

ANNEX TWO TO SETTLEMENT AGREEMENT
FEDERAL AUTHORIZATIONS CONSULTATION PROTOCOL

BETWEEN:

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA, as represented by the Minister of
Indian Affairs and Northern Development**

AND:

THE DENE THA' FIRST NATION, as represented by its Chief and Council

(collectively, "the Parties")

PREAMBLE:

WHEREAS the Dene Tha' First Nation (DTFN) has *Treaty 8* rights that are protected by section 35 of the *Constitution Act, 1982* and assert aboriginal rights and title in and to certain lands within the southern portion of the Northwest Territories ("NWT"), as indicated on the map in Appendix "A" to this Protocol;

WHEREAS the Dene Tha' filed an application for Judicial Review in the Federal Court on May 17, 2005 and on November 10, 2006 Justice Phelan handed down his reasons for judgment in respect of the above described judicial review, *Dene Tha' First Nation v. MOE et al.* (Fed Ct. No. T-867-05) and Canada has appealed that judgment;

WHEREAS the Parties wish to create a Protocol that the Parties may agree to use for Consultations with the DTFN in respect of Federal Authorizations that may have an adverse impact on DTFN's existing or asserted Treaty or Aboriginal rights;

WHEREAS the Parties wish to create a practical and efficient process for Consultations in keeping with any obligations they each may have with respect to consultation;

WHEREAS the Parties have developed this Protocol to set out the agreed-upon approach to Consultation;

WHEREAS the Parties wish to establish a clear and effective mechanism by which the Parties will seek to reconcile their respective rights and interests.

THE PARTIES AGREE AS FOLLOWS:

1.0 DEFINITIONS AND INTERPRETATION

- 1.1 Unless otherwise defined in this Protocol, words and phrases shall have the same meaning as provided for in article 1 of the Settlement Agreement.
- 1.2 With the exception of an express reference to an article found in the Settlement Agreement, a reference in this Protocol to an article shall be a reference to the article found in this Protocol.
- 1.3 The following definitions apply to this Protocol:

“Claim” means the claim made by the DTFN to aboriginal rights and title in and to certain lands within the southern portion of the Northwest Territories (“NWT”), as indicated on the map in Appendix “A” to this Protocol.

“Connecting Facilities” means the pipeline and related facilities, known as the Dickins Lake and Vardie River Projects proposed by NOVA Gas Transmission Ltd. (NGTL) in north-western Alberta to facilitate the shipment of natural gas from the MGP to southern markets and includes any connecting facilities proposed by successors or assigns of NGTL.

“Consultation and Consultations” means the process and activities set out in articles 6 and 7 of this Protocol.

“Disagreement” means a disagreement over the amendment, interpretation or application of this Consultation Protocol or a disagreement over the existence of a legal duty to consult.

“Federal Authorization” means any lease, licence, permit, regulatory decision, or other approval made or issued by a Federal Decision-Maker in respect of any project other than the MGP and Connecting Facilities.

“Federal Decision-Maker” means:

- (a) any Federal Minister or Federal Department, or
- (b) Crown Corporation, Federal Board, Regulatory Agency, or other body empowered by Canada to make or issue a Federal Authorization for which a notice has been issued in accordance with article 2 of this Protocol.

“Mackenzie Gas Project” and “MGP” means the gathering system, pipeline and related facilities to transport natural gas through the NWT to northern Alberta and includes any of the following:

- (a) three onshore natural gas fields known as Taglu, Parsons Lake and Niglintgak in the Mackenzie Delta area of the Northwest Territories;
- (b) the Mackenzie gathering system, including gathering pipelines to transport production from the three fields, an Inuvik area facility to process production from the three fields into gas and natural gas liquids (NGL), and a 480 kilometre (298 mile) NGL pipeline to transport natural gas liquids to Norman Wells, Northwest Territories to a point of interconnection with the Enbridge Pipeline (NW) Inc. Norman Wells Pipeline;
- (c) the 1220 kilometre (758 mile) Mackenzie Valley Pipeline to transport gas from the Inuvik area to a point of interconnection with the NOVA Gas Transmission Ltd. System in northern Alberta;
- (d) other related facilities associated with the Mackenzie Valley Pipeline, including compressor stations at Little Chicago, Norman Wells, Blackwater River and Trail River, Northwest Territories and a heater station at Trout River Northwest Territories; and
- (e) pipeline related facilities such as looping, emergency response systems, safety enhancements, and vegetation management measures.

as proposed by the project proponents led by Imperial Oil Resources Ventures Limited (IORVL) and any successors and assigns who become project proponents subsequent to IORVL.

“Treaty or Aboriginal Rights” means any right held by the DTFN under the Alberta Schedule to the *Constitution Act, 1930*, Treaty 8 or under section 35 of the *Constitution Act, 1982*.

2.0 APPLICATION OF THIS PROTOCOL

- 1. This Protocol applies to Federal Ministers and Federal Departments but only applies to a Crown Corporation, Federal Board or Agency that has been identified through a written notice sent by Canada to the DTFN.
- 2. This Protocol does not apply to the MGP and Connecting Facilities.

3.0 GEOGRAPHIC AREA OF CONSULTATION

- 1. Subject to articles 3.2 and 3.3, the Parties agree that, as of the Effective Date, Consultations under this Protocol will take place in relation to the geographic area set out in the map attached as Appendix “A” to this Protocol.

2. If Canada accepts in whole or in part the Claim, Canada will advise whether the geographic area of Consultation shall be adjusted within the geographic area set out in the map attached as Appendix "A" to this Protocol.
3. If Canada rejects the Claim as set out in article 4 of the Settlement Agreement, Canada will advise whether the geographic area of Consultation shall be confined to within the boundaries of Treaty 8 or remain as set out in the map attached as Appendix "A" to this Protocol, or be within another defined geographic area.

4.0 PURPOSE

1. The purpose of this Protocol is to establish a clear and effective mechanism for Canada to consult with the DTFN where Canada contemplates a Federal Authorization that may have an adverse impact on the DTFN's existing or asserted Treaty or Aboriginal rights.

5.0 PRINCIPLES

1. This Protocol will be guided by the following principles:
 - (a) Consultation and accommodation involve duties of reciprocity, specificity and responsiveness by the Parties;
 - (b) Consultation must be conducted in good faith; and
 - (c) This Protocol is not intended to create, recognize, affirm, limit, deny, derogate from or abrogate any aboriginal or treaty rights within the meaning of sections 25 and 35 of the *Constitution Act, 1982*.
2. Canada's decision to notify the DTFN of a Federal Authorization and subsequent steps taken by the representatives of the Parties to consult does not constitute an admission by either Party as to the existence or scope of any legal duty of consultation.
3. The Parties will work with the Government of Alberta and the Government of the Northwest Territories to avoid duplication and overlap of consultation processes. The Parties may invite the Government of Alberta, the Government of the Northwest Territories, the Proponents of the Project or other interested parties, to participate in discussions of any issues of mutual interest relating to a Federal Authorization.
4. The Parties agree that this Protocol does not substitute for, or replace, nor is it intended to duplicate any other process pursuant to federal or provincial statutes, including but not limited to an environmental assessment process. The Parties agree to avoid duplication and promote efficiency.

5. Canada's obligation to disclose information as provided in this Protocol shall be subject to federal laws relating to confidentiality, access to information and privacy.

6.0 CONSULTATION -COMMENCEMENT AND ROLE OF PARTICIPANTS

1. Where Canada contemplates a Federal Authorization in relation to the geographic area set out in article 3 which may have an adverse impact on the existing or asserted Treaty or Aboriginal rights, Canada will provide notice of the Federal Authorization to the DTFN.
2. Prior to undertaking any of the steps set out in articles 6.3 to 6.6, the DTFN may notify Canada that they do not wish to be consulted further with respect to a Federal Authorization for which notice has been provided under article 6.1. Where the DTFN notifies Canada that they do not wish to be consulted, the DTFN notice is an irrevocable direction not to consult that can be relied upon by Canada for that specific Federal Authorization. Where the DTFN notifies Canada that they do not wish to be consulted further, the DTFN agree that Canada will have satisfied any obligation it has to consult with the DTFN in respect of that Federal Authorization.
3. Where no notice has been provided by the DTFN under article 6.2, Canada will identify a representative to facilitate Consultations on behalf of Canada under this Protocol. For greater certainty, the representative from Canada shall include at least one senior level government official and the representative shall facilitate the required Consultation on behalf of all Federal Decision-Makers.
4. The DTFN will identify a person or official to facilitate the Consultation process on behalf of the DTFN in this Protocol. For greater certainty, the representative from the DTFN shall include a person who is knowledgeable of the DTFN and who has the authority to make decisions in communication with the DTFN band council to facilitate and co-ordinate the DTFN responsibilities in respect of this Protocol.
5. The Parties shall provide notice to each other of the person or official identified to facilitate the Consultations.
6. As soon as possible after the provision of notice in article 6.5, the representatives shall meet to develop a mechanism to facilitate and co-ordinate Consultations and to decide upon timelines acceptable to both Parties for carrying out the Consultations.
7. Any mechanism for facilitating and co-ordinating Consultations in this article is subject to this Protocol.

8. If Canada or the DTFN wish to change their representatives, that Party may identify one or more persons who have the qualifications provided for in articles 6.3 and 6.4 to act as its representative under this Protocol.

7.0 CONSULTATION PROCESS

1. In any Consultation pursuant to article 6.6, Canada will, to the extent appropriate:
 - (a) Ensure that the DTFN is provided with relevant and sufficient information that is reasonably required to assess potential adverse impacts of a Federal Authorization on their existing or asserted Treaty or Aboriginal rights in a timely and ongoing manner;
 - (b) Engage the DTFN so that the DTFN has an opportunity to articulate any of its concerns regarding the potential adverse impacts of a proposed Federal Authorization on their existing or asserted Treaty or Aboriginal rights;
 - (c) Seriously consider the concerns of the DTFN expressed in relation to the potential adverse impacts of the Federal Authorization on their existing or asserted Treaty or Aboriginal rights;and, if appropriate,
 - (d) Seriously consider ways in which to mitigate any potential adverse impacts that the Federal Authorization might have on the existing or asserted Treaty or Aboriginal rights of the DTFN; and
 - (e) Accommodate the concerns of the DTFN, taking into account the public interest.
2. With respect to article 7.1(b), the DTFN will express their concerns with clarity, focusing on the alleged adverse impacts on their existing or asserted Treaty or Aboriginal rights by carrying out all reasonable efforts to provide details including, but not limited to, the following:
 - (a) the type of activity which forms the basis of the right;
 - (b) the location where the right is exercised; and
 - (c) the means of exercising the right.

8.0 FUNDING

1. The DTFN may apply for funding to engage in Consultations under any applicable federal programs in accordance with the funding criteria established from time to time by Canada for such programs.

9.0 CONFIDENTIALITY

1. Subject to article 5.5:
 - (a) The Consultations set out in this Protocol are intended to be on the record and are not subject to settlement privilege;
 - (b) This Protocol is not confidential and may be made public and may be tendered in evidence in any legal, regulatory or environmental assessment proceeding; and
 - (c) A party may tender records or information received during the Consultations set out in this Protocol as evidence in any legal, regulatory or environmental assessment proceedings.
2. By agreement in writing, the Parties may engage in off the record, without prejudice discussions that do not constitute consultation.

10.0 TERM OF THIS PROTOCOL

1. This Protocol comes into effect on the Effective Date of the Settlement Agreement.
2. Either of the Parties may terminate this Protocol by giving to the other Party sixty days written notice of termination which contains reasons for termination.
3. During the notice period set out in article 10.2, the Parties shall meet and make reasonable efforts to resolve the issues that gave rise to the termination notice in accordance with article 13.
4. This Protocol may be amended from time to time, with the written agreement of the Parties. The Parties may agree to amend this Protocol in light of changes to the law with respect to Canada's duty to consult. If the Parties cannot agree on amendments, such Disagreement shall be dealt with in accordance with the article 13.
5. No later than three years after the Effective Date of this Protocol, the Parties will review this Protocol and consider whether amendments to or termination of this Protocol are appropriate.

11.0 MEETINGS

1. The representatives shall determine a process for setting meeting dates, preparing and distributing agendas, determining the participants at meetings, recording and distributing minutes of meetings, and recording and distributing the results of any Consultations.
2. The representatives shall make available the results of Consultations to Federal Decision-Makers and the DTFN.

12.0 NOTICES

1. All notices, communications and steps required to implement this Protocol, and to facilitate the carrying out of the obligations hereunder, shall be through the representatives, unless otherwise provided for in this Protocol or unless either of the Parties advises otherwise in writing.
2. Where, in this Protocol, any notice, information or other communication is required to be given by any of the Parties, it will be made in writing. It will be effectively given:
 - (a) By delivery to the address of the party in article 12.3 on the date of delivery;
 - (b) By pre-paid registered mail to the address of the party, in article 12.3, on the date the registered mail is delivered; and
 - (c) By facsimile, to the facsimile number of the party, in article 12.3, on the date the facsimile is sent.
3. The address, email, and facsimile numbers of the parties are:

The Deputy Minister of Indian Affairs and Northern Development:

Deputy Minister
Indian and Northern Affairs
Deputy Minister's Office
10 Wellington Street, Room 2101
Gatineau, Quebec
K1A 0H4

Tel: 819-997-0133
Fax: 819-953-2251

Chief of the DTFN:

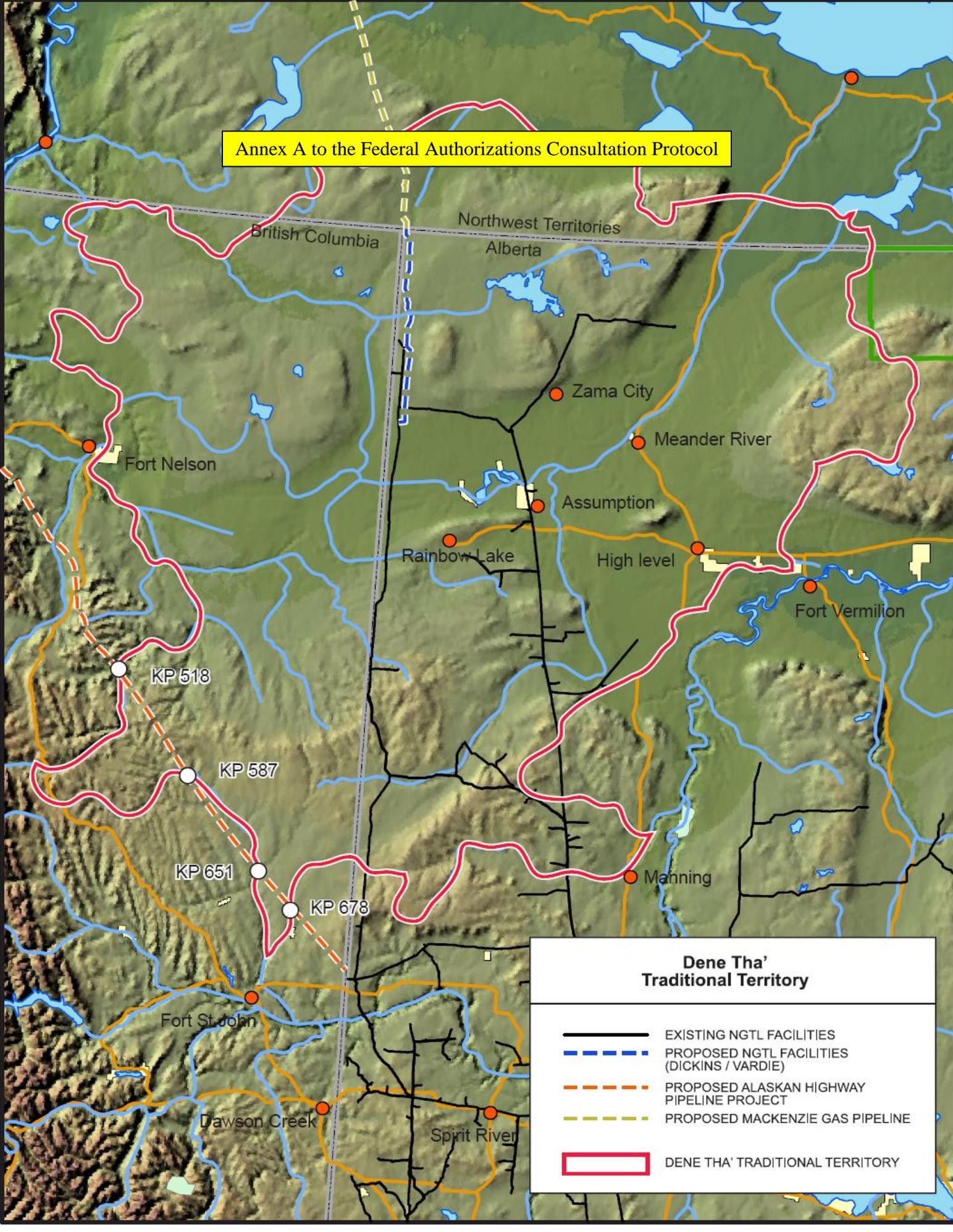
Dene Tha' First Nation
P.O. Box 120
Chateh, AB T0H 0S0

Tel: 780-321-3774
Fax: 780-321-3886

13.0 DISAGREEMENT RESOLUTION

1. If a disagreement arises between the Parties in respect of the amendment, interpretation or application of this Protocol, the disagreement shall be dealt with in accordance with articles 13.3 to 13.5 as the sole and exclusive methods of resolving the disagreement.
2. If a disagreement arises between the Parties in respect of the existence of a legal duty to consult and that disagreement is not resolved in accordance with articles 13.3 to 13.5, the DTFN may commence a proceeding against Canada in a court of competent jurisdiction.
3. The DTFN Chief and a senior level government official identified by the Minister will seek informal ways to resolve disagreements under articles 13.1 or 13.2 which may be referred to them by either party.
4. If the disagreement remains unresolved after the process in article 13.3, the DTFN Chief and senior level government official may agree to appoint a mediator or facilitator to assist in resolving the disagreement.
5. If the disagreement remains unresolved after the processes in article 13.3 and any consideration by a mediator or facilitator under article 13.4, either party may refer the disagreement to a third party who will hear the submissions of the Parties regarding the disagreement and will provide formal written recommendations to the Parties for resolution of the disagreement.
6. Recommendations under article 13.5 are not binding on either party.
7. Each party will bear its own costs of the process set out in article 15.3 and the Parties will share equally the costs of the processes set out in articles 13.3 to 13.5.
8. The Parties will keep confidential and will not rely on, or introduce as evidence in any Proceeding, any views expressed or suggestions made by either Party in respect of a possible settlement of the Disagreement. Nothing in this article prevents either Party from disclosing in public or in any Proceeding the existence of a Disagreement.

Annex A to the Federal Authorizations Consultation Protocol



Dene Tha' Traditional Territory

- EXISTING NGTL FACILITIES
- - - PROPOSED NGTL FACILITIES (DICKINS / VARDIE)
- - - PROPOSED ALASKAN HIGHWAY PIPELINE PROJECT
- - - PROPOSED MACKENZIE GAS PIPELINE
- DENE THA' TRADITIONAL TERRITORY