III Transmission Project"
2. Chief Constant York Factory Canadian Hydropower Association Forum 2012 [May 15 2012];
3. Defining the Pen Islands Caribou Herd of southern Hudson Bay;
4. Keeyask Infrastructure Revised Environment Act Licence (Caribou Calving) [April 13 2012];
5. YFFN Crown Consultation - Initial Objectives (Meeting with Manitoba ANA) [September 22 2010];
6. York Factory Community Meeting 2-sided Insert - 7 Themes and Bare Minimum Requirements [September 15 2010];
7. YFFN - Crown Consultation Community Notice [September 15 2010];
8. YFFN - Crown Consultation Community Notice [July 20 2010];
9. Map - YFFN - Old Fish Camp TLE Selection Map 1.
10. YFFN - 1995 AGREEMENT - PLAN 4.2 RMA [Trapline 13]; and
11. York Factory First Nation map6-2600_aboriginal_lands_750k

**Achieving Social, Economic, Environmental and Treaty Justice:
Licencing the Manitoba Hydro Bipole III Transmission Project**

Comments of Chief Louisa Constant

Clean Environment Commission
November 21, 2012 - Winnipeg, Manitoba

Tansi, good afternoon. I would like to thank the Elder for the blessing. I would also like to acknowledge and thank our Elders, Councilors, women and youth who are participating in this hearing before the Clean Environment Commission. I would like to acknowledge the Chair and members of the panel of the Clean Environment Commission. I look forward to providing our comments on how the full and meaningful engagement of the York Factory First Nation in the planning, assessment, construction and operation of the Bipole III Transmission Project and the establishment of effective terms and conditions in the *Environment Act* and other licences can help achieve social, economic, environmental and Treaty justice for the York Factory First Nation.

The comments of the York Factory First Nation regarding the Bipole III Transmission Project will address the following six matters:

1. The rights and interests of York Factory which are affected by the Bipole III Project, including existing Treaty Entitlement Parcels and the York Factory Resource Management Area;
2. The expectation of York Factory to be fully engaged in the planning, design, construction and operation of all Manitoba Hydro projects within the ancestral lands of the York Factory First Nation, including the Bipole III Project;
3. The lack of engagement of York Factory by Manitoba Hydro in the pre-project studies, design, route selection and business opportunities related to the Bipole III Transmission Project in a manner similar to that associated with the Keeyask Generation Project;

4. The lack of engagement of York Factory by the province of Manitoba in a Crown-First Nation justification, consultation and accommodation process in respect of the Bipole III Project;
5. The importance of applying the *Inninesewin* – the Traditional Knowledge and wisdom - of York Factory and of treating *Inninesewin* with equal importance and value;
6. The failure of Manitoba Hydro to treat the *Inninesewin* of York Factory with equal importance and value, with a discussion of the consideration of caribou, moose and other wildlife in the Environmental Impact Statement as examples; and
7. Conclusion

1.0 The rights and interests of York Factory which are affected by the Bipole III Project, including existing Treaty Entitlement Parcels and the York Factory Resource Management Area

When Chief Charles Wastasecoot and Councillor Robert Beardy and Councillor Sandy Beardy entered into the adhesion to Treaty 5 on August 10, 1910 at Fort York, the traditional territories and homelands of the Fort York Band included a vast area of the Hudson's Bay coast between the Churchill River and the Kettle River in Ontario and the lower Nelson and Hayes river areas.

Our oral histories say that we did not surrender the lands, waters and natural resources within our ancestral lands to His Majesty the King. Our Elders tell us that the terms of the Treaties entered into between the Treaty 5 Nations and His Majesty establish a solemn promise that the lands within our traditional territories would be shared forever between the Treaty 5 Nations and the Crown and with the settlers and others entering our traditional lands.

The terms of Treaty 5 and Treaty Commissioner Semmens confirmed a Treaty right to the economic pursuits of the Fort York Band by promising:

- that we "shall have right to pursue [our] avocations of hunting and fishing throughout" our traditional lands; and
- to ensure that we would make an annual "purchase of ammunition (...) and

twine for nets”, which were some of the most important tools of our livelihoods in 1910; and

- “to encourage the practice of agriculture”.

The exercise of the aboriginal and Treaty rights of York Factory, including the right to advance the economic pursuits of York Factory, has been significantly and adversely affected and infringed by the cumulative and irreversible adverse effects on York Factory of Manitoba Hydro’s existing developments and the regulation of water flows and levels.

York Factory has entered into the 1977 *Northern Flood Agreement* and the successor 1995 *Comprehensive Implementation Agreement* with Manitoba, Canada and Manitoba Hydro in order to address the impacts of Manitoba Hydro’s projects and operations. The province of Manitoba declared on December 15, 2000 that these agreements are modern day treaties. However, many of the commitments and obligations of Manitoba Hydro and Manitoba remain unfulfilled, such as the provision of Compensation Lands (Article 3) and the development and adoption of a Resource Management Plan and a Land Use Plan (Article 4) which would apply to the York Factory Resource Management Area.

The Commission should note that Manitoba Hydro Map 6-2600-02, “Aboriginal Lands”, does not identify that portion of the York Factory Resource Management Area which encompasses our community at York Landing, Manitoba. York Factory has provided the Commission with a corrected map adapted from Map 6-2600-02 and with a copy of Plan 4.2 from the 1995 *Comprehensive Implementation Agreement*.

York Factory has also provided the Commission with a map of the York Factory Treaty Entitlement Parcel identified as “Old Fish Camp” on the north shore of the Burntwood River at the confluence with Split Lake and of the parcel identified as “Kelsey Site” which is immediately east of the Kelsey Generating Station. Under the terms of the *Manitoba Treaty Land Entitlement Framework Agreement*, York Factory has a right to select 29,173 acres of land under the per capita provision of Treaty No. 5.

York Factory exercises Treaty and Northern Flood Agreement rights within the Study Area and the preferred route, including the right to select and set aside additional reserves of land.

2.0 The expectation of York Factory to be fully engaged in the planning, design, construction and operation of all Manitoba Hydro projects within the ancestral lands of the York Factory First Nation, including the Bipole III Project

In 2012, it remains the objective of the York Factory First Nation to make sure that the Treaty promises are honoured and continue to benefit our people "for as long as the sun shines, the grass grows and the waters flow."

It is also the objective of the York Factory First Nation to capture the opportunities and benefits from all existing and future Manitoba Hydro developments within our ancestral lands and traditional territories. The York Factory First Nation also intends to protect our citizens and our lands, waters and the environment.

The Bipole III, Keeyask and Conawapa Projects are coming. York Factory has secured a role as an equity owner in the Keeyask Project in partnership with Manitoba Hydro and the three other First Nation partners.

York Factory has provided the Commission with a copy of York Factory's May 15, 2012 presentation to the Canadian Hydropower Association Forum outlining the arrangements between York Factory and Manitoba Hydro related to the Keeyask Generation Project. In part, these arrangements are a result of the consultations and discussions conducted in accordance with the Future Development provisions (Article 9) of the 1995 Comprehensive Implementation Agreement.

It is York Factory's expectation that York Factory will be engaged in a similar manner in all Manitoba Hydro projects or Future Developments within our ancestral lands, including the Bipole III Project, including as part of measures intended to partly accommodate and reconcile the significant, cumulative and irreversible adverse effects on York Factory of Manitoba Hydro's existing developments and the regulation of water flows and levels.

3.0 The lack of engagement of York Factory by Manitoba Hydro in the design, route selection and business opportunities related to the Bipole III Transmission Project in a manner similar to that associated with the Keeyask Generation Project

The definition of a "Future Development" in the 1995 Comprehensive Implementation Agreement states:

"Future Development means:

The construction of any portion or parts of the Project not physically constructed at the Date of this Agreement; and any major redevelopment or reconstruction of any Existing Development; which is reasonably likely to have a material and continuing physical, chemical or biological impact upon a water body within the Resource Management Area." [emphasis added]

In the event that a proposed Manitoba Hydro project is determined to be a Future Development, a detailed process of information sharing and consultations must take place with York Factory, including such matters as:

9.3.2 Process

Prior to making its final selection of its option for Future Development, Hydro shall: (...)

- c. in consultation with York Factory, identify any issues of particular concern or importance to York Factory and Members;*
- d. in consultation with York Factory, identify and review potential positive and negative effects on York Factory and Members which would result from each option for Future Development;*
- g. in consultation with York Factory, consider practical and reasonable ways in which York Factory can benefit from such Future Development;*
- k. identify in a reasonably timely manner:*
 - i any employment opportunities related to Future Development which may be available for Members including any pre-requisite education or training,*
 - ii any business opportunities related to Future Development which may be available to York Factory and Members in the Resource Management Area,(...)*

As Manitoba Hydro has deemed that the Bipole III Project does not have a "material and continuing physical, chemical or biological impact upon a water body", Manitoba Hydro takes the position that the Bipole III Project is not a

Future Development under the 1995 Comprehensive Implementation Agreement and so the consultations, considerations and engagement required under the 1995 Agreement do not apply to the Bipole III Project.

Regardless of any narrow interpretation of the definition of Future Development by Manitoba Hydro, it remains York factory's expectation that such consultations and engagement are a necessary and reasonable part of measures intended to partly accommodate and reconcile the significant, cumulative and irreversible adverse effects on York Factory of Manitoba Hydro's existing developments and the regulation of water flows and levels.

York Factory has expressed its expectation that Manitoba Hydro will engage York Factory in the planning, construction and operation of the Bipole III Project in a manner consistent with a Future Development and substantially similar to that followed for the Keeyask project (see again the May 15, 2012 presentation to the Canadian Hydropower Association Forum). However, York Factory has not been meaningfully engaged by Manitoba Hydro in consideration of how the multi-billion dollar Bipole III Project can benefit York Factory.

4.0 The lack of engagement of York Factory by the province of Manitoba in a Crown-First Nation justification, consultation and accommodation process in respect of the Bipole III Project

York Factory has not been engaged by Manitoba in a Crown-First Nation consultation and accommodation process regarding the Bipole III Project, even though York Factory has requested such consultations at least as early as September, 2010.

York Factory has provided the Commission with several documents describing York Factory's perspectives, efforts and objectives since 2010 to engage Manitoba in Crown-First Nation consultation and accommodation processes regarding a number of Manitoba Hydro projects and several other matters.

For example, the back page of the July 20, 2010 YFFN - Crown Consultation Community Notice and newsletter highlights that the Assistant Deputy Minister of Manitoba Conservation and other provincial representatives were in York Landing to discuss the development of a Comprehensive Consultation Agreement which would provide for multiple consultation and accommodation

processes.

The September 15 2010 Community Notice and the two-sided insert setting out the "7 Themes and Bare Minimum Requirements" highlight the rapid development of York Factory's perspectives and expectations regarding the Crown's Duty to Consult and the Comprehensive Consultation Agreement.

The September 22, 2010 document "YFFN Crown Consultation - Initial Objectives" confirms that York Factory identified the Bipole III Project as being within the scope of the consultations under the proposed Comprehensive Consultation Agreement. York Factory provided Manitoba with a proposed draft Comprehensive Consultation Agreement shortly after this meeting.

The Comprehensive Consultation Agreement was signed by Manitoba and York Factory on November 8, 2012, more than two years after discussions commenced. The Schedule 1 to the Comprehensive Consultation Agreement confirms that consultations on the Bipole III project are subject to the Agreement. In light of the advanced project schedule, York Factory looks forward to commencing the Bipole III consultations in the very near future.

York Factory is also looking for Manitoba's and Manitoba Hydro's commitment to support the development of the Land Use Plan and the Resource Management Plan under Article 4 of the 1995 Comprehensive Implementation Agreement as a practical way to capture and benefit from First Nation and Crown investments in Traditional Land Use Studies and other land use information and to facilitate future consultation and accommodation processes.

5.0 The importance of applying the *Inninesewin* of York Factory and of treating *Inninesewin* with equal importance and value

Even though York Factory is moving forward with the Keeyask Project as one of the owners and project partners, our Elders remind us that the York Factory First Nation should not - and cannot - forget that we experience the cumulative and irreversible social, cultural, spiritual and environmental impacts of Manitoba Hydro's previous projects every single day.

York Factory has acknowledged that the construction and operation of the Keeyask Project is inconsistent with our Customary Laws and our obligations to

protect *N'tuskenan*.

It is very important for York Factory to apply our role in the Keeyask Project, and in all Manitoba Hydro projects within our ancestral lands, to achieve *Kwayaskonikiwin* – reconciliation and a balance - between our Customary Laws and Manitoba Hydro's projects and operations.

By working to apply our Customary Law principles to guide the design and environmental assessment and the construction, operation and monitoring of Manitoba Hydro projects, we can help make sure that we achieve a reconciliation and balance between Manitoba Hydro's projects and our Customary Law.

To help us achieve a balance, it is important for York Factory to incorporate our wisdom and Traditional Knowledge - our *Inninesewin* - and Customary Law principles into all aspects of Bipole III Project, including the any Project Development Agreement, the heritage resources protection plans, the environmental protection plans, the environmental monitoring plans and the project monitoring plans.

The September, 2004 Report of the Commission in the Wuskwatim Generation and Transmission Projects observes in respect of Traditional Knowledge:

"In this report the Commission uses the terms Western Scientific Knowledge (WSK) and Traditional Scientific Knowledge (TSK) and accords them equal importance and value throughout the report." [emphasis added]

To help make sure that *Kwayaskonikiwin* will take place according to our vision and in accordance with our obligations under the Customary Law, we must also rebuild and strengthen our existing relationships and create new relationships. The Commission must ensure that the *Inninesewin* of York Factory is meaningfully sought and is accorded an equal importance and value by Manitoba Hydro, government and others.

6.0 The failure of Manitoba Hydro to treat the Traditional Knowledge of York Factory with equal importance and value, with a discussion of the consideration of caribou, moose and other wildlife in the Environmental Impact Statement as examples

York Factory has considerable experience in the documentation and practical application of Traditional Knowledge and in the conduct of Traditional Land Use Studies. For example, York Factory previously carried out a detailed Traditional Knowledge Study associated with the planning and establishment of Wapusk National Park. York Factory and Fox Lake representatives make up one half of the Management Board of Wapusk National Park in accordance with the Wapusk National Park Establishment Agreement and Traditional Knowledge is regularly considered by the Park Management Board.

York Factory has been working to ensure that we can document and fully incorporate our Traditional Knowledge into the Keeyask Project and has carried out some Traditional Knowledge studies related to the re-runnings of the Kelsey Generating Station Project and the Conawapa Project.

York Factory has also requested that Manitoba Hydro support York Factory's efforts to document, develop and complete our Land Use Management Plan and our Resource Management Plan and to make sure that these Plans are applied as important elements of the planning and environmental assessment for the Bipole III Project, the Keeyask Project and the Conawapa Project.

York Factory has also been working to clarify the role of the Resource Management Board established by the 1995 Comprehensive Implementation Agreement in the planning, review, assessment and approvals of Manitoba Hydro projects. The York Factory Resource Management Board has not been engaged by Manitoba Hydro or Manitoba in the consideration of the Bipole III Project.

As previously noted, York Factory has repeatedly requested that Manitoba and Manitoba Hydro support the development of the Land Use Plan and the Resource Management Plan under Article 4 of the 1995 Comprehensive Implementation Agreement as a practical way to capture and benefit from First Nation and Crown investments in Traditional Land Use Studies and other land use information.

Manitoba Hydro did not seek and has, to our knowledge, not applied the Traditional Knowledge of York Factory as part of the planning and assessment of the Bipole III Project.

York Factory makes the following general comment on the consideration and application of Aboriginal Traditional Knowledge in the EIS:

1. The EIS must contain meaningful explanations of the identification, consideration or application of Aboriginal Traditional Knowledge (ATK), for example:

- a) as part of any suggestion that ATK played a role in project design, the EIS should explain:
 - i) how ATK was contributed or solicited;
 - ii) what ATK was considered;
 - iii) which elements of the project design took ATK into account; and
 - iv) how the final project design is different as a result of the consideration of ATK.
- b) as part of any suggestion that ATK will play a role in future monitoring activities, the EIS should explain:
 - i) how ATK was identified, documented, contributed or solicited;
 - ii) how ATK was considered;
 - iii) which elements of the project monitoring will take ATK into account;
 - iv) in the context of monitoring, how ATK is expected to assist in addressing any gaps in baseline information or the prediction of impacts; and
 - v) in the context of regulatory requirements, including licence terms and conditions, how ATK can assist in addressing gaps in baseline information or prediction of impacts.

2. Where the EIS makes reference to effects on caribou, in particular, to the effects related to the disruption or fragmentation of areas used by caribou during calving and to any suggestion in respect of the availability of alternative suitable caribou habitat:

- a) the EIS should describe the analysis applied to arrive at any conclusion in respect of effects on caribou due to the availability of alternative habitat and identify the sources of the information relied upon;
- b) as to the location and nature of any alternative caribou habitat, the comments in the EIS should make a clear distinction between habitat used by caribou during non-calving periods and habitat used

- by caribou during calving;
 - c) in the event that any conclusions set out in the EIS in respect of caribou rely upon an assumption as to the availability of alternative caribou calving habitat, the EIS should specifically indicate whether it is assumed that any such alternative caribou calving habitat will actually be used, and if so, identify the analysis applied and the sources of the information relied upon; and
 - d) in the event that ATK is a source of the information relied regarding the conclusions in respect of the effect of the loss of caribou calving islands, the EIS should provide the information identified at 1(a)(i) through 1(a)(iv), inclusive.
- 3. As to the preparation of comments in the EIS comments regarding the effects of the Project on Lake Sturgeon or other fish species, including in the context of the monitoring of the effects of the Project on the populations of Lake Sturgeon and other fish species:
 - a) where ATK is a source of the information relied regarding the conclusions in respect of the effect on Lake Sturgeon and other fish species, the EIS should provide the information identified at 1(a)(i) through 1(a)(iv), inclusive; and
 - b) where the EIS suggests and appears to rely upon the role of ATK in the monitoring of the effects on Lake Sturgeon and other fish populations, the EIS should provide the information identified at 1(b)(a) through 1(b)(v), above.
- 4. As to the preparation of comments in the EIS on the effects on historic, heritage and cultural resources:
 - a) in the event that ATK is a source of the information relied regarding the conclusions in respect of the effect on historic, heritage or cultural resources, the EIS should provide the information identified at 1(a)(i) through 1(a)(iv), inclusive; and
 - b) in the event that the EIS may suggest or rely upon the role of ATK in the monitoring of the effects on historic or heritage resources, the EIS should provide the information identified at 1(b)(a) through 1(b)(v), above.
- 5. Where the EIS identifies an effect on people, fish, wildlife, trees, plants, peatlands, waters, lands or other resources, the EIS should clearly:

- a) identify the effect (such as the clearing or grubbing of forested lands, berries, medicines or peatlands);**
- b) quantify the effect (such as by species, volume or area); and**
- c) assign an economic value to the effect.**

York Factory considers caribou, much like Lake Sturgeon, to be integral to the cultural identity of the York Factory Cree.

York Factory is very concerned that Manitoba Hydro has not meaningfully sought the Traditional Knowledge of York Factory regarding the study of caribou in the Bipole III Study Area, along the preferred route and in the Lower Nelson River and Hayes River areas generally.

During various meetings over the past several years regarding the pre-project studies related to the Keeyask Project, York Factory representatives and Traditional Knowledge holders have consistently advised Manitoba Hydro of the presence of boreal woodland caribou in the project area.

As noted, Manitoba Hydro has not engaged York Factory in respect of the pre-project studies, planning and design of the Bipole III Project.

In the public literature associated with the Keeyask Project, Manitoba Hydro has characterized the caribou in the Keeyask Project and Lower Nelson River areas as "coastal caribou". Similarly, Manitoba and Environment Canada do not recognize the existence of boreal woodland caribou in the Keeyask project, the Lower Nelson River or upper Hayes-Pennycutaway River areas.

York Factory is concerned that, on April 13, 2012, Manitoba Conservation unilaterally removed from the conditions of the Keeyask Project Infrastructure Licence to document caribou calving areas and to remove the corresponding provisions in the Monitoring plan. York Factory had not been part of any discussion of any proposal to remove the requirement to document caribou calving areas from the Environment Act Licence or to remove the corresponding provisions from the Monitoring Plan. York Factory has provided a copy of this correspondence to the Commission.

Especially considering the importance of correctly identifying caribou calving areas and understanding calving behavior as part of the identification and

definition of the various caribou herds in the Lower Nelson River and upper Hayes-Pennycutaway River areas, York Factory is very concerned Manitoba is intentionally taking steps to reduce the available science on caribou calving, not to enhance the available information.

York Factory has provided the Commission with a copy of the article appearing in the *Defining the Pen Islands Caribou Herd of southern Hudson Bay*, which report was originally submitted at The Seventh North American Caribou Conference held in Thunder Bay, Ontario, on August 19 through 21, 1996. The article was developed using unpublished historical information from three of Manitoba's most experienced caribou biologists, Vince Crichton, Steve Kearney (recently retired as Northeast Regional Director of Manitoba Conservation) and Cam Elliot (formerly a long-time Superintendent of Wapusk National Park).

The calving area of the Pen Island woodland caribou herd in the 1980's is shown at Figure 2 of *Defining the Pen Islands Caribou Herd of southern Hudson Bay* as a discreet band of coastal tundra along the Hudson Bay coast between the Kettle and Niskibi Rivers. Calving takes place in the spring, meaning that calving female caribou from the Pen Island herd are located at or nearby the Hudson Bay coast in the spring.

Also of significance is the information in *Defining the Pen Islands Caribou Herd of southern Hudson Bay*, which in part relied upon the observations of Traditional Knowledge holders from Shamattawa, that the movements of caribou defined as the Pen Island herd seasonally gravitated toward the inland areas as far as Gillam in the fall and winter and back toward the Hudson Bay coast in the spring and summer.

The Supplemental Caribou Technical Report, August, 2012, makes a reference to this earlier research at page 77 in noting that caribou have moved from the former Pen Island calving areas between the Kettle and Niskibi Rivers at the Manitoba-Ontario boundary and are more recently reported as calving further eastward to an area of the Hudson Bay coast between Fort Severn and Peawanuck, Ontario.

The report, *Defining the Pen Islands Caribou Herd of southern Hudson Bay*, refers to a description by Shamattawa hunters of some caribou in the upper Hayes River area as "woodland" caribou. Reports of woodland caribou in the

Lower Nelson River and upper Hayes-Pennycutaway River areas are reiterated by York Factory Traditional Knowledge holders.

The Supplemental Caribou Technical Report appears to identify at least some of the caribou described as woodland caribou by York Factory Traditional Knowledge holders (and possibly previously by hunters from Shamattawa) as the "Gillam Area Pen Island Caribou".

However, it is apparent that the behavior of the "Gillam Area Pen Island Caribou", particularly in relation to the location of spring calving, significantly differs from the calving behavior of those woodland caribou identified as the Pen Island herd in *Defining the Pen Islands Caribou Herd of southern Hudson Bay* and at page 77 of the Supplemental Caribou Technical Report.

Even though there is clearly a difference between the Traditional Knowledge of York Factory and the information being relied upon by Manitoba Hydro in respect of caribou, particularly in respect of the definition of caribou herds in the Lower Nelson River and upper Hayes-Pennycutaway River areas, Manitoba Hydro has not meaningfully engaged the Traditional Knowledge holders of York Factory to assist in clarifying these matters.

Particularly in respect of pursuit of a better understanding of caribou in the Bipole III Study Area and along the preferred route and in the areas of the other Project elements, Manitoba Hydro has failed to accord the Traditional Knowledge of York Factory with equal importance and value.

7.0 Conclusion

York Factory looks forward to the support of the Clean Environment Commission in strengthening our relationship with Manitoba and Manitoba Hydro regarding the Bipole III Project and in recommending terms and conditions in order for York Factory to effectively address the opportunities and issues within our ancestral homelands in ways that are consistent with the Treaties and with our traditions and with our customary approaches to sharing, cooperation and decision-making.

Kinanaskomitin, Ekosi!



The York Factory First Nation and the Keeyask Generating Station Project:

Building Value Through Partnership



The York Factory First Nation and the Keeyask Generating Station Project

- **The York Factory First Nation is working with our partners Manitoba Hydro and the other Keeyask Cree Nations - the Tataskweyak Cree Nation, the War Lake First Nation and the Fox Lake Cree Nation - to develop the 695 megawatt (MW) Keeyask Generating Station.**
- **The Keeyask Generating Station is located at Gull Rapids on the Nelson River in Northern Manitoba.**
- **“Keeyask” means gull in the Cree language.**
- **The formal announcement of the decision to proceed with the Keeyask Generation Project was made on June 28, 2011.**



Building Value and Benefits Through Partnership

- **York Factory has long taken the view that the further development of hydroelectric projects in northern Manitoba can only proceed with the direct partnership of the First Nation peoples most directly affected.**
- **York Factory has also determined that any future hydro developments within our ancestral lands must advance our community and economic interests through York Factory's equity ownership and by working in partnership with Manitoba Hydro.**
- **York Factory has been involved in negotiations with Manitoba Hydro and the other Keeyask Cree Nations since 2001.**



Future Development Through Equity Partnership

- **York Factory has determined that participating in the Keeyask Generating Station Project can result in benefits for the citizens of the York Factory First Nation.**
- **York Factory has negotiated the opportunity to purchase up to a 5% equity interest in the Keeyask Generating Station Project.**
- **In addition to participating in the employment, business opportunities and investment opportunities in Keeyask, York Factory is working to ensure that our values and principles and perspectives are addressed in the Environmental Impact Assessment related to Keeyask.**



Stewards of *N'Tuskenan* – Our Land and Waters

- **As stewards of our lands, the York Factory First Nation has a duty to protect our lands, waters, fish, wildlife and medicines that are so important to the citizens of the York Factory First Nation.**
- **The Elders of the York Factory First Nation remind us that it is important that York Factory acknowledges that the construction and operation of the Keeyask Project is inherently inconsistent with our Customary Laws and our obligations to protect Mother Earth.**
- **Our Elders also remind us that even though we are now looking at a new hydro project, the York Factory First Nation cannot forget that we experience the irreversible social, cultural, spiritual and environmental impacts of Manitoba Hydro's previous developments on the Lower Nelson River every single day.**



Achieving *Kwayaskonikiwin*

- It is important for York Factory to achieve *Kwayaskonikiwin* – which means achieving a reconciliation and restoring balance in the Cree language - between our Customary Laws and the Keeyask Project.
- The York Factory First Nation is working to ensure that balance is maintained by including our *Ethinesewin* – the Traditional Knowledge of our Elders, resource users and community – in the project design and in the Environmental Impact Assessment for the Keeyask Project.



Incorporating York Factory Values and Principles

- **By working to incorporate our Customary Law principles into all aspects of the planning, development and operation of the Keeyask Project, we can help make sure that we achieve a reconciliation and balance between the Keeyask Project and our Customary Law.**
- **These areas include or will include:**
 - **Project Development Agreement**
 - **Adverse Effects Agreement**
 - **Heritage resources protection plans**
 - **Environmental protection plans**
 - **Environmental monitoring plans**
 - **Project monitoring plans**
 - **Access management plans**



Securing Benefits and Value

- **Further to Article 9 of our 1996 Comprehensive Implementation Agreement, York Factory and Manitoba Hydro have also negotiated important areas of benefits related to the Keeyask Project.**
- **These include:**
 - **Project Planning**
 - **Ownership Opportunities**
 - **Training & Employment**
 - **Business Opportunities**
 - **Environmental Monitoring**



Significant Project Agreements

- **To secure our objectives, York Factory has entered into several agreements and processes with our partners Manitoba Hydro and the other Keeyask Cree Nations - the Tataskweyak Cree Nation, the War Lake First Nation and the Fox Lake Cree Nation.**
- **These include:**
 - **Project Development Agreement**
 - **Adverse Effects Agreement**
 - **Hydro Northern Training and Employment Initiative**
 - **Wuskwatim Keeyask Training Consortium**



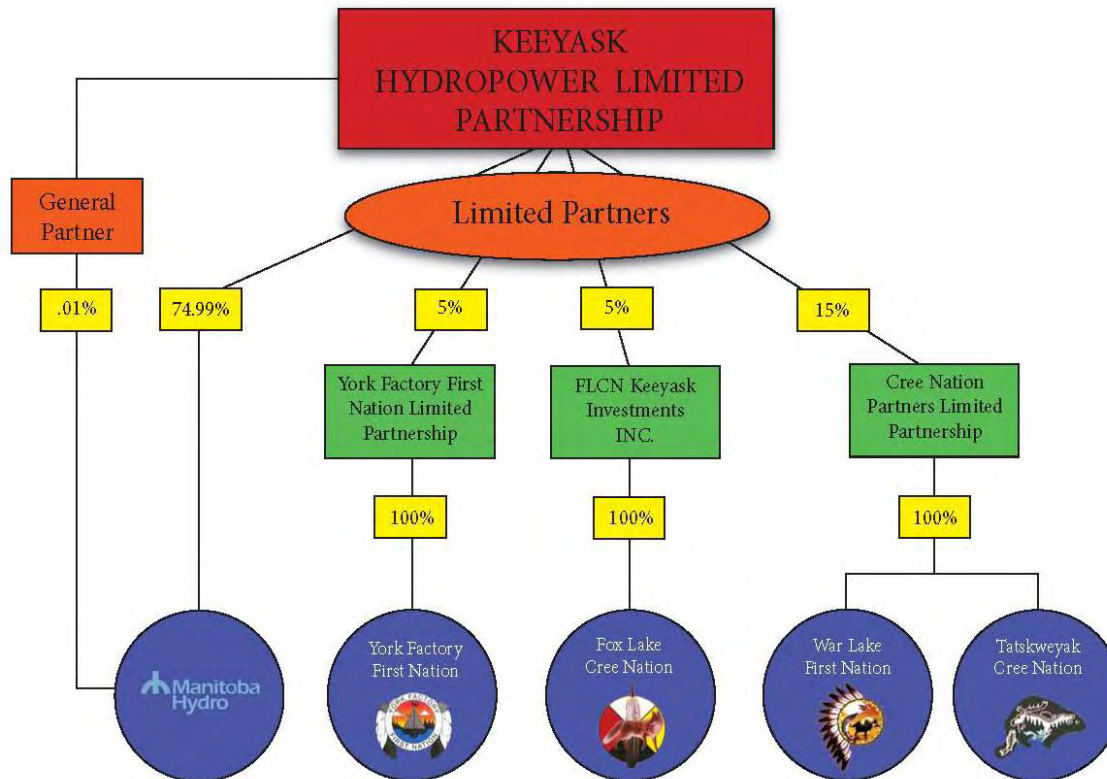
Joint Keeyask Project Development Agreement

- **The Joint Keeyask Development Agreement is a legal agreement that has been negotiated between Manitoba Hydro, York Factory First Nation, the Fox Lake Cree Nation and the Cree Nation Partners (Tataskweyak Cree Nation and War Lake First Nation).**
- **The Agreement sets out:**
- **The terms of a partnership, through which Manitoba Hydro and the four First Nations would become co-owners of, and investors in, the Keeyask Generating Station.**
- **The rules for how the partners would invest in and receive revenues from the project.**
- **The provisions for training and employment, business opportunities, the construction and operation of the project, and environmental monitoring of the project.**



Joint Keyask Project Development Agreement

KEYYASK LIMITED PARTNERSHIP CORPORATE STRUCTURE





Pre-Project Training

- The Wuskwatim Keeyask Training Consortium provided \$45 million in pre-project training.
- \$33.75 million was allocated to Keeyask Cree Nations' training funds for the pre-project training of York Factory citizens.
- York Factory's portion of the pre-project training dollars was \$6.75 million.
- Other training and employment provisions are outlined in the Joint Keeyask Development Agreement and the Burntwood Nelson Agreement.



Pre-Project Training

- Training courses offered have included:
- Carpentry
- Heavy equipment operation
- Job readiness
- Cooking
- Security
- High school equivalency
- Electrical
- Financial officer training
- Computer literacy



Employment and the Burntwood-Nelson Agreement

- **The Burntwood-Nelson Agreement is a collective agreement between the Hydro Projects Management Association, which represents contractors, and the Allied Hydro Council of Manitoba, which represents Unions.**
- **The Agreement sets out terms of employment for all workers and employees who work on hydro construction projects in Northern Manitoba, including Aboriginal workers.**
- **Under the terms of the JKDA, employment at Keeyask will be governed by the BNA and also by a Letter of Agreement applying to the Keeyask Project to be negotiated with Unions.**

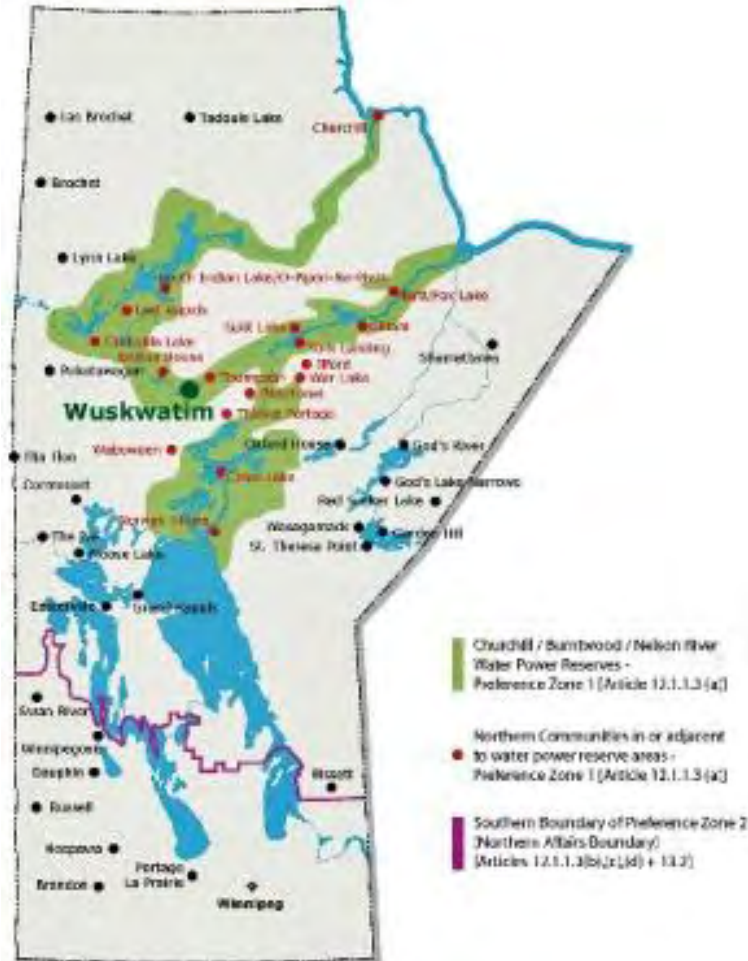


Employment and the “Northern Preference Clause”

- The Burntwood-Nelson Agreement includes a “northern preference clause” requiring that employment on all major northern hydroelectric projects will be offered first to job-qualified Northern Aboriginal peoples who:
 - Qualify as Northern Residents
 - Register with the job placement and referral agency for the Keeyask Project
 - Who reside in the Churchill River, Burntwood River and Nelson River region



Northern Employment Preference Zone





Directly Negotiated Contracts

- **As part of the JKDA negotiations, a number of business contracts have been allocated to each respective Keeyask Cree Nation with a total estimated value of \$203 million.**
- **Specific contracts are reserved for the Keeyask Cree Nations and business contracts are secured through direct negotiations with Hydro by KCNs.**
- **First preference will be given to members of Keeyask Cree Nations.**



First Nation Shares of Directly Negotiated Contracts

- **Manitoba Hydro has divided the direct negotiating contracts based on the total populations of each First Nation, as follows:**
 - **60% to Cree Nation Partners**
 - **20% to York Factory**
 - **20% to the Fox Lake Cree Nation**
- **York Factory and Fox Lake have agreed to jointly negotiate their 40% share of Keeyask-related business contracts.**
- **York Factory has secured 3 service contracts as part of the JKDA negotiations.**



Directly Negotiated Contracts

BUSINESS OPPORTUNITIES OFFERED THROUGH THE JKDA IDENTIFIED WORK PACKAGES

IDENTIFIED WORK PACKAGES
(\$203,100,000 - VALUE AS OF JULY 2007)

CREE NATION PARTNERS

YORK FACTORY FIRST NATION

FOX LAKE CREE NATION

CREE NATION PARTNERS
(Tataskweyak Cree Nation & War Lake First Nation)

SERVICE CONTRACTS:

- Camp Maintenance Services
- First-Aid Services

INFRASTRUCTURE CONTRACTS - CAMPS:

- Start-Up Camp - Site Preparation & Development
- Main Camp - Site Preparation & Development
- Main Camp Sewer & Water Services
- Construction Power (ROW) Cleaning
- Main Camp - Decommissioning

INFRASTRUCTURE CONTRACTS - ROADS:

- North Access Road Construction
- South Access Road Construction

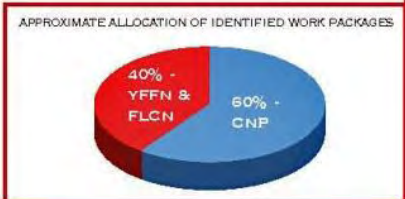
PRINCIPAL STRUCTURES CONTRACTS:

- Forebay Cleaning
- Painting and Architectural Finish

**YORK FACTORY FIRST NATION
&
FOX LAKE CREE NATION**

SERVICE CONTRACTS:

- Catering
- Security Services
- Employee Retention and Support Services





“Identified Work Packages”

- **The “Identified work packages” allocated to York Factory and Fox Lake include:**
- **Catering:** York Factory and Fox Lake would provide complete catering services for Keeyask GS project camps.
- **Security Services:** York Factory and Fox Lake would provide security services 24 hours and 7 days per week at camps, work areas and related facilities (excluding Contractor’s work areas).
- **Employee Retention and Support Services:** York Factory and Fox Lake would provide Employee Retention and Support services for project employees.



Business Arrangements Outside of Keeyask Joint Development Agreement

- **YFFN has a number of on-going business contracts outside of the JKDA.**
- **These include:**
 - **Catering contracts at Manitoba Hydro's Kelsey and Laurie River projects**
 - **Camp services for environmental field studies at York Factory's Silver Goose Lodge**
 - **Employment Services for the Keeyask and Conawapa field study programs**



Future Generations

- **The York Factory First Nation looks forward to working together with the Keeyask Cree Nations and Manitoba Hydro and with the province of Manitoba to ensure that that the Keeyask Generating Station Project will benefit the present and future generations of the York Factory First Nation and all First Nations peoples in northern Manitoba.**
- **Kinanaskomitin, thank you.**

Defining the Pen Islands Caribou Herd of southern Hudson Bay

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Abstract: In this paper, we describe the Pen Islands Herd of caribou, the largest aggregation of caribou in Ontario (it also occupies a portion of northeastern Manitoba). Photographic counts showed the herd had a minimum population of 2300 in 1979, 4660 in 1986, 7424 in 1987 and 10 798 in 1994. Throughout the 1980s, the Pen Islands caribou exhibited population behaviour similar to migratory barren-ground caribou herds, although morphology suggests they are woodland caribou or possibly a mixture of subspecies. The herd had well-defined traditional tundra calving grounds, formed nursery groups and large mobile post-calving aggregations, and migrated over 400 km between tundra summer habitats and boreal forest winter habitats. Its migration took it into three Canadian jurisdictions (Ontario, Manitoba, Northwest Territories) and it was important to residents of both Manitoba and Ontario. It is clear that the herd should be managed as a migratory herd and the critical importance of both the coastal and variable large winter ranges should be noted in ensuring the herd's habitat needs are secure.

Key words: woodland caribou, Ontario, Manitoba, migration, population size, annual range.

Rangifer, Special Issue No. 10, 33–40

Introduction

Woodland Caribou (*Rangifer tarandus caribou*) are found throughout northern Ontario north of about 50°30' north latitude (Darby *et al.*, 1989). The Hudson Bay Lowlands contains the majority of the province's caribou, including aggregations that occur along the Hudson Bay coast (Fig. 1). In the late 1970s and early 1980s, evidence accumulated about increasing numbers of caribou summering near the Ontario-Manitoba border (Thompson & Abraham, 1994). It was thought that this summer aggregation might be the source of the increasing number of observations of caribou in winter in the boreal forest of extreme northeastern Manitoba and northwestern Ontario. In addition to the many questions of biological interest raised, the discovery of so many caribou had several implications for harvest by the Cree people of the area, tourism and jurisdictional management. These implications provided the impetus for the Ontario Ministry of Natural Resources (OMNR) to undertake a 3 year study to document the characteristics of the herd.

The objectives of this paper are: 1) to review the history of caribou occupation of the Hudson Bay

Lowlands between Ft. Severn, Ontario and York Factory, Manitoba; 2) to define the size of this herd during the 1980s and early 1990s, and 3) to delineate the annual range and seasonal use areas.

Study area

East Pen Island lies offshore from Ontario and is thus part of the Northwest Territories. West Pen Island, formerly an island but now a peninsula of the Ontario coast, lies to the southwest of East Pen Island, within 5 km of the Manitoba border (Fig. 1). Because these islands are near the longitudinal centre of the calving and summer range where the first evidence of a large summer aggregation was obtained, we named this group of caribou the Pen Islands Herd.

The study area comprised an area of approximately 80 000 km² in extreme northwestern Ontario and northeastern Manitoba (Fig. 1). It is bounded on the east by the Severn River, on the north by Hudson Bay, on the west by the Nelson River, and on the south (at approximately latitude 55° N) by God's Lake, Edmund Lake, Kistigan Lake

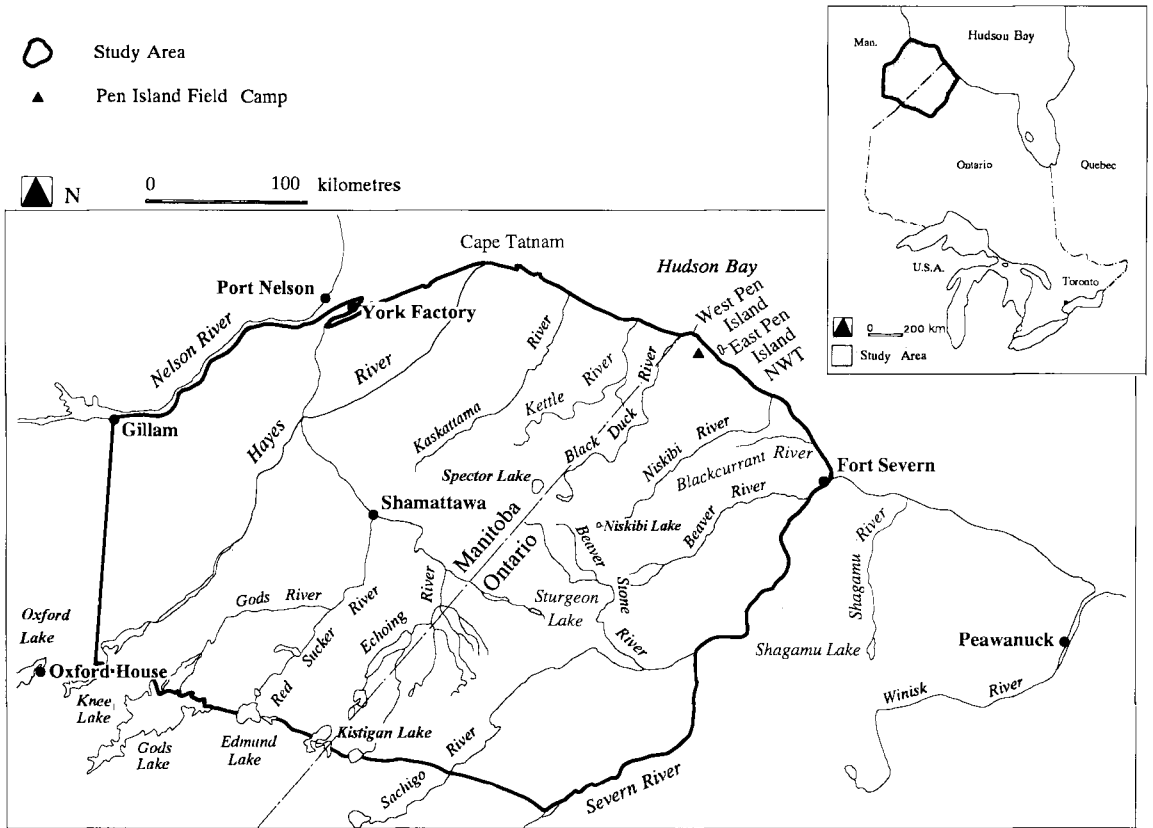


Fig. 1. Pen Islands caribou study area in Ontario and Manitoba and southern Hudson Bay coast showing places of caribou groups and movements described in text.

and the upper reaches of the Echoing River watershed. The majority of the study area is in the Hudson Bay Lowland physiographic region (Hutchison, 1982) and the remainder is on the Canadian Shield (Rowe, 1972). Within this broad study area, spring, summer and fall studies were concentrated between the Niskibi River, Ontario and Cape Tatnam, Manitoba and within 20 km of Hudson Bay (the Forest-Tundra zone of Rowe, 1972). Winter radio-tracking and aerial surveys defined the inland extent of the study area.

Methods

Historical information on caribou numbers, distribution and harvest was assembled from published and unpublished reports, OMNR and Manitoba Department of Natural Resources (MDNR) files, researchers' notes and Lowland residents.

Visual and photographic aerial surveys were flown in the coastal portion of the study area to locate important areas and to estimate population size in summer. We conducted a total of 26 reconnaissance and photographic aerial surveys on a subjective schedule between 25 May 1987 and 13 June 1989. Aggregations were photographed to obtain total population surveys on 11 July 1986, 25-26 May, 22-23 June and 14 July 1987 and 20 July 1988.

Caribou were captured and collared or tagged in two separate time periods. The first session was during the rut from 28 September to 5 October 1987 when 21 females and 2 males were captured and fitted with radio-collars. The second session was from 7 to 14 June 1988 just after calving when 4 females (all collared) and 23 males (13 collared, 10 ear-tagged) were captured. We conducted a total of 25 telemetry surveys between 28 October 1987

and 27 March 1990, approximately bi-weekly during winter to locate collared caribou. The annual ranges of the 23 caribou tagged during the rut in September-October 1987 and the 27 caribou tagged during early aggregation period in June 1988 were overlapping and indicated that both sets of captured animals did come from the same population. Therefore, these two groups are combined for analysis and discussion of the Pen Islands Herd characteristics. Annual range was estimated by creating an outer convex polygon of locations of radio-marked caribou each year.

A detailed description of methods is provided in an OMNR internal report by Thompson & Abraham (1994).

Historical perspective on caribou in the Pen Islands area

Relatively little quantitative information is available on the historic numbers, distribution or behaviour of caribou in the Hudson Bay Lowland, particularly along the Hudson Bay coast. The earliest written records are from the period of Hudson's Bay company settlement in the 1700s. Andrew Graham (in Williams, 1969:14-16) describes "reindeer" as being "several kinds" and "very numerous" in the 1770s along the Hudson Bay coast. He mentions their great importance in the diet of Indians and in the local economy. He also provides a vivid description of their "southward" migratory movement in May along the coast past the "York Fort" (now York Factory) and "Severn" (now Fort Severn) settlements and their return "northward" migratory movement in September. Finally, he notes them as "rarely seen within eighty or one hundred miles of the coast" between November and April. Other early accounts of caribou in this area by S. Hearne, N. J  r  mie, and J.B. Tyrrell were summarized in Banfield (1961:85); these noted migration between forested interior areas and coastal tundra. Banfield (1961) also raised a question of taxonomic status of "the herds that formerly inhabited the southern Hudson Bay coast from Cape Henrietta Maria, Ontario to Cape Churchill, Manitoba". The question he posed (and left unanswered) was whether they were "migratory woodland caribou" or the "southernmost tundra caribou". Despite rapid reduction of the herds through heavy killing in the eighteenth century, apparently a few migratory bands still existed as late as 1912. The caribou that Banfield himself examined in northeastern Manitoba in 1949

"appeared to be woodland caribou" but interestingly, he noted that the area was "overrun by migrating tundra reindeer" at the time. Despite the observation, he offered qualified conclusions that "reduction of local populations has apparently curtailed the migratory habit" and that the area was a "possible ... area of intergradation between the subspecies." de Vos & Peterson (1951) stated that woodland caribou occurred widely in scattered herds but also noted that they were "absent from a fringe along the Hudson Bay in the northwestern part" of Ontario.

In the 1950s and 1960s, a series of surveys of the Hudson Bay Lowland was made during summer, fall and winter. Winter surveys (Simkin, 1962; 1964; 1966; 1967) and interviews with Cree living in the area revealed that the coastal zone was virtually unoccupied in winter, just as Graham had noted so much earlier, except that there was a small group north of Sutton Lake toward Cape Henrietta Maria (de Vos & Peterson, 1951; D. Simkin, pers. comm.). Simkin found caribou in winter (January to March) 50-100 miles inland from Hudson Bay and showed winter densities in these interior Lowland forests to be similar to densities in the bulk of Ontario's boreal forest. Occasional winter surveys conducted between 1959 and 1982 by Ontario and Manitoba provincial employees documented caribou distribution and densities in parts of our study area. Although winter concentration areas were mapped, neither month to month movements nor annual variation in areas occupied were known and no population estimates were made that could be related to the entire study area we defined. Thompson (1986) presented results of a survey conducted from 1981-1983 and summarized all previous winter caribou surveys from the Ontario Hudson Bay Lowland. The 1981-83 surveys re-confirmed the absence of caribou from the coastal zone in winter, and documented significant wintering concentration areas at the habitat boundary of the Hudson Bay Lowlands Forest and the Northern Boreal Forest (terminology of Rowe, 1972) particularly around Sturgeon Lake, Ontario and the upper reaches of the Echoing River near the Manitoba border.

Simkin's (1959) interviews with Cree residents provided accounts of caribou movement inland in November (i.e., away from open tundra areas to forested areas) and coastward in February and March, a pattern that appears to have held true for the entire Hudson Bay coast. During our community visits from 1987-90, Fort Severn hunters related their accumulated knowledge of caribou in their

areas of activity. They reported that caribou were thinly scattered over this portion of the Lowland about 50 years ago. In more recent years, they noted the migratory nature of these animals, particularly an east to west movement to the coast in April when the snow is crusted (J. Stoney, pers. comm.) and an increase in summer numbers on the coast. Fort Severn hunters distinguished three types of caribou within and near their hunting grounds: small caribou north of the Nelson River called "little white ones", the Pen Islands animals, and larger "woodlands" caribou. Their caribou harvesting habits incorporated a shift from mainly inland hunting to coastal harvesting in the early 1970s.

Independent discussions we had at this time with Shamattawa, Manitoba, Cree hunters revealed similar information. They also distinguished three types. Shamattawa hunters began to see and hunt the migrating caribou in about 1980 (possibly the Pen Islands Herd) in addition to the more usual resident "woodlands" caribou and the Cape Churchill caribou with thinner hides and "pelage like a rabbit". Corresponding reports from Manitoba Department of Renewable Resources (S. Kearney, pers. comm.) suggested increases in winter use of the boreal forest in extreme northeastern Manitoba near the Ontario border, including the Shamattawa area and the Echoing River watershed, during the early 1980s. Movement patterns reported by Shamattawa Cree hunters were westward movements in the fall towards Oxford House (Fig. 1) and return movements in winter and towards the coast in spring.

Information from both Fort Severn and Shamattawa revealed an awareness that beginning in the early 1970s, caribou seemed to concentrate in summer near the Pen Islands. Interestingly, neither community was aware of the location of calving. Taken as a whole, the information from Fort Severn and Shamattawa pointed either to an increasing herd in the Pen Islands area or, alternately, a range shift (from the interior or further north along the coast?) and increased use of coastal areas in spring and summer and interior areas in winter in extreme northwestern Ontario and northeastern Manitoba. We cannot distinguish between these alternatives.

Generally missing from both the technical and Native accounts is a comprehensive understanding of numbers, distribution and behaviour of caribou in the Lowland during the snow-free seasons. In summer surveys, Simkin (1959; 1961; 1965) recorded small bands along the Hudson Bay coast from

Cape Henrietta Maria to the Manitoba border. The largest summer group he recorded was 41, with averages from 6 to 9 depending on month and year; these data are mostly from the Hudson Bay coast east of the Winisk River. From the Winisk River west to the Shagamu River, he found no evidence of large groups, nor tracks of more than 2 together. West of Severn, near the Niskibi River he found "heavy track concentrations" but few caribou. Simkin (1965) found no specific coastal calving grounds.

During 20 coastal polar bear (*Ursus maritimus*) surveys conducted between 1963 and 1990, no large caribou aggregations were recorded (G. Kolenosky and others, unpubl. reports). However, most of these surveys were conducted between late August and early September and covered only the area within 5 km of the high tide line. Our study indicates that the large aggregations disperse by late July and that smaller bands of caribou probably move into the treed ridges and fen areas some distance from the coastline. This probably resulted in polar bear surveyors seeing few caribou, even in years when the population was growing.

In the 1970s, observations and photographic documentation of caribou in summer along the Hudson Bay coast were obtained by biologists conducting waterfowl surveys. The existence of a large herd west of Fort Severn was first suggested by the observations of H. G. Lumsden (pers. comm.) in 1973. During July waterfowl surveys, he observed tracks in tidal mudflats along the coast strongly suggestive of large numbers of caribou. R.K. Ross (pers. comm.) recorded many small groups (1-40) near the Pen Islands between May and October 1977, but he also found mixed sex groups of 150 and 300 in July 1977. The first photographs confirming large caribou aggregations (totalling 2300 animals) in the Pen Islands area were taken on 6 July 1979 by Lumsden near the mouth of the Black Duck River at the Ontario-Manitoba border.

As a result of heightened awareness, OMNR employees were encouraged to regularly report and if possible, photograph caribou they observed along the coast. In 1983, we began systematic attempts to collect numerical population data on caribou summering in this area, with variable success. However, by 1985, we knew unequivocally that summer post-calving aggregations containing a few thousand caribou occupied the coastal tundra west of Fort Severn, but we did not have a reliable estimate of numbers. Finally, a count of 4,666 caribou

of both sexes and all ages was obtained from photographs of three large aggregates found between Black Currant River and the Pen Islands on 11 July 1986. We did not search west of the Kettle River, Manitoba on this date so it is possible that other similar groups were not located. On 27 March 1987, approximately 400-500 animals were observed in a 4-6 km area approximately 10 km from the Pen Islands (D. McKnight, pers. comm.). At this time, we knew little else about this population of animals, including their connections, if any, to Manitoba and Ontario winter concentrations (Thompson, 1986).

This was the information that led us to the working hypothesis that a group of migratory caribou occupied coastal tundra areas centered at the Pen Islands in spring and summer and moved to inland forested areas in winter. The "herd" appeared to straddle the Ontario-Manitoba border and seemed to be both large and increasing in size.

The intensive study from 1987-1990 allowed us to define the general population behaviour of the Pen Islands Caribou Herd. Although subsequent population growth and other events may have changed this picture, we offer the following information as the first definitive description of the Herd.

Subspecies identity

The subspecies identity of the Pen Islands caribou is not certain. Pen Islands animals are larger than barren-ground caribou and resemble woodland caribou in external body and skull measurements and antler position, but antler characteristics are more similar to barren-ground caribou (Thompson & Abraham, 1994). Genetic studies may help resolve the question posed by Banfield (1961) about whether the herd has a mixed subspecies origin.

Population size 1987-1989

Aerial photographic surveys of summer aggregations containing both sexes and all ages were conducted in 1987 and 1988 to determine population size. We located the aggregations by flying parallel low altitude transects over the entire coastal calving and summer range and few single caribou were observed. On 14 July 1987, we found and photographed 7 distinct groups on intertidal flats and beach ridges near the coast, totalling 7424 caribou. Surveys before and after this date in 1987 indicated

that this was the peak of aggregation and this survey gave us the largest count obtained during the three year study. Other counts at peak aggregation yielded as few as 3190 (20 July 1988). Thus, we recognize that the photographic technique we used is only able to provide a minimum population estimate and that scattered individuals, small bands and in some years, even large aggregates could have been missed. However, the aggregating behaviour was consistent among years and provided an annual opportunity in mid July to record the majority of caribou in the Herd.

Population size since 1990

The techniques we established were used to conduct photographic counts after the intensive study. Delean (1993) photographed 5113 caribou in aggregates, primarily between Kaskattama River and Cape Tatnam, Manitoba. Scholten (1994) photographed 10 798 caribou in 12 aggregates across virtually the entire described summer range from Cape Tatnam, Manitoba to Niskibi River, Ontario. We interpret the difference between years (a two fold increase) as a problem with the visual location of aggregates in 1993, similar to our earlier experience, rather than real population change. Simultaneous ground observations made by us in 1993 indicated over 500 caribou along the coast between the Severn River and the Winisk River. We have not previously associated this portion of the coast with the Pen Islands herd summer range, chiefly because of the lack of observations of caribou near Ft. Severn between 1987 and 1990 and because of the physical barrier to eastward travel that the large Severn River and the community of Ft. Severn might pose. However, it is possible that as the herd has grown such factors as their own habitat impacts, increased human disturbance and coincidental increases in other herbivores (e.g. snow geese) may have induced the herd to move farther eastward than during our initial study. An alternative explanation is that the caribou bands near the Shagamu River and Shagamu Lake have increased in parallel with the Pen Islands Herd. Regular observations have been made of small summer bands near the river mouth and winter concentrations near the lake.

In summary, the known number of caribou summering in the Pen Islands area has risen steadily from at least 2300 in 1979 to at least 10 800 in 1994.

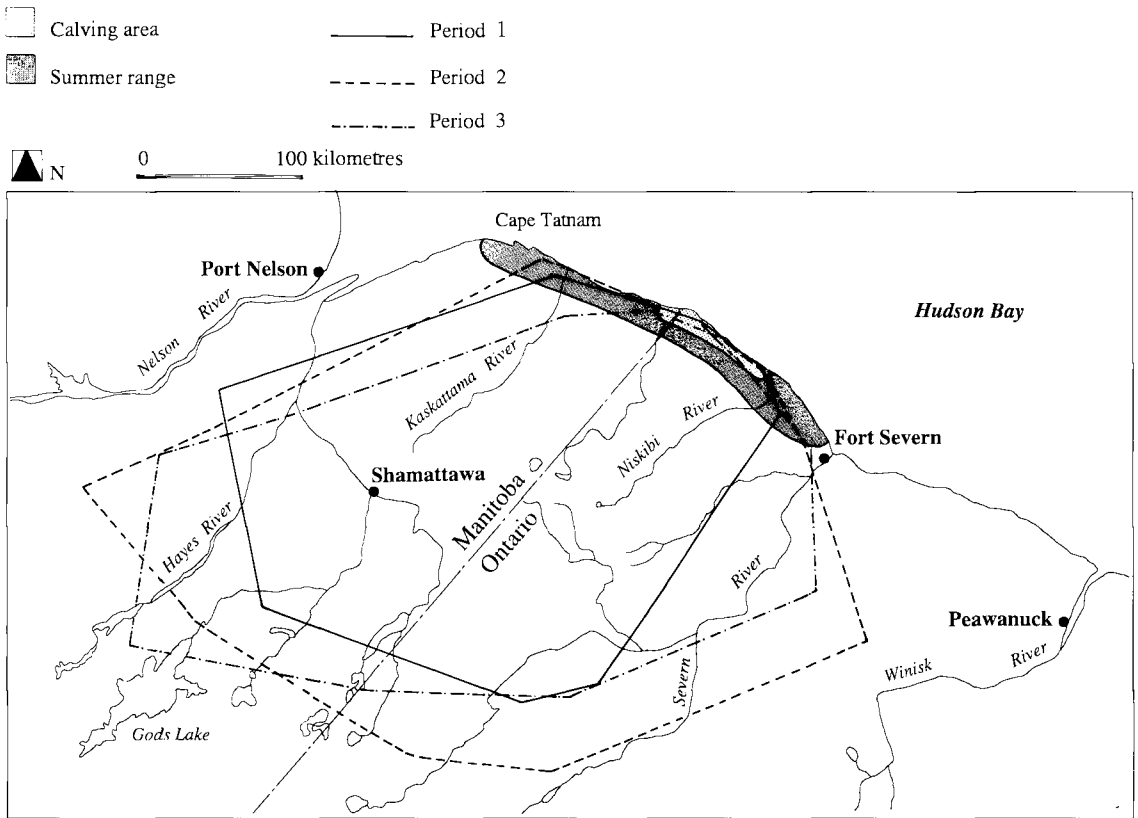


Fig. 2. Annual range of Pen Islands caribou herd showing calving area and summer areas and outer convex polygon of all fall-winter radio telemetry locations in each year (Period 1 = Sept. 1987- June 1988; Period 2 = Sept. 1988 - July 1989; Period 3 = Sept. 1989 - March 1990).

Annual range

Spring

The Pen Islands Herd calving area extended from the Niskibi River, Ontario ($56^{\circ}56' \text{ N}$, $89^{\circ}22' \text{ W}$) westward to the Kettle River, Manitoba ($56^{\circ}30' \text{ N}$, $88^{\circ}09' \text{ W}$), was approximately 90 km in length and caribou were observed using these same grounds during all 3 years of study (Fig. 2). This was also where R. K. Ross (pers. comm.) noted calving caribou in 1977. There was nearly complete segregation of the sexes during the peak calving period from the 17-21 May. Most bulls were presumed to be in forest and forest-tundra areas south of the calving grounds. Thus, the Pen Islands herd exhibited a pattern of dispersion during calving and traditional use that is characteristic of migratory barren-ground herds.

Summer

Summer aggregations occupied the Forest-Tundra zone from the Black Currant River, Ontario to Cape

Tatnam, Manitoba and were usually found within 5 km of the coast. Cow-dominated "nursery" groups formed immediately after calving (surveys from 24-28 May) and contained up to 764 animals. Bull-dominated groups at this time usually contained 10 or fewer individuals although groups of up to 50 were found. Beginning in early June, all age and sex classes came together to form larger, loosely-knit aggregations and by mid-June, these mixed groups predominated (81%) and a few contained over 500 animals and the largest was 1465. The peak aggregation period occurred in mid July each year when virtually the entire Pen Islands population was found in a few large groups, some containing 2000 animals. By late July and throughout August, these large mixed groups could not be found, despite extensive searches. Apparently they fractured into small bands or solitary social units, including cow-calf pairs. Caribou were rarely encountered in the immediate coastal area. Limited observations of caribou in the fens and bogs up to 40 km inland

from 1993 to 1996 suggest they retreated to the spruce-lichen ridges and wetlands of the interior.

Autumn

Telemetry surveys in early to mid-September showed that 79% of caribou were within 30 km of the coast. Small groups were more widely distributed over the available Forest-Tundra and edge of the Hudson Bay Lowlands Forest than during the calving and aggregation periods. The rutting period of the Pen Islands Herd was from mid-September to mid-October. Back-dating from calving, the peak rutting period in all years was estimated to be the last week of September and the first week of October. This back-dated estimate was supported by observations of behaviour and condition during tagging operations.

Winter

After spending approximately 6 months in the open tundra and forest-tundra transition near the coast, the Pen Islands caribou moved southward and inland in late October. No narrowly defined fall migration routes were detected during the study, instead, the movement occurred across a broad front. The infrequency of our radio locations (2-4 weeks apart) precluded defining whether movements occurred along river drainages.

The pattern in each of the three years was for the herd to move gradually inland during November and December, reaching the most distant points from the coast by mid-January and February, then returning slowly to the coast in March and arriving in April. They used substantially different areas in each year: in the 1987-88 they straddled the Ontario-Manitoba border throughout the fall and winter as they moved inland and back toward the coast. In 1988-89, they concentrated in Manitoba in early fall, shifted eastward into Ontario in November, moved back into Manitoba in December through late winter, then east into Ontario for spring. In 1989-90, they moved inland in Manitoba during early fall but then moved eastward into Ontario in December where they remained for the rest of the winter. The Pen Islands Herd showed no consistent preference for either the Northern Coniferous or Hudson Bay Lowlands forest types. Instead, they showed a complex movement and habitat use pattern among months and years. Our data indicate that bulls and cows shared the same winter range over the three years.

The maximum area occupied in each year (includ-

ing all locations for collared caribou plus summer observations) is shown in Fig. 2. Similarity of annual ranges is evident, however, variation in extent of inland movement is present among years, possibly associated with differences in snow fall or other environmental factors such as timing of freeze up on lakes and rivers, or altered habitat due to the previous summer's forest fires.

Conclusion

Migratory caribou herds that occupy tundra habitats in summer and move into forested habitats in winter have been documented from northwestern Alaska continuously to Manitoba (Baker, 1980:207; Calef, 1981: 16-17). The migratory George River Herd (Couturier *et al.*, 1990) occupies the Ungava peninsula in Quebec. A notable gap in southern Hudson Bay has been filled by our documentation of the range and behaviour of the Pen Islands Herd.

The herd's usual range has been documented by this study. Although it is small in population and range relative to most of the migratory herds, it is similar to them in behaviour, population characteristics and habitat use and appears to be in a rapid growth phase (Thompson & Abraham, 1994). Exceptional movements that probably involved the Pen Islands Herd (e.g., large numbers of caribou were located west and south of Gillam, Manitoba in winter 1991-92, C. Elliott, pers. comm.) have subsequently been noted. Further assessments will be required to monitor annual variation in size of the summer and winter range and location of additional use areas. Management policy must address the herd's need to respond positively to a variety of environmental factors and to vary its use of extensive portions of the land base. Management plans must also account for increased human awareness, use and activity in the herd's known range.

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Conservation and Water Stewardship

Climate Change and Environmental Protection Division
Environmental Approvals Branch
123 Main Street, Suite 160, Winnipeg, Manitoba R3C 1A5
T 204 945-8321 F 204 945-5229
www.gov.mb.ca/conservation/eal

CLIENT FILE NO.: 5420.00

April 13, 2012

Ryan Kustra
Manitoba Hydro
360 Portage Avenue
P.O. Box 815
Winnipeg MB R3C 2P4



Dear Mr. Kustra:

Manitoba Conservation and Water Stewardship has determined that an alteration, pursuant to Section 14(2) of *The Environment Act*, to Environment Act Licence No. 2952 is required.

An alteration to the licence is required as it has been determined that the potential negative environmental effects associated with the methods required to identify active caribou calving areas are greater than the anticipated benefits of avoiding them for this project. Therefore, the licence conditions that require identification of these areas, specifically Clauses 24 and 25, have been removed.

This alteration will require a change to the Keeyask Infrastructure Project Terrestrial and Aquatic Monitoring Plan dated October 2011. A revised version of this plan is requested as soon as possible.

Enclosed is revised **Environment Act Licence No. 2952 R** dated April 13, 2012 issued in accordance with The Environment Act to **Keeyask Hydropower Limited Partnership, represented by the General Partner, 5900345 Manitoba Ltd.** for the construction, operation and maintenance of the Development being a 25 kilometre, two-lane, all-weather gravel road from Provincial Road 280 to the north shore of Gull Rapids, a start-up construction camp, and the first phase of a main construction camp, including wastewater treatment facilities for both camps, in accordance with the Proposal filed under The Environment Act, including the Environmental Assessment Report dated July 31, 2009, and additional information dated August 31, 2009, October 6, 2009, October 26, 2009, June 11, 2010, November 24, 2010, January 18, 2011, and January 24, 2011.

In addition to the enclosed Licence requirements, please be informed that all other applicable federal, provincial and municipal regulations and by-laws must be complied with. A Notice of Alteration must be filed with the Director for approval prior to any alteration to the Development as licensed.

For further information on the administration and application of the Licence, please feel free to contact Jeff Fountain, Environment Officer, Northeast Region at (204) 677-6703.

Pursuant to Section 27 of The Environment Act, this licensing decision may be appealed by any person who is affected by the issuance of this Licence to the Minister of Conservation within 30 days of the date of the Licence.

Yours truly,

Tracey Braun
Tracey Braun, M.Sc.
Director
Environment Act

Enc.

c: Don Labossiere, Director, Environmental Compliance & Enforcement
Pierce Roberts, Director, Northeast Region
Jason Fontaine, Aboriginal and Northern Affairs
Public Registries

NOTE: Confirmation of Receipt of this Licence No. 2952 R (by the Licencee only) is required by the Director of Environmental Approvals. Please acknowledge receipt by signing in the space provided below and faxing a copy (letter only) to the Department by April 27, 2012.

On behalf of Keeyask Hydropower Limited Partnership

Date

****A COPY OF THIS LICENCE AND THE KEYASK INFRASTRUCTURE PROJECT ENVIRONMENTAL PROTECTION PLAN MUST BE KEPT ON SITE AT THE DEVELOPMENT AT ALL TIMES****

Licence No. / Licence n°

2952 R

Issue Date / Date de délivrance

March 8, 2011

Revised

April 13, 2012

In accordance with The Environment Act (C.C.S.M. c. E125) /
Conformément à la Loi sur l'environnement (C.P.L.M. c. E125)

Pursuant to Section 11(1) / Conformément au Paragraphe 11(1)

THIS LICENCE IS ISSUED TO : / CETTE LICENCE EST DONNÉE À :

**KEYYASK HYDROPOWER LIMITED PARTNERSHIP, REPRESENTED BY
THE GENERAL PARTNER, 5900345 MANITOBA LTD.:**
"the Licence"

for the construction, operation and maintenance of the Development being a 25 kilometre, two-lane, all-weather gravel road from Provincial Road 280 to the north shore of Gull Rapids, a start-up construction camp, and the first phase of a main construction camp, including wastewater treatment facilities for both camps, in accordance with the Proposal filed under The Environment Act, including the Environmental Assessment Report dated July 31, 2009, and additional information dated August 31, 2009, October 6, 2009, October 26, 2009, June 11, 2010, November 24, 2010, January 18, 2011, and January 24, 2011, and subject to the following specifications, limits, terms and conditions:

DEFINITIONS

In this Licence:

“**Department**” means Manitoba Conservation;

“**Director**” means an employee so designated pursuant to The Environment Act;

“**Environment Officer**” means an employee appointed as such by the Minister;

“**Natural Resource Officer**” means an employee appointed as such by the Minister;

“**Partnership**” means Keeyask Hydropower Limited Partnership, represented by the General Partner, 5900345 Manitoba Ltd.;

“waterbody” means any body of flowing or standing water, whether naturally or artificially created, and whether the flow or presence of water is continuous, intermittent or occurs only during a flood, including but not limited to a lake, river, creek, stream, slough, marsh, swamp and wetland, including ice on any of them; and

“wetlands” means those areas where the water table is at or above the land surface for a long enough period each year to make the area capable of supporting aquatic or hydrophilic vegetation, and which have soils with characteristics indicative of wet conditions.

GENERAL TERMS AND CONDITIONS

This Section of the Licence contains requirements intended to provide guidance to the Licencee in implementing practices to ensure that the environment is maintained in such a manner as to sustain a high quality of life, including social and economic development, recreation and leisure for present and future Manitobans.

1. The Licencee shall not affect any land during the construction and operation of the Development which is not leased or owned by the Partnership or where permission to use land or resources has not been acquired through reservation, easement, or permit issued by the Province of Manitoba.
2. The Licencee shall establish any fuel storage areas required for the construction and operation of the Development:
 - a) a minimum distance of 100 metres from any waterbody; and
 - b) in compliance with the requirements of *Manitoba Regulation 188/2001*, or any future amendment thereof, respecting *Storage and Handling of Petroleum Products and Allied Products*.
3. The Licencee shall ensure fuel storage containers incorporate secondary containment in accordance with *Manitoba Regulation 188/2001*, or any future amendment thereof, respecting *Storage and Handling of Petroleum Products and Allied Products*.
4. The Licencee shall collect and dispose of all used petroleum products and other regulated hazardous wastes generated by the machinery used in the construction and operation of the Development in accordance with *The Dangerous Goods Handling and Transportation Act*.
5. The Licencee shall, at all times during the construction of the Development, have available at the construction sites, materials to contain and recover spills of fuel and other fluids associated with construction machinery.

6. The Licencee shall during construction and operation of the Development:
 - a) immediately report any reportable spills to Manitoba Conservation's Accident Reporting Line at (204) 944-4888 pursuant to **Manitoba Regulation 439/87**, respecting **Environmental Accident Reporting**, or any future amendment thereof; and
 - b) at the request of the Director, provide a follow-up report to the Director on a reportable environmental accident outlining the cause(s) and proposed corrective action to prevent reoccurrence.
7. The Licencee shall dispose of solid waste and non-reusable demolition and construction debris from the Development at a waste disposal ground operating under the authority of a permit pursuant to **Manitoba Regulation 150/91** respecting **Waste Disposal Grounds**, or any future amendment thereof, or a Licence pursuant to **The Environment Act**.
8. The Licencee shall, during construction of the Development, dispose of all sewage and septage from on-site sanitary facilities in accordance with:
 - a) **Manitoba Regulation 83/2003**, respecting **Onsite Wastewater Management Systems Regulation**, or any future amendment thereof; or
 - b) this Licence.
9. The Licencee shall, during construction of the Development, adhere to the general recommendations on design, construction and maintenance of stream crossings as specified in the Manitoba Department of Natural Resources and federal Department of Fisheries and Oceans guidelines titled **Manitoba Stream Crossing Guidelines for the Protection of Fish and Fish Habitat, May 1996**.
10. The Licencee shall, prior to construction of the Development, obtain all permits and agreements as required by Manitoba Infrastructure and Transportation.
11. The Licencee shall, prior to construction of the Development, provide a copy of this Licence and the Keeyask Infrastructure Project Environmental Protection Plan (EPP) to the contractor and subcontractor(s) involved in the Development and ensure they have a working knowledge and understanding of the conditions in the Licence and prescriptions in the EPP.

SPECIFICATIONS, LIMITS, TERMS AND CONDITIONS

12. The Licencee shall, not less than two weeks prior to beginning construction of the Development, provide notification to the Environment Officer in Thompson and the Natural Resource Officer in Gillam responsible for the administration of this Licence of the intended starting date of construction, the names of the contractors responsible for the construction, and the names of the personnel responsible for onsite management of the project.

13. The Licencee shall, prior to commencement of clearing and construction activities for the Development, submit to the Director, a Keeyask Infrastructure Project Environmental Protection Plan (EPP). The EPP shall describe the approach to be used by the Licencee to monitor construction activities of the project to ensure that mitigative measures are applied systematically, and in a manner consistent with the commitments made in the Keeyask Infrastructure Project Environmental Assessment Report. Specifically, the EPP shall:
 - a) describe the protocol for internal reporting on monitoring and compliance for the construction of the project;
 - b) provide field construction personnel with clear instructions on the mitigation measures to be implemented and on the appropriate lines of communication and means of reporting to be followed throughout the full-life cycle of the project;
 - c) summarize environmental sensitivities and mitigation actions, list emergency response plans and reporting protocols, describe a closure plan for borrow pits, including mitigation of potential hazards to public safety and mitigation to address land reclamation concerns; and
 - d) provide specific information on waste management practices to be used during the construction phase of the project, including consideration of all liquid and solid wastes generated.
14. The Licencee shall, prior to construction of the Development, arrange a meeting with the construction Project Managers and the Northeast Region of Manitoba Conservation to review the EPP, pursuant to Clause 13 of this Licence. Written confirmation from the Director that the EPP is acceptable to Manitoba Conservation is required prior to the start of construction of the Development.
15. The Licencee shall, prior to construction, prepare for the approval of the Director, a report on monitoring programs to be undertaken in relation to the environmental practices outlined in the Keeyask Infrastructure Project Environmental Assessment Report and the EPP. The report shall:
 - a) provide a description of the proposed activities for monitoring effects to the physical, aquatic, and terrestrial environments arising from the site preparation and construction of the Development; and
 - b) describe the parameters to be measured, the methodology and frequency of measurement, references to established thresholds and sustainability indicators, where appropriate, and the protocol for reporting the results of monitoring of the environmental conditions affected by the Development to Manitoba Conservation.
16. The Licencee shall, during construction, implement the monitoring programs approved pursuant to Clause 15 of this Licence.
17. The Licencee shall report annually to the Director on the results of the monitoring programs as approved pursuant to Clause 15 of this Licence.

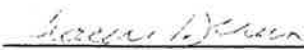
18. The Licencee shall, prior to construction of the Development, obtain a Water Rights Licence for any water well(s) associated with the development, pursuant to *The Water Rights Act*.
19. The Licencee shall, prior to construction of the Development, obtain a Live Fish Handling Permit from the Fisheries Branch of Manitoba Water Stewardship for any fish relocating activities.
20. The Licencee shall flag and avoid environmentally sensitive sites and priority habitat as prescribed in the EPP, prior to commencing construction activities near the areas in which they occur.
21. The Licencee shall, during construction of the Development, provide nuisance wildlife training to construction personnel when required.
22. The Licencee shall, during construction of the Development, minimize impacts to active animal dens and bird nests as prescribed in the EPP.
23. The Licencee shall, during construction of the Development, discourage hunting and access near the Development.
24. The Licencee shall, during construction of the Development, minimize right-of-way clearing near water crossings, and confine construction activities to the cleared areas.
25. The Licencee shall, at the completion of construction, post wildlife crossing signs at both ends of the road.
26. The Licencee shall, during construction and operation of the Development, minimize impacts to surface drainage patterns, flows rates, and the function of wetlands.
27. The Licencee shall, during construction and operation of the Development, implement measures designed to minimize erosion and prevent the deposition of sediment into waterbodies.
28. The Licencee shall:
 - a) immediately following construction, revegetate erosion prone areas with a mixture of native plant species and/or where necessary for erosion control purposes, non-invasive grasses and herb mixtures; and
 - b) not exceed recommended amounts of nitrogen and phosphorous when fertilizing restored areas.
29. The Licencee shall construct and operate the start-up camp wastewater collection and disposal system in accordance with the Keeyask Infrastructure Project Environmental Assessment Report dated July 31, 2009, and additional information dated October 6, 2009, October 26, 2009, June 11, 2010, and

November 24, 2010, and in accordance with the specifications, limits, terms and conditions prescribed under Schedule A of this Licence.

30. The Licencee shall construct and operate the 2500-person construction camp wastewater collection system and sewage treatment plant in accordance with the Keeyask Infrastructure Project Environmental Assessment Report dated July 31, 2009, and additional information dated January 18, 2011 and January 24, 2011, and in accordance with the specifications, limits, terms and conditions prescribed under Schedule B of this Licence.
31. The Licencee shall obtain approval from the Director for any proposed alteration to this Development before proceeding with the alteration.
32. The Licencee shall, not later than six months following a decision not to proceed with construction of the Keeyask Generating Station, file a decommissioning plan for the Development for the approval of the Director. The plan shall report on the actions to be taken by the Licencee in decommissioning the Development, including the timing of decommissioning and the methods used to restrict access to the area.
33. The Licencee shall implement the plan approved by the Director pursuant to Clause 32 of this Licence. Implementation of the plan shall be carried out as described in the plan unless otherwise required or approved by the Director in writing.

REVIEW AND REVOCATION

- A. If, in the opinion of the Director, the Licencee has exceeded or is exceeding or has or is failing to meet the specifications, limits, terms, or conditions set out in this Licence, the Director may, temporarily or permanently, revoke this Licence.
- B. If, in the opinion of the Director, new evidence warrants a change in the specifications, limits, terms or conditions of this Licence, the Director may require the filing of a new proposal pursuant to Section 11 of The Environment Act.
- C. If construction of the development has not commenced within five years of the date of this Licence, the Licence is revoked.



Tracey Braun, M.Sc.
Director
Environment Act

**Consultation and Accommodation:
Objectives of the York Factory First Nation**

Meeting between York Factory First Nation and Manitoba
September 22, 2010 - Winnipeg, Manitoba

The immediate objectives of the York Factory First Nation for the Crown-First Nation Consultation and Accommodation Process between the York Factory First Nation and the Province of Manitoba are:

- ✓ First, that Manitoba (and Canada) and York Factory will jointly develop a comprehensive Crown-First Nation Consultation Agreement that will guide and provide for the consultation and accommodation process and that will set out how York Factory will be involved in developing solutions to accommodate the aboriginal and Treaty rights of the York Factory First Nation and to minimize any adverse effects of these authorizations and decisions.
- ✓ Second, that Manitoba and Canada will engage York Factory in a meaningful process of consultation, justification and accommodation regarding:
 - ▶ the Kelsey Rerunning Project;
 - ▶ issued Mineral Exploration Licence 367B;
 - ▶ the designations of the Kaskatamagan and Kaskatamagan-Sipi Wildlife Management Areas;
 - ▶ Manitoba Hydro's request for a Final Licence for Churchill River Diversion Project;
 - ▶ the low water levels on Split Lake;
 - ▶ PR 280; and
 - ▶ Bipole III
- ▶ Third, that Manitoba and Canada agree to consult York Factory regarding any existing authorizations, designations or decisions that were made or issued without having first consulted the York Factory First Nation and that Manitoba and Canada further agree that these existing authorizations, designations or decisions will be amended or even revoked if the consultation process shows that the rights of York Factory are being impacted or infringed.
- ▶ Fourth, that no further activities or changes in land use will take place while Manitoba consults York Factory on any matter subject to the Crown's Duty to Consult and a consultation process.
- ▶ Fifth, that Manitoba will fund all of the costs of each consultation and accommodation process and that the consultation process would include the significant participation of our Elders' Council and will provide for the documentation and management of our traditional land use information by York Factory.
- ▶ Finally, York Factory is also looking for Manitoba's commitment to the development of the Land Use Plan and the Resource Management Plan under Article 4 of the 1995 Comprehensive Implementation Agreement as a practical way to capture and benefit from First Nation and Crown investments in traditional land use studies and other land use information and to facilitate future consultation and accommodation processes.



Seven Themes of First Nation-Crown Relations "Giving Life to the Treaty Relationship in the 21st Century"

Customary Law and Consultation: Prior to contact with Europeans, relations between the Nations and peoples of Turtle Island were guided by customary inter-tribal and intra-tribal protocols and practices. These Customary Laws, which are practiced to this day, form the foundation of First Nations' expectations, standards and values for relations and consultations between Nations, clans and families.

Relations During and After Treaty: The making of Treaties to recognize and reconcile the original Aboriginal title is consistent with ancient customary inter-tribal and intra-tribal protocols. The Treaties establish a relationship and commitment - *"for as long as the sun shine, the grass grows and the waters flow"* - between the Treaty Nations to consult each other whenever the Treaty promises may be affected by the actions and decisions of either the Crown or the First Nations.

The Crown's Duty to Consult: The recognition and affirmation of Treaty rights in the *Constitution Act, 1982* has resulted in the Supreme Court of Canada's recognition that upholding the "honour of the Crown" and achieving a reconciliation of the original Aboriginal title are continuing obligations of the federal - and provincial - governments. The Supreme Court and other courts have confirmed the constitutional duty of the Crown to consult, justify and accommodate a Treaty First Nation whenever an action or decision of the Crown may infringe or adversely affect an aboriginal or Treaty right.



Crown-First Nation Consultation Process: The duty to consult is grounded in the honour of the Crown. Treaty First Nations and governments must now engage in a process to identify any infringements or adverse effects of aboriginal or Treaty rights through the process as set out by the Supreme Court of Canada and other courts. Of central importance to this process is the documentation of the Traditional Knowledge and the traditional land use and occupancy information of Treaty First Nations. Treaty First Nations and governments must establish Crown-First Nation Consultation Protocols in order to provide a clear process for where a First Nation demands the conduct of the consultation process and or where the Crown request that a First Nation engage in the consultation process.

Justification and Accommodation: Aboriginal and Treaty rights may only be infringed where there are constitutionally valid reasons for doing so. The Supreme Court of Canada has established standards to be followed during a Crown-First Nation consultation process to determine whether any potential infringement of aboriginal and Treaty rights may be justified. Where any potential infringement may be found to be justified, the effect of these infringements on First Nations must be accommodated. Accommodation measures can include the negotiation of Impact and Benefit Agreements and Revenue Sharing as well as terms and conditions to be included in permits and licences issued under federal and provincial laws. Accommodation measures can also include innovative "legacy" measures that provide long-lasting benefits to affected First Nations that may be unrelated to the nature of the proposed decision or action.

Implementing Accommodation Measures: First Nations and the Crown must also be consult to ensure that measures to prevent infringements or to accommodate justifiable infringements are being implemented and are effective. First Nations and the Crown will need to work together to establish effective non-derogation provisions in laws and to reform of legal frameworks to provide for both the protection of aboriginal and Treaty rights and for the implementation of accommodation measures.

Establishing Relationships with the Governments: As symbolized by the handshake depicted on the Treaty Medal, there must be an effective and ongoing relationship between the Crown and Treaty First Nations in order to give life to the Treaty relationship in the 21st Century.

Consultation and Accommodation: Meeting the "Bare Minimum Requirements"

York Factory First Nation Community Consultation and Accommodation Meeting
September 15, 2010 - York Factory First Nation, York Landing, Manitoba

Issue:

- ▶ A review of Supreme Court of Canada decisions addressing the honour of the Crown and the Crown-First Nation consultation and accommodation process reveals what may be described as "the bare minimum requirements" of the Crown-First Nation Consultation and Accommodation process.
- ▶ In many cases, Manitoba may not meet these "bare minimum requirements" in the engagement of First Nations in, and in the conduct of, the consultation and accommodation process.
- ▶ As acknowledged by Manitoba, *"(t)he failure of the Crown to engage in meaningful consultations may result in any laws passed, actions taken or decisions made in the absence of consultation being declared invalid"*.

Background:

- ▶ In respect of Manitoba's duty to engage, consult, justify and accommodate - at a bare minimum - Manitoba must:
 - a) provide notice;
 - b) directly engage the affected First Nation;
 - c) provide the affected First Nation with information:
 - i) that details Manitoba's proposed decision or action;
 - ii) that identifies how Manitoba proposes to address and accommodate the interests of the affected First Nation;
 - iii) that identifies the scope of Manitoba's understanding of the potential adverse impact of the proposed decision or action on the affected First Nation's interests;
 - d) explicitly solicit the affected First Nation's response to the notice and information;
 - e) listen carefully to the concerns of the affected First Nation;
 - f) attempt to minimize the adverse impacts on the rights of the affected First Nation;
 - g) where an infringement of a right is identified, the consultation must proceed to the analysis of justification established by the Supreme Court of Canada in *R. v. Sparrow*;
 - h) where an adverse impact or an infringement will occur and can be justified, to accommodate the adverse impact or infringement; and
 - i) advise the affected First Nation how Manitoba will address and accommodate any impact or justifiable infringement.
- ▶ Manitoba often incorrectly proceeds on the basis that any perceived or actual non-response by a First Nation to a request for comment by a specified deadline justifies a determination by Manitoba that there is no adverse effect or impact requiring accommodation and that Manitoba may act. Manitoba does not routinely provide a First Nation with information identifying Manitoba's understanding of any potential adverse effect on an affected First Nation's interests, whether or not a First Nation responds to a request for comment.
- ▶ After a decision is made, Manitoba often fails to advise the affected First Nation how Manitoba will specifically address and accommodate any adverse effect or impact.

Recommendation:

- ✓ **That York Factory ensure Manitoba and Canada follow each step of the Supreme Court's "bare minimum requirements" of the consultation and accommodation process.**



Message from Chief and Council
September 15, 2010

Tansi!

This is a follow up to our newsletter of July 20, 2010 on the issue of The Crown's (The Province of Manitoba and Canada) Duty to Consult and to honor our commitment to provide updates to you. We continue to very busy conducting business on behalf of our community members. We do our best to maintain a schedule that allows us to be in the community as much as possible. We schedule meetings outside of the community on a bi-weekly basis.



This newsletter is to provide up to date information on the issue of the two levels of governments' duty to consult on any infringement of your aboriginal and treaty rights by any government action. It is intended to keep all our members informed of developments we are currently engaged in with the Province of Manitoba and Canada. We hope you will read the information and if you have questions please feel free to contact any one of the Council members and we will do our best to advance your concern.

Once again, the Chief and Council hold steadfast that any infringement of our rights will not be tolerated and governments will be held accountable for trespasses in our traditional territory . We will hold them to the principle that the federal and provincial governments must consult with all our members on any and all licences, permits, or activities within our traditional territory and we must protect our lands and resources for future generations. Governments will no longer be allowed to issue licences, permits, or authorize any activity or free entry into our traditional territory without the express consent of the York Factory First Nation.

Ekosi,

Chief and Council

The York Factory First Nation is pursuing the following initiatives or has issued a formal "Notice of Demand for the Conduct of a Crown-First Nation Consultation" or has requested engagement regarding the following matters:

Comprehensive Crown-First Nation Consultation Agreement

Manitoba has agreed in principle to engage York Factory in the development of a Comprehensive Crown-First Nation Consultation Agreement to guide the conduct of the consultation and accommodation process between Manitoba and York Factory. The development of this agreement will be in accordance with a process agreed to between York Factory and Manitoba and supported with funding provided by Manitoba to York Factory. As part of York Factory's strategic consultation plan, York Factory's approach to the development of the basic document "package" for the comprehensive Crown-First Nation Consultation and Accommodation arrangements is:

- ▶ An "**Accord**" or similar arrangement to confirm how Manitoba will settle or seek to reconcile each action or decision that was unlawfully made by Manitoba without first consulting York Factory, for example, the issuance of Mineral Exploration Licence 367B. The Accord would outline means to strengthen the government-to-government relationship, outline joint objectives that would include environmental protection, economic benefits, specific projects of community interest, legislative reform and land use planning, as well as any joint working groups or committees that will plan, oversee and ensure these objectives are achieved.
- ▶ A **Consultation and Accommodation Agreement** or **Consultation Protocol** that will set out the overall terms, objectives and expectations of the basic commitment between Manitoba (and Canada, where applicable) and York Factory and to engage in consultation and accommodation processes.
- ▶ **Consultation Guidelines** which are attached to and form part of the Consultation Agreement and which set out the specific principles and processes that will be applied to consultations.
- ▶ A **Consultation Plan** that is attached to the Agreement that will set out and guide the specific step-by-step activities to be carried out for each consultation and accommodation process.
- ▶ A **Consultation Budget** that is attached to the Agreement that will identify the costs of each consultation process and how these costs will be funded by Government.

Manitoba Hydro Kelsey Rerunning Project

On November 19, 2007, the York Factory First Nation issued a "Notice of Demand for the Conduct of a Crown-First Nation Consultation" regarding the Kelsey Rerunning Project. In July, 2010, Manitoba approved interim revisions to the authorizations for the Kelsey Rerunning Project, subject to the conduct and outcome of consultations. York Factory has requested and has received detailed information, including on fish passage and fish mortality. Manitoba has agreed to engage York Factory in a consultation and accommodation process that Manitoba wishes to conclude by December, 2010. Documenting York Factory's Traditional Knowledge and Traditional Land Use is

key to understanding the potential impacts of the Kelsey Rerunning Project on York Factory's rights. A Consultation Plan and Consultation Budget is being developed by York Factory.

Mineral Exploration Licence No. 367B

On October 24, 2008, the York Factory First Nation issued a demand for the conduct of a Crown-First Nation consultation regarding an application for Mineral Exploration Licence 367B. However, Manitoba issued Mineral Exploration Licence 367B effective October 15, 2009 without having first consulted and accommodated York Factory. On May 21, 2010, the York Factory First Nation demanded that MEL 367B be immediately *rescinded, revoked or withdrawn due to Manitoba's failure of the Crown to have first engaged the York Factory First Nation in a process of consultation, justification and accommodation*. The holder of Mineral Exploration Licence 367B has also applied for Work Permits, which are also subject to the Crown-First Nation Consultation process. York Factory has conducted initial consultation activities and has prepared a draft a Consultation Agreement and Consultation Guidelines and is developing a Consultation Plan and Budget which includes a Traditional Land Use Study. York Factory is also working on an Accord document.

Designation of the Kaskatamagan Wildlife Management Area

Designation of the Kaskatamagan-Sipi Wildlife Management Area

The Assistant Deputy Minister of Conservation has been assigned by the Minister to engage York Factory in a consultation process to address and to seek to reconcile Manitoba's unilateral designations of the Kaskatamagan and Kaskatamagan-Sipi Wildlife Management Areas and the establishment of protective regulations in the fall of 2009. York Factory is writing the Minister to confirm York Factory's position and the scope of the consultations. A Consultation Plan and Consultation Budget is being developed by York Factory.

Manitoba Hydro Request for a Final Licence for the Churchill River Diversion Project

Manitoba Water Stewardship has engaged York Factory in a Crown-First Nation consultation regarding Manitoba Hydro's request for a Final Licence for the Churchill River Diversion Project. York Factory has held preliminary meetings with Manitoba's consultation team and is working to confirm the scope of the consultation and accommodation process, which Manitoba plans to conduct and conclude in 2010-2011. A Consultation Plan and Consultation Budget is being developed by York Factory.

Low Water Levels on Split Lake

The Assistant Deputy Minister of Conservation has been assigned by the Minister to engage York Factory in a Crown-First Nation consultation regarding the infringements of York Factory's aboriginal and Treaty rights that resulted from Manitoba Hydro causing low water levels on Split Lake which, in turn, resulted in the cancellation of York Factory's annual spring Goose Camp Days and pickerel fishery. As an accommodation measure, York Factory seeks changes to Manitoba Hydro's operating licences requiring minimum water flows and levels to ensure the conduct of cultural events and the exercise of aboriginal and Treaty rights. York Factory is completing correspondence to the Minister to formally confirm York Factory's position. York Factory is working to confirm the scope of these consultations and to develop a Consultation Plan and Consultation Budget.

Immediate Objectives for the Crown-First Nation Consultation and Accommodation Process

- ✓ First, that Manitoba (and Canada) and York Factory will jointly develop a comprehensive Crown-First Nation Consultation Agreement that will guide and provide for the consultation and accommodation process and that will set out how York Factory will be involved in developing solutions to accommodate our aboriginal and Treaty rights and to minimize any adverse effects of these authorizations and decisions.
- ✓ Second, that Manitoba and Canada will engage York Factory in a meaningful process of consultation, justification and accommodation regarding the Kelsey Rerunning Project, issued Mineral Exploration Licence 367B, the designations of the Kaskatamagan and Kaskatamagan-Sipi Wildlife Management Areas, Manitoba Hydro's request for a Final Licence for Churchill River Diversion Project and the low water levels on Split Lake.
- ✓ Third, that Manitoba and Canada agree that any existing authorizations, designations or decisions can be amended or even cancelled if the consultation process shows that our rights are being impacted or infringed.
- ✓ Fourth, that no further activities or changes in land use will take place while Manitoba consults York Factory on any matter subject to the Crown's Duty to Consult and a consultation process.
- ✓ Finally, that Manitoba will fund all of the costs of each consultation and accommodation process and that the consultation process would include the significant participation of our Elders' Council and will provide for the documentation and management of our traditional land use information by York Factory. As part of this objective, York Factory is also looking for Manitoba's commitment to the development of the Land Use Plan and the Resource Management Plan under Article 4 of our 1995 Comprehensive Implementation Agreement as a practical way to capture and benefit from First Nation and Crown investments in traditional land use studies and other land use information and to facilitate future consultation and accommodation processes.

Community Program Updates Meeting

Date: September 15, 2010

Time: 6:00 p.m.

Place: George Saunders Memorial School



Chief and Council and York Factory First Nation program coordinators and staff will be presenting updates on the status of the Crown-First Nation consultation and accommodation processes between the York Factory First Nation, the Government of Manitoba and the Government of Canada. There will be presentations and a question and answer period. Chief and Council invite all community members to attend the meeting.



Message from Chief and Council

Tansi!

We have been very busy since we were elected in April of this year to be your political representatives. We thank you for the honor!

This informational newsletter is provided to you to inform you of your right to be consulted on any infringement of your aboriginal and treaty rights by any government action. The newsletter provides a summary of all current discussions we have initiated on your behalf. It is intended to keep all our members abreast of developments we are currently engaged in with the Province of Manitoba. We will continue to provide updates in the months ahead.



The Chief and Council hold steadfast that any infringement of our rights will not be tolerated and governments will be held accountable for trespasses in our traditional territory. We will hold them to the principle that the federal and provincial governments must consult with all our members on any and all licences, permits or activities within our traditional territory and we must protect our lands and resources for future generations.

We look forward to seeing you at the community meetings being held on July 20th, and July 21st, 2010 in York Landing, Manitoba.

Ekosi,

Chief and Council

The Crown's Duty to Consult: The recognition and affirmation of Treaty rights in the *Constitution Act, 1982* has resulted in the Supreme Court of Canada's recognition that upholding the "honour of the Crown" and achieving a reconciliation of the original Aboriginal title are continuing obligations of the federal and provincial governments. The Supreme Court and other courts have confirmed the constitutional duty of the Crown to consult, justify and accommodate a Treaty First Nation whenever an action or decision of the Crown may infringe or adversely affect an aboriginal or Treaty right.

Crown-First Nation Consultation Process: The duty to consult is grounded in the honour of the Crown. Treaty First Nations and governments must work to jointly identify any infringements or adverse effects of aboriginal or Treaty rights through the process as set by the Supreme Court of Canada and other courts. Of central importance to this process is the Traditional Knowledge and the traditional land use and occupancy information of Treaty First Nations. Treaty First Nations and governments must now establish Crown-First Nation Consultation Protocols or Agreements to guide and provide for the conduct of the Crown-First Nation consultation and accommodation process where either a First Nation or the Crown requests the conduct of the consultation process.



Justification and Accommodation: Aboriginal and Treaty rights may only be infringed where there are constitutionally valid reasons for doing so. The Supreme Court of Canada has established standards to be followed during a Crown-First Nation consultation process to determine whether any potential infringement of aboriginal and Treaty rights may be justified. Where any potential infringement may be found to be justified, the effect of these infringements on First Nations must be accommodated. Accommodation measures can include the negotiation of Impact and Benefit Agreements and Revenue Sharing as well as terms and conditions to be included in permits and licences issued under federal and provincial laws. Accommodation measures can also include innovative "legacy" measures that provide long-lasting benefits to affected First Nations that may be unrelated to the nature of the proposed decision or action.

Implementing Accommodation Measures: First Nations and the Crown must also be consulted to ensure that measures to prevent infringements or to accommodate justifiable infringements are being implemented and are effective. First Nations and the Crown will need to work together to establish effective non-derogation provisions in laws and to reform statutory and regulatory frameworks to provide for both the protection of aboriginal and Treaty rights and for the implementation of accommodation measures.

Establishing Relationships with the Governments: As symbolized by the handshake depicted on the Treaty Medal, there must be an effective and ongoing relationship between the Crown and Treaty First Nations in order to give life to the Treaty relationship in the 21st Century.

Crown-First Nation Consultations with the York Factory First Nation

The York Factory First Nation has issued a formal "Notice of Demand for the Conduct of a Crown-First Nation Consultation" or has requested engagement regarding the following matters:

Manitoba Hydro Kelsey Rerunning Project

In September 2006, Fisheries and Oceans Canada (DFO) initiated an environmental assessment of the Kelsey Rerunning Project under s. 5 of the *Canadian Environmental Assessment Act* because Fisheries and Oceans Canada may issue a permit or license under ss. 35(2) and s. 32 of the *Fisheries Act*. DFO officials have advised York Factory that Canada intends to conduct a separate Crown Consultation with affected aboriginal communities, including York Factory. On November 19, 2007, the York Factory First Nation issued a "Notice of Demand for the Conduct of a Crown-First Nation Consultation" regarding the Kelsey Rerunning Project. Manitoba recently advised York Factory that Manitoba wishes to issue authorizations for the Kelsey Rerunning Project in July, 2010. York Factory has requested detailed information, including on fish passage and fish mortality.

Mineral Exploration Licence No. 367B

On October 24, 2008, the York Factory First Nation issued a demand for the conduct of a Crown-First Nation consultation regarding an application for Mineral Exploration Licence 367B. However, Manitoba issued Mineral Exploration Licence 367B effective October 15, 2009 without having first consulted and accommodated York Factory. On May 21, 2010, the York Factory First Nation wrote the Director of Mines to demand that Manitoba *"immediately rescind, revoke or withdraw MEL 367B due to the failure of the Crown to have first engaged the York Factory First Nation in a process of consultation, justification and accommodation prior to purportedly issuing MEL 367B to be effective October 15, 2009."* The holder of Mineral Exploration Licence 367B has also made applications for Work Permits, the approvals of which are subject to the Crown-First Nation Consultation process.

Designation of the Kaskatamagan Wildlife Management Area

Designation of the Kaskatamagan-Sipi Wildlife Management Area

It is the position of York Factory that Manitoba continues to owe a duty to consult York Factory regarding Manitoba's unilateral designations of the Kaskatamagan and Kaskatamagan-Sipi Wildlife Management Areas and the establishment of protective regulations in the fall of 2009.

Manitoba Hydro Request for a Final Licence for the Churchill River Diversion Project

Manitoba Water Stewardship has engaged York Factory in a Crown-First Nation consultation regarding Manitoba Hydro's request for a Final Licence for the Churchill River Diversion Project.

Comprehensive Crown-First Nation Consultation Agreement

York Factory has requested that Manitoba and York Factory develop a Comprehensive Crown-First Nation Consultation Agreement to guide the conduct of the consultation and accommodation process between Manitoba and York Factory. The development of this agreement will be in accordance with a process agreed to between York Factory and Manitoba and supported with funding provided by Manitoba to York Factory for this purpose.



Innovation, Energy and Mines

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T 204-945-6563 F 204 945 8427
www.manitoba.ca/minerals

Community Consultation Meeting

Date: July 20, 2010

Time: 10:00 a.m.

Place: York Factory Learning Institute

The Government of Manitoba will be participating in a community consultation with York Factory First Nation on the issues of mineral exploration licences and work permits to carry out exploration in the region. There will be a presentation on the business of mineral exploration and mining and a question and answer period. The Chief and Council invite all community members to attend the meeting.



Community Consultation Meeting

Date: July 21, 2010

Time: 10:00 a.m.

Place: York Factory Learning Institute

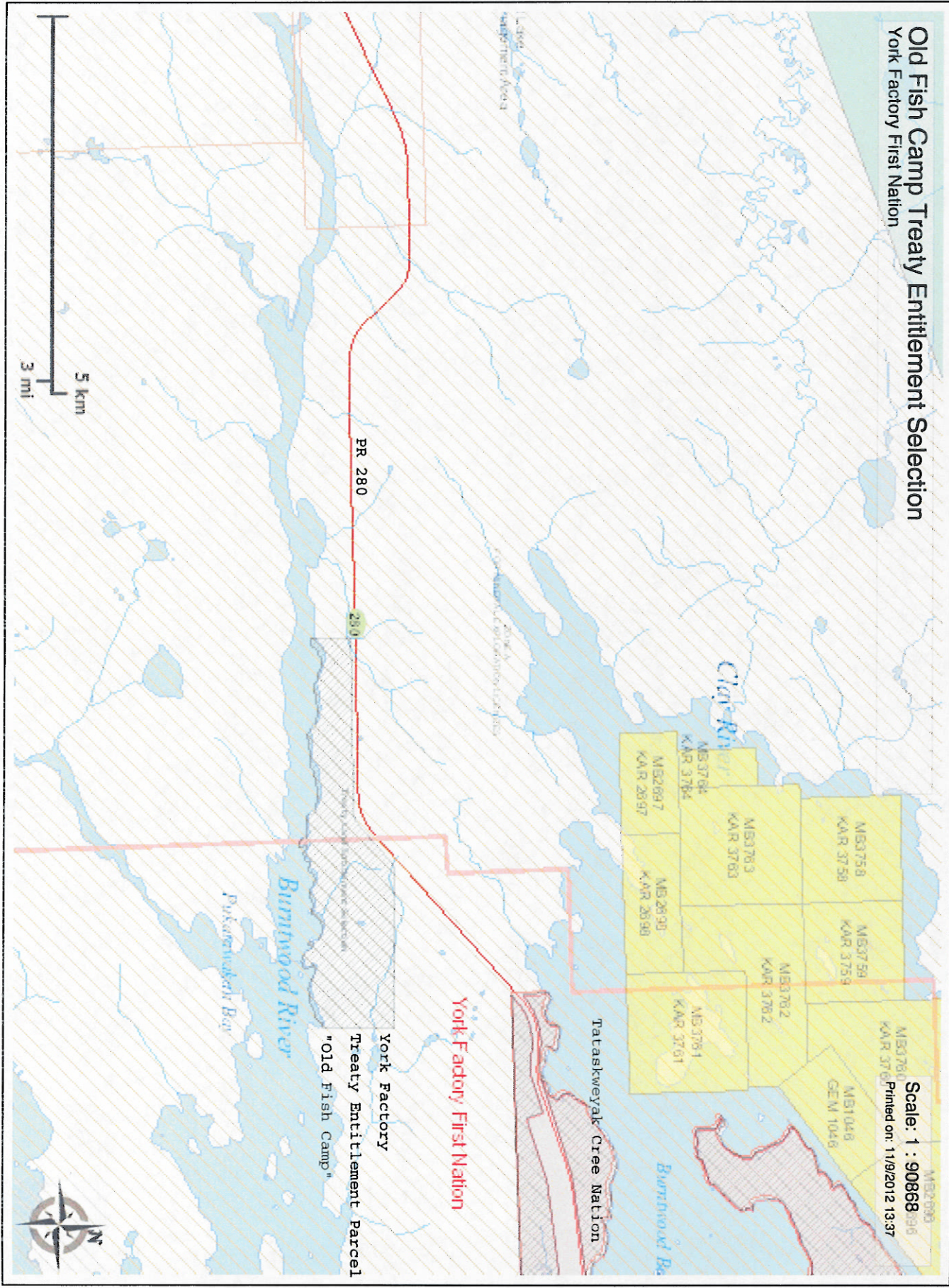
The Government of Manitoba will be participating in a community consultation with York Factory First Nation on the issues related to the Kelsey Rerunning Project and other issues related to Manitoba Hydro. There will be a presentation on the Project and other issues and a question and answer period. The Chief and Council invite all community members to attend the meeting.

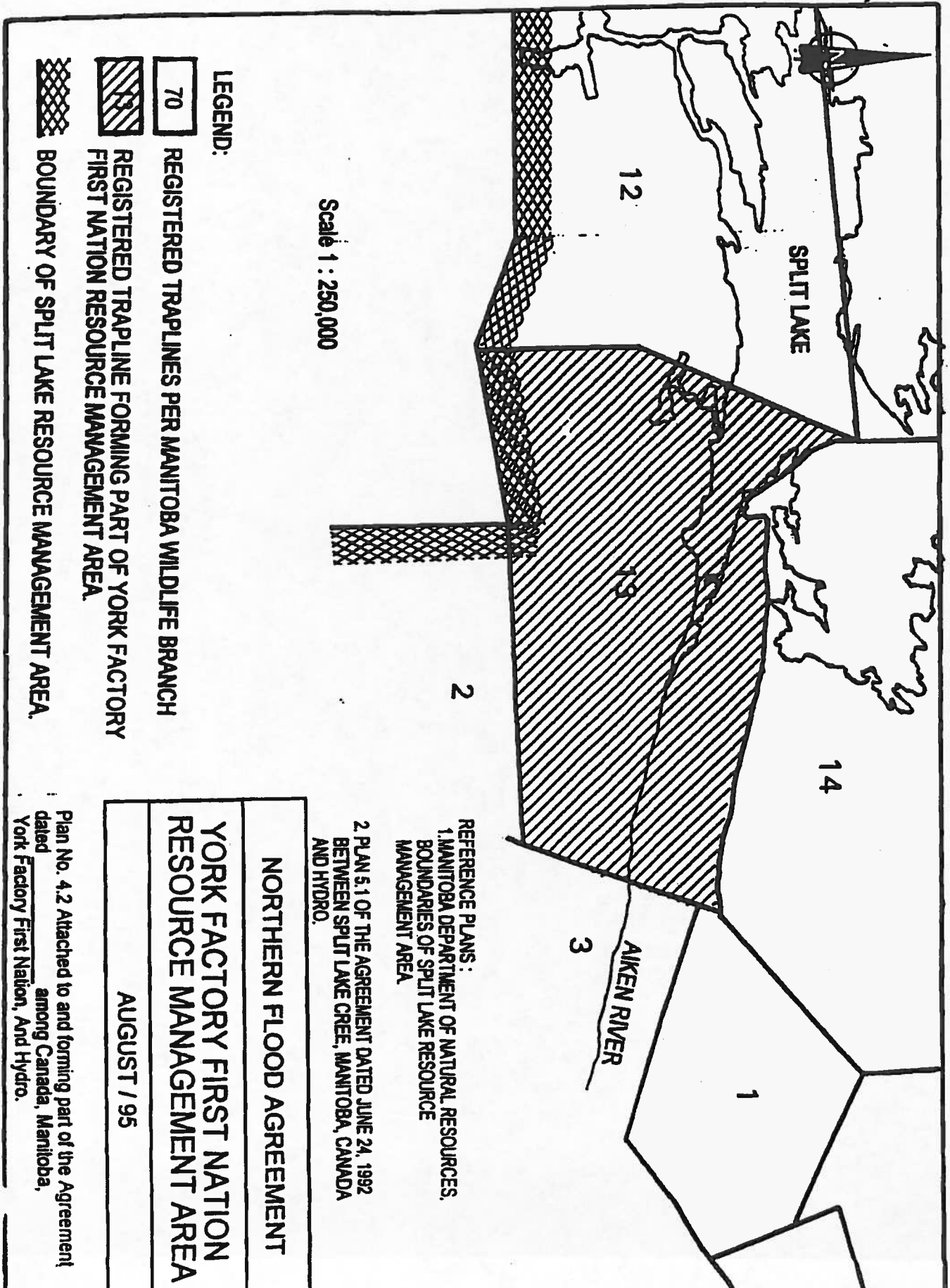
Manitoba
spirited energy

Old Fish Camp Treaty Entitlement Selection

York Factory First Nation

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LEGEND:



70 REGISTERED TRAPLINES PER MANITOBA WILDLIFE BRANCH



REGISTERED TRAPLINE FORMING PART OF YORK FACTORY FIRST NATION RESOURCE MANAGEMENT AREA



BOUNDARY OF SPLIT LAKE RESOURCE MANAGEMENT AREA.

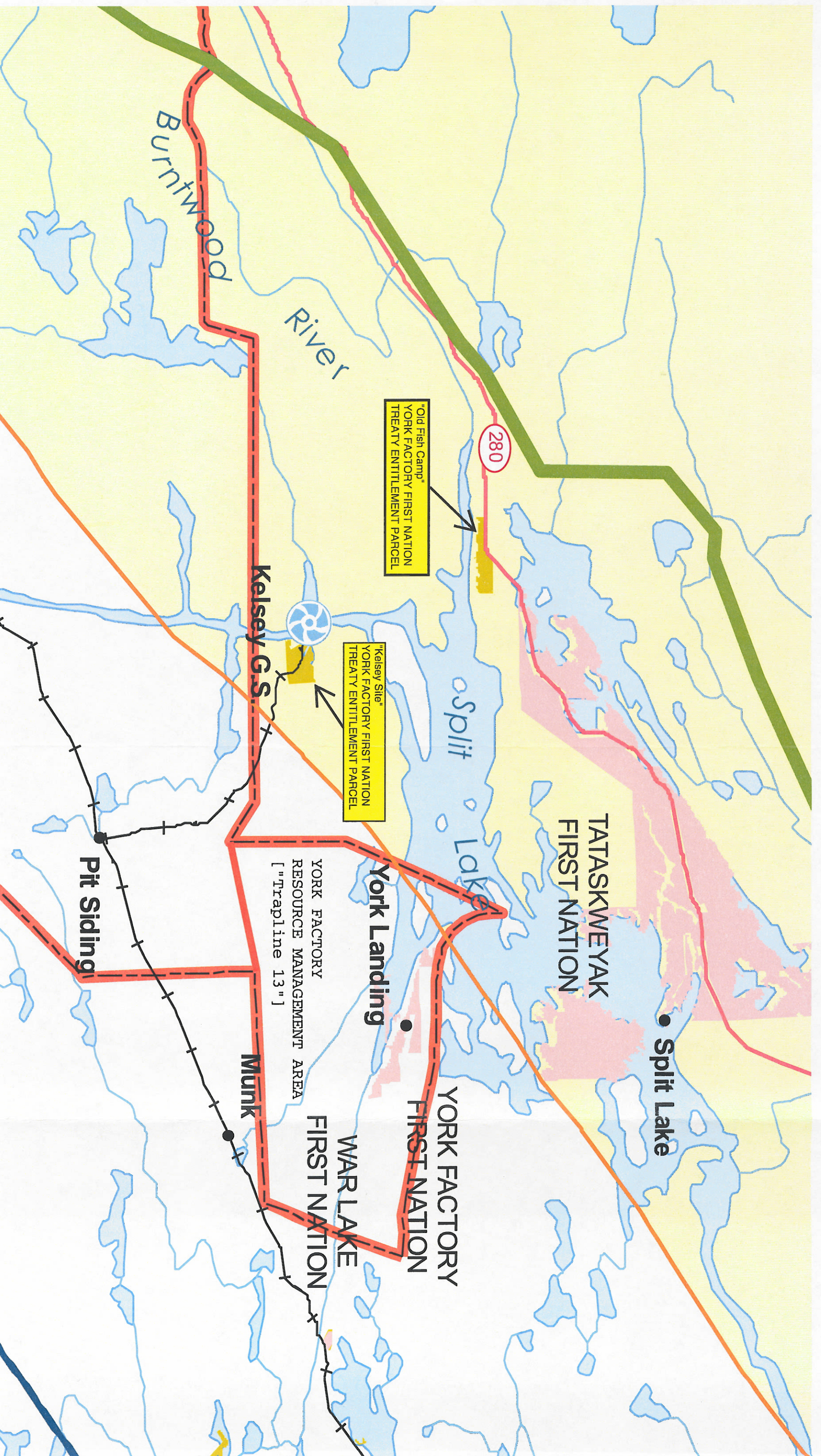
REFERENCE PLANS:
 1. MANITOBA DEPARTMENT OF NATURAL RESOURCES,
 BOUNDARIES OF SPLIT LAKE RESOURCE
 MANAGEMENT AREA

2. PLAN 5.1 OF THE AGREEMENT DATED JUNE 24, 1992
 BETWEEN SPLIT LAKE CREE, MANITOBA, CANADA
 AND HYDRO.

NORTHERN FLOOD AGREEMENT
YORK FACTORY FIRST NATION
RESOURCE MANAGEMENT AREA

AUGUST / 95

Plan No. 4.2 Attached to and forming part of the Agreement
 dated _____ among Canada, Manitoba,
 York Factory First Nation, And Hydro.



ABORIGINAL LANDS - YORK FACTORY FIRST NATION
 [Adapted from Map 6-2600 - Aboriginal Lands]