

This is Affidavit #1 of L. King  
dated February 24, 2014

Court File No. 13-14

**FEDERAL COURT**

BETWEEN:

ALLAN ADAM on his own behalf and on behalf of all other members of  
Athabasca Chipewyan First Nation;  
ATHABASCA CHIPEWYAN FIRST NATION

Applicants

AND:

MINISTER OF THE ENVIRONMENT,  
ATTORNEY GENERAL OF CANADA, and SHELL CANADA LIMITED

Respondents

**AFFIDAVIT #1 OF LISA KING**

I, Lisa Deskelni King, Director of Athabasca Chipewyan First Nation  
("ACFN") Industry Relations Corporation ("IRC"), of 220 Taiganova Crescent,  
Fort McMurray, Alberta, T9K 0T4, SWEAR THAT:

1. I have personal knowledge of the facts and matters deposed to in this Affidavit, save and except where the same are stated to be on information and belief, in which case I believe those facts and matters to be true.
2. Where I have attached as an Exhibit to this Affidavit a copy or excerpt of a document that is available online on a website or in the IRC's electronic files, I have compared the print copy I attach and the version I viewed on the computer screen to ensure it is an accurate copy. Further, where I attach as an Exhibit a letter, email or other document that I received or sent electronically, I have compared the print copy I attach to the version I received electronically ensure it is an accurate copy. Finally, where I attach a copy of document, the original of

which exists in the IRC's records, I have compared the copy of the document to the original that resides in the IRC's records to ensure it is an accurate copy.

3. I am a member of the ACFN. Deskelni, my ancestral name, means "keeper of the river".

4. I was born and raised mainly in Fort McMurray. I spent part of my childhood on a trapline. I am still an active land user today. I exercise my Aboriginal and Treaty 8 rights ("**Rights**") in the place where Shell wants to build the proposed Jackpine Mine Expansion ("**Project**").

5. I obtained my university degree in environmental sciences as a way of fulfilling my duty to protect our Earth Mother. I have worked for the IRC for almost ten years now, first as an environmental specialist and, for several years now, as its Director.

6. The IRC is responsible for responding to third party applications for development within ACFN's traditional lands on behalf of and under direction from ACFN leadership. It acts as the facilitator between ACFN, government departments, and developers.

7. The IRC's day-to-day tasks include reviewing proposed development applications to determine which ones require a response from ACFN and which ones require prioritizing. We identify where projects are on ACFN traditional lands, facilitate consultation sessions like Elders meetings, and project-specific engagement sessions, and conduct or oversee various western science studies as well as traditional use and knowledge collection.

8. ACFN'S traditional lands radiate north, east, west and south from the Peace-Athabasca Delta including the Lower Athabasca River and lands to the south of Lake Athabasca, extending to the lands around Fort McMurray and Fort MacKay ("**Traditional Lands**"). The Project falls within the Traditional Lands, as do many other proposed developments. The IRC is extremely busy trying to keep up with a massive amount of project referrals.

9. If there is a conflict between a proposed development and ACFN land use, the IRC identifies where and how ACFN might be impacted based on the ACFN traditional knowledge available to our staff. The IRC then provides this information to the proponent. There are still gaps in the IRC's traditional use information: we know there are members out there that we have not yet identified and interviewed to fill those knowledge gaps. So there is always a chance that developments will have even greater impacts than the IRC knows and can communicate to companies and government.

10. In addition to reviewing project applications and trying to keep track of government initiatives relating to our Traditional Lands, the IRC works on additional programs and projects to the extent permitted by our resources. We have tried to fill some of the gaps in government land management activities. For example, we conduct some community-based monitoring in parts of ACFN's Traditional Lands, and we have created our own stewardship policy for wood bison and caribou. Our office is actively trying to find creative ways to govern and protect the lands that ACFN relies on for the exercise of its Rights. We do our best to ensure that our Rights are protected, following the direction of the ACFN elected Council and the guidance of ACFN Elders.

11. From ACFN's perspective there is no time to waste. Members voluntarily abstain from hunting woodland caribou in our Traditional Lands because population levels are so low. We have experienced devastating impacts to our ability to trap species such as muskrat for food and fur. There is only one herd of bison – the Ronald Lake Bison Herd – from which we can legally harvest. This herd and its habitat have no protection from either the federal or provincial governments. Yet industrial development continues to be approved within its range. If this Herd is not protected, we will likely lose the ability to hunt bison within our Traditional Lands very quickly.

12. It is becoming harder and harder for our members to harvest waterfowl and moose. And when we do harvest them we have to wonder whether they are

contaminated or not. We are fast approaching a time when we will no longer be able to harvest these resources. We have been raising such concerns to the federal Crown for years, but we have yet to see concrete protective action being taken.

13. Most often our concerns are shuffled off to various regional processes that achieve little to no practical concrete results.

14. During my time at the IRC I have represented ACFN in several forums meant to address cumulative impacts management. In my opinion, none of these forums have succeeded in managing cumulative impacts to an acceptable level or at all. ACFN's Rights are being eroded one project at a time, and it is becoming harder and harder for us to exercise them in any meaningful way.

15. That is one of the reasons ACFN, through the IRC, has put so much effort into trying to consult with the Crown about the Project, including our intervention regarding the Project. I describe both the pre-hearing and hearing phases of the Crown's consultation process for this Project below. We participated very intensively because we hoped to achieve one of three things:

- a. convince the Crown to reject the Project;
- b. delay decision-making on the Project until the Crown has the information necessary to understand the Project's impacts on the environment and ACFN's Rights in light of the extensive development that has already occurred on our Traditional Lands;  
or
- c. at the very least, secure some protective conditions or other concrete government action to address our concerns about the impacts of this Project in light of the existing, extensive development of our Traditional Lands and the rapidly shrinking ability of ACFN members to exercise their Rights, because existing regional processes simply are not working.

16. An example of a process we participated in that has not yet resulted in any protection for our Rights is in relation to the Richardson Backcountry – a critical area for many of our members’ Rights exercise. In the past, ACFN participated in discussions with the provincial government regarding management for the Richardson Backcountry. Alberta would only discuss access management, and even on that subject these discussions did not result in the type of protective measures ACFN wanted to see. We were asked to participate at the same level as All-Terrain Vehicle club members but we declined because our Constitutionally protect Rights have higher status. In 2008 ACFN tabled a proposal for co-management of the Richardson Backcountry with Alberta. We drew this proposal to the attention of Premier Redford again in 2012. To the best of my knowledge, no concrete protections have emerged from ACFN’s efforts to work with Alberta to manage the Richardson Backcountry.

17. A second example of a regional initiative in which ACFN has participated is the Cumulative Environmental Management Association (“**CEMA**”), and the Muskeg River Integrity Group. CEMA is a multi-stakeholder group meant to make recommendations to manage the cumulative environmental effects of regional development and to produce recommendations and management frameworks pertaining to the cumulative impact of oil sands development in North-Eastern Alberta on air, land, water and biodiversity. CEMA has working groups on various issues. The Muskeg River Integrity Group was one of those groups, and it was meant to produce a water management framework for the Muskeg River watershed. Another CEMA group – at first the in stream flow needs group was responsible for providing recommendations to government for establishing rules for water withdrawals from and an in-stream flow for the Lower Athabasca River. The Department of Fisheries and Oceans (“**DFO**”) was part of that process.

18. I found our participation in CEMA to be discouraging and frustrating. ACFN had high hopes that CEMA would establish an in-stream flow for the Athabasca River that respected the River and the need of ACFN members to travel on the River to reach our reserves and exercise our Rights. We had really high hopes that the Muskeg River would be protected. ACFN eventually quit CEMA when it became apparent that CEMA would not accomplish those objectives. There was not equal representation at the table. It was heavily one sided where our voice, and the voice of First Nations generally, was minor compared to industry. Chipewyan Prairie Dene First Nation, Fort McMurray First Nation and Mikisew Cree First Nation left CEMA around the same time that ACFN did.

19. Later, a parallel process for water withdrawals from the Athabasca River – the Phase 2 Framework Committee - was established between DFO, Alberta and First Nations. We participated at a high level in this process, but nothing came of our participation before the whole process got subsumed under LARP.

20. I was active in the original Muskeg River Integrity Group along with our Elder Pat Marcel from approximately 2004 to 2007. We were very disappointed when that framework did not result in protections for that river. CEMA failed to deliver a water management plan for the Muskeg River. Alberta developed an interim plan, the *Muskeg River Interim Management Framework for Water Quantity and Quality* (“**Interim Framework**”). But the *Interim Framework* exempted the Project from the goal of ensuring no physical diversion or rerouting of the main stem of the Muskeg River while the framework is in place. At paragraph 406 of its report, the Jackpine Mine Expansion Joint Review Panel (“**Panel**”) found that Alberta did not apply the precautionary approach in considering the Project’s impacts on the Muskeg River.

21. Pat Marcel and I worked hard in the Muskeg River Integrity Group because the Muskeg River is a very culturally important place for ACFN. In

general, rivers are important to us – we rely on them for travel, fish, medicines, fur and food. A river has a spirit and we have a responsibility to protect those spirits. That is part of our way of life. And along the Muskeg River in particular, Dene people have thousands of years of history there. There is a protected historical site near the Muskeg River, and partially located on another Shell lease, called the Quarry of the Ancestors, or Creeburn Lake. ACFN members were instrumental in getting that site protected. Some of the artifacts from that site have been identified as being 10,000 years old. ACFN members currently use spiritual sites in the Muskeg River area. It is a place where we can still gather our traditional medicines. The Muskeg River corridor is an important place for our traditional resources like plants, wildlife, and fish.

22. I have told Shell and Canada representatives repeatedly that ACFN does not want the Muskeg River destroyed, mined out, and that this would be very harmful to the River and to ACFN's spirituality, health and culture. For example, on March 20, 2009 other ACFN representatives and I met with representatives of Shell Canada Ltd. ("**Shell**") and the Department of Fisheries and Oceans ("**DFO**") to discuss Shell's plan to compensate for the destruction of the Muskeg River with a fish compensation lake. Attendees at that meeting included myself, Ian Peace, Nicole Nicholls and Dan Smith for ACFN; Ashley Nixon, Karen Roberts, Bill Kovach, Rick Courtney and others for Shell; and Marek Janowicz, Brian Makowecki, Dixie Smeeton and Court Berryman for DFO. During the March 20, 2009 meeting I raised ethical issues with mining the tributaries to the river, and the need for a cultural assessment, to understand the serious impacts that this mining would have on ACFN. My staff, Ian Peace and Nicole Nicholls, also explained the cultural value of the Muskeg River to Shell and DFO, to let them know that ACFN's concerns go beyond maintaining fish habitat.

23. In 2011, Shell told ACFN that they could divert the water from the Muskeg River into a ditch, instead of through a pipe. I told Shell and Canada that that plan did not address our concerns, but Shell's proposal did not change.

Diversion of the Muskeg River is just one of the issues we raised with Canada during the pre-hearing phase of consultation.

### **ACFN's pre-Hearing Engagement with Canada on the Project**

24. ACFN actively attempted to engage with Canada in a concrete way regarding the Project prior to the fall 2012 Panel hearing for the Project (the "**Hearing**"). We submitted a record of most of these efforts to the Panel as part of our Hearing intervention ("**Intervention**").

25. On February 24, 2014 I confirmed that ACFN's Intervention can be found as document 465 on the CEEA Registry 59540, for the Jackpine Mine Expansion at this address: <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=81951>.

26. ACFN submitted its Intervention materials on October 1, 2012. Attached to my Affidavit as **Exhibit "32"** is a copy of the Index of Documents-Table of Concordance to ACFN's Intervention (the "**Index of Documents**"). It lists all of ACFN's Intervention materials. ACFN filed thousands of pages of documents with the Panel. I have only attached some of our documentary evidence to my Affidavit, but the Index of Documents shows the scope of our Intervention.

27. Appendix F of ACFN's Intervention materials included a record of ACFN's attempts to have the impacts of the Project addressed by Canada. I will describe the highlights of this record below.

28. ACFN identified as early as 2007 that the Project and Shell's proposed Pierre River Mine would have adverse impacts upon ACFN's Rights, culture and traditional land use. Many early letters refer to both the Project and the proposed Pierre River Mine because Shell originally filed a single application for the two projects.

29. Attached to my Affidavit as **Exhibit "1"** is a copy of a letter from Blair Whenham of the IRC to George Arcand, Acting Regional Director, Alberta

Region, Indian and Northern Affairs Canada, dated November 8, 2007. It was filed as Appendix F, Tab 2 of ACFN's Intervention. In this letter ACFN identified a number of adverse impacts that it expected would result from the Project and the Pierre River Mine, taking other planned and approved developments into account: the almost total decimation of the Muskeg River watershed; impacts to ACFN's fishery and ability to navigate on the Athabasca River; loss of boreal forest and wetlands; the inability of companies to successfully reclaim peatlands; the loss of a large area within ACFN's traditional lands for the exercise of Treaty Rights; the likely permanent nature of the associated tailings ponds; permanent loss of traditional and ecological knowledge in the affected areas; potential contamination of country foods; problems associated with increased use of lands by a transient worker population (i.e. trespass, vandalism, competition for traditional resources, waste of traditional resources, destruction of sensitive ecological sites); the extirpation of caribou from the region and significant loss of other wildlife species.

30. In the November 8, 2007 letter, ACFN noted its expectation of deep consultation leading to accommodation, and acknowledged that as industry was unlikely to mitigate certain impacts, Canada would need to provide accommodation. We indicated that one possible accommodation would be for the Project not to proceed.

31. Attached to my Affidavit as **Exhibit "2"** is a copy of a letter from me to Brian Makowecki of DFO dated May 12, 2009. It was filed as Appendix F, Tab 8 of ACFN's Intervention. In this letter, I advised DFO that we would not be participating in DFO's No Net Loss Planning process as it did not appear to be a forum that would address impacts to our Rights.

32. In addition, my May 12, 2009 letter explained ACFN's view that certain information requirements needed to be incorporated into DFO's consideration of the Project as well as into any regional land use planning exercises. To this end, I enclosed with my letter ACFN's Traditional Resource Use Plan proposal. In

essence, the proposal was for Canada and Alberta to work with ACFN in order to identify what socio-cultural, economic and ecological conditions were required in order to ensure that the meaningful practice of ACFN's Rights would be sustained within its Traditional Lands for future generations. To my knowledge, this was the first time that ACFN brought the Traditional Resource Use Plan proposal directly to the attention of Canada. I have not attached the proposal itself – my colleague Nicole Nicholls speaks to the revised proposals that ACFN provided to Canada in 2010 and 2011.

33. Attached to my Affidavit as **Exhibit “3”** is a copy of a letter from Nicole Nicholls of the IRC, to then federal Environment Minister Jim Prentice and his provincial counterpart, dated August 7, 2009, regarding the Project and the Pierre River Mine. This letter was copied to Laura Knowles at Canada's Major Projects Office and Brett Maracle of the Canadian Environmental Assessment Agency (“**Agency**”). The letter was prepared on my instruction and I reviewed it. It was filed as Appendix F, Tab 11 of ACFN's Intervention. The letter raises ACFN's concern about the destruction of the Muskeg River and its watershed, and identified some of the other likely general adverse impacts of the Project.

34. The August 7, 2009 letter notes ACFN's concern that the cumulative impacts of development are making it harder and harder for ACFN members to practice their traditional way of life and for elders to pass down this culture to ACFN youth. Ms. Nicholls asks Minister Prentice a number of questions about Canada's commitment to developing a proper understanding of how these cumulative impacts are compromising the ability of ACFN members to exercise their Treaty and Aboriginal rights prior to decision-making on the Project. For example, she asked whether Canada was willing to work with ACFN to develop a Traditional Resource Use Plan, and fund this Plan so that it could be developed in time to inform the review of the Project, as well as whether Canada was willing to gather baseline environmental data prior to Project approval so as to ensure that the potential impacts of the Project could be properly understood prior to any approval.

35. Attached to my Affidavit as **Exhibit “4”** is a copy of a letter from me to Shauna Sigurdson, Regional Director AB/NWT, Agency, dated March 25, 2010. It was copied to Minister Prentice, Lauren Knowles at the Major Projects Office, and Mai-Linh Huynh of the Agency. It was filed as Appendix F, Tab 28 of ACFN’s Intervention. I explained that ACFN wished to provide input into how consultation on the Project and the Pierre River Mine would take place, and our view that ACFN would be significantly impacted by the Project and Pierre River Mine. We requested a meeting with the Agency as soon as possible.

36. Attached to my Affidavit as **Exhibit “5”** is a copy of a letter from Shauna Sigurdson of the Agency to me dated April 30, 2010, responding to my letter of March 25. It was it was filed as Appendix F, Tab 33 of ACFN’s Intervention. Ms. Sigurdson explained that Canada had not yet determined whether federal environmental assessment legislation would apply to the Project. In the interim, the Agency encouraged the proponent to identify and understand potential impacts to Aboriginal communities as part of the provincial environmental process. She proposed that the Agency meet with ACFN to discuss how a federal consultation process could look if a federal environmental assessment was required. The Agency sent a similar letter to Chief and Council dated May 3, 2010 and which is attached to my Affidavit as **Exhibit “6”**.

37. On May 31, 2010, Nicole Nicholls and I met with Agency and Transport Canada representatives, including Sheila Risbud from the Agency. At this meeting, Ms. Risbud outlined the basics of what she thought a consultation process could look like. At that time, we did ask the Agency to do some work to support an informed assessment of the impacts of the Project on ACFN’s Rights and way of life.

38. Attached to my Affidavit as **Exhibit “7”** is a copy of a letter from me to Lauren Knowles, Senior Operational Officer at the federal Major Projects Management Office, dated November 16, 2010, regarding the Project and the Pierre River Mine. It was filed as Appendix F, Tab 50 of ACFN’s Intervention.

Ms. Risbud was copied on this correspondence. I put Ms. Knowles on notice that ACFN expected consultation on several items, in particular the time lines associated with the environmental assessment and authorization processes associated with the Project, due to our limited capacity.

39. Attached to my Affidavit as **Exhibit “8”** is a copy of “Draft Aboriginal Consultation Plan for the Environmental Assessment Process for the Proposed Shell Jackpine Mine Expansion and Pierre River Mine”, prepared by the Agency, dated January 7, 2011 (“**Draft Plan**”). It was filed as Appendix F, Tab 58 of ACFN’s Intervention. Key points of the Draft Plan are:

- a) Canada was taking a “whole of government” approach to consulting in which federal consultation obligations were to be integrated with the environmental assessment to the extent possible.
- b) The Agency “is responsible for coordinating the federal Aboriginal consultation.... and fulfills the role of Crown Consultation Coordinator.”
- c) During the pre hearing and hearing phases (II and III) of federal consultation, the federal government would consult directly with Aboriginal groups only on matters that fell outside of the Panel mandate and such matters were expected to be the exception.
- d) Canada wished to “capitalize” on the opportunities in the environmental assessment process for information gathering about Aboriginal concerns and potential impacts.
- e) Canada viewed it as important for Aboriginal groups to make their concerns known to the Panel so that it could make informed recommendations on the proposed projects.

- f) The record established through the Panel process and the report produced by the Panel (“**Panel Report**”) was to be the primary source of information to support the federal government’s assessment of the Project’s potential adverse impacts on Aboriginal and treaty rights. This assessment would occur during Phase IV – consultation on the Panel Report.
- g) Responsibility for consultation during the Regulatory Phase V would be transferred from the Agency to DFO, and would include consultation on specific details on project construction, operation and eventual decommissioning.

40. Attached to my Affidavit as **Exhibit “9”** is a copy of a letter from me to Sheila Risbud, Crown Consultation Coordinator for the Agency, dated January 26, 2011 regarding the Draft Consultation Plan for the Project. It was filed as Appendix F, Tab 61 of ACFN’s Intervention. Some key points of ACFN’s submission on the Draft Consultation Plan were:

- a) The Draft Plan was unclear regarding who would make determinations about ACFN’s Rights, and at what stage of the Project review process.
- b) ACFN was encouraged to participate fully in the Panel hearings but it was unclear what mandate, if any, the Panel would have to consider or act on information about ACFN’s Rights.
- c) Consultation had to begin immediately and could not be deferred to later stages of the regulator process because the constitutional issues ACFN had raised, including determinations regarding the severity of potential impacts to ACFN’s Rights, whether the duty to consult had been discharged, and whether the Crown had adequately accommodated adverse impacts on ACFN’s Rights, required immediate action from the Federal Crown. The massive

and accelerating industrial development of its traditional lands was rapidly depriving ACFN members of the meaningful ability to exercise their Rights. ACFN members stood to be deprived of the core entitlement secured under Treaty 8: the right to continue their traditional way of life and maintain their distinctive Dene culture.

- d) Projects were being approved one after another without a reliable, comprehensive assessment of cumulative impacts on the environment, or on ACFN's Rights.
- e) In these circumstances, the honour of the Crown compelled Canada to take positive steps to ensure that further development was consistent with the continued, meaningful exercise of the Rights, including the obligation to inform itself as to what was required to sustain the Rights in perpetuity.

41. In my letter of January 26, 2011, I asked the Federal government to work with ACFN to address information gaps and to generate critical information for understanding what was required to ensure that ACFN could sustain its Rights in perpetuity, and the protected areas, thresholds, targets and monitoring required to maintain these thresholds in practice. We asked the Federal Crown to incorporate the results of such work into the Project review process rather than leaving it until the very last stages of regulatory review.

42. In my letter of January 26, 2011, I noted that under the Draft Consultation Plan, Phase IV appeared to be geared at identifying, rather than resolving outstanding Aboriginal concerns, and that the Agency appeared to have no mandate to respond to propose or negotiate accommodations or otherwise present the position of the Crown. We asked the Agency to clarify several questions about the consultation process.

43. Attached to my Affidavit as **Exhibit "10"** is a copy of a letter from Sheila Risbud of the Agency to me dated April 1, 2011, responding to my letter of

January 26, 2011. It was filed as Appendix F, Tab 66 of ACFN's Intervention. In this correspondence Ms. Risbud said that the Agency agreed that consultation should begin soon and proposed a meeting between ACFN and the Agency to identify information gaps. Ms. Risbud wrote that the federal government saw value in pursuing discussion on ACFN's Traditional Land and Resources Use Management Plan ("TLRUMP") proposal. Ms. Risbud acknowledged that the Crown may need to include additional consultation activities or further efforts to address accommodation outside of the Panel review process. She reiterated that Canada would rely upon the Panel process "to the greatest extent possible" to meet its legal duty to consult with Aboriginal groups.

44. ACFN and the Mikisew Cree First Nation ("**Mikisew**") made submissions on the Joint Review Panel report for the Joslyn North Mine Project, another oil sands mine that went to hearing in 2010. Erin Thomson, member of Mikisew's legal team, provided the "Joint Response of Athabasca Chipewyan First Nation & Mikisew Cree First Nation to the Report of the Joint Review Panel for the Joslyn North Mine Project", dated March 17, 2011 to Marie-France Therrien and Sheila Risbud of the Agency on April 6, 2011. I was copied on Ms. Thomson's email. Attached to my Affidavit and marked collectively as **Exhibit "11"** is a copy of Ms. Thomson's email and the Joslyn Project Submission.

45. The Joslyn Project Submissions explained ACFN's concerns with the failure of the governments of Alberta and Canada to assess or manage the cumulative effects of oil sands development on our traditional lands and Treaty rights. Here are some key matters covered in the Submissions:

- a) ACFN is witnessing the collapse of lands, waters and resources that had sustained our Nation for generations.
- b) The Crown has legal duty to take action, and that such action is long overdue.

- c) Although Environment Canada had acknowledged the need to fill information gaps in order to ensure effective mitigation in as early as 1997 (page 11), there was still no effective regulatory system in place to responsibly manage the cumulative impacts of development in the oil sands region. We asked government to step up and take a leadership role in addressing cumulative effects.
- d) Alberta's process for developing the Lower Athabasca Regional Plan was fundamentally deficient and was not a credible or reliable initiative to manage cumulative impacts of development upon our culture or our Rights.

46. Attached to my Affidavit as **Exhibit "12"** is a copy of Miksiew and ACFN's "Joint Submissions regarding the draft Agreements to Establish Joint Panel(s) for the Jackpine Mine Expansion Project and the Pierre River Mine Project ("the draft Agreements") and their attached Terms of Reference ("TORs")", dated April 6, 2011. Erin Thompson provided this document to Ms. Therrien and Ms. Risbud via her email of the same date, which I have already referenced above. This document was filed as Appendix F, Tab 68C of ACFN's Intervention. ACFN's key concerns in this document centered on ensuring that the Panel had the mandate and expertise to address impacts to ACFN's Rights.

47. Attached to my Affidavit as **Exhibit "13"** is a copy of a letter from Chief Allan Adam, ACFN, to the Honourable John Duncan, Minister of Indian and Northern Affairs, dated April 11, 2011. It was filed as Appendix F, Tab 69 of ACFN's intervention. Both myself and Sheila Risbud were copied on this correspondence. Chief Adam alerted Minister Duncan to ACFN's concerns regarding the direct, indirect and cumulative impacts of the Project and Pierre River Mine on ACFN's reserves, all of which are located downstream. He noted that ACFN members have observed environmental damage to their reserve lands, which they reasonably attributed to oil sands development upstream. Impacts reported included declining water levels which sometimes prevented members'

access to reserve lands, and contamination of the Athabasca River which had decreased the utility of downstream reserves by eliminating sources of usable drinking water and reducing members' willingness and ability to harvest fish in nearby waters. Chief Adam asked how Canada planned to assess and then avoid or mitigate impacts to our reserve lands. To my knowledge, ACFN did not receive a reply to this letter.

48. Attached to my Affidavit as **Exhibit "14"** is a copy of an email from Sheila Risbud of the Agency, to Nicole Nicholls of the IRC, dated May 16, 2011. It was filed as Appendix F, Tab 79 of ACFN's Intervention. I was copied on this email. The email enclosed a series of "mind maps" of the Agency's understanding of some potential impacts of the Project on ACFN; a table of the Agency's understanding of common interests as between Canada, ACFN and Mikisew; and a list of reference materials which were informing the Agency's Issues Tracking Table. I have included some of the enclosures to Ms. Risbud's May 16, 2011 email as exhibits to my Affidavit:

- a) **Exhibit "15"** is a copy of "Overlapping Issues Between Federal Departments and ACFN-MCFN regarding the proposed Shell Jackpine Mine Expansion and Pierre River Projects", dated May 3, 2011. It was filed as Appendix F, Tab 79A of ACFN's Intervention.
- b) **Exhibit "16"** is a copy of "Potential Impacts on Fishing Rights (ACFN & MCFN)". It was filed as Appendix F, Tab 79B of ACFN's Intervention.
- c) **Exhibit "17"** is a copy of "Potential Impacts on Gathering Rights (ACFN & MCFN)". It was filed as Appendix F, Tab 79C of ACFN's Intervention.

- d) **Exhibit “18”** is a copy of “Potential Impacts on Hunting Rights (ACFN & MCFN).” It was filed as Appendix F, Tab 79D of ACFN’s Intervention.
- e) **Exhibit “19”** is a copy of “Potential Impacts on other existing or potential Aboriginal Rights (ACFN & MCFN)”. It was filed as Appendix F, Tab 79E of ACFN’s Intervention.
- f) **Exhibit “20”** is a copy of “Potential Impacts on Trapping Rights (ACFN & MCFN)”. It was filed as Appendix F, Tab 79F of ACFN’s Intervention.
- g) **Exhibit “21”** is a copy of “Reference List for ACFN MCFN”. It was filed as Appendix F, Tab 79G of ACFN’s Intervention.

49. Attached to my Affidavit as **Exhibit “22”** is a copy of a letter from Sheila Risbud to me dated May 26, 2011. It was filed as Appendix F, Tab 81A of ACFN’s Intervention. In this letter Ms. Risbud indicated that Canada’s Draft Consultation Plan was not meant to address the broader issue of adverse cumulative impacts to ACFN. She advised that ACFN must raise the cumulative impacts issue directly with the Panel, in the final Crown Consultation Coordinator Report, and through discussions with senior federal officials. The May 3 2011 meeting minutes that were enclosed with Ms. Risbud’s letter are included in Affidavit #1 of Nicole Nicholls.

50. Ms. Risbud stated in her May 26, 2011 letter that the Federal Crown would be able to discuss its position on matters such as the adequacy of consultation and accommodation of the Rights during Phase IV (post-Report) consultation. She advised that federal Crown representatives “will have the mandate to propose and negotiate mitigation measures that are within the federal government’s authority for the proposed projects (i.e. that relate to federal permits)”. She said that the federal Crown would “consider accommodation measures beyond project-specific mitigation to the extent appropriate.”

51. Ms. Risbud's May 26, 2011 letter also states that those portions of the Crown Consultation Report related to representations by ACFN would be shared with us, and that we would have the opportunity to provide comments. Ms. Risbud noted that Transport Canada advised that ACFN's concerns regarding the impacts of water withdrawals on navigation in the Athabasca River would be considered in Transport Canada's review of any *Navigable Water Protection Act* applications it received regarding water withdrawals for the Project.

52. Attached to my Affidavit as **Exhibit "23"** is a copy of Ms. Risbud's email which transmitted the May 26 letter and the May 3 tracked changed minutes.

53. Attached to my Affidavit as **Exhibit "24"** is a copy of the Agency's track changed May 3 meeting minutes.

54. Attached to my Affidavit as **Exhibit "25"** is a copy of a letter from me and Melody Lepine, MCFN GIR, to Brian Makowecki, Manager, Oil Sands Projects, DFO, and to Pat Marriot, Acting Regional Approvals Manager, Northern Region, Alberta Environment, dated October 12, 2011. It was filed as Appendix F, Tab 91 of ACFN's Intervention. It describes the Nations' disappointment with the fact that we had been pushed to the sidelines of the Phase 2 Water Management process for establishing withdrawal rules and in flow needs for the Lower Athabasca River. We also objected to the framework being handed over to Alberta to deal with under the Lower Athabasca Regional Plan ("**LARP**"). We had already expressed concerns that Alberta had not shown a commitment to consider, respond to, and integrate our submissions on LARP and its frameworks, which also failed to incorporate measures to ensure protection of our Treaty Rights.

55. Attached to my Affidavit as **Exhibit "26"** is a copy of a letter dated October 19, 2011 from myself to Jason Plamondon at Shell regarding Shell's summary of ACFN's additional traditional land use information. It was filed as Appendix F, Tab 93A of ACFN's Intervention. This correspondence expresses ACFN's frustration with Shell's insistence on continuing to assess Project impacts

in a manner that systematically minimized or excluded from consideration the most significant impacts on ACFN culture, traditional practices, and constitutional rights.

56. Attached to my Affidavit as **Exhibit “27”** is a copy of an email string beginning with an email Mai-Linh Huynh of Agency, to a few people including Melody Lepine of Mikisew, Sheila Risbud of the Agency, and me, dated November 4, 2011. It was filed as Appendix F, Tab 97 of ACFN’s Intervention. It includes an email from Ms. Risbud indicating that the Agency will provide clarity on when and how Canada would share with ACFN its position on potential impacts and infringements to ACFN’s Rights. It also discusses ACFN’s provision of further information to Canada about its concerns regarding caribou.

57. Attached to my Affidavit as **Exhibit “28”** is a copy of Mr. Donald Crowe’s cover letter for Shell’s Submission of Additional Information to the Joint Review Panel. It discusses ACFN’s review of this information. *Document # 140 on the CEEA Registry for Sudepine Mine Expansion. Dated Nov-15, 2011*

58. Attached to my affidavit as **Exhibit “29”** is a copy of a letter from me to Jason Plamondon, of Shell, and to Marek Janowicz of DFO dated November 14, 2011. It was filed as Appendix F, Tab 99A of ACFN’s Intervention. It is a cover letter for ACFN’s reviews of Shell’s proposed No Net Loss Plan Redclay Compensation Lake. It highlights ACFN’s concerns with the destruction of habitat for the Ronald Lake Bison herd, and the cultural inappropriateness of a manmade lake for Dene traditional land use.

59. Attached to my Affidavit as **Exhibit “30”** is a copy of a letter from Dean Stinson O’Gorman of the Agency and Terry Abel of the Alberta Energy Resources Conservation Board (“**ERCB**”) to Cristina A. Scattolin, Janes Freedman Kyle Law Corporation, dated December 2, 2011. It was filed as Appendix F, Tab 104A of ACFN’s Intervention. I was copied on this correspondence. This letter explains that the final Panel Agreement was changed to include consideration of the interests and knowledge of Aboriginal groups and communities potentially affected by the Project. The letter enclosed the final

Panel Agreement and Terms of Reference as well as a chart of the Agency and ERCB's responses to our comments on the draft Agreement and Terms of Reference. The final Panel Agreement and Terms of Reference are included in the Panel Report so I have not attached them here.

60. Attached to my Affidavit as **Exhibit "31"** is a copy of an August 3, 2012 letter from Melody Lepine of Mikisew and me to the Shell Review Panel Secretariat in response to the Panel's request for submissions on the adequacy of Shell's responses to the Supplemental Information Requests issued by the Panel on January 30, 2012. This letter is an excerpt of document 276 on the CEEA Registry 59540, which I last viewed on February 24, 2014 at this address: <http://www.ceaa-acee.gc.ca/050/documents/p59540/80764E.pdf>. The letter expresses, among other things, our serious concerns with Shell's approach to assessing impacts on our traditional land use, culture and Rights.

#### **ACFN's Intervention in the Hearing ("Intervention")**

61. In Alberta, a joint review panel is a coordinated effort between the ERCB – now the Alberta Energy Regulator – and the Agency to conduct a single environmental assessment of a proposed project that meets the requirements of the relevant provincial and federal legislation. Joint review panels must also abide by their terms of reference, which are established by Canada and Alberta to help shape the panel's mandate.

62. Joint review panels typically ask interested parties to comment on the sufficiency of the information that has been submitted by the proponent in support of its project application. Once a panel has decided it has enough information to proceed to hearing, it sets deadlines for filing written documentary evidence and Notices of Questions of Constitutional Law, and hearing dates. The oral hearing typically consists of the proponent providing an opening statement and putting forward a large witness panel for cross-examination. Then interested parties who qualify to participate each put forward their witness panels to give evidence and to be cross-examined on their oral and written submissions. Once the hearings

conclude, the Panel writes a report summarizing its findings, recommendations, and in some cases, the conditions it is placing on the proposed project.

63. Joint review panels have been established to review several proposed oil sands mines within ACFN's Traditional Lands. I have attended several joint review panel hearings in the past on behalf of ACFN, at least in part, including for the the Muskeg River Mine Expansion, Voyageur, Kearl Oil Sands, and Joslyn North. I also attended the 2013 hearing for Teck's proposed winter drilling program.

64. To my knowledge, no joint review panel has ever said that an oil sands mine application should be denied. To my knowledge, the Panel for this Project was the only joint review panel reviewing an oil sands project to ever make findings of significant adverse environmental impacts, and adverse impacts of any sort on Aboriginal and Treaty Rights.

65. The IRC spent years getting ready to intervene in the Panel hearing of the Project. We reviewed and commented on Shell's information with the help of experts and community members. We noted information gaps that should be filled. We met with our community members and collected their views on the Project. We prepared and commissioned the preparation of ACFN reports to file with the Panel. We commented on the Panel's terms of reference.

66. In August 2012, the Panel determined it had sufficient information to proceed to hearing. On August 17, 2012 the Panel issued a Notice of Hearing for the Project. Documentary evidence and Notices of Questions of Constitutional Law were to be submitted by October 1, 2012. The Panel set a preliminary hearing date for the Notices of Questions of Constitutional Law on October 23, 2012 with the hearing of Shell's Project application to commence on October 29, 2012.

67. I actively participated in preparing ACFN's Intervention, and was involved in determining the content of ACFN's submissions and written evidence, as well as in identifying our Hearing witnesses.

68. ACFN submitted its Intervention materials on October 1, 2012. Attached to my Affidavit as **Exhibit "32"** is a copy of the Index of Documents-Table of Concordance to ACFN's Intervention (the "**Index of Documents**"). It lists all of ACFN's Intervention materials. ACFN filed thousands of pages of documents with the Panel. I have only attached some of our documentary evidence to my Affidavit, but the Index of Documents shows the scope of our Intervention. We did our best to make sure that the Panel, Alberta and Canada had as much information as we could provide about the type and extent of impacts that ACFN is experiencing from development on our Traditional Lands and that we expected to experience if the Project were approved. We hoped that our submissions would ensure that ACFN's Rights were properly taken account in decision-making for the Project.

69. ACFN filed a Notice of Question of Constitutional Law. It is attached to the Affidavit #1 of Doreen Somers as **Exhibit "1"**. It was filed on October 1, 2012 along with ACFN's Intervention. Because the Panel would be making a final determination on whether to authorize the Project under the provincial *Oil Sands Conservation Act*, we wanted the Panel to assess whether the Crowns had discharged their consultation and accommodation obligations and to address this matter in the Panel Report.

70. Attached to my Affidavit as **Exhibit "33"** is a copy of ACFN's submission to the Panel. It was filed on October 1, 2012 as part of ACFN's Intervention. In this submission, we objected to approval of the Project. We outlined many of the anticipated Project impacts on ACFN. We also provided a list of proposed mitigations and accommodation measures in the event that the Project was approved. Some examples are: a five year moratorium on new development in certain portions of the Athabasca Oil Sands Region, applicable to

the Project, while the Crown gathered information to properly understand the impacts of oil sands development to date on the environment and ACFN's Rights; the development of a TLRUMP and use of the TLRUMP to select conservation areas; emergency protection orders for Woodland Caribou within north eastern Alberta; immediate protection for the Ronald Lake Bison herd from non-First Nations hunting, and of the herd's habitat throughout their range; and funding for ACFN culture programs to maintain and promote ACFN's land-based knowledge to help mitigate the losses associated with the reduced access to Traditional Lands.

71. Attached to my Affidavit as **Exhibit "34"**, is a copy of an excerpt of Appendix A, Tab 1 of ACFN's Intervention, called Treaty No. 8 Made June 21, 1899 and Adhesions, Reports, Etc.

72. Attached to my Affidavit as **Exhibit "35"** is a copy of an excerpt of *As Long As This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* by René Fumoleau (Toronto: McClelland and Stewart Ltd, 1975). The entire document was filed as Appendix A, Tab 63 of ACFN's Intervention.

73. Attached to my Affidavit as **Exhibit "36"** is a copy of an excerpt of "Athabasca Chipewyan First Nation Integrated Knowledge and Land Use Report and Assessment for Shell Canada's Proposed Jackpine Mine Expansion and Pierre River Mine", dated April 20, 2011, updated September 15, 2012, by Dr. Craig Candler. The full report was filed as Appendix D, Tab 1 of ACFN's Intervention. It concluded that the Project would have significant adverse residual impacts on ACFN's traditional knowledge and land use.

74. Attached to my Affidavit as **Exhibit "37"** is a copy of "Preliminary Data on ACFN Knowledge and Use: Migratory Birds and Aquatic Fur, with reference to the proposed Jackpine Mine Expansion (JPME) proposed by Shell Canada", a technical report prepared by Craig Candler, PhD, Director of the Firelight Group for ACFN IRC, dated September 28, 2012. It was filed as Appendix D, Tab 2 of ACFN's Intervention. It describes the importance of migratory birds to ACFN,

some of the changes ACFN members have observed in the population, health and migration patterns of the birds within the Traditional Lands, and the consequent impacts on ACFN's ability to harvest this key traditional resource.

75. Attached to my Affidavit as **Exhibit "38"** is a copy of an excerpt of "Research Report: An Ethnohistory of the Athabasca Chipewyan First Nation", an expert report submitted by Dr. Patricia A. McCormack on September 2, 2012. The full report was filed as Appendix D, Tab 5 of ACFN's Intervention. This report gives cultural and historical background on ACFN, and discussed cultural impact and the conditions under which cultural impacts may occur, to assist the Panel in understanding Project impacts on ACFN.

76. Attached to my Affidavit as **Exhibit "39"** is a copy of "A Narrative of Encroachment Experienced by Athabasca Chipewyan First Nation", a report prepared by P.M. Larcombe, Symbion Consultants for ACFN, dated September 28, 2012. It was filed as Appendix D, Tab 7 of ACFN's Intervention. The Larcombe report provides background cultural information about ACFN, and describes the many types of impacts and impact pathways that ACFN members are experiencing that are relevant to assessing Project impacts.

77. Attached to my Affidavit as **Exhibit "40"** is a copy of an excerpt of "Athabasca Chipewyan First Nation (ACFN) Supplemental Social, Economic and Cultural Effects Submission for Shell Canada's Proposed Jackpine Mine Expansion", a report prepared by Alistair MacDonald, Firelight Group Research Cooperative for ACFN, dated September 29, 2012. The entire report was filed as Appendix D, Tab 8 of ACFN's Intervention. The excerpt summarizes the social, economic and cultural Project impacts that the author predicts ACFN will experience and suggests many mitigation measures.

78. Attached to my Affidavit as **Exhibit "41"** is a copy of an excerpt of "Effects on Traditional Resources of the Athabasca Chipewyan First Nation: The Shell Jackpine Mine Expansion and Pierre River Mine Projects", a report prepared by Management and Solutions in Environmental Science ("**MSES**") for

ACFN, dated September 2012. The full report was filed as Appendix E, Tab 2 of ACFN's Intervention. It explains the severe loss of traditional lands and resources that ACFN is experiencing based on 2008 data, and how the Project will exacerbate that situation.

79. Attached to my Affidavit as **Exhibit "42"** is a copy of "Continued Effects on Traditional Resources of the Athabasca Chipewyan First Nation between 2008 and 2011: The Shell Jackpine Mine Expansion and Pierre River Mine Projects", a report prepared by MSES for ACFN, dated September 2012. It was filed as Appendix E, Tab 3 of ACFN's Intervention. It updates the analysis in MSES's previous report, described above, with 2011 data, and it confirms the predicted trajectory of the rate of loss of lands and resources in that earlier report.

80. Attached to my Affidavit as **Exhibit "43"** is a copy of an excerpt of "Avian Hazard Map - Shell Hearing Submission", a report prepared by MSES for ACFN, dated September 2012. The full report was filed as Appendix E, Tab 45 of ACFN's Intervention. It describes the Project's potential impacts to migratory birds, and its potential contribution to regional impacts.

81. Attached to my Affidavit as **Exhibit "44"** is a copy of "A Foundation for the Future: Building an Environmental Monitoring System for the Oil Sands", a report prepared by the Oil Sands Advisory Panel for the Minister of Environment, dated December 2010. It was filed as Appendix H, Tab 2 of ACFN's Intervention. This report, authored by an expert panel appointed by former Minister of Environment Prentice, confirmed ACFN's lack of trust in the monitoring system to date.

82. Attached to my Affidavit as **Exhibit "45"** is a copy of Chapter 2 "Assessing Cumulative Environmental Effects of Oil Sands Projects" of the Report of the Commissioner of the Environment and Sustainable Development—October 2011, a report published by the Office of the Auditor General of Canada, dated 2011. It was filed as Appendix H, Tab 3 of ACFN's Intervention.

83. Attached to my Affidavit as **Exhibit “46”** is a copy of the Athabasca Chipewyan First Nation’s submissions to the Parliamentary Standing Committee on Woodland Caribou, 2010. It was filed as Appendix H, Tab 4 of ACFN’s Intervention. In these submissions, ACFN signalled its alarm over the loss of woodland caribou in our traditional lands, and asked Canada to take protective measures.

84. Attached to my Affidavit as **Exhibit “47”** is a copy of the Supplementary Submission of Athabasca Chipewyan First Nation to the Federal Statutory Review of the Species at Risk Act, dated April 13, 2010. It was filed as Appendix H, Tab 5 of ACFN’s Intervention. In this document ACFN discussed the importance of protecting woodland caribou and wood bison.

85. ACFN submitted the following documents to the Panel as exhibits during the Hearing and I have confirmed they were posted to the CEEA Registry.

- a) Attached to my Affidavit as **Exhibit “48”** is a copy of excerpts of Hearing Exhibit #006-022 Athabasca Chipewyan First Nation – ACFN Expert Panel Presentation dated October 31, 2012 and submitted on November 6, 2012.
- b) Attached to my Affidavit as **Exhibit “49”** is a copy of Hearing Exhibit #006-024 Athabasca Chipewyan First Nation Report “Nih Boghodi: We are the stewards of our land” dated April 26, 2012 and submitted on November 7, 2012. This is ACFN’s Stewardship Plan for caribou and bison, which ACFN prepared in 2012.
- c) Attached to my Affidavit as **Exhibit “50”** is a copy of Hearing Exhibit #006-028, Answers to Hearing undertakings by Aqua Environmental Associates, submitted on November 16, 2012. Answers to hearing undertakings are answers to questions that an expert was asked during the Hearing, either orally or in writing, by the Panel or on a cross-examination and promised to consider and

answer. This particular document contains the answers of ACFN's expert, Dr. Martin Carver.

- d) Attached to my Affidavit as **Exhibit "51"** is a copy of Hearing Exhibit #006-029 Undertaking Responses by Dr. Candler, submitted on November 16, 2012.
- e) Attached to my Affidavit as **Exhibit "52"** is a copy of Hearing Exhibit #006-030 Responses to Secretariat's Questions for Dr. Komers, Dr. Gustell and Ms. Hectenthal, submitted on November 18, 2012. These were answers provided by ACFN's expert, MSES, in response to questions from the Panel.
- f) Attached to my Affidavit as **Exhibit "53"** is a copy of Hearing Exhibit #006-031 Responses to Secretariat's Questions for ACFN's expert Bruce Maclean, submitted on November 18, 2012.
- g) Attached to my Affidavit as **Exhibit "54"** is a copy of Hearing Exhibit #006-032 Responses to Secretariat's Questions for ACFN's expert Dr. Craig Candler, submitted by ACFN on November 18, 2012.

#### **October 30, 2013 Letter of Minister McQueen to Minister Aglukkaq**

86. I understand from speaking with ACFN's legal counsel, Jenny Biem, that on February 13, 2013, Canada's legal counsel provided Ms. Biem's office with a copy of an October 30, 2013 letter from Minister McQueen to Minister Aglukkaq. Ms. Biem provided me with a copy of this letter, which I had never seen before. I have read the letter. I have also read the response that Ms. Nicholls has provided to Minister McQueen's letter in her affidavit for this proceeding. I agree with all of Ms. Nicholls' comments regarding Minister McQueen's letter and I would have instructed IRC staff who were attending meetings with Canada to share those comments with Canada during our Phase IV consultation, had I had the opportunity to do so.

SWORN BEFORE ME at the City of )  
*Fort McMurray* in the Province of )  
Alberta, this *24* day of )  
February, 2014. )

  
A Commissioner for the taking of )  
affidavits in Alberta )  
)

  
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**LISA DESKELNI KING**

**JENNY BIEM**  
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