

Review Panel Report 2015

Lower Athabasca Regional Plan



Pursuant to subsection 19.2(2) of the *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8, the Review Panel appointed by the Stewardship Minister submits their Report on their review of the Lower Athabasca Regional Plan, dated September 2012.

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Executive Summary

The Regional Planning process set out in the *Alberta Land Stewardship Act* (ALSA) provides for directly-affected Albertans to request a review of a land-use plan. The Lower Athabasca Regional Plan (LARP or the Plan) was the first regional plan to be approved by the Government of Alberta (Alberta or the Crown). The Stewardship Minister received Applications (the Applications) for review of the LARP from six First Nations, including:

- Athabasca Chipewyan First Nation (ACFN);
- Mikisew Cree First Nation (MCFN);
- Cold Lake First Nations (CLFN);
- Onion Lake Cree Nation (OLCN);
- Fort McKay First Nation and Fort McKay Métis Community Association (FMFN); and
- Chipewyan Prairie Dene First Nation (CPDFN).

After considering the Applications and, in accordance with the ALSA, the Minister appointed a Review Panel (the Panel) to conduct a review of the Applications. This report sets out the results of that review, including the Review Panel's findings and recommendations.

The mandate of the Review Panel is described in further detail in this report. The role of the Panel is to make recommendations concerning issues raised in the various Applications where the First Nations have proven that they are "directly and adversely affected." This report is submitted to the Stewardship Minister, who then refers the report to Cabinet.¹

One of the fundamental themes throughout the LARP is cumulative effects management (CEM). The LARP describes the purpose of CEM as follows: "to balance economic development opportunities and social and environmental considerations."² This theme is drawn from Alberta's Land-use Framework (LUF), which was released by the provincial government in 2008.

The LARP, in describing the LUF's vision, notes:³

"The vision describes a desired future state for the Lower Athabasca in which the region's diverse economic opportunities are balanced with social and environmental considerations using a cumulative effects management approach. Cumulative effects management focuses on achievement of outcomes, understanding the effect of multiple development pressures (new and existing), assessment of risk, collaborative work with shared responsibility for action and improved integration of economic, environmental and social considerations."

The Applications reviewed by the Panel included assertions and evidence indicating that the cumulative effects of rapid change in the Lower Athabasca Region are having an impact on the First Nation Applicants. During its review, the Panel considered the written evidence of six First Nations, which set out a number of concerns with the LARP.

The process set out in the *Rules of Practice for Conducting Reviews of Regional Plans* (the Rules) provided for a response to the First Nations' Applications by Alberta and then a final reply by the Applicants.

One of the difficulties encountered by the Review Panel in assessing the Applications was that, Alberta, in its responses to the concerns raised by the Applicants, frequently disputed the jurisdiction of the Panel to address those First Nations' concerns. Alberta's response was essentially the same to each of the Applications. Alberta chose to rely on its legal argument and filed little in the way of rebuttal evidence. Because of its approach to the Applications and the Panel's jurisdiction, the Crown did not, in many instances, specifically address the arguments of the First Nations or their written evidence.

If the Review Panel adopted the position of the Crown, we would have been left with little rationale for determining whether each Applicant has, or has not, been "directly and adversely affected" by the proposed implementation of the LARP.

¹ *Alberta Land Stewardship Act*, section 19.2(3) ² Lower Athabasca Regional Plan (LARP); page 2 ³ LARP; page 23

To address the legal issues raised by Alberta's responses, the Review Panel issued an Information Request on this jurisdictional matter to all parties — pursuant to Section 28 of the Rules — and then, after receiving written arguments from all the parties on February 5, 2015, deliberated and ruled on the jurisdictional question. The Panel's full ruling on its jurisdiction is included as Appendix 3 of this report.

After ruling on the issue of jurisdiction, the Panel addressed the First Nations' Applications. Most of the First Nation Applicants, in their written arguments, maintained that although the LARP proposed a "balancing of interests" through the cumulative effects management model set out in the document, their interests were not incorporated in the LARP in any meaningful way.

Specific provisions in the LARP and other government documents nonetheless make reference to Alberta's commitment "to engage with and consult Aboriginal Peoples."⁴ The Review Panel urges the Government of Alberta, in achieving the LARP's strategic and implementation objectives, to fulfill the commitments it has made to the First Nations throughout the document.

The Panel notes, however, that the Crown's response to the First Nation Applications asserts that they are *not* affected by the LARP. The Panel respectfully disagrees. The fact that the LARP engages Aboriginal interests is evident from the following:⁵

- a. Introduction, page 5: the LARP recognizes First Nations hold Constitutional Rights and that Crown decisions can affect these rights;
- b. Strategic Plan, page 15: the LARP recognizes that Aboriginal Peoples are residents of the region and are engaged in economic activities in the region;
- c. Strategic Plan, page 22: the LARP recognizes that First Nations have "traditional-use locations of culture and spiritual significance" in the region;
- d. Strategic Plan, page 29: the LARP recognizes that cumulative effects on air, waste, land and biodiversity affect First Nations' Constitutional Rights;

- e. Strategic Plan, page 29: the LARP indicates that Alberta will consider, in developing the biodiversity management framework and the landscape management plan, how First Nations' Constitutional Rights can occur within reasonable proximity to First Nations' main population centres;
- f. Strategic Plan, page 30: the LARP indicates conservation areas, in part, are intended to support the exercise of Constitutional Rights;
- g. Strategic Plan, page 34: the LARP indicates that Aboriginal Peoples will be included in land-use planning decisions because of their unique relationship with the lands in the region; and
- h. Regulatory Details Plan, page 63: the LARP encourages Aboriginal Peoples to participate in land-use planning in recognition of the cultural and economic importance of land-use to those Aboriginal communities with constitutionally-protected rights.

Although the Review Panel has addressed the issues raised by each Applicant — as to whether they have, or have not, been "directly and adversely affected," pursuant to the Regulations and Rules⁶ — the Review Panel believes there are broader general observations, which warrant the Minister's attention in addition to the specific recommendations set out in the report below.

The Review Panel begins its report by examining the purposes of the ALSA as described in section 1(2):

- b. to provide a means to a plan for the future, recognizing the need to manage activity to meet the reasonable foreseeable needs of current and future generations of Albertans, *including Aboriginal Peoples*. (Emphasis added)

On a plain reading of the Act, once the Panel has determined whether or not an Applicant is "directly and adversely affected," the Panel believes it is obligated to conduct a broader review of the potential consequences of the existing regional plan. The Review Panel believes that the ALSA does

⁴ Cold Lake First Nation Response Submission; page 7 and LARP, Outcome 7 ⁵ Fort McKay First Nation Response to the Crown's Submission; page 14-15 (a)-(g)

⁶ "Regulations" means the *Alberta Land Stewardship Regulation*, Alta. Reg. 179/2011 "Rules of Practice" means *Alberta Land Stewardship Act - Rules of Practice for Conducting Reviews of Regional Plans* (March 2014) made by the Stewardship Minister

not limit the scope of the review, or the Review Panel's authority, to issue general observations or suggestions to the Minister concerning the LARP.

The Review Panel believes these proceedings are intended to serve the broader public interests of the Act in serving all Albertans, by making suggestions to the Minister on ways to improve the implementation of the LARP. Therefore, in this report, the Review Panel has also included a section entitled "General Observations and Suggestions to the Minister," which encompasses a variety of topics that we hope will improve the LARP for all Albertans.

As noted in the Table of Contents, this section includes the following topics:

- LARP Strategic Timelines
- LARP Monitoring Initiatives
- The Issue of Traditional Land Use
- Cumulative Effects Management
- Country Foods and Health Concerns
- Report of the Joint Review Panel Shell Canada Energy Jackpine Mine Expansion Project
- Biodiversity Management Framework – Woodland Caribou/Wood Bison

It quickly became clear to the Review Panel that the First Nations Applicants believe the LARP has excluded the "balancing" of interests in favour of industrial development in the region over their respective constitutional rights.⁷

The LARP *does* recognize that the First Nations are entitled, within the limits set by law, to use Traditional Land Use territory beyond their Reserves. While there is agreement amongst the parties on this principle, the understanding of the location or boundaries of such lands differs between Alberta and the Applicants.

Upon review of the Applications, it was evident to the Review Panel that the Traditional Lands described in the submission of each First Nation Applicant were being, for the most part, encroached upon and reduced by rapid industrial development of the Lower Athabasca Region.⁸ For example, in its written evidence, Fort McKay First Nation noted that leases to oil sands companies had already been taken up approximately 70 per cent of its Traditional Territory. For many Applicants, the principles of CEM in the LARP are considered to be an abstract vision.

The LARP provides for the creation of new conservation and recreation areas in which Alberta argues First Nations members can carry out their various Traditional Land Use (TLU) activities. Each Applicant, for a variety of reasons, argued that such areas were inadequate to meet their needs in any meaningful way.

The Review Panel suggests to the Minister that, in order to achieve the purposes described in the ALSA, a TLU Management Framework must be developed and included as an important component of the LARP. This will recognize and honour the "constitutionally-protected rights" of the First Nation communities residing in the Lower Athabasca Region. Such a framework would assist all stakeholders, operators, regulators, governments and Aboriginal Peoples in land-use planning for the region in the foreseeable future.

The Review Panel strongly suggests to the Minister that to achieve effective cumulative impact management in the Lower Athabasca Region, as prescribed in the LARP, an equalization must be achieved to find a balance between industrial activity and the "constitutionally-protected rights" of the First Nation Applicants which must be achieved in order for the LARP to attain its prescribed "vision" and "purpose."

The Review Panel suggests that the recent Supreme Court of Canada decision in *Grassy Narrows v. Ontario (Natural Resources)* confirms that the province has a constitutional obligation to manage lands in a way that respects Treaty rights, regardless of the division of powers.⁹

⁷ Treaties 6 and 8, as modified by the *Natural Resources Transfer Agreement, 1930* (enacted by the *Constitution Act, 1930* (U.K.) 20-21 George V, c.26 and s. 35 *Constitution Act, 1982*) ⁸ i.e. Bitumen extraction, conventional oil extraction, natural gas extraction, pipelines, power lines and substations, gravel pits, camps, disposal wells, landfills, oil sands and gas exploration, forest harvesting and municipal growth. ⁹ *Grassy Narrows v. Ontario (Natural Resources)*, 2014 S.C.C. 48 at paragraph 50

In conclusion, the Review Panel with the limited resources available, found these proceedings both interesting and challenging. We anticipate that the Recommendations for the six First Nations, and Observations and Suggestions to the Minister, will prove to be helpful in the long term; aiding to improve the implementation of the LARP to the benefit of all persons and stakeholders living and working in the Lower Athabasca Region. As reflected in the *Alberta Land Stewardship Act*, it is anticipated that a revised LARP will meet the needs of future generations of Albertans residing in this region, including Aboriginal Peoples.

As this was the first Review Panel to examine Applications for amendments from parties concerning a regional plan, there was little precedence to rely on prior to publishing this report for the Minister. We hope the organization of the document is considered satisfactory to those who review our recommendations concerning the LARP.

The Review Panel thanks all those personnel in the Land Use Secretariat who assisted with the logistics and administration in the compilation of this report and, in particular, Parveen Virring.

Jeff Gilmour
LARP Review Panel Chair

General Overviews

The Lower Athabasca Region

Geography

The Lower Athabasca Region comprises a large section of northeastern Alberta, covering approximately 93,260 square kilometres.¹

As shown in Figure 1, the region is bordered by the Northwest Territories to the north and by the County of Vermillion River, County of St. Paul and Smoky Lake County to the south.² To the east of the region is Saskatchewan, and to the west are Wood Buffalo National Park, MacKenzie County and the Municipal District of Opportunity.

Settlement

The region encompasses the Regional Municipality of Wood Buffalo, Lac La Biche County, the Municipal District and Town of Bonnyville, and the City of Cold Lake. Twelve First Nations Reserve Lands, two Métis Settlements, and several communities with high Métis populations are in the Lower Athabasca Region, as illustrated in Figure 2. Details of the region can be found in the profile of the Lower Athabasca Region, located at www.landuse.alberta.ca.

Landscape

Much of the Lower Athabasca Region is in the boreal forest and is home to many diverse landforms, types of vegetation and species. The southern part of the region has valuable agricultural land. There are two major watersheds associated with the Athabasca and Beaver rivers — separated by the continental divide — plus many wetlands and a large series of groundwater aquifers within the region.

The Lower Athabasca Region has experienced rapid economic development, particularly over the past decade, which has placed many pressures on the region. The most prominent and expanding land-use activity in the region has been the development of Alberta's oil sands resource. The region is also home to

other economic activity, including agriculture, forestry, natural gas production, and recreation and tourism.

In some cases, challenges have arisen in reconciling the expansion of oil sands development with other sectors, such as forestry. Facilitating successful coexistence and growth of multiple industries, while minimizing land impacts, is therefore a priority. There is also an opportunity to support a growing tourism industry throughout the region, including within the unique Lakeland Country area.

The Lower Athabasca Region has emerged as an important economic driver for Alberta and for all of Canada. It has created substantial employment and income for Canadians, and contributes significant revenues to the provincial and federal governments, helping to finance public programs, services and infrastructure. While its economic outlook is subject to volatile commodity prices, the region is still expected to grow to meet rising worldwide demand for resources. In 2011, approximately 1.7 million barrels of crude bitumen were produced per day in the oil sands. This number is expected to more than double to about 3.5 million barrels per day by 2020.³

As noted in the Lower Athabasca Regional Plan (LARP), the following are some important facts and statistics of the region:⁴

- The region contains approximately 82 per cent of the province's oil sands resources and much of the Cold Lake oil sands area;
- The oil sands are the third largest petroleum reserve in the world;
- Northern parts of the region have high potential for metallic and industrial minerals;
- Forestry is a significant industry within the region;
- Approximately five per cent of the region's total land area is used for agriculture;

¹ Advice to the Government of Alberta Regarding a Vision for the Lower Athabasca Region; pages 1-2 ² Lower Athabasca Regional Plan (LARP); page 14

³ LARP; page 25 ⁴ LARP; pages 14-16

- One-third of Alberta's hydroelectric potential falls within the region, mainly between the Athabasca and Slave rivers; and
- Tourism activities in the region include hunting, fishing, and ecotourism and adventure-based activities.

Ecosystems and the Environment

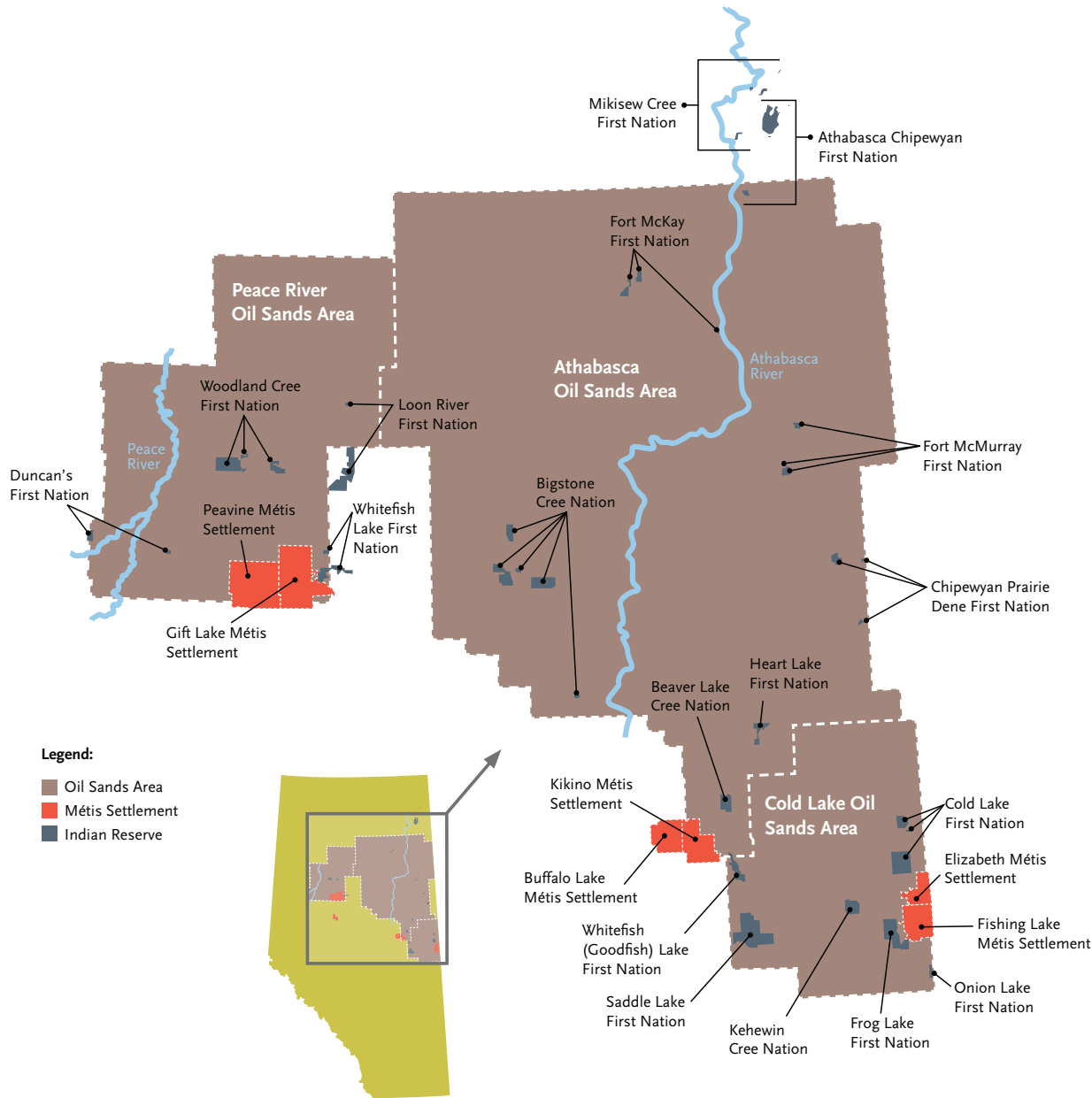
With respect to ecosystems and the environment, the region contains diverse landforms, vegetation and species:⁵

- A wide range of fish, wildlife and plant species exist in the region, including: 28 species of fish, over 500 vascular plant species and numerous birds and mammals;
- The region spans the catchment areas of three water basins: the Athabasca River Basin, the Beaver River Basin and the Peace/Slave River Basin;
- The Athabasca River is the main source of water for oil sands mining activities. About three per cent of the river's flow has been allocated for oil sands mining operations. For onsite oil sands activities, groundwater is the main source of water.

The Lower Athabasca Region represents the province's fastest growing regional contributor of greenhouse (GHG) emissions, accounting for approximately 15 per cent of the province's total GHG emissions.⁶ This is largely due to oil sands development.

⁵ LARP; page 17 ⁶ LARP; page 18

FIGURE 2:
First Nations Reserve Lands and Métis Settlements within or Adjacent to the Oil Sands Regions
(Responsible Actions - A Plan for Alberta's Oil Sands, Figure 6, page 31. Government of Alberta, Feb. 2009)



Responsible Actions - A Plan for Alberta's Oil Sands, Figure 6, page 31. Government of Alberta, Feb. 2009:
Figure 6 - First Nations Reserve Lands and Métis Settlements within or Adjacent to the Oil Sands Regions

The Derivation of the Lower Athabasca Regional Plan 2012-2022

Alberta's Land-use Framework (LUF) — released in 2008 — established seven new land-use regions and called for the development of a regional plan in each region of the province. The LUF committed the Government of Alberta to manage the cumulative effects of development on air, water, land and biodiversity at each of the regional levels.

The LUF established three desired outcomes:

- A healthy economy supported by our land and natural resources;
- Healthy ecosystems and environment; and
- People-friendly communities with ample recreational and cultural opportunities.

As noted in the Lower Athabasca Regional Plan (LARP), the *Alberta Land Stewardship Act* (ALSA) supports the LUF and established the legal basis for the development of regional plans. The ALSA authorizes the Lieutenant Governor in Council to establish integrated planning regions and, following public consultation, a regional plan.¹ The regional plan must describe the vision and objectives for the region and may include policies, set thresholds, specify indicators, describe monitoring, and describe the measures to be taken to achieve the objectives and policies.²

The purpose of the ALSA is described in section 1(2) of the legislation as follows:

- a. to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;
- b. to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including Aboriginal Peoples;

- c. to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment;
- d. to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.

It is interesting to note that neither of the terms “sustainable development” or “cumulative effect” are defined in the ALSA, although the term “effect” is defined in section 2(1)(h) as:

- i. any effect on the economy, the environment, a community, human health or safety, a species or an objective in a regional plan, regardless of the scale, nature, intensity, duration, frequency, probability or potential of the effect; and
- ii. a cumulative effect that arises over time or in combination with other effects.

It should be noted, however, that both of the terms are defined in the Land-use Framework glossary as a reference for all regional plans.

- “Sustainable development” is defined as “development that meets the needs of the present without compromising the ability of future generations to meet their needs.”
- “Cumulative Effects” is defined as “the combined effects of past, present and reasonable foreseeable land-use activities, over time, on the environment.”

Sections 8 and 9 of the ALSA describe the various elements of a regional plan. Section 13(2) states: “regional plans are legislative instruments and, for the purposes of any other enactment, are considered to be regulations.” Subsection 2.1 then follows, declaring “notwithstanding subsection (2), a regional plan

¹ *Alberta Land Stewardship Act* (ALSA), section 3(1), 4(1) and 5 ² ALSA, section 8(1) and 8(2)

may provide rules of application and interpretation, including specifying which parts of the regional plan are enforceable as law and which parts of the regional plan are statements of public policy or a direction of the Government that is not intended to have binding legal effect.”

Part 4, Division 2 of the ALSA outlines the establishment of the Regional Advisory Councils and their respective terms of reference in establishing regional plans.

Pursuant to section 66 of the ALSA, the Lieutenant Governor in Council established the *Alberta Land Stewardship Regulation* (2011) and the *Rules of Practice for Conducting Reviews of Regional Plans* (March 2014).

As noted earlier in accordance with the ALSA, the Lower Athabasca Regional Advisory Council (RAC) began its work in December 2008. In 2009, representatives from Treaty 6 and 8 joined the RAC, as did a representative from the Métis Settlements who was appointed earlier. In 2010, the 17-member RAC used a cross-section of expertise and experience to compile their “Advice to the Government of Alberta Regarding a Vision for the Lower Athabasca Region.” This document was based on the RAC’s terms of reference.

In particular, the RAC was asked to provide advice on the following aspects of land use in the designated region:

- future resource development growth and environmental event considerations;
- land conservation objectives;
- regional air and water thresholds; and
- human development considerations.

Segments of the recommendations concerning Aboriginal Peoples are noted in Appendix 4 of this document.

The Lower Athabasca Regional Plan is the first of seven plans developed by the LUF. The development of the LARP was a three-phase consultation process that included:

- input on the Lower Athabasca region and raise awareness;
- feedback on the advice from the Lower Athabasca Regional Advisory Council; and
- feedback on the Government of Alberta’s Draft Lower Athabasca Integrated Regional Plan.

The LARP has four main parts:

1. Introduction

Includes the overall purpose of the LARP and how it is intended to inform land-use decisions;

2. Strategic Plan

Sets out the vision for the future of the Lower Athabasca Region and outlines a set of strategic directions that will assist in realizing the vision and desired outcomes;

3. Implementation Plan

Includes more specific regional objectives, strategies and actions to support realization of the regional vision, and includes indicators so that the progress towards this vision can be measured and evaluated; and

4. Regulatory Details Plan

Introduces regulatory requirements to enable the achievement of the strategic direction and associated actions.³

The LARP identifies strategic directions for the past 10 years and will be assessed and, if required, updated every five years. The LARP became effective September 1, 2012, after being approved by Cabinet.

The seven strategic directions are as follows:

- Improving the integration of industrial activities on the landscape;
- Encouraging timely and progressive reclamation of disturbed lands;

³ Response Submissions of the Government of Alberta to Onion Lake First Nation Application; page 3, paragraph 14

- Managing air, water and biodiversity through management frameworks that take proactive approaches and set limits and triggers, and by minimizing land disturbance in the region;
- Creating new conservation areas that are large, interconnected and maintain intact habitat to support biodiversity;
- Strengthening infrastructure planning to support future growth of the region;
- Designating new recreation and tourism areas to provide diverse recreation opportunities to local residents and tourism products for visitors to the region; and
- Inclusion of Aboriginal Peoples in land-use planning.⁴

In addition to these seven strategic directions, the Implementation Plan section of the LARP outlines seven regional outcomes in Tables 1 and 2 of the plan:

1. The economic potential of the oil sands resource is optimized;
2. The region's economy is diversified;
3. Landscapes are managed to maintain ecosystem function and biodiversity;
4. Air and water are managed to support human and ecosystem needs;
5. Infrastructure development supports economic and population growth;
6. The quality of life of residents is enhanced through increased opportunities for recreation and active living;
7. Inclusion of Aboriginal Peoples in land-use planning.⁵

In an attempt to manage cumulative effects (as defined previously), the Government of Alberta has established the goal of creating management frameworks to establish outcomes and objectives along with the strategies and actions to achieve

them. Each framework confirms regional objectives by establishing limits and triggers as shown in the Regulatory Details Plan of the LARP. Limits are intended to be clear boundaries in the system, which are not to be exceeded. Triggers are to be used as warning signals to allow for evaluation, adjustment and innovation of the framework on an ongoing basis.

The LARP commits to the completion of various environmental management frameworks for biodiversity, tailings, groundwater, air quality and surface water quality, as well as a strategy to address reclamation of industrial sites. The Government of Alberta is also committed to updating phase 1 of the Water Management Framework for the Lower Athabasca River.

Under the LARP heading of "Healthy Ecosystems and Environment," the Government of Alberta has established an additional 16 per cent of the region as new conservation area, bringing the total area of conserved lands to approximately 22 per cent, or two million hectares. There are five conservation areas designated under the *Provincial Parks Act* and one under the *Public Lands Act*.

To optimize the recreation and tourism potential for residents and visitors, the LARP has established nine new provincial recreation areas under the *Provincial Parks Act* and five new public land areas for recreation and tourism (PLARTs) development under the *Public Lands Act*.

As noted in Part 8 of the Regulatory Details Plan of the LARP, one of the key components of the "Outcomes" of the strategies is for the designated provincial Ministers to establish programs to monitor and evaluate:

- a. The status of each supporting indicator; and
- b. The effectiveness of each strategy in achieving the outcomes identified in Tables 1 and 2 of the LARP.

For each department assigned the various strategic responsibilities, the relevant Minister will be accountable for closely monitoring and enforcing

⁴ Lower Athabasca Regional Plan (LARP); page 24 ⁵ LARP; pages 68-69

the triggers and limits for each framework under the heading “Lead Ministry.” In addition to the LARP, the appropriate legislation, regulation, strategy and government policy will have to be adhered to by the responsible government Minister identified in the LARP.

In addition to the monitoring responsibilities outlined in the LARP for Government of Alberta departments, the 2013 Progress Report for the LARP stated that in 2013, legislation was created to establish the Alberta Environmental Monitoring Evaluation and Reporting Agency (AEMERA). This is an “arms-length agency responsible for monitoring and reporting on the condition of Alberta’s environment.” The enabling legislation that created this organization is the *Protecting Alberta’s Environment Act*.

Section 3(1) of this legislation outlines the purposes of the Agency. The relevant points are as follows:

- a. to obtain credible and relevant scientific data and other information regarding the condition of the environment in Alberta; and
- b. to ensure the data and other information are available and reported to the public in an open and transparent manner.

Section 4 of this Act states that “...in consultation with the Minister, the Agency shall report to the public on the condition of the environment in Alberta.”

In addition to AEMERA, the Progress Report notes that the Canada-Alberta Oil Sands Environmental Monitoring Information Portal — a federal and provincial joint panel — will support “the integrated monitoring, evaluation and reporting of air, land, water and wildlife in the oil sands area specifically, and ultimately the province as a whole.”⁶

The LARP also reported that monitoring, evaluation and reporting initiatives and programs in the region are also conducted by the Wood Buffalo Environmental Association, the Lakeland Industry and Community Association, the Regional Aquatics Monitoring Program and the Alberta Biodiversity Monitoring Institute.⁷

⁶ Land-use Framework Regional Plans Progress Report: A review of our progress in 2013; page 9 ⁷ LARP; page 19

Defining the “Plan”

The Oxford Dictionary defines the term “plan” as a:

“Formulated or organized method by which a thing is to be done, way of proceeding, scheme, arranged before-hand.”¹

The Alberta Land-use Framework, released in 2008, stated:

“Establishing a formal regional planning system is the most effective way to implement provincial policy. A regional approach will establish land-use management objectives and determine land-use trade-offs. Regional planning will integrate economic, environmental and social factors and provide the context for future, more detailed planning. The regional plan will ensure that planning for land use, water and air quality are aligned with each other.”²

The same document noted that regional plans will:

- Reflect the vision, principles and outcomes of the Land-use Framework;
- Define regional outcomes (economic, environmental and social) and a *broad plan* for land and natural resource use for public and private lands within the region; (Emphasis added)
- Align provincial strategies and policies at the regional level;
- Consider the input from First Nations and Métis communities, stakeholders, and the public;
- Determine specific trade-offs and appropriate land and natural resource management for specific landscapes within a region;
- Define the cumulative effects management approach for the region and identify targets and thresholds;

- Provide direction and context for local plans within the region;
- Recognize the authority and role of municipalities in local decision-making;
- Be approved by Cabinet, thereby becoming government land-use policies for the regions; and
- Will be subject to regular reviews and public reporting.³

The Government of Alberta’s document “Terms of Reference for Developing the Lower Athabasca Regional Plan” stated:

“A regional plan is intended to paint a picture of how a region should look over several decades. At the *broadest level*, each regional plan will consider a planning horizon of at least 50 years.”⁴
(Emphasis added)

The same document noted that:

“A regional plan sets out information about the state of a region today. It describes our future vision and outcomes for that region. And it articulates the strategies, actions and approaches that should be followed to ensure the region is developed in ways that achieve the vision and outcomes.”⁵

With respect to the *Alberta Land Stewardship Act* (ALSA), section:

1(2)(b) states that one of the purposes of this Act is: “to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including Aboriginal Peoples.”

8(1)(a) states in the ALSA that one of the elements of a regional plan is to “describe a vision for the planning region.”⁶

¹ The Concise Oxford Dictionary, New Edition, 1976 ² Land-use Framework; page 23 ³ Land-use Framework; page 26 ⁴ Terms of Reference for Developing the Lower Athabasca Regional Plan; page 3 ⁵ Terms of Reference for Developing the Lower Athabasca Regional Plan; page 4 ⁶ *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8

The Lower Athabasca Regional Plan (LARP) described the vision for the Lower Athabasca Region, as follows:

“The Lower Athabasca Region is a vibrant and dynamic region in Alberta. People, industry and government partner to support development of the region and its oil sands reserves. Economic opportunities abound in forestry, minerals, agriculture, infrastructure development, the service industry and tourism. The region’s air, water, land and biodiversity support healthy ecosystems and world-class conservation areas. Growing communities are supported by infrastructure and people can enjoy a wide array of recreation and cultural opportunities.”⁷

The LARP further expanded on this vision by noting:

“To achieve the regional vision, the LARP establishes seven desired regional outcomes. The regional outcomes are consistent with and support the province-wide outcomes set out in the Land-use Framework, namely:

- Healthy economy supported by our land and natural resources;
- Healthy ecosystems and environment; and
- People-friendly communities with ample recreation and cultural opportunities.”⁸

The LARP goes on to explain the implementation of the regional plan:

“Various governments, ministries and agencies will work together in an integrated manner as they develop the required system and tools to support implementation of the regional plan. While the following strategies and actions each fall primarily into the mandate of one or more ministries, it is important to note that a government-wide approach will be taken to implement the strategies. This is part of the shift to a cumulative effects management system as envisioned by the Land-use Framework.”⁹

In regards to the application process to the Review Panel, the *Alberta Land Stewardship Regulation* states:

“Subject to subsection (2), on receipt of a complete Application, the Stewardship Minister shall forward the Application to the panel for the *panel to conduct the required review of the regional plan and to report the results of the review and any recommendations to the Stewardship Minister.*”¹⁰ (Emphasis added)

The *Rules of Practice for Conducting Reviews of Regional Plans* — released in March 2014 — under the heading of “Conducting the Review,” seems to be much more restrictive in the mandate of the Review Panel. The Rules limit the review to only the *written* evidence of the Applicants, pertaining to the specific provisions of the LARP.¹¹

In addressing the specific concerns of each Applicant with respect to the LARP, and whether or not they have been “directly and adversely affected,” the Review Panel considers that, to address the purported “purpose” and “vision” enunciated in the ALSA and in the LARP itself, the Review Panel is obligated to describe “common concerns” raised by the First Nations Applicants to these proceedings. It is for these reasons that the Review Panel has made seven “General Observations and Suggestions” to the Minister. The Review Panel has also addressed the specific issues raised by each Applicant concerning the proposed implementation of the LARP.

The Review Panel suggests these “broader” observations encompass significant matters described in the LARP, which, in the opinion of the Review Panel, should be addressed by the Government of Alberta if the regional plan is to be successfully implemented. The Review Panel notes that if the cumulative effects management model, as described in the LARP, is to be relied upon by all stakeholders, industry, governments and the public, the “balance” must be more equitable between industrial activity in the region and the recognition of the rights of the First Nation Applicants residing in the area.

⁷ Lower Athabasca Regional Plan (LARP); page 37 ⁸ LARP; page 24 ⁹ LARP; page 36 ¹⁰ *Alberta Land Stewardship Regulation*; subsection 9(1) ¹¹ LARP; pages 7-8

In Fort McKay First Nation's (FMFN) Response to the Crown's Submission, the Applicant stated:

"The Panel has a broad public interest mandate to ensure regional plans made by Alberta meet the broad public purposes of the Act, including ensuring the future needs of Aboriginal Peoples, consistent with the Crown's constitutional obligations. To discharge its mandate, the Panel must adopt a generous and liberal interpretation of its jurisdiction and the LARP and reject the Crown's narrow interpretation of the Panel's authority and the scope of the Review as Alberta's interpretation would effectively defeat the legislative intent of the Act in providing an opportunity to review a regional plan within one year of it coming into force."¹²

Mikisew Cree First Nation (MCFN) also noted in its submission:

"A *broad* and purposive interpretation of "directly and adversely affected" is required to meet the purposes of the ALSA and the object of this Review Panel is to consider whether the LARP is consistent with the purpose of the Act with respect to the bearing on Aboriginal Peoples. A *broad and purposive interpretation* is also consistent with the scheme of the ALSA, wherein other rights, such as private property, are dealt with in much greater specificity."¹³ (Emphasis added)

For the above reasons, the Review Panel — in an effort to improve the implementation plan as described in the LARP — makes seven "General Observations and Suggestions" to the Stewardship Minister with respect to this document.

¹² Fort McKay First Nation Response to the Crown's Submission; page 2, paragraph 2 ¹³ Reply Submission of the Mikisew Cree First Nation; page 10

The Mandate of the Review Panel

Introduction

In December 2008, the Alberta Government released Alberta's Land-use Framework, which established seven new land-use regions. The Lower Athabasca Regional Plan (LARP) is a regional plan approved by the Government of Alberta (Alberta or the Crown) under the authority of the *Alberta Land Stewardship Act* (ALSA) to provide for long-term sustainable development in the Lower Athabasca Region of the province. The LARP was tabled before the Legislative Assembly in August 2012 and became effective on September 1, 2012.

Section 19.2 of the ALSA and the *Alberta Land Stewardship Regulation* (ALSR) provide an opportunity for persons who claim that they are "directly and adversely affected" by the LARP to apply for a review of the LARP within 12 months of the date that the LARP comes in to force. Six First Nations applied for such a review of the LARP. They are Athabasca Chipewyan First Nation (ACFN), Mikisew Cree First Nation (MCFN), Cold Lake First Nations (CLFN), Onion Lake Cree Nation (OLCN), Fort McKay First Nation and Fort McKay Métis Community Association (FMFN), and Chipewyan Prairie Dene First Nation (CPDFN) (the Applicants).

1.1 THE MANDATE OF THE REVIEW PANEL

A Lower Athabasca Regional Plan Review Panel was appointed on June 23, 2014. The Review Panel was selected by the Stewardship Minister and consists of Mr. Jeff Gilmour (Panel Chair) and Ms. Winona Twin.

The Review Panel must provide advice on whether each Applicant is "directly and adversely affected" by either a specific provision, or provisions, in the LARP. The Review Panel must consider the six review requests and provide recommendations to the Government of Alberta within one year of their appointment by June 22, 2015. The Review Panel will submit a separate report and any recommendations for each Application.

The Review Panel must abide by a *Code of Conduct for Panels Established Under ALSA and Rules of Practice for Conducting Reviews of Regional Plans* in accordance with the ALSA and ALSR.

1.2 THE REVIEW PROCESS

Once an Application for review is deemed complete, the Application is posted to the Land-use Framework website.¹ The Government of Alberta then prepares a submission in response to the Application within 90 days of the Application being deemed complete. The Applicant then prepares a submission in response to the Government of Alberta within 60 days of receiving the Government of Alberta's submission. The submissions are then posted to the Land-use Framework website. The Review Panel then begins to conduct the review and submits a recommendations report to the Government of Alberta. The report is posted to the Land-use Framework website within 30-60 days of it being submitted to the Government of Alberta.

1.3 THE FINAL REPORT

The Panel must submit its report and any recommendations to the Minister within one year less one day from being appointed, or on a shorter timeline as directed by the Minister. The Panel's report and any recommendations must reflect a consensus of the Panel members. The Panel does not have authority to consider or award costs in relation to the review.

The scope of the Panel's Report depends on whether the Panel finds the Applicant has been "directly and adversely affected" by the LARP. If the Panel finds that the Applicant is not "directly and adversely affected," in accordance with either sections 36(a) or (b) of the Rules, the Panel must issue its report to the Minister with its advice on this issue alone.²

If the Panel's advice is that the Applicant is "directly and adversely affected," in accordance with either sections 36(a) or (b) of the Rules, the Panel must include in its report to the Minister:

¹ Alberta Environment and Sustainable Resource Development Website, "Request for Review of LARP": <https://landuse.alberta.ca/RegionalPlans/LowerAthabascaRegion/LARPRequestReview/Pages/default.aspx> ² *Ibid.*

- a. an explanation of how the specific provision(s) in the LARP directly and adversely affects the Applicant; and
- b. an explanation of the adverse effects of the specific harm(s) listed in the definition of “directly and adversely affected” in the ALSR (health, property, income or quiet enjoyment of property, or some combination of them) that the Applicant is suffering or expects to suffer as a result of the specific provision(s) identified.

The Panel may, in its report to the Minister, include recommendations specific to the provision(s) identified in section 38(a) of the Rules that may mitigate the adverse effects identified in section 38(b) of the Rules.

Interpreting Jurisdiction and the Statutory Framework

2.1 INTERPRETATION OF STATUTES AND REGULATIONS

The Review Panel must give a remedial and purposive interpretation to the provisions of the ALSA and the ALSR. Common law, the ALSA and the *Alberta Interpretation Act* (AIA) all require a remedial and purposive interpretation of these authorities.³

The case law on statutory interpretation requires statutory provisions, including provisions concerning jurisdiction or powers, to be purposively interpreted in the context of the legislative scheme as a whole.⁴ An exception to this rule is applied in the cases of penal regimes, such as the *Criminal Code of Canada*, or regimes that can deprive a person of property, such as tax legislation. The ALSA is not a penal regime. Although the ALSA does address compensation in the case where implementation of a regional plan might result in a compensable taking, the Review

Panel has no role in such matters. The provisions of the legislation related to Review Panel jurisdiction and under consideration herein do not involve a regime to deprive persons of property.

The AIA requires “the fair, large and liberal construction [of legislation] and interpretation that best ensures the attainment of its objects.”⁵

2.2 THE REVIEW PANEL'S AUTHORIZING STATUTE

The *Alberta Land Stewardship Act* was enacted to create a single land planning process covering both private and public lands, and to consolidate responsibility for land-use planning. Consideration of environmental effects on land, air and water are fundamental to the ALSA planning process. These environmental effects are to be balanced with social and economic goals.

These purposes are subject to an overriding provision, which specifically states that the government “must respect the property and other rights of individuals and must not infringe on those rights except with due process of law and to the extent necessary for the overall public interest.”⁶

The rules of statutory interpretation require that legislation, including regulations and rules established under that legislation, be interpreted in a way which will contribute to the statutory purpose.

The ALSA discusses interpretation of the regional plans at 13(3) under Part 2: Nature and Effect of Regional Plans and Compliance Declarations.

13(3) The meaning of a regional plan is to be ascertained from its text, in light of the objectives of the regional plan, and in the context in which the provision to be interpreted or applied appears.

³ *Alberta Interpretation Act*, RSA 2000, c 1-18. [AIA] ⁴ (*Montreal (City) v. 29521366 Quebec*, 2005 SCC 62; *Re Rizzo & Rizzo Shoes Ltd* [1998] 1 SCR 27; *Nabors Canada Ltd v. Alberta* 2010 ABCA 243; *Zakhary v. College of Physicians and Surgeons*, 2013 ABCA 336 ⁵ AIA at s 10. The *Alberta Interpretation Act*, Section 10 sets out that “An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.” The AIA applies to all enactments (Section 2). These provisions can be overruled by a contrary statement in the enactment (Section 3(1)) or by a common law rule of construction that is applicable to the provision at issue and not inconsistent with the AIA (Section 3(3)). We note that counsel for the Athabasca Chipewyan First Nation (ACFN) argues that Alberta’s Response to the ACFN Application does not conform with the principles of statutory interpretation and case law. ACFN submits that as a result, the Review Panel’s jurisdiction is limited to the point of absurdity. ACFN Reply at 41. ⁶ *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8, s 1(1).

2.3 THE AUTHORIZING REGULATION AND RULES

Forwarding Application to panel

9(1) Subject to subsection (2), on receipt of a complete Application, the Stewardship Minister shall forward the Application to the panel for the panel to conduct the required review of the regional plan and to report the results of the review and any recommendations to the Stewardship Minister.

(2) If the Stewardship Minister has received 2 or more Applications, the Stewardship Minister may combine some or all of those Applications to be reviewed concurrently by the panel.

(3) An Application is not complete until all of the applicable information required under section 7(1) has been provided to the satisfaction of the Stewardship Minister.

Rules respecting conduct of review

10(1) The Stewardship Minister may establish rules respecting the conduct of a review by a panel, including, without limitation, rules respecting the review of combined Applications, and the contents of reports and any recommendations by the panel.

(2) If the Stewardship Minister establishes rules referred to in subsection (1), the rules and any amendments to them must be posted on the secretariat's website.

Jurisdictional Matters Raised in the Proceeding and The Panel's Ruling

Under the *ALSA Rules of Practice for Conducting Reviews of Regional Plans* (the Rules), the Review Panel constituted to conduct the review is restricted to consideration of written submissions. These submissions include the original Applications from the First Nations, received in the latter part of August 2013, a response to each of the six Applications, filed by Alberta on June 25, 2014, and replies by five of the six Applicants to Alberta's submissions.⁷

These written submissions set out strongly divergent views about the scope of the Review Panel's jurisdiction. Alberta's response to many of the concerns raised by the Applicants was to assert that those issues were outside the Review Panel's jurisdiction.⁸

The Review Panel subsequently issued Information Requests (IR) to Alberta and the Applicants (the Parties) pursuant to section 28 of the Rules. Alberta's response to several of the Information Requests repeated its views about the limited scope of the Panel's jurisdiction,⁹ consistent with its June 25, 2014 responses.

In the circumstances, the Review Panel decided that it was necessary to set out its interpretation of its jurisdiction. The jurisdictional issues raised by Alberta affected all of the Applications. In order to complete its review and provide its advice to the Stewardship Minister in the time allowed by Rule 40, the scope of the Review Panel's authority had to be determined.

In the Review Panel's view, the approach to the overall interpretation of these authorities proposed in the Alberta submissions and, of the Review Panel's jurisdiction in particular, was narrow and restrictive. Alberta's argument seemed, to the Review Panel, too narrowly focused on sections 5(1)(c) of the ALSR and on Rules 35-39. Greater recognition and weight should have been given to the ALSA section 1 "Purposes of the Act", section 2 "Definitions" and, in particular, subsection 2(h) and section 13, which leads to the text of the LARP as a means for determining the meaning of the Plan.

It is a principle of statutory interpretation that the Legislature does not intend to produce absurd consequences.¹⁰ The Review Panel found that the Alberta argument, which concluded that the Review Panel has no jurisdiction to consider questions of: constitutional law; consultation during the development of the LARP; "harms" that pre-date the LARP; "harms" related to future development activity; "harms" related to the implementation of the LARP; or "harms" related to omissions from the LARP, reduced the Review Panel's role to a point approaching absurdity. After considering the submissions from all parties, the Review Panel ruled as follows:¹¹

⁷ OLCN did not provide a Reply to Alberta's Response to its Request for Review. ⁸ For citation purposes in this ruling, unless otherwise noted, the Review Panel will refer to the Alberta response to CLFN (the "Alberta Response"), however, the arguments in all six of Alberta's responses were virtually identical. ⁹ See in particular Alberta's responses to Panel Information Requests #9 and #11 dated December 8 and 12, 2014 respectively. ¹⁰ *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at 27. ¹¹ The Review Panel's full Jurisdictional Ruling can be found in Appendix 3

Panel's Jurisdiction on Questions of Constitutional Law:

The Review Panel does not have the power to make decisions impacting the rights of persons.¹²

The Review Panel's position is that it should take notice of existing constitutional rights in the normal course of its review, to the extent that those rights can be related to "health, property, income, or quiet enjoyment of property" as set out in section 5(1)(c) of the ALSR. Whether Aboriginal rights or Treaty rights fall within the scope of this legislation is a statutory interpretation question for the Review Panel to answer, without determining or redefining the scope of such rights when they have already been determined through a Treaty or by the Courts.

Taking notice of a constitutional right that may be harmed by the LARP is distinct from determining a constitutional question. Neither the LARP nor its authorizing legislation is under review by way of a constitutional challenge. Notably, there is nothing in the ALSA, the ALSR or the Rules that would prevent the Review Panel from considering constitutionally-protected First Nation rights in its review of the Applications and the LARP.

Panel's Jurisdiction to Consider Consultation During the LARP Creation or During LARP Implementation:

The Review Panel, Alberta and First Nations are in agreement that the Panel has no jurisdiction to address questions related to the adequacy of Crown consultation. The Review Panel lacks the authority to answer questions of law, a necessary prerequisite to performing an assessment of the adequacy of consultation.

The Review Panel notes that section 5 of the ALSA required consultation in the development of the LARP. That term is not defined in the ALSA but the Review Panel finds that it refers to the planning process, and *not* the consultation requirement imposed by case law, when the Crown undertakes actions which may infringe Aboriginal or Treaty rights.

The Review Panel's position is that it may look to the LARP consultation record for the purpose of assessing whether a harm to "health, property, income, or quiet

enjoyment of property" exists, or will likely occur, and to make recommendations to the Stewardship Minister on mitigating those harms. A review of the LARP consultation record may inform the Review Panel in the formulation of any recommendations that it makes to the Stewardship Minister.

Panel's Jurisdiction to Consider Alleged Harms from Activities Which Pre-date LARP:

Section 7 of the ALSR refers to adverse effects a person is "suffering or expected to suffer." Further, section 2(1)(h) of the ALSA contains a broad definition of "effect," which includes cumulative effects. Sections 7-9 of the ALSA require that the LARP content be generated in consideration of the history of the planning region. In addition, it seems unusual to the Review Panel that a statutory framework intended to ensure sustainable development in the Lower Athabasca region would be required to do so with no reference to past events and changes to the landscape.

The Review Panel's position is that it *may* consider effects that pre-date the LARP in assessing whether the Applicants have sustained harm from the implementation of the LARP. The LARP is a strategic land-use planning initiative. An inability to make a baseline assessment would be an absurd outcome of a narrow interpretation of the ALSA and the ALSR.

The Review Panel may not, however, make recommendations based on past harms, or recommend any fresh consultation activity that is intended to remedy past harms. The Review Panel must focus on the LARP as a prospective document, while taking cognizance of existing development.

Panel's Jurisdiction to Consider Applicants' Allegations of Harms Related to Potential Future Development Activities:

The Review Panel's position is that its jurisdiction extends to considering future development as part of its review of the LARP. The LARP is a prospective and strategic document. However, the Review Panel must confine its review to activities and outcomes that are reasonably probable and supported by evidence.

¹² *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3 at 10 (b).

The Review Panel notes that the ALSA contemplates impacts from future development as one of the purposes of the LARP.¹³ The ALSA also uses language about “probability” of an effect, contemplating future effects that have not yet occurred.¹⁴ The Rules use language about the harms that a person “is suffering or expects to suffer as a result of the specific provision(s) identified” (Emphasis added).¹⁵ Each of these provisions supports the conclusion that the Review Panel may consider harms from future development.

Panel’s Jurisdiction to Consider Allegations of Harms Related to the Implementation of LARP:

The Review Panel’s position is that it has jurisdiction to consider implementation of the LARP to the extent that implementation may, or likely will, harm “health, property, income, or quiet enjoyment of property.”

The LARP is, after all, binding on other decision-makers and has regulatory effect. The issue is not, as Alberta puts it, “the alleged harms caused by how the LARP is or may be applied or interpreted by industry or regulatory decision-makers...” The problem is that the LARP is binding on other regulators and that the Applicants allege harm resulting from the implementation of an incomplete plan.

Nothing in the ALSA or the ALSR restricts the Review Panel from considering implementation of the LARP. Further, timelines for implementation of the LARP provisions are included in the content of the Plan. Evidence that those timelines are not being met, and that regulators have been required to make decisions in the absence of the LARP guidance, goes to an assessment of the effects of the LARP.

The Courts have clearly indicated that government’s strategic decisions and plans can have adverse effects on the exercise of Aboriginal and Treaty rights.¹⁶ A review of the implementation of the LARP does not affect the jurisdiction or activities of regulators, such as the Alberta Energy Regulator. In addition, it is difficult to see how, in a practical way, the “content” of the LARP referred to by Alberta can be separated from the effects of implementation.

Panel’s Jurisdiction to Consider Omissions from LARP:

The Review Panel’s position is that it may consider omissions from the LARP to the extent that those omissions cause harm in relation to the matters enumerated in section 5(1)(c) of the ALSR.

The ALSA, the ALSR and the Rules do not restrict the jurisdiction of the Review Panel to consider harms arising from omissions. In fact, they do not address this issue explicitly. A purposive interpretation of the ALSA and the ALSR should ensure that the Review Panel may consider the specific provisions of the LARP in the whole of the legislative context. If specific provisions together reveal a gap in the planning framework, the Review Panel may have jurisdiction to consider this gap if it leads to harm to “health, property, income, or quiet enjoyment of property.”

The Review Panel’s purpose, broadly speaking, is to review complaints from persons directly affected by the LARP and make recommendations based on a review of all the evidence. To fulfill this purpose, in the case of omissions, the Review Panel will review the Applicants’ concerns about the omissions, and the Crown’s responses to each of these complaints. In particular, the Review Panel may look to whether the matters omitted were considered by the Crown during the planning stages, and whether, during the balancing process inherent in land-use planning, the Crown omitted these matters for a particular reason. Upon a review of the Applications and the evidence they include, the Review Panel may determine whether these alleged omissions have caused harm in the context of section 5(1)(c) of the ALSR and, if such a finding is made, direct a recommendation to the Stewardship Minister.

The gap in the LARP may be ascertained from a failure to include actions contemplated in content outlined in the ALSA at sections 7-9.¹⁷ These sections of the ALSA outline a list of the contents that may be included in a regional plan. The Review Panel may recommend that the Stewardship Minister reconsider omitting such content where an Applicant’s evidence discloses an identifiable and eligible harm resulting

¹³ ALSA at s 1(2)(b). ¹⁴ ALSA at 2(1)(h)(i). ¹⁵ Rules of Practice for Conducting Reviews of Regional Plans at section 38 ¹⁶ Rio Tinto, supra note 15 at 47. ¹⁷ ALSA at s 7-9.

from a gap in the LARP provisions. The Review Panel finds that it *may* consider evidence of omissions from the LARP where there is evidence that the omission will harm the “health, property, income, or quiet enjoyment of property,” and the omitted material is clearly within the objectives of the ALSA under section 1 and the powers of the Stewardship Minister under sections 7-9.

The Review Panel finds that the constitutional division of powers does not prevent Alberta from acting in a way that will uphold its obligations under the Treaties. The federal and provincial Crowns share the responsibility for implementing measures to protect Treaty rights. As the provincial Crown may benefit from a Treaty, it must uphold its responsibilities through its actions.¹⁸

The Panel's Jurisdiction to Consider Harms Alleged to be Caused by Legislation Other Than LARP:

The Review Panel's position is that it does not have the jurisdiction to make recommendations about amendments to legislation. The Review Panel may consider how the LARP interacts with other legislation, especially when those legislative initiatives are the result of the LARP provisions. The Review Panel is not restricted by the ALSA or the ALSR from considering the legislative context beyond the LARP. If the Review Panel were so restricted, then the content of the LARP could not be placed in a broader context. For example, the Review Panel would have no way to assess the importance of a conservation area designation versus an industrial designation in achieving the goals of the ALSA.

¹⁸ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at 152. *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48. We note in fairness that the *Grassy Narrows* decision was released after the date when Alberta filed its response.

Legal Review of the term “Directly and Adversely Affected”¹

1.1 THE INTERPRETATION OF “HARM”

The definition of “directly and adversely affected” is found in section 5(1)(c) of *Alberta Land Stewardship Regulation* (ALSR). The proper interpretation of the phrase “more than minimally harmed” requires a purposive analysis. The *Alberta Land Stewardship Act* (ALSA) was drafted with broad purposive intent.

The drafters intended the ALSA to cover a wide range of persons. It sets out a threshold for the Review Panel to use in exercising its discretion when determining the fate of an Application for review or amendment of a regional plan. However, the Review Panel’s role is confined to identifying specific provisions of regional plans that “directly and adversely affect” an Applicant. An Applicant must demonstrate a direct causal link between the regional plan and the harm alleged and the harm must be more than “minimal.”²

The drafters of the ALSA and its Regulations chose not to include a definition of “harm” in this legislation. The drafters did not intend the threshold of “harm” to be just *any* “harm;”³ nor did they intend it to be “significant harm,”⁴ “serious and irreversible harm”⁵ or “irreparable harm.”⁶ The “harm” threshold under the ALSR is much lower than thresholds found in other environmental legislation. The threshold is a *de minimis* threshold.

Adjudicative bodies have struggled with the determination of what amounts to “harm” under various environmental statutes. The level of “harm” is decided based on the applicable legislation, on a case-by-case basis, and often with considerable weight given to evidence. For example:

- the Ontario Environmental Assessment Board held that “significant harm” is not to be synonymous with a level or concentration of contamination exceeding a numerical limit in a regulation;⁷
- the Court of Queen’s Bench of Alberta held that “harmful” was not to be interpreted as the equivalent of “damage” when considering impacts to fish habitat under the *Fisheries Act*;⁸
- the British Columbia Environmental Appeal Board held that “irreparable harm” is harm which either cannot be quantified in monetary terms or which cannot be cured and “may include situations where a permanent loss of natural resources will be the result if a stay is not granted;”⁹ and
- the Ontario Court of Appeal held that fly-rock had only a trivial effect causing minimal harm to the environment and did not amount to enough “harm” to meet the threshold of “adverse effect” under Ontario’s *Environmental Protection Act*.¹⁰

Finally, “Harm” is only explicitly defined in one Canadian environmental statute.¹¹

1.2 INTERPRETATION OF “HEALTH, PROPERTY, INCOME OR QUIET ENJOYMENT OF PROPERTY OR SOME COMBINATION OF THEM...”

The following concerns raised by the Applicants fall within the scope of the definition of health, property, income or quiet enjoyment of property, or some combination of them:

¹ A legal opinion from the Review Panel’s legal counsel and adopted by the Review Panel. ² For these reasons, the Canadian and provincial environmental assessment regimes provide little help to the interpretation of a regional planning regime. For example, under the *Canadian Environmental Assessment Act*, 2012 SC 2012, c 19, s 52 proponents must provide to the Agency a description of their proposed project if it is captured by regulations outlining projects likely to require federal environmental assessment. The threshold determination was made by government in these regulations and is not made by the body conducting the assessment. ³ Such as found in the *Ontario Environmental Protection Act* RSO 1990, c E 19, under s 1 where “adverse effect” means one of the 8 enumerated grounds, including: s 1(h) “harm or material discomfort”. ⁴ Such as found in the conditions of “significant harm” to the environment under the *Ontario Environmental Bill of Rights*, 1993, SO c. 24. ⁵ Such as found in the test to appeal Renewable Energy Approvals under s 145.2.1 (2) of the *Ontario Environmental Protection Act* RSO 1990, c E 19. ⁶ Such as found in the *Environmental Impact Assessment Regulation*, NB Reg 87-83, s 4; *Clean Environment Act*, RSNB 1973, c. C-6. ⁷ *Residents Against Company Pollution Inc., Re* (1996) 1996] OEAB No 29, 20 ELR (NS) 97. ⁸ *R. v. Jackson*, [1994] 1 AJ No 680, 22 Alta LR (3d) 438 (Alta QB). ⁹ *Dickie v. British Columbia (Assistant Regional Water Manager)* (2012), 2012 CarswellBC 3900, 73 CELR (3d) 229 (BC Environmental App Bd) at para. 72; this interpretation was made in the context of the test for a stay under s 92(9) of the British Columbia’s *Water Act*, RSBC 1996, c 483. ¹⁰ RSO 1990, c E 19; as mentioned above: *R. v. Castonguay Blasting Ltd.*, 2012 ONCA 165. ¹¹ “Harm” is defined in the *Environmental Bill of Rights*, 1993 as: “any contamination or degradation and includes harm caused by the release of any solid, liquid, gas, odour, heat, sound, vibration or radiation.” This definition is, unfortunately, of little assistance in the ALSA context.

Health

The Review Panel may consider harms to physical, mental and community health. There is a high evidentiary standard to meet in order to demonstrate harm to physical health. The Review Panel should also be aware of the potential harm to mental health associated with development impacts on areas of cultural significance.

Income

The Review Panel may consider harm to income where the income flows from activity within the scope of rights protected under section 35(1) of the *Constitution Act, 1982* ("section 35(1) rights"). A definition of income that flows from the exercise of First Nations' section 35(1) rights should reflect First Nations' income from traditional economies, which are not cash-based. Treaty rights in Alberta do not include the exercise of these rights for commercial purposes.

The Review Panel may also consider harm to income where the income flows from other activities. In considering other income, the Review Panel will restrict itself to a definition of income as described in "Cash-based Income."

Property

The Review Panel may consider harms to First Nations-held private property and to Reserve Land. Lands over which First Nations exercise Treaty rights do not fall within the definition of "property."

Quiet enjoyment of property

The Review Panel may consider harms to Aboriginal rights or Treaty rights. The Review Panel must restrict its consideration to harms that are reasonably probable, and harms that affect a right that is either an established Aboriginal right or a right that has been established by Treaty. To identify instances where harm is relevant, the Review Panel may also consider whether harm to "quiet enjoyment of property" interacts with health, property or income.

Some combination of health, income or property

The Review Panel may consider a combination of harms to health, income and property. The definition of "directly and adversely affected" allows the Review Panel to avoid unnecessary compartmentalization

when assessing the Applicants' alleged harms. This catch-all category may be particularly important when assessing evidence of harm to the Applicants' Traditional Land Use that does not fall solely within one approved category.

1.3 ABORIGINAL TREATY RIGHTS AND THE DEFINITION OF "DIRECTLY AND ADVERSELY AFFECTED"

All of the territory covered by the LARP is covered by Aboriginal Treaties.

Treaty rights are land-based rights that are rooted in solemn agreements between First Nations and the Crown. Treaty and Aboriginal rights are protected by section 35(1) of the *Constitution Act, 1982*. The Supreme Court of Canada has held that:¹²

"Treaty rights, like Aboriginal rights are specific and may be exercised exclusively by the First Nation that signed the Treaty. The interpretation of each Treaty must take into account the First Nation signatory and the circumstances that surrounded the signing of the Treaty."

The Supreme Court of Canada has also held that Treaties command "a generous interpretation and uncertainties, ambiguities or doubts should be resolved in favour" of the First Nations.¹³ Treaties should not be interpreted as if they were drafted like "commercial contracts negotiated at arm's length by parties with equal bargaining power."¹⁴

Consideration of Treaty rights is within the Review Panel's jurisdiction, to the extent that it is necessary to consider treaties while ruling on the Applications made by First Nations for a review of the LARP. In order to decide whether the First Nation Applicants' Treaty rights are "directly and adversely affected" by the LARP, the Review Panel must address these Treaty rights.

The Review Panel does not have jurisdiction to decide whether the LARP, or any government action, has infringed Treaty rights, as this is a determination of law. However, the Review Panel should be sensitive to the potential for Alberta to authorize activity that would infringe Treaty rights.

¹² *R. v. Sundown* [1999] 1 SCR 393 (SCC) at para. 25. ¹³ *R. v. Van der Peet* [1996] 2 SCR 507 (SCC) at para. 143. ¹⁴ *R. v. Marshall* [1999] 3 SCR 456 (SCC) at para. 45.

1.4 HARM TO INCOME

1.4.1 CASH-BASED INCOME

Black's Law Dictionary defines "income" as:¹⁵

"The money or other form of payment that one receives, periodically, from employment, business, investments, royalties, gifts, and the like."

This definition flows from a Western style of economic activity, and from a cash-based economy.

1.4.2 INCOME DERIVED FROM EXERCISE OF SECTION 35(1) RIGHTS

First Nations traditional economies did not rely on monetary currency. With this context in mind, and a broad and liberal approach to Treaty interpretation, hunting, fishing and trapping activity could be encompassed by an alternate definition/interpretation of "income".

The Oxford Dictionary provides a definition of "income" that includes:¹⁶

"That which comes in as periodical produce of one's work, business, lands or investments" and "project, proceeds, results, 'harvest.'"

This alternative definition reflects the fact that, prior to European contact, First Nations did not partake or have access to the exchange of money or the contemporary "economy" as we know it today. Rather, the benefits they derived from the land formed the structure of their economy. At the community level, Aboriginal health and lifestyle has and continues to be closely linked to traditional food systems through other economic and social pathways that form the basis of non-cash economies.¹⁷

1.4.3 LAND USE ACTIVITY THAT FALLS OUTSIDE THE SCOPE OF ABORIGINAL AND TREATY RIGHTS

The Review Panel may consider harm to income where the income flows from activity outside of section 35(1) protected rights. However, in considering whether an activity constitutes income, the Review Panel should restrict itself to a definition of income as described in section 3.1.1 above, "Cash-Based Income."

Treaty harvesting rights in Alberta do not include the right to harvest for commercial purposes. Harm to income that flows from commercial (as opposed to subsistence) activity may be considered, but only where that income falls under the definition of "Cash-Based Income."

Historically, the treaties in the prairie provinces included a commercial right to hunt, and a commercial right to fish. However, courts have held that these Aboriginal commercial rights to hunt, trap and fish on public land have been modified¹⁸ by the *Natural Resources Transfer Agreement, 1930* (NRTA).¹⁹ For example in *R. v. Horseman*,²⁰ the Supreme Court of Canada held that the NRTA unilaterally restricted Treaty rights to hunting for sustenance. The Alberta Court of Appeal followed this decision in *R. v. Gladue*²¹ and held that a commercial right to fish was also modified by the NRTA.

1.4.4 TRADITIONAL LAND USE ACTIVITY THAT FALLS WITHIN SECTION 35(1) ABORIGINAL AND TREATY RIGHTS

Hunting, fishing and trapping rights arise from both Treaty rights and inherent Aboriginal rights.

- Treaty 8, which covers most of the LARP territory, promises a continued right to hunt, fish or trap within the Treaty area.

¹⁵ Black's Law Dictionary, 8th ed. (United States: West Publishing Co, 2004) at 778. ¹⁶ Compact Edition of the Oxford English Dictionary, Volume 1A-O (United Kingdom: Oxford University Press, 1981) at 1404. ¹⁷ Willows, N.D. (2005). Determinants of Healthy Eating in Aboriginal Peoples in Canada. *Canadian Journal of Public Health* 96 (Supplement 3): S32-S36; Kuhnlein, H.V., Receveur, O., Soueida, R., & Egeland, G. (2004). Arctic Indigenous Peoples Experience the Nutrition Transition with Changing Dietary Patterns and Obesity. *The Journal of Nutrition* 134: 1447-1453; Johnson, J.S., Nobman, E.D., & Asay, E., & Lanier, A.P. (2009). Dietary Intake of Alaska Native People in Two Regions and Implications for Health: The Alaska Native Dietary and Subsistence Food Assessment Project. *International Journal of Circumpolar Health* 68(2): 109-122 [Willows, 2005]. ¹⁸ In *R. v. Badger* [1996] 2 CNLR 77 (SCC) the Supreme Court of Canada clarified that the *Natural Resources Transfer Agreement, 1930* (NRTA) had modified, but not extinguished the Treaty right to hunt for food. ¹⁹ *Natural Resources Transfer Agreement, 1930* (enacted by the *Constitution Act, 1930* (U.K.) 20-21 George V, c 26). ²⁰ [1990] 3 CNLR 95 (SCC). ²¹ [1996] 1 CNLR 153 (ABCA), leave to appeal refused (1996), 200 AR 396 (note)(SCC). [1990] 3 CNLR 95 (SCC).

- An Aboriginal right to fish on a site-specific basis was first recognized in the Supreme Court of Canada's decision in *R. v. Sparrow*.²² First Nations can prove their rights through litigation in court. Where a right is asserted but not proven, the Crown has a constitutional duty to consult where action is contemplated that has the potential to adversely affect the asserted right.²³

The Supreme Court of Canada has held that these Treaty rights include not only the right to hunt, trap and fish in a defined territory,²⁴ but encompass "that which is reasonably incidental" to harvesting.²⁵

"[T]hat which is reasonably incidental is something which allows the claimant to exercise the right in the manner that his or her ancestors did, taking into account acceptable modern developments or unforeseen alterations in the right... The inquiry is largely a factual and historical one. Its focus is not upon the abstract question of whether a particular activity is "essential" in order for hunting to be possible but rather upon the concrete question of whether the activity was understood in the past and is understood today as significantly connected to hunting. Incidental activities are not only those which are essential, or integral, but include, more broadly, activities which are meaningfully related or linked."

Courts also applied a liberal interpretation to the spatial application of Treaty rights. For example, in *R. v. Badger*, the Supreme Court of Canada held that hunting on private land may be allowed if there is no "visible, incompatible land use."²⁶ Further, the Supreme Court of Canada held that this right to hunt and fish for food under the NRTA is not limited by provincial boundaries in the Prairies. For example, in *R. v. Frank*,²⁷ the Supreme Court of Canada held that the NRTA extended Treaty hunting rights for food to a Treaty holder from Saskatchewan hunting in Alberta.

The wording in Treaty 8 demonstrates that hunting, fishing and trapping rights are not only important for sustenance but that they formed the basis of the First Nation signatories' "vocation" and "economy."

"And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

In *R. v. Horseman*,²⁸ the Supreme Court of Canada highlighted and confirmed the importance of hunting to the signatories of Treaty 8 and the link to traditional economic activity in the area, quoting the following passage from *Commentary on Economic History of Treaty 8 Area*. (unpublished; June 13, 1985)

"The Indians indicated to the Treaty 8 Commissioners that they wanted assurances that the government would look after their needs in times of hardships before they would sign the Treaty. The Commissioners responded by stressing that the government did not want Indians to abandon their traditional economic activities and become wards of the state. Indeed, one of the reasons that the *Northwest Game Act* of 1894 had been enacted was to preserve the resource base of the native economies outside of organized territories. The government feared that the collapse of these economies would throw a great burden onto the state such as had occurred when the bison economy of the prairies failed."

More recently, the BC Court of Appeal in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*²⁹ addressed the idea of Treaty 8's continued protection of the First Nation signatories' traditional economic activity.³⁰

²² [1990] 3 CNLR 160 (SCC). ²³ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para. 35. ²⁴ *Simon v. The Queen*, [1985] 2 SCR 387 at para. 31; *R. v. Sundown* [1999] 1 SCR 393; *Mikisew Cree First Nation v. Canada*, 2005 SCC 69 at paras 47-48. ²⁵ *R. v. Sundown* [1999] 1 SCR 393 at para. 30. ²⁶ *R. v. Badger* [1996] 2 CNLR 77 (SCC). ²⁷ [1978] 1 SCR 95. The accused, a Treaty Indian from Saskatchewan hunting in Alberta appealed a conviction of unlawfully having in his possession moose meat contrary to s 16 of the *Wildlife Act*. He claimed he was exempted from the provisions of s 16 by virtue of para. 12 of the Alberta NRTA which stated that provincial game laws would not apply to "Indians within the boundaries" who were hunting for food on unoccupied Crown lands. The Supreme Court of Canada held that the provision applied to Indians at any particular time were in the boundaries of Alberta. ²⁸ *R. v. Horseman* [1990] 1 SCR 901; note this passage was reproduced by the Mikisew Cree First Nation in their Application for Request for Review, dated August 22, 2013 at page 5. ²⁹ 2011 BCCA 247. ³⁰ *Ibid* at 137 and 140.

“While specific species and locations of hunting are not enumerated in Treaty 8, it guarantees a “continuity in traditional patterns of economic activity” and respect for “traditional patterns of activity and occupation.” The focus of the analysis then is those traditional patterns.”

1.5 HARM TO HEALTH

1.5.1 HEALTH DEFINED

Black’s Dictionary defines “health” “as the state of being or whole in body, mind or soul” and as “freedom of pain and sickness.”

The definition of health is broad and covers not only physical aspects of human health but also mental aspects of health. In order to interpret what constitutes a “harm” to “health” under the definition of “directly and adversely affected”, the Review Panel considered not only how case law has interpreted the word but also the socio-economic state of health in Canadian Aboriginal communities. Specifically, the Review Panel considered the cumulative effects of development in First Nation Traditional Territories.

1.5.2 WHAT CONSTITUTES A DIRECT AND ADVERSE EFFECT TO HEALTH

The Applicants have raised issues associated with the LARP’s alleged “direct and adverse” effects on their health.³¹ The Review Panel must decide whether planned development activity impacts the Applicants’ physical, mental or community health.

Adjudicative decisions demonstrate a high standard to meet in order to show harm to First Nations’ health through development.

The following examples demonstrate the importance of evidence to prove a “harm” to human health directly or a “harm” to First Nations’ health indirectly through the impacts of development on their traditional food sources.

The Shell Jackpine Mine Expansion

Despite evidence from experts, the determination of whether an alleged harm to health would meet the threshold of the definition of “directly and adversely affected” requires an analysis of cumulative impacts to health. For example, the Joint Review Panel in the Shell Jackpine Mine Expansion found that in relation to the regional study area assessed by Shell, and that despite the LARP’s new conservation areas, the cumulative impacts on wildlife had exceeded or were reaching threshold, resulting in significant adverse effects on biodiversity.³² However, the ultimate decision of the Joint Review Panel in the Shell Jackpine Mine Expansion exemplifies how initial issues with potential adverse effects on health (either directly or indirectly by impacting the traditional food source relied on by First Nations) can be addressed in subsequent approval applications or justified in reaching a decision at large. In July 2013, the Joint Review Panel issued its Decision Report, deeming the Jackpine Mine Expansion Project to be in the public’s interest and recommending it for approval:

“The Project would provide significant economic benefits for the region, Alberta and Canada. Although the Panel finds that there would be significant adverse project effects on certain wildlife and vegetation, under its authority as the [Alberta Energy Regulator], the Panel considers these effects to be justified and that the Project is in the public interest.”³³

Taseko Mines Limited Prosperity Gold-Copper Mine Project Proposal

Taseko Mines Limited has been working to advance development of a gold-copper mine (the Project) in the Cariboo-Chilcotin Region District (close to Williams Lake) in British Columbia.³⁴ The Federal Review Panel that reviewed Taseko’s proposal concluded that the cumulative effects of the Project were too large to mitigate.³⁵ The Panel considered many direct and indirect adverse effects to health.

³¹ For example see Reply Submissions of Athabasca Chipewyan First Nation, dated August 25, 2014 at para. 99. ³² 2013 ABAER 011; Jackpine Mine Expansion Project AER Application No 1554388 Fort McMurray Area CEEA Reference No 59540 at para. 31. ³³ *Ibid* at para. 8. ³⁴ Federal Review Panel, Report of the Federal Review Panel Established by the Minister of the Environment on Taseko Mines Limited’s Prosperity Gold-Copper Mine Project July 2, 2010 (CEAA Reference No. 09-05-44811) (Ottawa: Federal Review Panel, 2010) [Review Panel Report on Taseko Mines]. ³⁵ SEE PAGE 31 FOR FOOTNOTE.

The Federal Review Panel considered many aspects of the Project's potential adverse effects on the human health of the First Nations people in the area. Ultimately, the Panel held that the Project would not result in significant adverse effects on human health from consuming fish, moose meat and drinking water, nor would the Project result in a significant adverse effect on community health services.³⁶ However, many of the health factors the Panel considered are relevant to the Panel's determination that:³⁷

"The project would result in significant adverse environmental effects on the Tsilhqot'in Nation regarding their current use of lands and resources for traditional purposes and on cultural heritage resources."

In this determination, the Panel reviewed First Nation's health issues, specifically related to nutritional aspects of traditional foods. The Panel considered evidence from both the proponent and the First Nation communities.

1.6 HARM TO MENTAL HEALTH

As seen in the above definitions, mental health falls under the definition of "health." Two recent recommendations resulting from environmental assessments in British Columbia and the Northwest Territories demonstrate the importance of First Nation's psychological responses to loss of land due to development. These Panels not only analyzed the physical effects of the proposed projects but also assessed the health impacts from cultural loss.³⁸ In particular, the two assessments reflect upon health impacts related to the destruction of sacred sites.

Ur Energy Inc. Screech Lake Uranium Exploration Project

The Mackenzie Valley Environmental Impact Review Board accepted that the Upper Thelon area was of high spiritual and cultural importance to the Akaitcho First Nation. The Impact Review Board found that the uranium exploration project would not be compatible with Akaitcho values because it would cause social degradation and mental distress.³⁹

Taseko Mines Limited Prosperity Gold-Copper Mine Project Proposal

The Federal Review Panel accepted evidence that the area of the proposed mine was one of few cultural and spiritual areas of importance that had not been affected by development.⁴⁰

The Panel heard from witnesses who compared past trauma associated with colonization, residential schools and substance abuse to the potential mental trauma associated with loss of Traditional Land Use by development.

1.7 HARM TO PROPERTY AND ENJOYMENT OF PROPERTY

1.7.1 PROPERTY DEFINED

Black's Law dictionary defines "property" as:

1. The right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership.
2. Any external thing over which the rights of possession, use and enjoyment are exercised.⁴¹

³⁵ On November 2, 2010 The Federal Government gave its response to the Panel's recommendations: "The Government of Canada has determined that the significant adverse environmental effects cannot be justified in the circumstances." (see *Taseko Mines Ltd. v. Phillips*, 2011 BCSC 1675 at para. 7) Since then, Taseko Mines eliminated the most significant adverse environmental effects of the original project; in particular, the destruction of Fish Lake. This redesigned proposal, named the "New Prosperity Project". In August of 2011, Taseko submitted a revised comprehensive project description for the New Prosperity Project to the Canadian Environmental Assessment Agency. On November 7, 2011, the Minister of the Environment announced the Project would undergo an environmental assessment by way of the Federal Review Panel. On October 31, 2013, the Panel issued its report finding adverse effects likely in respect of water quality in the surrounding lakes, adverse effects to fish and fish habitat and Tsilhqot'in current use of lands for traditional purposes, cultural heritage and archaeological/historical resources: see *Taseko Mines Limited Notice of Application for Judicial Review of the Federal Review Panel decision dated October 31, 2013*. Court File No. T-1977-13, dated November 13, 2013. ³⁶ *Review Panel Report on Taseko Mines*, *supra* note 29 at 239 ³⁷ *Ibid* at 203. The Panel noted that community hearing sessions were a key source of information for the Panel on current use of lands and resources for traditional purposes and cultural heritage. ³⁸ For further discussion on the cultural loss associated with proposed development projects on indigenous peoples in Canada see Graben, S., "Rationalizing Risks to Cultural Loss in Resource Development", (2013) 26 Can. J.L. & Juris. 83. ³⁹ Mackenzie Valley Review Board, Mackenzie Valley Environmental Impact Review Board Report of Environmental Assessment and Reasons for Decision On Ur Energy Inc. Screech Lake Uranium Exploration Project (EA 0607-003) (Yellowknife: Mackenzie Valley Review Board, 2006) ⁴⁰ *Review Panel Report on Taseko Mines*, *supra* note 29. ⁴¹ Black's Law Dictionary, 8th ed. (United States: West Publishing Co, 2004) at 1252.

Black's Law dictionary defines "enjoyment of property" as "1. Possession and use, especially of rights or property. 2. The exercise of a right."⁴²

Black's Law dictionary also considers the definition of "beneficial enjoyment," which allows for the possession and benefit of land or other property, but without legal title."⁴³

1.7.2 REAL PROPERTY INTERESTS

Lands privately held by First Nations

Private properties held by First Nations meet the definition of "property." Title to these lands is separate from Aboriginal constitutional status. The Review Panel should regard these lands as indistinct from all other fee simple lands held by non-indigenous persons.

Reserve Lands

First Nation Reserve Lands fall within the definition of "property." First Nations have a protected right to use and benefit from these lands, if not outright title.⁴⁴ First Nations have an exclusive right to use, benefit from and occupy these lands.⁴⁵

Lands over which a First Nation has land-based Treaty rights

The Courts have not found land-based Treaty rights to hunt, fish, trap and use lands in a traditional fashion to be registrable interests in land. However, the Courts have recently contemplated that harm to land-based rights akin to a profit à prendre may be possible.⁴⁶

1.7.3 QUIET ENJOYMENT OF PROPERTY

Harm to Traditional Land Use falls within the scope of harm contemplated by Section 5(1)(c) of the ALSR. Section 5(1)(c) permits the Review Panel to consider harm to "quiet enjoyment of property." The Review Panel must restrict its consideration to harms that are reasonably probable, and harms that affect a right that is either an established Aboriginal right or one that has been established by Treaty.

To identify instances where harm is relevant, the Review Panel may also consider whether harm to "quiet enjoyment of property" interacts with health, property or income.

"Quiet enjoyment of property" is not defined in the ALSA, or any of its subordinate legislation. There are several sources the Review Panel may look to in order to interpret the meaning and scope of this category of harm.

Statute

"Quiet enjoyment of property" has not been often used as a phrase in legislation before. Some examples were provided by the Applicants, including the decision in *Whiskey's Lounge Ltd v. Nova Scotia Utility and Review Board*.⁴⁷ In *Whiskey's Lounge*, the right to quiet enjoyment encompassed "offensive or disturbing activity... that significantly limits the use and enjoyment of a person's property."

Commercial and landlord/tenant agreements

"Quiet enjoyment of property" is a real estate covenant in leases and commercial agreements. It is one of the rights in the "bundle of rights" that make up a property right, and is usually transferred with a right of occupation in a lease. It prevents the landlord from interfering with the lessee's use of the land. The proper remedy for a breach of such a covenant is damages.

Real estate transaction

During a real estate transaction, such as a conveyance, one of the clauses in the transaction is the "quiet enjoyment clause" wherein the seller or lessor agrees to not disrupt the new owner or lessee's use of the land. The proper remedy for a breach of such a covenant is damages.

Common law of nuisance and trespass

Nuisance focuses on the harm to the plaintiff and its property and whether that harm is reasonable. One way to harm a property is to interfere with a plaintiff's use and enjoyment of land. Trespass is another cause of action founded in the interference with a plaintiff's occupation of the property.

⁴² Black's Law Dictionary, 8th ed. (United States: West Publishing Co, 2004) at 571 ⁴³ Black's Law Dictionary, 8th ed. (United States: West Publishing Co, 2004) at 571.

⁴⁴ The title to Reserve Lands is held by the Crown. *Indian Act*, RSC 1985, c I-5. ⁴⁵ *Indian Act*, RSC 1985, c I-5. ⁴⁶ *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.*, 2015 BCCA 154. ⁴⁷ *Whiskey's Lounge Ltd v. Nova Scotia Utility and Review Board*, 2007 NSCA 95.

Examples of interference with quiet enjoyment of property include:

- Spoiling a neighbour's view;⁴⁸
- Restricting air flow onto a neighbour's land;⁴⁹
- Taking light from a neighbour's window.⁵⁰

A plaintiff does not necessarily have to show an exclusive right of occupation in order to claim against a tortfeasor under nuisance or trespass. In several cases in Alberta, across Canada, and even in the U.K., a person who did not own the property, but who was merely a beneficial user of the property, was entitled to claim in nuisance on the grounds that the defendant interfered with their quiet enjoyment. The case law in Canada varies widely on what level of occupation, or quality of right, is sufficient to ground a tort claim in nuisance or trespass.

Several cases have suggested that a successful action in trespass may be founded on interference with a proven Aboriginal right. In *Tolko Industries Ltd. v. Okanagan Indian Band*, an Aboriginal right to harvest timber was conceded by the Crown. The Court contemplated that the proven Aboriginal harvesting right could form the basis of an action in trespass. The Court found that this Aboriginal right was analogous to a *profit à prendre*.⁵¹

It is less clear whether a right or interest in land that has not been proven or established through Treaty or through a court determination is capable of founding an action in nuisance. In *Motherwell v. Motherwell*, the Alberta Court allowed for a claim in private nuisance where no legal right of occupation existed. The Court drew a distinction between a licensee who is "merely present" and occupancy of a substantial nature, and held the latter could found a claim in nuisance.⁵²

British Columbia's lower courts have rejected the line of reasoning in *Motherwell*. *Sutherland v. Canada* distinguished between interests in land that have been established versus those that have not.⁵³ *Thomas v. Rio Tinto Alcan Inc.*, applied this distinction

to Aboriginal rights, claiming that those rights that have not been proven cannot form the basis for an action in nuisance.⁵⁴

The most recent discussion of whether an Aboriginal right could found an action in private nuisance took place in *Saik'uz Nation*. In this decision, the British Columbia Court of Appeal considered whether to strike claims in tort founded on Aboriginal rights that had not been proven.⁵⁵ The Court refused to strike the claims of an Aboriginal community on the basis that the rights upon which they wanted to base their claim were not yet proven in court. The Court analogized to a claim involving nuisance and a disputed lease, where the leaseholder would have the opportunity to prove the lease's validity as part of the nuisance action. The Court found that Aboriginal landowners have analogous property rights, and distinguishing between Aboriginal property rights and other property rights is discriminatory. The Court held that the Aboriginal community should have the opportunity to prove the Aboriginal right as part of the litigation process. However, whether the asserted but unproven Aboriginal right at issue would actually found a claim in private nuisance remains an open question.

Saik'uz shows that in the right circumstances the Courts would likely be open to finding nuisance arising from an Aboriginal rights claim. This decision supports the Review Panel considering interference with quiet enjoyment of property based on established Aboriginal and Treaty rights. However, as the Review Panel cannot make a legal declaration on an unproven Aboriginal right, the Review Panel must restrict its consideration to established rights only.

In summary, if the Review Panel adopts the narrower view of *Sutherland* and *Thomas*, this would mean that private nuisance claims can be made where a Traditional Land Use is a Treaty right or ancillary to an established Treaty right, but not where it is asserted only.

If, on the other hand, the Review Panel follows Alberta's older *Motherwell* ruling, then Traditional Land Use that are not ancillary to Treaty rights can also be included.

⁴⁸ *Attorney-General v. Doughty* (1752) 2 Ves. Sen. 453, and *Fishmongers' Co. v. East India Co.* (1752) 1 Dick 163. ⁴⁹ *Bland v. Mosely* (1587) cited in *Aldred's Case* (1610) 9 Co.Rep. 57b, 58a, and *Chastey v. Ackland* [1895] 2 Ch. 389; all as cited in *Hunter and Others v. Canary Wharf Ltd*; *Hunter and Others v. London Docklands Corporation* [1997] UKHL 14.

⁵⁰ *Dalton v. Angus* (1881) 6 App.Cas. 740, 794-795. ⁵¹ *Tolko Industries Ltd. v. Okanagan Indian Band*, 2010 BCSC 24. ⁵² *Motherwell v. Motherwell*, [1976] AJ No. 55 at 32.

⁵³ *Sutherland v. Canada (Attorney General)*, 2001 BCSC 1024. ⁵⁴ *Thomas v. Rio Tinto Alcan Inc.*, 2013 BCSC 2303 at 155. ⁵⁵ *Saik'uz Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc v. British Columbia*, 2015 BCCA 154 at para. 40. [*Saik'uz Nation*]

Until the Courts settle the issue of whether an unproven Aboriginal right can ground an action in tort, we recommend that the Review Panel focus on proven Aboriginal rights when looking at interference with quiet enjoyment connected with Traditional Land Use.

1.8 SOME COMBINATION OF THE HARMS

The Review Panel should not consider itself restricted to categorizing impacts into only one of income, health or property. The Applicants may assert impacts that do not fall neatly into one of these categories. The Review Panel may consider a combination of harms across more than one category, none of which rise to the requisite level of harm, but which taken together form a harm.

A good example of the usefulness of this catch-all category is demonstrated in the Federal Review Panel in the Taseko Mines Limited Prosperity Gold-Copper Mine Project proposal. The Federal Review Panel held that the Project would not result in significant adverse effects on human health from consuming fish, moose meat and drinking water. The Federal Review Panel also found that the Project would not result in a significant adverse effect on community health services. However, many of the health factors the Panel considered were relative to the Panel's determination that:⁵⁶

“The Project would result in significant adverse environmental effects on the Tsilhqot’in Nation regarding their current use of lands and resources for traditional purposes and on cultural heritage resources.”

The definition of “directly and adversely affected” allows the Review Panel to avoid unnecessary compartmentalization when assessing the Applicants’ alleged harms.

⁵⁶ Federal Review Panel, Report of the Federal Review Panel Established by the Minister of the Environment on Taseko Mines Limited’s Prosperity Gold-Copper Mine Project July 2, 2010 (CEAA Reference No. 09-05-44811) (Ottawa: Federal Review Panel, 2010) at 203.

Six Applications/ Recommendations to the Minister

Review Panel Legislative Guidance

In addressing the issues raised by an Applicant, the Review Panel must consider the relevant provisions of the *Alberta Land Stewardship Regulation* and the *Rules of Practice for Conducting Reviews of Regional Plans*¹ (the Rules).

- Section 5(1)(c) of the Regulation defines the term “directly and adversely affected” as the “reasonable probability that a person’s health, property, income or quiet enjoyment of property, or some combination of them, is being or will be more than minimally harmed by the regional plan.”
- Section 38 of the Rules reads: as follows: “If the Panel’s advice is that the Applicant is “directly and adversely affected” in accordance with either 36(a) or (b) of the Rules, the Panel must, in its report to the Minister:
 - a. Identify and explain how the specific provision or provisions in the regional plan or in the amendment to the regional plan directly and adversely affects the Applicant; and
 - b. Explain the adverse effects with respect to health, property, income or quiet enjoyment of property, or some combination of them, that the Applicant is suffering or expects to suffer as a result of the specific provision(s) identified.”

The Review Panel has some degree of flexibility in reviewing the written evidence of the Applicants and the Crown. The Panel’s role is to review the evidence, weigh it and, based on that evidence, determine the facts in order to ascertain, for each issue, whether the Applicant has been “directly and adversely affected” by the LARP.

It is the intention of the Review Panel to explain its reasons as to why it has accepted some evidence over other evidence in determining its specific recommendations to the Minister for each issue identified in the Applicants’ arguments. Only the written evidence provided by the Parties to these proceedings will be considered by the Review Panel in determining the facts of each issue.

¹ *Alberta Land Stewardship Act - Rules of Practice for Conducting Reviews of Regional Plans* (March 2014)

Onion Lake Cree Nation

Analysis of Application

Background

Onion Lake Cree Nation (OLCN) is an Indian Band pursuant to the *Indian Act*. Its members are the beneficiaries of Treaty 6, which affords them land-use rights pursuant to the Treaty, the *Natural Resources Transfer Agreement, 1930* and section 35 of the *Constitution Act, 1982*. Amongst these rights is the right to carry out their traditional vocations of hunting, fishing, trapping and gathering (Traditional Land Use) in a manner consistent with the way they carried out these activities prior to Treaty.

Pursuant to Treaty 6 and the *Indian Act*, OLCN is the beneficial owner of Reserve Land in Alberta, which is situated just south of the southern border of the Lower Athabasca Region. The Traditional Territory of OLCN extends into the area covered by the Lower Athabasca Regional Plan (LARP) and, like all members of Treaty 6, OLCN members have the right to engage in Traditional Land Use on all unoccupied Crown land in the Province of Alberta.

Recently, Alberta acknowledged it has a duty to consult with OLCN in respect to land-use decisions and the taking up of land within OLCN's Traditional Territory in Alberta. OLCN is also the legal owner of parcels of land in and near Lloydminster, Alberta, some of which were purchased as part of OLCN's Treaty Land Entitlement claim.

Onion Lake Cree Nation brought this Application, on August 29, 2013, for review of the LARP — pursuant to section 19.2 of the *Alberta Land Stewardship Act* (ALSA), S.A. 2009, c. A-26.8, and the *Alberta Land Stewardship Regulation* (ALSR) — on the basis that OLCN is a person "directly and adversely affected" by the LARP.

Issues

The Review Panel considers that the raised issues by the Applicant can be summarized as follows:

Issue One: The Lower Athabasca Regional Plan does not address the management of ongoing Traditional Land Use (TLU) by Onion Lake Cree Nation members.

Issue Two: The Lower Athabasca Regional Plan designates new conservation areas without considering the impact on Onion Lake Cree Nation's Traditional Land Use or whether such areas support Onion Lake Cree Nation's Traditional Land Use.

Issue Three: The Lower Athabasca Regional Plan designates new tourism and recreation areas without considering the impact on Onion Lake Cree Nation's Traditional Land Use.

Issue Four: The Lower Athabasca Regional Plan's "inclusion of Aboriginal Peoples in land-use planning" fails to be effective or meaningful.

I. Argument of the Applicant - Onion Lake Cree Nation

ISSUE ONE

The Lower Athabasca Regional Plan does not address the management of ongoing Traditional Land Use (TLU) by Onion Lake Cree Nation members.

In addressing Issue One, the Applicant referred to the following specific provisions within the LARP:

- Strategic Direction: Managing Air, Water, Biodiversity, and Minimizing Land Disturbance (pages 27-29);
- Outcome 3 (pages 42-46); and
- Outcome 4 (pages 46-58).

The Applicant argued that Traditional Land Use rights and activities include hunting, fishing, trapping, gathering, ceremonial activities and wildlife management practices. All of these uses are inter-related and depend on a healthy environment.¹

Onion Lake Cree Nation stated that, although the “LARP purports to take a cumulative effects based approach to the management of environmental [considerations] in the region, the LARP does not address TLU issues specifically.”²

OLCN maintained that TLU cannot be addressed, as “various ecological indicators are protective of TLU activities.” The Applicant argued that “TLU activities depend upon a number of factors [that] are not accounted for in the LARP, which includes: location and availability of traditional ecological resources; quantity of traditional ecological resources; confidence in the quality and safety of ecological resources; access to ecological resources; and more complex cultural and spiritual factors.”³

The Applicant has taken the position that the “LARP contains no data relating to TLU ecological requirements, no consideration of cumulative impacts to TLU to date, no forward-looking thresholds for land uses [that] conflict with TLU, and no prioritization of TLU in accordance with its constitutionally-protected status.”⁴

In addressing the specific adverse effects in Issue One, OLCN described the following:⁵

- The LARP does not provide any mechanism to address or prevent cumulative effects on the exercise of TLU in the Lower Athabasca Region;
- Under the heading of “Subsistence and Income,” OLCN stated that there will be a decrease in the ability to practice subsistence hunting and gathering, which will affect the income of OLCN members who must spend money for commercial replacements and travel further and expend more resources to hunt, fish, trap and gather those foods and medicines that used to be readily-available to them;
- Under the heading of “Health and Wellness” on page 6 of its Application, OLCN argued that its members will have a decrease in the ability to engage in TLU pursuits, which could affect their physical and psychological health;
- Purchasing non-traditional foods could have a negative impact on members’ health, contributing to higher rates of heart disease, cancer and diabetes; and
- Under the heading of “Culture and Language,” OLCN argued that TLU is a venue for the development of language and cultural practices. This includes the “development of Cree language skills, spirituality and cultural practices tied to the land.” Such activities are inhibited and adversely impacted when families have to drive for hours to find suitable, clean and quiet locations.

¹ Onion Lake Cree Nation (OLCN) Application; page 4 ² OLCN Application; page 4 ³ OLCN Application; page 4 ⁴ OLCN Application; pages 4-5

⁵ OLCN Application; pages 5-6

ISSUE TWO

The Lower Athabasca Regional Plan designates new conservation areas without considering the impact on Onion Lake Cree Nation's Traditional Land Use or whether such areas support Onion Lake Cree Nation's Traditional Land Use.

Onion Lake Cree Nation argued that one of the key criterion identified for selecting conservation areas in the LARP is to locate areas that support Aboriginal traditional uses.⁶

The Applicant argued that “the designation of new conservation areas under the LARP does nothing to ensure that OLCN members will be able to engage in the meaningful practice of their Treaty Rights,” and will be “directly and adversely affected” as follows:

- There are no conservation areas within OLCN's Traditional Territory;
- There are no conservation areas that are reasonably proximate to OLCN or reasonably accessible by its members;
- The LARP provided that “hunting, fishing and trapping will continue in accordance with provincial laws.”⁷ OLCN argued that these conservation areas have been designed to accommodate multiple uses such as low-impact recreation, nature-based tourism, and commercial guiding/outfitting/hunting. In some cases, even industrial activity will be permitted.⁸ Such activity will have the potential of being adverse to TLU by OLCN members.

ISSUE THREE

The Lower Athabasca Regional Plan designates new tourism and recreation areas without considering the impact on Onion Lake Cree Nation's Traditional Land Use.

Onion Lake Cree Nation “maintains that two of the nine new provincial recreation areas (Clyde Lake and Winifred Lake) are [located] in the Treaty 6 region.”⁹

The Lower Athabasca Regional Plan also identified Lakeland County as an area for development into an ‘iconic tourism destination offering tremendous tourism potential.’”¹⁰

OLCN members will experience the adverse impact of increased tourism and recreation plans, which are likely to conflict with the Nation's ability to access land, water and resources for TLU purposes.

They may also encounter the following impacts when Crown lands have been converted to parks:

- regulatory restrictions on harvesting activities;
- conflicts with parks officials and recreational users;
- increased competition for fish, game and berries from the public;
- interference or limits placed on families to camp in large groups for extended periods; and
- interference of quiet enjoyment of the areas by public campers.

ISSUE FOUR

The Lower Athabasca Regional Plan's “inclusion of Aboriginal Peoples in land-use planning” fails to be effective or meaningful.

Onion Lake Cree Nation maintained in its submission that the Lower Athabasca Regional Plan fails to address Traditional Land Use issues. As a result, the LARP has a “direct and adverse affect” on the ability of OLCN members to practice their Treaty rights.

The Applicant recommended that the Government of Alberta develop a Traditional Land Use Management Plan as a vital part of the LARP.

⁶ Lower Athabasca Regional Plan (LARP); page 30 ⁷ LARP; page 30 ⁸ LARP Regulatory Details Plan; section 16(2), schedule F, Note 1 ⁹ OLCN Application; page 8 and LARP Regulatory Details Plan; section 42, schedules F and G ¹⁰ LARP; page 33

II. Response Argument of the Crown of the Province of Alberta

The Crown submitted their response to the Onion Lake Cree Nation Application on June 25, 2014.

In addressing the issues raised by the Applicant, the Crown contended that the Review Panel has a limited mandate and jurisdiction to address such issues. The Crown stated that:

Panel has no Jurisdiction to Determine Questions of Constitutional Law.¹¹

"The *Administrative Procedures and Jurisdiction Act* (APJA) indicates that no decision-maker has jurisdiction to determine a question of constitutional law (which includes a determination of any right under the Constitution) unless conferred such jurisdiction by regulation. The Panel is a "decision-maker" to which the APJA applies. While the Panel's role pursuant to the ALSA is to provide a report and recommendations to the Stewardship Minister, rather than the Panel itself rendering changes to the regional plan, other panels who provide recommendations have been found to be "decision-makers" pursuant to APJA.

As a decision-maker, the Panel has not been granted jurisdiction to determine questions of constitutional law. The Designation of Constitutional Decision-Makers Regulation, which confers jurisdiction in relation to questions of constitutional law to certain decision-makers, does not include a Panel under the ALSA."

Panel has no Jurisdiction to Consider Alleged Inadequacy of Consultation During LARP Creation or During LARP Implementation.¹²

"The Panel is limited in its jurisdiction to reporting to the Minister as to existing or future harms caused by the content of the LARP. Alleged harms related to how the LARP was created or harms alleged to be caused by how the LARP is being, or may be, applied are not within the Panel's jurisdiction."

The Government of Alberta submitted that "several issues raised by the Applicant are related to adequacy of past or future consultations and cannot be considered by the Panel." In addressing Issue Four raised by the Applicant, the Government of Alberta contends it *has* included Aboriginal Peoples in the LARP land-use planning process and it outlines a number of commitments made to engage with and consult with Aboriginal Peoples.¹³ (Emphasis added)

In conclusion, the Government of Alberta maintained that the "LARP *does* provide for effective and meaningful engagement and consultation opportunities for the Applicant, including with respect to impacts on rights recognized by section 35 of the *Constitution Act, 1982*."¹⁴ (Emphasis added)

Panel has no Jurisdiction over Alleged Harms from Activities Which Pre-date LARP.¹⁵

The Government of Alberta contended that the "Panel has jurisdiction only with respect to harms alleged to be caused by the content of the LARP. Harms which are alleged to have occurred due to activities which were carried on or approved prior to the LARP cannot be caused by the LARP and are therefore outside of the Panel's jurisdiction."

The Government of Alberta stated that "much of what OLCN considers its Traditional Territory has been taken up for various purposes, including military, agriculture, municipal settlement, provincial parks and industrial oil and gas land uses."¹⁶

In any case, the Government of Alberta contends that approximately 1.5 million more hectares of land has been established in the LARP for conservation areas.¹⁷ The Crown stated, "the reduction in land distribution by the creation of conservation areas is expected to enhance opportunities for the exercise of Treaty rights and Traditional Land Use."¹⁸

¹¹ Response Submissions of the Government of Alberta; pages 9-10, paragraphs 50-51 ¹² Response Submissions of the Government of Alberta; pages 10-12, paragraphs 56-61 ¹³ Response Submissions of the Government of Alberta; page 11, paragraph 59 ¹⁴ Response Submissions of the Government of Alberta; page 12, paragraph 61

¹⁵ Response Submissions of the Government of Alberta; page 12, paragraphs 62-65 ¹⁶ Response Submissions of the Government of Alberta; page 12, paragraph 63

¹⁷ LARP; page 84 ¹⁸ Response Submissions of the Government of Alberta; page 12, paragraph 64

Panel has no Jurisdiction to Consider Applicant's Allegations of Harms Related to Potential Future Development Activities.¹⁹

The Government of Alberta responded to the argument of the Applicant that there is the potential for multiple uses within conservation areas, including increased industrial activity.²⁰

The Crown stated, in its submission, that the LARP does not authorize any particular activity or development. All future development activities remain subject to the existing regulatory process. Alleged harms related to potential future activities are therefore not caused by the LARP and are outside of the Panel's jurisdiction.

In any case, the Government of Alberta submitted that the intention of the LARP is not to increase the alleged harms to potential future activities, but rather, to reduce the likelihood that such harms will occur at all.

Panel has no Jurisdiction to Consider Allegations of Harms Related to the Implementation of LARP.²¹

The Crown stated that the "Panel must consider only the harm caused by the content of the LARP. Alleged harms caused by how the LARP is or may be applied or interpreted by industry or regulatory decision-makers are outside the Panel's jurisdiction and cannot be considered."

Reference was made by the Crown to the Applicant's concerns that were raised by the Alberta Energy Regulator (AER) pertaining to the issue of TLU.

The Government of Alberta maintained that the Applicant still has the ability to raise concerns with regulators on impacts a specific project may have on their recognized rights. Such concerns can be raised in the appropriate forum through appeal or judicial appeals. The LARP does not interfere with the ability of the Applicant to proceed with the appeal process.

Panel has no Jurisdiction in Relation to Alleged Omissions from LARP.²²

The Government of Alberta submitted that the "Panel has no jurisdiction to consider the following concerns raised by the Applicant:

- The LARP does not expressly include a mechanism for management of Traditional Land Use, such as a Traditional Land Use framework;
- There are no conservation areas within what OLCN considers to be its Traditional Territory;
- The lack of sufficient restrictions on recreation and development in conservation areas; and
- No indication in the LARP that the thresholds set for certain air, water and land pollution indicators are protective of human health for Traditional Land users."

The Crown outlined the reasons why Traditional Land Use is not addressed in the Lower Athabasca Regional Plan:²³

"In any event, in relation to the concern that the LARP does not explicitly include mechanisms for managing Traditional Land Use or access for the exercise of Treaty rights, Alberta submits that it must also respect its jurisdictional limits as included in the federal-provincial division of powers within sections 91 and 92 of the *Constitution Act, 1867*. Under this division of powers, Canada has exclusive legislative power over "Indians" and "Lands reserved for the Indians." While provincial enactments of general application (such as the LARP) apply of their own force to "Indians" and on Reserves, this is subject to exceptions arising from the division of powers. The key exceptions are that the LARP and other provincial enactments cannot legislate about Indian rights, the status or capacities of Indians as Indians or the Indian interest in land. Nor can such provincial enactments single out "Indians" for special treatment. Therefore, in legislating access to provincial Crown land, Alberta could not expressly define somebody as being or not being an "Indian"

¹⁹ Response Submissions of the Government of Alberta; page 13, paragraphs 67-71 ²⁰ OLCN Application; page 7 ²¹ Response Submissions of the Government of Alberta; pages 13-14, paragraph 72-75 ²² Response Submissions of the Government of Alberta; pages 14-17, paragraph 76-92 ²³ Response Submissions of the Government of Alberta; page 15, paragraph 79

or lands as those to which “Indians” have a right of access to exercise Treaty rights. To the extent that the Applicant suggests that the LARP should be amended to do such things, such amendments may be unconstitutional.”

“The LARP does not take away from the Crown’s duty to consult or other policy commitments to consult with Aboriginal Peoples (such as First Nations) when government decisions may adversely affect the exercise of constitutionally protected rights.”²⁴

The Crown’s submission referred to the various management frameworks:²⁵

“The LARP states that the biodiversity management framework and landscape management plan are to have several measures that will support systematic, regional management of wildlife habitat and populations and showed, in turn, support the exercise of Treaty rights and Traditional Land Use (LARP; pages 45-46). The LARP also expressly indicates that Alberta will work with First Nations in developing the biodiversity management framework, the landscape management plan, and the Lower Athabasca Regional Trail System Plan.”

With respect to the matter of conservation areas, Alberta submitted that one of the key criteria for the establishment of such areas was that the area support Aboriginal traditional uses (LARP; page 30). In establishing the location of such areas, and additional factors were also considered such as whether such areas were representative of local biological diversity.

In addressing the Applicant’s concern that no conservation areas were established within the area that OLCN “considers to be its Traditional Territory or within reasonable proximity to the Applicant’s members,” the Crown maintained that “the Applicant’s Reserve Land is outside the Lower Athabasca Region.”²⁶

In addressing the “Applicant’s concern regarding the LARP not restricting the potential for multiple uses within the conservation areas, Alberta notes that prior to the LARP, there was little coordinated regulation of multiple uses, including industrial development within these areas...under the LARP, while existing petroleum and natural gas tenures and surface materials leases will be honoured new activity that is incompatible with the purposes of conservation areas will not be allowed in order to minimize or prevent new land disturbance...[the Crown asserted that the] LARP provides that hunting, fishing and trapping will continue in accordance with existing provincial laws within the conservation areas.”²⁷

With respect to addressing the concerns of the Applicant concerning the Air Quality Management Framework, the Government of Alberta “notes that the triggers and limits within the framework are based on the Alberta Ambient Air Quality Objectives (AAAQO).”

In relation to the Surface Water Quality Framework, its limits and triggers are also based on existing guidelines (LARP; pages 74-76, Tab 4 page 20).

In summary, the Government of Alberta submitted that items or measures alleged to be missing from the Lower Athabasca Regional Plan cannot be harm caused by the LARP and are outside of the Review Panel’s jurisdiction.

Panel has no Jurisdiction to Consider Harms Alleged to be Caused by Legislation Other Than LARP.²⁸

The Crown has taken the position that the Panel has no ability to recommend amendments to any other legislative instruments. In its submission,²⁹ the Government of Alberta stated that the following concerns of the Applicant fall within this category:

- New conservation areas will be subject to existing provincial laws which allegedly restrict the exercise of hunting, fishing and trapping;³⁰

²⁴ Response Submissions of the Government of Alberta; page 15, paragraph 82 ²⁵ Response Submissions of the Government of Alberta; page 15, paragraph 81

²⁶ Response Submissions of the Government of Alberta; page 15, paragraph 83 ²⁷ Response Submissions of the Government of Alberta; pages 15-16 and LARP; page 30

²⁸ Response Submissions of the Government of Alberta; page 17-20, paragraphs 73-106 ²⁹ Response Submissions of the Government of Alberta; paragraph 95

³⁰ OLCN Application; page 7

- The LARP's designation of two new recreation areas (Clyde Lake and Winifred Lake) as well as the development of Lakeland County as an "iconic tourism destination" has the potential to result in regulatory restrictions on harvesting activities and limits on camping in large groups for extended periods of time;³¹
- The Crown argued that such concerns are not concerns about the LARP, so much as about other "existing provincial laws" that govern hunting, fishing, trapping and camping in conservation areas, provincial recreation areas or public land-use zones for recreation and tourism, such as the *Provincial Parks Act*, the *Public Lands Act*, the *Wildlife Act* and the *Fisheries Act*; and
- The Government of Alberta noted that existing provincial laws do not prevent hunting, fishing or trapping within provincial parks or public land use zones.³² While the designation of these areas as provincial recreation areas does not prohibit such activities, Alberta acknowledged that prior authorization (such as permits) may be required for certain activities, including camping in large groups for extended periods of time. (*Provincial Parks (General) Regulation* (Tab 19, section 39).

Issues Within the Panel's Jurisdiction³³

In paragraph 98 of its submission, the Crown conceded as follows:

"...generally, the Panel *does* have jurisdiction to recommend that an area designated by the LARP as a conservation area, provincial recreation area or PLART not be designated at all or be given a different type of designation. However, the Panel's jurisdiction in this regard is limited — the Panel may *only* recommend an alternate designation from the existing set of designations under existing provincial legislation. The Panel cannot create new designations as it does not have authority to recommend changes to provincial legislation governing land designations as they are outside the LARP." (Emphasis added)

The Government of Alberta referred to the concerns raised by the Applicant that the provincial recreation areas (Clyde Lake and Winifred Lake) and the development of Lakeland County could potentially result in adverse effects of the Applicant's Traditional Land Use. The Applicant argued such designations as "iconic tourism designation" will lead to increased conflict and competition with the interests of non-Aboriginal recreational users.

The Crown maintained that the Applicant will not be adversely affected by the LARP's designation of Clyde Lake and Winifred Lake as provincial recreation areas. In fact, the Crown stated the Applicant will "benefit from the increased regulation of recreational activity in the area."³⁴

"Once established as provincial recreation areas, Clyde Lake and Winifred Lake will be subject to additional regulation. For example, motorized recreation will be limited to designated routes. This regulation is intended to mitigate impacts to the lands and potential biodiversity impacts associated with [various] motorized access."³⁵

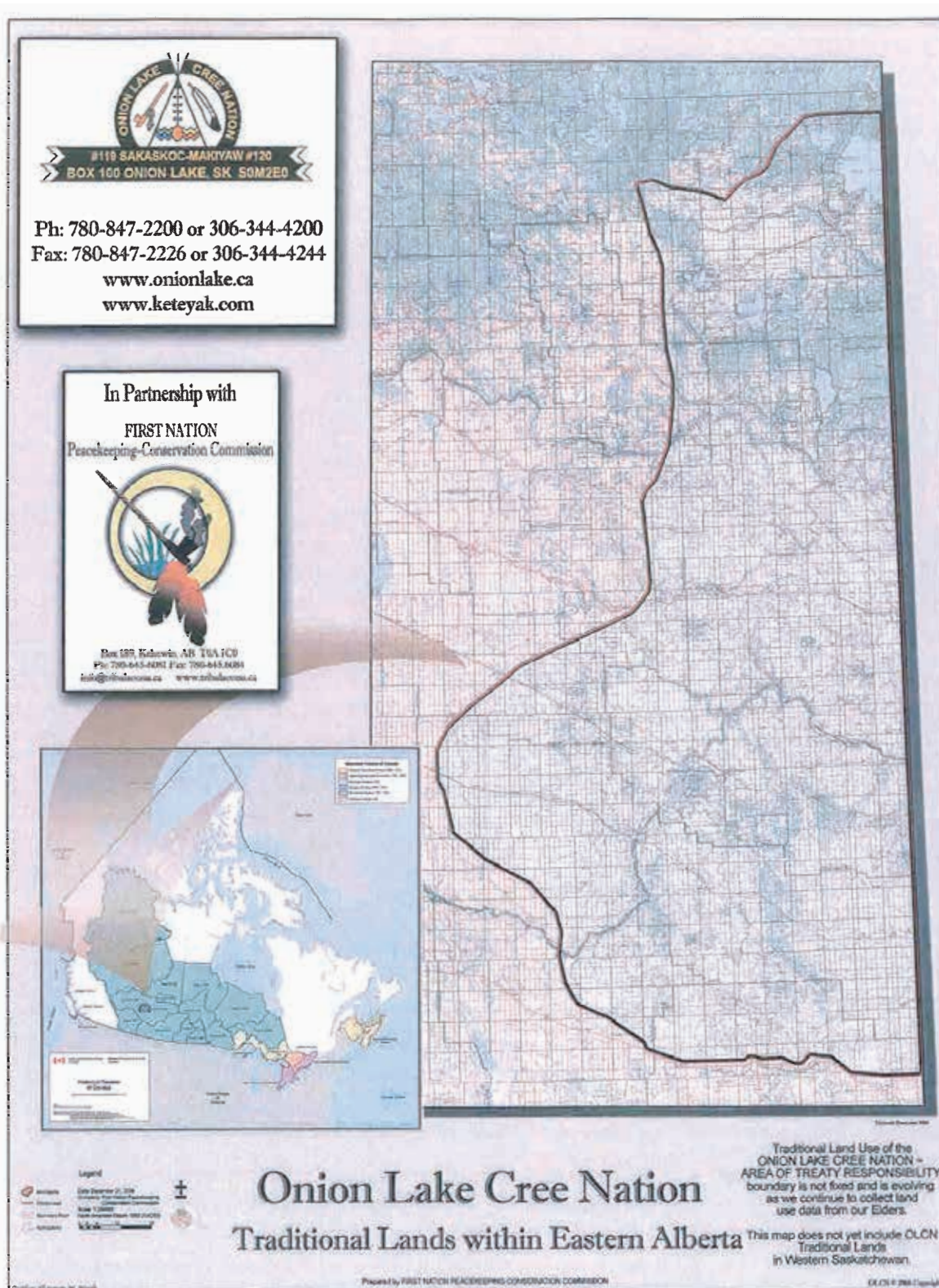
The Government of Alberta has taken the position that the "increased regulation of Clyde Lake and Winifred Lake as provincial recreation areas will support the exercise of traditional activities and will reduce the potential for conflict between users."³⁶

The Crown concluded its argument:³⁷ "Alberta submits that the Applicant has not shown that there is any existing or future harm caused by a provision of the LARP so as to trigger the Panel's power to provide recommendations for amendment to the Minister... the Applicant is not "directly and adversely affected" in accordance with Rule 36."³⁸

III. Onion Lake Cree Nation's Response to the Crown's Submission

The Applicant did not respond to the Crown's submission of June 25, 2014.

³¹ OLCN Application; page 8 ³² Response Submissions of the Government of Alberta; page 18, paragraph 101 ³³ Response Submissions of the Government of Alberta; pages 19-20, paragraphs 107-118 ³⁴ Response Submissions of the Government of Alberta; page 19, paragraph 110 ³⁵ Response Submissions of the Government of Alberta; page 20, paragraph 112 ³⁶ Response Submissions of the Government of Alberta; page 20 and LARP; page 30 ³⁷ Response Submissions of the Government of Alberta; page 20, paragraph 117-118 ³⁸ *Alberta Land Stewardship Act - Rules of Practice for Conducting Reviews of Regional Plans* (March 2014)

FIGURE 1:**Onion Lake Cree Nation Traditional Lands within Eastern Alberta (Response to Information Request #3)**

Panel Recommendations to the Minister for Onion Lake Cree Nation

Issue One

The Lower Athabasca Regional Plan does not address the management of ongoing Traditional Land Use (TLU) by Onion Lake Cree Nation members.

RECOMMENDATIONS TO THE MINISTER

On the basis of written evidence provided by both parties to these proceedings, the Review Panel recommends to the Minister that the Applicant *has been* “more than minimally harmed” by the Lower Athabasca Regional Plan. The Review Panel concludes that Traditional Land Use issues have not been addressed in the document, and that Onion Lake Cree Nation (OLCN) members have been “directly and adversely affected” by such omissions, and the “income” and “health” of its members have suffered as a result of such inaction.

REASONS FOR THE RECOMMENDATION

The Application by Onion Lake Cree Nation, who is a member of Treaty 6, stated that approximately one-third of its Traditional Land Use (TLU) territory is within the boundaries of the Province of Alberta. As shown in Figure 1 of OLCN’s Application, the northern extremity of OLCN’s TLU boundary in the province appears to be close to the southern boundary of the area included in the Lower Athabasca Regional Plan (LARP).

The Crown’s argument throughout these proceedings is that the Review Panel has very limited jurisdiction to address issues raised by the First Nations. In its June 25, 2014 response to the OLCN Application, the Crown stated that the Review Panel has no jurisdiction over the following matters:

- No jurisdiction to determine questions of constitutional law;
- No jurisdiction to consider alleged inadequacy of consultation during the LARP creation or implementation;
- No jurisdiction over alleged harms from activities which pre-date the LARP;
- No jurisdiction to consider alleged harms related to potential future development activities;
- No jurisdiction to consider alleged harms related to the implementation of the LARP;
- No jurisdiction in relation to alleged omissions from the LARP; and
- No jurisdiction to consider harms alleged to be caused by legislation other than the LARP.¹

¹ Response Submissions of the Government of Alberta; page 9, paragraph 48

The only issue the Crown contended that the Review Panel *can* address is the “LARP’s designation of the two new provincial recreation areas of Clyde Lake and Winifred Lake as well as the development by Lakeland County.”²

The Crown responded to the first issue of the Applicant’s submission:

“In any event, in relation to the concern that the LARP does not explicitly include mechanisms for managing Traditional Land Use or access for the exercise of Treaty rights, Alberta submits that it must also respect its jurisdictional limits as included in the federal-provincial division of powers within sections 91 and 92 of the *Constitution Act, 1867*. Under this division of powers, Canada has exclusive legislative power over “Indians” and “Lands reserved for the Indians.” While provincial enactments of general application (such as the LARP) apply of their own force to “Indians” and on Reserves, this is subject to exceptions arising from the division of powers. The key exceptions are that the LARP and other provincial enactments cannot legislate about Indian rights, the status or capacities of Indians or the Indian interest in land. Nor can such provincial enactments single out “Indians” for special treatment. Therefore, in legislating access to provincial Crown land, Alberta could not expressly define somebody as being or not being an “Indian” or lands as those to which “Indians” have a right to access to exercise Treaty rights. To the extent that the Applicant suggests that the LARP should be amended to do such things, such amendment, may be unconstitutional.”³

In addressing TLU territorial areas, the Crown maintained that the new conservation areas were created to support Aboriginal traditional uses, as noted in the LARP:

“Hunting, fishing and trapping (including by Aboriginal Peoples) [in conservation areas] will continue in accordance with existing provincial laws governing such activities as such laws may be amended or replaced from time to time.”⁴

The Crown stated: “with respect to the designation of conservation areas, Alberta submits that one of the key criteria for establishment of conservation areas were that the area support Aboriginal traditional uses. These uses were considered, along with the other criteria such as little to no industrial activity and areas that are representative of the biological diversity, in establishing the location of conservation areas.”⁵

The Crown also noted: “much of what OLCN considers its Traditional Territory has been taken up for various purposes, including military, agriculture, municipal settlement, provincial parks and industrial oil and gas uses, as noted on pages of the Applicant’s submissions.”⁶

Based on the evidence of the Government of Alberta, the Review Panel concludes that the Applicant can carry out its respective TLU activities only within the conservation and recreation areas designated in the LARP and that their historical TLU territories, as described in the maps submitted to the Review Panel as part of their respective submissions, are not recognized by the Crown.

The Applicant, in its submission, argued that although the LARP claims to take a cumulative effects approach to the management of environmental effects in the region, it does not address TLU issues.

Onion Lake Cree Nation maintained that Traditional Land Use activities depend on a number of factors, which are not accounted for in the Lower Athabasca Regional Plan, such as: location and availability of traditional ecological resources; quantity of traditional ecological resources; quality of traditional ecological resources; access to ecological resources; and more complex and spiritual factors.

The Applicant also took the position that the LARP contains no data relating to the Traditional Land Use ecological requirements, no consideration of cumulative impacts to TLU, no forward-looking thresholds for land uses that conflict with TLU, and no prioritization of TLU in accordance with its constitutionally-protected status.

² Response Submissions of the Government of Alberta; page 19, paragraph 109 ³ Response Submissions of the Government of Alberta; page 15, paragraph 79

⁴ Lower Athabasca Regional Plan (LARP); page 30 ⁵ Response Submissions of the Government of Alberta; page 15, paragraph 80 ⁶ Response Submissions of the Government of Alberta; page 12, paragraph 63

Under the heading of “Subsistence and Income,” OLCN stated that, as a result of the Crown not recognizing its TLU territory, there will be a decrease in the ability to practice subsistence hunting and gathering [which will affect] the income of those members who must spend [money] for commercial replacements and who must now travel further and expend more resources to hunt, fish and trap and gather those foods and medicines that used to be readily available to them.⁷

The Applicant argued, under the heading “Health and Wellness,” that its members will have a “decreased ability to engage in TLU [pursuits, which could affect their] physical and psychological health.” Purchasing “non-traditional foods [has] had a negative impact on OLCN members’ health, contributing to higher rates of heart disease, cancers and diabetes.”

On the same page, under the heading of “Culture and Language,” OLCN also submitted that “Traditional Land Use is a venue for the development of language and cultural practices,” which entails the development of the “Cree language skills, spiritually and cultural practices that are intimately tied to the land.”⁸ Such activities are inhibited and adversely impacted when OLCN families have to seek out locations far from their Reserve to carry out such activities.

Issue Two

The Lower Athabasca Regional Plan designates new conservation areas without considering the impact of Onion Lake Cree Nation’s Traditional Land Use or whether such areas support Onion Lake Cree Nation’s Traditional Land Use.

RECOMMENDATIONS TO THE MINISTER

On the basis of the written evidence provided by both parties to these proceedings, the Review Panel recommends to the Minister that the Applicant *has* been “more than minimally harmed” by the Lower Athabasca Regional Plan not providing a conservation area in Alberta reasonably close to Onion Lake Cree Nation’s Reserve where the Applicant can carry out Traditional Land Use activities. As a result, the Applicant has been “directly and adversely affected” by such omissions, in that “income, health and quiet

enjoyment of property” effects have been suffered by its members.

REASONS FOR THE RECOMMENDATION

In its Application, Onion Lake Cree Nation argued that “one of the key criterion identified for selecting conservation areas in the LARP is to locate areas that support Aboriginal traditional uses.” In the designation and rationale for developing such areas, it is supposed to allow First Nations to engage in their Aboriginal and Treaty rights of Traditional Land Use:

OLCN, in its Application, stated:

- There are no conservation areas within their Traditional Territory; and
- There are no conservation areas that are reasonably proximate to OLCN or reasonably accessible to its members.

As noted in the Crown’s submission: “much of what OLCN considers its Traditional Territory has been taken up for various purposes, including military, agricultural, municipal settlement, provincial parks and industrial oil and gas land uses.”⁹

The LARP defines “conserved land” as:

- i. parks designated under the *Provincial Parks Act*;
- ii. wilderness areas, ecological reserves, and natural areas designated under the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*; and
- iii. public land use zones managed for one or more conservation purposes and declared under the *Public Lands Act*.¹⁰

The Crown stated:

“The LARP sets aside approximately 1.5 million more hectares of land as conservation areas. *The reduction in land disturbance by the creation of conservation areas is expected to enhance opportunities for the exercise of Treaty rights and Traditional Land Uses.*”¹¹ (Emphasis added)

⁷ Onion Lake Cree Nation (OLCN) Application; page 5 ⁸ OLCN Application; page 6 ⁹ Response Submissions of the Government of Alberta; page 12, paragraph 63

¹⁰ LARP; page 44 ¹¹ Response Submissions of the Government of Alberta; page 12, paragraph 64

Although the Lower Athabasca Regional Plan has created six new conservation areas, there are none near Onion Lake Cree Nation's Reserve or within its Traditional Land Use territory. The closest new conservation area to OLCN is the Dillon River Conservation Area, which is north of the Cold Lake Air Weapons Range (CLAWR).

The Review Panel, in considering the written evidence of both parties to these proceedings, recommends to the Minister that, of the new conservation areas created in the LARP for the use and enjoyment of the Applicant, there are none near Onion Lake Cree Nation lands that can be "reasonably" relied upon by its members. As a result, the Panel considers that OLCN is unable to carry out its Traditional Land Use activities and, as a result, *has been* "more than minimally harmed" and "directly and adversely affected" by a "loss of quiet enjoyment of property," "loss of income" and detrimental "health effects" to its members.

Issue Three

The Lower Athabasca Regional Plan designates new tourism and recreation areas without considering the impact on Onion Lake Cree Nation's Traditional Land Use.

RECOMMENDATIONS TO THE MINISTER

Onion Lake Cree Nation's Traditional Land Use rights have not been impacted by the creation of the two new recreation areas of Clyde Lake and Winifred Lake in the Lower Athabasca Regional Plan.

REASONS FOR THE RECOMMENDATION

The LARP noted that nine provincial recreation areas and five new public land areas have been created for recreation and tourism.

"The provincial recreation areas will be managed to minimize industrial land disturbance and ensure quality recreational experiences. Petroleum and natural gas tenure and recreational leases will be honored, consistent with current policy. Any new petroleum and natural gas or oil sands tenure sold in a provincial recreation area will include a

restriction that prohibits surface access. Access to water resources and associated allocation and disposal infrastructure will be permitted in the new provincial recreation areas."¹²

OLCN maintained that two of the nine new provincial recreation areas are located in Treaty 6 region; Clyde Lake and Winifred Lake.

The Review Panel notes that such provincial recreation areas are located north of the CLAWR; well outside the Traditional Land Use territory noted by OLCN, with respect to their Traditional Lands map.¹³ For this reason, the Review Panel has determined that these two new recreational areas in the LARP do *not* have an impact on OLCN's traditional rights or uses.

Issue Four

The Lower Athabasca Regional Plan's "inclusion of Aboriginal Peoples in land-use planning" fails to be effective or meaningful.

RECOMMENDATIONS TO THE MINISTER

The Review Panel has no recommendations to the Minister on this issue on whether the Applicant has been "directly and adversely affected."

REASONS FOR THE RECOMMENDATION

OLCN maintained, in its submission, that the inclusion of its members in the development and planning of the Lower Athabasca Regional Plan should be more effective and "meaningful." The Review Panel suggests that, in the future, the Applicant should initiate further discussions with the Government of Alberta to make dialogue between the two parties more "meaningful" regarding its concerns with the Lower Athabasca Regional Plan document review.

¹² LARP; pages 32-33 ¹³ Figure 1: Onion Lake Cree Nation Traditional Lands within Eastern Alberta (Response to Information Request #3)

Cold Lake First Nations Analysis of Application

Background

Cold Lake First Nations (CLFN) is an Indian Band pursuant to the *Indian Act* and its members are the beneficiaries of Treaty 6.

CLFN is the beneficial owner of four Reserves that are situated within the Lower Athabaskan Region in northeastern Alberta. The Nations' Traditional Territory, Denne Ni Nennè, is largely centered around Primrose Lake and encompasses lands and waters within the present provincial borders of both Alberta and Saskatchewan, including Cold Lake.

Highway 5 connects the main settlement within Cold Lake First Nations' Le Goff Reserve 149 to the urban centres of Cold Lake and Bonnyville. The membership, according to Aboriginal Affairs and Northern Development (2013) is 2,695. The Le Goff Reserve 149 encompasses an area of 14,528 hectares. The other three Reserves are: 149A Cold Lake Town, 149B English Bay and 149C Martineau River.

CLFN is a sub-group of the larger Athabaskan-speaking Dene Nation, which extends from Alaska to Hudson Bay and includes a number of cultural groups.

The Berry Point Report¹ of 2012 outlines the formation of the Cold Lake Air Weapons Range (CLAWR), announced in 1951, followed by a number of claims and commissions concerning the 20-year lease agreements for the CLAWR and its impact on the rights of the CLFN.

In March 1995, the federal government announced it would resolve the grievances of the CLFN concerning the CLAWR. In 2001, a "Settlement Agreement" was entered into between the Government of Canada and the CLFN. As seen in Figure 3, in the same year, an "Access Agreement" was signed by the Government of Canada, the Government of Alberta and the CLFN.

Some important provisions of the "Access Agreement" are highlighted as follows:

- "Whereas the loss of livelihood and other grievances of the Denesoun'lini with respect to the establishment of the Range were inquired into and described in the Report of the Cold Lake Inquiry issued by the Indian Specific Claims Commission in August 1993;
- Whereas access to and use of the lands within the Range is an important element in the final resolution of the said grievances of Cold Lake First Nations and Canada is prepared to grant access for such purpose;"²
- "Whereas Alberta has agreed, subject to compliance with applicable provincial legislation, that members of Cold Lake First Nations may engage in the activities within the Range as set out in this agreement;"³

¹ Berry Point Report; paragraph 4.3.2 ² Access Agreement; page 2 ³ Access Agreement; page 3

- “Canada hereby grants to CLFN and its members access to the Access Area⁴ for the following activities and for the monitoring of such activities:
 - a. trapping;
 - b. fishing for domestic and commercial purposes;
 - c. hunting big game and wildlife;
 - d. harvesting fruits and berries, wild mushrooms, roots, dye plants and natural medicines;
 - e. heritage or cultural activities, including periodic visits to the Range by elders and other members of the CLFN;
 - f. gathering bark and other materials for crafts and specialty forest products provided, subject to Article 7.2, that no logging takes place;
 - g. undertaking archaeological and historical research as may be permitted by the Wing Commander;
 - h. such other activities as may be agreed to in writing by the Wing Commander from time to time.”⁵

The Traditional Land Use (TLU) area of the CLFN is outlined in Appendix 9 of the Applicant’s submission.

Cold Lake First Nations brought this Application, on August 30, 2013, for review of the Lower Athabasca Regional Plan (LARP) — pursuant to section 19.2 of the *Alberta Land Stewardship Act* (ALSA), S.A. 2009, c. A-26.8, and the *Alberta Land Stewardship Regulation* (ALSR) — on the basis that CLFN is a person “directly and adversely affected” by the LARP.

The Review Panel summarizes the argument of the Applicant, CLFN, as to why it is “directly and adversely affected” for each of the issues that follow, pursuant to section 5(1)(c) of the *Alberta Land Stewardship Regulation*.

Issues

The Review Panel considers that the raised issues by the Applicant can be summarized as follows:

Issue One: Whether the Lower Athabasca Regional Plan should include plans for the Cold Lake Air Weapons Range.

Issue Two: Whether the Lower Athabasca Regional Plan should address the management of ongoing Traditional Land Use.

Issue Three: Whether the Lower Athabasca Regional Plan designates new conservation areas and tourism and recreation areas without considering the impact on Traditional Land Use.

Issue Four: Whether the Lower Athabasca Regional Plan’s inclusion of Aboriginal Peoples in land-use planning is effective or meaningful.

I. Argument of the Applicant – Cold Lake First Nations

ISSUE ONE

Whether the Lower Athabasca Regional Plan should include plans for the Cold Lake Air Weapons Range.

CLFN argued that settlement and access agreements — executed by Canada, the Province of Alberta and the Applicant — allow its members to regain limited access to Cold Lake Air Weapons Range for traditional and cultural pursuits.

Pursuant to paragraph 7.1 of the Access Agreement, the Applicant described the purpose for which its members can access the area for Traditional Land Use.

The Applicant also maintained that within the CLAWR is the “Wildlife Preservation Area” (WPA); an area of cultural importance as it provides a conservation area that supports the maintenance of healthy wildlife populations.

⁴ “Access Area” is delineated on the map in Appendix A of the Access Agreement ⁵ Access Agreement; page 8, under the heading of “Access CLFN” in paragraph 7.1

Cold Lake First Nations argued that the Lower Athabasca Regional Plan outlines no plans for the Cold Lake Air Weapons Range and, as a result, fails to protect their traditional use and rights as described in the Access Agreement. The failure of the LARP to consider the cumulative impacts in the CLAWR in the future will have an adverse impact on their TLU.

ISSUE TWO

Whether the Lower Athabasca Regional Plan should address the management of ongoing Traditional Land Use.

The Applicant made the argument that the LARP purports to take a cumulative effects-based approach to the management of environmental effects in the region, but fails to consider TLU issues. The CLFN then outlined a number of examples to illustrate that the LARP does not provide any mechanism to address or prevent cumulative effects on the exercise of TLU in the region. The examples are as follows:

- a. The LARP contains no data relating to Aboriginal land and resource requirements;
- b. While the LARP and its frameworks contain certain impact thresholds, the thresholds must be developed in a manner that reflects the conditions necessary to sustain the practice of TLU;
- c. The LARP does not appear to consider the existing land and other disturbances that are already affecting the exercise of Treaty and Aboriginal rights;
- d. The LARP describes how Alberta will work with First Nations in developing a biodiversity management framework and landscape management plan...however we [CLFN] note that Outcome 3, which details the strategies for developing a biodiversity management framework and landscape management plan, makes no mention of TLU;
- e. First Nations [understood that they] would not be confined to Reserves and could continue to practice TLU on their Traditional Lands. Even with this [less] restrictive view, there is no area

reasonably proximate to CLFN's Reserve Lands where it can freely exercise its TLU.

- f. The LARP, including its frameworks and initiatives does not mention the priority for TLU.⁶

The Applicant recommended that the LARP must develop some form of TLU management framework for land-use planning to allow for a better assessment of cumulative effects on TLU.

ISSUE THREE

Whether the Lower Athabasca Regional Plan designates new conservation areas and tourism and recreation areas without considering the impact on Traditional Land Use.

Cold Lake First Nations noted that the LARP created five new conservation areas. One of these areas, Dillon River Wildland Park, is established in the northern portion of CLFN's Traditional Territory.⁷

The Applicant stated that one of the key criteria for selecting conservation areas in the LARP (page 30), is for such areas to support traditional uses; however, the LARP also stated that hunting, fishing, and trapping "will continue in accordance with existing provincial laws." CLFN maintained that laws governing such areas could restrict Aboriginal and Treaty rights.

In addition, the Applicant argued that the new conservation areas have been designed to accommodate multiple uses such as low-impact recreation, nature-land tourism and commercial guiding, outfitting and hunting. In some cases, even industrial activity will be permitted in these areas.⁸ Such measures could adversely affect TLU. The Applicant questioned whether any ecological or cultural evaluation has taken place to determine whether these compensation areas can support TLU.

The Applicant argued that the Dillon River Conservation Area, north of the CLAWR, is the only conservation area within Cold Lake First Nations' Traditional Territory and is unlikely — because of its small size — to provide enough of a land base for Traditional Land Use.

⁶ Cold Lake First Nations (CLFN) Application; pages 7-8 ⁷ Lower Athabasca Regional Plan (LARP) Regulatory Details Plan; section 13, schedule G ⁸ LARP Regulatory Details Plan; section 16(Z), schedule F

With respect to the question of tourism and recreational areas; the Applicant noted that two of the nine provincial recreational areas, Clyde Lake and Winifred Lake, are in or near CLFN's Traditional Territory.⁹ The LARP also identified Lakeland County as an area for development into an "iconic tourism destination."¹⁰

The Applicant argued that increased tourism and recreation has the potential to "directly and adversely affect" the exercise of Treaty and Aboriginal rights in the following manner:

- Decreased access to preferred areas (e.g. barriers that prevent access, such as gates across trails);
- Restriction of harvesting practices in parks (e.g. collection or removal of plant or animal life is not allowed in parks without the permission of the Minister, possession or discharge of a firearm is restricted within a park, and the dressing, hanging and storing of big game is not allowed in a provincial park);
- Overnight camping is typically only allowed in designated areas (generally inappropriate for multi-family traditional camps);
- Decreased quality and quantity of key resources (e.g. contamination);
- Incompatibility, conflict and competition with the interests of non-Aboriginal recreational users (e.g. campers, hunters, fishermen, snowmobilers);
- Concerns about safety (e.g. hunting in populated areas, lone harvesters may feel intimidated when coming into contact with recreational users and avoid areas altogether); and
- Construction and maintenance of structures is generally not allowed (this interferes with infrastructure such as cabins, smoking/drying racks, swear lodges, etc.)¹¹

ISSUE FOUR

Whether the Lower Athabasca Regional Plan's inclusion of Aboriginal Peoples in land-use planning is effective or meaningful.

The Applicant argued that, rather than including Aboriginal Peoples in land-use planning processes and decisions at strategic levels, the LARP proposed to conduct consultations on individual decisions "in accordance with applicable government policy as it may be from time to time,"¹² when such decisions may adversely affect the exercise of rights.

The Applicant also suggested that, in the document, the indicator of success for the various initiatives is the "participation of First Nations," rather than the "meaningful incorporation of Aboriginal People and knowledge in the land-use planning process." The result of this inadequate engagement with the First Nations people could have an impact on the ability of Cold Lake First Nations members to practice their Treaty and Aboriginal rights.

The Applicant noted a number of specific adverse effects that it expects to suffer as a result of the issues addressed above:

- a. A decrease in the ability to practice subsistence hunting and gathering has an effect on the income of [certain] CLFN members;
- b. CLFN elders and members frequently report how difficulties in harvesting traditional foods contributes negatively to their health and wellness;
- c. [There is a risk that] Traditional Land users are likely to ingest greater amounts of soil than urbanites;
- d. There will be a correlative decrease in many of the Dene cultural practices and language [if the practice of TLU is decreased]; and
- e. The relationship to the land is an important component of TLU.¹³

⁹ LARP Regulatory Details Plan; section 5.42, schedules F and G ¹⁰ LARP; page 33 ¹¹ CLFN Application; page 11-12 ¹² Response to Aboriginal Consultation on the Lower Athabasca Regional Plan; page 6 ¹³ CLFN Application; pages 13-15

II. Response Argument of the Crown of the Province of Alberta

The Crown submitted their response to the Cold Lake First Nations Application on June 25, 2014.

ISSUE ONE

Whether the Lower Athabasca Regional Plan should include plans for the Cold Lake Air Weapons Range.

In its response to the CLFN Application, the Crown asserted that the Review Panel has no jurisdiction to address this issue.¹⁴

The Crown maintained that Cold Lake Air Weapons Range (CLAWR) lands “are not generally available for the exercise of Treaty rights, except with respect to the limited and controlled access which was given to the Applicant’s members under an Access Agreement... Under the LARP, CLAWR remains designated as a military reserve.”¹⁵

As noted in the Crown’s response to Onion Lake Cree Nation (OLCN), the Government of Alberta maintained that the Review Panel has very limited jurisdiction to address the concerns raised by CLFN. These matters are summarized as follows:

- No jurisdiction to determine questions of constitutional law;
- No jurisdiction to consider alleged inadequacy of consultation during the LARP creation or implementation;
- No jurisdiction over alleged harms from activities which pre-date the LARP;
- No jurisdiction to consider alleged harms related to potential future development activities;
- No jurisdiction to consider alleged harms related to the implementation of the LARP;
- No jurisdiction in relation to alleged omissions from the LARP; and

- No jurisdiction to consider harms alleged to be caused by legislation other than the LARP.

The Crown concurred that, in its review of the LARP, the Review Panel *does* have jurisdiction concerning the designation of the conservation and recreation areas.

It should be noted that these jurisdictional arguments raised by the Crown are virtually the same arguments addressed in response to all Applicant submissions to these proceedings, and are again referred to in the Crown’s response to Issue Four.

ISSUE TWO

Whether the Lower Athabasca Regional Plan should address the management of ongoing Traditional Land Use.

The Crown responded to this concern raised by the Applicant as follows: “Canada has exclusive legislative power over “Indians” and “Lands reserved for the Indians.” While provincial enactments of general application (such as the LARP) apply of their own force to “Indians” and on Reserves, this is subject to exceptions arising from the division of powers. The key exceptions are that the LARP and other provincial enactments cannot legislate about Indian rights, the status or capacities of Indians as Indians or the Indian interest in land. Nor can such provincial enactments single out “Indians” for special treatment. Therefore, in legislating access to provincial Crown land, Alberta could not expressly define somebody as being or not being “Indian” or lands as those to which “Indians” have a right of access to exercise Treaty rights. To the extent that the Applicant suggests that the LARP should be amended to do such things, such amendments may be unconstitutional.”¹⁶

The Crown submitted that the Panel has no jurisdiction to determine questions of constitutional law.¹⁷

With respect to the Applicant’s concern that threshold impacts and trigger conditions were developed without sustaining the practice of Traditional Land Use, the Crown noted that the Air Quality Management Framework and the Surface Water Quality Framework have adopted stringent provincially-accepted guidelines depending on the use.¹⁸

¹⁴ Response Submissions of the Government of Alberta; page 15, paragraph 80 ¹⁵ Response Submissions of the Government of Alberta; page 16, paragraph 85

¹⁶ Response Submissions of the Government of Alberta; page 15, paragraph 81 ¹⁷ Response Submissions of the Government of Alberta; page 9, paragraph 49

¹⁸ Response Submissions of the Government of Alberta; page 17, paragraphs 88-91

The Crown submitted that, in any case, “items or measures alleged to be missing from the LARP cannot be harm caused by the LARP, and [therefore are matters] outside of the Panel’s jurisdiction.”¹⁹

ISSUE THREE

Whether the Lower Athabasca Regional Plan designates new conservation areas and tourism and recreation areas without considering the impact on Traditional Land Use.

The Crown maintained that in “the designation of conservation areas, one of the key criteria for the establishment of conservation areas were that these areas were to support Aboriginal traditional uses.”²⁰

In addressing the Applicant’s concerns that the Dillon Conservation Area is too small to support Traditional Land Use, the Crown noted that this area is 191,544 hectares, or two per cent, of the total land-base within the LARP area.²¹

“With respect to the Applicant’s concern regarding the LARP restricting the potential for multiple uses within conservation areas, Alberta notes that, prior to the LARP, there was little coordinated regulation of multiple uses, including industrial development within these areas... Under the LARP, while existing petroleum and natural gas tenures and surface materials leases will be honoured, new activity that is incompatible with the purposes of conservation areas will not be allowed in order to minimize or prevent new land disturbance. The LARP provides that hunting, fishing and trapping will continue in accordance with provincial laws within conservation areas.”²²

With respect to the Applicant’s concern about not being able to hunt and fish in the conservation areas, the Crown²³ responded as follows: “regarding hunting, fishing and trapping within the new conservation areas (which will be established as either wildland provincial parks or public land use zones), Alberta noted that the existing provincial laws do not prevent hunting, fishing or trapping within wildland provincial parks or public land use zones.”

With respect to the Applicant’s concerns regarding the two new recreation areas of Clyde Lake and Winifred Lake and the development of Lakeland County as an “iconic tourism destination,” the Crown maintained these are not concerns about the LARP, but of “existing provincial laws.”²⁴

In the development of the new recreation areas, the Crown acknowledged that there may be a number of restrictions in these provincial recreation areas. The Crown stated, “while the designation of these areas as provincial recreation areas does not prohibit their activities (concerns raised by Applicant), Alberta acknowledged that prior authorizations (such as permits), may be required for certain activities.”²⁵

The Crown argued that, with respect to access, any impact to the Applicant’s access to Clyde Lake and Winifred Lake recreation areas is minimal and reasonable. “Establishment of the recreation areas will not prevent pedestrian access. However, establishment of these areas will somewhat change motorized access.”²⁶

The Crown further noted that: “increased regulation of Clyde Lake and Winifred Lake as provincial recreation areas will support the exercise of traditional activities on the landscape, and will reduce the potential for conflict between users, including the Applicant’s members, rather than increase such conflict.”²⁷

ISSUE FOUR

Whether the Lower Athabasca Regional Plan’s inclusion of Aboriginal Peoples in land-use planning is effective or meaningful.

The Crown maintained that pages 63-65 of the Lower Athabasca Regional Plan expressly indicate that “Alberta will work with First Nations in developing the biodiversity management framework, the landscape management plan and the Lower Athabasca Regional Trail System Plan.”²⁸

¹⁹ Response Submissions of the Government of Alberta; page 18, paragraph 93 ²⁰ Response Submissions of the Government of Alberta; page 16, paragraph 82

²¹ Response Submissions of the Government of Alberta; page 16, paragraph 86 ²² Response Submissions of the Government of Alberta; page 16, paragraph 87

²³ Response Submissions of the Government of Alberta; page 19, paragraph 103 ²⁴ Response Submissions of the Government of Alberta; page 18, paragraph 98

²⁵ Response Submissions of the Government of Alberta; page 19, paragraph 105 ²⁶ Response Submissions of the Government of Alberta; page 19, paragraph 107

²⁷ Response Submissions of the Government of Alberta; page 21, paragraph 122 ²⁸ Response Submissions of the Government of Alberta; page 16, paragraph 83

In its submission, the Crown asserted that the Review Panel has limitations concerning the issues it can actually address in the Lower Athabasca Regional Plan. The Crown stated that:

1. The Panel has no jurisdiction to determine questions of constitutional law;²⁹
2. The Panel has no jurisdiction to consider alleged inadequacy of consultation during the LARP creation or the LARP implementation;³⁰
3. The Panel has no jurisdiction over alleged harms from activities which pre-date the LARP. The Crown argues that the Panel has jurisdiction only with respect to harms alleged to be caused by the content of the LARP;³¹
4. The Crown maintains that all future development activities remain subject to the existing regulatory process. Alleged harms related to potential future activities are not caused by the LARP and are outside of the Panel's jurisdiction;³²
5. The Panel must only consider the harm caused by the content of the LARP. Alleged harms caused by how the LARP is, or may be, applied or interpreted by industry or regulatory decision-makers are outside the Panel's jurisdiction and cannot be considered;³³
6. The Panel has no jurisdiction to consider measures alleged to be missing from the LARP. Reference is made to page 27, which states, "where the LARP is silent on a particular topic, not taking away from existing rights occurs; rather, the current regulatory regime remains unchanged";³⁴
7. The Panel has no jurisdiction to consider harms alleged to be caused by legislation, other than the LARP.³⁵ The Crown's submission stated: "Alberta concedes that, generally, the Panel *does* have jurisdiction to recommend that an area designated by the LARP as a conservation area, provincial recreation area, or PLART, not be designated at all, or be given a different type of designation. However, the Panel's jurisdiction in this regard is limited —

the Panel may only recommend an alternative designation from the existing set of designations under the existing provincial legislation. The Panel cannot create new designations as it does not have authority to recommend changes to the provincial legislation governing land designation as they are outside the LARP."³⁶ (Emphasis added)

The only one of the Applicant's concerns that the Crown stated the Review Panel *does* have jurisdiction over, is the LARP's designation of the two new provincial recreation areas of Clyde Lake and Winifred Lake and the development of Lakeland County.

III. Cold Lake First Nations' Response to the Crown's Submission

Cold Lake First Nations responded to the Crown's submission on August 24, 2014.

As detailed below, Cold Lake First Nations responded to four areas noted in the Government of Alberta's argument:

- 1a. The Review Panel has jurisdiction to consider omissions from the LARP. In its submission,³⁷ CLFN argued that when the LARP purports to do something, but is silent on how that thing will be achieved, it is a failure of the LARP to address and achieve its objectives (by omission) that causes probable harm to CLFN. Accordingly, harm caused by omission must be considered by the Review Panel in review of the LARP.
- 1b. CLFN also argued that the Government of Alberta suggested the LARP cannot explicitly include mechanisms for managing Traditional Land Use or access for the exercise of Treaty rights because the government's jurisdiction to do so is limited by the federal-provincial division of powers in the *Constitution Act, 1867*. CLFN also maintained that the Government of Alberta suggested it cannot legislate Traditional Land Use matters because "the LARP cannot

²⁹ Response Submissions of the Government of Alberta; page 9 ³⁰ Response Submissions of the Government of Alberta; page 10 ³¹ Response Submissions of the Government of Alberta; page 12 ³² Response Submissions of the Government of Alberta; page 13 ³³ Response Submissions of the Government of Alberta; page 14

³⁴ Response Submissions of the Government of Alberta; page 14, paragraph 79 ³⁵ Response Submissions of the Government of Alberta; page 18 ³⁶ Response Submissions of the Government of Alberta; page 19, paragraph 100 ³⁷ CLFN Response Submission; page 2

define somebody as being “Indian” or not, or define lands to which “Indians” have a right to access.”³⁸ CLFN argued that such principles and conclusions fly in the face of its own recognized constitutional obligations, misinterpret established case law and ignore current legislation in Alberta and other provinces.

The Applicant submitted that the Government of Alberta can enact legislation that protects Traditional Land Use and improves access for the exercise of adhering to Treaty rights. The Applicant maintained that the LARP must address TLU matters in order to achieve its objectives.³⁹

- 1c. CLFN suggested that the LARP has failed to identify any specific plan for the Cold Lake Air Weapons Range because it has no obligations in this area.

The First Nation maintained that the Government of Alberta has the jurisdiction and authority to regulate natural resource development, the environment and wildlife within the CLAWR.⁴⁰ In addition, the Applicant argued that the LARP has failed to recognize the Access Agreement executed between the Government of Canada, the Government of Alberta and the CLFN for the CLAWR.

2. CLFN noted⁴¹ that the LARP, in Outcome 7, is meant to “encourage Aboriginal Peoples’ participation in land-use planning and decision-making.” A number of specific strategies are described in the document for implementing a specific outcome. The CLFN submitted that many of these strategies are ineffective because they fail to address Traditional Land Use, which results in a “direct and adverse affect” on the ability of its members to practice Treaty and Aboriginal rights.

The Applicant stated: “while Alberta says it included Aboriginal Peoples in the LARP land-use planning processes, Alberta provides no evidence in its response as to how feedback from Aboriginal Peoples was actually considered or incorporated in the LARP.”

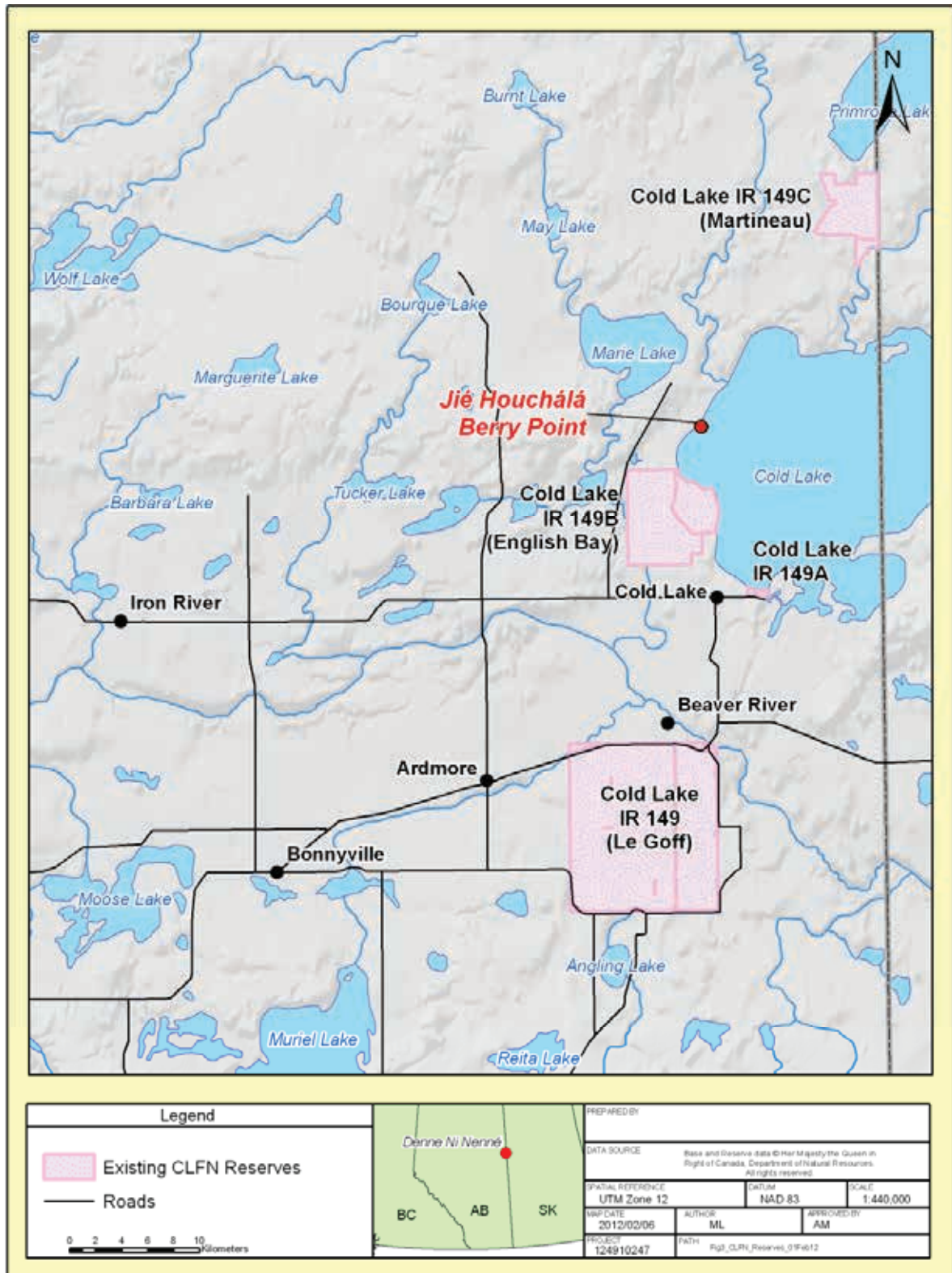
3. In its submission, CLFN agreed with the Government of Alberta that the Review Panel may not determine questions of constitutional law. The First Nation responded by stating, in their brief, that they never asked the Review Panel to determine such questions.⁴²

CLFN took the position that the Review Panel is permitted to consider constitutional principles in conducting its review. They submitted that the Review Panel is required to consider such factors as “health, property, income or quiet enjoyment of property.” To make this determination, CLFN maintained the Review Panel must consider constitutional principles such as the Crown’s fiduciary obligation to uphold and fulfill its Treaty obligations.

4. CLFN noted a number of examples in the Crown’s submission that describe statements that are unsupported by any evidence or studies to verify how the various commitments of the Government of Alberta will be implemented or not.⁴³

³⁸ CLFN Response Submission; page 3 ³⁹ CLFN Response Submission; page 4 ⁴⁰ CLFN Response Submission; page 4 ⁴¹ CLFN Response Submission; page 5 ⁴² CLFN Response Submission; page 6 ⁴³ CLFN Response Submission; pages 7-8

FIGURE 1:
Cold Lake First Nations' Reserve Lands (CLFN Binder 1, Tab 3)



CLFN Binder 1, Tab 3: Figure 1.2 - Cold Lake First Nations' Reserve Lands

FIGURE 2:
Traditional Land Use of the Cold Lake First Nations (CLFN Binder 1, Tab 9)

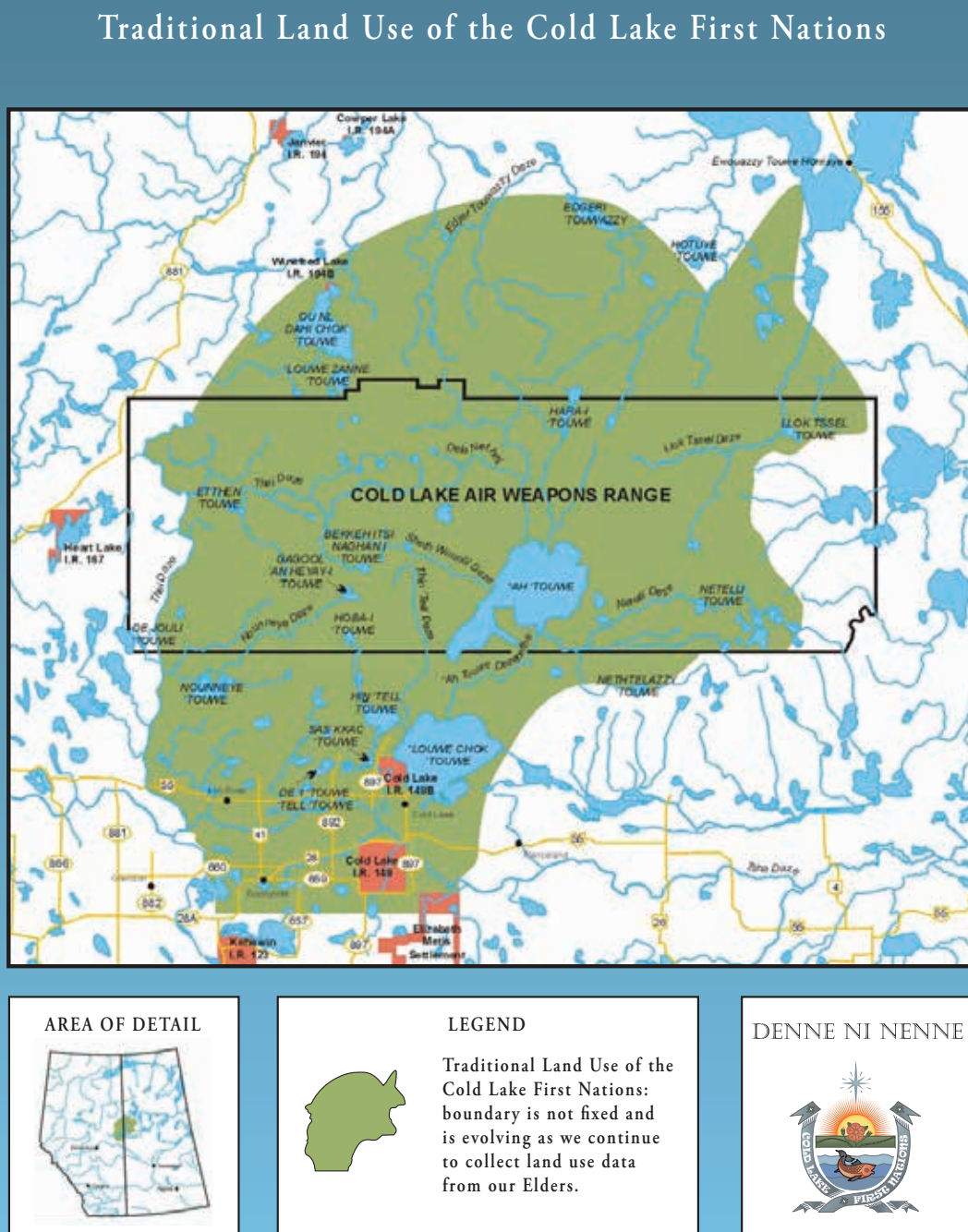
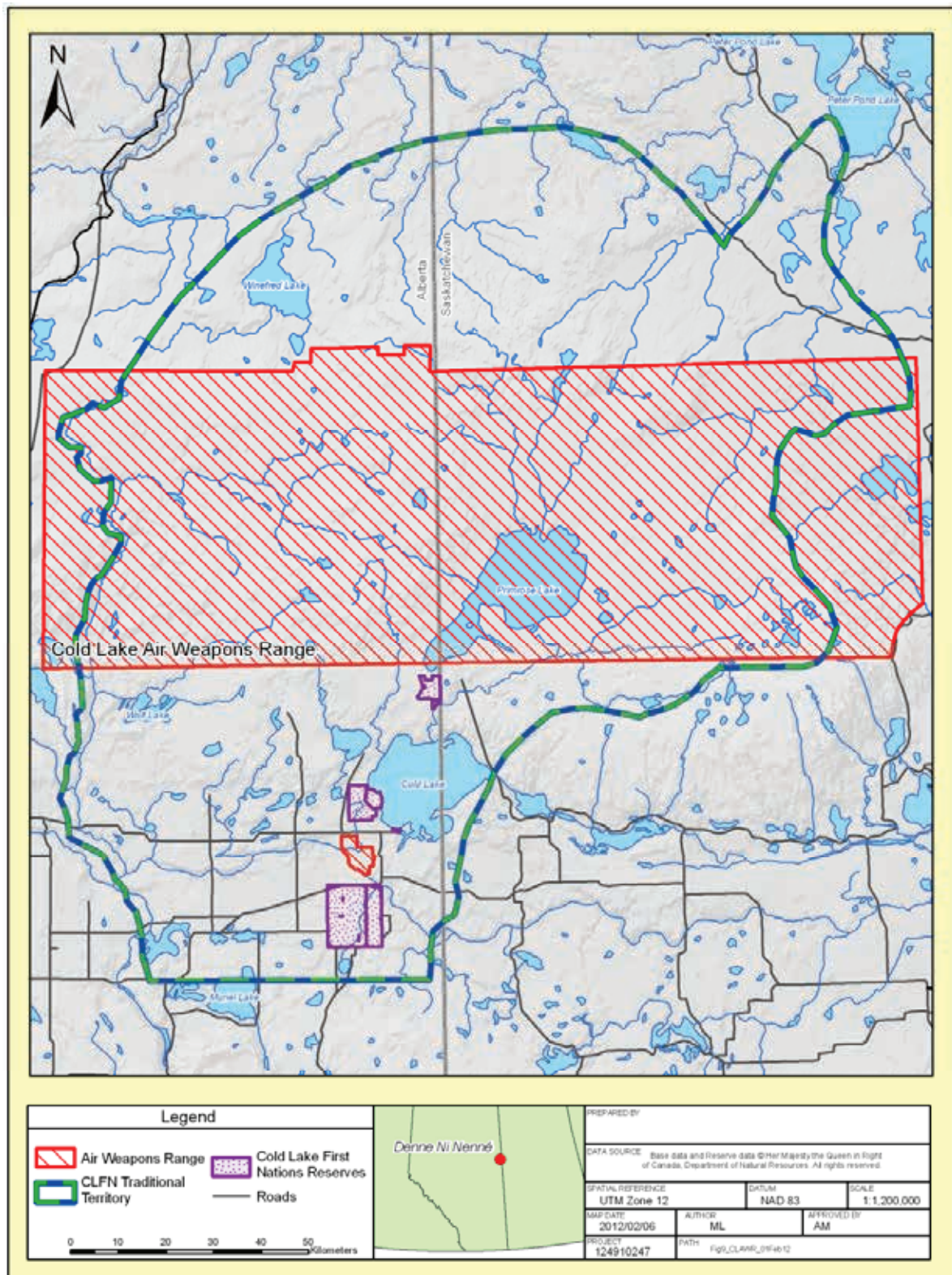


FIGURE 3:**Cold Lake Air Weapons Range in Relation to Denne Ni Nennè (CLFN Binder 1, Tab 3)****CLFN Binder 1, Tab 3:** Figure 4.6 - Cold Lake Air Weapons Range in Relation to Denne Ni Nennè

Panel Recommendations to the Minister for Cold Lake First Nations

Issue One

Whether the Lower Athabasca Regional Plan should include plans for the Cold Lake Air Weapons Range.

RECOMMENDATIONS TO THE MINISTER

The Lower Athabasca Regional Plan (LARP) should include plans for the Applicant within the Cold Lake Air Weapons Range (CLAWR). The Applicant has been “more than minimally harmed” and has been “directly and adversely affected” by a “loss of income” and resulting “health effects,” as well as a “loss of quiet enjoyment of property.”

REASONS FOR THE RECOMMENDATION

The Crown took the position in addressing the first issue that, from the beginning, the Review Panel has no jurisdiction to address this matter. The Crown also stated that CLAWR lands are federal lands and are not generally available for the exercise of Treaty rights, except with respect to the limited and controlled access that was given to the Applicant’s members under the Access Agreement. Under the LARP, the CLAWR remains designated as a military reserve.¹

The Review Panel has difficulty supporting the Crown’s position for the following reasons:

- After many years under dispute, an Access Agreement was executed in 2001 between the Government of Canada, the Government of Alberta and the Applicant, allowing CLFN members limited access to the CLAWR to carry out their traditional and cultural pursuits. This list is noted on page two of the Applicant’s submission;
- Within the CLAWR is a Wildlife Preservation Area (WPA), which is intended to support a healthy wildlife population for the Applicant’s members in their Traditional Land Use (TLU) area;
- As shown in Figures 1 and 2 of the CLFN submission, the CLAWR is within the TLU area, as identified by the Applicant;
- The Crown has taken the position that the CLAWR is a “military reserve” solely within the jurisdiction of the federal government. The Applicant, however, took the position that the Government of Alberta has the jurisdiction or authority to regulate health, natural resource development or wildlife in this area, as described in the *Constitution Act, 1867* and the *Natural Resources Transfer Agreement, 1930*; and

¹ Response Submissions of the Government of Alberta; page 16, paragraph 85

- Limited evidence by the Crown, aside from its jurisdictional arguments, as to why the CLAWR should not be included within the LARP.

Such a position is further recognized by the Review Panel in the report filed by the Applicant entitled The Cumulative Effects of Historic, Current and Future Land-Uses on the Peoples and Landscape of Cold Lake First Nations, prepared by A Landscape Cumulative Effects Simulator (ALCES) in October 2012.²

The conclusion in the report found:

“As the past century has unfolded, the ability of CLFN to participate meaningfully in traditional activities has been substantively eroded. Some land-uses, such as croplands and parks, are partially available to CLFN, but are not conducive to traditional activities. Others, such as the military (CLAWR) and the energy sector, create impediments or barriers that prevent CLFN from accessing vestiges of natural landscapes. When considered in total, these overlapping land-uses have restricted the CLFN community to a very small fraction of their original Traditional Territory.

The adaptive nature of the CLFN people to their pre-European boreal landscape was based on the key elements of “meaningful” space and time. They required an extensive landscape over which to seek and use resources. No single portion of their Traditional Territory met their full seasonal and annual requirements for fish, moose, berries, and other resources. As a result, family clans would have been highly mobile, residing in regions until local foods were depleted, and then moving to new locations to allow for resource recovery. Some of these patterns would have been seasonal; other movements might reflect decadal periods. The spatial-temporal system that defined the CLFN people for millennia no longer exists. Hemmed in by croplands to the south and an air weapons range to the north, the CLFN community of today has very few remaining areas on which to participate in traditional activities. Not surprisingly, these natural landscape remnants experience high levels of traditional resource use and may be readily over-exploited. No longer able to access their Traditional Lands extensively, CLFN have few remaining venues to satisfy the existing appetite for traditional activity.”

In recognizing the provincial obligations concerning First Nations’ Treaty rights, the Review Panel refers to the recent Supreme Court of Canada Keewatin decision:³

“Where a province intends to take up lands for the purposes of a project within its jurisdiction, the Crown must inform itself of the impact the project will have on the exercise by the Ojibway of their rights to hunt, fish and trap, and communicate its findings to them. It must then deal with the Ojibway in good faith, and with the intention of sustainability addressing their concerns (*Mikisew*, at paragraph 55 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at paragraph 168). The adverse impact of the Crown’s project (and the extent of the duty to consult and accommodate) is a matter of degree, but consultation cannot exclude accommodation at the outset. Not every taking up will constitute an infringement of the harvesting rights set out in Treaty 3. This said, if the taking up leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished and trapped, a potential action for Treaty infringement will arise.” (*Mikisew*, at paragraph 48)

As noted by the Review Panel, the Government of Alberta’s Terms of Reference for Developing the Lower Athabasca Regional Plan, (July 2009) stated that:

“Cumulative effects management will be used at the regional level to manage the impacts of development on land, water and air;” and

In the same document:

“Lands under federal jurisdiction, such as First Nations Lands, national parks and military lands also need to be considered. Although a regional plan will not direct activities on these lands, *it must consider the long-term needs of these areas and how they may impact desired outcomes in the region.*” (Emphasis added)

The Review Panel notes that the underlying theme of the LARP is Cumulative Effects Management (CEM). The term “effect” is defined in section 2(h) of the *Alberta Land Stewardship Act* as follows:

² ALCES; page 150, paragraph 10 ³ *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 S.C.C. 48, also known as the Keewatin Decision

- i. any effect on the economy, the environment, a community, human health or safety, a species or an objective in a regional plan, regardless of the scale, nature, intensity, duration, frequency, probability or potential of the effect; and
- ii. a cumulative effect that arises over time in combination with other effects.

The LARP identifies, in a number of instances, various CEM provisions. For example: the plan uses “a cumulative effects management approach to balance economic development opportunities and social and environmental considerations.”⁴

The LARP also states that: “Cumulative effects management focuses on achievement of outcomes, understanding that effects of multiple development pressures (existing and new), assessment of risk, collaborative work with shared responsibility for action and improved integration of economic, environmental and social considerations.”⁵

In conclusion, in addressing a recommendation to the Minister on Issue One, the Review Panel finds the following:

- a. The Review Panel has the jurisdiction to address this matter;
- b. The Applicant is “directly and adversely affected” pursuant to section 5(1)(c) of the Regulation and section 38 of the Rules⁶ on the following grounds:
 - 1. The loss of wildlife in the CLAWR has impacted the Applicant’s “income” and “health” as a result of increased activity within the Applicant’s Traditional Land Use areas;
 - 2. The Government of Alberta has the authority and responsibility to address such matters as the regulation of health, resource development, and wildlife in the CLAWR, even though defence-related matters are the sole jurisdictional responsibility of the federal government;

3. Cumulative Effects Management has been compromised in this area due to substantial, increased resource development activities as identified in the ALCES report over the years, in addition to the military use of the CLAWR, which forms part of Cold Lake First Nations’ Traditional Land Use area. Such increased activity in the CLAWR has interfered with the Applicant’s “quiet enjoyment of property” in complying with the CEM objectives of the Government of Alberta.

4. Based on the evidence of the Applicant, the Review Panel determines that even with the execution of the Access Agreement signed in 2001, the Applicant, over the years, has still had problems using the “access area” because of the Department of National Defence’s (DND) use of the weapons range and the issuing by the Government of Alberta of ongoing oil and gas leases in the same area.

5. The Government of Alberta’s Terms of Reference for Developing the Lower Athabasca Regional Plan (July 2009) stated that, in reviewing military lands, plans “must consider the long-term needs of the areas and how they may impact desired outcomes in the region.”

The Review Panel concludes that the Applicant, based on the written evidence provided by both parties, *has been* “more than minimally harmed” by the current and ongoing activities within the CLAWR, and that such activities, which are regulated and under the jurisdiction of the Government of Alberta, should be considered and recognized by the LARP.

Issue Two

Whether the Lower Athabasca Regional Plan should address the management of ongoing Traditional Land Use.

RECOMMENDATIONS TO THE MINISTER

The Review Panel agrees with the Applicant that the LARP should consider addressing Traditional Land Use concerns in Cold Lake First Nations’ Traditional Land Use area. The Review Panel, on the basis of the

⁴ Lower Athabasca Regional Plan (LARP); page 2 ⁵ LARP; page 3 ⁶ Alberta Land Stewardship Act - Rules of Practice for Conducting Reviews of Regional Plans (March 2014)

written evidence provided by both parties to these proceedings, recommends that the Applicant *has* been “more than minimally harmed” and *has* been “directly and adversely affected” by a “loss of income” and the resulting “health effects” on its members, and the “loss of quiet enjoyment of property” on their Territorial Lands.

REASONS FOR THE RECOMMENDATION

The Crown took the position that the Review Panel has no jurisdiction to determine questions of constitutional law or any matters missing from the LARP. With respect to the Applicant’s concerns that various impacts and trigger conditions identified in the management frameworks were adopted without the inclusion of TLU, the Government of Alberta argued that such actions were taken using stringent provincially-accepted guidelines depending on the use.

CLFN took the position that, in fact, they never asked the Review Panel to determine constitutional questions of law, but that constitutional principles have to be considered by the Review Panel, such as the factors noted in Section 38 of the Rules.⁷

The Applicant also noted that the Review Panel *does* have jurisdiction to consider omissions from the LARP. For example, if the LARP purports to do something, but is silent on how it will be achieved, it is a failure of the LARP to address and achieve its objectives (by omission), which could prove harmful to the Applicant.

Cold Lake First Nations also remarked that many of the strategies proposed in the LARP are ineffective because they fail to address structural land uses. The Applicant recommended that the LARP must develop some form of TLU management framework for land-use planning to allow for a better assessment of cumulative effects in the Lower Athabasca Regional Plan.

In its submission, CLFN refers to the Cold Lake Jié Houchálá (Berry Point) Traditional Land Use and Occupancy Report (February 2012), hereinafter referred to as the Berry Point Report.⁸

The Berry Point Report lists a number of Traditional Land Use activities in this area, including the concept of “living on the land gathering space.” The report states, “within the boreal forest not all areas are equally suited to traditional use and community habitation. “*Living on the land gathering places*” support an abundance of plant and animal resources...to sustain large gatherings of people.”⁹

Based on the information reported in a number of interviews, the Applicant argued that Berry Point is a significant area for CLFNs’ Traditional Land Use and occupancy.¹⁰ For example:

- It is a place of unusual abundance and diversity of resources, particularly fish and berries.
- It is very close to occupied Reserve Lands.
- It is one of several “living on the land gathering places” in *Denne Ni Nennè* outside of CLAWR, and the only one that is still relatively accessible for Cold Lake First Nations’ use.
- Ancestral occupation has continued for thousands of years down to the present, an aspect of particular significance to Cold Lake First Nations.
- It has a rare combination of spiritual qualities that result in a high spiritual significance.

These characteristics result in a place that is of particular value not only for CLFN harvesting and occupancy activities, but also for other related cultural practices, such as the teaching and transmission of traditional knowledge.

Similar to the concerns raised in the ALCES Report, with respect to the issue of cumulative impacts, the Berry Point Report¹¹ notes “when all encroachments within *Denne Ni Nennè*, Cold Lake First Nations’ Traditional Lands, agriculture, hydrocarbon developments and parks are taken into account, little remains for the Nations’ members to exercise their constitutionally protected rights.”

⁷ *Alberta Land Stewardship Act - Rules of Practice for Conducting Reviews of Regional Plans* (March 2014) ⁸ Cold Lake First Nations (CLFN) Application; binder 1, tab 3

⁹ Berry Point Report; page 57, paragraph 5.3 ¹⁰ Berry Point Report; page 105, paragraph 5.6 ¹¹ Berry Point Report; page 50, paragraph 4.3.5

Cumulative impacts are further reinforced in the Berry Point Report.¹²

“While Cold Lake First Nations’ occupancy and use of *Berry Point* has continued despite the encroachments and resultant impacts, it is becoming more difficult and tenuous. With fewer and fewer places left to go in which Cold Lake First Nations members can engage in traditional practices and customs, in ways that are meaningful and attached to the ancestors, any further impacts to *Berry Point* can be expected to be significant and will challenge the ability of the Nation to maintain traditional practices and customs and by extension *Denesuline* identity and the transmission of beliefs, values, customs and traditions to future generations.”

The report concluded with the reasons why *Berry Point* is significant to Cold Lake First Nations with respect to Traditional Land Use matters:¹³

- Harvest and process fish for food purposes;
- Harvest moose and rabbits for food purposes;
- Harvest berries for food purposes; and
- Harvest plants for medicines for health and ceremonial purposes.

Furthermore, *Jié Houchálá/Berry Point* is a cultural hub where Cold Lake First Nations members continue to:

- Frequent it to promote cultural continuity and identity through:
 - Intergenerational transmission (teaching) of traditional knowledge and traditional activities;
 - Intergenerational transmission of history, ancestry and culture; and
 - Holding social and cultural gatherings.
- Use it for family social purposes.

Finally, *Jié Houchálá/Berry Point* is a sacred place to Cold Lake First Nations as an area where:

- The ancestors have lived and where their spirits are present;
- There are burial sites; and
- Members go for healing, to reconnect with themselves and the land, and to conduct ceremonies.

The unique qualities of this area that make it especially important to Cold Lake First Nations are that:

- It is valued and enjoyed by families from all of the Cold Lake First Nations communities (English Bay, Le Goff, Little Cold Lake Town);
- There is a strong historic and ancestral connection with the place;
- It is highly accessible to Cold Lake First Nations members and families;
- It is an extremely productive fishing area;
- It is located on Cold Lake, itself a significant cultural and sacred place for the Nation; and,
- It is a rich and diverse area that supports multiple traditional use activities.

In assessing impacts of the proposed English Bay Recreation Area expansion and development, it is important to take the entire contextual setting into account. This contextual setting is described in Section 3 and can be summarized as follows:¹⁴

- The traditional livelihood, mode of life and unique *Denesuline* culture of Cold Lake First Nations is dependent upon access to sufficient quality and quantity of lands and resources within *Denne Ni Nennè*;
- Cold Lake First Nations has experienced historic and continuing encroachment on *Denne Ni Nennè* and the lands and resources necessary to support Traditional Land Use activities;

¹² Berry Point Report; page 134, paragraph 6.2.4 ¹³ Berry Point Report; page 140 and 141, paragraph 7 ¹⁴ Cold Lake First Jié Houchálá (Berry Point); section 3

- The process of colonization itself has had impacts on Cold Lake First Nations' ability to pursue traditional activities and on cultural identity.
- Cold Lake First Nations has a deep-rooted distrust of government as a result of what they have experienced as a history of broken promises.
- While Cold Lake First Nations is in a process of cultural regeneration and recovery with cultural protection and promotion efforts in place, this process requires continuation of access to lands and resources necessary to support the traditional use and occupancy activities that are necessary for cultural identity and continuation.

The Review Panel has reviewed the written evidence of both parties and recommends that:

- a. the Review Panel *does* have jurisdiction to review this issue;
- b. the Applicant is "directly and adversely affected" by the encroachment of development activities within their Traditional Land Use territory, as described by both the ALCES and Berry Point reports;
- c. such increasing development within Cold Lake First Nations' Traditional Land Use territory has resulted in the combination of detrimental effect from: a "loss of income" due to the inability to hunt, fish and trap on these lands; the incidental "health effects" of not being able to consume country foods; and the "loss of quiet enjoyment of property" on their TLU territory;
- d. based on reports submitted by the Applicant, ongoing development is encroaching on CLFNs' TLU territory each year; and
- e. the Applicant is "more than minimally harmed".

Issue Three

Whether the Lower Athabasca Regional Plan designates new conservation areas and tourism and recreation areas without considering the impact on Traditional Land Use.

RECOMMENDATIONS TO THE MINISTER

The Review Panel agrees with the Applicant that the LARP designates new conservation areas and tourism areas without considering the impact of Traditional Land Use.

On the basis of the written evidence provided by both parties to these proceedings, the Review Panel recommends that the Applicant *has* been "more than minimally harmed" and *has* been "directly and adversely affected" by a "loss of income," resulting "health effects," and a "loss of quiet enjoyment of property" as a result of the creation of the new conservation and recreation areas in the LARP.

REASONS FOR THE RECOMMENDATION

The Crown argued, with respect to this issue, that such areas were, in fact, established to "support Aboriginal traditional uses."¹⁵

Under the LARP, the Crown maintained that, while existing petroleum and natural gas tenures and surface materials leases will be honoured, new activity that is incompatible with the purposes of conservation areas will not be allowed in order to minimize or prevent new land disturbance. The LARP provides that hunting, fishing and trapping will continue in accordance with provincial laws within conservation areas.¹⁶

In the development of the new recreation areas, the Crown maintained that such areas do not prohibit Traditional Land Use activities, recognizing that permits may be required for certain activities.¹⁷

In addressing Issue Three, Cold Lake First Nations responded that the Dillon River Conservation Area — which was a new conservation area designated under the Lower Athabasca Regional Plan — was within its Traditional Territory and, in fact, was the

¹⁵ Response Submissions of the Government of Alberta; page 16, paragraph 82 ¹⁶ Response Submissions of the Government of Alberta; page 16, paragraph 87

¹⁷ Response Submissions of the Government of Alberta; page 19, paragraph 105

only conservation area created under the LARP in its Traditional Territory. Based on the LARP, this area equates to approximately two per cent of the regions' land area.¹⁸

On the basis of the Applicant's evidence, the Clyde Lake Recreation Area is just outside the western border of its Traditional Territory. The newly created LARP recreation area of Winifred Lake is within its Traditional Territory.

The Applicant had a number of concerns with the creation of these new conservation and recreation areas in their Traditional Territory:

- regulations imposed by the Crown will interfere with their Treaty and Aboriginal rights;
- multiple users in these areas will interfere with their members' exercise of Treaty and Aboriginal rights; and
- the Dillon River Conservation Area is too small and remote to sustain the wildlife populations necessary to support hunting for both recreational hunters and CLFN members.

Cold Lake First Nations argued that, because of the reasons stated above, the health of its members are "directly and adversely affected" — both physically (by being unable to harvest and ingest traditional foods) and psychologically (due to reduced communal cultural benefits) — as the Traditional Land Use area has been substantially reduced by resource development and military activities. The Dillon River Conservation Area is simply too small to meet the needs of Cold Lake First Nations' Traditional Land Use requirements.

The Applicant argued that the Winifred Lake Recreation Area also has an impact on its members' "health" and "quiet enjoyment of property" for the following reasons:

- Once the land is designated a "recreation area" under the *Provincial Parks Act*, far more restrictions are imposed on CLFNs' members, who are used to such activities as hunting, plant gathering and fish harvesting.

- The Applicant pointed to the Berry Point Report,¹⁹ in which it referred to the use of such areas by outdoor users as being typically incompatible with the "quiet enjoyment of property" by CLFN members. The express purpose of such areas is "to establish, maintain and facilitate the use and enjoyment for outdoor recreation," and not to exercise TLU. Outdoor recreation would include activities such as RV camping, snowmobiling and all terrain vehicle use. The development of infrastructure in these areas could include the construction of roads, trails, picnic areas, fire pits, toilets and parking areas. Similar to the Dillon River Conservation Area, the Applicant must deal with the problem of "multiple users" at the Winifred Lake Recreation Area.

In its recommendation to the Minister concerning Issue Three, the Review Panel finds that:

- With respect to the concerns raised by the Applicant regarding the new conservation area of Dillon River, which is within the Applicant's Traditional Land Use territory, the LARP provides that Cold Lake First Nations' members can still hunt, fish and trap in accordance with provincial laws. However, the Applicant argues that this 191,000-hectare conservation area is too small for CLFNs' members to carry out their Traditional Land Use activities.

The LARP states that "the new conservation areas will be enacted under provincial parks legislation or the *Public Lands Act*. Conservation areas will be managed to provide low-impact backcountry recreation opportunities and nature-based tourism products and services."²⁰

Key criteria for such areas in the LARP include:

- Areas with little to no industrial activity; and
- Areas which support Aboriginal traditional uses.

With the creation of the new recreation areas, the Applicant noted that the Clyde Lake Recreation area is just outside the western border of its Traditional Territory; whereas the Winifred Lake Recreation area is within its Traditional Territory.

¹⁸ Cold Lake First Nations response to Information Request 7 from the LARP Review Panel ¹⁹ Berry Point Report; binder 1, tab 3 ²⁰ LARP; page 30

In regards to recreation areas, and similarly to conservation areas, the LARP states that “with the exception of new motorized access management requirements, hunting, fishing and trapping will continue in accordance with existing provincial laws governing such activities as such laws be amended or replaced from time to time. Hunting includes commercial guiding and outfitting operations where wildlife species management plans provide an allocation for that use.”²¹

The LARP also notes that “these areas will help provide diverse, enjoyable outdoor recreation opportunities that contribute to healthy lifestyles. The provincial recreation areas will be managed to minimize industrial land disturbance and ensure quality recreational experiences.”²²

The Applicant noted the following concerns with the new conservation area of Dillon River:

- The area is too small to provide enough wildlife for its members to hunt, fish and trap for their TLU activities;
- Regulations imposed by the Crown could interfere with the Applicants’ Treaty and Aboriginal rights;
- Industrial activity could take place in these areas;
- The Government of Alberta could initiate multi-use corridors in these areas.²³ These corridors could include:
 - Public highways
 - Electric transmission
 - High-speed rail
 - Pipelines
 - Water management
 - Telecommunication towers
 - Recreation trails

With respect to the new recreation areas, the Applicant is concerned about:

- gates across trails that could impede their members’ access;
- the restriction of harvesting practices in parks;
- overnight camping only being allowed in certain designated areas;
- the possible contamination of key resources;
- incompatibility with recreational users such as snowmobilers and campers;
- hunting safety;
- the inability to construct small lodges and smoking/drying racks; and
- multi-use corridors, as mentioned previously.

The Review Panel has reviewed the written evidence of both the CLFN and the Crown and recommends that:

- a. The Review Panel *does* have jurisdiction to review this issue;
- b. The Applicant *has* been “more than minimally harmed”;
- c. The establishment of the Dillon River Conservation Area and the recreation areas of Clyde and Winifred lakes impacts the TLU and Aboriginal rights of the Applicant;
- d. The creation of the new conservation areas and the two recreation areas has caused CLFNs’ members to be “directly and adversely affected,” as it has restricted the Applicant’s TLU territory. This means limitations on hunting, fishing and trapping, resulting in a “loss of income” and the incidental reduction of country *foods*, causing potential “health” problems.

²¹ LARP; page 90, note 6 ²² LARP; page 32 ²³ LARP; page 90, note 7

As noted in the [Berry Point Report](#), the Review Panel agrees that the new development activities within Cold Lake First Nations' Traditional Territory *has* resulted in a "loss of quiet enjoyment of property" due to the decrease of their Traditional Land Use activities and lands, as described in their submission.

Issue Four

Whether the Lower Athabasca Regional Plan's inclusion of Aboriginal Peoples in land-use planning is effective or meaningful.

RECOMMENDATIONS TO THE MINISTER

This issue is a matter between the Cold Lake First Nations and the Government of Alberta, and is outside the jurisdiction of this Review Panel. Therefore, no recommendations will be made to the Minister on this issue.

REASONS FOR THE RECOMMENDATION

The Applicant, in its evidence, indicated to the Review Panel that there was the notion²⁴ that First Nations "participated" in the development of the LARP, "rather than the meaningful incorporation of Aboriginal Peoples and their knowledge in the land planning process." The results of this inadequate engagement has, in the opinion of CLFN, impacted its members and their ability to practice their Treaty and Aboriginal rights.

The Crown took the position that it has worked extensively with Cold Lake First Nations in the development of the Lower Athabasca Regional Plan and the various management framework agreements, as well as the Lower Athabasca Regional Trail System Plan.

In conclusion, pertaining to addressing a recommendation to the Minister on Issue Four, the Review Panel finds the following:

- a. The Review Panel considers that the issue of meaningful land-use planning consultation between the Government of Alberta and Cold Lake First Nations should be resolved between the two parties and is outside the jurisdiction of this Review Panel;
- b. The Review Panel recommends that further dialogue and consultation should take place between the two parties on land-use planning issues involving the Lower Athabasca Regional Plan.

²⁴ CLFN Application; page 13

Chipewyan Prairie Dene First Nation Analysis of Application

Background

Chipewyan Prairie Dene First Nation (CPDFN) holds Treaty 8 and Aboriginal rights within the Lower Athabasca Regional Planning area, including the Janvier Indian Reserves No. 194, 194A and 194B.

CPDFN is also a “band” under the *Indian Act*, with eight Reserves. Its Traditional Lands radiate north of Fort Chipewyan, south of Saddle Lake, west of Wabasca and east of Peter Pond Lake in Saskatchewan.

As a member of Treaty 8, CPDFN members continue to hold and exercise the rights guaranteed by the Treaty, as modified by the *Natural Resources Transfer Agreement, 1930* (enacted by the *Constitution Act, 1930* (U.K.) 20-21 George V, c. 26).

The Treaty rights include the right to harvest specific species in specific locations, as well as incidental rights such as:

- routes of access and transportation;
- sufficient water quality and quantity;
- sufficient quality and quantity of resources in preferred harvesting areas;

- abundant berry crops in preferred harvesting areas;
- traditional medicines in preferred harvesting areas;
- the experience of remoteness and solitude on the land;
- construction of shelters on the land to facilitate hunting, trapping, gathering and/or fishing;
- use of timber to live on the land while hunting, trapping, gathering and/or fishing (e.g. to build shelters and fires);
- the right to instruct younger generations on the land;
- access to safe lands within which to practise rights;
- the right to feel safe and secure in the conduct of such practices and activities;
- lands and resources accessible within constraints of time and cost;
- socio-cultural institutions for sharing and reciprocity; and
- spiritual sites and associated practices.¹

¹ Chipewyan Prairie Dene First Nation (CPDFN) Application; page 2

CPDFN members reside primarily in Janvier, Fort McMurray and Lac La Biche. CPDFN's Traditional Lands, as shown in Figure 1, include but are not limited to the Christina River Watershed, which has undergone significant changes over the past 40 years.²

On September 5, 2013, CPDFN submitted a request for review of the Lower Athabasca Regional Plan (LARP) — pursuant to section 19.2(1) of the *Alberta Land Stewardship Act* (ALSA), S.A. 2009, c. A-26.8, the *Alberta Land Stewardship Regulation* (ALSR), and Form LUS-01 — on the basis that CPDFN is a person “directly and adversely affected” by the LARP.

Issues

The Review Panel considers that the raised issues by the Applicant can be summarized as follows:

Issue One: The Lower Athabasca Regional Plan does not include, nor protect, Chipewyan Prairie Dene First Nation (CPDFN) Treaty and Aboriginal rights, Traditional Land Use or culture.

Issue Two: The Lower Athabasca Regional Plan does not include consideration of, nor does it address, how the Applicant's members can continue to access and peacefully use and occupy Reserve Lands.

Issue Three: The Lower Athabasca Regional Plan is being applied by decision-makers and relied upon by oil sands companies to preclude the protection of Aboriginal and Treaty rights and land uses.

Issue Four: The Lower Athabasca Regional Plan is being applied by decision-makers to effectively rule out the possibility of establishing areas that can be set aside for Traditional Land Use and the exercise of Treaty rights.

I. Argument of the Applicant – Chipewyan Prairie Dene First Nation

ISSUE ONE

The Lower Athabasca Regional Plan does not include, nor protect, the Applicant's Treaty and Aboriginal rights, Traditional Land Use or culture.

As per the Form LUS-01, the Applicant, in its submission, highlighted the specific sections of the LARP that it considers “directly and adversely” affect CPDFN. The Applicant requested a review of, and amendments to, the LARP in its entirety, “as the plan as a whole fails to address or protect CPDFN's Treaty rights, Traditional Land Use, peaceful use and occupation of its Reserve Lands, and its culture.”³

The specific provisions of the LARP that CPDFN objects to are as follows:⁴

Regulatory Details Plan, Part 1 – General

1. Section 1(e) – exclusion of a Regulatory Details Plan Part for Traditional Land Use and Treaty Rights, including limits, triggers and thresholds.
2. Sections 4-7 – to the extent that the Plan is intended to guide, inform, or bind the Crown, decision-makers, local government bodies and all other persons in the absence of measures that are protective of CPDFN's Treaty and Aboriginal rights, Traditional Land Uses, and culture.
3. Section 10(2) – to the extent that it requires decision making bodies to make changes or implement new initiatives to comply with the LARP in the absence of measures that are protective of CPDFN's Treaty and Aboriginal rights, Traditional Land Uses and culture.

Regulatory Details Plan, Part 2 – Conservation Areas

4. Sections 13-17 – Conservation Areas have not been selected nor designed, nor their objectives set, in a manner consistent with CPDFN's Treaty Rights and Traditional Land

² CPDFN Application; pages 1-3 ³ CPDFN Application; page 3 ⁴ CPDFN Application; pages 3-7

Uses and values, or with CPDFN's ability to access and peacefully use and occupy its Reserve Lands.

Regulatory Details Plan, Part 3 – Conserved Lands

5. Section 19 – does not allow for a conservation purpose that addresses CPDFN's Treaty rights, Traditional Land Use, or access and peaceful enjoyment of its Reserve Lands.

Regulatory Details Plan, Part 4 – Air Quality

6. Sections 22, 24, 25-26 – to the extent that these sections incorporate by reference the Air Quality Management Framework. Air quality triggers and limits have not been set with reference to the health of CPDFN members, with regard to their ability to use and enjoy the Traditional Lands, or with regard to the need to maintain certain areas for the exercise of Treaty Rights and traditional uses.

Regulatory Details Plan, Part 5 – Surface Water Quality

7. Section 29 (a)(e) and sections 30-34 – to the extent that these sections incorporate the Surface Water Quality Framework.

Regulatory Detail Plan, Part 6 – Groundwater

8. Sections 36(a) and 37-38 – to the extent that they incorporate the Groundwater Management Framework.

Regulatory Details Plan, Part 7 – Recreation and Tourism

9. Sections 39(a)(b) and 42-45.

Regulatory Detail Plan, Part 8 – Monitoring and Reporting

10. Sections 46 and 48 – to the extent that they incorporate the Implementation Plan, as the Implementation Plan does not address not protect CPDFN's Treaty and Aboriginal Rights traditional uses, culture, and ability to access and use and peacefully enjoy its Reserve Lands.

Strategic Plan

The Strategic Plan excludes any consideration of CPDFN's Treaty and Aboriginal Rights, Traditional Land Use or culture, and prioritizes activities that are incongruent with CPDFN's current and continued ability to exercise its Treaty and Aboriginal Rights, Traditional Land Uses, and culture. Specific examples include, but are not limited to:

11. Alberta's statement of commitment to optimizing the economic potential of the resource and general endorsement of the prioritization of development of the oil sands above all else (pages 14-15).
12. The Regional Vision presented on pages 22-23 where developing oil sands reserves are prioritized above all else, and there is no goal to protect Treaty and Aboriginal rights, Traditional Land Use and culture.
13. The inadequate role given to Aboriginal Peoples in implementing sub plans under a regional plan that does not include their Treaty and Aboriginal Rights, Traditional Land Use and culture i.e. see pages 23 and 69. The opportunity to provide information does not translate into any government commitment to take actions or require decision-makers to exercise their functions in a manner consistent with the continued ability of Aboriginal Peoples to exercise Treaty and Aboriginal rights, engage in Traditional Land Use, practice their culture or to access, peacefully use and occupy their Reserve Lands.
14. Page 23 – explicitly contemplates future mine development in the Richardson conservation area, which is the Richardson Backcountry “if approvals are granted in the future for a mining development in the new Richardson PLART...” or park “the boundaries for this area will be re-examined, if deemed necessary and acceptable as a result of the regulatory review for the mining development.”
15. Inadequate land designated for the Dillon Wilderness Area.

16. Inadequate lands south of Fort McMurray designated as Conservation Areas.
17. Page 25 – Strategic Directions for the region – clearly oil sand development is expected and encouraged as being the dominant activity in the region.
18. Page 26 – Encouraging Timely and Progressive Reclamations section – reclamation required only to an equivalent land capability (rather than to a state consistent with Aboriginal Traditional Land Use and the exercise of Treaty Rights), to date this approach has not mitigated impacts on Traditional Land Use in the oil sands.
19. Page 27 – “Managing Air, Water and Biodiversity, and Minimizing Land Disturbance” – there is no management framework — including limits, triggers and thresholds — for Aboriginal and Treaty Rights and Traditional Land Use.
20. Page 29 – “Creating New Conservation Areas” – areas were not created or set aside to be consistent with Aboriginal and Treaty rights practice and Traditional Land Use, despite CPDFN’s submission.
21. Page 29-30 – Development that is incompatible with the exercise of CPDFN’s Aboriginal and Treaty rights practice is still allowed in conservation areas.
22. Page 30 – areas will be managed to provide “low impact backcountry recreation opportunities and nature based tourism products and services” without any mechanism for consideration of the increased direct and adverse impacts such activities will have upon CPDFN. Restrictions on motorized vehicles will impact Treaty rights exercise if put in place without regard to the needs of CPDFN members.
23. Page 32 – Providing New Recreation and Tourism Opportunities – “these areas will be managed to ...ensure quality recreational experience.”
24. Page 33 – Existing tenures honoured. Access to water resources and associated allocation and disposal infrastructure permitted.

Government will consider new surface access through these areas. No consideration of existing Treaty rights. In PLARTs, industrial development activities will continue while impacts on recreation and tourism features will be minimized. No goal of minimizing impacts on CPDFN’s Treaty and Aboriginal Rights, Traditional Land Uses and culture.

25. Page 34 – Inclusion of Aboriginal Peoples in Land-use Planning. Relegates CPDFN to the role of [Traditional Ecological Knowledge] TEK and information provider. No commitment by Alberta to do anything with this information that is protective of CPDFN Treaty rights, Traditional Land Use and culture. See also page 63, outcome 7 “Inclusion of Aboriginal Peoples in land use planning.”

Implementation Plan

26. Requires review in its entirety.
27. Upholding section 35 of the *Constitution Act, 1982* and the continuation of CPDFN as a distinctive culture is not part of the vision for the Lower Athabasca Region.
28. Regional Outcomes are not designed to protect nor do they incorporate CPDFN’s Treaty Rights, Traditional Land Uses, culture, and peaceful use an occupation of its Reserve Lands. The first outcome is focused upon ensuring that the economic potential of the oil sands resource is optimized. Strategies for achieving outcome 1 do not include any measures or strategies to ensure actions are consistent with CPDFN’s Treaty rights, Traditional Land Uses and culture. In general, none of the regional outcomes or strategies to achieve them are designed to address or integrate CPDFN’s Treaty rights, Traditional Land Use and culture. See also Table 2.
29. In particular, CPDFN notes that the objective of maintaining ecosystem function and biodiversity is not a proxy for maintaining CPDFN’s ability to exercise its Treaty Rights and Traditional Land Use and culture, or for peaceful use and enjoyment of its Reserve Lands.

30. Page 51 – Surface Water Quality Objective does not incorporate Treaty Rights or Traditional Land Use, in particular avoidance behaviour, health concerns, right to clean water. Limits were not based upon Treaty Right or traditional use considerations.
31. Page 58 – Surface Water Quantity. Does not incorporate limits and triggers relevant to the exercise of Treaty Rights and traditional uses by CPDFN members. Phase 2 must incorporate limits, triggers and thresholds appropriate to maintenance of CPDFN Treaty rights and traditional uses, and ability to access and peacefully use and occupy its Reserve Lands.
32. Page 65 – Monitoring, evaluating and reporting - needs to include thresholds, triggers limits [regarding] Treaty Rights, traditional uses and impacts to CPDFN's ability to enjoy its Reserve Lands, as well as CPDFN's explicit involvement as monitors.

Schedules

33. Schedule A – Air Quality Management Framework Limits and Triggers.
34. Schedule B – Surface Water Quality Management Framework Limits and Triggers.
35. Schedule C – Groundwater Management Framework Interim Quality Triggers.
36. Schedule E – Lower Athabasca Regional Trail System Plan – does not include Treaty rights and Traditional Land Uses or ability to peacefully use and enjoy Reserve Lands as criteria or objectives, or as factors to be included in development of plan.
37. Schedule F.
38. Schedule G.

ISSUE TWO

The Lower Athabasca Regional Plan does not include consideration of, nor does it address, how the Applicant's members can continue to access and peacefully use and occupy Reserve Lands.

In its submission, the Applicant stated, “the LARP does not include nor address how CPDFN members can continue to access and peacefully use and occupy their Reserve Lands.”⁵

The Applicant also referred to the Jackpine Mine Expansion hearing decision of the [Alberta Energy Regulator] (ABAER) on a submission made by Athabasca Chipewyan First Nation (ACFN).

ISSUE THREE

The Lower Athabasca Regional Plan is being applied by decision-makers and relied upon by oil sands companies to preclude the protection of Aboriginal and Treaty rights and land uses.

The Applicant referred to a number of ABAER decisions and applications pertaining to this issue.⁶

ISSUE FOUR

The Lower Athabasca Regional Plan is being applied by decision-makers to effectively rule out the possibility of establishing areas that can be set aside for Traditional Land Use and the exercise of Treaty rights.

The Applicant again referred to the ABAER Joint Review Panel for the Jackpine Mine Expansion recommendations:

- a. the effects of the offsets on existing Traditional Land Use and the need to maintain areas for Traditional Land Use by Aboriginal Peoples, including areas containing traditional plants and other culturally important resources (paragraph 12);
- b. the need to preserve the suite of species and ecosystems in the region and to maintain local and regional biodiversity as well as the need to preserve unique environments and species (paragraph 996); and

⁵ CPDFN Application; page 7 ⁶ CPDFN Application; pages 9-11

- c. the need for conservation effects to address the impacts on some migratory birds (paragraph 936).⁷

CPDFN listed the adverse effects — as noted under Issue One — that they are suffering, or expect to suffer, as a result of specific sections of the LARP:⁸

1. Decisions are being and will be made, and development is being and will steamroll ahead without the information or planning required to maintain CPDFN's Treaty rights, traditional uses, and ability to access and peacefully use and occupy its Reserve Lands.
2. Loss of ability to exercise Treaty and Aboriginal Rights in preferred places by preferred means. Place-based knowledge and cultural landscape are essential to CPDFN's traditional way of life.
3. Loss of ability to engage in Traditional Land Use and other traditional pursuits.
4. Loss of ability to transmit traditional knowledge and culture to future generations.
5. Loss of ability to engage in cultural activities and live in a culturally appropriate manner.
6. Loss of culture.
7. Loss of identity as Dene people.
8. Loss of food security.
9. Increased risks, and perceived risks, associated with consumption of traditional foods.
10. Health impacts linked to changes in diet from traditional to store-bought foods, as well as to contamination of country foods, and change in lifestyle as Traditional Land Use opportunities decrease.
11. Recreational use of much of the Traditional Lands has already interfered with CPDFN's exercise of rights in the area. The LARP designations may encourage further consumptive and non-consumptive sport and commercial hunters and fishers, as well as increasing numbers of

recreational snowmobiles, all-terrain vehicles and other backcountry transportation uses. They may also support commercial tourism development. And if the proposed road and trail networks discussed under the LARP come to fruition, access to the area for everybody will be greatly improved and with more access and more non-indigenous and recreational users, CPDFN is often not able to hunt in areas due to safety concerns. That is a direct impact.

12. The LARP's goals of increasing recreation and tourism will have direct and adverse impacts upon CPDFN, for example by increasing competition for resources, reducing harvest success, preventing the discharge of firearms due to concerns for the safety of others; and detracting from the incidental rights to feel safe, secure and experience remoteness and solitude on the land.
13. Several areas have been identified by CPDFN as places the members wish to protect as sanctuaries for their current use and for the use of future generations. The [Government of Alberta] GoA LARP does not sufficiently consider these priority areas.
14. There is a high potential that the LARP land use designations are not mitigation for CPDFN's regional concerns – they could actually attract tourism-based investment and government induced infrastructure, which would proactively encourage incremental and new sport and recreational use in CPDFN's homeland areas. This would further restrict CPDFN use of the area, in particular their use for hunting.
15. No meaningful ability to be involved in stewardship activities in core CPDFN areas. Encouraging CPDFN's involvement in developing sub plans under the overarching plan that explicitly does not incorporate protection of Treaty Rights and Traditional Land Uses does not address CPDFN's concerns, creates an impossible situation where CPDFN is asked to provide input into a framework that will not be able to be responsive to that input.

⁷ CPDFN Application; page 9 ⁸ CPDFN Application; page 9

16. Loss of ability to access fishing, hunting, and trapping areas due to water quantity issues in the Christina River Watershed and the Athabasca River and other surrounding lakes and streams.
17. Contamination of local water.
18. Decision-makers will allow the removal of tracts of land from the diminishing intact land base available to support CPDFN's Aboriginal and Treaty rights and the traditional resources required to sustain these rights, without regard to what is required to support the continued exercise of CPDFN's Aboriginal Treaty Rights, traditional uses, and culture.
19. In addition to the direct removal of lands, approval of oil sands development projects will, in practice, result in an even more expansive area of land, beyond the immediate and substantial footprint of individual projects, due to gates, fences, concerns about noise, dust, contamination of air, waterways, and other traditional resources, and other factors.
20. CPDFN views the land as a living being. Injury to parts of the body affect the health of the whole.
21. Further transformation of the land within the Lower Athabasca Planning Region from natural to industrial [will] exacerbate current conditions and effectively preclude meaningful use of an expansive area within CPDFN's Traditional Lands.
22. Psychological impacts [regarding] failure to fulfill cultural obligations to ensure that seven generations from now, CPDFN members can exercise their Rights and culture.
23. Chronic fears around traditional food and medicine safety.
24. Chronic fear around air and water quality.
25. Impact to CPDFN's ability to exercise Dene spiritual practices.
26. The disturbance of lands, waters and natural resources that Aboriginal Peoples are culturally connected to can cause deep psychological

harm on two fronts. First, feelings of having no control in decision-making about how the environment is allocated, used, and disturbed can result in individual and collective feelings of hurt, frustration and anger. Secondly, the worldview or cosmology of most indigenous peoples, and of CPDFN, dictates that humans are related on a level basis with the animate and inanimate components of the environment. Humans are expected to treat all human and non-human relatives equally and with respect, including a moral code of not harming the environment necessary for survival and being proactive in ensuring the safety and survival of not just humans, but all relations. Witnessing environmental degradation can be stressful. Emotions can include deep spiritual fear of repercussion; feelings of shame about not being able to protect human and non-human relations, and about the losses that will be experienced by the younger generation and generations not yet born; and feelings of anxiousness, frustration, depression and fear that the current generation cannot fulfill its responsibilities to transfer the cultural knowledge necessary for the health and sustainability of their culture and the environment.

27. Erosion of the foundational relationship between CPDFN and Alberta as Treaty Partners.

CPDFN concluded its submission by requesting that the Minister "amend the provisions of the Lower Athabasca Regional Plan identified in Part 1A herein, to be consistent with the exercise of CPDFN's Treaty and Aboriginal rights and Traditional Land Use in perpetuity."

II. Response Argument of the Crown of the Province of Alberta

The Crown submitted their response to the Chipewyan Prairie Dene First Nation Application on June 25, 2014.

As per the Crown's response to previous submissions from Applicants, it alleged the Review Panel has no jurisdiction to address the following concerns with respect to the LARP:

- No jurisdiction to determine questions of constitutional law;
- No jurisdiction to consider alleged inadequacy of consultation during the LARP creation or implementation;
- No jurisdiction to consider alleged harms from activities which pre-date the LARP;
- No jurisdiction to consider alleged harms related to potential future development activities;
- No jurisdiction to consider alleged harms related to the implementation of the LARP; and
- No jurisdiction in relation to alleged omissions from the LARP.⁹

The Crown asserted that the Applicant, CPDFN, has “not shown that there is any existing or future harm to income, property, health or quiet enjoyment of property caused by a provision of the LARP so as to trigger the Panel’s power to provide recommendations for amendment to the Minister.”¹⁰

With respect to the concern of the Applicant’s specific allegations of harms related to potential future development activities, the Crown noted again that such concerns are outside the Review Panel’s jurisdiction, and the following concerns addressed by CPDFN fall within this category:¹¹

- The contemplation of future development which is incompatible with the Applicant’s view of Treaty rights practice in conservation areas, including reference to the mineral tenures in the Richardson Wildland Park (Part A, paragraph 18 of the Applicant’s submission);
- Loss of ability to exercise what the Applicant considers to be its members’ Treaty and Aboriginal rights in preferred places by preferred means (Part C, paragraph 2 of the Applicant’s submission);
- Loss of ability to engage in Traditional Land Use and other traditional pursuits (Part C, paragraph 4 of the Applicant’s submission);
- Loss of ability to transmit traditional knowledge and culture to future generations (Part C, paragraph 5 of the Applicant’s submission);
- Loss of ability to engage in cultural activities and live in a culturally appropriate manner (Part C, paragraph 6 of the Applicant’s submission);
- Loss of culture (Part C, paragraph 7 of the Applicant’s submission);
- Impact to identity as Denesuline people and ability to exercise Dene spiritual practices (Part C, paragraphs 3 and 24 of the Applicant’s submission);
- Loss of food security (Part C, paragraph 8 of the Applicant’s submission);
- Increased risks, and perceived risks, associated with consumption of traditional foods (Part C, paragraph 9 of the Applicant’s submission);
- Health impacts linked to changes in diet from traditional to store-bought foods, as well as contamination of country foods, and change in lifestyle as Traditional Land Use opportunities decrease (Part C, paragraph 10 of the Applicant’s submission);
- Loss of ability to utilize the Athabasca River as a navigation corridor (Part C, paragraph 16 of the Applicant’s submission);
- Loss of ability to access fishing, hunting and trapping areas due to water quantity issues (Part C, paragraph 17 of the Applicant’s submission);
- Contamination of local water (Part C, paragraph 18 of the Applicant’s submission);
- Decision-makers will allow removal of tracts of land from land base supporting the exercise of what the Applicant considers its Treaty rights and traditional uses (Part C, paragraph 19 of the Applicant’s submission); and
- Further transformation of land from natural to industrial (Part C, paragraphs 20-23 and 25 of the Applicant’s submission).

⁹ Response Submissions of the Government of Alberta; page 1, paragraph 4 ¹⁰ Response Submissions of the Government of Alberta; page 1, paragraph 7

¹¹ Response Submissions of the Government of Alberta; page 14, paragraph 69

In any event, Alberta submitted that the LARP either (a) reduces the likelihood of prospective future harm which the Applicant is concerned with, or (b) has no effect on such harms. The LARP, overall, does not increase the possibility of such potential future harms.

With respect to the Applicant's concern regarding the potential for future development in conservation areas, Alberta submitted that many forms of development, including petroleum and natural gas development and oil sands development, are not permitted in the conservation areas, including the Richardson Wildland Park. The LARP protects a large amount of Traditional Land — an additional 1.5 million hectares — from future industrial development.

In regards to the concerns outlined by the Applicant in Part C of its submission, Alberta submitted that Treaty rights, while constitutionally recognized and affirmed, are not unlimited. Specifically, the Treaty right to hunt, trap and fish for food is not site-specific; it is the activity which is protected. Further, the Supreme Court of Canada has found for the exercise of Treaty rights that changes in method do not change the essential character of the practices nor diminish the rights. Accordingly, a First Nation's exercise of Treaty right in a manner different from that previously used does not necessarily diminish the exercise of the Treaty right. Alberta submitted that a changing landscape may change the exercise of Treaty rights, without harming such rights.

In summary, Alberta submitted that the above-alleged harms relate to potential future activities and are outside of the Panel's jurisdiction.

With respect to the question of alleged "omissions" from the LARP raised by the Applicant, the Crown maintained that the Review Panel again has no jurisdiction to address such matters, as noted on page 16 of its argument. The following concerns raised by CPDFN would fall into this category:

- The LARP does not include a specific regulatory details plan for Traditional Land Use and Treaty rights nor does it contain other measures that are protective of what the Applicant considers to be its members' Treaty and Aboriginal

rights, Traditional Land Uses and culture (Part A, paragraphs 1-3, 10, 12, 16 and 26-30 of the Applicant's submission);

- The conservation areas have not been selected nor designed, nor their objectives set, in a manner consistent with the Applicant's view of its members' Treaty rights and Traditional Land Uses or with the Applicant's ability to access and peacefully use and occupy Reserve Lands (Part A, paragraph 4, 5 and 17 of the Applicant's submission);
- The Air Quality Management Framework triggers and limits do not include reference to the health of the Applicant's members (Part A, paragraph 6 of the Applicant's submission);
- Reclamation is only required to an equivalent land capability (Part A, paragraph 15 of the Applicant's submission). The LARP does not require reclamation to any particular standard — it merely outlines the existing requirement (paragraph 91, page 19 of the Applicant's submission);
- Conservation areas will be managed to provide low-impact backcountry recreation opportunities and nature-based tourism products and services without any mechanism for consideration of the impacts such activities will have upon the Applicant, including restrictions on motorized vehicles (Part A, paragraph 20 of the Applicant's submission);
- A large portion of the lands recommended by the Applicant for preservation in the Dillon Wildlife Area were not accepted (Part A, paragraph 19 of the Applicant's submission);
- With respect to the designation of conservation areas, Alberta submitted that one of the key criteria for establishment of these areas was that they supported Aboriginal Traditional Land Use.¹² These uses were considered, along with other criteria, such as little to no industrial activity and areas that are representative of the biological diversity in establishing the location of these areas;

¹² Lower Athabasca Regional Plan (LARP); page 30

- The LARP also expressly indicated that the Government of Alberta will work with First Nations in developing the biodiversity management framework, the landscape management plan, and the Lower Athabasca Regional Trail System Plan;¹³
- The Crown maintained that the triggers and limits established in the Air Quality Management Framework are based on the Alberta Ambient Air Quality Objectives (AAAQO), which were developed and implemented under the *Environmental Protection and Enforcement Act*.¹⁴
- The Government of Alberta responded to the Applicant's concern "that there is "no mechanism" for consideration of the potential impacts on the Applicant of future development of backcountry recreation and nature-based tourism."¹⁵ The Crown maintained that the LARP does not preclude the duty of the Government of Alberta to consult with the Applicant. In addition, in its argument, the Crown responded:

"Pending plans formally designating areas or routes, the LARP specifies that "off-highway vehicle use is permitted on existing access." The rationale for restricting motorized access to designated areas is "to mitigate potential biodiversity impacts associated with random motorized access. This in turn will support the exercise of traditional activities on the landscape."¹⁶

With respect to the Applicant's concerns regarding the Dillon Conservation Area, the Crown acknowledged this area is contiguous with the Gipsy-Gordon Conservation Area designated under the LARP. New forestry harvesting and mineral activities are not contemplated with these areas.¹⁷

The Crown asserted that the following concerns raised by the Applicant do fall within the jurisdiction of the Review Panel, but that the content of the LARP does not, in fact, cause any harm to CPDFN:

- The LARP prioritizes development.¹⁸
- The LARP's designations of provincial recreation areas and public land areas for recreation and tourism (PLARTs) may result in increased recreation areas and, therefore, increased competition for resources, impacting the Applicant's members.

The Crown responded to these two concerns as follows:

- The LARP does not prioritize development. The LARP "aligns provincial policies at the regional level to balance Alberta's economic, environmental and social goals."¹⁹
- The Crown argued that any effect from the LARP's designation of recreation areas is not adverse. The majority of the lands that will be established as PLARTs are currently vacant public lands administered under the *Public Lands Act* and the *Public Lands Administration Regulation* (PLAR).

The Crown also noted the following:

"On these vacant public lands, motorized access is not limited to designated routes and any person can enter onto and occupy this land for a recreational purpose for up to 14 days, subject to certain expectations. (PLAR, section 32)

Once established as either provincial recreation areas under the *Provincial Parks Act* or as public land use zones under the *Public Lands Act*, these areas will be subject to additional regulation. For example, motorized recreation will be limited to designated routes. This regulation is intended to mitigate impacts associated with random motorized access. Regulation of motorized access will increase, not detract from, safety. Hunting, with its attending safety concerns, will continue to be regulated by existing legislation."²⁰

¹³ LARP; pages 63-65 ¹⁴ Response Submissions of the Government of Alberta; page 17, paragraph 86 ¹⁵ Response Submissions of the Government of Alberta; page 18, paragraph 89 ¹⁶ Response Submissions of the Government of Alberta; page 18, paragraph 90 ¹⁷ LARP; page 84 ¹⁸ CPDFN Application; Part A, paragraphs 11-12

¹⁹ LARP; page 2 ²⁰ Response Submissions of the Government of Alberta; pages 20-21, paragraphs 105-106

The Government of Alberta concluded by arguing that the majority of concerns raised by the Applicant are not related to the content of the LARP and are, therefore, outside the jurisdiction of the Review Panel. The Crown submitted that no harm, as alleged, arises from the content of the LARP to CPDFN and, therefore, the Applicant is *not* “directly and adversely affected” in any way by this document.

III. Chipewyan Prairie Dene First Nation’s Response to the Crown’s Submission

Chipewyan Prairie Dene First Nation responded to the Crown’s submission on August 24, 2014.

CPDFN submitted a comprehensive overview pertaining to the Review Panel’s broad jurisdiction, the meaning of “directly and adversely affected,” the content of the LARP and the matter of cumulative effects.

This overview will address the Applicant’s concerns with the Crown’s position that the Review Panel has very limited jurisdiction concerning issues raised by CPDFN regarding the LARP.

Application Does Not Raise Questions of Constitutional Law:

The Applicant stated that, “contrary to the Crown’s Response, CPDFN has not asked the Panel to determine a question of constitutional law or to make findings that LARP infringes CPDFN’s Constitutional Rights.”²¹ However, as noted in paragraph 55 of their submission, the Applicant took the position that the protection of CPDFN’s constitutional rights are clearly within the content of the LARP and, therefore, part of the Panel’s review.

For example, CPDFN stated that the LARP directly links to biodiversity management framework and landscape management plan with the potential protection of constitutionally-protected rights, in which the Review Panel can assist the Crown in amending the LARP to respect such rights.

Crown Errs in Interpreting CPDFN Concerns Relate to Inadequate Consultation during LARP Creation or Implementation:

The Applicant pointed out that ongoing consultation with Aboriginal Peoples is outside the Review Panel’s jurisdiction. CPDFN stated that the Strategic and Implementation Plans in the LARP identify inclusion of Aboriginal Peoples in land-use planning decisions by relying on ongoing consultation with First Nations.

CPDFN noted that its concern that “general statements including Aboriginal Peoples in land-use decisions without any detailed commitment is ineffective in addressing their constitutional rights.” Instead, the Applicant argued that without any effective and detailed commitment from the Government of Alberta, the LARP only “promotes, authorizes and justifies the accumulation of impacts caused by development without any assessment of those impacts on CPDFN.”²²

Existing Harms on CPDFN are Within the Scope of Review:

CPDFN stated that there are already very significant effects of development on the Applicant, which has submitted evidence of adverse effects on the community, due to the decline of available land and declining wildlife populations.

CPDFN disagreed with the Crown that existing impacts are outside the scope of the Review Panel’s consideration. The Plan is intended to manage cumulative effects, which are existing impacts, as well as existing impacts combined with future approved and planned impacts.

In referencing the LARP, CPDFN stated that oil sands development is to be managed by strategies and tools to ensure a healthy environment and the respect of the constitutional rights of Aboriginal communities. CPDFN contended that the significant problem is that strategies are not yet developed to carry out this objective.²³

²¹ CPDFN Submission; paragraph 53 ²² CPDFN Submission; paragraph 57 ²³ LARP; page 25

In its submission, the Applicant argued that “conservation areas largely overlap with existing parks that have had limited development but have not prevented the existing impacts from oil sands development [or the decline of the wildlife population]. Instead, the LARP has established provincial designated recreational areas right within CPDFN’s cultural homeland in [close] proximity to [CPDFN’s] settlement areas and the lands [protected under their Treaty and constitutional rights].²⁴

CPDFN noted that, “the LARP contemplates additional planning for increased tourism and recreational use of the region to better manage the impact on the land of the Plan’s aim to increase tourism and recreation within [its] Traditional Territory.” To date, two years after the creation of the LARP, no such planning is in existence.²⁵

In addition, CPDFN noted that the LARP’s promotion of increased recreational pursuits could conflict with the Government of Alberta’s need to protect the rights of Aboriginal Peoples.

CPDFN stated that the LARP²⁶ refers to the implementation of any “integrated land management” plan between industry users, public land disturbance, and communities. The Applicant noted that to date, such a plan is still not in place.²⁷

Harms Resulting from Potential Activities are Within the Scope of Review:

CPDFN argued that the position taken by the Government of Alberta that the Review Panel cannot consider future harms in relation to the LARP is incorrect.²⁸ The Plan is “intended to ameliorate the existing gaps in the regulatory system and conditions in order to achieve healthy environments and communities in the future.”

CPDFN noted that, in the LARP, the Crown indicated that many initiatives in the document refer to future times for completion, but at the same time, takes the position that the Review Panel cannot consider potential impacts as a result of future development and sustainable development. Existing impacts, including wildlife populations and land disturbances, have all occurred since the publication of the LARP.

Harms Resulting from the Application of LARP are Within the Scope of Review:

CPDFN argued that the Government of Alberta’s position — that the implementation of the LARP cannot be considered because only the contents of the LARP can be reviewed by the Review Panel — is unsupportable. In its submission, the Applicant maintained that the Government of Alberta “refuses to consult and address the need to mitigate the impacts on CPDFN, such as the ability to harvest country foods” on the grounds that such concerns are not “project-specific,” which is the approach taken by the Government of Alberta.²⁹

Harms Resulting from LARP Omissions are Within the Scope of the Review:

The Crown has taken the position that the Review Panel does not have jurisdiction to consider omissions in the LARP. CPDFN’s position, with respect to this issue, is that the LARP does *not* preclude the Review Panel from considering omissions, such as elements of the LARP referenced but not included.

The Applicant stated that, “the interpretation of the Act clearly places omissions within the Panel’s jurisdiction. Any request for review must be made within 12 months from the date the regional plan came into force.”³⁰ CPDFN then argued that the legislative intent of the “review was for the Panel to review the Plan as it exists today and how it affects [Applicants]... Rather, the review power, it is argued, is more likely intended to capture problems in the way the regional plan is crafted, including critical omissions. [Therefore], the incompleteness of the Plan is a matter within the purview of the [Panel to consider].”

CPDFN also submitted that the “exclusion of necessary tools and measures to protect CPDFN’s Constitutional Rights does fall within the scope of the Panel’s review because the LARP identifies CPDFN’s Constitutional Rights as requiring to be considered by the LARP, but then fails to consider them in any substantive way while allowing impacts of development to accumulate.”

²⁴ CPDFN Submission; paragraph 61 ²⁵ CPDFN Submission; paragraph 62 ²⁶ LARP; pages 38-39 ²⁷ CPDFN Submission; paragraph 64 ²⁸ CPDFN Submission; paragraph 66

²⁹ CPDFN Submission; paragraph 73 ³⁰ CPDFN Submission; paragraph 76

The Applicant also referred to the argument of the Crown's submission³¹ regarding the decision of the powers debate preventing the Government of Alberta from managing development, so as not to adversely affect, or eliminate, CPDFN's constitutional rights. CPDFN suggested that this position is wrong. The LARP itself recognizes that the Government of Alberta has a duty to consult and accommodate such rights. CPDFN referred to a number of Supreme Court of Canada decisions to validate this claim.

The Applicant also relied on article 12 of the *Natural Resources Transfer Agreement, 1930* and subsection 35(1) of the *Constitution Act, 1982*, to reinforce its position with respect to this matter.³²

Crown Errs in Claiming Matters Within Panel's Jurisdiction do not Directly and Adversely Affect CPDFN:

CPDFN has taken the position that the LARP *does* prioritize oil sands development, which directly and adversely affects CPDFN.³³ The Applicant is of the opinion that most of the lands in the region are designated for oil sands development. Apart from the conservation areas, it is argued that there are no limits that prevent or impede full development, even though the LARP promises to manage the impacts on such development. In addition, the biodiversity management framework and the landscape management plan are not in place yet to address the concerns of CPDFN.

In its submission, the Applicant argued that, while the Crown [understands] that CPDFN cannot rely on what is missing from the LARP to claim it is "directly and adversely affected," [it, at the time] urges the Review Panel to rely on additional regulations to offset such affects, with no time limits set as to when such regulations will be implemental.³⁴

CPDFN's submission noted that the Crown took the position that "CPDFN is not "directly and adversely affected" by the Plan as it currently exists because the regional plan provides for the existing regulatory regime with respect to recreation on public vacant land." CPDFN responded by stating, "that the existing

regulatory regime has not protected CPDFN's Constitutional Rights from the current declines in wildlife populations." CPDFN maintained that, "the LARP provides a clear policy statement that promotes increased recreational use of vacant public lands. This policy has a direct and adverse effect on CPDFN made worse by the lack of measures and "additional regulations" which the Crown claims are expected in the future and will protect Constitutional Rights."³⁵

CPDFN concluded its submission by stating that it is "directly and adversely affected" by the LARP in its failure to provide any effective measure or tool to balance the Applicant's Constitutional Rights with the other interests promoted and prioritized by the LARP, including oil sands development and increased recreation on public lands in the region.

The CPDFN also argued that the existing regulatory system fails to provide adequate protection of the health and rights of CPDFN, which are affected by the cumulative environmental effects of development.

³¹ Response Submissions of the Government of Alberta; page 17, paragraph 82 ³² CPDFN Submission; paragraph 79 and 80 ³³ LARP; pages 23 and 25

³⁴ CPDFN Submission; paragraph 84 ³⁵ CPDFN Submission; paragraph 85

FIGURE 1:
Chipewyan Prairie Traditional Lands Map (CPDFN Binder 2, Tab 15)

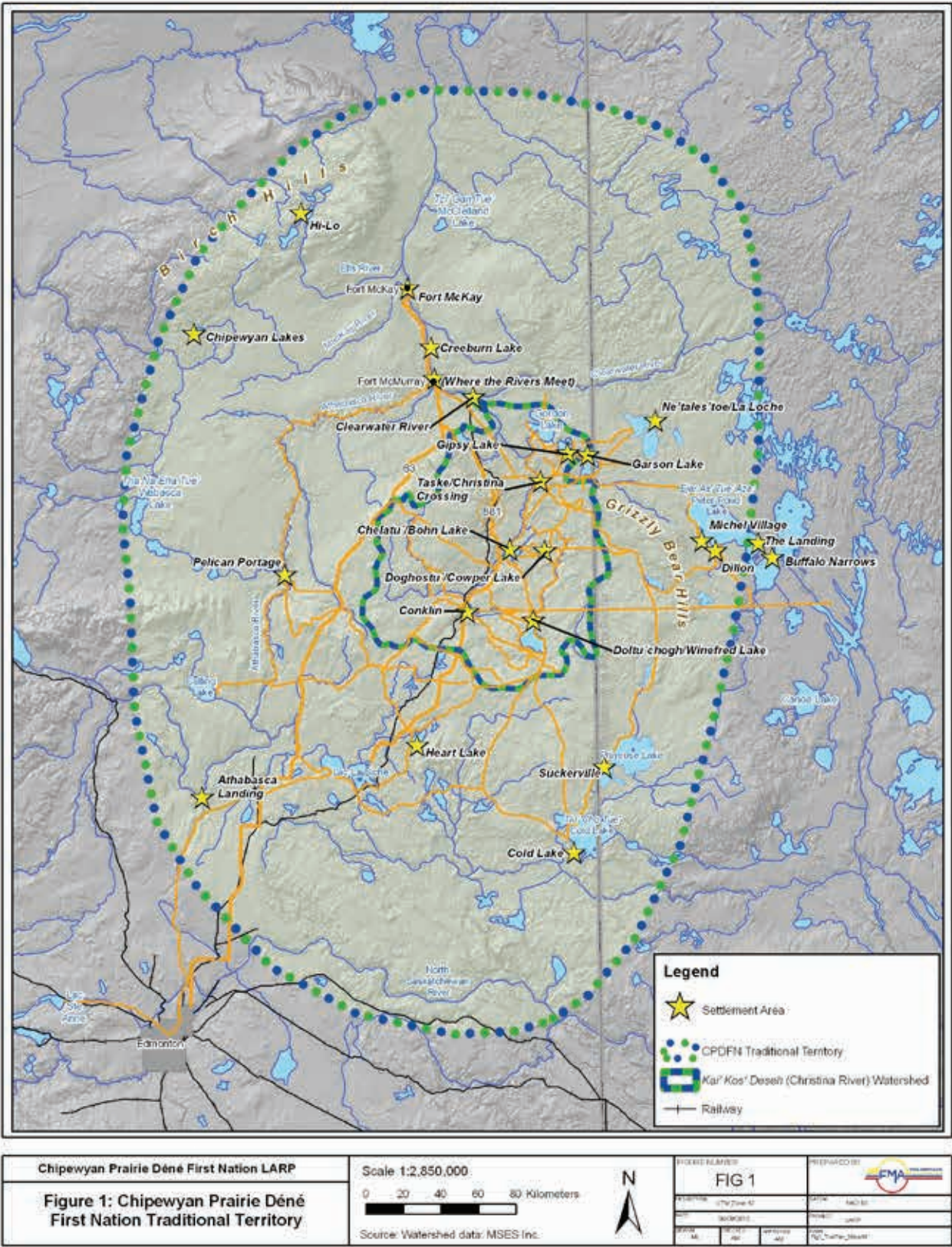


FIGURE 2:
CPDFN Selected Cultural/Sacred Landscape Features/Locales (CPDFN Binder 2, Tab 17)

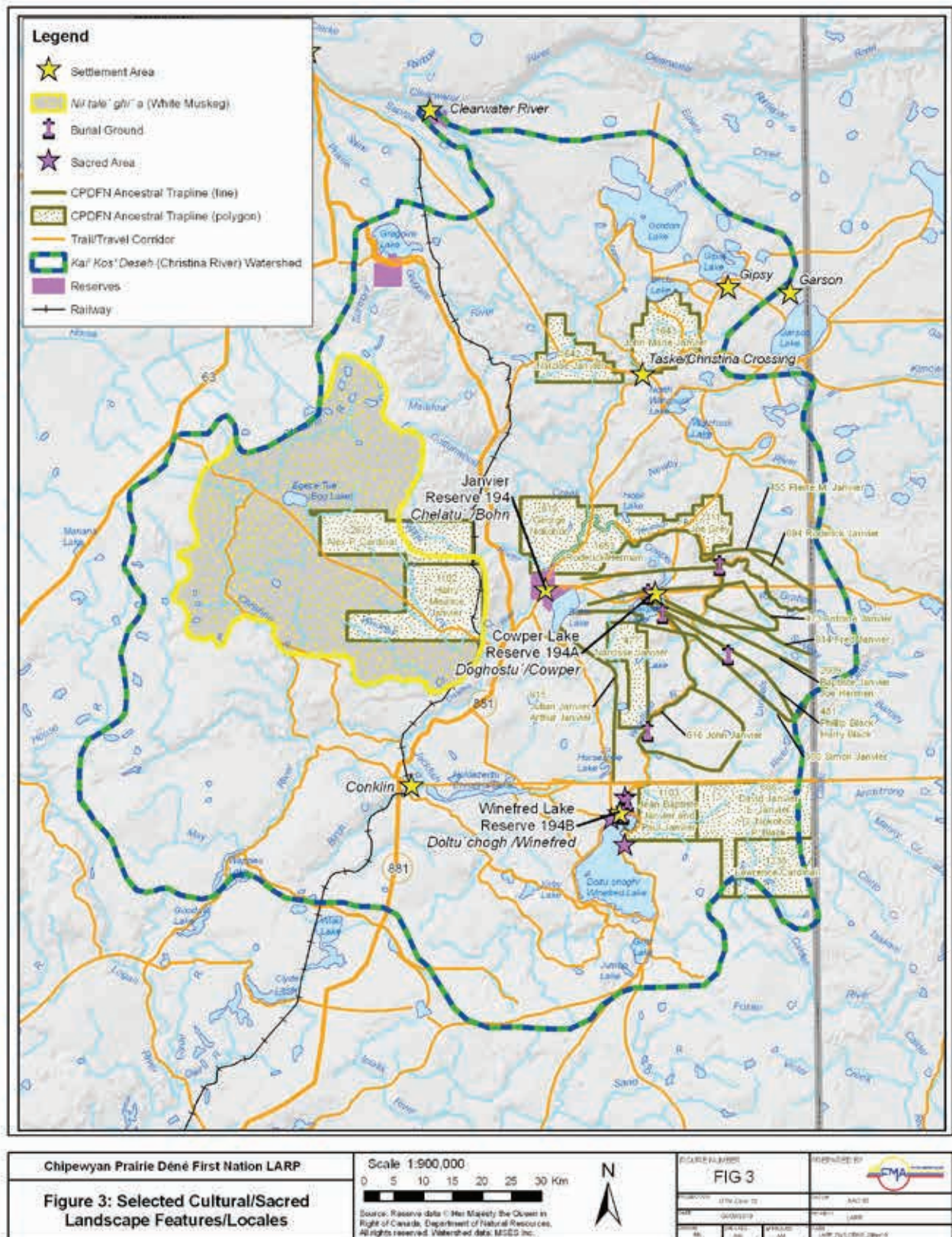
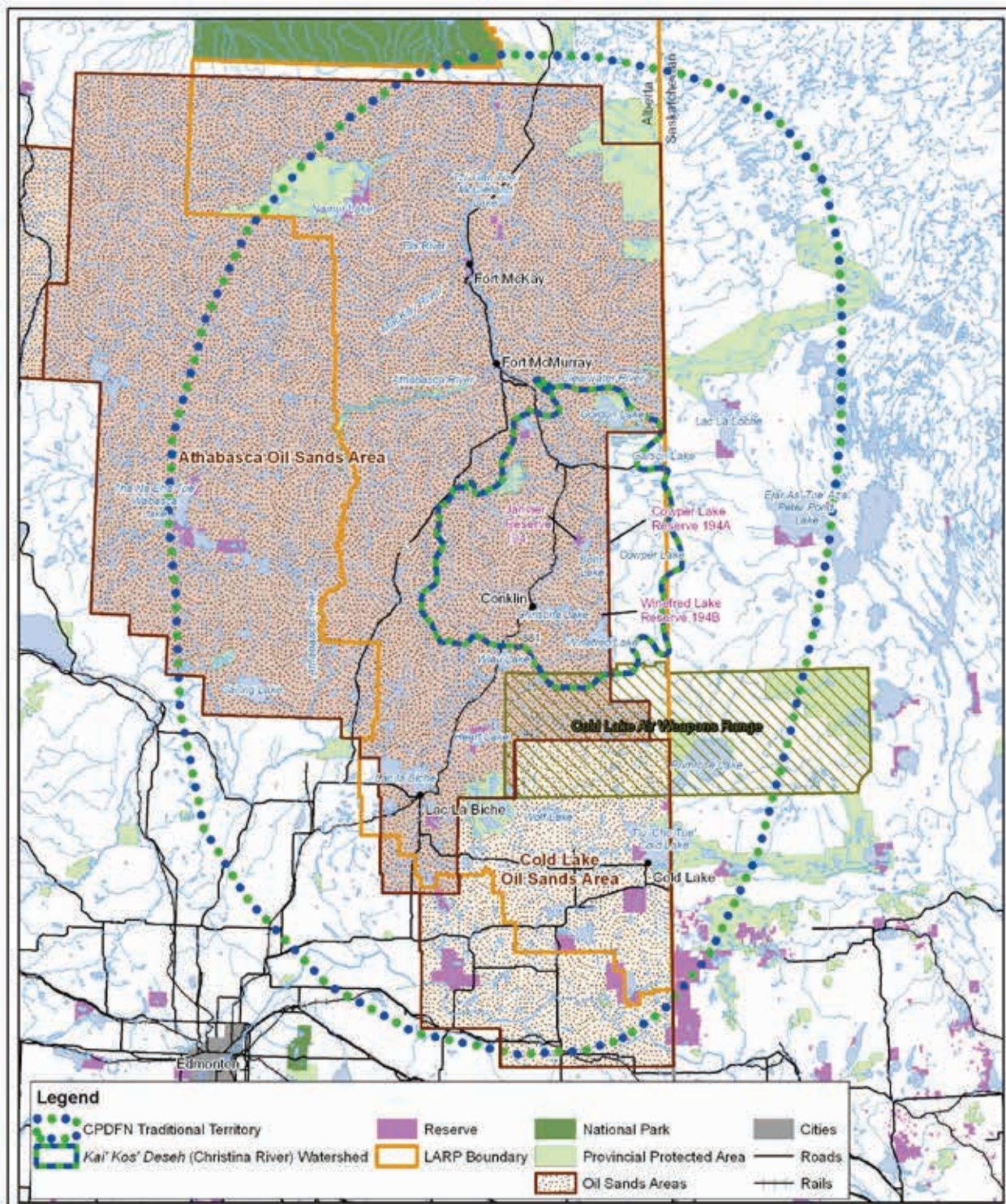


FIGURE 3:
Alberta Oil Sands and Other Regional Boundaries (CPDFN Binder 2, Tab 19)



Chipewyan Prairie Dené First Nation LARP

Figure 5: LARP, Alberta Oil Sands and Other Regional Boundaries

Source: Reserve data: © Her Majesty the Queen in Right of Canada, Department of Natural Resources. All rights reserved.
 Vector data: MGE Inc.
 Oil Sands Areas: Digitized (Feb 2010) from: www.energy.gov.ab.ca/oilsands/compinfo/OilSands_projects.pdf



0 10 20 30 40 Km
 Scale 1:2,850,000

MAP NUMBER

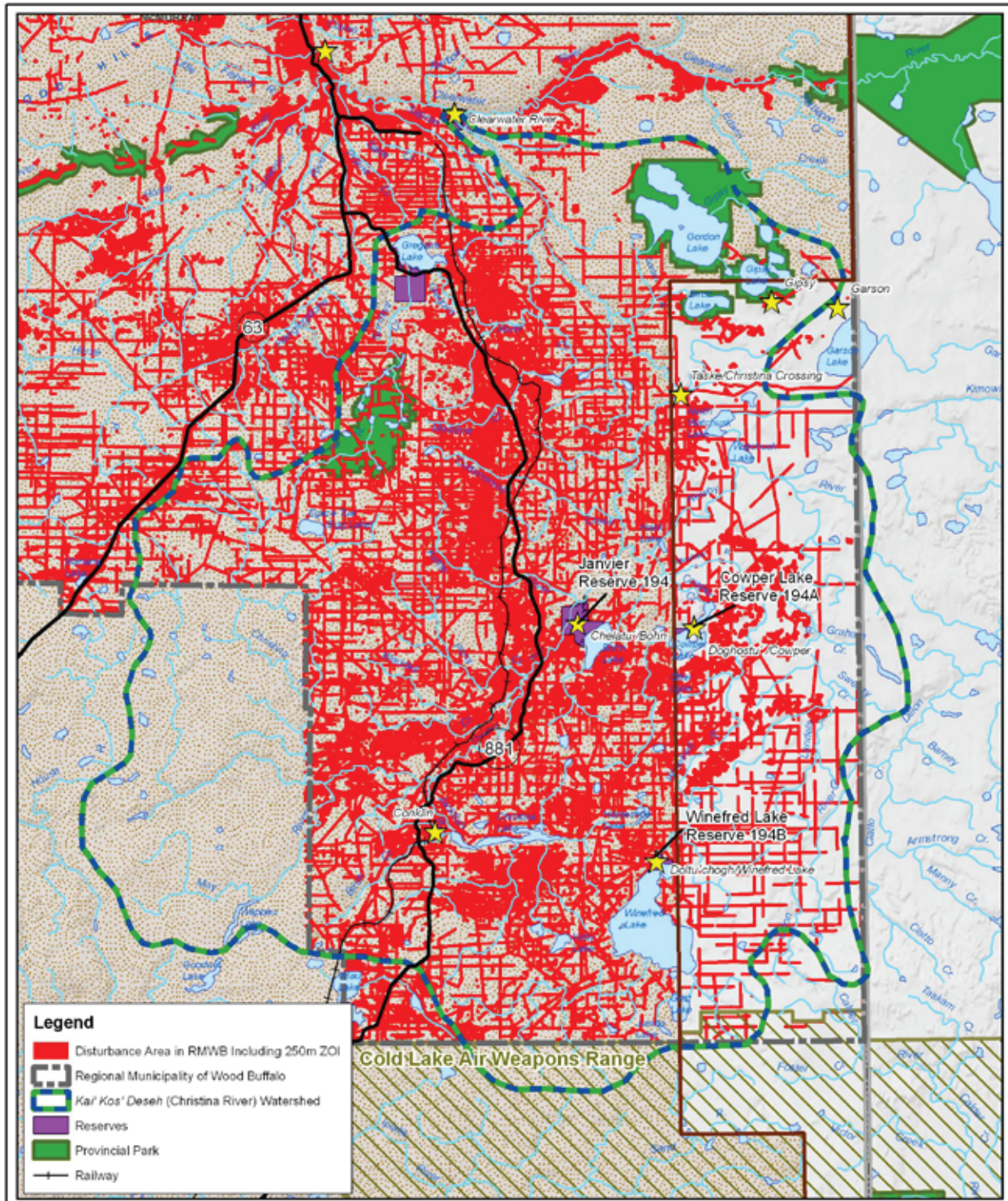
FIG 5

UTM Zone 18N
 30TQD29

PREPARED BY



PROJECT: LARP
 FILE: LARP_Regional_Boundaries_2010

FIGURE 4:**Land Cover Disturbance within Kai' Kos Deseh/Christina River Watershed (CPDFN Binder 2, Tab 21)**

<p>LARP</p> <p>Figure 7: Land Cover Disturbance within Kai' Kos Deseh/Christina River Watershed</p>	<p>Source: Reserve data © Her Majesty the Queen in Right of Canada, Department of Natural Resources. All rights reserved.</p> <p>Oil Sands Areas: Digitized (Feb 2010) from www.energy.gov.ab.ca/landAccess/pdfs/OilSands_projects.pdf</p> <p>Watershed and Disturbance data: MSES</p> <p>Scale 1:900,000</p>	<p>FIGURE 7</p> <p>FIGURE 7</p> <p>DATE: 09/07/10</p> <p>PROJECT: LARP</p> <p>PREPARED BY: CMA</p>
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FIGURE 5:
Areas for Protected Traditional Use within Chipewyan Prairie Dene First Nation Traditional Territory
(CPDFN Binder 2, Tab 22)

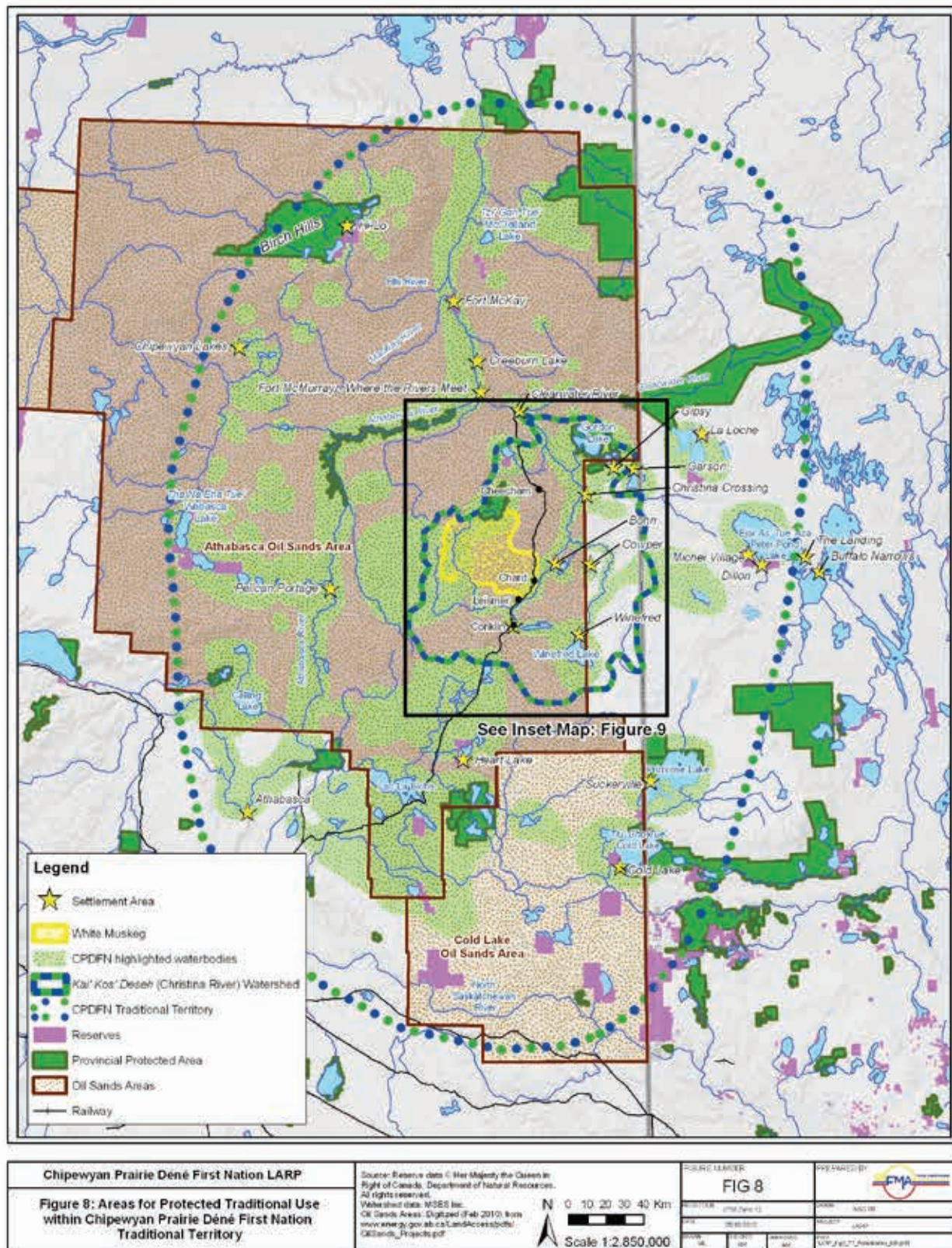
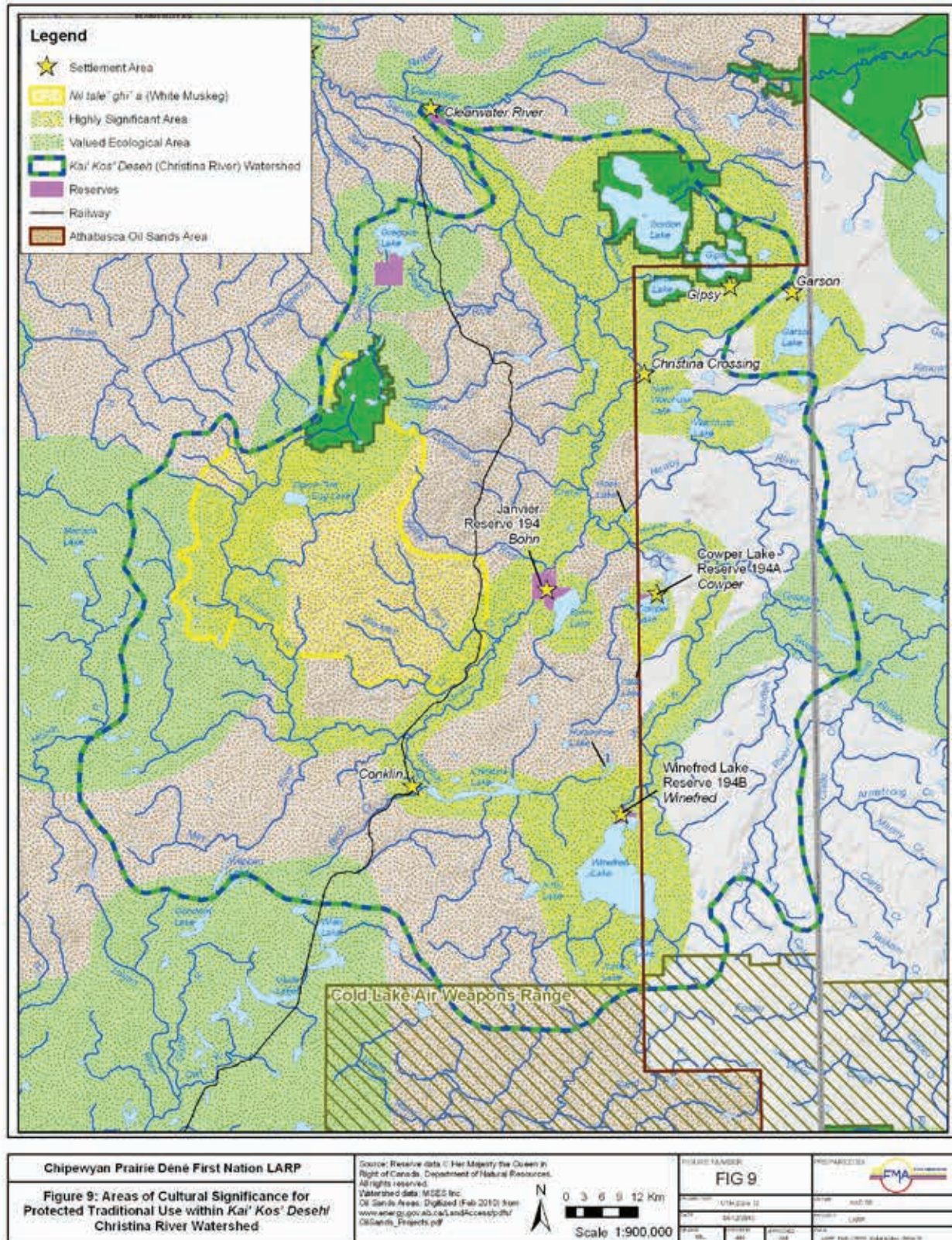


FIGURE 6:

Areas of Cultural Significance for Protected Traditional Use within Kia' Kos Deseh/Christina River Watershed (CPDFN Binder 2, Tab 23)



Panel Recommendations to the Minister for Chipewyan Prairie Dene First Nation

Issue One

The Lower Athabasca Regional Plan does not include, nor protect, Chipewyan Prairie Dene First Nation's (CPDFN) Treaty and Aboriginal rights, Traditional Land Uses, or culture.

RECOMMENDATIONS TO THE MINISTER

The Review Panel recommends that the Applicant has been “directly and adversely affected” by the “loss of income,” the resulting “health effects” on CPDFN members, and the “loss of quiet enjoyment of property” on its Territorial Lands.

REASONS FOR THE RECOMMENDATION

In CPDFN's submission, they listed a number of incidental rights with respect to their Treaty 8 guarantees. They noted that Treaty rights “include the right to harvest specific species in specific locations.”¹

The Applicant then argued that, “although the Crown secured the right to “take up” lands from time to time under the Treaty, this right is itself subject to the Crown's duty to consult and accommodate CPDFN's interests before reducing the area over which CPDFN members may continue to pursue their hunting,

trapping and fishing rights. This duty to consult and accommodate extends to CPDFN's concerns about the cumulative impacts of development on its Traditional Lands and the meaningful exercise of its Treaty Rights.”²

CPDFN's Traditional Territory — including, but not limited to, the Christina River Watershed — have undergone rapid and momentous change over the past 40 years. This change has significantly reduced CPDFN members' ability to exercise their Treaty rights on their Traditional Lands, proximate to the places where the vast majority of CPDFN members reside and, in turn, is resulting in significant pressure on culture and identity. While several factors have contributed to this change, the single most contributing factor has been industrial development projects such as bitumen extraction, conventional oil extraction, natural gas extraction, pipelines, power lines and substations, gravel pits, camps, disposal wells, landfills, oil sands and gas exploration, and forest harvesting and the associated footprints.

The Applicant submitted to the Review Panel a Traditional Land Use Study, “Kai' Kos' Dehseh”

¹ Chipewyan Prairie Dene First Nation (CPDFN) Application; page 2 ² CPDFN Application; page 3

Dene”- The Red Willow River (Christina River) People (2007). In this study, CPDFN listed a number of Traditional Land Use activities described by the First Nation’s elders and interviewees. As noted in the Argument of the Applicant in their submission, they had a number of objections with the LARP, both in the Regulatory Details Plans and in the Implementation and Strategic Plans of the document.

Some specific concerns addressed by CPDFN regarding Issue One, are as follows:

Regulatory Details Plan, Part 1 – General

- Section 1(e) excludes Traditional Land Use and Treaty Rights, including limits, triggers and thresholds.

Regulatory Details Plan, Part 8 – Monitoring and Reporting

- Sections 46 and 48, to the extent that they incorporate the Implementation Plan, as the Implementation Plan does not address, nor protect, CPDFN’s Treaty and Aboriginal Rights, traditional uses, culture and ability to access and use and peacefully enjoy its Reserve Lands.

Strategic Plan

- Excludes any consideration of CPDFN’s Treaty and Aboriginal Rights, Traditional Land Use or culture, and prioritizes activities that are incongruent with CPDFN’s current and continued ability to exercise its Treaty and Aboriginal Rights, Traditional Land Uses and culture.

Implementation Plan

- Upholding section 35 of the *Constitution Act, 1982* and the continuation of CPDFN as a distinctive culture is not part of the vision for the Lower Athabasca Region.
- Regional Outcomes are not designed to protect, nor do they incorporate, CPDFN’s Treaty Rights, Traditional Land Uses, culture, and peaceful use and occupation of its Reserve Lands.

- Monitoring, evaluating and reporting need to include thresholds, triggers and limits [regarding] Treaty Rights, traditional uses and impacts to CPDFN’s ability to enjoy its Reserve Lands, as well as CPDFN’s explicit involvement as monitors.

It is also interesting to recognize the submission from CPDFN, entitled Chipewyan Prairie Dene First Nation Submission on Protected Lands to ensure the continued Traditional Land Use of the Chipewyan Prairie Dene First Nation, (November 4, 2010) (Tab 13). The document includes quotes from previous workshops and studies concerning land-use issues.

The Crown, in response to this issue, once again described the limited jurisdiction of the Review Panel, particularly in regards to any allegations of harms to potential future development activities, such as those described in pages 3-7 of CPDFN’s submission.

In any event, the Government of Alberta submitted that the LARP either reduces the likelihood of prospective future harm, which the Applicant is concerned with, or has no effect on such harms. The Crown, in its response to the Applicant’s submission, also argued:

“In regards to the concerns outlined by the Applicant in Part C of its submissions, Alberta submits that Treaty rights, while constitutionally recognized and affirmed, are not unlimited. Specifically, the Treaty to hunt, trap and fish for food is not site-specific; it is the activity which is protected. Further, the Supreme Court of Canada has found for the exercise of Treaty rights that changes in method do not change the essential character of the practice nor diminish the right. Accordingly, a First Nation’s exercise of Treaty rights in a manner different from that previously used does not necessarily diminish the exercise of Treaty rights. Alberta submits that a changing landscape may change the exercise of Treaty rights, without harming such rights.”³

After reviewing the written evidence of both parties to these proceedings, the Review Panel concurs with the arguments of the Applicant that CPDFN has been “more than minimally harmed” by the

³ Response Submissions of the Government of Alberta; page 15, paragraph 72

omission of the LARP to consider the Traditional Land Use and territory of the Applicant, pursuant to their Aboriginal and Treaty rights. As a result, the Review Panel recommends to the Minister that CPDFN *has* been “directly and adversely affected,” by the “loss of income,” the resulting “health effects” on CPDFN members, and the “loss of quiet enjoyment of property” on the Applicant’s Territorial Lands.

Issue Two

The Lower Athabasca Regional Plan does not include consideration of, nor does it address, how the Applicant’s members can continue to access and peacefully use and occupy Reserve Lands.

RECOMMENDATIONS TO THE MINISTER

The Review Panel recommends that the Applicant, CPDFN, *has* been “directly and adversely affected” by the “loss of quiet enjoyment of property” on their Traditional Lands to carry out Traditional Land Use (TLU) activities, pursuant to their respective Aboriginal and Treaty rights.

REASONS FOR THE RECOMMENDATION

In addressing Issue Two, the Applicant, on page 7 of its submission, referred specifically to paragraphs of the Jackpine Mine Expansion decision to endorse its concerns.⁴ The Review Panel also reviewed CPDFN’s concerns with conservation and recreation areas with respect to this issue.⁵ Conservation areas are described in Part 2 of the LARP’s Regulatory Details Plan and Recreation areas are described on pages 32-33.

The following concerns raised by the Applicant with respect to these two areas, are as follows:

- Regulatory Details Plan, Part 2: Conservation Areas, Section 13-17: Conservation areas have not been selected nor designed, nor their objectives set, in a manner consistent with CPDFN’s Treaty Rights and Traditional Land Uses and values, or with CPDFN’s ability to access and peacefully use and occupy its Reserve Lands;
- Regulatory Details Plan, Part 3: Conserved Lands Section 19: Does not allow for a conservation purpose that addresses CPDFN’s Treaty rights,

Traditional Land Use, or access and peaceful enjoyment of its Reserve Lands.

Under the Strategic Plan:

- The LARP, page 23: Explicitly contemplates future mining development in the Richardson Conservation Area;
- Inadequate land designated for the Dillon Wilderness Area;
- Inadequate lands south of Fort McMurray designated as conservation areas;
- The LARP, page 29: “Creating New Conservation Areas” – areas were not created or set aside to be consistent with Aboriginal and Treaty rights practice and Traditional Land Use, despite CPDFN’s submission;
- The LARP, page 29-30: Development that is incompatible with the exercise of CPDFN’s Aboriginal and Treaty rights practice is still allowed in conservation areas;
- The LARP, page 30: Areas will be managed to provide “low-impact backcountry recreation opportunities and nature-based tourism products and services” without any mechanism for consideration of the increased direct and adverse impacts such activities will have upon CPDFN. Restrictions on motorized vehicles will impact Treaty rights exercise if put in place without regard to the needs of CPDFN members;
- The LARP, page 33: “Existing tenures honored. Access to water resources and associated allocation and disposal infrastructure permitted. Government will consider new surface areas through these areas. No consideration of existing Treaty rights. In PLARTs industrial development, activities will continue while impacts on recreation and tourism features will be minimized. No goal of minimizing impacts on CPDFN’s Treaty and Aboriginal Rights, traditional uses and culture.”

⁴ 2013 Alberta Energy Regulator 011 ⁵ CPDFN Application; pages 3-7

On page 10, paragraph 11, the Applicant noted:

“Recreational use of much of the Traditional Lands has already interfered with CPDFN’s exercise of rights in the area. The LARP designations may encourage further consumptive and non-consumptive sport and commercial hunters and fishers, as well as increasing numbers of recreational snowmobiles, all-terrain vehicles and other backcountry transportation uses. They may also support commercial tourism development. And, if the proposed road and trail networks discussed under the LARP come to fruition, access to the area for everybody will be greatly improved and with more access and more non-indigenous and recreational users, CPDFN is often not able to hunt in areas due to safety concerns. That is a direct impact.

The LARP’s goals of increasing recreation and tourism will have direct and adverse impacts upon CPDFN, for example by increasing competition for resources, reducing harvest success, preventing the discharge of firearms due to safety concerns for others; and detracting from the incidental rights to feel safe, secure and experience remoteness and solitude on the land.”

The Crown’s June 25, 2014 response to the Applicant’s submission argued that many forms of development, including petroleum and natural gas development and oil sands development, are not permitted in conservation areas, including the Richardson Wildlife Park. The Government of Alberta also argued that many of the concerns raised by the Applicant with respect to conservation and recreational areas are alleged “omissions” and are, therefore, outside the jurisdiction of the Review Panel.

In any case, with respect to the designation of conservation areas, the Government of Alberta submitted that one of the key criterion for the establishment of the areas was that they supported Aboriginal Traditional Land Use.⁶ This position was taken, along with other criteria — such as little to no industrial activity and areas that are representative of the biological diversity — in establishing the location of such areas.

The Crown responded to the Applicant’s concern that there is “no mechanism” for consideration of the potential impacts on CPDFN’s future development of backcountry recreation and nature-based tourism.⁷

The Crown noted:

“Pending plans formally designating areas or routes, the LARP specifies that “off-highway vehicle use is permitted on existing access.” The rationale for restricting motorized access to designated areas is “to mitigate potential biodiversity impacts associated with random motorized access. This in turn will support the exercise of traditional activities on the landscape.”⁸

With respect to the Applicant’s concerns regarding the Dillon Conservation Area, the Crown acknowledged this area is contiguous with the Gipsy-Gordon Conservation Area designated under the LARP. New forestry harvesting and mineral activities are not contemplated in these areas.⁹

The Crown maintained that any effect from the LARP’s designation of recreation areas is not adverse. The majority of the lands that will be established as provincial recreation areas, or PLARTs, are currently vacant public lands administered under the *Public Lands Act* and the *Public Lands Administration Regulation* (PLAR).

The Crown reinforced their position by stating:

“On these vacant public lands, motorized access is not limited to designated routes and any person can enter onto and occupy this land for a recreational purpose for up to 14 days, subject to certain exceptions. (PLAR, section 32)

Once established as either provincial recreation areas under the *Provincial Parks Act* or as public land use zones under the *Public Lands Act*, these areas will be subject to additional regulation. For example, motorized recreation will be limited to designated routes. This regulation is intended to mitigate impacts associated with random motorized access. Regulation of motorized access

⁶ Lower Athabasca Regional Plan (LARP); page 30 ⁷ Response Submissions of the Government of Alberta; page 18, paragraph 89 ⁸ Response Submissions of the Government of Alberta; page 18, paragraph 90 ⁹ LARP; page 84

will increase, not detract from safety. Hunting, with its attending safety concerns, will continue to be regulated by existing legislation.”¹⁰

After reviewing the written evidence of both parties to these proceedings, the Review Panel agrees with the Applicant that, although the LARP does designate TLU activities within the new conservation and recreation areas for the Applicant, there are too many restrictions in these areas to ensure CPDFN’s members can peacefully use and occupy such areas.

To summarize the concerns raised by the Applicant:

- The location of these areas is too distant for CPDFN members’ use;
- The size of the conservation areas is too small to carry out TLU activities;
- Industrial activities can still continue in PLARTs;
- Motorized traffic, such as snowmobiles and ATVs, could cause safety concerns for CPDFN hunters in these areas;
- Government of Alberta regulations and policies could impede the free access of the Applicant’s members in such areas;
- The LARP allows for “multi-use corridors” for both the new conservation and recreation areas;¹¹ and
- Increased use by recreational users besides Aboriginal hunters, trappers and fishers, could result in safety concerns for Aboriginal members.

The Review Panel recommends to the Minister that the new conservation and recreation areas in the LARP do not allow the Applicant access and peaceful use of its Traditional Territory. Therefore, the Review Panel recommends that the Applicant *has* been “more than minimally harmed” and *has* been “directly and adversely affected” by the “loss of quiet enjoyment of property” in carrying out TLU activities in their Territorial Lands, pursuant to CPDFN’s Treaty and Aboriginal rights.

Issue Three

The Lower Athabasca Regional Plan is being applied by decision-makers and relied upon by oil sands companies to preclude the protection of Aboriginal and Treaty rights and land uses.

RECOMMENDATIONS TO THE MINISTER

With respect to this Issue, the Review Panel recommends to the Minister that the Applicant *has* been “directly and adversely affected” by the “loss of quiet enjoyment of property” on CPDFN’s Territorial Land within the Lower Athabasca Region.

REASONS FOR THE RECOMMENDATION

The Applicant, with respect to this issue, referred to a number of regulatory tribunal decisions.¹² In its submission, under the heading of “Strategic Plan,” CPDFN states:

- The LARP, pages 14-15: Alberta’s statement of commitment to optimizing the economic potential of the resource and general endorsement of the prioritization of development of the oil sands above all else;
- The LARP, pages 22-23: The Regional Vision where developing oil sands reserves are prioritized above all else, and there is no goal to protect Treaty and Aboriginal Rights, Traditional Land Use and culture;
- The LARP, page 25: Strategic Directions for the region – clearly oil sand development is expected and encouraged as being the dominant activity in the region.

Under the heading of “Implementation Plan” in CPDFN’s submission:

“Regional Outcomes are not designed to protect, nor do they incorporate, CPDFN’s Treaty Rights, Traditional Land Uses, culture, and peaceful use and occupation of its Reserve Lands. The first outcome is focused upon ensuring that the economic potential of the oil sands resource is optimized. Strategies for achieving outcome one do not include any measures or strategies to ensure actions are consistent with CPDFN’s Treaty rights, Traditional Land Use and culture.”

¹⁰ Response Submissions of the Government of Alberta; paragraphs 105-106 ¹¹ LARP; page 90, note 7 ¹² CPDFN Application; page 8

In its submission, CPDFN expanded on its concerns pertaining to this issue:

“Decisions are being and will be made, and development is being, and will steamroll ahead without the information or planning required to maintain CPDFN’s Treaty rights, traditional uses, and ability to access and peacefully use and occupy its Reserve Lands.”¹³

CPDFN’s argument continued:

“Decision-makers will allow the removal of tracts of land from the diminishing intact land base available to support CPDFN’s Aboriginal and Treaty Rights and the traditional resources required to sustain these rights, without regard to what is required to support the continued exercise of CPDFN’s Aboriginal and Treaty Rights, traditional use and culture.

In addition to the direct removal of lands, approval of oil sands development projects will, in practice, result in an even more expansive area of land, beyond the immediate and substantial footprint of industrial projects, due to gates, fences, concerns about noise, dust, contamination of air, waterways, and other traditional resources.¹⁴

...Further transformation of the land within the Lower Athabasca Planning Region from natural to industrial fill exacerbate current conditions and effectively preclude meaningful use of an expansive area within CPDFN’s Traditional Lands.”

The Crown, in responding to the Applicant’s concern that the LARP prioritizes development, referred to the LARP under the heading of “Purpose,” in which the document “aligns provincial policies at the regional level to balance Alberta’s economic, environmental and social goals.”

The Review Panel reviewed the written evidence of both parties to these proceedings concerning Issue Three. The Review Panel also reviewed the decisions of the Alberta Energy Regulator (AER), as noted on pages 7-9 of CPDFN’s submission. In these decisions, it seems clear to the Review Panel that the AER is addressing the fact that there is a regulatory gap in the LARP, which is constraining the AER to

effectively “balance” development with the rights of the Aboriginal participants at the hearing.

With reference to the AER decision — regarding Dover Operating Corp., 2013 ABAER 014, at paragraphs 44-46 — the CPDFN submitted the following example:

“Fort McKay led evidence of severe significant cumulative adverse impacts of industrial development upon its ability to exercise its Treaty Rights and Traditional Land Uses, as well as to [enjoying] its Reserve Lands. The AER found that as the LARP indicated the area requested to be set aside as a Traditional Land Use buffer was *within an area where oil sands development was prioritized*, the AER could not grant the relief sought by the community of Fort McKay.”¹⁵ (Emphasis added)

In referring to the Jackpine Mine Expansion decision, 2013 ABAER 011, at paragraphs 8 and 18:

“The Panel approved the mine expansion even though it found the project would have significant adverse impacts on traditional resources relied upon by ACFN, adverse impacts upon ACFN’s rights and Traditional Land Use, as well as significant adverse cumulative impacts upon ACFN’s Treaty rights, Traditional Land Use, and culture. The Panel’s decision was based in part upon the fact that “the Project... is in an area where the government has identified bitumen extraction as a priority use.” (Emphasis added)

In the third hearing before the AER — which had not concluded at the time of CPDFN’s submission — Teck Resources, the proponent, cited the Dover Decision in support of the proposition that the AER must act in accordance with the LARP as it exists today, and that “Teck’s program is located in an area designated for oil sands exploration and development under the LARP.”

The Review Panel is of the opinion that such observations, reached in the decisions of the AER, reinforce the argument of the Applicant that, in fact, the LARP is incomplete in addressing the First Nation’s Treaty rights, Traditional Land Use and cultural considerations with that of development

¹³ CPDFN Application; page 9 ¹⁴ CPDFN Application; page 11 ¹⁵ CPDFN Application; page 8

opportunities for resource projects in the Lower Athabasca Region.

As a result, the Review Panel agrees with the Applicant that there appears to be an imbalance in priorities of the Government of Alberta between resource development and the Treaty and Aboriginal rights of CPDFN in the region. As a result, the Review Panel concludes that the Applicant *has* been “more than minimally harmed” and *has* been “directly and adversely affected” by the “loss of quiet enjoyment of property” in their Territorial Lands, due to the priority of the Government of Alberta for resource development on their lands rather than considering CPDFN’s Aboriginal and Treaty rights in the Lower Athabasca Region.

Issue Four

The Lower Athabasca Regional Plan is being applied by decision-makers to effectively rule out the possibility of establishing areas that can be set aside for Traditional Land Use and the exercise of Treaty rights.

RECOMMENDATIONS TO THE MINISTER

It is the recommendation to the Minister, with respect to this issue, that the Applicant *has* been “directly and adversely affected” by the “loss of income” and by “health effects” to CPDFN members. There has also been a “loss of quiet enjoyment of property” as a result of TLU not being included in the LARP in the exercise of Treaty rights of the Applicant.

REASONS FOR THE RECOMMENDATION

In its submission, the Applicant addressed this issue by referring to the Joint Review Panel for the Jackpine Mine Expansion. The recommendation was that the Government of Alberta consider the need in the LARP for “conservation offsets” to address the significant affects of the LARP. These would include the following:

- a. the effects of the offsets on existing Traditional Land Use and the need to maintain areas for traditional use by Aboriginal Peoples, including areas containing traditional plants and other culturally important resources (paragraph 12);
- b. the need to preserve the suite of species and ecosystems in the region and to maintain local and regional biodiversity as well as the need to preserve unique environments and species (paragraph 936); and
- c. the need for conservation offsets to address the impacts on some migratory birds (paragraph 936).

Issue Four is linked to Issue One in attempting to address the Applicant’s concerns with the recognition of its Territorial Lands and TLU in the LARP. Within the LARP, the Government of Alberta appears to promote such TLU rights for First Nations in the Lower Athabasca Region, within the new conservation and recreation areas, as noted in Schedule F of the LARP. On the basis of CPDFN’s Treaty and Aboriginal rights, for the most part, CPDFN has maintained that such resolution in recognizing their Territorial Lands and usage is inadequate.

It is also interesting to note, under Tab 21 of the Applicant’s submission, a map showing the saturated disturbance area covering the Applicant’s land coverage.¹⁶ There are very few areas within the Applicant’s Territorial Land in which a “disturbance” is not taking place. Beginning on page 9 of its submission, CPDFN described the adverse effects described in Part A:

1. Decisions are being and will be made, and development is being and will steamroll ahead without the information or planning required to maintain CPDFN’s Treaty rights, traditional uses, and ability to access and peacefully use and occupy its Reserve Lands.
2. Loss of ability to exercise Treaty and Aboriginal Rights in preferred places by preferred means. Place-based knowledge and cultural landscape are essential to CPDFN’s traditional way of life.
3. Loss of ability to engage in Traditional Land Use and other traditional pursuits.
4. Loss of ability to transmit traditional knowledge and culture to future generations.
5. Loss of ability to engage in cultural activities and live in a culturally appropriate manner.

¹⁶ CPDFN Submission; Tab 21, Figure 7: Land Cover Disturbance Within Kai’ Kos Deseh/Christina Watershed

6. Loss of culture.
7. Loss of identity as Dene people.
8. Loss of food security.
9. Increased risks, and perceived risks, associated with consumption of traditional foods.
10. Health impacts linked to changes in diet from traditional to store-bought foods, as well as to contamination of country foods, and change in lifestyle as Traditional Land Use opportunities decrease.
11. Recreational use of much of the Traditional Lands has already interfered with CPDFN's exercise of rights in the area. The LARP designations may encourage further consumptive and non-consumptive sport and commercial hunters and fishers, as well as increasing numbers of recreational snowmobiles, all-terrain vehicles and other backcountry transportation uses. They may also support commercial tourism development. And if the proposed road and trail networks discussed under the LARP come to fruition, access to the area for everybody will be greatly improved and with more access and more non-indigenous and recreational users, CPDFN is often not able to hunt in areas due to safety concerns. That is a direct impact.
12. The LARP's goals of increasing recreation and tourism will have direct and adverse impacts upon CPDFN, for example by increasing competition for resources, reducing harvest success, preventing the discharge of firearms due to concerns for the safety of others; and detracting from the incidental rights to feel safe, secure and experience remoteness and solitude on the land.
13. Several areas have been identified by CPDFN as places the members wish to protect as sanctuaries for their current use and for the use of future generations. The [Government of Alberta] GoA LARP does not sufficiently consider these priority areas.
14. There is a high potential that the LARP land use designations are not mitigation for CPDFN's regional concerns — they could actually attract tourism-based investment and government-induced infrastructure, which would proactively encourage incremental and new sport and recreational use in CPDFN's homeland areas. This would further restrict CPDFN's use of the area, in particular their use for hunting.
15. No meaningful ability to be involved in stewardship activities in core CPDFN areas. Encouraging CPDFN's involvement in developing sub-plans under the overarching plan that explicitly does not incorporate protection of Treaty Rights and Traditional Land Uses does not address CPDFN's concerns and creates an impossible situation where CPDFN is asked to provide input into a framework that will not be able to be responsive to that input.
16. Loss of ability to access fishing, hunting, and trapping areas due to water quantity issues in the Christina River Watershed and the Athabasca River and other surrounding lakes and streams.
17. Contamination of local water.
18. Decision-makers will allow the removal of tracts of land from the diminishing intact land base available to support CPDFN's Aboriginal and Treaty rights and the traditional resources required to sustain these rights, without regard to what is required to support the continued exercise of CPDFN's Aboriginal Treaty Rights, traditional uses, and culture.
19. In addition to the direct removal of lands, approval of oil sands development projects will, in practice, result in an even more expansive area of land, beyond the immediate and substantial footprint of individual projects, due to gates, fences, concerns about noise, dust, contamination of air, waterways, and other traditional resources, and other factors.
20. CPDFN views the land as a living being. Injury to parts of the body affect the health of the whole.
21. Further transformation of the land within the Lower Athabasca Planning Region from natural to industrial [will] exacerbate current conditions and effectively preclude meaningful use of an expansive area within CPDFN's Traditional Lands.

22. Psychological impacts [regarding] failure to fulfill cultural obligations to ensure that seven generations from now, CPDFN members can exercise their Rights and culture.
23. Chronic fears around traditional food and medicine safety.
24. Chronic fear around air and water quality.
25. Impact to CPDFN's ability to exercise Dene spiritual practices.
26. The disturbance of lands, waters and natural resources that Aboriginal Peoples are culturally connected to can cause deep psychological harm on two fronts. First, feelings of having no control in decision-making about how the environment is allocated, used, and disturbed can result in individual and collective feelings of hurt, frustration and anger. Secondly, the worldview or cosmology of most indigenous peoples, and of CPDFN, dictates that humans are related on a level basis with the animate and inanimate components of the environment. Humans are expected to treat all human and non-human relatives equally and with respect, including a moral code of not harming the environment necessary for survival and being proactive in ensuring the safety and survival of not just humans, but all relations. Witnessing environmental degradation can be stressful. Emotions can include deep spiritual fear of repercussion; feelings of shame about not being able to protect human and non-human relations, and about the losses that will be experienced by the younger generation and generations not yet born; and feelings of anxiousness, frustration, depression and fear that the current generation cannot fulfill its responsibilities to transfer the cultural knowledge necessary for the health and sustainability of their culture and the environment.
27. Erosion of the foundational relationship between CPDFN and Alberta as Treaty Partners.

With respect to the Applicant's concern about the loss of food security, it is interesting to note the study

identified in Tab 14 of CPDFN's submission, Appendix A, entitled, Ecological Consideration for Designated Areas for Protection.¹⁷ The report highlights the decline of the moose population and caribou in the Regional Municipality of Wood Buffalo.¹⁸

The Crown's response to this issue is again noted in that the Review Panel has no jurisdiction to address most of the concerns raised by CPDFN. The Government of Alberta submitted that most of the alleged harms raised by the Applicant in respect to these matters relate to potential future activities outside of the Review Panel's jurisdiction.

In any case, "Alberta submits that Treaty rights, while constitutionally recognized and affirmed, are not unlimited. Specifically, the Treaty right to hunt, trap and fish for food is not site-specific; is it the activity which is protected. Further, the Supreme Court of Canada has found for the exercise of Treaty rights that changes in method do not change the essential character of the practice nor diminish the rights. Accordingly, a First Nation's exercise of a Treaty right in a manner different from that previously used does not necessarily diminish the exercise of the Treaty right. Alberta submits that a changing landscape may change the exercise of Treaty rights, without harming such rights."¹⁹

On receiving the written evidence of both parties to these proceedings, the Review Panel agrees with the evidence provided by the Applicant. The Review Panel is of the opinion that the Applicant *has* been "more than minimally harmed" by the LARP not establishing areas that can be set aside in the Lower Athabasca Region for CPDFN's Traditional Land Use and the exercise of their Treaty rights.

It is the opinion of the Review Panel that the Applicant *has* been "directly and adversely affected," by this omission in the LARP, and that such inaction *has* resulted in the "loss of income" and the resulting "health effects" for CPDFN members. There has also been a "loss of quiet enjoyment of property" for the Applicant's Traditional Land Use requirements, as a result of excessive development within their Traditional Lands, as described in the exercise of its Treaty and Aboriginal rights in the Lower Athabasca Region.

¹⁷ MSES (no date) ¹⁸ Figure 3: Caribou Habitat Distribution within Regional Municipality of Wood Buffalo ¹⁹ Response Submissions of the Government of Alberta; page 15, paragraph 72

Athabasca Chipewyan First Nation Analysis of Application

Background

Athabasca Chipewyan First Nation (ACFN) is the successor to an Aboriginal group that entered Treaty 8 with the Crown at Fort Chipewyan in 1899. ACFN is also a “band” under the *Indian Act*, with eight Reserves, including Chipewyan No. 201 and 201A-201G.

ACFN’s Traditional Lands radiate north, east, west and south from the Peace-Athabasca Delta, including, but not limited to, the Lower Athabasca River and lands to the south of Lake Athabasca, extending to the lands around Fort McMurray and Fort McKay. ACFN members reside primarily in Fort Chipewyan, Fort McKay and Fort McMurray.¹

Athabasca Chipewyan First Nation brought this Application on August 31, 2013 for review of the Lower Athabasca Regional Plan (LARP) — pursuant to section 19.2(1) of the *Alberta Land Stewardship Act* (ALSA), S.A. 2009, c. A-26.8, and the *Alberta Land Stewardship Regulation* (ALSR) — on the basis that ACFN is a person “directly and adversely affected” by the LARP.

The Review Panel summarizes the argument of the Applicant, as to why they are “directly and adversely affected” for each of the issues that follow, pursuant to section 5(1)(c) of the *Alberta Land Stewardship Regulation*.

Issues

The Review Panel considers that the raised issues by the Applicant can be summarized as follows:

Issue One: The Lower Athabasca Regional Plan does not include nor protect the Applicant’s Treaty and Aboriginal rights, Traditional Land Use or culture.

Issue Two: The Lower Athabasca Regional Plan does not include consideration of, nor does it address, how the Applicant’s members can continue to access and peacefully use and occupy Reserve Lands.

Issue Three: The Lower Athabasca Regional Plan is being applied by decision-makers and relied upon by oil sands companies to preclude the protection of Aboriginal and Treaty rights and Traditional Land Use.

Issue Four: The Lower Athabasca Regional Plan is being applied by decision-makers to effectively rule out the possibility of establishing areas that can be set aside for Traditional Land Use and the exercise of Treaty rights.

¹ Athabasca Chipewyan First Nation (ACFN) Application; pages 2-3

I. Argument of the Applicant – Athabasca Chipewyan First Nation

ISSUE ONE

The Lower Athabasca Regional Plan does not include nor protect the Applicant's Treaty and Aboriginal rights, Traditional Land Use, or culture.

The Applicant in its submission to the Review Panel argued that when it entered into Treaty 8 with the Crown, it continued to hold and exercise the rights guaranteed by the Treaty, as modified by the *Natural Resources Transfer Agreement, 1930*, which includes the right to hunt, trap, fish and gather on all unoccupied Crown lands in the province and other lands to which they have rights of access.

In its submission, the Applicant noted that Treaty rights include the right to harvest specific species, as well as “incidental rights,” including the following:

- routes of access and transportation;
- sufficient water quality and quantity;
- sufficient quality and quantity of resources in preferred harvesting areas;
- cultural and spiritual relationships with the land;
- abundant berry crops in preferred harvesting areas;
- traditional medicines in preferred harvesting areas;
- the experience of remoteness and solitude on the land;
- construction of shelters on the land to facilitate hunting, trapping, gathering and/or fishing;
- use of timber to live on the land while hunting, trapping, gathering and/or fishing (e.g. to build shelters and fires);
- the right to instruct younger generations on the land;
- access to safe lands within which to practice rights;
- the right to feel safe and secure in the conduct of such practices and activities;
- lands and resources accessible within constraints of time and cost;
- socio-cultural institutions for sharing and reciprocity; and
- spiritual sites and associated practices.

The Applicant maintained that “under the Treaty, among other entitlements, ACFN secured protection for the continuity, in *perpetuity*, of traditional patterns of activity and occupation within its Traditional Lands. As a constitutional imperative, the Treaty protects the core entitlement of ACFN members to the meaningful exercise of their Treaty Rights on Traditional Lands. The Province of Alberta cannot constitutionally infringe this core Treaty Right by depriving ACFN of the meaningful opportunity to exercise its Treaty Rights on its Traditional Lands.

Although the Crown secured the right to “take up” lands from time to time under the Treaty, this right is itself subject to the Crown’s duty to consult and accommodate ACFN’s interests before reducing the area over which ACFN members may continue to pursue their hunting, trapping and fishing rights. This duty to consult and accommodate extends to ACFN’s concerns about the cumulative impacts of development on its Traditional Lands and meaningful exercise of its Treaty Rights.”²

ISSUE TWO

The Lower Athabasca Regional Plan does not include consideration of, nor does it address, how the Applicant's members can continue to access and peacefully use and occupy Reserve Lands.

In its submission, the Applicant noted that “ACFN members continue to actively exercise their Treaty Rights on their Traditional Lands and continue to rely on the Traditional Lands for: travel to and from ACFN Reserve Lands; social, cultural and spiritual purposes; economic development; traditional use and occupation;

² ACFN Application; pages 2-3

and the health and vibrancy of their communities and their distinctive way of life.

The Athabasca River is the lifeblood of ACFN Traditional Lands. The ability to use the River is central to sustaining ACFN's identity, culture and well-being. The health of the Athabasca River is inextricably linked to the ability of ACFN members to exercise their Treaty Rights within a significant portion of their Traditional Lands. The Athabasca River provides a vital transportation corridor, access to Reserve Lands, access to traditional hunting, trapping, fishing and gathering areas, and supports the traditional resources required for the meaningful exercise of ACFN's Treaty Rights and the continuity of ACFN's distinctive culture.

ACFN's Traditional Lands, including the Athabasca River north of Fort McMurray, have undergone rapid and momentous change in recent decades. This change has significantly reduced ACFN's members' ability to exercise their Treaty Rights on their Traditional Lands proximate to the places where the vast majority of ACFN members reside. While several factors have contributed to the change, a significant contributing factor has been oil sands exploration and development."³

In form LUS-01 Part 1, the Applicant is asked to *"clearly identify the specific provision (section) of the Regional Plan that you believe is directly and adversely affecting you, or will directly and adversely affect you."*

The Applicant responded by listing the most "Cultural specific provisions in the LARP" to address their concerns with the document:⁴

Regulatory Details Plan, Part 1 – General

1. Section 1(e) – exclusion of a Regulatory Details Plan Part for Traditional Land Use and Treaty Rights, including limits, triggers and thresholds.
2. Sections 4-7 – to the extent that the Plan is intended to guide, inform, or bind the Crown, decision-makers, local government bodies and

all other persons in the absence of measures that are protective of ACFN's Treaty and Aboriginal rights, Traditional Land Uses, and culture.

3. Section 10(2) – to the extent that it requires decision making bodies to make changes or implement new initiatives to comply with the LARP in the absence of measures that are protective of ACFN's Treaty and Aboriginal rights, Traditional Land Uses and culture.

Regulatory Details Plan, Part 2 – Conservation Areas

4. Sections 13-17 – Conservation Areas have not been selected nor designed, nor their objectives set, in a manner consistent with ACFN's Treaty rights and Traditional Land Uses, or with ACFN's ability to access and peacefully use and occupy its Reserve Lands.

Regulatory Details Plan, Part 3 – Conserved Lands

5. Section 19 – does not allow for a conservation purpose that addresses ACFN's Treaty rights, Traditional Land Use, or access and peaceful enjoyment of its Reserve Lands.

Regulatory Details Plan, Part 4 – Air Quality

6. Sections 22, 24, 25 and 26 – to the extent that these sections incorporate by reference the Air Quality Management Framework. See also Schedule A. Air quality triggers and limits have not been set with reference to the health of ACFN members, with regard to their ability to use and enjoy their property, or with regard to the need to maintain certain areas for the exercise of Treaty Rights and traditional uses.

Regulatory Details Plan, Part 5 – Surface Water Quality

7. Section 29(a)(e) and sections 30-34 – to the extent that these sections incorporate the Surface Water Quality Framework. See also Tables B-1 and B-2 and Schedules B and C.

³ ACFN Application; pages 3-4 ⁴ ACFN Application; pages 4-8

Regulatory Detail Plan, Part 6 – Groundwater

8. Sections 36(a) and 37-38 – to the extent that they incorporate the Groundwater Management Framework.

Regulatory Details Plan, Part 7 – Recreation and Tourism

9. Sections 39(a)(b) and 42-45.

Regulatory Detail Plan, Part 8 – Monitoring and Reporting

10. Sections 46 and 48 – to the extent that they incorporate the Implementation Plan, as the Implementation Plan does not address not protect ACFN's Treaty and Aboriginal Rights traditional uses, culture, and ability to access and use and peacefully enjoy its Reserve Lands.

Strategic Plan

The Strategic Plan excludes any consideration of ACFN's Treaty and Aboriginal Rights, Traditional Land Use or culture, and prioritizes activities that are inconsistent with ACFN's current and continued ability to exercise its Treaty and Aboriginal Rights, Traditional Land Uses, and culture. Specific examples include, but are not limited to:

11. Alberta's statement of commitment to optimizing the economic potential of the resource and general endorsement of the prioritization of development of the oil sands above all else (pages 14-15).
12. The Regional Vision presented on pages 22-23, where developing oil sands reserves are prioritized above all else, and there is no goal to protect Treaty and Aboriginal rights, Traditional Land Use and culture.
13. The peripheral/token role given to Aboriginal Peoples in implementing sub plans under a regional plan that does not include their Treaty and Aboriginal Rights, Traditional Land Use and culture i.e. see pages 23 and 69. The

opportunity to provide information does not translate into any government commitment to take actions or require decision-makers to exercise their functions in a manner consistent with the continued ability of Aboriginal Peoples to exercise Treaty and Aboriginal rights, engage in Traditional Land Use, practice their culture or to access, peacefully use and occupy their Reserve Lands.

14. Page 23 – explicitly contemplates future mine development in the Richardson conservation area, which is the Richardson Backcountry “if approvals are granted in the future for a mining development in the new Richardson [public land for recreation and tourism] PLART...” or park “the boundaries for this area will be re-examined, if deemed necessary and acceptable as a result of the regulatory review for the mining development”.
15. Page 25 – Strategic Directions for the region – clearly oil sand development is expected and encouraged as being the dominant activity in the region.
16. Page 26 – Encouraging Timely and Progressive Reclamations section – reclamation required only to an equivalent land capability (rather than to a state consistent with Aboriginal Traditional Land Use and the exercise of Treaty rights), to date this approach has not mitigated impacts on Traditional Land Use in the oil sands.
17. Page 27 – “Managing Air, Water and Biodiversity, and Minimizing Land Disturbance” – there is no management framework, including limits, triggers and thresholds, for Aboriginal and Treaty Rights and Traditional Land Use.
18. Page 29 – “Creating New Conservation Areas” – areas were not created or set aside to be consistent with Aboriginal and Treaty rights practice and Traditional Land Use, despite ACFN's substantive submissions on same.

19. Page 29-30 – Development that is incompatible with the exercise of ACFN’s Aboriginal and Treaty rights practice is still allowed in conservation areas. Currently almost all of the areas identified for the Richardson Wildland Provincial Park have existing metallic and industrial mineral tenures in the form of permits and the entire proposed Richardson public land area for recreation and tourism public use has existing metallic and industrial mineral tenures in the form of permits.
20. Page 30 – areas will be managed to provide “low impact backcountry recreation opportunities and nature-based tourism products and services” without any mechanism for consideration of the increased direct and adverse impacts such activities will have upon ACFN. Restrictions on motorized vehicles will impact Treaty rights exercise if put in place without regard to the needs of ACFN members.
21. Page 32 – Providing New Recreation and Tourism Opportunities - “these areas will be managed to...ensure quality recreational experience.”
22. Page 33 – Existing tenures honoured. Access to water resources and associated allocation and disposal infrastructure permitted. Government will consider new surface access through these areas. No consideration of existing Treaty rights. In PLART industrial development, activities will continue while impacts on recreation and tourism features will be minimized. No goal of minimizing impacts on ACFN’s Treaty and Aboriginal Rights, Traditional Land Uses and culture. The LARP contemplates mining development in new Richardson PLART.
23. Page 34 – Inclusion of Aboriginal Peoples in Land-use Planning. Relegates ACFN to the role of [Traditional Ecological Knowledge] TEK and information provider. No commitment by Alberta to do anything with this information that is protective of ACFN Treaty rights, Traditional Land Use and culture. See also page 63, outcome 7 “Inclusion of Aboriginal Peoples in land-use planning.”

Implementation Plan

24. Requires review in its entirety.
25. Upholding section 35 of the *Constitution Act, 1982* and the continuation of ACFN as a distinctive culture is not part of the vision for the Lower Athabasca Region.
26. Regional Outcomes are not designed to protect, nor do they incorporate, ACFN’s Treaty Rights, Traditional Land Uses, culture, and peaceful use and occupation of its Reserve Lands. The first outcome is focused upon ensuring that the economic potential of the oil sands resource is optimized. Strategies for achieving outcome 1 do not include any measures or strategies to ensure actions are consistent with ACFN’s Treaty rights, Traditional Land Uses and culture. In general, none of the regional outcomes or strategies to achieve them are designed to address or integrate ACFN’s Treaty rights, Traditional Land Use and culture.
27. In particular, ACFN notes that the objective of maintaining ecosystem function and biodiversity is not a proxy for maintaining ACFN’s ability to exercise its Treaty Rights and Traditional Land Use and culture, nor for peaceful use and enjoyment of its Reserve Lands.
28. Page 51 – Surface Water Quality Objective does not incorporate Treaty Rights or Traditional Land Use, in particular avoidance behaviour, health concerns, right to clean water. Limits were not based upon Treaty Rights or traditional use considerations.
29. Page 58 – Surface Water Quantity. Does not incorporate limits and triggers relevant to the exercise of Treaty Rights and traditional uses by ACFN members. In particular, ACFN has provided Alberta with the [Aboriginal Base Flow] ABF and [Aboriginal Extreme Flow] ABX. Phase 2 must incorporate limits, triggers and thresholds appropriate to maintenance of ACFN Treaty rights and traditional uses, and ability to access and peacefully use and occupy its Reserve Lands.

30. Page 65 – monitoring, evaluating and reporting – needs to include thresholds, triggers, limits [regarding] Treaty Rights, traditional uses and impacts to ACFN’s ability to enjoy its Reserve Lands, as well as ACFN’s explicit involvement as monitors.

Schedules

31. Schedule A – Air Quality Management Framework Limits and Triggers.
32. Schedule B – Surface Water Quality Management Framework Limits and Triggers.
33. Schedule C – Groundwater Management Framework Interim Quality Triggers.
34. Schedule E – Lower Athabasca Regional Trail System Plan – does not include Treaty rights and Traditional Land Uses or ability to peacefully use and enjoy Reserve Lands as criteria or objectives, or as factors to be included in development of plan.
35. Schedule F.
36. Schedule G.

ISSUE THREE

The Lower Athabasca Regional Plan is being applied by decision-makers and relied upon by oil sands companies to preclude the protection of Aboriginal and Treaty rights and Traditional Land Use.

In addressing this specific issue, the Applicant, on page 10 of its submission, highlighted a number of resource projects in their area where the regulator recognized that a particular project could have adverse impacts on ACFN’s rights and Traditional Land Use. The Applicant contended that the regulator was constrained in most of these cases because: “the government has identified bitumen extraction as a priority use.”

The Applicant concluded by stating: “the LARP is being applied by decision-makers to effectively rule out the possibility of establishing areas that can be

set aside for Traditional Land Use and the exercise of Treaty rights. However, the Joint Review Panel for the Jackpine Mine Expansion strongly recommended that Alberta consider the need for conservation offsets to address significant efforts, including consideration of:

- a. the effects of the offsets on existing Traditional Land Use and the need to maintain areas for traditional use by Aboriginal Peoples, including areas containing plants and other culturally important resources (paragraph 12);
- b. the need to preserve the suite of species and ecosystems in the region and to maintain local and regional biodiversity as well as the need to preserve unique environments and species (paragraph 996); and
- c. the need for conservation offsets to address the impacts on some migrating birds (paragraph 936).⁵

ISSUE FOUR

The Lower Athabasca Regional Plan is being applied by decision-makers to effectively rule out the possibility of establishing areas that can be set aside for Traditional Land Use and the exercise of Treaty rights.

The Applicant addressed this issue by summarizing Section C of LUS-01 to explain the adverse effects its members are suffering, or expect to suffer, as a result of the implementation of the LARP. These adverse effects are noted on pages 11-13 of its submission:

Adverse effects include, but are not limited to:

1. Decisions are being, and will be, made and development is being and will steamroll ahead without the information or planning required to maintain ACFN’s Treaty rights, traditional uses, and ability to access and peacefully use and occupy its Reserve Lands. As the Joint Review Panel for JME⁶ noted: The absence of a management framework and associated thresholds for TLU makes it very difficult for Aboriginal groups, industry, and panels such as this one to evaluate the impact of individual projects on TLU.”

⁵ ACFN Application; pages 10-11 ⁶ Jackpine Mine Expansion

2. Loss of ability to exercise Treaty and Aboriginal Rights in preferred places by preferred means. Place-based knowledge and cultural landscape are essential to ACFN's traditional way of life.
3. Loss of ability to engage in Traditional Land Use and other traditional pursuits.
4. Loss of ability to transmit traditional knowledge and culture to future generations.
5. Loss of ability to engage in cultural activities and live in a culturally-appropriate manner.
6. Loss of culture.
7. Loss of food security.
8. Increased risks, and perceived risks, associated with consumption of traditional foods.
9. Health impacts linked to changes in diet from traditional to store-bought foods, as well as to contamination of country foods, and change in lifestyle as Traditional Land Use opportunities decrease.
10. Recreational use of Richardson Backcountry has already interfered with ACFN's exercise of rights in the area. The LARP designations may encourage further consumptive and non-consumptive sport and commercial hunters and fishers, as well as increasing numbers of recreational snowmobiles, all-terrain vehicles and other backcountry transportation uses. They may also support commercial tourism development. And if the proposed road and trail networks discussed under the LARP come to fruition, access to the area for everybody will be greatly improved and with more access and more non-indigenous and recreational users, ACFN is often not able to hunt in areas due to safety concerns. That is a direct impact.
11. The LARP's goals of increasing recreation and tourism will have direct and adverse impacts upon ACFN, for example, by increasing competition for resources, reducing harvest success, preventing the discharge of firearms due to concerns for the safety of others, and detracting from the incidental rights to feel safe, secure and experience remoteness and solitude on the land.
12. Lake Athabasca and Richardson recreation tourism areas in the LARP fall within homeland areas that have been identified by ACFN as places the members wish to protect as sanctuaries for their current use and for the use of future generations. The [Government of Alberta] GoA LARP goal for those areas is to "provide for additional recreation opportunities and attract tourism investment." And to "address the growing demand for recreational opportunities and provide an attractive land base for tourism investment."
13. There is a high potential that the LARP land use designations are not mitigation for ACFN's regional concerns — they could actually attract tourism-based investment and government-induced infrastructure, which would proactively encourage incremental and new sport and recreational use in ACFN's homeland areas. This would further restrict ACFN use of the area, in particular their use for hunting.
14. No meaningful ability to be involved in stewardship activities in core ACFN areas. Encouraging ACFN's involvement in developing sub plans under the overarching plan that explicitly does not incorporate protection of Treaty Rights and Traditional Land Uses does not address ACFN's concerns, creates an impossible situation where ACFN is asked to provide input into a framework that will not be able to be responsive to that input.
15. Loss of ability to utilize the Athabasca River as a navigation corridor.
16. Loss of ability to access fishing, hunting, and trapping areas due to water quantity issues in the Athabasca River and the Peace Athabasca Delta.
17. Contamination of local water.
18. Decision-makers will allow the removal of tracts of land from the diminishing intact land base available to support ACFN's Aboriginal and Treaty rights and the traditional resources

required to sustain these rights, without regard to what is required to support the continued exercise of ACFN's Aboriginal Treaty Rights, traditional uses, and culture.

19. In addition to the direct removal of lands, approval of oil sands development projects will, in practice, result in an even more expansive area of land — beyond the immediate and substantial footprint of individual projects — due to gates, fences, concerns about noise, dust, contamination of air, waterways, and other traditional resources, and other factors.
20. ACFN views the land as a living being. Injury to parts of the body affects the health of the whole.
21. Further transformation of the land within the Lower Athabasca Planning Region from natural to industrial [will] exacerbate current conditions and effectively preclude meaningful use of an expansive area within ACFN's Traditional Lands.
22. Psychological impacts [regarding] failure to fulfill cultural obligations to ensure that seven generations from now, ACFN members can exercise their Rights and culture.
23. Impact to ACFN's ability to exercise Dene spiritual practices.
24. The disturbance of lands, waters and natural resources that Aboriginal Peoples are culturally connected to can cause deep psychological harm on two fronts. First, feelings of having no control in decision-making about how the environment is allocated, used, and disturbed can result in individual and collective feelings of hurt, frustration and anger. Secondly, the worldview or cosmology of most indigenous peoples, and of ACFN, dictates that humans are related on a level basis with the animate and inanimate components of the environment. Humans are expected to treat all human and non-human relatives equally and with respect, including a moral code of not harming the environment necessary for survival and being proactive in ensuring the safety and survival of not just humans, but all relations. Witnessing

environmental degradation can be stressful. Emotions can include deep spiritual fear of repercussion; feelings of shame about not being able to protect human and non-human relations, and about the losses that will be experienced by the younger generation and generations not yet born; and feelings of anxiousness, frustration, depression and fear that the current generation cannot fulfill its responsibilities to transfer the cultural knowledge necessary for the health and sustainability of their culture and the environment.

25. Erosion of the foundational relationship between ACFN and Alberta as Treaty partners.⁷

In conclusion, on page 14 of ACFN's submission, the Applicant requested that "the Minister amend the provision of the LARP...to be consistent with the exercise of ACFN's Treaty and Aboriginal rights and Traditional Land Use *in perpetuity*, in order to diminish or eliminate the adverse effects identified in its submission."

II. Response Argument of the Crown of the Province of Alberta

The Crown submitted their response to the Athabasca Chipewyan First Nation Application on June 25, 2014.

ISSUE ONE

The Lower Athabasca Regional Plan does not include nor protect the Applicant's Treaty and Aboriginal rights, Traditional Land Use or culture.

The Crown addressed the concerns raised by ACFN with respect to this issue as follows:

Panel has no Jurisdiction to Determine Questions of Constitutional Law.⁸

Subject to the *Administrative Procedures and Jurisdiction Act* (APJA), the Review Panel is a "decision-maker" to which the act applies and has not been granted jurisdiction to determine questions of constitutional law.⁹

⁷ ACFN Application; pages 11-13 ⁸ Response Submissions of the Government of Alberta; page 10 ⁹ Response Submissions of the Government of Alberta; page 10, paragraph 49

To find that the “LARP somehow infringes on [ACFN] members’ Treaty rights or Aboriginal rights would necessarily involve determining rights by applying Section 35 of the *Constitution Act, 1982*...and therefore, outside the scope of the Panel’s jurisdiction.”¹⁰

Panel has no Jurisdiction to Consider Alleged Inadequacy of Consultation During LARP Creation or During LARP Implementation.¹¹

The Crown again asserted that alleged harms related to how the “LARP was created or harms alleged to be caused by how the LARP is being, or may be, applied, are not within the Panel’s jurisdiction. Therefore, it is outside of the purview of the Panel to consider the adequacy of consultation leading to the enactment of the LARP or the adequacy of future consultation as it may occur under the LARP.”¹²

Specifically, the Crown noted that the following issues raised by the Applicant in its submission cannot be considered by the Review Panel:¹³

- “Strategic Plan, pages 23 and 69: The peripheral/token role given to Aboriginal Peoples in implementing sub plans under a regional plan that does not include what the Applicant considers to be its Treaty and Aboriginal rights, Traditional Land Use, and culture, as noted at Part A, paragraph 13 and Part C, paragraph 14 of the Applicant’s submissions.”
- “Strategic Plan, page 23: The opportunity to provide information does not translate into any government commitment to take actions or require decision-makers to exercise their functions in a manner consistent with the Applicant’s view of the continued ability of Aboriginal Peoples to exercise Treaty and Aboriginal rights, engage in Traditional Land Use, practice their culture or to access, peacefully use and occupy their Reserve Lands, as noted in Part A, paragraph 13 of the Applicant’s submissions.”

- “Strategic Plan, 34 and 63 (Outcome 7): [ACFN argued that such sections] “relegate the Applicant to the role of traditional ecological knowledge (TEK) and information provider.” [There is] no commitment by Alberta to do anything with this information that is protective of the Applicant’s view of its Treaty rights, Traditional Land Use and culture as noted in Part A, paragraph 23 of the Applicant’s submissions.”

The Crown asserted in its submission that it *did* “include Aboriginal Peoples in the LARP land-use planning processes and decisions at the strategic level during the LARP creation.”¹⁴

The Crown noted a number of explicit references to Alberta’s continuing commitments to engage with and consult Aboriginal Peoples.¹⁵

In conclusion, the Crown asserted that the LARP *does* provide for effective and meaningful engagement and consultation opportunities for ACFN, including with respect to impacts on rights recognized under section 35 of the *Constitution Act, 1982*.

ISSUE TWO

The Lower Athabasca Regional Plan does not include consideration of, nor does it address, how the Applicant’s members can continue to access and peacefully use and occupy Reserve Lands.

In response to Issue Two, the Crown argued that:

Panel has no Jurisdiction to Consider Matters Related to LARP Creation.¹⁶

The Crown asserted that the “Panel cannot consider the Applicant’s concern, as noted at page 7 of its supplemental submissions, and that LARP does not meet the Terms of Reference for the LARP regarding consideration of lands under federal jurisdiction.”¹⁷

The Crown submitted, “Alberta’s regulatory authority over [federal] lands is limited [by the *Constitution Act, 1867*].” The Crown noted that this restriction was duly noted in the Terms of Reference for Developing the Lower Athabasca Regional Plan, 2009. “The LARP

¹⁰ Response Submissions of the Government of Alberta; page 10, paragraph 53 ¹¹ Response Submissions of the Government of Alberta; page 10 ¹² Response Submissions of the Government of Alberta; page 10, paragraph 55 ¹³ Response Submissions of the Government of Alberta; page 11, paragraph 56 ¹⁴ Response Submissions of the Government of Alberta; page 11, paragraph 57 ¹⁵ Response Submissions of the Government of Alberta; page 11, paragraph 58 ¹⁶ Response Submissions of the Government of Alberta; page 13 ¹⁷ Response Submissions of the Government of Alberta; page 13, paragraph 62

acknowledges [on page 88] that approximately 10% of the region includes the Cold Lake Air Weapons Range, First Nations Reserves, Métis Settlements and Lake Athabasca.”¹⁸

The Crown “also notes that the new Kazan and Richardson Wildlife Parks are located north and south of Lake Athabasca, near the Applicant’s Reserve Lands.” (LARP; page 92). “The inclusion of these areas within the LARP recognizes the importance of continued opportunities for Aboriginal traditional uses.”¹⁹

Panel has no Jurisdiction over Alleged Harms from Activities Which Pre-date LARP.²⁰

As noted earlier, the Crown alleged the Review Panel has jurisdiction only with respect to harms alleged to be caused by the content of the LARP, and not for alleged harms that were due to activities carried on, or approved, prior to the LARP.

The Crown submitted that this applies to the following concerns raised by ACFN’s submission:

- Honoring of existing tenures including permitting access to water resources and disposal infrastructure, as noted in Part A, paragraph 22;
- Recreational use of the area which the Applicant considers its Traditional Territory (including Richardson Backcountry), which has already interfered with the Applicant’s exercise of rights as noted in Part C, paragraph 10; and
- The decline in the availability of traditional resources, as noted on pages 7-8 of the Applicant’s supplemental submissions.

In any event, the Crown asserted that the “LARP sets aside approximately 1.5 million more hectares of land as conservation areas” (LARP; page 84). This reduction in land disturbance is expected to enhance opportunities for the exercise of Treaty rights and Traditional Land Uses.²¹

With respect to the Applicant’s concern that existing tenures will be honoured, with allowance for access to water resources and disposal infrastructure, [the Crown maintained that the] “LARP commits to making integrated land management between all industrial users on public lands a necessary element of doing business.”²²

In looking at the concern of the Applicant with respect to the recreational use of spaces that ACFN considers Traditional Territory, the Crown, in paragraph 69, claimed that the “LARP calls for additional planning for these types of uses to better manage the impact to the land.”

The Crown concluded by stating that the LARP *does* consider existing development and works towards reducing continued effects of all development at the regional level.

ISSUE THREE

The Lower Athabasca Regional Plan is being applied by decision-makers and relied upon by oil sands companies to preclude the protection of Aboriginal and Treaty rights and Traditional Land Use.

With respect to Issue Three, the Crown argued that:

Panel has no Jurisdiction to Consider Applicant’s Allegations of Harms Related to Potential Future Development Activities.²³

The Crown maintained, as it had previously, that all future development activities remain subject to the existing regulatory process. Alleged harms related to potential future activities are therefore not caused by the LARP and are outside the Review Panel’s jurisdiction.

In its submission,²⁴ the Crown noted the following concerns raised in ACFN’s submission, which fall within this category:

- “The contemplation of future mine development in the Richardson Conservation Area,” contrary to the Applicant’s concerns with respect to Treaty rights in the proposed conservation areas; (Part A, paragraphs 14 and 19 of the Applicant’s supplemental submissions)

¹⁸ Response Submissions of the Government of Alberta; page 13, paragraph 63 ¹⁹ Response Submissions of the Government of Alberta; page 13, paragraph 64

²⁰ Response Submissions of the Government of Alberta; page 13 ²¹ Response Submissions of the Government of Alberta; page 13, paragraph 67 ²² Response Submissions of the Government of Alberta; page 14, paragraph 68 ²³ Response Submissions of the Government of Alberta; page 14 ²⁴ Response Submissions of the Government of Alberta; page 14, paragraph 73

- Loss of ability to exercise the Applicant members' Treaty and Aboriginal rights "in preferred places by preferred means"; (Part C, paragraph 2 of Applicant's submissions)
- Loss of ability to engage in Traditional Land Use and other traditional pursuits; (Part C, paragraph 3 of Applicant's submissions)
- Loss of ability to transmit traditional knowledge and culture to future generations; (Part C, paragraph 4 of Applicant's submissions)
- Loss of ability to engage in cultural activities and live in a culturally appropriate manner; (Part C, paragraph 5 of Applicant's submissions)
- Loss of culture; (Part C, paragraph 6 of Applicant's submissions)
- Impact to identity of the Dene people; (Part C, paragraph 23 of Applicant's submissions)
- Loss of land security; (Part C, paragraph 7 of Applicant's submissions)
- Increased risks, and perceived risks, associated with the consumption of [non-traditional] foods; (Part C, paragraph 8 of Applicant's submissions)
- Health impacts linked to changes in diet from traditional to store-bought foods, as well as contamination of country foods; (Part C, paragraph 9 of Applicant's submissions)
- Loss of ability to utilize the Athabasca River as a navigation corridor; (Part C, paragraph 15 of Applicant's submissions)
- Loss of ability to access fishing, hunting and trapping due to water quantity issues; (Part C, paragraph 16 of Applicant's submissions)
- Contamination of local water; (Part C, paragraph 17 of Applicant's submissions)

- Further transformation of land from natural to industrial; (Part C, paragraphs 19-22 and 24 of Applicant's submissions)
- Development near Poplar Point and Point Brule will exacerbate trespass[ing]. (Page 8 of Applicant's submissions)

The Crown stated that "the Applicant's concern regarding the potential for future mine development in the Richardson Conservation Area, [is] that development is not contemplated in the Richardson Conservation area."²⁵ The Crown noted:

"Alberta submits that Treaty rights, while constitutionally recognized and affirmed, are not unlimited. Specifically, the Treaty right to hunt, trap and fish for food is not site-specific; it is the activity which is protected. Further, the Supreme Court of Canada has found for the exercise of Treaty rights that changes in method do not change the essential character of the practice nor diminish the rights. Accordingly, a First Nation's exercise of a Treaty right in a manner different from that previously used does not necessarily diminish the exercise of the Treaty right. Alberta submits that a changing landscape may change the exercise of Treaty rights, without harming such rights."²⁶

In conclusion, the Crown submitted that the aforementioned alleged harms relate to potential alleged harms and are outside of the Panel's jurisdiction.

Panel has no Jurisdiction to Consider Allegations of Harms Related to Implementation of LARP.²⁷

The Crown argued that the Review Panel must consider only the harm caused by the content of the LARP. Alleged harms caused by how the LARP is, or may be, applied or interpreted by industry or regulatory decision-makers are outside the Review Panel's jurisdiction.

The Crown addressed the following concern raised by the Applicant on this matter: "the LARP is being applied by decision-makers and relied on by oil sands companies to preclude the protection of what the

²⁵ Response Submissions of the Government of Alberta; page 15, paragraph 75 ²⁶ Response Submissions of the Government of Alberta; page 16, paragraph 76

²⁷ Response Submissions of the Government of Alberta; page 16

Applicant considers to be its members' Aboriginal rights, Treaty rights and Traditional Land Uses."²⁸

The Government of Alberta concluded by stating that the "LARP does not take away from the Applicant's ability to raise its concerns with these project-specific decision-makers about the impacts of projects on [their rights], in the appropriate forum, which [could] be through the appeal or judicial review mechanism for [each] specific decision-maker."²⁹

ISSUE FOUR

The Lower Athabasca Regional Plan is being applied by decision-makers to effectively rule out the possibility of establishing areas that can be set aside for Traditional Land Use and the exercise of Treaty rights.

With respect to Issue Four, the Crown argued that:

Panel has no Jurisdiction in Relation to Alleged Omissions from LARP.³⁰

As argued previously by the Crown, the Review Panel has jurisdiction only with respect to harms alleged to be caused by specific provisions of the LARP.

The Crown referred to various concerns raised by ACFN with respect to this matter:³¹

- The LARP does not include a specific regulatory details plan for Traditional Land Use and Treaty rights nor does it contain other measures that are protective of what the Applicant considers to be its members' Treaty and Aboriginal rights, Traditional Land Uses and culture; (Part A, paragraphs 1-3, 10, 12, 17, 26-30 and 34 of the Applicant's submissions)
- The conservation areas have not been selected nor designed, nor their objectives set, in a manner consistent with the Applicant's view of its members' Treaty rights and traditional uses or with the Applicant's ability to access and peacefully use and occupy Reserve Lands; (Part A, paragraphs 4, 5, 18 of the Applicant's submissions)

- The Air Quality Management Framework triggers and limits do not include reference to the health of the Applicant's members; (Part A, paragraph 6 and 31)
- Reclamation is only required to an equivalent land capability (rather than to a state consistent with the Applicant's view of Aboriginal Traditional Land Use and the exercise of Treaty rights); (Part A, paragraph 16 of the Applicant's submissions)
- Conservation areas will be managed to provide low-impact backcountry recreation opportunities and nature-based tourism products and services without any mechanism for consideration of the impacts such activities will have on the Applicant, including restrictions on motorized vehicles; (Part A, paragraph 20 of the Applicant's submissions)
- The lack of mechanism to protect the navigation and riparian rights; (Page 8 of the Applicant's supplementary submissions)
- The Water Quality Framework does not address safe drinking water or other health concerns related to water quality for the Applicant's Reserves or members; (Page 8 of the Applicant's supplementary submissions)
- The LARP does not prevent Shell's Jackpine Application or planned development case. (Page 9 of the Applicant's supplementary submissions)

In responding to the Applicant's concerns that the LARP does not include mechanisms for managing TLU or access for the exercise of their Treaty rights, the Crown submitted that it must respect its jurisdictional limits as noted in the *Constitution Act, 1867*.

The Crown noted the, "LARP and other provincial enactments cannot legislate about Indian rights, the status or capacities of Indians as Indians or the Indian interest in land. Nor can such provincial enactments single out "Indians" for special treatment. Therefore, in legislating access to provincial Crown Land, Alberta could not expressly define somebody as being or not being an "Indian" or lands as those to which "Indians" have a right of access to exercise Treaty

²⁸ ACFN; Part B and C, paragraphs 1 and 19; and page 8 of ACFN Supplemental Submission ²⁹ Response Submissions of the Government of Alberta; page 17, paragraph 82

³⁰ Response Submissions of the Government of Alberta; page 17 ³¹ Response Submissions of the Government of Alberta; page 17, paragraph 85

rights. To the extent that the Applicant suggests that the LARP should be amended to do such things, such amendments may be unconstitutional.”³²

With respect to the designation of conservation areas, the Crown “submits that one of the key criteria for the establishment of such areas was that the area support Aboriginal traditional uses” as noted on page 30 of the LARP. Other criteria to be considered were “little to no industrial activity and areas that are representative of the biological diversity in establishing the location of conservation areas.”³³

The Government of Alberta also maintained that the LARP, in establishing the “biodiversity management framework and landscape management plan, [supports] systematic, regional management of wildlife habitat and populations which support Treaty rights and Traditional Land Use.”³⁴ The LARP also expressly indicates that Alberta will work with First Nations in developing the biodiversity management framework, the landscape management plan, and the Lower Athabasca Regional Trail System Plan.”³⁵

With respect to the Air Quality Management Framework, the Government of Alberta “notes that the triggers and limits within the framework are based on the Alberta Ambient Air Quality Objectives (AAAQO).”³⁶

In addressing “the Applicant’s concerns regarding water quality, the LARP [relies on] the Surface Water Quality Management Framework [which identifies] 28 indicators and establishes triggers and limits. In selecting the limits, guidelines for each indicator were selected from the Alberta Water Quality Guidelines for the Protection of Aquatic Life...and five other guidelines.”³⁷

In addressing “the Applicant’s concern that there is “no mechanism” for [examination] of the potential impacts of future development of backcountry recreation and nature-based tourism, [the Government of] Alberta states...that the LARP does not take away from the existing Crown duty...to consult with the Applicant, which includes restrictions on motorized access.”³⁸ The rationale for restricting motorized access to designated areas is

“to mitigate potential biodiversity impacts associated with random motorized access,” which will support the exercise of traditional activities.”³⁹

In responding to the Applicant’s concern regarding suitable reclamation criteria, the Government of Alberta, in paragraph 97 on page 20 of its submission, responded by stating that the LARP does not require reclamation “to any particular standard,” but only the existing requirement. The document does, however, contemplate the implementation of a reclamation strategy that will provide mechanisms to define, measure and report on the return of lands to equivalent capability.”⁴⁰

In summary, the Crown maintained that items or measures alleged to be missing from the LARP cannot be harm caused by the LARP and therefore, are outside the Review Panel’s jurisdiction.

Panel has no Jurisdiction to Consider Harms Alleged to be Caused by Legislation Other Than LARP.⁴¹

The Crown submitted that the following concerns fall within this category:

- “Designation of public land-use zones under the *Public Lands Administration Regulation* will result in restrictions on the use of highway vehicles, snow vehicles and motorized boats;
- Designation of recreation areas and public land-use zones will restrict the use of camping and fires;
- Designation of recreation areas and public recreation trails will restrict the use of firearms.”⁴²

The Government of Alberta argued that such concerns are not concerns about the LARP but relate to the *Provincial Parks Act* or the *Public Lands Act*.

The Crown conceded that the Review “Panel does have jurisdiction to recommend that an area designated by the LARP as a conservation area, provincial recreation area or a public land area for recreation and

³² Response Submissions of the Government of Alberta; page 18, paragraph 86 ³³ Response Submissions of the Government of Alberta; page 18, paragraph 87

³⁴ Lower Athabasca Regional Plan (LARP); pages 45-46 and Response Submissions of the Government of Alberta; paragraph 88 ³⁵ LARP; pages 63-65 and Response Submissions of the Government of Alberta; paragraph 88 ³⁶ Response Submissions of the Government of Alberta; page 19, paragraphs 90-92 ³⁷ Response Submissions of the Government of Alberta; pages 19-20, paragraphs 90-93 ³⁸ LARP; page 30 ³⁹ Response Submissions of the Government of Alberta; page 20, paragraphs 95-96 ⁴⁰ LARP; page 46 ⁴¹ Response Submissions of the Government of Alberta; page 21 ⁴² Response Submissions of the Government of Alberta; page 21, paragraph 103

tourism (PLART) not be designated at all or be given a different designation.” However, the Crown alleged that this jurisdiction is limited by only recommending an “alternative designation from the existing set of designations under existing provincial legislation.”⁴³ The Government of Alberta took the position that the Applicant has not suggested any changes to these designations or that the LARP should not have established these areas in the first place.

The Crown asserted that any impact to the Applicant’s access to these areas is minimal and reasonable, and the regulation of motorized access supports the Applicant’s exercise of Treaty rights. “Much of the lands that will become conservation areas, provincial recreation areas and PLARTs are currently vacant public lands under the *Public Lands Act*.”⁴⁴ Once these areas are established, motorized access will be restricted to designated trails and areas. The LARP specifically indicated that the Government of Alberta will engage with First Nations in the designation of such routes and areas.

The Crown also noted the concern of the Applicant that there could be restrictions on camping and fires within “recreation areas” and “public land use zones.” The Crown stated that the “establishment of public land-use zones will not change the status quo with respect to camping or fires. Part 9 of the *Public Lands Administration Regulation* (PLAR) does not contain any provisions regarding camping or fires related to public land use zones. Although Part 9 of PLAR does contain provisions regulating camping and fires with respect to public land recreation areas, the LARP does not designate any public land recreation areas. With respect to provincial recreation areas, Alberta acknowledges that, under the *Provincial Parks (General) Regulation*, permits may be required for camping in areas outside of designated areas, in large groups or for longer stays. However, Alberta submits this is reasonable to mitigate impacts to the provincial recreation area.”⁴⁵

In addressing the Applicant’s concern about restriction on the use of firearms within recreation areas and public land trails, the Government of

Alberta acknowledged that the above regulation “requires a permit to discharge a firearm in a provincial recreation area...that this restriction is reasonable to protect users of these areas. The LARP does not designate any public land trails.”⁴⁶

The Government of Alberta submitted that any of the above impacts to the Applicant are reasonable and will be minimal.

Issues Within the Panel’s Jurisdiction.⁴⁷

The Crown identified specific concerns of the Applicant that are within the Review Panel’s jurisdiction, but that in any event, there is no harm caused in the LARP, as alleged by ACFN:

- “The LARP prioritizes development; (Part A, paragraph 11 and 12 of the Applicant’s submission)
- The LARP’s designations of provincial recreation areas and public land use areas for recreation and tourism (PLARTs) may result in increased recreation use of the areas, and therefore, increased competition for resources, thereby impacting the use of the areas by the Applicant’s members; (Part C, paragraph 10-13 of the Applicant’s submissions)”⁴⁸
- The LARP prioritizes development (Part A, paragraph 11-12 and 15 of the Applicant’s submission and page 7 of the Applicant’s supplemental submission). The Crown maintains that the LARP does not prioritize development in the region, but the document intends to strike a balance between social, environmental and economic outcomes;⁴⁹
- The Crown asserts that the LARP’s designation of recreation areas does not adversely affect the Applicant (Paragraphs 127-132 of the Crown’s submission). The Applicant argues that the LARP’s designations of provincial recreation areas and public land areas for recreation and tourism (PLARTs) may impact the Applicant’s exercise of Treaty rights by encouraging further

⁴³ Response Submissions of the Government of Alberta; page 21, paragraph 106 ⁴⁴ Response Submissions of the Government of Alberta; page 22, paragraph 110

⁴⁵ Response Submissions of the Government of Alberta; page 23, paragraph 116 ⁴⁶ Response Submissions of the Government of Alberta; page 23, paragraph 117

⁴⁷ Response Submissions of the Government of Alberta; page 23 ⁴⁸ Response Submissions of the Government of Alberta; page 23, paragraph 120 ⁴⁹ Response Submissions of the Government of Alberta; page 24, paragraph 126

sport and commercial hunters and fishers as well as increasing the numbers of recreational users;⁵⁰

- The Crown, in paragraph 131 of its submission, argued that increased regulation of these areas will instead support the exercise of traditional activities and should reduce the potential for conflict amongst users, rather than increase conflict.

The Crown, in conclusion, submitted that the majority of concerns raised by ACFN are not related to the content of the LARP and are, therefore, outside of the Review Panel's jurisdiction. It stated that no harm to the Applicant, as alleged, arises from the content of the LARP, and the Applicant has not been "directly and adversely affected" in accordance with Rule 36.⁵¹

III. Athabasca Chipewyan First Nation's Response to the Crown's Submission

Athabasca Chipewyan First Nation responded to the Crown's submission on August 25, 2014.

ACFN reinforced its arguments in this document, based on its earlier submission, concerning the following sections:

- Part II (page 2) – Alberta's Abuse of the Review Panel Process
- Part III (page 6) – Alberta's Mischaracterization of ACFN's Treaty Rights
- Part IV (page 14) – The Scope of the Review Panel's Jurisdiction

Recognizing the arguments of the Applicant with respect to these three parts, much of these sections seemed, for the most part, to concentrate on the jurisdiction of the Review Panel and ACFN's Treaty rights, which was articulated in ACFN's original Application.

In reviewing this submission, the Review Panel is interested in ACFN's response to the Crown's submission, particularly concerning the heading

"directly and adversely affected," beginning on page 27 of their document.

Under the heading of "Health," beginning on page 28 of its submission, ACFN identifies a number of provisions that affect the physical health of its members:

Regulatory Details Plan, Part 1 - General:

Section 1(e), Sections 4-7, Section 10(2), (ACFN Application, page 4);

Regulatory Details Plan, Part 4 - Air Quality:

Sections 22, 24, 25-26, Schedule A, (ACFN Application, page 5);

Regulatory Details Plan, Part 5 - Surface Water Quality:

Section 29 (a)(e) and Section 30-34, Tables B-1 and B-2 and Schedules B and C, (ACFN Application, page 5);

Regulatory Details Plan, Part 6 - Groundwater:

Section 36(a) and 37-38 (ACFN Application, page 5).

On page 29 of ACFN's response submission, it noted that, in its original argument, ACFN provided a number of areas in the LARP that "directly and adversely" affect the physical health of its members:

- water contamination;
- loss of food security;
- increased risks and perceived risks, associated with consumption of traditional foods;
- health impacts linked to changes in diet from traditional to store-bought foods, as well as contamination of country foods;
- increase in acidifying emissions;
- loss of ability to access fishing, hunting and trapping areas due to water quality issues in the Athabasca River and the Peace Athabasca Delta;
- declines in the availability of suitability of those traditional resources due to contamination concerns;

⁵⁰ Response Submissions of the Government of Alberta; page 24, paragraph 127 ⁵¹ *Alberta Land Stewardship Act - Rules of Practice for Conducting Reviews of Regional Plans* (March 2014)

- contamination of a fishing reserve set aside specifically to exercise Treaty and Aboriginal rights;
- decline in water;
- concerns over quality of safe drinking water and other health concerns related to water quality for ACFN's Reserves and ACFN members who live downstream in Fort Chipewyan;
- impacts to diet and nutrition stemming from loss of access to nutrient-dense, lower-fat foods with high-quality proteins, mineral and vitamins;
- loss of exercise due to inability to exercise its Treaty and Aboriginal rights, which generally involves significant physical exertion;
- less access to country foods and limited disposable income has led to the purchase of cheaper and less [healthy] food alternatives, thus increasing the prevalence of diabetes, obesity, heart disease and other chronic diseases; and
- distress and depression associated with decreased food security.

In paragraph 100, ACFN alleged the Crown responded to these concerns, by noting:

- "The LARP states that the biodiversity management framework and landscape plan are to have several measures which will support systematic, regional management of wildlife habitat and populations and should, in turn, support the exercise of Treaty and Traditional Land Use;"⁵²
- "The triggers and limits framework of the LARP were set based on human health and environmental health and, therefore, supportive of Traditional Land Use;"⁵³
- The LARP enhances the use of AAAQOs by the above-referenced triggers, thus "allowing for sufficient time to plan and react to manage all quality so as to avoid reaching that limit;"⁵⁴

- "The triggers and limits in the Surface Water Quality Framework adopt the most stringent of the provincially-accepted guidelines depending on the use which is at issue; and"⁵⁵
- "Maintenance of the status quo is not an adverse effect by the LARP;" with respect to where the LARP is silent on a particular topic."⁵⁶

ACFN has requested a review of, and amendments to, Sections 22, 24, 25 and 26 of the LARP's Regulatory Details Plan, Part 4 Air Quality (ACFN's Application, page 5).

ACFN's Treaty and Aboriginal rights⁵⁷

The Applicant began this section by outlining a historical overview of its Treaty and Aboriginal rights. ACFN asserts the following activities as Treaty Rights:⁵⁸

- Routes of access and transportation;
- Sufficient water quality and quantity;
- Sufficient quality and quantity of resources in preferred harvesting areas;
- Cultural and spiritual relationships with the land;
- Abundant berry crops in preferred harvesting areas;
- The experience of remoteness and solitude on the land;
- Use of timber to live on the land while hunting, trapping, gathering and /or fishing;
- Lands and resources accessible within constraints of time and cost;
- Construction of shelters on the land to facilitate hunting, trapping and/or fishing;
- The right to instruct younger generations on the land;
- Access to safe lands within which to practice rights;

⁵² Response Submissions of the Government of Alberta; page 18 ⁵³ Response Submissions of the Government of Alberta; page 19 ⁵⁴ Response Submissions of the Government of Alberta; page 19 ⁵⁵ Response Submissions of the Government of Alberta; page 19 ⁵⁶ Response Submissions of the Government of Alberta; page 21 ⁵⁷ ACFN Application; pages 2-3 ⁵⁸ Reply Submissions of Athabasca Chipewyan First Nation; page 34, paragraph 113

- The right to feel safe and secure in conduct of such practices and activities;
- Lands and resources accessible within constraints of time and costs;
- Socio-cultural institutions for sharing and reciprocity; and
- Spiritual sites and associated practices.

ACFN further asserted that its Treaty and Aboriginal rights also include:⁵⁹

- Healthy populations of uncontaminated or “safe” fish in preferred harvesting locations;
- Healthy populations of uncontaminated or “safe” game in preferred harvesting areas;
- Healthy populations of uncontaminated or “safe” medicines, berries and other plant foods in preferred harvesting areas; and
- Feelings of safety and security;

ACFN described the importance of the Athabasca River.⁶⁰ The Applicant relies on boat travel to exercise its right to hunt, trap and fish. The Applicant argued that it faces increasing constraints on its Traditional Lands due to the decreasing ability to navigate the river.

ACFN submitted that the use of the river has already been compromised because of the lower quantity and quality of water on the basis of it being downstream of oil sands development.⁶¹ Water levels in the river and delta are already too low to consistently support the exercise of Treaty rights. ACFN’s evidence is that its rights are impaired by low flows in the Athabasca River, and that further withdrawals will result in “direct and adverse affects” to its rights.

ACFN discussed the contamination of the airshed,⁶² which they maintain will “directly and adversely affect” their rights by:

- a. Resulting in a loss of ability or loss of enjoyment in exercising those rights;

- b. Adversely impacting vegetation within ACFN’s Traditional Lands;
- c. Further contamination of the watershed, particularly lakes relied upon for fishing;
- d. [Impacting the quality and safety of traditional plants; and]
- e. [The air pollution is affecting the quality of habitat for migrating birds].

Under the heading of “Current Management,”⁶³ ACFN referred to a number of reports and studies, reinforcing their concerns regarding health and environmental issues:

- a. Lower Athabasca Region, Status of Management Report for Environmental Management Frameworks (August 2014), released by the Government of Alberta, noted that, “some triggers were exceeded leading to required management responses.” ACFN noted, “why did it take 18 months to advise of the breach in trigger thresholds?”;
- b. ACFN made reference to the Kurek Study (2012),⁶⁴ conducted by Environment Canada and Queens University, measuring polycyclic aromatic hydrocarbon deposition levels at lakes and the Athabasca River near oil sands upgrader operations;
- c. Government of Canada Response to Alberta’s Draft Lower Athabasca Regional Plan (June 6, 2011).

ACFN’s response to this report is that the Review Panel should consider the best of Canada’s recommendations regarding the LARP, as noted on pages 41-51 of its submission.

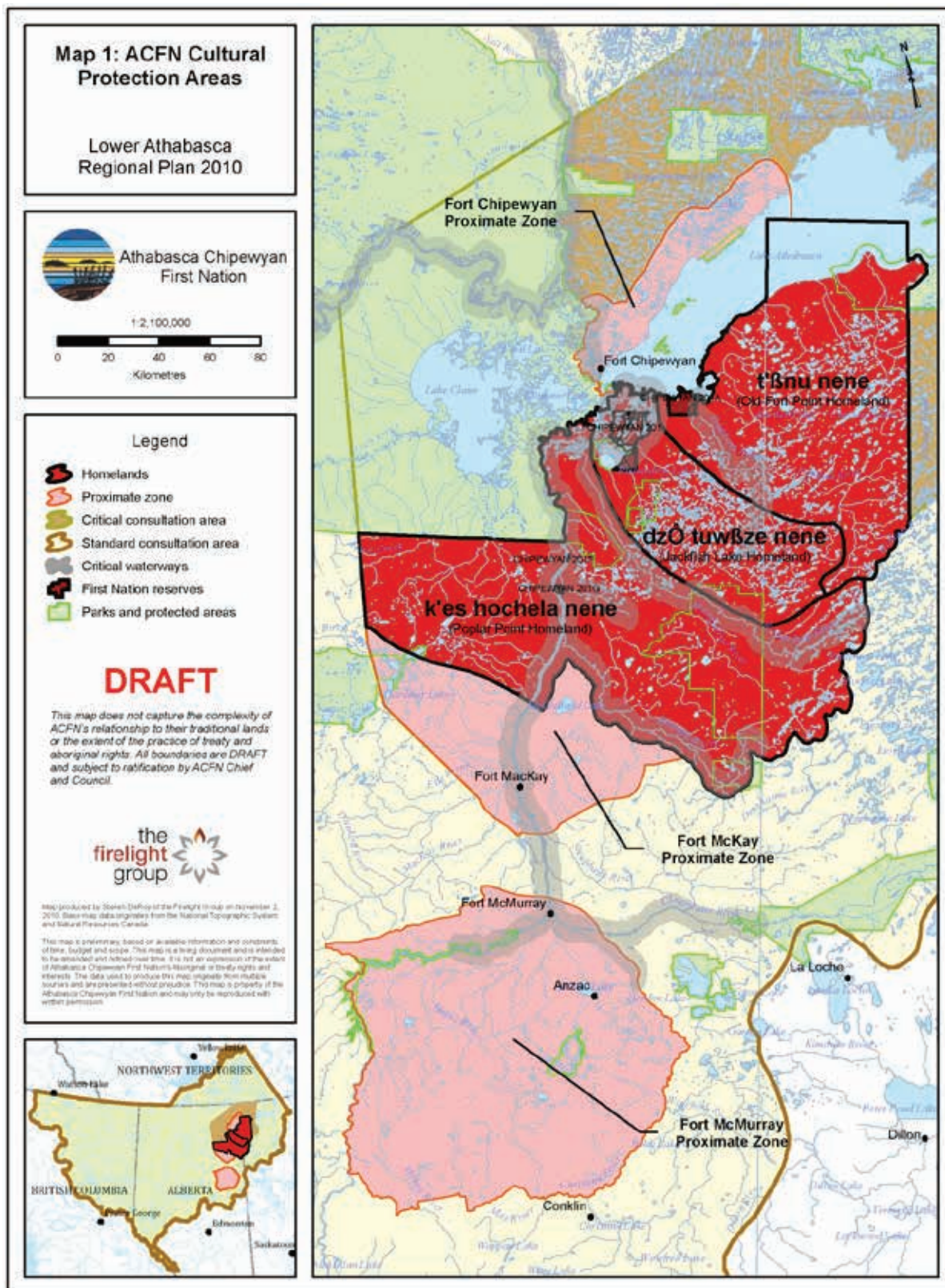
In summary, ACFN concluded that it raises “direct and adverse affects” with respect to health and transportation issues impacting ACFN’s ability to exercise its Treaty and Aboriginal rights.

⁵⁹ Reply Submissions of Athabasca Chipewyan First Nation; page 35, paragraph 114 ⁶⁰ Reply Submissions of Athabasca Chipewyan First Nation; paragraph 118-122

⁶¹ *As Long as the Rivers Flow* provided in Applicants Supplementary Submission; page 25 ⁶² Reply Submissions of Athabasca Chipewyan First Nation; page 37, paragraph 123 ⁶³ Reply Submissions of Athabasca Chipewyan First Nation; page 40 ⁶⁴ Reply Submissions of Athabasca Chipewyan First Nation; page 41, paragraph 135

FIGURE 1:

Athabasca Chipewyan First Nation Advice to the Government of Alberta Regarding the Lower Athabasca Regional Plan (Response to Information Request #6)



Panel Recommendations to the Minister for Athabasca Chipewyan First Nation

Issue One

The Lower Athabasca Regional Plan does not include, nor protect, the Applicant's Treaty and Aboriginal rights, Traditional Land Use or culture.

RECOMMENDATIONS TO THE MINISTER

On the basis of the written evidence submitted by both parties to the Review Panel with respect to this issue, the Review Panel recommends to the Minister that the Applicant *has* been “more than minimally harmed” by the Lower Athabasca Regional Plan (LARP). ACFN *has* also been “directly and adversely affected” by a “loss of income” and resulting “health effects,” as a result of the Lower Athabasca Regional Plan not recognizing Traditional Land Use health concerns raised by the Applicant.

REASONS FOR THE RECOMMENDATION

In Athabasca Chipewyan First Nation's (ACFN) submission of August 19, 2013, the Applicant cited a number of “incidental rights” as a result of their Treaty with the Crown. The Applicant argued that, “under the Treaty, among other entitlements, ACFN secured protection for the continuity, *in perpetuity*, of

traditional patterns of activity and occupation within its Traditional Lands.”¹

The Applicant asserted the following as Treaty and Aboriginal rights. With respect to the issue of determining whether the Applicant has been “directly and adversely affected,” the Applicant — under the heading of “Health,”² — identified a number of provisions in its Application affecting the health of its members, from Regulatory Details Plan 1 to Plan 6.³

ACFN's response submission to the Crown provided specific areas within the LARP that affect the health of its members:⁴

- water contamination;
- loss of food security;
- increased risks and perceived risks, associated with consumption of traditional foods;
- health impacts linked to changes in diet from traditional to store-bought foods, as well as contamination of country foods;

¹ Athabasca Chipewyan First Nation (ACFN) Application; page 3 ² Reply Submissions of Athabasca Chipewyan First Nation; page 28 ³ Reply Submissions of Athabasca Chipewyan First Nation; pages 28-29 ⁴ Reply Submissions of Athabasca Chipewyan First Nation; page 29, paragraph 99

- increase in acidifying emissions;
- loss of ability to utilize the Athabasca River as a navigation corridor;
- loss of ability to access fishing, hunting and trapping areas due to water quantity issues in the Athabasca River and the Peace Athabasca Delta;
- declines in the availability of suitability of those traditional resources due to contamination concerns;
- contamination of a fishing reserve set aside specifically to exercise Treaty and Aboriginal rights;
- decline in water;
- concerns over quality of safe drinking water and other health concerns related to water quality for ACFN's Reserves and ACFN members who live downstream in Fort Chipewyan;
- impacts to diet and nutrition stemming from loss of access to nutrient-dense, lower-fat foods with high-quality proteins, mineral and vitamins;
- loss of exercise due to inability to exercise Treaty and Aboriginal rights which generally involve significant physical exertion;
- less access to country foods and limited disposable income has led to the purchase of cheaper and less healthy food alternatives and, thus, [has increased] the prevalence of diabetes, obesity, heart disease and other chronic diseases;
- distress and depression associated with decreased food security.

The detrimental effects are further described by the Applicant's Supplemental Evidence of August 31, 2013.⁵

In this document, ACFN stated:

"The serious decline in the availability of traditional resources such as wildlife, migratory birds, fish, and water; as well as serious declines in the availability of sustainability of those traditional resources that remain due to the contamination concerns, have

and continue to directly and adversely impact the value of ACFN's Reserve Lands, and member's ability to quietly enjoy those lands for the purposes for which they were set aside.

For example, ACFN [Indian Reserve] IR. 201 D was specifically set aside as a fishing reserve, but many ACFN members no longer fish there due to contamination concerns.

Poplar Point is located in proximity to the range of the Ronald Lake Bison herd and is regularly used as a base camp for those ACFN members wishing to hunt bison. The prioritization of oil sands development, and lack of a traditional use management framework means that the lands that are currently used by bison are likely to be taken up, bison will be driven out, and ACFN's ability to quietly enjoy Poplar Point to support this subsistence hunting activity will be lost."⁶

It is interesting to note that the Applicant with the Mikisew Cree First Nation (MCFN), in September 28, 2010, filed a proposal with the Government of Alberta to develop a "Traditional Land and Resource Use and Management Plan (TLRUMP)." The Crown, in response to ACFN's submission, argued that, similar to other Applications by First Nations, the Review Panel had limited jurisdiction in addressing the Application's concerns with the LARP document.

In its submission, ACFN stated that the Government of Alberta *did* include Aboriginal Peoples in the LARP land-use planning process at the strategic level, including with respect to impacts on rights recognized by the Government of Alberta under section 35 of the *Constitution Act, 1982*.⁷

The Review Panel, based on the written evidence submitted by both parties to these proceedings, recommends to the Minister that there appears to be a conflict between the health concerns raised by the Applicant and its members in their Traditional Territory with the position of the Crown, which noted on page 5 of the LARP:

"Government of Alberta will continue to consult with Aboriginal Peoples when government

⁵ ACFN Supplemental Evidence; Tab 6 ⁶ ACFN Supplemental Evidence; page 7 ⁷ Response Submissions of the Government of Alberta; page 11, paragraph 57

decisions may adversely affect the continued exercise of their constitutionally-protected rights, and the input from such consultations continues to be considered prior to the decision.”

With respect to this issue, the Review Panel recommends to the Minister that, as a result of the LARP and its impact on ACFN, the “health” of ACFN members *has* been “directly and adversely affected” by the loss of the ability of its members to hunt, fish and trap on their Traditional Territory lands; which also affects the “income” of said members, by the loss of such resources for its members.

Issue Two

The Lower Athabasca Regional Plan does not include consideration of, nor does it address, how the Applicant’s members can continue to access and peacefully use and occupy Reserve Lands.

RECOMMENDATIONS TO THE MINISTER

ACFN *has* been “directly and adversely affected” by a “loss of quiet enjoyment of property” and “loss of income,” as a result of the LARP not recognizing the Territorial Land Use needs and requirements of the Applicant.

REASONS FOR THE RECOMMENDATION

The Applicant, in its submission, noted the following concerning this issue:

“The Athabasca River is the lifeblood of ACFN Traditional Lands. The ability to use the River is central to sustaining ACFN’s identity, culture and well-being. The health of the Athabasca River is inextricably linked to the ability of ACFN members to exercise their Treaty Rights within a significant portion of their Traditional Lands. The Athabasca River provides a vital transportation corridor, access to Reserve Lands, access to traditional hunting, trapping, fishing, and gathering uses, and supports the traditional resources required for the meaningful exercise of ACFN’s Treaty Rights and the continuity of ACFN’s distinctive culture.”⁸

The Applicant outlined specific concerns within the LARP which it fails to address, as noted in the Regulatory Details Plan the Strategic and

Implementation Plans. In Tab 3 of its submission, ACFN referred to the ACFN Community Report, As Long As the Rivers Flow: Athabasca River Use, Knowledge and Change (August 16, 2010). This report is based on ACFN-specific information resulting from the Athabasca River Use and Traditional Ecological Knowledge (TEK) study conducted in Spring 2010. The report focused on ACFN knowledge of the river, how it has changed over the past several decades, and how the use of the river has changed as a result. Key issues raised in the study include issues of lower water levels and reduced water quality.⁹

On page 4 of ACFN’s supplemental submission, the Applicant stated:

“ACFN’s beneficial ownership of its Reserve Lands arose specifically out of Treaty 8, and were intended to support ACFN’s way of life, including income, livelihood, health and culture, by serving as a base for the exercise of section 35 Rights over broad areas of surrounding lands. Reserves were promised to Indian Bands in relation to livelihood, which was mixed economy in which hunting, fishing, trapping and gathering were important aspects. The Reserves were never expected to provide all the land that the Indians required. ACFN’s right to earn livelihood and to obtain subsistence from harvesting activities is analogous to, and indivisible from, the right to earn an income. In fact, it has always been explicitly understood by the signatories to the Treaty to be so. It was specifically contemplated that the normal enjoyment of Reserve Lands included the ability to hunt, fish, trap and gather in surrounding lands and waters.”

ACFN argued on page 5 of the same submission:

“ACFN’s right to use its Traditional Lands for rights-based and cultural activities is analogous to the right to quiet enjoyment of property. ACFN’s right to earn livelihood and to obtain sustenance from harvesting activities is analogous to, and indivisible from, the right to earn an income.”

The response argument of the Crown noted that the Review Panel has no jurisdiction to consider matters related to the creation of the LARP, or over alleged harms from activities that pre-date the LARP.¹⁰ The

⁸ ACFN Application; pages 3-4 ⁹ ACFN Application; pages 4-8 ¹⁰ Response Submissions of the Government of Alberta; page 13

Crown also asserted that conservation areas are expected to enhance opportunities for the exercise of ACFN's Treaty rights and traditional uses. The Crown concluded that the LARP *does* consider existing development and works towards reducing continued effects of all development at the regional level.

The Review Panel recognizes the argument of the Applicant that the Athabasca River is very important to ACFN in maintaining the "lifeblood" of its Traditional Lands. The Applicant, in its evidence, is concerned with the quality and quantity of this river system. In addition, similar to the arguments of other First Nation Applicants, ACFN argued that its Traditional Land territory, as described in its Aboriginal and Treaty rights, cannot be captured entirely within the LARP's proposed new conservation and recreational areas.

The Review Panel agrees with ACFN that not considering its Traditional Land Use activities and territory in the LARP results in "more than minimal harm" to the Applicant. The Review Panel recommends that the Applicant, *has* been "directly and adversely affected" by the "loss of quiet enjoyment of property" and the "loss of income" for its members, with the reduction of harvesting activities on the river itself.

Issue Three

The Lower Athabasca Regional Plan is being applied by decision-makers and relied upon by oil sands companies to preclude the protection of Aboriginal and Treaty rights and Traditional Land Use.

RECOMMENDATIONS TO THE MINISTER

The Applicant is "directly and adversely affected" with respect to this issue through "loss of income" and adverse "health effects" for its members, as a result of continued impacts on its Territorial Lands from industrial development.

REASONS FOR THE RECOMMENDATION

In its submission ACFN stated:

"The LARP is being applied by decision-makers to effectively rule out the possibility of establishing areas that can be set aside for Traditional Land Use and the exercise of Treaty rights. However, the Joint Review Panel for the Jackpine Mine Expansion

strongly recommended that Alberta consider the need for conservation offsets to address significant efforts, including consideration of:¹¹

- a. the effects of the offsets on existing Traditional Land Use and the need to maintain areas for traditional use by Aboriginal Peoples, including areas containing plants and other culturally-important resources (paragraph 12);
- b. the need to preserve the suite of species and ecosystems in the region and to maintain local and regional biodiversity as well as the need to preserve unique environments and species (paragraph 996); and
- c. the need for conservation offsets to address the impacts on some migrating birds (paragraph 936)."¹²

The Applicant, in its supplemental evidence package, submitted:

"ACFN's Poplar Point Reserve is completely surrounded by oil sands leases. As the Dover decision reveals, the LARP as it now stands has led decision-makers to believe they cannot protect Reserve Lands from oil sands development coming right up to their boundaries. Noise, odour and light could well render the Reserve uninhabitable. The risk of injury to people and property will increase. Trespass is already increasing, and will be exacerbated by the development near Poplar Point and Point Brule. The ecology of the Reserve Lands will be changed. They will no longer be fit for the purpose of supporting cultural land use and section 35 Rights. The LARP does not contain the necessary tools to manage the cumulative effects of this development.

The LARP's frameworks do not contain measures that address the health impacts of air pollution, water pollution, odour, and noise on ACFN's members using their Reserve Lands... All of ACFN's Reserve Lands are downstream of the oil sands, and the water quality framework under the LARP does not address safe drinking water or the other health concerns related to water quality for ACFN's Reserves, nor for ACFN members who live downstream in Fort Chipewyan."¹³

¹¹ 2013 Alberta Energy Regulator 011 ¹² ACFN Application; pages 10-11 ¹³ ACFN supplemental evidence package; page 8

In the Applicant's evidence documents, the issue of health is also reviewed. ACFN noted:

"The World Health Organization has defined health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." This definition has been adopted by Health Canada."¹⁴

In the same document, concerning the effects of health concerns from oil sands development, ACFN stated:

"The reduction in opportunities to exercise section 35 Rights have direct physical health consequences for ACFN members, including:

1. Impacts related to diet and nutrition stemming from loss of access to nutrient-dense of lower-fat foods with high-quality proteins, minerals and vitamins.
2. Loss of exercise of rights generally involves significant physical exertion.
3. Less access to country foods and limited disposable income often means having to purchase cheaper and less healthy food alternatives. This increases the incidence of diabetes, obesity, heart disease and other chronic diseases.

The reduction in opportunities to exercise section 35 Rights has direct psychological health consequences for ACFN members including:

1. Distress and depression associated with decreased food security;
2. Psychological harm connected to disturbance of lands, waters and natural resources that ACFN members are culturally-connected to."¹⁵

Culture is a determinant of health, and loss or devaluation of language and culture adversely affects health.¹⁶

As noted by ACFN, household income can be significantly "directly and adversely affected" when foods must be purchased instead of harvested, as

well as when members must travel further in order to harvest successfully.

The Crown, in response to ACFN's argument with respect to this issue, maintained that the Review Panel has no jurisdiction in relation to the Applicant's allegations of harms related to potential future development activities, and that all future development activities remain subject to the existing regulatory process.

In its submission, the Crown noted:

"Alberta submits that Treaty rights, while constitutionally recognized and affirmed, are not unlimited. Specifically, the Treaty right to hunt, trap and fish for food is not site-specific; it is the activity which is protected. Further, the Supreme Court of Canada has found for the exercise of Treaty rights that changes in method do not change the essential character of the practice nor diminish the rights. Accordingly, a First Nation's exercise of Treaty right in a manner different from that previously used does not necessarily diminish the exercise of the Treaty right. Alberta submits that a changing landscape may change the exercise of Treaty rights, without harming such rights."¹⁷

The Review Panel agrees with the Applicant that the LARP is unable to ensure the sustainability of ACFN's lands and how the potential impact will be addressed on its lands. The serious decline in the availability of traditional resources such as wildlife, lands and fish impacts the "health" and "income" of its members for the future. With respect to the Athabasca River, ACFN is concerned about the contamination of these waters in addition to the existing water level of the river.

All of ACFN's lands are downstream of the oil sands and are being impacted by such issues as safe drinking water and other health concerns noted in the evidence of the Applicant.

The Review Panel concluded that the Applicant *has* been "more than minimally harmed" and that its members *are* "directly and adversely affected" by the potential "loss of income" and "health effects" from oil sands development within their Territorial Lands, as recognized in ACFN's Treaty and Aboriginal rights.

¹⁴ ACFN supplemental evidence package; page 5 ¹⁵ ACFN supplemental evidence package; page 9 ¹⁶ [Larcombe Encroachment Report](#) ¹⁷ Response Submissions of the Government of Alberta; page 16, paragraph 76

Issue Four

The Lower Athabasca Regional Plan is being applied by decision-makers to effectively rule out the possibility of establishing areas that can be set aside for Traditional Land Use and the exercise of Treaty rights.

RECOMMENDATIONS TO THE MINISTER

The Review Panel recommends to the Minister that the Applicant, ACFN *has* been “directly and adversely affected,” resulting in a “loss of income,” detrimental “health effects,” and the “loss of quiet enjoyment of property.”

REASONS FOR THE RECOMMENDATION

Beginning on page 11 of its Application, ACFN listed a number of adverse effects, arguing that “development is being and will steamroll ahead without the information or planning required to maintain ACFN’s Treaty rights, traditional uses, and ability to access and peacefully use and occupy its Reserve Lands.”

Aside from the concerns raised in their earlier issues, ACFN addressed important matters, on page 12 of their Application, relating to recreation areas. These include:

- Paragraph 10: “Recreational use of Richardson Backcountry has already interfered with ACFN’s exercise of rights in the area. The LARP designations may encourage further consumptive and non-consumptive sport and commercial hunters and fishers, as well as increasing numbers of recreational snowmobiles, all-terrain vehicles and other transportation uses. They may also support commercial tourism development. And if the proposed road and trail networks discussed under the LARP come to fruition, access to the area for everybody will be greatly improved and, with more access and more non-indigenous and recreational users, ACFN is often not able to hunt in areas due to safety concerns. That is a direct impact.”

- Paragraph 11: “the LARP’s goals of increasing recreation and tourism will have direct and adverse impacts upon ACFN for example: by increasing competition for resources; reducing harvest success; preventing the discharge of firearms due to concerns for the safety of others; and detracting from the incidental rights to feel safe, secure and experience remoteness and solitude on the land.”
- Paragraph 12: “Lake Athabasca and Richardson recreation tourism areas in the LARP fall within homeland areas that have been identified by ACFN as places the members wish to protect as sanctuaries for their current use and for the use of future generations. The [Government of Alberta] (GoA) LARP goal for those areas is to provide for additional recreation opportunities and attract tourism investment.”
- Paragraph 13: “There is a high potential that the LARP land-use designations are not mitigation for ACFN’s regional concerns — they could actually attract tourism-based investment and government-induced infrastructure, which would proactively encourage incremental and new sport and recreational use in ACFN’s homeland areas. This would further restrict ACFN use of the area, in particular, their use for hunting.”

On page 9 of ACFN’s supplemental submission, they also noted:

“The designation of traditionally-used areas as “Public Land Use Areas” will directly and adversely affect ACFN’s livelihood, health, and ability to exercise Treaty Rights. Designation as Public Land Use Zones under (PLAR) will result in: restrictions on the uses of conveyances including on- and off-highway vehicles or snow vehicles and motorized [boats], which many ACFN members rely upon for accessing Traditional Lands for rights-based activities (section 185 PLAR); restrictions on camping and fires in certain circumstances within public recreation areas and public land-use zones; and restrictions on the use of firearms in public land recreation areas or public recreation trails (section 188 PLAR) which are created pursuant to Schedule F of the LARP.”

With respect to the creation of new conservation areas (as noted on page 29 of the LARP), ACFN remarked that these “areas were not created or set aside to be consistent with Aboriginal and Treaty rights practice and Traditional Land Use, despite ACFN’s substantive submissions on same.”¹⁸

The Review Panel reviewed the cumulative effects management scheme, outlined on page 3 of the LARP, and the document in the Applicant’s submission in Appendix 4, entitled Regional Municipality of Wood Buffalo Cumulative Effects Study.

The Crown responded to ACFN’s submission by providing very little evidence against the Applicant’s concerns with respect to this issue, other than to state that the Review Panel has no jurisdiction in relation to alleged omissions from the LARP.

In responding to the Applicant’s concerns that the LARP does not include mechanisms for managing Traditional Land Use or access for the exercise of their Treaty rights, the Crown submitted that it “must respect its jurisdictional limits as noted in the *Constitution Act, 1867*. With respect to the designation of conservation areas in the LARP, the Government of Alberta maintained that one of the key considerations in the creation of such areas was “to support Aboriginal traditional uses.”

The Crown also argued that the LARP’s designation of recreation areas does not adversely affect the Applicant.¹⁹

The Review Panel, after considering the written evidence of both parties to these proceedings, believes that the creation of both the conservation and recreation areas established limitations on ACFN’s members to carry out TLU within their Traditional Territory, pursuant to their Aboriginal and Treaty rights. These two areas are the only ones in the LARP designated for such purposes, but the Applicant has argued, for a number of reasons, that government restrictions or allowances make it very difficult for ACFN members to have free access to carry out their TLU activities in these areas. For example, as noted in other Applications by First Nations, Note 7 on page 90 of the LARP allows for “multi-use corridors for both areas.”

For the above reasons, the Review Panel has determined that the Applicant *has* been “more than minimally harmed” and *has* been “directly and adversely affected” by the provisions of the LARP that impact ACFN’s Traditional Land Use. This *has* resulted in a “loss of income,” resulting “health” implications, and “loss of quiet enjoyment of property,” caused by the inclusion of conservation and recreation areas within ACFN’s Traditional Lands, as described on page 32 of the LARP and Part 2 of the Regulatory Details Plan. The Applicant argued that such areas do not enhance their members’ ability to effectively carry out their ongoing TLU activities.

¹⁸ ACFN Application; page 6, paragraph 18 ¹⁹ Response Submissions of the Government of Alberta, paragraphs 127-132

Mikisew Cree First Nation Analysis of Application

Background

The Mikisew Cree First Nation (MCFN) is an Indian Band under the *Indian Act* and an Aboriginal group as per the meaning of section 35 of the *Constitution Act, 1982*.¹ MCFN is the largest First Nation within the Regional Municipality of Wood Buffalo, with a registered population of 2,758 members. MCFN has nine Reserves set aside for its use and benefit, pursuant to the *Indian Act*, RSC 1985, c 1-6, in the oil sands region. Approximately half of its members live in or around Fort Chipewyan. Most of the remaining half of their members live in the vicinity of Fort McKay and Fort McMurray. MCFN's Traditional Lands extend around Lake Athabasca, over the Peace-Athabasca Delta, and south to, and including, Fort McMurray and the Clearwater River.

Mikisew Cree First Nation brought this Application, on August 22, 2013, for review of the Lower Athabasca Regional Plan (LARP) — pursuant to section 19.2 of the *Alberta Land Stewardship Act* (ALSA), S.A. 2009, c. A-26.8, and the *Alberta Land Stewardship Regulation* (ALSR) — on the basis that MCFN is a person “directly and adversely affected” by the LARP.

Issues

The Review Panel considers that the raised issues by the Applicant can be summarized as follows:

Issue One: The Lower Athabasca Regional Plan has an absence of measures that are protective of the Applicant's Treaty rights, Traditional Land Use and culture.

Issue Two: The Lower Athabasca Regional Plan finds the Crown, decision-makers, local government bodies and all persons in the absence of measures that are protective of the Applicant's Treaty rights, Traditional Land Use and culture.

Issue Three: The Lower Athabasca Regional Plan prioritizes economic interests over section 35 rights.

Issue Four: The Lower Athabasca Regional Plan's environmental frameworks lack thresholds and triggers relating to the protection of Treaty rights.

Issue Five: The Lower Athabasca Regional Plan designates conservation, recreation and mixed-use access without taking any steps to ensure that the legal regimes for these areas are, or will be, capable of protecting and accommodating Treaty rights.

Issue Six: The Government of Alberta has not meaningfully consulted the Applicant with respect to the development of The Lower Athabasca Regional Plan.

¹ Mikisew Cree First Nation (MCFN) Application; page 3

I. Argument of the Applicant – Mikisew Cree First Nation

ISSUE ONE

The Lower Athabasca Regional Plan has an absence of measures that are protective of the Applicant's Treaty rights, Traditional Land Use and culture.

See Issue One – Recommendations to the Minister with respect to this matter (see page 137).

ISSUE TWO

The Lower Athabasca Regional Plan finds the Crown, decision-makers, local government bodies and all persons in the absence of measures that are protective of the Applicant's Treaty rights, Traditional Land Use and culture.

The Applicant argued that the LARP fails to address or protect MCFN's peaceful use and occupation of lands on which it has a right to access, including its Reserve Lands, and its culture.

In its Application, MCFN listed the specific relevant sections of the LARP that they believe infringe on such rights:²

- Section 1(e) – exclusion of a Regulatory Details Plan for Traditional Land Use and Treaty Rights, including limits, triggers and thresholds.
- Sections 4-7 – to the extent that the Plan is intended to guide, inform, or bind the Crown, decision-makers, local government bodies and all other persons, in the absence of measures that are protective of MCFN's Treaty and Aboriginal rights, Traditional Land Use, and culture. For example:
- Section 6 of the Regulatory Details Plan states that it is enforceable as law, and its provisions bind:
 - a. the Crown;
 - b. decision-makers;
 - c. local government bodies; and

d. subject to section 15.1 of the Act, all other persons.

- Section 7(1) of the Regulatory Details Plan requires that a "decision-maker, before carrying out any function in respect of the decision-maker's powers, duties and responsibilities in the planning region, *consider the LARP Strategic Plan and the LARP Implementation Plan.*"
- Section 7(2) requires that a local government body, "before carrying out any function in respect of the local government body's powers, duties and responsibilities in the planning region, *consider the LARP Strategic Plan and the LARP Implementation Plan.*"

The direct result of this is that each of the priorities, objectives, strategies, and plans laid out in the LARP Strategic and Implementation Plans will guide the decisions respecting land use and land planning made by all government decision-makers (at both the provincial and municipal levels) in and around MCFN's territory. As such, a number of the principles, priorities and strategies identified in the Strategic and Implementation Plans will also "directly and adversely impact" MCFN to the extent that decision-makers are obliged to consider them and make decisions in accordance with the objectives and strategies set out in the LARP.

A number of other provisions in the Regulatory Details Plan also require provincial and municipal decision-makers to consider, and seek to achieve, specific objectives and strategies of the LARP. These include:

- Section 10(2) – to the extent that it requires decision-making bodies to make changes or implement new initiatives to comply with the LARP in the absence of measures that are protective of MCFN's Treaty and Aboriginal rights, Traditional Land Use and culture.
- Sections 13-20 – the provisions respecting establishing conservation areas and conserved lands:

13 – In this part, "conservation area" means the lands identified as conservation areas and labelled 1 through 6 on the LARP Digital Map.

² MCFN Application; pages 7-13

16(1) – The Designated Minister may take whatever steps that, in the opinion of the Designated Minister, are desirable for achieving the conservation objectives of the LARP Strategic Plan and the LARP Implementation Plan and for implementing Schedule F to the LARP Implementation Plan in respect of conservation areas.

(2) Subject to any other law, a statutory consent may be renewed in a conservation area if the statutory consent is, at the effective date of renewal, in good standing under the provisions of the enactment or enactments applicable to the statutory consent, and:

- a. if the statutory consent is consistent with this regional plan; or
- b. if the statutory consent is inconsistent with or non-compliant with this regional plan, within the meaning of section 11(2), but:
 - i. is an agreement under the *Mines and Minerals Act* or a disposition under the *Public Lands Act* that is valid and subsisting at the time this regional plan comes into force; or
 - ii. if it is not an agreement or disposition referred to in subclause (i), but is, within the meaning of section 11(4), incidental to an agreement or disposition referred to in subclause (i).

17 – In respect of the land use in a conservation area, the Designated Minister shall establish and maintain programs evaluating the effectiveness of the conservation area in meeting the relevant conservation objectives in the LARP Implementation Plan.

19 – In this Part:

- a. “conservation purposes,” in respect of land, means the purposes referred to in section 29(1) of the Act, but does not include the following agricultural purposes:

- i. cultivation;
- ii. clearing; and
- iii. range improvements within the meaning of regulations and rules under the *Public Lands Act*.

b. “conserved land” means:

- i. parks designated under the *Provincial Parks Act*;
- ii. wilderness areas, ecological reserves, and natural areas designated under the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act*; and
- iii. public land-use zones managed for one or more conservation purposes and declared under the *Public Lands Act*.

20 – The Designated Minister shall establish and maintain programs:

- a. monitoring the total combined area of conserved land in the planning region; and
- b. evaluating the ratio of conserved land referred to in clause (a) to the total area of land comprising the planning region.

- Sections 22, 24, 25-26: The provisions respecting air quality management frameworks:

22 – In this Part:

- a. “framework” means the document referred to in this regional plan as the Air Quality Management Framework for the Lower Athabasca Region as amended or replaced from time to time;
- b. “limit” means the applicable limit specified in Table A-1 of the LARP Implementation Plan;
- c. “person responsible” has the same meaning as defined in the *Environmental Protection and Enhancement Act*;

- d. “trigger” means the applicable trigger specified in Tables A-1 and A-2 of the LARP Implementation Plan.

23(1) – The Designated Minister, in the exercise of the Designated Minister’s powers and duties under this Part, may determine:

- a. the measurements of substances of concern at monitoring stations established and maintained under a program referred to in section 24;
- b. whether a trigger or limit has been exceeded for the purposes of this Part;
- c. whether a trigger or limit exceeded in respect of one or more specific areas in the planning region is of concern in other areas of the planning region or the whole planning region; and
- d. the duration of an exceedance of a trigger or limit determined by the Designated Minister.

(2) The Designated Minister’s determination is final and binding on the Crown, decision-makers, local government bodies and, subject to section 15.1 of the Act, all other persons.

24 – In respect of the framework, the Designated Minister shall establish and maintain programs:

- a. managing ambient air quality limits and triggers for substances that, in the opinion of the Designated Minister, are indicators of the air quality effects of concern for the planning region;
- b. monitoring and evaluating the ambient air quality in the planning region; and
- c. evaluating the effectiveness of the framework in meeting the air quality objective stated in the LARP Implementation Plan.

26(1) – If the Designated Minister determines that a trigger or limit has been exceeded, an appropriate official or officials in the Designated

Minister’s government department must initiate a management response consistent with the framework...

27 – For greater clarification, in reaching an opinion under sections 25 and 26, the Designated Minister may consider such information as, in the Designated Minister’s opinion, is material to:

- a. a particular activity or activities or type or class of activity or types or classes of activities;
- b. the relevant area or relevant part of the area in which the activity is to occur;
- c. the relevant area or relevant part of the area in which an effect or effects of the activity or activities are reasonably expected to occur;
- d. the reasonably expected, relevant period or duration of the effect or effects of the activity or activities;
- e. any other matter that, in the Designated Minister’s opinion, is advisable under a program referred to in section 24.

- Sections 29, 30-34, 36, 37-38: The provisions related to surface and ground water quality management frameworks:

29 – In this Part:

- a. “framework” means the document referred to in this regional plan as the Surface Water Quality Management Framework for the Lower Athabasca River as amended or replaced from time to time;
- b. “limit” means the applicable limit specified in Tables B-1 and B-2 of the LARP Implementation Plan;
- c. “Lower Athabasca River” means that portion of the Athabasca River commencing at the easternmost boundary of the Grand Rapids Wildland Provincial Park to the confluence of the Athabasca River with the Athabasca Delta;

- d. “person responsible” has the same meaning as defined in the *Environmental Protection and Enhancement Act*;
- e. “trigger” means the applicable trigger specified in Tables B-1 and B-2 of the LARP Implementation Plan;
- f. “water” has the same meaning as defined in the *Water Act*.

30(1) – The Designated Minister, in the exercise of the Designated Minister’s powers and duties under this Part, may determine:

- a. the measurements of substances of concern at monitoring stations established and maintained under a program referred to in section 31;
- b. whether a trigger or limit has been exceeded for the purposes of this Part;
- c. whether a trigger or limit exceeded in respect of one or more specific areas in the Lower Athabasca River is of concern in other areas of the Athabasca River, or its tributaries or distributaries, or other areas of the planning region or the whole planning region; and
- d. the duration of an exceedance of a trigger or limit determined by the Designated Minister.

(2) The Designated Minister’s determination is final and binding on the Crown, decision-makers, local government bodies and, subject to section 15.1 of the Act, all other persons.

31 – In respect of the framework, the Designated Minister shall establish and maintain programs:

- a. managing water quality limits and triggers for substances that, in the opinion of the Designated Minister, are indicators of the surface water quality effects of concern for the Lower Athabasca River;
- b. monitoring and evaluating the water quality in the Lower Athabasca River; and

- c. evaluating the effectiveness of the framework in meeting the water quality objective for the Lower Athabasca River stated in the LARP Implementation Plan.

33(1) – If the Designated Minister determines that a trigger or limit has been exceeded, an appropriate official or officials in the Designated Minister’s government department must initiate a management response consistent with the framework.

34 – For greater clarification, in reaching an opinion under sections 32 and 33, the Designated Minister may consider such information, as in the Designated Minister’s opinion, is material to:

- a. a particular activity or activities or type or class of activity or types or classes of activities;
- b. the relevant area or relevant part of the area in which the activity is to occur;
- c. the relevant area or relevant part of the area in which an effect or effects of the activity or activities are reasonably expected to occur;
- d. the reasonably expected, relevant period or duration of the effect or effects of the activity or activities;
- e. any other matter that, in the Designated Minister’s opinion, is advisable under a program referred to in section 31.

36 – In this Part:

- a. “framework” means the document referred to in this regional plan as the Groundwater Management Framework as amended or replaced from time to time;
- b. “groundwater” has the same meaning as defined in the *Water Act*.

37 – In respect of the framework, the Designated Minister shall establish and maintain programs monitoring and evaluating the groundwater quantity and quality in the planning region.

- Sections 39, 42-45: The provisions respecting the creation of recreation and tourism areas:

39 – In this Part:

- a. “provincial recreation area” means lands identified as a provincial recreation area and labelled A through I on the LARP Digital Map;
- b. “public land area for recreation and tourism” means lands identified as a public land area for recreation and tourism and labelled 1 through 5 on the LARP Digital Map;
- c. “water” means water as defined in the *Water Act*.

42 – In respect of public land areas for recreation and tourism and provincial recreation areas, the Designated Minister may take whatever steps, that in the opinion of the Designated Minister, are desirable for achieving the recreation and tourism objectives of the LARP Strategic Plan and implementing Schedule F to the LARP Implementation Plan.

43 – Subject to any other law, a statutory consent may be renewed in a provincial recreation area if the statutory consent is, at the effective date of renewal, in good standing under the provisions of the enactment or enactments applicable to the statutory consent, and:

- a. if the statutory consent is consistent with this regional plan; or
- b. if the statutory consent is inconsistent with or non-compliant with this regional plan, within the meaning of section 11(2); but
 - i. is an agreement under the *Mines and Minerals Act* or a disposition under the *Public Lands Act* that is valid and subsisting at the time this regional plan comes into force, or
 - ii. if it is not an agreement or disposition referred to in subclause (i), but is, within the meaning of section 11(4), incidental to an agreement or disposition referred to in subclause (i).

45 – In respect of the land use in public land areas for recreation and tourism and provincial recreation areas, the Designated Minister shall establish and maintain programs evaluating the effectiveness of the public land area for recreation and tourism or provincial recreation area in meeting the recreation and tourism objectives in the LARP Strategic Plan and the LARP Implementation Plan.

The Strategic and Implementation Plans [including the following schedules]:

- Schedule A – Air Quality Management Framework Limits and Triggers.
- Schedule B – Surface Water Quality Management Framework Limits and Triggers.
- Schedule C – Groundwater Management Framework Interim Quality Triggers.
- Schedule E – Lower Athabasca Regional Trail System Plan – does not include Treaty rights and Traditional Land Use or ability to peacefully use and enjoy Reserve Lands as criteria or objectives, or as factors to be included in development of plan.
- Schedule F
- Schedule G

The Applicant argued that each of the above provisions (including the strategic and implementation plans) of the LARP has the potential to directly and adversely affect MCFN.

ISSUE THREE

The Lower Athabasca Regional Plan prioritizes economic interests over section 35 rights.

In its submission to the Review Panel, the Applicant argued that the LARP prioritizes economic interests over the section 35 rights of the Applicant.

MCFN stated the following:

“Subsection 7(1) and 7(2) of the LARP requires that a provincial decision-maker or local government body consider the LARP Strategic and Implementation Plan prior to carrying out any function related to their powers, duties and

responsibilities in the planning region. As a result, every decision made in the Lower Athabasca Region will be made in accordance with the priorities, and to achieve the objective set out in the LARP. This will directly and adversely impact MCFN because the Strategic and Implementation Plans in the LARP prioritize a range of land-users for the majority of lands within the Lower Athabasca Region over the practice of Treaty Rights, which appear to be treated as recreational activities...the LARP does not provide any guidance to decision-makers to avoid further adversely affecting and infringing MCFN's Treaty Rights and completely ignores that previous decisions made by Alberta have adversely affected and infringed MCFN's section 35 Rights already."³

MCFN continued:

"The Lower Athabasca Region is a vibrant and dynamic region of Alberta. People, industry and government partner to support development of the region and its oil sands reserves. Economic opportunities abound in forestry, minerals, agriculture, infrastructure development, the service industry and tourism. The region's air, water, land and biodiversity support healthy ecosystems and world-class conservation areas. Growing communities are supported by infrastructure and people can enjoy a wide array of recreation and cultural opportunities."⁴

ISSUE FOUR

The Lower Athabasca Regional Plan's environmental frameworks lack thresholds and triggers relating to the protection of Treaty rights.

In its submission, MCFN maintained that the various management frameworks lack the essential thresholds and triggers relating to the protection of Aboriginal and Treaty rights. MCFN stated that, "the practical result is that the LARP establishes thresholds that effectively guarantee that the Lower Athabasca Region will fail to support the conditions and resources required for the exercise of MCFN's section 35 Rights and culture."⁵

MCFN elaborated further:

"The LARP indicates that frameworks will use disturbance levels, triggers, and thresholds based on future anticipated oil sands development rather than pre-disturbance levels, or current disturbance levels. By focusing on future development, the air and water quality frameworks will fail to capture and address cumulative effects of pre-existing development. Again, this directly affects MCFN's right to have the Crown take positive steps to ensure the continued ability of our members to exercise their rights and culture, taking into account the conditions and preferred location/manner of exercising those rights.

In addition, the scope and utility of the proposed frameworks are seriously limited by:

- excluding important elements such as odours, flaring, [carbon dioxide] CO₂, and particulates from air quality thresholds;
- not setting baseline levels and excluding [polycyclic aromatic hydrocarbon] PAHs from surface water quality thresholds;
- basing the ground management framework on self-reported industry data and by excluding wetland health from that framework; and
- basing land disturbance plans on future anticipated oil sands development."⁶

ISSUE FIVE

The Lower Athabasca Regional Plan designates conservation, recreation and mixed-use access without taking any steps to ensure that the legal regimes for these areas are, or will be, capable of protecting and accommodating Treaty rights.

In its submission, MCFN argued that the LARP designates conservation, recreation and mixed-use areas without taking any steps to ensure that the legal regimes for these areas are, or will be, capable of protecting and accommodating Aboriginal Treaty rights.⁷

³ MCFN Application; page 14 ⁴ MCFN Application; page 15 ⁵ MCFN Application; page 16 ⁶ MCFN Application; page 17 ⁷ MCFN Application; page 18

For example, the Applicant stated:

“The provisions of the *Provincial Parks Act*, the *Public Lands Act* and their associated regulations impose limits on the location, time and manner of accessing lands for exercising section 35 Rights and these enactments provide no priority scheme for Aboriginal access to areas relied upon for the practice of their Rights.

In some cases, industrial activities will still be permitted in these same conservation areas, while at the same time, no steps have been taken in [Public Lands Administration Regulation] PLAR to ensure that MCFN will continue to have sufficient access to Crown lands for the exercise of their Treaty rights that Treaty 8 and the [Natural Resources Transfer Agreement, 1930] NRTA guarantees. This is extremely problematic, because a central component of the right to hunt and trap under Treaty 8 is the right to access sufficient lands on which wildlife is located to preserve a way of life that depended on hunting, trapping and fishing...

These recreational areas, established under the provisions of the *Public Lands Act*, will again impose certain limits on access and on the activities that may be done in those areas. In addition, the creation of new provincial recreation areas is intended to support greater tourism development, which will reduce the ability of MCFN members to engage in our Treaty rights as increased non-Aboriginal presence creates safety concerns (for example with respect to hunting) and increased competition for resources (such as wildlife as more sports hunters come to the area).

One example of this is the creation of the Lake Athabasca Public Land Use Area for Recreation and Tourism. This Public Land Use Area is to be designated as a Public Land Use Zone pursuant to the *Public Lands Administration Regulation* (PLAR). PLAR includes a number of general land-use restrictions for Public Land Use Zones, including:

- restrictions on the uses of conveyances, including on and off-highway vehicles or snow vehicles, and motorized boats, which many

MCFN members rely upon for accessing our Traditional Lands for rights-based activities (see section 185);

- restrictions on camping and fires in certain circumstances within public recreation areas within public land use zones; and
- restrictions on the use of firearms in public land recreation areas or public recreation trails (see section 188), which are created pursuant to Schedule F of the LARP.⁸

Finally, to the extent that conservation areas can provide some areas for exercise of MCFN's rights, MCFN maintained that the LARP has established such areas far away from MCFN.⁹

ISSUE SIX

The Government of Alberta has not meaningfully consulted the Applicant with respect to the development of the LARP.

The Applicant argued that the LARP has been developed without adequate consultation with First Nations residing in the Lower Athabasca Region.¹⁰

How the provisions of the LARP are, or will, directly and adversely affect(ing) the MCFN.

In addressing the specific “direct and adverse affects” on MCFN members, the Applicant referred to the following areas of concern:¹¹

a. Health

MCFN has consistently raised concerns about the effects of intensive oil and gas development throughout its Traditional Territory.

In its submission, MCFN refers to page 6 of the Adam and Marcel Study, 2010:

“The Lower Athabasca River system, which includes the Peace-Athabasca Delta, is absolutely critical for the ability of our [MCFN] members to practice their Treaty 8 rights, and to sustain their unique Aboriginal livelihoods,

⁸ MCFN Application; page 18 ⁹ MCFN Application; page 19 ¹⁰ MCFN Application; pages 20-21 ¹¹ MCFN Application; page 19

cultures, and identities as Cree and Dene peoples. Our First Nations have depended upon the bountiful ecology of the Delta to sustain our families, cultures, and livelihood for generations. The Athabasca River itself is our main travel route into the heart of our Traditional Lands. Without adequate water quality or quantity in the river system, we cannot access our important cultural, spiritual, and subsistence areas and we cannot sustain the health and well-being of our families on the traditional foods that we have always obtained from the river system.”¹²

b. Environment

MCFN argued that the Government of Alberta finalized the LARP without working with MCFN “to develop a knowledge base of what resources, conditions and criteria are needed for MCFN to sustain its livelihood and protect its rights and culture... Simply put, the LARP does not meet even the minimum definitions or processes for proper planning and falls very far short of other planning initiatives in Canada where First Nations rights and concerns have been integrated into planning.”¹³

c. Economic

In its submission, MCFN noted:

“As a result of the emphasis on economic interests in the LARP, MCFN will lose the lands, waters and resources that are required for the continued exercise of MCFN’s way of life. The LARP directs decision-makers to meet the objective of maximizing the development of the oil sands, but also to maintain and diversify other industries, including forestry, agriculture, tourism and, importantly, energy, mineral and coal exploration and extraction, and the extraction of surface material. This is particularly concerning because the LARP plans for a massive expansion of infrastructure in the region, as well as, at least a doubling of oil production in the area.”¹⁴

d. Conservation areas

MCFN argued that “in the final LARP, Alberta established a large conservation area that is completely unrelated to the areas where our members exercise their rights... Conservation areas have been chosen to avoid conflict with oil sands and other leases, not on ecological needs or considerations.

The various conservation areas created in our Traditional Lands both include restrictions on activities that are incompatible with the exercise of our Treaty rights and, in some circumstances, allow continued petroleum and gas development. In addition, the creation of new provincial recreation areas is intended to support greater tourism development, which will result in reduced ability of MCFN members to engage in our Treaty rights or increased non-Aboriginal presence creates safety concerns (hunting) and increased competition for resources.”¹⁵

MCFN requested the Review Panel to consider the following concerns pertaining to the LARP:

- the development of a Traditional Land Use framework to be incorporated into the LARP (as recommended by the Joint Review Panel for the Shell Jackpine Mine Expansion);
- the identification of conservation areas in a manner that respects and recognizes MCFN’s ability to exercise their section 35 Rights;
- an approach to environmental management and monitoring that is based on pre-disturbance baselines to account for, and address, the cumulative effects of pre-existing development on the environment and MCFN’s section 35 Rights;
- the development of specific consultation processes and information that decision-makers should consider respecting our exercise of our section 35 Rights and spiritual cultural practices prior to making land-use decisions in accordance with the LARP;

¹² MCFN Application; page 15 ¹³ MCFN Application; page 19 ¹⁴ MCFN Application; page 21 ¹⁵ MCFN Application; page 22

- the development of a regional baseline health study focused on the health of First Nations, Métis and other Aboriginal groups and impacts from the environmental effects of oil sands development in the Lower Athabasca Region (as recommended by the Joint Review Panel for the Shell Jackpine Mine Expansion);
- the development of a clear communication plan to ensure that MCFN understands how its concerns were considered and integrated into the LARP; and
- potential revisions to the LARP to address the adverse impacts to MCFN's section 35 Rights and our members' health and well-being, as identified in this request for review and in previous meetings and correspondence with the Government of Alberta respecting the LARP.

II. Response Argument of the Crown of the Province of Alberta

The Crown submitted their response to the Mikisew Cree First Nation Application on June 25, 2014.

The Crown alleged that the "harms" raised by the Applicant are outside the jurisdiction of the Review Panel.

- No jurisdiction to determine questions of constitutional law;
- No jurisdiction to consider alleged inadequacy of consultation during the LARP creation or implementation;
- No jurisdiction to consider matters related to the LARP creation;
- No jurisdiction to consider alleged harms from activities which pre-date the LARP;
- No jurisdiction to consider alleged harms related to potential future development activities;
- No jurisdiction to consider alleged harms related to the implementation of the LARP;

- No jurisdiction in relation to alleged omissions from the LARP; and
- No jurisdiction to consider harms alleged to be caused by legislation other than the LARP.

The only area the Crown stated the Review Panel *does* have jurisdiction over is the concerns addressing safety issues relating to the creation of new conservation and recreation areas; however, the Crown stated "that the content of the LARP does not, in fact, cause any of the harms alleged by the Applicant."

With respect to the issue of recreational areas, the Crown asserted that MCFN will *not* be adversely affected. The Government of Alberta maintained that:

"The majority of the lands that will be established as provincial recreation areas, or PLARTs, are currently vacant public lands administrated under the *Public Lands Act* and the *Public Lands Administration Regulation* (PLAR). On these vacant public lands, motorized access is not limited to designated lands, motorized access is not limited to designated routes and any person can enter onto and occupy this land for a recreational purpose (as defined) for up to 14 days, subject to certain exceptions.

Once established as either provincial recreation areas under the *Provincial Parks Act* or as public land use zones under the *Public Lands Act*, these areas will be subject to additional regulation. For example, motorized recreation will be limited to designated routes. This regulation is intended to mitigate impacts to the lands and potential biodiversity impacts associated with random motorized access. Regulation of motorized access will increase, not detract from, safety. Hunting, with its attending safety concerns, will continue to be regulated by existing regulation.

Alberta submitted that the increased regulation of the provincial recreation areas and PLARTs will support the exercise of traditional activities on the landscape and will reduce the potential for conflict between users, including the Applicant's members, rather than increase such conflict."¹⁶

¹⁶ Response Submissions of the Government of Alberta; pages 21-22, paragraphs 124, 125 and 126

III. Mikisew Cree First Nation's Response to the Crown's Submission

Mikisew Cree First Nation responded to the Crown's submission on August 24, 2014.

MCFN's response to the Crown's argument is organized into three parts:

- a. The Crown's argument respecting the limited jurisdiction of the Review Panel;
- b. Alberta's arguments that MCFN is not adversely affected by the LARP; and
- c. Alternative argument should the Review Panel determine that it does not have jurisdiction to consider issues subscribed by MCFN.

Note: As the Review Panel did not issue its decision regarding jurisdiction until January 2015, it reviewed only the second part of the evidence submitted by MCFN. Part 2 begins on page 9 of MCFN's submission.

MCFN urged the Review Panel to follow the causation principles described by the Supreme Court of Canada in *Rio Tinto* when determining whether MCFN is "directly and adversely affected" by the LARP.¹⁷

In its submission,¹⁸ MCFN also noted:

"Further, a broad and purposive interpretation of "directly and adversely affected" is required to meet the purposes of the ALSA and the object of this Review Panel [is] to consider whether the LARP is consistent with the purpose of the Act with respect to the berating on Aboriginal Peoples. A broad and purposive interpretation is also consistent with the scheme of the ALSA, wherein other rights, such as private property rights, are dealt with in much greater specificity."¹⁹

MCFN continued in its evidence:

"When approach to determining impacts established in *Rio Tinto*²⁰ is considered together

with a purposive interpretation of the ALSA and its regulations, "quiet enjoyment of property" and "health" clearly engage the exercise of MCFN's section 35 Rights and right to access Crown lands for the purpose of exercising those rights. Given that the *Natural Resources Transfer Agreement, 1930* codifies the right to access Crown lands for the purpose of exercising their section 35 Rights, MCFN submits that "property" includes Crown lands to which MCFN members have a right to access."²¹

MCFN noted the following issues concerning the Crown's response that the LARP does not harm them. According to MCFN, the Crown:²²

- a. provided no evidence of regulatory decisions that would support Alberta's assertion that there is no prioritization of economic interests over MCFN's constitutionally protected rights;
- b. provided no evidence respecting the process that went into balancing of different interests in the LARP to support Alberta's contention that the LARP does not prioritize economic interests;
- c. provided no evidence that conditions necessary to support the future exercise of constitutionally protected rights were taken into account in the measures included in the LARP for the purpose of balancing outcomes for the Lower Athabasca Region;
- d. provided no evidence that the needs of constitutionally-protected rights were taken into account in any thresholds or frameworks under the LARP;
- e. provided no evidence that the LARP will prevent development within conservation areas;
- f. provided no evidence of any meaningful correlation between conservation areas in the LARP and the patterns of MCFN use and occupancy;
- g. provided no evidence to respond to the reports of contamination of food resources affecting the health of MCFN members;

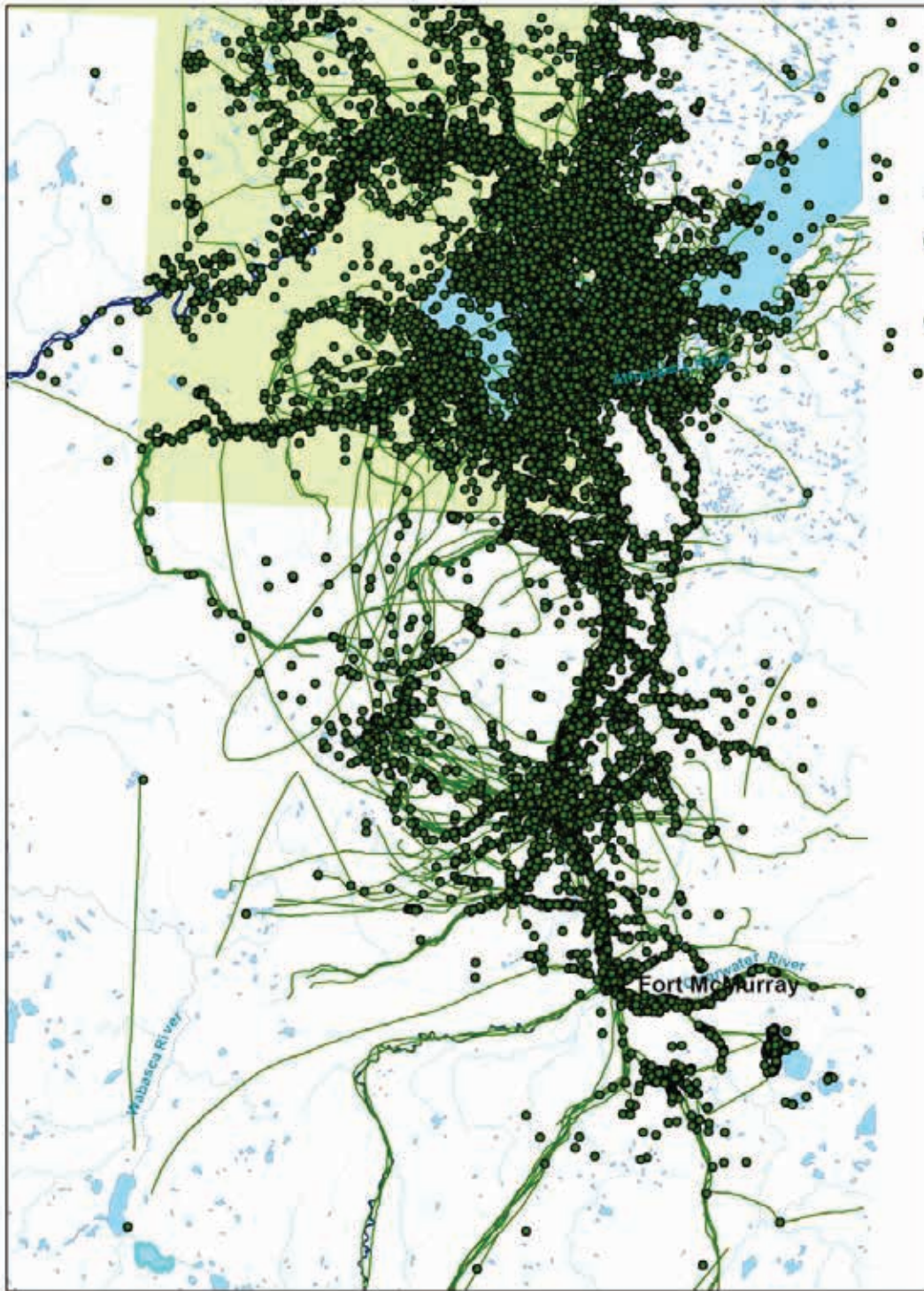
¹⁷ Response Submissions of the Government of Alberta; Tab 9 ¹⁸ Reply Submission of the Mikisew Cree First Nation; page 10, paragraph 42 ¹⁹ *Alberta Land Stewardship Act*; section 19.1 ²⁰ MCFN Application ²¹ Reply Submission of the Mikisew Cree First Nation; page 11, paragraph 44 ²² Reply Submission of the Mikisew Cree First Nation; page 11, paragraph 45

- h. provided no evidence to establish that the future needs of MCFN members have been provided in the LARP;
- i. provided no evidence to rebut MCFN's evidence that the LARP is being used by Alberta and other decision-makers to take away MCFN's right to have its concerns regarding impacts to its constitutionally-protected rights considered in decision-making; and
- j. provided no response to the extracts of regulatory decision contained in MCFN's supporting materials that provide examples of regulatory decision-makers explaining that they are compelled by the LARP to approve industrial projects because the LARP has prioritized economic considerations over environmental and social considerations. As set out in these extracts, the Alberta Energy Regulator is using the LARP to justify authorizing impacts to constitutionally-protected rights without considering the cumulative effects and concerns articulated by First Nations.

In conclusion, MCFN maintained that Alberta has systematically excluded their constitutional rights from the LARP and that MCFN is "directly and adversely affected" by the prioritization of development without measures to protect MCFN's health, rights and enjoyment of Crown lands for the exercise of those rights.

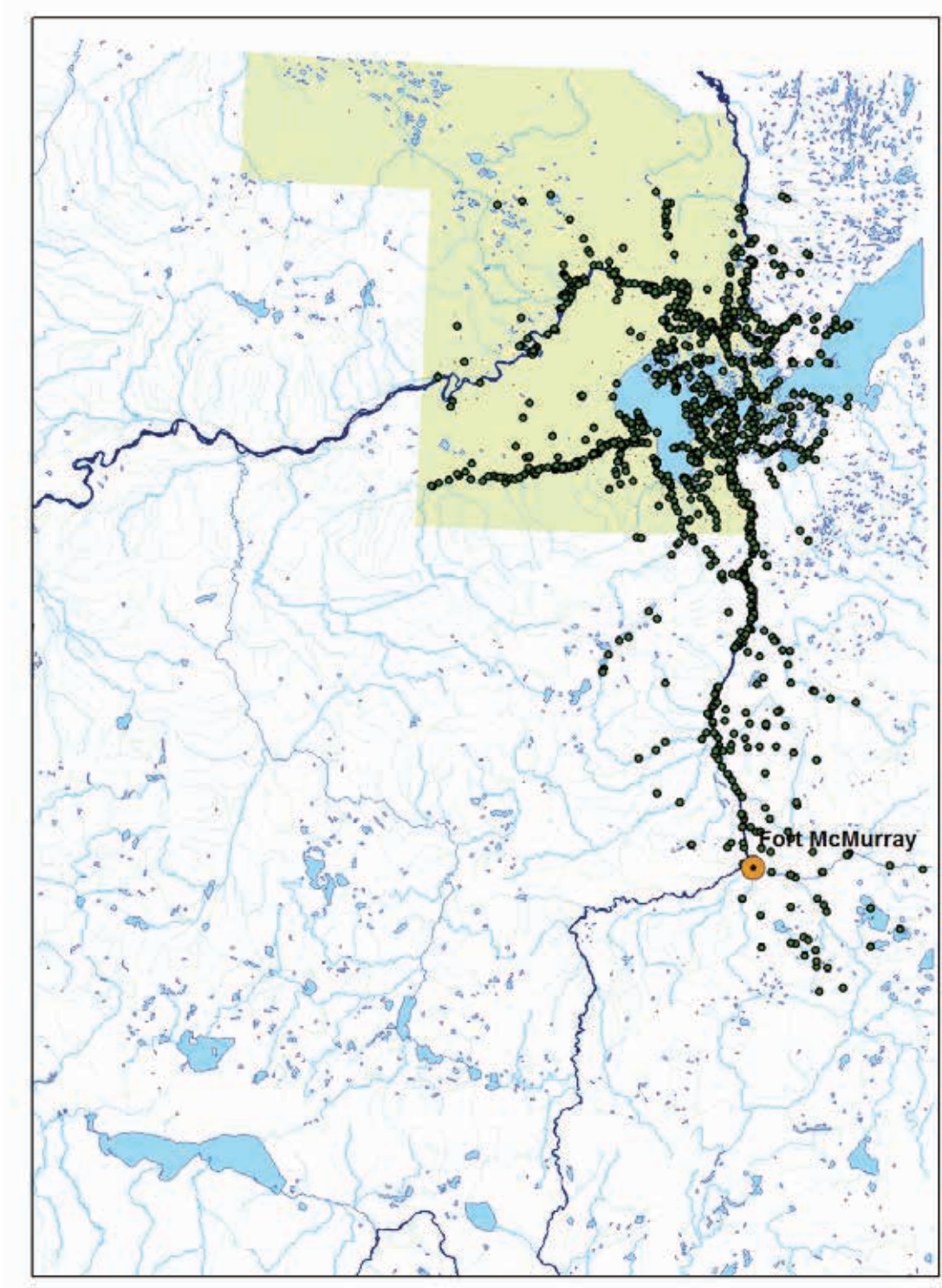
FIGURE 1:

Aggregate of All Point, Polygon and Line Data in the Six TLU Studies (MCFN Binder 1, Tab 9)



MCFN Binder 1, Tab 9: Map Three - Aggregate of All Point, Polygon and Line Data in the Six TLU studies (based on available MCFN TLU studies; prepared by MSES Inc 2010)

FIGURE 2:
Habitation Sites (MCFN Binder1, Tab 9)



MCFN Binder 1, Tab 9: Map Five - Habitation Sites
(use data from the Tobias Study and prepared by MSES Inc 2010)

MCFN Binder 1, Tab 9: *Mikisew Cree Land and Resource Use Sites and Features and Areas Proposed for Protection (use data from all six TLU studies; MSES Inc 2010)*



Panel Recommendations to the Minister for Mikisew Cree First Nation

Issue One

The Lower Athabasca Regional Plan has an absence of measures that are protective of the Applicant's Treaty rights, Traditional Land Use and culture.

RECOMMENDATIONS TO THE MINISTER

A general observation to the Minister is made on this issue concerning Traditional Land Use (TLU) matters.

REASONS FOR THE RECOMMENDATION

See General Observations and Suggestions to the Minister, in this Report, regarding a TLU Management Framework. This reinforces the statement made by the Applicant concerning this matter.

Issue Two

The Lower Athabasca Regional Plan finds the Crown, decision-makers, local government bodies and all persons in the absence of measures that are protective of the Applicant's Treaty rights and Traditional Land Use and culture.

RECOMMENDATIONS TO THE MINISTER

The Review Panel recommends that — due to the LARP's lack of measures that are protective of the Applicant's Treaty rights, Traditional Land Use and culture — MCFN *has* been "more than minimally harmed" and *has* been "directly and adversely

affected" as a result of "loss of income, health and loss of quiet enjoyment of property."

REASONS FOR THE RECOMMENDATION

In its Application, MCFN argued that the LARP is lacking in specific measures that are protective of the Applicant's Treaty rights, Traditional Land Use and culture. Without specific protection measures, the Applicant's traditional economy, which is dependent on Traditional Land, will be directly affected.

In addressing the harm to income, the Review Panel had to determine where the income flows from an activity within the scope of the rights protected under section 35(1) of the *Constitution Act, 1982*. These rights should reflect incomes from traditional economies.

With respect to the harm of "physical health," the Review Panel believes that the burden of proof is more difficult to meet than that of mental health because it will require more direct evidence of "cause and effect."

In its submission, MCFN referred to page 6 of the *Adam and Marcel Study*, 2010:

"The Lower Athabasca River system, which includes the Peace-Athabasca Delta, is absolutely critical for the ability of our [MCFN] members to practice their Treaty 8 rights, and to sustain

their unique Aboriginal livelihoods, cultures, and identities as Cree and Dene peoples. Our First Nations have depended upon the bountiful ecology of the Delta to sustain our families, cultures, and livelihood for generations. The Athabasca River itself is our main travel route into the heart of our Traditional Lands. Without adequate water quality or quantity in the river system, we cannot access our important cultural, spiritual, and subsistence areas and we cannot sustain the health and well-being of our families on the traditional foods that we have always obtained from the river system.”¹

The Review Panel also considered the Applicant’s argument that the LARP adversely impacts MCFN members’ Treaty rights to hunt, if their Traditional Land Use is impacted by the Government of Alberta’s failure to consider their Traditional Territory and Treaty harvesting rights.

In its evidence, the Applicant maintained that industrial activity was encroaching on its Traditional Territory. The Review Panel considered that such inaction, which was not addressed in the LARP, is a reasonable ground to believe that harms to Traditional Land Use or Aboriginal land interests could involve the “loss of quiet enjoyment of property.”

The Applicant provided the Review Panel with evidence that the Lower Athabasca River System is dramatically being affected by industrial development by its members’ use of this valuable resource in addition to ever-increasing development in its Territorial Lands. Such incursions on both land and water would reasonably impact MCFN’s members to effectively carry out their TLU activities — resulting in both losses of income and possible detrimental health concerns to its members, by reducing the amount of country foods available in the region.

Noting that the Crown did *not* rebut the position of the Applicant on this issue, the Review Panel believes that the cumulative impact of industrial activity on MCFN members’ use of their Traditional Territory results in a “loss of income,” detriments to members’ health, and the “loss of quiet enjoyment of property” on such lands and the Lower Athabasca River.

Issue Three

The Lower Athabasca Regional Plan prioritizes economic interests over section 35 rights.

RECOMMENDATIONS TO THE MINISTER

The Review Panel recommends that — due to the fact that the LARP does not take into account the Applicant’s traditional economies and places the needs of industry over the Applicant’s section 35 rights — MCFN *has* been “directly and adversely affected” by the “loss of quiet enjoyment of property” on the Territorial Lands of the Applicant.

REASONS FOR THE RECOMMENDATION

Similar to Issue Two, the Applicant maintained that the LARP does not take into account MCFN’s traditional economies and places the needs of industry over the Applicant’s section 35 rights.

MCFN referred in its evidence, that:

“As a result of the emphasis on economic interests in the LARP, MCFN will lose the lands, waters and resources that are required for the continued exercise of MCFN’s way of life. The LARP directs decision-makers to meet the objective of maximizing the development of the oil sands, but also to maintain and diversify other industries, including forestry, agriculture, tourism and, importantly, energy, mineral and coal exploration and extraction, and the extraction of surface materials. This is particularly concerning because the LARP plans for a massive expansion of infrastructure in the region, as well as, at least a doubling of oil production in the area.”²

In its reply to the Crown, MCFN asserted that the Crown provided no evidence to rebut MCFN’s evidence that the LARP is being used by the Government of Alberta to take away MCFN’s right to have its concerns regarding impacts to its constitutionally-protected rights considered in the decision-making process.

In addition, the Review Panel examined the number of resource-use sites located in the Applicant’s TLU area.³ The LARP stated, “in 2011, approximately

¹ Mikisew Cree First Nation (MCFN) Application; page 15 ² MCFN Application; page 21 ³ MCFN Application; Binder 1, Tab 9

1.7 million barrels of total crude bitumen per day were produced in the oil sands – a number that is expected to more than double to about 3.5 million barrels per day by 2020.”⁴

The Review Panel concludes, based on the written evidence provided by both parties to these proceedings, that industrial activity is continuing to dramatically impact the Traditional Territory and TLU of the Applicant and, therefore, MCFN *has* been “directly and adversely affected” by the “loss of quiet enjoyment of property.”

Issue Four

The Lower Athabasca Regional Plan’s environmental frameworks lack thresholds and triggers relating to the protection of Treaty rights.

RECOMMENDATIONS TO THE MINISTER

The Review Panel recommends no action to the Minister on this issue.

REASONS FOR THE RECOMMENDATION

In its submission, MCFN maintained that the various management frameworks lack the essential thresholds and triggers relating to the protection of Aboriginal and Treaty rights. MCFN stated that, “the practical result is that LARP establishes thresholds that effectively guarantee that the Lower Athabasca Region will fail to support the conditions and resources required for the exercise of MCFN’s section 35 Rights and culture.”⁵

MCFN elaborated further:

“The LARP indicates that frameworks will use disturbance levels, triggers, and thresholds based on *future anticipated* oil sands development rather than pre-disturbance levels, or current disturbance levels. By focusing on future development, the air and water quality frameworks will fail to capture and address cumulative effects of pre-existing development. Again, this directly affects MCFN’s right to have the Crown take positive steps to ensure the continued ability of our members to exercise their rights and culture; taking into account the conditions and preferred location/manner of exercising those rights.

In addition, the scope and utility of the proposed frameworks are seriously limited by:

- excluding important elements such as odours, flaring, [carbon dioxide] CO₂, and particulates from air quality thresholds;
- not setting baseline levels and excluding [polycyclic aromatic hydrocarbon] PAHs from surface water quality thresholds;
- basing the ground management framework on self-reported industry data and by excluding wetland health from that framework; and
- basing land disturbance plans on future anticipated oil sands development.”⁶

The Review Panel is not clear, based on the evidence of the Applicant, which impacts MCFN is alluding to when it says there is a lack of thresholds and triggers relating to the protection of their Treaty rights. The LARP has already initiated limits and triggers for air quality and water quality.⁷

Recognizing that the LARP should eventually initiate the same procedures for the remainder of the management frameworks, the Review Panel considers that more evidence was required from the Applicant to address their argument that such thresholds and triggers in the LARP were not necessarily protecting the Applicant’s Treaty rights.

Issue Five

The Lower Athabasca Regional Plan designates conservation, recreation and mixed-use access without taking any steps to ensure that the legal regimes for these areas are, or will be, capable of protecting and accommodating Treaty rights.

RECOMMENDATIONS TO THE MINISTER

The Review Panel recommends that the Applicant, MCFN, *has* been “directly and adversely affected” by the designation of these new conservation, recreation and mixed-use areas, without protection or accommodation of the Treaty rights of MCFN members, resulting in their “loss of quiet enjoyment of property.”

⁴ Lower Athabasca Regional Plan (LARP); page 25 ⁵ MCFN Application; page 16 ⁶ MCFN Application; page 17 ⁷ LARP Regulatory Details plan; parts 4 and 5

REASONS FOR THE RECOMMENDATION

The Applicant argued, in its written submission, that the LARP designates conservation, recreation and mixed-use areas without taking any steps to ensure that the legal regimes for these areas are, or will be, capable of protecting and accommodating Treaty rights.

While the LARP⁸ outlined the express purposes of such areas, the Applicant argued:

"The provisions of the *Provincial Parks Act*, the *Public Lands Act*, and their associated regulations impose limits on the location, time and manner of accessing lands for exercising section 35 Rights and these enactments provide no priority scheme for Aboriginal access to areas relied upon for the practice of these rights."

"In some cases, industrial activities will still be permitted in these same conservation areas, while at the same time no steps have been taken in [Public Lands Administration Regulation] PLAR to ensure that MCFN will continue to have sufficient access to Crown lands for the exercise of their Treaty rights that Treaty 8 and the [Natural Resources Transfer Agreement, 1930] NRTA guarantees."⁹

The Review Panel determines that a central component of the right to hunt, trap and fish under Treaty 8 would seem to be the right to access sufficient land on which wildlife is located to preserve the Applicants members' way of life.

In its submission, MCFN argued that the Government of Alberta finalized the LARP without working with MCFN "to develop a knowledge base of what resources, conditions and criteria are needed for MCFN to sustain its livelihood and protect its rights and culture."¹⁰

Increased non-Aboriginal presence in these areas creates safety concerns with respect to hunting in these areas. MCFN argued that:

"In the final LARP, Alberta established a large conservation area that is completely unrelated to the areas where our members exercise their rights and demonstrates, in our view, a complete rejection

by Alberta of its obligation to assess and manage impacts to our rights in a manner consistent with constitutional principles. Conservation areas have been chosen to avoid conflict with oil sands and other leases, not on ecological needs or considerations."¹¹

MCFN further argued:

"These recreational areas, established under the provisions of the *Public Lands Act*, will again impose certain limits on access and on the activities that may be done in those areas. In addition, the creation of new provincial recreation areas is intended to support greater tourism development, which will reduce the ability of MCFN members to engage in our Treaty rights as increased non-Aboriginal presence creates safety concerns and increased competition for resources."¹²

One example of this is the creation of the Lake Athabasca Public Land Use Area for Recreation and Tourism. This Public Land Use Area is to be designated as a Public Land Use Zone pursuant to the *Public Lands Administration Regulation* (PLAR). PLAR includes a number of general land use restrictions for Public Land Use Zones, including:

- restrictions on the uses of conveyances, including on and off-highway vehicles or snow vehicles, and motorized boats, which many MCFN members rely upon for accessing our Traditional Lands for rights-based activities;
- restrictions on camping and fires in certain circumstances within public recreation areas within public land use zones; and
- restrictions on the use of firearms in public land recreation areas or public recreation trails, which are created pursuant to Schedule F of the LARP.

MCFN also maintained that the LARP has established these areas far away from MCFN.

In addition, the Review Panel also noted that multi-use corridor restrictions are recognized in the LARP for these same areas.¹³

⁸ LARP; page 24 ⁹ MCFN Application; page 18 ¹⁰ MCFN Application; page 19 ¹¹ MCFN Application; page 22 ¹² MCFN Application; page 18 ¹³ LARP; Note 7, page 90

In its response to the Crown's argument, MCFN noted that the Crown provided no evidence that the LARP will prevent development within the conservation areas, nor did it provide evidence "of any meaningful correlation between conservation areas in the LARP and the patterns of MCFN use and occupancy."¹⁴

In considering the written evidence provided by both parties to these proceedings, the Review Panel recommends to the Minister that the LARP has failed to take the necessary steps of ensuring that either of the conservation or recreation areas are, or will be, capable of protecting and accommodating the Treaty rights of MCFN members. The Applicant has demonstrated in its written evidence that, although the Government of Alberta maintains that these areas have been created in the LARP in order for the Applicant to carry out their TLU activities, MCFN has described that there are many restrictions in these areas, which would very likely impede the Applicant's members from carrying out such on-going activities. As a result, the Review Panel recommends to the Minister that the Applicant *has* been "directly and adversely affected" by their "loss of quiet enjoyment of property."

Issue Six

The Government of Alberta has not meaningfully consulted the Applicant with respect to the development of the Lower Athabasca Regional Plan.

RECOMMENDATIONS TO THE MINISTER

- a. The Review Panel determines that land-use planning consultation between the Government of Alberta and MCFN should be "more effective and meaningful," should be resolved between the two parties, and is outside the jurisdiction of the Review Panel;
- b. The Review Panel recommends that further dialogue and consultation take place between the two parties on land-use planning involving the development and implementation of the LARP.

¹⁴ Reply Submission of the Mikisew Cree First Nation; page 11

Fort McKay First Nation and Fort McKay Métis Community Association Analysis of Application

Background

The Fort McKay First Nation and Fort McKay Métis Community Association¹ (FMFN) owns fee simple lands near the Hamlet of Fort McKay and has the use and benefit of Reserves 174, 174D, 174C, 174B and 174A. The Reserve Lands are composed 26,000 hectares, resulting from the terms of Treaty 8 and pursuant to section 18(1) of the *Indian Act*, RSC 1985, c 1-5.

As noted in Fort McKay's Application:

Fort McKay's residential community is located near the Hamlet of Fort McKay. Reserve 174 borders the Hamlet of Fort McKay to the north and is set aside for residential development.

Reserves 174A and 174B (the Moose Lake Reserves) are contiguous and border the north and east of Namur Lake. The Reserves are also south, east and (partially) west of Gardiner Lake in 98-17-W4; 98-

16-W4; and 97-16-W4, respectively. Fort McKay First Nation has cabins on both of these Reserves, which are occupied in winter and summer.

The Moose Lake Reserves were expanded — pursuant to a land claim settlement between the First Nation, Alberta and Canada in 2006 — for the purpose of Traditional Land Use...

The Fort McKay Métis Community Association holds lands as per a long-term lease at the Hamlet of Fort McKay.

The LARP designates as "mixed use" all land surrounding and bordering the Hamlet of Fort McKay; Reserves 174, 174C and 174D and about 39% of the land bordering Reserves 174A and 174B (all of the east and south of the latter two Reserves).

Fort McKay has riparian rights with respect to the Athabasca River, Ells River and MacKay River. The source of Fort McKay's drinking water for its

¹ Fort McKay Métis Community Association changed legal counsel on March 30, 2015

residential community on the Athabasca River is the Ells River. The entire length of the River from Namur Lake to the Hamlet runs through lands designated for oil sands development...

The individual members of Fort McKay hold trapping licences in Registered Fur Management Areas (RFMAs), which permit the harvest of furs and hunting. They have constructed cabins within these RFMAs.

Oil sands, oil and gas, forestry and other development is permitted within Fort McKay's Traditional Territory; however not within conservation areas, Reserve Lands and the urban development area of Fort McMurray. About 70 per cent of FMFN's Traditional Territory and 98 per cent of its trapping area has been leased to oil sands developers.

Fort McKay's Traditional Territory makes up 34 per cent of the Lower Athabasca Region. About 12 per cent of Fort McKay's territory is dedicated to newly-planned conservation areas, which are located on its outer fringes.²

The Review Panel notes that FMFN signed an "Access Management Plan" with the Government of Alberta and other industry parties. This plan addressed the Moose Lake Area with the aim to balance development and environmental protection in the area.³

Fort McKay First Nation and Fort McKay Métis Community Association brought this Application, on August 28, 2013, for review and amendment of the Lower Athabasca Regional Plan (LARP) — pursuant to section 19.2 of the *Alberta Land Stewardship Act* (ALSA), S.A. 2009, c. A-26.8, and the *Alberta Land Stewardship Regulation* (ALSR) — on the basis that FMFN is a person "directly and adversely affected" by the LARP.

The Review Panel summarizes the argument of the Applicant, as to why they are "directly and adversely affected" for each of the issues that follow, based on section 5(1)(c) of the *Alberta Land Stewardship Regulation*.

Issues

The Review Panel considers that the issues raised by the Applicant can be summarized as follows:

Issue One: The Lower Athabasca Regional Plan prioritizes oil sands development at the expense of the Applicant's rights.

Issue Two: The majority of the land management strategies under the Lower Athabasca Regional Plan are not yet developed or in place.

Issue Three: The Lower Athabasca Regional Plan does not contain any outcomes, thresholds, frameworks or management plans for managing adverse impacts to the Applicant's Lands or for adverse effects on opportunities to exercise Treaty and Aboriginal rights and Traditional Land Use.

I. Argument of the Applicant – Fort McKay First Nation

ISSUE ONE

The Lower Athabasca Regional Plan prioritizes oil sands development at the expense of the Applicant's rights.

In its Application, FMFN noted the priority placed in the LARP on oil sands development:⁴

"Schedule F and Schedule G of the LARP designates 5,415,345 [hectares] ha or 58.10% of the Region's Green Area (public lands) for oil sands and other energy development, surface materials extraction, grazing, tourism and recreation, motorized access, hunting, fishing and trapping, and multi-use corridors. In the White Area, the same land uses are designated for the 672,220 ha of public lands in this area, which comprises 7.21%. The total area in which oil sands and resource extraction is permitted is 65.31%.

New and existing conservation area designations comprise 22.41% of the Region (2,089,491 ha). Some of the conservation area is permitted for use by existing oil and gas tenure holders, and future

² Fort McKay Métis Community Association (FMFN) Application; page 11 and onwards ³ Aanationtalk; March 25, 2015 ⁴ FMFN Application; page 5

multi-use infrastructure corridors. 2.19% of the Region is designated for Recreation areas, existing and new, and Public Land Areas for Recreation and Tourism. The remainder of the region, approximately 10% is made up of the Cold Lake Air Weapons Range, First Nation Reserves, Métis Settlements and Lake Athabasca.

While the majority of the region is designated for “mixed use,” the various uses cannot all be supported on the same land and are in competition with each other. This is acknowledged in the Land-use Framework [LUF] (Alberta 2008):

‘...There are more and more people doing more and more activities on the same piece of land. This increases the number of conflicts between [competing] user groups and often stresses the land itself. Our land, air and water are not unlimited. They can be exhausted or degraded by overuse.’

And in reference to the Lower Athabasca Region:

‘Northeastern Alberta has been the epicentre for economic growth in Alberta and Canada through the development of the oil sands. With over \$100 billion in planned oil sands investment in the region, the environment and communities are under immense pressure from a variety of stakeholders, often with competing interests.’

The LARP prioritizes oil sands development for this “mixed use” area. The first outcome, “the economic potential of the oil sands resource is optimized,” and the indicators for assessing achievement include oil sands production rate, total oil sands investment and cost of production. (LARP; page 38)

The LARP is a formal statement of government policy. The Regulatory Details Plan compels statutory decision-makers to consider the Strategic Plan and Implementation Plan, in part, to manage activities and set priorities. (LARP; sections 2-5)

The prioritization of oil sands development at the expense of Fort McKay’s rights is apparent from the fact that:

- a. the area in which oil sands and other development is prioritized has been designated;
- b. most of the management tools that would indirectly support the exercise of Treaty and Aboriginal rights are not yet developed;
- c. the absence of any outcome or objective, framework, or threshold, protecting these rights; [and]
- d. the new conservation areas have not been legally created but the Regulatory Details Plan mandates that no decision-maker may adjourn or refuse an approval for any Application because the Crown has not completed or complied with any commitment or direction in the LARP Strategic or Implementation Plans. ([LARP] subsection 7(3))”

ISSUE TWO

The majority of the land management strategies under the Lower Athabasca Regional Plan are not yet developed or in place.

FMFN’s submission stated:⁵

“The effective date of the LARP is September 1, 2012, despite the [fact that the] majority of land management strategies and implementation are not yet developed or in place. The area in which oil sands and resource development can occur has been designated and the implementation strategies are in place; but the majority of frameworks and regulatory tools to meet the vision and outcomes (apart from optimizing oil sands development) have not been created. The following are not in place:

- Creation of the new conservation areas;
- Biodiversity framework including objectives for biodiversity;
- Landscape management plan;
- Tailings management plan;
- Wetlands policy;

⁵ FMFN Application; page 6, paragraph 27

- Progressive reclamation strategy;
- Completion of groundwater management framework (unenforceable interim quality limits currently in the LARP);
- Completion of surface water quantity management framework for the Lower Athabasca River;
- Designation of new provincial recreational areas;
- Creation of public land areas for recreation and tourism;
- Regional trail system ([LARP] Schedule E);
- Sub-regional plan for south Athabasca oil sands area;
- Sub-regional plan for the north Athabasca oil sands area;
- Cumulative effects assessment and risk assessment (not identified as an action item in the [LARP] Plan, but page 22 of the Strategic Plan says this is a key component of the new cumulative effects management approach by which development pressures will be managed);
- Mandatory integrated land-use management (see page 25, the LARP will make regional integrated land management a necessity; no details provided on how and when);
- Although conservation offsets are contemplated under Division 4, Part 3 of the ALSA, there are no implementation tools or policy developed;
- The LARP commits to consult Aboriginal communities, including Métis, on regional planning but does not yet have a Métis consultation policy and does not in fact consult Métis communities.”

The Applicant further remarked:⁶

“While a number of management tools and strategies are contemplated, some with target dates, there are no regulatory backstops if the target dates are not met. An updated surface water quantity framework was to be complete in 2012 but this has not occurred. It is highly unlikely that the frameworks [targeted] for completion in 2013 will meet this target. These include the biodiversity framework, the landscape management plan, regional parks plan, and a subregional plan for the south of the Region. The LARP says that Aboriginal communities will be consulted and included in the development of these frameworks and plans.”

The Applicant listed a history of the Government of Alberta failing to meet deadlines for developing frameworks to manage cumulative effects.⁷

FMFN argued that the “LARP is in effect and authorizes resource development in the majority of the Region but in the absence of key measures to manage the environmental and social consequences or deliver on the stated intention of managing cumulative effects.”

The Applicant concluded this issue by stating:⁸

“The Vision and Outcomes cannot be achieved apart from the policy direction to optimize oil sands development and requirement that decision-makers comply with the thresholds set for air quality (for [nitrogen dioxide] NO₂ and [sulphur dioxide] SO₂ only), the water quality thresholds for the Athabasca River (which are provincial parameters applied at one monitoring location and only apply to one water body); and the [criteria] framework for water quantity (which applies to one water body only). The environmental thresholds that are in place under the LARP do not apply until monitoring results reach “triggers,” which means the existing tools under the LARP do not assist in meeting the objective of integration of economic, environmental and social consideration at the “development planning and approval stage of decision making (LARP; page 23).”

⁶ FMFN Application; page 8, paragraph 29 ⁷ FMFN Application; page 9, paragraph 31 ⁸ FMFN Application; page 9, paragraph 32

ISSUE THREE

The Lower Athabasca Regional Plan does not contain any outcomes, thresholds, frameworks or management plans for managing adverse impacts to the Applicant's Lands or for adverse effects on opportunities to exercise Treaty and Aboriginal rights and Traditional Land Use.

In its submission, FMFN argued that, although the LARP states that the region will be developed using a cumulative effects management approach to balancing environmental and social objectives, no outcomes or objectives have been established in several areas. This has led to compromised environmental and community health problems.

The Terms of Reference (ToR) for the LARP stated:

"It will be important that continued opportunities exist for Aboriginal traditional uses to be in close proximity to First Nations and Métis Communities." FMFN maintains that no such opportunities are incorporated in the LARP with respect to Fort McKay, either through a Strategic Plan, Implementation Plan or objectives.⁹

The Applicant made reference to the ToR again:

"Land use must be managed to include Aboriginal traditional use" and the criteria for establishing conservation areas included "areas that support Aboriginal traditional uses."¹⁰

The proposed conservation areas do not support Traditional Land Use by Fort McKay beyond a "de minimis" level. Of the more than 2,600 traditional use sites that Fort McKay has documented to date, less than 20 per cent of these are within existing parks and conservation areas.

In its submission, FMFN stated:

"Fort McKay is not able to identify any provision of the LARP that ensures the sustainability of its Lands for the community's long-term cultural, social or economic needs. Specifically, how terrestrial resources on its Reserves will support

Traditional Land Use, how water quality and quantity on its Lands will support its domestic and commercial needs or how air quality will protect members health. Potential impacts to Reserve Lands are not addressed at all by the LARP."¹¹

The Applicant then referred to specific provisions in the LARP in which they argue that its members have been "directly and adversely affected."

- "The LARP, in its incomplete form, authorizes development in the majority of Fort McKay's Traditional Territory and up to the borders of its Lands but does not contain the necessary tools to manage the cumulative effects of this development."¹²
- "98% of Fort McKay's trapping areas and about 70% of its Traditional Territory has been leased to oil sands developers."¹³
- "Adverse impacts to Fort McKay's use and enjoyment of its homes and Lands from existing oil sands experienced to date include: air pollution, including odours, degradation of air quality, noise, light pollution, the shaking of houses, blocked or delayed access to the Hamlet, cabins and Moose Lake Reserves."¹⁴
- "Explosions, fires, and release of toxic substances have already occurred at industrial sites [within] 10 to 20 km of the Hamlet of Fort McKay."¹⁵
- "The intensity and proximity of development to the borders of conservation areas (such as parks) has been shown to be directly and adversely related to the ability of the conservation area to support biodiversity, including wildlife. The neighboring development creates a population sink within the conservation area and this is particularly acute in areas the size of Reserves 174A and 174B."¹⁶

a. Wildlife Impacts

- "Terrestrial Ecosystem Management Framework (TEMF) in 2008 found that caribou, fisher, moose and black bear habitat indicators were

⁹ Lower Athabasca Regional Plan (LARP) ToR; page 17-18 ¹⁰ LARP ToR; pages 11 and 14 ¹¹ FMFN Application; page 10, paragraph 38 ¹² FMFN Application; page 13, paragraph 57 ¹³ FMFN Application; page 13, paragraph 58 ¹⁴ FMFN Application; page 14, paragraph 61 ¹⁵ FMFN Application; page 14, paragraph 64

¹⁶ FMFN Application; page 14, paragraph 65

below or at the lower limit of their natural range of variation (NRV). The report indicated that aggressive steps needed to be taken immediately to preserve those indicators in the Regional Municipality of Wood Buffalo (RMWB) and recommended wildlife populations be maintained within 10% of the lower limit of NRV.”¹⁷

- “In the development of the LARP, the Government of Alberta used [A Landscape Cumulative Effects Simulator] ALCES simulation modeling to evaluate planning options in the Region. Moose and fisher habitat quality were used as terrestrial wildlife indicators to assess the impacts of development if it continued at the current rate. The simulations measured changed from NRV. The computer simulations of the baseline found that moose and fisher habitat quality declined rapidly. Moose and fisher were 30% below NRV as of 2009. Within 20 years, fisher and moose habitat was at least 60% below the NRV.”¹⁸
- “Alberta Sustainable Resource Development has conducted several moose population surveys since the early 1990s in Fort McKay’s Traditional Territory and these indicate moose populations have declined as much as 50% in the last 15 years.”¹⁹
- “Fort McKay’s cumulative effects studies completed in 2013 [Tab 10] found 57% of the Traditional Territory is disturbed or within 500 m of disturbed land — mostly oil sands development. Some wildlife populations are already below sustainable levels over the next 50 years, fish population will decline 99% NRV; fisher 66% below NRV; and moose by 55%. All of these changes fall within the “threatened” or “endangered” standards set by the International Union of Conservation of Nature Conventions.”²⁰
- “Existing impacts of Fort McKay members’ trapping areas include loss of substantial areas for use, blocked access, decreased wildlife and increased risk of personal injury due to heavy equipment being operated on traditional trails and access routes.”²¹

- “It is highly likely the development planned for the area near the Reserves will [consider] harvesting of wildlife unsustainable from these Reserves in the near future.” (ALCES, Moose Lake Protected Report (2013) Tab 9)

Fort McKay also wants to preserve the ecological integrity of its lands, and the LARP is currently inconsistent with achieving this objective.”²² (Alberta Landscape Team, Management Options Report (2009))

- “Alberta and Canada’s Caribou Policies call for the preservation of existing habitat and restoration of habitat to meet a threshold of 65% of intact habitat in each endangered caribou herd. The ranges for the endangered Red Earth and [West side of Athabasca River] WSAR herds overlap or are adjacent to Reserves 174A and 174B. The Alberta Landscape Team identified the WSAR range as having the greatest probability of success for preventing the extirpation through habitat restoration and mortality control and recommended establishment of a conservation area adjacent to the Birch Mountain Wildland Park comprised of “thousands of square kilometers.” This would also be adjacent to the Moose Lake Reserves and therefore overlap Fort McKay’s requested buffer area [would] serve the dual purposes of preserving the integrity of the Reserves, Traditional Land Use in the area and the caribou.”²³

The Applicant also included a copy of the Gould Environmental Report (March 2013) - A Wildlife Assessment for the Dover Commercial Project (ERCB Application 1673682) Tab 14.

b. Health Impacts

- “The LARP adversely affects Fort McKay’s social and cultural health which in turn affects the health of community members. This is largely due to the loss of opportunities to pursue Traditional Land Use and cultural activities in clean, accessible and culturally relevant areas. The LARP also adversely affects the health of community members by facilitating increased development

¹⁷ FMFN Application; page 15, paragraph 69 ¹⁸ FMFN Application; page 15, paragraph 70 ¹⁹ FMFN Application; page 15, paragraph 71 ²⁰ FMFN Application; page 16, paragraph 72

²¹ FMFN Application; page 16, paragraph 74 ²² FMFN Application; page 17, paragraph 77 ²³ FMFN Application; page 17, paragraph 79

with its associated pollution, in the absence of tools to manage and mitigate this pollution.”²⁴

- “Fort McKay is permanently adversely affected by loss of intergenerational knowledge transfer.”²⁵
- “The Cultural Heritage Baseline Report and Cultural Heritage Impact Assessment contained in the attached Fort McKay Specific Assessment (Fort McKay 2010) documents [note] that significant adverse effects have already occurred to Fort McKay’s cultural heritage, including Traditional Land Use, as a result of existing oil sands and related development. This is directly related to loss of cultural landscapes, the ability to practice Treaty rights, loss of cultural values (including language and traditional knowledge) and loss of social integration through rapid socio-economic changes since the advent of oil sands development.”²⁶
- “The practice of Traditional Land Use and simply “going out on the land” are important health determinants because they are linked to physical health. They are an important source of physical activity to maintain fitness for Fort McKay members. Harvesting activities provide country foods, which is associated with much better health status in Aboriginal communities than processed food. Decrease in harvesting and consumption of country foods is associated with higher levels of obesity, diabetes and other health conditions.”²⁷ (Earle, Traditional Aboriginal Diets and Health, (Natural Collaborating Centre for Aboriginal Health 2011))”
- According to research commissioned by Fort McKay, ALCES 2011, Conserving Opportunities for Traditional Activities (Tab 11) “existing and approved development will result in Fort McKay being able to sustainably harvest from its Moose Lake Reserves and environs, enough moose to provide 1/3 of one ounce of dry meat per person per year. This is a severe reduction in the amount of food harvested and processed by Fort McKay and abrogation of the Treaty right of meaningful opportunities to hunt.”²⁸

c. Impacts from the Lack of Management of Pollution

- FMFN argued that the LARP sets thresholds for only two air contaminants and does not include health based limits. The Applicant also argued that Alberta’s Ambient Air Quality Objectives and Guidelines (2010) are “outdated, and do not reflect the World Health Organization’s criteria for ambient air quality that has been adopted by other countries.”²⁹
- FMFN stated that “other substances [that] need to be regionally managed because of the threat they pose to human health include: ozone, carbon monoxide, particulate matter, hydrogen sulphide and benzene.”³⁰
- “Odours have caused health impacts such as nausea, headaches and exacerbation of asthma. Odours are a chronic, unregulated and unmonitored adverse effect on Fort McKay.”³¹
- With respect to the issue of water, FMFN argued that, for determining water quality concerns, key pollutants associated with the “oil sands are not included, the thresholds only apply to the Athabasca River, and only apply at a measurement point about 100 km downstream from Fort McKay — at a point [where] many of the substances of concern will be diluted.”³²
- The Applicant noted that “no management framework is in place to monitor Fort McKay’s drinking water source — the Ells River, or for any other Rivers or water bodies that Fort McKay uses for fishing or other consumptive uses.”³³

Recommended Amendments to the LARP by FMFN

- Buffer areas around the Hamlet of Fort McKay and its Reserves whereby resource development is not permitted;

²⁴ FMFN Application; page 20, paragraph 92 ²⁵ FMFN Application; page 20, paragraph 93 ²⁶ FMFN Application; page 20, paragraph 94 ²⁷ FMFN Application; page 20, paragraph 97 ²⁸ FMFN Application; page 21, paragraph 98 ²⁹ FMFN Application; page 21, paragraph 100 and 101 ³⁰ FMFN Application; page 22, paragraph 106 ³¹ FMFN Application; page 22, paragraph 107 ³² FMFN Application; page 23, paragraph 110 ³³ FMFN Application; page 23, paragraph 111

- Creation of additional conservation areas contiguous to the Birch Mountain Wildlife Park and to the north, south and east of Reserves 174A and 174B to support their Treaty and Aboriginal rights;
- The development and implementation of a Traditional Land Use Management Framework;
- The inclusion of a requirement to complete a framework for protection of water levels and water quality in all rivers and Namur and Gardiner lakes;
- The expansion of the air management framework to include other air contaminants besides NO₂ and SO₂; and
- An amendment to require consultation of Métis communities in the development of the biodiversity and Traditional Land-use Framework.

II. Response Argument of the Crown of the Province of Alberta

The Crown submitted their response to the Fort McKay First Nation Application on June 25, 2014.

Similar to the Government of Alberta's response to other First Nations' submissions, it believes that the Review Panel has no jurisdiction to address the following issues:

- No jurisdiction to determine questions of constitutional law;
- No jurisdiction to consider matters related to the LARP creation;
- No jurisdiction over alleged harms from activities which pre-date the LARP;
- No jurisdiction to consider alleged harms related to potential future development activities;
- No jurisdiction to consider alleged harms related to the implementation of the LARP; and
- No jurisdiction in relation to alleged omissions from the LARP.

The only issue the Government of Alberta *does* feel falls within the jurisdiction of the Review Panel is the prioritization of development.

The Crown maintained that the "the LARP does not authorize development. Rather, it creates a framework that is intended to guide decision-makers in the exercise of their powers and duties."³⁴

In its submission, the Crown stated that the LARP does not prioritize development. The LARP "aligns provincial policies at the regional level to balance Alberta's economic, environmental and social goals."³⁵ (LARP; page 2)

The Government of Alberta noted that the Applicant, in paragraph 24 of its submission, recognizes in the LARP "seven regional outcomes;" the first is "optimizing the economic potential of the oil sands." The Crown argued that the LARP does not rank regional outcomes.³⁶

The Crown remarked on FMFN's argument: "the Applicant raises concern that conservation areas have not been created, either as wildland provincial parks...or as a public land use zone...and refers to section 7(3) of the Regulatory Details of the LARP."³⁷

"Section 7(3) of the Regulatory Details Plan is simply to indicate that decision-makers must continue to process, and decide upon, all Applications received. In other words, the decision-makers cannot hold the Application in abeyance pending the implementation of any direction or commitment under the LARP."³⁸

In conclusion, the Government of Alberta submitted that the majority of concerns raised by FMFN are not related to the content of the LARP, or are outside the jurisdiction of the Review Panel. The Crown also argued that the Applicant has not shown that there is any existing or future harms caused by a provision of the LARP to trigger a recommendation for amendment to the Minister.

³⁴ Response Submissions of the Government of Alberta; page 19, paragraph 99 ³⁵ Response Submissions of the Government of Alberta; paragraph 102

³⁶ Response Submissions of the Government of Alberta; page 19, paragraph 103 ³⁷ Response Submissions of the Government of Alberta; page 20, paragraph 105

³⁸ Response Submissions of the Government of Alberta; paragraph 106

III. Fort McKay First Nation's Response to the Crown's Submission

Fort McKay First Nation responded to the Crown's submission on August 25, 2014.

FMFN, in its reply to the Crown's argument, addressed two important matters:

- a. The jurisdiction of the Review Panel; and
- b. The meaning of "directly and adversely affected."

The Review Panel reviewed these two arguments of the Applicant and addressed them in the Jurisdictional Ruling by the Review Panel in January 2015 and in the Legal Review of the term "Directly and Adversely Affected," as described in the General Overviews section of this Report.

The Review Panel intends to focus on the arguments on page 14 of FMFN's response submission, under the heading of "The Content of the LARP."

The Content of the LARP

"The Crown says that the LARP's *content* may only be reviewed, and therefore, the content of the LARP must directly and adversely affect Fort McKay, [in order] to engage the Panel's jurisdiction. Alberta then says that the LARP balances interests, which is unreviewable. However, Fort McKay's point is that its interests are not incorporated in any tangible way and therefore not "balanced" in the LARP. Specific provisions of the LARP say that Alberta will consult First Nations if their rights may be adversely affected by decisions. The Crown's response to the Application paradoxically says First Nations are *not* affected by the LARP. The Panel, as well as the Stewardship Minister, must comply with the intent and provisions of the Act, and respect the rights of Fort McKay as a First Nation and as the community most "directly and adversely affected" by the Plan and the effects of land use that the Plan is intended to ameliorate. The Review is intended to serve the broader public interests of the Act and the Panel's

role is to advise the Minister if the Plan does, or will likely, adversely affect the rights of Fort McKay. *[The panel must also] make recommendations to improve the Plan to avoid such effects.*³⁹ (Emphasis added)

The fact that the LARP engages Aboriginal interests is evident from the following:

- a. In the Introduction, at page 5, the LARP recognizes First Nations hold Constitutional Rights and Crown decisions can affect these rights;
- b. In the Strategic Plan, at page 15, the LARP recognizes that Aboriginal Peoples are residents of the region and are engaged in economic activities in the region;
- c. In the Strategic Plan, at page 22, the LARP recognizes that First Nations have "traditional-use locations of cultural and spiritual significance" in the region;
- d. In the Strategic Plan, at page 29, the LARP recognizes that cumulative effects on air, waste, land and biodiversity affect First Nations' Constitutional Rights;
- e. In the Strategic Plan, at page 29, the LARP indicates that Alberta will consider, in developing the biodiversity management framework and the landscape management plan, how First Nations' Constitutional Rights can occur within reasonable proximity to First Nations' main population centres;
- f. In the Strategic Plan, at page 30, the LARP indicates conservation areas, in part, are intended to support the exercise of Constitutional Rights; and
- g. In the Strategic Plan, at page 34, the LARP indicates that Aboriginal Peoples will be included in land-use planning decisions because of their unique relationship with the lands in the region."

³⁹ Response Submissions of the Government of Alberta; paragraphs 4 and 9-17 and LARP; pages 5 and 34

The fact that the LARP excludes Fort McKay's interests in the balancing of the LARP is evident from the following:

- a. "In the Implementation Plan, at pages 92-93, the LARP designates conservation areas in the far periphery of where Fort McKays exercises its Constitutional Rights; most of Fort McKays high and moderate use areas are not included in the conservation areas; Alberta's own moose population survey shows moose are declining in the east slope of the Birch Mountains, which is the area where the Crown, in its response, says Fort McKay's constitutional rights can be exercised; no conservation areas are located in areas reasonably accessible from Fort McKay's population centre; Fort McKay's cumulative effects studies show that wildlife and fish populations are dropping and will continue to drop below sustainable levels based upon the current trajectory of oil sands development; Alberta has not published any data to show the conservation areas are in fact used, or usable, by First Nations or that they contain, or will contain, wildlife and other resources necessary to support Constitutional Rights;
- b. Schedule F of the LARP designates 65% of the Region (which translates to about 75% of Fort McKay's Traditional Territory) for development as of the effective date of the Plan but the biodiversity management framework and landscape management plan was not created as of the effective date, and which are now long passed their due dates of 2013, as set out in the Implementation Plan at page 71;
- c. No setbacks or buffers between development and Fort McKay Reserves and community lands are included in the Plan although leases border these Reserves, as does the designated development zone;
- d. No thresholds for odours or air pollutants apart from NO₂ and SO₂ are included in the Plan;

- e. No surface water quality or quantity thresholds are established for any surface water other than the Athabasca River (and then only at one location — far upstream from Fort McKay), including the Ells River where Fort McKay obtains its drinking water or Namur and Gardiner lakes adjacent to Fort McKay's Reserves; and
- f. Alberta submitted that the nature of Fort McKay's interests do not trigger a request of a review of the LARP.

This all indicates that while the Plan is intended to meet the purposes of the Act, it does not. This means the LARP, as it exists, is not sufficient to protect the health and other rights of Fort McKay and recommendations are necessary so that the LARP can meet the purposes of the Act. The Panel is tasked with assisting the Crown do so."

In its submission,⁴⁰ FMFN maintained that the LARP does not prioritize oil sands development. It refers to the LARP, which states: "Alberta is committed to optimizing [this (oil sands)] resource."⁴¹

The LARP stated that the first outcome — a "healthy economy supported by our lands and resources" — is primary, and other lands and resources will be harnessed to this objective. The Provincial Energy Strategy is expressly incorporated into the LARP."⁴²

FMFN noted:

"It is clear from the fact that the main element of the LARP that does not exist in its present form, is that most of the lands in the region are designated for oil sands development.

Apart from the conservation areas (which are outside of the oil sands deposits) there are no limits that prevent or impede full development in order to achieve a healthy environment and healthy communities and respect property and Constitutional Rights. Rather, the function of the LARP has been to support unchecked development because of the unfulfilled promise that the LARP will manage the impacts of this development."⁴³

⁴⁰ FMFN Submission; page 31 ⁴¹ LARP; page 14 ⁴² LARP; page 23 ⁴³ FMFN Submission; page 31, paragraph 89

In referring to the Crown's Response,⁴⁴ FMFN argued in its submission that:

"While the Crown claims that the AER could refuse an Application for inconsistency with planned, but yet-to-be-set-aside conservation areas, notwithstanding section 7(3) of the Regulatory Details of the LARP, the Crown does not address how section 7(3) is reconciled with the fact that oil sands development is permitted in the majority of the Plan's region, which overlaps almost all of Fort McKay's Traditional Territory. And the grantors of the statutory consents are interpreting the LARP, including section 7(3), to mean that oil sands projects are to be approved in the areas designated for them, notwithstanding that the LARP is incomplete and a project's contribution to cumulative impacts are not being managed."⁴⁵

In conclusion, FMFN maintains that they *are* "directly and adversely affected" by the coming into force of the LARP, and that the First Nation's Constitutional Rights must be recognized.

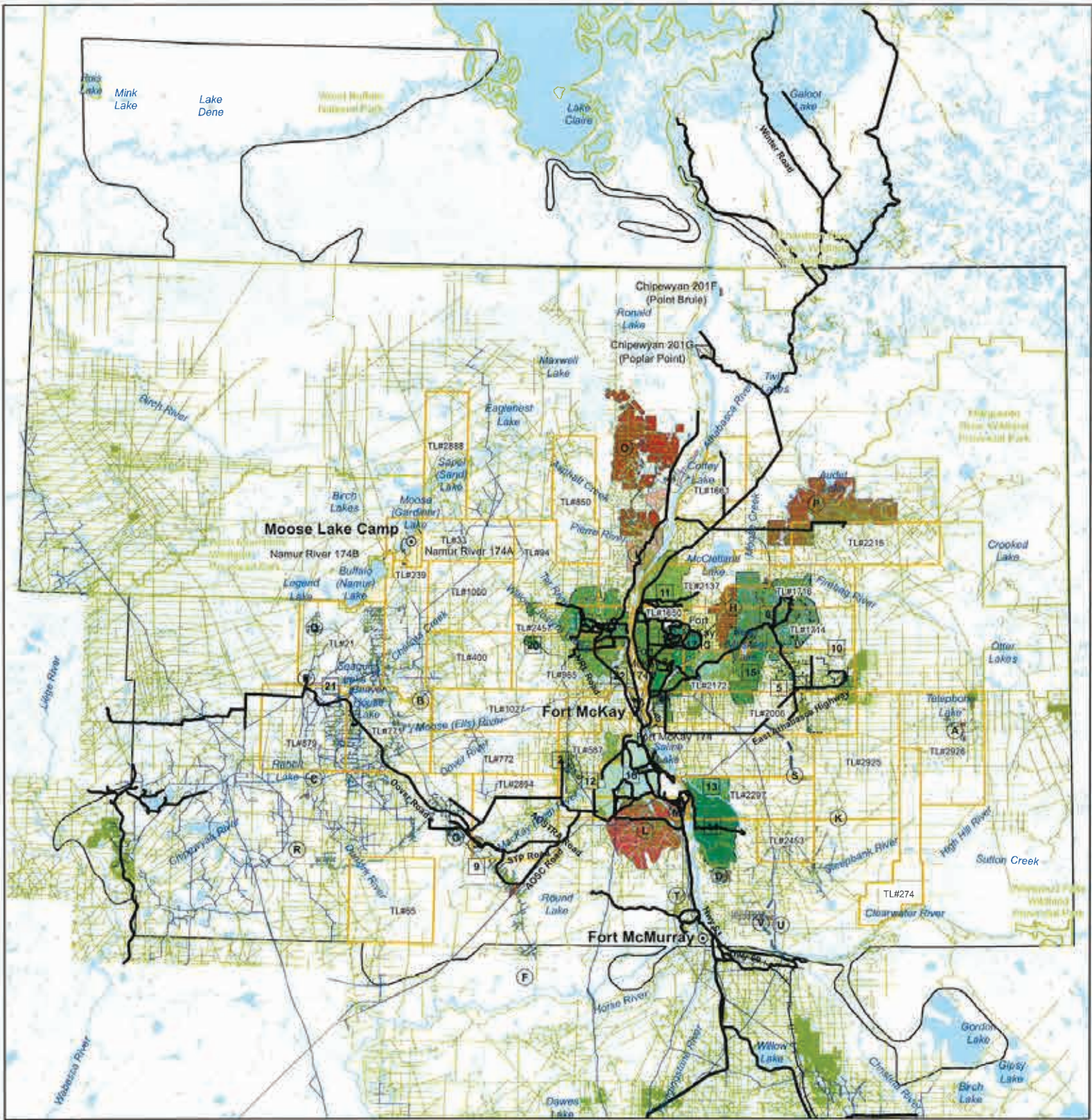
The Applicant concluded that:

"The existing regulatory system fails to provide the adequate protection of the health and rights of Fort McKay which are affected by the cumulative environmental effects of development. The purpose of the LARP is to manage these impacts and it does so only in a very limited way.

This is particularly harmful to Fort McKay because the LARP is being used to justify and authorize further impacts on Fort McKay's Constitutional Rights without regard to cumulative impacts of development. Since the LARP's coming into force, Alberta, industry and the AER have relied on the Plan to shut Fort McKay out of the project-specific regulatory process and to avoid consulting and addressing the very real impacts on Fort McKay. This indicates that the content of [the] Plan is not working in achieving the purposes of the [*Alberta Land Stewardship Act*] Act or the Plan's Vision and Outcomes, except for the optimization of oil sands development."⁴⁶

⁴⁴ Response Submissions of the Government of Alberta; paragraphs 106-107 ⁴⁵ FMFN Submission; page 32, paragraph 91 ⁴⁶ FMFN Submission; page 33, paragraph 94

FIGURE 1:
Existing, Approved and Planned Future Development in Fort McKay's Traditional Territory Map 2-2
(FMFN Response to Information Request #2)



Existing, Approved and Planned Future Development in Fort McKay's Traditional Territory Map 2-2

Legend

Existing Roads	Pipelines	ACFN Reserves	Designated Parks
Proposed Access Road	Transmission Lines	Fort McKay Reserves	Traditional Territory
Railway	Cutlines	Fort McKay Métis Settlement	Lakes
Cities, Towns, Villages		Traplines	Streams

Existing and Approved Developments

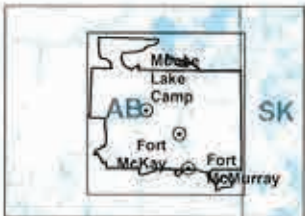
- 1 - CNRL Horizon Project (Mine) 250,000 bpd
- 2 - Dover SAGD Vapex (SAGD)
- 3 - Hammerstone Corporation Hammerstone Project (Quarry)
- 4 - Hammerstone Corporation Muskeg Valley Quarry (Quarry)
- 5 - Husky Sunrise Thermal Project (SAGD) 210,000 bpd
- 6 - Imperial Kearl Project (Mine) 345,000 bpd
- 7 - Shell Jackpine Mine Phase 1 (Mine) 200,000 bpd
- 8 - Shell Muskeg River Mine (Mine) 155,000 bpd
- 9 - Southern Pacific McKay Pilot (SAGD) 12,000 bpd
- 10 - Suncor Firebag Project Phases 1-6 (SAGD) 368,000 bpd
- 11 - Suncor Fort Hills Oil Sands Project (Mine) 190,000 bpd
- 12 - Suncor MacKay River Expansion SAGD (SAGD) 73,000 bpd
- 13 - Suncor North Steepbank Extension (Mine) 180,000 bpd
- 14 - Suncor Steepbank / Millenium Mine (Mine) 330,000 bpd
- 15 - Syncrude Aurora Mine South (Mine) 200,000 bpd
- 16 - Syncrude Aurora North Mine (Mine) 116,000 bpd
- 17 - Syncrude Mildred Lake Mine (Mine) 290,000 bpd
- 18 - Syncrude Mildred Lake Upgrader (Upgrader)
- 19 - Total Joslyn North Mine (Mine) 100,000 bpd
- 20 - VCI/BP Terre de Grace Pilot (SAGD) 10,000 bpd
- 21 - Sunshine Oilsands West Elfs SAGD Project (SAGD) 10,000 bpd

Planned Developments

- A - Cenovus Telephone Lake Project (SAGD) 90,000 bpd
- B - Dover OPCI Commercial Project (AOSC) (SAGD) 250,000 bpd
- C - AOSC Dover West Clastics Project (SAGD) 12,000 bpd
- D - Ivanhoe Tamarack Project (SAGD) 40,000 bpd
- E - AOSC Leduc TAGD Project (TAGD) 6,000 bpd
- F - MacKay OPCI MacKay River Commercial Project (AOSC) (SAGD) 150,000 bpd
- G - Marathon Oil Birchwood SAGD Demonstration Project (SAGD) 10,000 bpd
- H - Shell Jackpine Mine Expansion (Mine) 100,000 bpd
- I - Shell Pierre River Mine Project (Mine) 200,000 bpd
- J - Southern Pacific STP McKay Thermal Phase 2 (SAGD) 24,000 bpd
- K - Suncor Lewis Project (SAGD) 80,000 bpd
- L - Suncor Voyageur South Project (Mine) 120,000 bpd
- M - Suncor Voyageur Upgrader (Upgrader)
- O - Teck Frontier Project (Mine) 277,000 bpd
- P - Total E&P Canada Northern Lights Project (Mine) 114,000 bpd
- Q - Sunshine Legend Lake (SAGD) 10,000 bpd
- R - Sunshine Thickwood (SAGD) 10,000 bpd
- S - Oak Point Lewis Project (SAGD) 1,720 bpd
- T - ET Energy Poplar Creek Project (DT-ESP) 10,000 bpd
- U - Leduc Multi-User Access Road and Bridge (Road)
- V - VCI Advanced Tri-Star (SAGD) - 75,000 bpd

0 5 10 20 30 40
Kilometers
1:1,000,000
Projection: NAD 83 UTM Zone 12N

Produced by: CloverPoint Cartographics
For: Integral Ecology Group
Cultural Data Sources: Fort McKay First Nation
Basemap Data Sources: Government of Canada



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Panel Recommendations to the Minister for Fort McKay First Nation and Fort McKay Métis Community Association

Issue One

The Lower Athabasca Regional Plan prioritizes oil sands development at the expense of the Applicant's rights.

RECOMMENDATIONS TO THE MINISTER

Fort McKay First Nation (FMFN) *has* been “more than minimally harmed” as a result of increasing oil sands operations in their Traditional Territory, the result being that their members *have* been “directly and adversely affected” with “health,” “income” and “quiet enjoyment of property” concerns.

REASONS FOR THE RECOMMENDATION

The Applicant, FMFN, argued in its submission that it is apparent that the prioritization of oil sands development comes before Fort McKay's members' rights. FMFN provided the following reasons for this outcome:

- a. The area in which oil sands and other development is prioritized has already been designated;
- b. Most of the management tools that would indirectly support the exercise of Treaty and Aboriginal rights are not yet developed;
- c. The absence of any outcome or objective, framework, or threshold, protecting these rights;
- d. The new conservation areas have not been legally created but the Regulatory Details Plan mandates that no decision-maker may adjourn or refuse an approval for any Application because the Crown has not completed or complied with any commitment or direction in the LARP Strategic or Implementation Plans (subsection 7(3)).¹

¹ Fort McKay First Nation (FMFN) Application; page 6, paragraph 26

In its argument, the Applicant notes that while the majority of the region is designated for “mixed-use,” the “various uses cannot all be supported on the same land and in competition with one another.”

With reference to the Land-use Framework (2008), the Applicant maintained that:

“Northeastern Alberta has been the epicentre for economic growth in Alberta and Canada through the development of the oil sands. With over \$100 billion in planned oil sands investment in the region, the environment and communities are under immense pressure from a variety of stakeholders, often with competing interests.”²

The Applicant argued that the LARP prioritizes oil sands development for the “mixed-use” area because:

- The economic potential of the oil sands resource is optimized;³ and
- The indicators for assessing achievement include oil sands production rate, total oil sands investment and cost of production.⁴

The Crown, in its submission, argued that the LARP does not prioritize development and therefore does *not* directly and adversely affect the Applicant.

In FMFN’s response to the Crown, dated August 25, 2014, the Applicant argued that the Crown’s position is inconsistent with the wording of the LARP, as well as with Alberta’s Energy Policy, which is expressly incorporated into the LARP.⁵

FMFN maintained in its submission that most of the lands in the region are designated for oil sands development. “The function of the LARP has been to support unchecked development because of the unfulfilled promise that the LARP will manage the impacts of this development.”⁶

FMFN argued that: “the many objectives and frameworks that are missing from the LARP, combined with the LARP’s authorization of more than 65% of the region for oil sands development,

infringes the rights of Fort McKay to a healthy environment, the use and enjoyment of their lands and homes, and their constitutional rights to meaningful opportunities to hunt, fish, trap and pursue their culture.”⁷

In addition, FMFN noted that 98 per cent of Fort McKay’s trapping areas and about 70 per cent of its Traditional Territory has been leased to oil sands developers.⁸

The following impacts to FMFN’s members, as a result of this development in their Traditional Territory, are noted in their written evidence:

- Many members of Fort McKay are senior licence holders of trapping areas (Registered Fur Management Areas (RMFA)). These individuals hold trapping licences that permit the harvest of furs and hunting within their RMFAs. “The time spent on RMFAs is crucial to the passing of skills, knowledge and traditions among the Fort McKay people. From [the] harvesting to the processing of animals and hunting (as well as trapping) involves the entire community of Fort McKay while supporting the sharing of cultural teachings and language.”⁹
- Within a 20 km radius of the Hamlet, there are 11 major oil sands projects. Within approximately 10 kms, two major oil sands projects are in operation.¹⁰
- At least 6 new projects have been approved in Fort McKay’s Traditional Territory since the effective date of the LARP.¹¹
- The decreasing loss of wildlife, noted as a result of studies undertaken by the Applicant, illustrates that many species were below, or at the lower limit of, their natural range of variation (NRV).¹²
- As noted in its submission, FMFN argued that the practice of Traditional Land Use and going out on the land are important health determinants because they are linked to physical health. Harvesting activities also provide country foods, which are associated with much better health status than processed food. A decrease in

² Land-use Framework (2008); page 45 ³ Lower Athabasca Regional Plan (LARP); page 37 ⁴ LARP; page 37 ⁵ LARP; page 23 ⁶ FMFN Application; page 31, paragraph 89

⁷ FMFN Application; page 2 ⁸ FMFN Application; page 13, paragraph 58 and attached map – Tab 6 ⁹ FMFN Application; page 13 ¹⁰ FMFN Application; page 13, paragraph 60

¹¹ FMFN Application; page 18, paragraph 84 ¹² FMFN Application; pages 15-17

harvesting and consumption of country foods is associated with higher levels of obesity, diabetes and other health conditions.¹³

- FMFN argued that, due to the proximity to the number of oil sands projects within its Traditional Territory, their members suffer from air contamination, such as “ozone, carbon monoxide, hydrogen sulphide, benzene.”¹⁴ Odours from these projects cause “health impacts to its members such as nausea, headaches, and asthma conditions.”¹⁵ With reference to water issues, FMFN argued that, for determining water quality concerns, key pollutants associated with the oil sands are not included in evaluating pollution levels of the Athabasca River and that there is no management framework in place to monitor Fort McKay’s drinking water.¹⁶
- Designated conservation areas do not provide “continued opportunities for Aboriginal traditional uses to be in close proximity to First Nations and Métis communities.” No outcomes, objective or strategies are articulated in the LARP to address these requirements. The closest new conservation area (Gipsy-Gordon Wildland Park) is 60 kms away from the Hamlet of Fort McKay.

The following is FMFN’s response to the Crown’s submission:

“Fort McKay has submitted substantial evidence in its Application to support the fact that current, approved planned development will seriously degrade the environment, cause regional extirpation of fish and animals and create unacceptable health risks and impacts on Fort McKay. Alberta has not provided any evidence regarding the ability of the practically developed the LARP to meet the outcomes of the LARP or statements of intent in addressing these impacts that it relies upon in its response.”¹⁷

The Review Panel believes that the FMFN’s Traditional Territory is the *most* severely affected of all First Nations by oil sands development in the region. This has, in turn, impacted their Traditional and Aboriginal rights. A number of studies and reports submitted by the

Applicant support its claim that FMFN has been “more than minimally harmed” as approximately 70 per cent of their Traditional Territory has been leased by various oil sands operations. It is reasonable for the Review Panel to reach the conclusion that a bundle of “health,” “income” and “quiet enjoyment of property” concerns indicates that FMFN members *have* been “directly and adversely affected” by the proximity of these numerous oil sands operations to FMFN communities.

It is of particular concern to the Review Panel that the granting of such leases/licences to oil sands companies in FMFN’s Traditional Territory is not decreasing as a result of the LARP but, to the contrary and as noted by the Applicant, six new projects have been approved by the regulator in this area since the effective date of the LARP. Based on this industrial expansion in FMFN’s Traditional Territory, it is safe to assume that, under the existing strategies and outcomes described in the LARP, there will be little Traditional Territory left for FMFN members to carry out their TLU activities.

The Review Panel did take note of the fact that, on March 25, 2015, the Government of Alberta and FMFN signed a Letter of Intent to develop an Access Management Plan for the Moose Lake Area.¹⁸ The Plan will evidently be developed in 2015, between the province, FMFN and industry partners. Moose Lake is where many of FMFN members hunt, trap, fish and pick berries. Moose Lake and Buffalo Lake, also referred to as Gardiner Lake and Namur Lake, are located approximately 50km northwest of Fort McKay.

Issue Two

The majority of the land management strategies under the Lower Athabasca Regional Plan are not yet developed or in place.

RECOMMENDATIONS TO THE MINISTER

The Applicant *has* been “more than minimally harmed” and “directly and adversely affected” by the Crown not completing frameworks and thresholds as enunciated in the LARP. This lack of action has resulted in a “loss of quiet enjoyment of property” for FMFN members on their Traditional Territory.

¹³ FMFN Application; pages 20-21 ¹⁴ FMFN Application; page 22 ¹⁵ FMFN Application; page 22, paragraph 107 ¹⁶ FMFN Application; page 23, paragraph 110 and 111

¹⁷ FMFN Application; page 28; paragraph 75 ¹⁸ Aanationtalk; March 26, 2015

REASONS FOR THE RECOMMENDATION

In addressing the issue, FMFN maintained that, in the LARP, the area in which oil sands and resource development can occur has not been designated. And while the implementation strategies are in place, the majority of framework and regulatory tools needed to meet the Vision and Outcomes described in the LARP (apart from optimizing oil sands development) have not been created.

In its submission, FMFN pointed out a number of initiatives listed in the LARP, which, according to the Applicant, have not been completed.¹⁹ FMFN stated:

“The LARP is in effect and authorizes resource development in the majority of the Region but in the absence of key measures to manage the environmental and social consequences or deliver on the stated intention of managing cumulative effects.

As a result, the Vision and Outcomes cannot be achieved apart from the policy direction to optimize oil sands development and requirement that decision-makers comply with the [various] thresholds set for air [and water] quality...

The environmental thresholds that are in place under the LARP do not apply until monitoring results reach “triggers,” which means the existing tools under the LARP do not assist in meeting the objective of the integration of economic, environmental and social considerations at the ‘development, planning and approval stage of decision making.’”²⁰

As noted with other First Nation submissions, the Crown argued that the Review Panel has very limited jurisdiction to address this issue. In its submission, the Crown maintained that “the LARP does not authorize development [but instead] creates a framework that is intended to guide decision-makers in the exercise of their powers and duties.”²¹

In addition, the Crown argued that the LARP does not prioritize development but “aligns provincial policies at the regional level to balance Alberta’s economic, environmental and social goals,”²² and that the “LARP does not rank regional outcomes.”²³

In FMFN’s August 25, 2014 response to the Crown’s submission, the Applicant noted that the LARP excludes Fort McKay’s interests in the “balancing” of the LARP.²⁴

The Applicant referred to a number of regulatory decisions that recognized the ineffectiveness of the existing regulatory process in addressing cumulative effects that harm Fort McKay. FMFN also noted the inability of an incomplete the LARP to address the gap in the regulatory system.²⁵

In the same document, FMFN stated:

“The existing impacts — including increasing levels of air pollution, dramatic declines in moose and caribou, lands disturbed and fragmented by development, have occurred despite the existing review and approval mechanisms for oil sands projects. Alberta relies on the existing approval process to say the LARP does not create impacts because new projects will go through a review process. It is exactly the failure of the project specific review process that has caused the decline of the health of the ecosystems and the environment and the quality of life in Fort McKay.

Fort McKay’s concern is that the problem the LARP is supposed to address will continue to grow larger, and the impacts on Fort McKay will increase because projects continue to be approved even though critical aspects of the LARP are not yet developed. If further development was suspended while the LARP frameworks and thresholds were being created, the situation would be much different.”²⁶

The Review Panel agrees with the submissions of the Applicant that many of the proposed frameworks and thresholds are still not in place or have not yet been developed, thereby impacting FMFN members’ “quiet enjoyment of property” on their Traditional Territory.

In reviewing the written evidence of both parties to these proceedings, the Review Panel recommends to the Minister that the Applicant *has* been “more than minimally harmed” by such inaction by the Crown, and that FMFN *has* been “directly and adversely affected” by such omissions in the LARP in an attempt to enjoy the “quiet enjoyment of property” on their Traditional Lands.

¹⁹ FMFN Application; page 7 ²⁰ FMFN Application; page 9, paragraph 31 and 32 ²¹ Response Submissions of the Government of Alberta; page 19, paragraph 99

²² Response Submissions of the Government of Alberta; paragraph 102 and LARP; page 2 ²³ LARP; page 23 ²⁴ FMFN Submission; page 15, paragraph 42 ²⁵ FMFN Submission; pages 17-29 ²⁶ FMFN Submission; page 28, paragraphs 76-77

Issue Three

The Lower Athabasca Regional Plan does not contain any outcomes, strategies, thresholds, frameworks or management plans for managing adverse impacts to the Applicant's Lands or for adverse effects on opportunities to exercise Treaty and Aboriginal rights and Traditional Land Use.

RECOMMENDATIONS TO THE MINISTER

With respect to the issue, the Review Panel recommends to the Minister that the Applicant *has* been “more than minimally harmed” and as a result of the deficiencies not addressed in the LARP, FMFN members *have* been “directly and adversely affected” by a “loss of income,” potential “health effects” and a “loss of quiet enjoyment of property.”

REASONS FOR THE RECOMMENDATION

The Applicant alleged that the LARP — through its outcomes, thresholds, frameworks and management plans — does not recognize or establish the means to manage adverse impacts on FMFN lands, in accordance with Aboriginal rights and TLU.

In its submission, FMFN argued:

“Fort McKay is not able to identify any provision of the LARP that ensures the sustainability of its Lands for the community’s long-term cultural, social or economic needs. Specifically, how terrestrial resource on its Reserves will support Traditional Land Use, how water quantity and quality on its Lands will support its domestic and commercial needs or how air quality will protect members health. Potential impacts to Reserve Lands are not addressed at all by the LARP.”²⁷

The Applicant also noted that the proposed new conservation areas do not support Traditional Land Use by Fort McKay, beyond a “de minimus” level. The Review Panel recognizes that 98 per cent of Fort McKay’s trapping areas and approximately 70 per cent of its Traditional Territory have been leased to oil sands developers.²⁸ As a result of the close proximity to such development, FMFN members are currently affected by air pollution, noise, light pollution, odours etc.

In a number of studies, the Applicant argued that, as a result of the industrial development, wildlife is declining.²⁹ Another study submitted by the Applicant outlined that significant adverse effects have already occurred to Fort McKay’s cultural heritage, including Traditional Land Use, as a result of existing oil sands development.³⁰ The same review noted a link between the physical health of its members and the ability to harvest country foods.

The Crown, in response to the Applicant’s argument, maintained that the Government of Alberta has already established limits and thresholds for air quality and water quality in the LARP and is in the process of establishing the same parameters for other management framework agreements.

In conclusion, the Crown submitted that the majority of concerns raised by FMFN are not related to the content of the LARP or are outside the jurisdiction of the Review Panel.

The Applicant’s response to the Crown stated that:

“The existing regulatory system fails to provide the adequate protection of the health and rights of Fort McKay which are affected by the cumulative environmental effects of development. The purpose of the LARP is to manage these impacts and it does so only in a very limited way. This is particularly harmful to Fort McKay because the LARP is being used to justify and authorize further impacts on Fort McKay’s Constitutional Rights without regard to cumulative impacts of development. Since the LARP’s coming into force, Alberta, industry and the AER have relied on the Plan to shut Fort McKay out of the project-specific regulatory process and to avoid consulting and addressing the very real impacts on Fort McKay.”³¹

The Review Panel recognizes that one primary purpose of the LARP is to “use a cumulative effects management approach to balance economic development opportunities and social and environmental considerations.” In the case of the Applicant, the Review Panel considers that this specific purpose is not being achieved in the LARP

²⁷ FMFN Application; page 10, paragraph 38 ²⁸ FMFN Application; page 13 ²⁹ FMFN Application; pages 15-17 ³⁰ FMFN Application; page 20 ³¹ FMFN Submission; page 33, paragraph 94

document. The LARP has not taken adequate measures to protect the Applicant's Treaty and Aboriginal rights, Traditional Land Use and culture. In fact, it has done quite the opposite. As noted by the Applicant, leases are still being approved by government within the Applicant's Traditional Territory. At the current rate, it is fair to conclude that in the not-too-distant future, FMFN will not be able to utilize *any* of their Traditional Land because of industrial development activities.

In reviewing the written evidence of both parties to these proceedings, the Review Panel is of the opinion that, in the case of the Applicant, the pendulum is out of balance between economic development in the region and FMFN's Treaty rights, Traditional Land Use and culture. The Review Panel agrees with the Applicant that the LARP has not adequately addressed the adverse impacts to FMFN concerning their Aboriginal rights and Traditional Land Use.

For the reasons described above, the Review Panel recommends to the Minister that the Applicant *has* been "more than minimally harmed" with respect to this issue, and *has* been "directly and adversely affected" by this imbalance concerning cumulative effects management, resulting in a "loss of income," potential physical "health effects" and a "loss of quiet enjoyment of property" for the members of FMFN.

General Observations and Suggestions to the Minister

Lower Athabasca Regional Plan Proposed Strategic Timelines

In July 2014, the Government of Alberta provided a progress report on the Lower Athabasca Regional Plan (LARP) for 2013, regarding the implementation of strategies outlined in the Plan. As noted in this Annual Report, many of the timelines outlined in the LARP have been delayed with respect to the implementation of the initiatives. Strategies outlined with asterisk indicate the direct involvement of First Nations, as noted in the LARP.**

LARP OUTCOME:

The economic potential of the oil sands resource is optimized

- Sub-regional plan using a strategic environmental assessment approach for the south Athabasca oil sands area.
Original Completion Date
2013
Revised Completion Date
2014
- Responsible Actions: A Plan for Alberta's Oil Sands
Original Completion Date
Ongoing
Revised Completion Date
Continues
- Alberta Provincial Energy Strategy
Original Completion Date
Ongoing
Revised Completion Date
Continues
- Improved Regulatory Process through the Alberta Energy Regulator
Original Completion Date
Ongoing
Revised Completion Date
Continues

- Connecting the Dots: Aboriginal Workforce and Economic Development in Alberta **

Original Completion Date

Ongoing

Revised Completion Date

Aboriginal Workforce Strategy Spring 2015
(Crown Response Information Request #11, December 12, 2014)

LARP OUTCOME:

The region's economy is diversified

- Lakeland County Destination Development Strategy and Tourism Opportunity Plan **
Original Completion Date
2015
Revised Completion Date
2015
- Tourism development nodes
Original Completion Date
2015
Revised Completion Date
2015
- Tourism opportunity assessment for Quarry of Ancestors, Bitumount and Fort Chipewyan **
Original Completion Date
2014
Revised Completion Date
2014
- Scenic Byways Network
Original Completion Date
2015
Revised Completion Date
2015
- Prevent shortfalls in timber supply
Original Completion Date
Ongoing
Revised Completion Date
Ongoing

- Wildlife management planning initiatives
Original Completion Date
Ongoing
Revised Completion Date
Ongoing
- The Alberta Forest Products Roadways to 2020
Original Completion Date
Ongoing
Revised Completion Date
Ongoing
- Enhance and expand the supply of tourism products and infrastructure **
Original Completion Date
Ongoing
Revised Completion Date
Ongoing
- Clarity in rules for physical access to energy, mineral and coal resources
Original Completion Date
Ongoing
Revised Completion Date
Ongoing
- Promote new investment in energy, mineral and coal resource development
Original Completion Date
Ongoing
Revised Completion Date
Ongoing

LARP OUTCOME:

Landscapes are managed to maintain ecosystem function and biodiversity

- Create new conservation areas on provincial Crown Land **
Original Completion Date
As soon as practicable?
Revised Completion Date
Ongoing
- Develop a biodiversity management framework **
Original Completion Date
2013
Revised Completion Date
2014

- Develop a landscape management plan for public lands in the Green Area **
Original Completion Date
2013
Revised Completion Date
2014
- Manage existing conserved lands
Original Completion Date
Ongoing
Revised Completion Date
Ongoing
- Complete a tailings management framework
Original Completion Date
Ongoing
Revised Completion Date
Ongoing
- Implement a progressive reclamation strategy
Original Completion Date
Ongoing
Revised Completion Date
Ongoing

LARP OUTCOME:

Air and Water are managed to support human and ecosystem needs

- Complete and implement the Groundwater Management Framework for the Lower Athabasca Region
Original Completion Date
2014
Revised Completion Date
Ongoing
- Complete an updated Surface Water Quantity Management Framework for the Lower Athabasca River **
Original Completion Date
2012
Revised Completion Date
2015
- Implement the Air Quality Management Framework for the Lower Athabasca Region
Original Completion Date
2013
Revised Completion Date
Implemented in 2013

- Implement the Surface Water Quality Management Framework for the Lower Athabasca River

Original Completion Date

2013

Revised Completion Date

Implemented in 2013

LARP OUTCOME:

Infrastructure development supports economic and population growth

- Use [Comprehensive Regional Infrastructure Sustainability Plan] (CRISP) to augment and facilitate planning where oil sands development causes growth pressures

Original Completion Date

Ongoing

Revised Completion Date

Ongoing

- Ensure opportunities for future routes and siting for pipeline gateways, transmission corridors utility and electrical transmission corridors are maintained

Original Completion Date

Ongoing

Revised Completion Date

Ongoing

- Critical economic linkages to markets

Original Completion Date

Ongoing

Revised Completion Date

Ongoing

LARP OUTCOME:

The quality of life of residents is enhanced through increased opportunities for recreation and active living

- Designate new provincial recreation areas to address growing demand for recreational opportunities

Original Completion Date

As soon as practicable

Revised Completion Date

Ongoing

- Create public land areas for recreation and tourism that contain unique features and settings **

Original Completion Date

As soon as practicable

Revised Completion Date

Ongoing

- Develop the regional parks plan for the Lower Athabasca

Original Completion Date

2013

Revised Completion Date

2014

- Develop the Lower Athabasca Regional Trail System Plan **

Original Completion Date

Ongoing

Revised Completion Date

Ongoing

- Collect regional data including completion of recreation and tourism inventory, a scenic resource assessment inventory and a regional recreational demand and satisfaction survey

Original Completion Date

Ongoing

Revised Completion Date

Ongoing

LARP OUTCOME:

Inclusion of Aboriginal People in land-use planning**

- Continue to consult with Aboriginal Peoples in a meaningful way when government decisions may adversely affect the continued exercise of their constitutionally protected rights

Original Completion Date

Ongoing

Revised Completion Date

Ongoing

- Invite First Nations expressing an interest in the Richardson Backcountry to be included in a sub-regional initiative called the First Nations Richardson Backcountry Stewardship initiative

Original Completion Date

Ongoing

Revised Completion Date

Ongoing

Remarks

It is difficult for the Review Panel to determine if timelines are met, or when initiatives are due to be completed, when no specific dates are established to complete the various strategies. Inconclusive terms, such as those listed below, are used throughout the 2013 Progress Report for the LARP:

- Ongoing
- As soon as practicable
- Continues

Follow-up on the following strategies also estimated to be completed by 2014:

- Sub-regional plan using a strategic environmental assessment approach for the South Athabasca oil sands area.
- Tourism opportunity assessments for Quarry of the Ancestors, Bitumount and Fort Chipewyan.
- A Biodiversity Management Framework.
- A Landscape Management Plan for public lands in the Green Area.
- A Regional Parks Plan for the Lower Athabasca.

Potential Outcomes and Strategies that appeared in the LARP but were not included in the 2013 Progress Report are as follows:

- **LARP**
Pages 19/25
Initiative
Integrated Land Management (ILM)
- **LARP**
Page 21
Initiative
Letter of intent between Fort McKay and Government of Alberta for a community health assessment in Fort McKay
- **LARP**
Page 28
Initiative
The Water Management Framework: In-stream flow needs and water management system for the Lower Athabasca River - 2007
- **LARP**
Page 32
Initiative
Plan for Parks, the Alberta Recreation Corridor and Trails Designation Program, Active Alberta
- **LARP**
Page 33
Initiative
Tourism Development Strategy and the Tourism Management Strategy for Public Land
- **LARP**
Page 37
Initiative
Continued implementation of the Alberta Provincial Energy Strategy and Responsible Actions: A Plan For Alberta's Oil Sands
- **LARP**
Page 38
Initiative
Workforce Strategy for Alberta's Energy Sector
- **LARP**
Page 39
Initiative
Wildfire management planning
- **LARP**
Page 39
Initiative
Alberta Forest Products Roadmap to 2020
- **LARP**
Page 41
Initiative
Rules regarding physical access to energy, mineral and coal resources

- **LARP**

Page 58

- **Initiative**

Plan for a Fort McMurray Urban Development
Sub-region

It is anticipated that future LARP Progress Reports will identify the status of the initiatives above.

Other Government of Alberta documents:

- Cumulative Environmental Management Association (CEMA)
- Traditional Knowledge Framework September 2015 (Crown Response Information Request #11 December 12, 2014)
- Woodland Caribou Range Plans, First – Spring 2015, Second - End of 2015

dates for the Government of Alberta strategies *have not even been identified*. This lack of clarity means the public is not aware of when these strategies are supposed to be completed. Again, as noted on page 65 of the LARP:

“Monitoring, evaluation and reporting are key activities for the success of the Lower Athabasca Regional Plan. To respond effectively to changing circumstances and new information, government must have a way to assess regional planning progress on objectives and outcomes and initiate corrective action where required.

Government will use various mechanisms to formally communicate on regional plan progress to the public, including the release of reports on an annual basis that speak directly to the plan, as well as ministry communications that address more specific aspects of the plan.”

I. Observations and Suggestions to the Minister

The Review Panel suggests that based on the documents obtained from the Government of Alberta, many of the timelines pertaining to land-use planning have not been met, or their timelines have been extended. In many cases, no completion dates for these activities have been identified, other than to rely on such vague terms as “ongoing,” “as soon as possible,” or “continues.” These terms are not very helpful to the public in attempting to describe when such documents are to be completed by the Government of Alberta.

With respect to the inclusion of Aboriginal Peoples in land-use planning outcomes and activities, it is questionable whether much progress-to-date has been made in the completion of Outcome 7 of the LARP, at the time of our Report. Such commitments must be achieved in order to effectively implement the LARP.

Page 65 of the LARP refers to the Government of Alberta releasing progress reports on the LARP on an annual basis. An audit on the LARP should take place in 2017. The 2013 Progress Report was not published until July 2014. As noted earlier, many of the timelines for the strategic initiatives established were not met. However, most of the completion

Lower Athabasca Regional Plan Monitoring Initiatives

Introduction

The Lower Athabasca Regional Plan¹ (LARP) noted that “monitoring, evaluation and reporting are key activities for the success of the Lower Athabasca Regional Plan... A system of monitoring, evaluation, reporting and improvement is needed to determine the effectiveness of the regional plan (i.e. to determine if land-use strategies and actions will fulfill the regional plans’ objectives and outcomes).”

Under the heading of “Monitoring,” it stated: “on an ongoing basis, government will systematically collect and store data for indicators about the progress of achievement of the Lower Athabasca Regional Plan outcomes... Government will be responsible for collecting data for these over the span of the regional plan and for monitoring the data trends showing changes occurring in the region.”

Under the heading of “Evaluation” on the same page, it described the following: “the monitoring data will undergo rigorous evaluation, analysis and interpretation of results within the context of government policies and strategies designed to achieve the regional objectives and assure management actions are appropriate spatially and temporally.

This includes ministerial evaluation of monitoring data against the limits and triggers established for the region. *Wherever possible, the contributions of subject matter experts within the stakeholder community will be encouraged as input into this process.*” (Emphasis added)

Page one of the 2013 Progress Report of the LARP (published in July 2014) stated: “in compliance with the LARP, the Government of Alberta has established and will maintain programs that:

- Monitor the area of conserved land in the planning region and evaluate the ratio of conserved land to the total land;

- Manage ambient air quality limits and triggers, monitor and evaluate ambient air quality planning region, and evaluate the effectiveness of the air framework in meeting the air quality objectives states in the regional plan;
- Manage water quality limits and triggers, monitor and evaluate water quality, and evaluate the effectiveness of the frameworks in meeting the water quality objectives for the Lower Athabasca River;
- Monitor and evaluate groundwater quantity and quality in the planning region;
- Evaluate the effectiveness of the public land areas for recreation and tourism as well as the provincial recreation areas in meeting the recreation and tourism objectives for the region; and
- Monitor and evaluate the status of regional indicators and strategies, and the effectiveness of each strategy in achieving regional outcomes.”

Page 20 of the LARP noted that in 2011, a “Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring” (Joint Implementation Plan) was developed, which was intended to monitor oil sands activities over a three year term, beginning in 2012.

As noted in the LARP, the Joint Implementation Plan has a number of objectives:

- Support sound decision-making by governments and as well as stakeholders;
- Ensure transparency through accessible, comparable and quality-assured data;
- Enhanced science-based monitoring for improved characterization of the state of the environment and collect the information necessary to understand cumulative effects;

¹ Lower Athabasca Regional Plan (LARP); page 65

- Improve analysis of existing monitoring data to develop a better understanding of historical baselines and changes; and
- Reflect the trans-boundary nature of the issue and promote collaboration with the Governments of Saskatchewan and the Northwest Territories.

The Joint Implementation Plan [was also intended to] address the following matters:

- Air quality;
- Acid sensitive lands and accumulated aerial disposition;
- Water quality and quantity;
- Aquatic ecosystem health - including health and status of fish and other aquatic species;
- Wildlife toxicology;
- Land biodiversity and habitat disturbance; and
- Data management.

The 2013 Progress Report of the LARP mentioned that in 2013, the Government of Alberta created the Alberta Environmental Monitoring Evaluation and Reporting Agency (AEMERA) to establish an “arms-length agency responsible for monitoring and reporting on the condition of Alberta’s environment.”²

Specifically, the purposes of AEMERA are described in its enabling legislation as follows:³

Section 3(1)

- a. to obtain credible and relevant scientific data and other information regarding the condition of the environment in Alberta;
- b. to ensure the data and other information are available and reported to the public in an open and transparent manner; and
- c. any other purpose prescribed by the Lieutenant Governor in Council.

(2) In carrying out its purposes, the Agency shall:

- a. *plan, co-ordinate and conduct environmental monitoring*; (Emphasis added)
- b. collect, store, manage, analyze and evaluate environmental monitoring data;
- c. report on the status and trends related to the condition of the environment on the basis of the evaluation of the data collected;
- d. make environmental monitoring data and related evaluation and assessments publicly available;
- e. develop standards respecting environmental monitoring;
- f. establish advisory committees or panels respecting environmental monitoring; and
- g. carry out other activities determined by the Minister.

The Review Panel requested — in Information Request #9 to the Government of Alberta — an update on the status of the various management frameworks, which were noted throughout the LARP document. On the basis of the Government of Alberta’s response of December 2014, the following frameworks are complete:

- Air Quality Framework, in effect since 2012;
- Surface Water Quality Framework, in effect since 2012; and
- Groundwater Management Framework, in effect since 2012 but monitoring to be continued to “refine the triggers, limits, and monitoring network enhancements.”

This third point is recognized in Schedule C of the LARP, where it is noted that the listed triggers are “interim.”

The Government of Alberta, in March 2014, filed an update for 2012 on the Air Quality Management Framework and the Surface Water Quality Management Framework. These management

² *Protecting Alberta’s Environment Act*, assented to on December 11, 2013 and proclaimed into force on April 28, 2014. ³ *Protecting Alberta’s Environment Act*, c P-26.8, 2014

response reports, which were 18 months late, state that no limits were exceeded for air and surface water quality indicators, but some triggers were exceeded in both of these areas. For air quality, 10 air-monitoring stations exceeded triggers for nitrogen dioxide (NO₂) and sulphur dioxide (SO₂). Three of the 38 water quality indicators were exceeded at the Old Fort Station.

With respect to the issue of air pollution, the above reports note that only sulphur dioxide and nitrogen dioxide were measured, but that air pollution levels rose to levels two and three, on a scale of four, at several monitoring sites, mostly between Fort McMurray and Fort McKay. In the "Status of Air Quality Management Response," the worst pollution occurred near two large upgraders where sulphur dioxide emissions registered level three at two stations, based on the Alberta's Ambient Air Quality Objectives (AAAQO). Five other sites recorded sulphur dioxide at level two. Nitrogen dioxide emissions registered level two at five monitoring stations. The province's legal air quality threshold conforms to the AAAQO, which, according to the Air Quality Management Framework, is "intended to the extent that it is technically and economically feasible, and is socially and politically acceptable."

As noted on page one, under the heading of "Introduction" of the aforementioned reports, it states: "as part of a commitment under the Lower Athabasca Regional Plan (LARP), a management response must be initiated when a trigger or limit has been determined to be exceeded by the Minister of Environment and Sustainable Resource Development."

The same document outlines six steps in the Government of Alberta's management response for when framework agreement limits or triggers are exceeded. These steps are:

- Verification
- Preliminary assessment
- Investigation
- Mitigative management actions
- Evaluation
- Communication

The 2013 Progress Report for the LARP notes that, for the first two steps (verification and preliminary assessment), some progress has been made for both air and water quality and that, in the case of air quality, the third step (investigation) has been initiated. The Report also states that further updates concerning the status of the management response will be made in 2014. The Government of Alberta's response to Information Request #9 suggested this response be deferred to 2015, and management actions will also be updated.

Page 19 of the LARP refers to a number of agencies, besides the Government of Alberta, that are responsible for "monitoring, evaluation and reporting initiatives and programs in the region." The Review Panel was interested in knowing what the roles and responsibilities of these agencies were. The Government of Alberta, in Information Request #9, addressed the Review Panel's questions as follows:

- Wood Buffalo Environmental Association (WBEA) is a non-profit monitoring organization and a delivery partner in the Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring.
- Lakeland Industry and Community Association (LICA) is a non-profit monitoring organization and delivery partner in the Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring.
- Alberta Biodiversity Monitoring Institute (ABMI) is a non-profit monitoring organization, which generates most of the biodiversity data and information under the Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring.
- The Canada-Alberta Oil Sands Environmental Monitoring Information Portal is a website where the public can access information relating to the Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring.

In October 2014, the monitoring programs of the Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring were criticized by both levels of government. The report released by the Commissioner of the Environment and Sustainable Resource Development in Ottawa concluded that the plan had failed to include Aboriginal traditional knowledge in its work.

The report also notes that the federal government's role in oil sands monitoring is unclear beyond 2015. Alberta Auditor General Merwan Saher also examined the plan, noting that the annual report for 2012-13 was delivered 15 months after the review period. In his report, he found the Progress Report "lacked clarity and key information and contained inaccuracies, and that the management of the monitoring projects are weak." The Auditor General observed that the report failed to note that Aboriginal communities initially involved in the development of the plan had left for a number of reasons.

In a recent article by Martin Olszynski, an Assistant Professor at the University of Calgary, the issue of "monitoring" was reviewed for the oil sands region.⁴ He refers initially to the Royal Society of Canada's concern about the quality of water monitoring carried out by the Regional Aquatic Monitoring Program (RAMP) in 2010. The article lists the failure of such programs as RAMP as follows:

- "Notwithstanding the scale of potential environmental effects (i.e. beyond not just the boundaries of any single lease area but, indeed, well down-stream of the entire mineable area, including the Peace-Athabasca Delta), RAMP was an industry-driven initiative;
- There was inconsistency in sampling protocols; and
- There was insufficient spatial and temporal sampling coverage."

The author noted that a more established example of "ecosystem management" (EM) is the Lower Athabasca River Management Framework (LAR). On page 27 of his article, he stated that the LAR was designed to protect the ecological integrity of the river during oil sands development:

"The LAR Framework has its origins in the Joint Review Panel (JRP) reports for Shell's Jackpine I and Canadian Natural Resources Limited's (CNRL) Horizon oil sands projects. In the course of the hearings for those projects, various participants first raised concerns about the cumulative impact

of numerous and otherwise perfectly legal water withdrawals on the Lower Athabasca River's aquatic ecosystem — a classic example of a death by a thousand authorized cuts. Consequently, the JRPs directed the Cumulative Environmental Management Association (CEMA) to recommend, by 2005, a management system for maintaining instream flow needs (IFN), defined as the amount, flow, and quality of water required in the river "to sustain a healthy aquatic ecosystem." Failing such a management system, Alberta Environment (now Alberta Environment and Sustainable Resource Development or AESRD) and DFO were to step in and integrate an IFN as a condition in their respective approvals. CEMA failed to deliver an IFN, which led government regulators to release an initial phase of the [LAR] Framework in 2007. A second phase was intended to deal with long-term management and to establish an ecosystem base flow (EBF), defined as "the minimum streamflow value below which a component of the aquatic ecosystem is believed to be under increased stress." However, the Phase 2 Framework Committee (P2FC) has not been able to reach consensus on certain exemptions to the EBF, and Phase 1 continues to guide decision-making to this day.

Under Phase 1, naturally-occurring flows are divided into green, yellow, and red conditions. The green condition implies no restrictions on withdrawals, while the red condition means that water levels are unusually low and withdrawals need to be restricted in order to minimize the loss of fish habitat. Thus, the Lower Athabasca River aquatic ecosystem is being managed to try to suit both human and ecological needs rather than being subject to prohibitions and authorizations in the abstract with the importance of environmental monitoring made plain by the LAR Framework. Managers need to know flow conditions in order to take the right management actions under the Framework."

Olszynski then referred to the *Alberta Land Stewardship Act* (ALSA), which he said has the potential to foster effective EM, "although it too is laden with discretionary provisions."⁵ He then pointed specifically to the monitoring programs in the LARP:

⁴ *Environmental Monitoring and Ecosystem Management in the Oil Sands: Spaceship Earth or Escort Tugboat?* (2014) 10 McGill J.S.D.L.P. 1-44 ⁵ The term "may" appears in the statute over 60 times

"The situation is altogether different on the provincial side, where the legal landscape shifted considerably following the passage of the ALSA and the implementation of the Lower Athabasca Regional Plan (LARP) in 2012. Section 6 of the LARP provides that the "Regulatory Details Plan" (RDP) contained therein has the force of law. As part of the RDP, the designated Minister is required to establish various monitoring programs to support the new air quality, surface quality, and groundwater quality "environmental management frameworks" (essentially analogs of the LAR Framework but for different aspects of the environment) that have since been established as part of the LARP (section 24 for air quality monitoring, section 31 for surface water quality, and section 37 groundwater quality). More recently, and as already noted, the legal landscape shifted even further as the legal authority for such monitoring programs was added to Alberta's *Environmental Protection and Enhancement Act* (EPEA). Amendments to the EPEA authorize the Minister of Environment to make regulations "respecting the establishment and operation of one or more environmental monitoring programs, including... (a) the nature and scope of [such a] program; (b)...the participation in [such a] program; and (c)... the imposition of fees on participants." Finally, all such monitoring will eventually be coordinated by AEMERA, as provided in that agency's enacting legislation introduced in October and passed in November 2013."

I. Observations and Suggestions to the Minister

Throughout the LARP, reference is made that the various framework management agreements for air, water, land and biodiversity are continually monitored, evaluated and reported on by their respective lead ministries. Each framework is supposed to identify limits and triggers and, if these numbers are exceeded, a regional management response will be actioned if such verification is confirmed.

Each framework will describe the kinds of management actions that may be required, such as the preparation of mitigation plans, further modeling or monitoring and the use of best management practices. This is described in greater detail on page 65 of the LARP, which highlights that "a system of monitoring,

evaluation, reporting and improvement is needed to determine the effectiveness of the regional plan."

The LARP Progress Report of 2013, submitted in 2014, noted the following steps, which had to be followed by the Government of Alberta once the limits or triggers were exceeded for each framework management agreement:

- Verification
- Preliminary assessment
- Investigation
- Mitigative management actions
- Evaluation
- Communication

The Review Panel notes the following concerns, based on the Progress Reports on two of the management framework agreements completed in 2012:

- The Progress Report on these two management frameworks — air and water quality — were 18 months late;
- Although the Government of Alberta confirmed that the groundwater management framework has been in effect since 2012, it is not clear whether triggers or limits have been established. As of December 2014, it is also the understanding of the Review Panel that, for this framework, "monitoring network enhancements are [still] ongoing";
- In the Government of Alberta's response to the Review Panel's Information Request #9, it is stated that regional groundwater monitoring networks are being developed for the North Athabasca Oil Sands, South Athabasca Oil Sands, and the Cold Lake Beaver River areas. None of those networks are complete as of yet; and the Cold Lake Beaver River network has yet to be established;
- Currently, the air monitoring stations established measure for nitrogen dioxide and sulphur dioxide, relying on AAAQO objectives. Should additional industrial pollutants in the air be measured in the region, in addition to NO₂ and SO₂?

- Should the AAAQO objectives be reviewed? Applicants have argued they are outdated and do not reflect the World Health Organization's criteria for ambient air quality adopted by other countries;
- With respect to water quality thresholds for the Athabasca River, why is there only one monitoring location and it only applies to one water body? Why does the interim framework for water quality only refer to one water body?;
- In its Application, Fort McKay First Nation noted that key pollutants associated with the oil sands are not included in such tests and the thresholds only apply to the Athabasca River at a measurement point 100 kilometres from Fort McKay, at a point where many substances will be diluted;
- In the 2013 Progress Report of the LARP, it notes that the first two steps (verification and preliminary assessment) for both the air and water quality trigger levels were exceeded, and the third step (investigation) for the air quality levels, has been initiated by the Government of Alberta. The Review Panel questions when the Government of Alberta will initiate the remainder of the other six steps as part of its management response commitment, as described in the 2012 LARP Progress Report;
- The LARP refers to a number of non-profit organizations that will assist the Government of Alberta in the implementation of the Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring. With respect to these organizations, the Review Panel asks the following questions;
 - Does either the Province of Alberta or the federal Government check on the effectiveness of such organizations to monitor the oil sands activities?
 - Will the Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring be renewed by the federal Government after 2015?
 - Will AEMERA continue to use these non-profit organizations to monitor the oil sands activities if the federal Government does not renew their participation in the Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring?
- Will the Government of Alberta audit the effectiveness of these non-profit agencies to monitor the environment in their designated locales?
- The LARP notes, on page 65 under the heading of "Evaluation," "this includes ministerial evaluation of monitoring data against the limits and triggers established for the region. Wherever possible, the contributions of subject matter experts within the stakeholder community will be encouraged as input into this process." Does this refer to the inclusion of First Nation communities?;
- One of the purposes of AEMERA, as noted in its enabling legislation, is that the agency will "establish advisory committees or panels respecting environmental monitoring." It would be beneficial if the Government of Alberta appointed a number of First Nation members to such committees or panels; and
- In the future, will AEMERA have the necessary resources and budget to fulfill its mandate to effectively monitor the environment throughout the province?

FIGURE 1:
Monitoring Diagram from the LARP (page 65)



The Issue of Traditional Land Use

Introduction

Each of the six First Nations Applications submitted to the Review Panel contained a “Territorial Land” or “Traditional Land Use” (TLU) map — an integral component of their respective submissions. The Crown has acknowledged in its submissions that such lands exist, although there is a difference of opinion between the parties concerning the boundaries of such lands within the Lower Athabasca Region.

The Applicants, in general, state that ongoing development within such lands has impacted their “Aboriginal and Treaty rights,” as described under section 35 of the *Constitution Act, 1982*, even though the Land-use Framework of 2008 states that:

“The provincial government will strive for a meaningful balance that respects that constitutionally protected rights of Aboriginal communities with the interests of Albertans.”¹

Throughout the Lower Athabasca Regional Plan (LARP), reference is made to the fact that Aboriginal Peoples are encouraged to participate in land-use planning. The Review Panel notes that TLU management is a significant concern of each First Nation Applicant in these proceedings, and has not been addressed within the LARP.

For the above reasons, and if the LARP is to be successfully implemented in the region, the Review Panel makes several suggestions to the Minister concerning this important matter.

I. Explaining Traditional Land Use

A. DEFINITIONS AS NOTED BY COLD LAKE FIRST NATIONS (CLFN)²:

Traditional

In the context of Traditional Land Use and occupancy studies, the word ‘traditional’ refers to the constantly evolving transmission of customs and beliefs from

generation to generation. It is not to be confused with ‘traditionalism,’ which is the upholding or maintenance of traditions, especially so as to resist change. ‘Traditional,’ in reference to traditional use and occupancy research, does not only refer to the past. Nor does it imply that cultures are static. Adaptive change is inherent in every tradition and new technology is adopted and used within an Aboriginal community’s own systems of knowledge and ethics (see Tobias 2009; Wyatt et al 2010). The adoption of new technologies does not invalidate the cultural importance or meaningfulness of the activity itself (see Manuel and Posluns 1974; Johnson 2007).

Land

The concept of ‘the Land’ for Aboriginal Peoples extends well beyond the physical landscape, encompassing the sky, the air, celestial bodies, the waters, the elements, and all living and non-living things to be found within it. For this reason, Aboriginal Peoples’ relationships with the land are fundamentally spiritual (Ross 2005).

Use

‘Use’ refers to activities involving the harvesting of traditional resources and includes such things like hunting, trapping, fishing, gathering of medicinal plants and berry picking, and travelling to engage in these activities. It also includes a wide range of other activities and practices which for any given community or nation occurs over a specific geographic area (Tobias 2000).

Occupancy

‘Occupancy’ refers to an area a particular group regards as its own by virtue of continuing use, habitation, naming, knowledge and control. Occupancy is evidenced by fixed cultural sites such as habitations, sacred areas, burial grounds, place names, place-based legends and stories, and so on” (Tobias 2000). Occupancy, even more so than use, indicates a “longstanding relationship to the land” because “the knowledge associated with occupancy is deeper and represents a more intimate connection to territory” than does use (Tobias 2000).

¹ Land-use Framework; 2008, Strategy Seven ² Cold Lake First Nation *Jié Houchálá (Berry Point) Traditional Land Use and Occupancy Report*; Tab 3

B. AN EXAMPLE OF “TRADITIONAL LAND USE” AS AGREED TO BY CANADA, ALBERTA AND COLD LAKE FIRST NATIONS:³

“Canada hereby grants to CLFN and its members access to the Access Area for the following activities and for the monitoring of such activities:

- a. trapping;
- b. fishing for domestic and commercial purposes;
- c. hunting big game and wildlife;
- d. harvesting fruits and berries, wild mushrooms, roots, dye plants and natural medicines;
- e. heritage or cultural activities;
- f. gathering bark and other materials for crafts and specialty forest products;
- g. undertaking archaeological and historical research as may be permitted by the Wing Commander.”

C. THE GOVERNMENT OF ALBERTA'S FIRST NATION CONSULTATION POLICY ON LAND MANAGEMENT AND RESOURCE DEVELOPMENT (MAY 15, 2005) NOTED THAT:

“The Government of Alberta recognizes and respects the Treaties and the lands set aside under the Treaties as First Nations Reserve Lands. Nothing in this document will abrogate or derogate from the Treaties. Under section 35 of the *Constitution Act, 1982* existing Aboriginal and Treaty Rights of the Aboriginal Peoples of Canada are recognized and affirmed.”⁴

The policy statement in the same document reads:

“Alberta will consult with First Nations where Land Management and Resource Development on provincial Crown Lands may infringe First Nations Rights and Traditional Uses.”

At the bottom of the same page it stated that:

“Rights and Traditional Uses includes uses of public lands such as burial grounds, gathering sites, and historic or ceremonial locations, and existing constitutionally protected rights to hunt, trap and fish and does not refer to proprietary interested in the land.”

The provincial Framework and Consultation Guidelines⁵ promised that:

“Alberta will proceed with important initiatives such as traditional use studies and the meaningful involvement of First Nations in land and resource planning as a tool to identify and avoid or mitigate potential impacts on First Nations Rights and Traditional Uses or to accommodate those rights and traditional uses in Alberta’s decision-making.”

The guidelines also include a section on land management, stating that the:

“Lands Division is committed to consult with First Nations regarding strategic level planning and operational landscape level initiatives that may adversely impact First Nations Rights and Traditional Uses.”⁶

D. ALBERTA'S FIRST NATIONS CONSULTATION GUIDELINES ON LAND MANAGEMENT AND RESOURCE DEVELOPMENT (NOVEMBER 14, 2007) NOTED THAT:

“Alberta acknowledges a duty to consult with First Nations where Alberta’s actions have the potential to adversely impact Treaty rights. In recognition of its role Alberta may:

- Undertake consultation with First Nations on a range of provincial planning initiatives (e.g. Water for Life, Alberta’s Strategy for Sustainability, integrated land management plans);
- Provide direction and support to proposed regional consultation tables;

³ Access Agreement (October 10, 2001); Tab 2, page 8, paragraph 7.1 ⁴ The Government of Alberta's First Nation Consultation Policy on Land Management and Resource Development; page 2 ⁵ Framework and Consultation Guidelines (May 19, 2006); page 2 ⁶ Framework and Consultation Guidelines; page 3

- Work with First Nations to ensure traditional use study information is used to support consultation where such information is available;
- Provide information for First Nations and industry to assist in consultation activities;
- Where disputes arise, provide direction at the request of either party;
- Determine the adequacy of consultation activities with the intent of avoiding adverse impacts to First Nations Rights and Traditional Uses and making efforts to substantially address the concerns of First Nations;
- Report back to First Nations and industry regarding decisions; and
- Consider other issues or take other activities as Alberta deems necessary.”⁷

E. THE LAND-USE FRAMEWORK (LUF):

The LUF was designed to address a wide range of land management issues at the provincial level, and to balance competing demands on land resources.

Strategy 7 of this document stated:

“The provincial government will strive for a meaningful balance that respects the constitutionally protected rights of Aboriginal communities and the interests of all Albertans. The Government of Alberta will continue to meet Alberta’s legal duty to consult Aboriginal communities whose constitutionally protected rights, under section 35 of the *Constitution Act, 1982* (Canada), are potentially adversely impacted by development. Aboriginal Peoples will be encouraged to participate in the development of the land-use plan.”⁸

F. REFERENCES TO TLU IN THE LOWER ATHABASCA REGIONAL PLAN (LARP) NOTE AS FOLLOWS:

“Alberta recognizes that those First Nations and Métis communities that hold constitutionally

protected rights are uniquely positioned to inform land-use planning. Consulting Aboriginal communities on regional planning, particularly those aspects that have the potential to adversely impact their constitutionally protected rights, and reconciling interests are essential to achieving the regional vision. In accordance with applicable government policy as it may be from time to time, *the Government of Alberta will continue to consult with Aboriginal Peoples when government decisions may adversely affect the continued exercise of their constitutionally protected rights, and the impact from such consultations continues to be considered prior to the decision.*”⁹ (Emphasis added)

“The Alberta government collaborates with Aboriginal communities towards protecting traditional-use locations of cultural and spiritual significance. These places can be determined to be historic resources and subject to protection under the *Historical Resources Act.*”¹⁰

“In developing a biodiversity management framework and a landscape management plan, the Government of Alberta will work with First Nations to consider how First Nations’ exercise of constitutionally protected rights to hunt, fish and trap for food can continue to occur within reasonable proximity of First Nations’ main population centres.”¹¹

“Aboriginal culture, with its connection to the land and environment, provides a unique opportunity for engagement in land planning, conservation recreation and tourism initiatives.

The Alberta government will look for opportunities to engage these [Aboriginal] communities and invite them to share their traditional ecological knowledge to inform land and natural resource planning in this region.

In accordance with applicable government policy as it may be from time to time, *the Government of Alberta will continue to consult with Aboriginal Peoples when government decisions may adversely affect the continued exercise of their constitutionally protected rights, and the impact from such consultations continues to be considered prior to the decision.*”¹² (Emphasis added)

⁷ *Alberta First Nations Consultation Guidelines on Land Management and Resource Development*; page 2 ⁸ Land-use Framework (2008); page 21 ⁹ Lower Athabasca Regional Plan (LARP); page 5 ¹⁰ LARP; page 22 ¹¹ LARP; page 29 ¹² LARP; page 34

G. REFERENCES PERTAINING TO TRADITIONAL KNOWLEDGE FRAMEWORK (TKF):

In response to the Review Panel's Information Request #4 to the Crown seeking more information on the issue of traditional knowledge in Aboriginal communities, the Government of Alberta made reference to the "Cumulative Environmental Management Association (CEMA), which established a Traditional Knowledge [TK] Working Group with the aim of developing a Traditional Knowledge Framework."

In response to the Review Panel's Information Request #11, the Crown noted that the TK Working Group consisted of several First Nation participants. "The [mandate of] the CEMA Traditional Knowledge (TK) Working Group was established to promote the inclusion of traditional knowledge with CEMA and its work. This group's goals are to ensure meaningful Aboriginal input in environmental management frameworks and recommendations to government and hence to ensure the land, forest, air, water, wildlife and biodiversity in the Regional Municipality of Wood Buffalo will be protected and reclaimed for long term sustainability."¹³

"The [TK] Framework is anticipated to provide guidance and standards for meaningful inclusion of Aboriginal traditional knowledge and Aboriginal knowledge-holders in regional planning, regulatory processes and environmental assessment, and monitoring and follow-up. A successful TK framework may be a major step toward protecting Aboriginal communities' rights and values, and improving environmental outcomes, regulatory certainty and public trust regarding critical environmental decisions and processes that affect the region." The Crown anticipates the TK framework will be forwarded to the Government of Alberta for approval by September 2015.

Fort McKay noted to the Review Panel that the above timelines will not be implemented "given, as an example, the Crown's decision not to approve CEMA's Terrestrial Effects Management Framework (2008)."¹⁵

II. Responses from the First Nations Regarding Traditional Land Use

A. ONION LAKE CREE NATION (OLCN)

"Traditional Land Use" or "TLU" means the current and historical use by OLCN members of areas within the Traditional Territory and on their Reserves for purposes such as gathering berries, food plants and medical plants, gathering plants for construction of implements, tools or crafts, hunting, trapping and fishing and other resource harvesting activities, and including the identification and use by OLCN members of sites within the Traditional Territory as being of historical, cultural sacred, or spiritual importance to OLCN."¹⁶

"The members of OLCN possess constitutionally protected Treaty and Aboriginal Rights, which include the right to carry out: TLU activities in the same manner after Treaty as before... These rights and activities include hunting, fishing, trapping, gathering, ceremonial activities and wildlife management practices which are all inter-related and depend on a healthy environment."¹⁷

"In short, the failure of the LARP to engage First Nations at a higher and strategic level and the failure to engage First Nations at a project specific level results in a Land-use Framework that does not adequately address Traditional Land Uses which will have a "direct and adverse impact" on the ability of OLCN members to practice their Treaty Rights. OLCN considers this to be a serious breach of Alberta's obligations under Treaty 6 and the Honour of the Crown."¹⁸

B. COLD LAKE FIRST NATIONS (CLFN)

"While the LARP purports to take a cumulative effects based approach to the management of environmental effects in the region, a similar approach is not taken in respect to TLU issues.

¹³ Government of Alberta Response to Information Request #11 ¹⁴ Government of Alberta Response to Information Request #11; page 3 ¹⁵ Fort McKay First Nation and Fort McKay Métis Community Association Response to Information Request #11 ¹⁶ Onion Lake Cree Nation (OLCN) Response to Information Request #3; page 1 ¹⁷ OLCN Application; page 4 ¹⁸ OLCN Application; page 9

The following are specific examples of how the LARP fails to adequately address the management of TLU issues:¹⁹

...

“(c) Cumulative impacts to date: The LARP does not appear to consider the existing land and other disturbances that are already affecting (cumulatively) the exercise of Treaty and Aboriginal rights.

(d) Frameworks: The LARP describes how Alberta will work with First Nations in developing a biodiversity management framework and landscape management plan and that managing cumulative effects is important to the needs of Aboriginal communities holding traditional use rights (LARP; page 29). However, we note that Outcome 3, which details the strategies for developing a biodiversity management framework and landscape management plan, makes no mention of TLU.

(e) Area to practice TLU: Alberta’s position that “First Nations’ exercise of constitutionally protected rights to hunt, fish and trap for food can continue to occur within reasonable proximity of First Nations’ main population centres” (LARP; page 29) is contrary to the historic record. Reserves were not set aside with the intention that TLU would be restricted within or near to the Reserves. Rather, Treaty negotiators specifically understood and promised that First Nations would not be confined to Reserves and could continue to practice TLU on their Traditional Lands. Even with this less restrictive view, there is no area reasonably proximate to CLFN’s Reserve Lands where it can freely exercise its TLU.

(f) Priority for TLU: The LARP, including its frameworks and initiatives, does not mention the priority for traditional uses and the Constitutional protection thereof.”

“Fishing, hunting, trapping and gathering resources (Traditional Resources) are becoming scarce. Cold Lake First Nations has not seen any evidence that Alberta has studied or considered within the LARP or elsewhere whether there are enough Traditional

Resources within Cold Lake First Nations’ Traditional Territory to support all of the harvesting activities which are protected by Treaty. It is not a matter of Cold Lake First Nations wanting or advocating for “exclusive use” — the Supreme Court of Canada has already confirmed in *Sparrow* that First Nations harvesting must be prioritized over non-rights based harvesting as a matter of law. The problem, identified in these submissions and in the submissions of the other First Nations, is that Alberta has taken no steps under the LARP to identify or prioritize the needs of First Nations with respect to harvesting and access to Traditional Resources.

Ideally, a plan to identify the required Traditional Resources and to co-manage those resources in a responsible manner would be supported and pursued by Alberta and would be the basis upon which an alternate management regime, based on principles of shared decision-making and joint stewardship of key lands and resources for the continued exercise of rights, could be based. This has been a frequent and repeated request made by Cold Lake First Nations. Unfortunately, as the request has never been taken up by Alberta it is very challenging for Cold Lake First Nations to propose an alternate management regime as requested by the Panel. Too many information gaps remain to propose a reasonable management regime. Cold Lake First Nations is interested and willing to work with Alberta, and other parties, on developing an alternate management regime that could address the concerns identified above and we [CLFN] propose the following:

- a. Identify what key lands, and resources, are required to sustain rights over time for Cold Lake First Nations.
- b. Compare the results of (a) with the LARP and identify whether amendments are required.
- c. If amendments are required, then draft amendments in consultation with Aboriginal groups.
- d. Appoint a representative on behalf of the Crown to begin discussions with Cold Lake First Nations, and other First Nations, on the specific mechanisms for shared stewardship and decision-making, considering, among other things:

¹⁹ Cold Lake First Nations (CLFN) Application; page 7

- i. Establishing zones that consider the specific areas that are identified by Aboriginal groups as critical to their rights and culture;
- ii. Criteria for shared stewardship and decision-making and a detailed consultation and accommodation protocol for each zone;
- iii. The legislative mechanisms by which the management regime would be implemented;
- iv. That in those areas critical to the Aboriginal group's rights and culture, than no industrial or other activity is permitted which would adversely affect or infringe [on] the Aboriginal groups' constitutionally-protected rights until the management regime is finalized and enshrined in provincial legislation.

The first step in developing a co-management system for parks and recreation areas would be to gather information about:

- a. Which parks and recreation areas provide access to high quality Traditional Resources for Cold Lake First Nations and other First Nations;
- b. Whether the identified parks and recreation areas provide sufficient high quality Traditional Resources to support the exercise of Treaty and Aboriginal Rights by Cold Lake First Nations and other First Nations;
- c. If the answer to (b) is "yes," then consider which activities may be made available to all Albertans (considering the nature of the activity, the season, the number of people, and other relevant factors) without reducing the availability of Ecological Resources below the level necessary to support the exercise of Treaty and Aboriginal Rights by Cold Lake First Nations and other First Nations. For example, an area which is very good for hunting may be closed to other recreational users during moose hunting season but may be open for greater access during other seasons."²⁰

C. ATHABASCA CHIPEWYAN FIRST NATION (ACFN)²¹

"The Treaty Rights include the right to harvest specific species in specific locations, as well as incidental rights essential to the meaningful exercise of the Treaty Rights, such as:

- routes to access and transportation;
- sufficient water quality and quantity;
- sufficient quality and quantity of resources in referred harvesting areas;
- cultural and spiritual relationships with the land;
- abundant berry crops in preferred harvesting areas;
- traditional medicines in preferred harvesting areas;
- the experience of remoteness and solitude on the land;
- construction of shelters on the land to facilitate hunting, trapping, gathering and/or fishing;
- use of timber to live on the land while hunting, trapping, gathering and/or fishing (e.g. to build shelters and fires);
- the right to instruct younger generations on the land;
- access to safe lands within which to practice rights;
- the right to feel safe and secure in the conduct of such practices and activities;
- lands and resources accessible within constraints of time and cost;
- socio-cultural institutions for sharing and reciprocity; and
- spiritual sites and associated practices."

²⁰ Cold Lake First Nations Response to Information Request #7; pages 4-6 ²¹ Athabasca Chipewyan First Nation (ACFN) Application; pages 2-3

Athabasca Chipewyan First Nation (ACFN) and Mikisew Cree First Nation (MCFN) tabled the Traditional Land Use and Resource Use Management Plans (TLRUMP) concept with respect to a number of regulatory applications in the province.

As noted in the First Nations' proposal,²² the purpose of the TLRUMP is to provide information on the land and resource requirements of ACFN and MCFN for the "meaningful exercise of Treaty 8 rights now and in the future."

"Specific objectives of the TLRUMP study are to:

- Create an appropriate, culture-group specific vision for what constitutes the conditions for the meaningful practice of Treaty 8 rights currently and into the future;
- Identify the Valued Components (resources or conditions), tangible and intangible, that are central to the Aboriginal and Treaty Rights (rights) of the First Nations;
- Identify criteria and culturally appropriate indicators that can be used to measure the First Nations' ability to practice these rights;
- Examine the current nature and extent of the Valued Components in the First Nations' Traditional Lands, and a historical baseline of these components;
- Identify the current and likely pressures, including but not limited to industrial development on the Valued Components;
- Predict the likely future nature and extent of the Valued Components in the First Nations' Traditional Lands;
- Identify broad land and resource management strategies, as well as possible mitigation tools, that can support and improve the continued meaningful exercise of Treaty 8 rights (e.g. key protected or conservation areas, hunting restrictions, setbacks, timing windows; among others);

- Integrate the information into appropriate information and management tool formats (e.g. [geographic information system] GIS, planning documents, management objectives for particular use areas or districts; community based monitoring and adaptive management strategies) for use in resource and land use planning, decision-making and consultation processes."

The TLRUMP document includes the following:

- Study Purpose and Objectives
- Study Rationale
- Study Methodology
- Study Work Plan
- Summary of TLRUMP Deliverables
- Timelines and Budget

ACFN is concerned with Alberta and the Crown's mischaracterization of ACFN's Treaty and Aboriginal rights. ACFN asserted the following rights as incidental to the practice of its said rights:²³

- "Healthy populations of uncontaminated of "safe" fish in preferred harvesting locations;
- Healthy populations of uncontaminated or "safe" game in preferred harvesting locations;
- Healthy populations of uncontaminated or "safe" medicines, berries and other plant foods in preferred harvesting areas; and
- Feelings of safety and security."

"The Athabasca Chipewyan First Nation submits its 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 the lands around Fort McMurray and Fort McKay. However, it is important to note that the Traditional Lands is not defined in a manner that fits neatly within European patterns of land use and land holding."²⁴

²² Mikisew Cree First Nation (MCFN) Submission; Tab 6, pages 2-3 ²³ ACFN's Response to the Reply Submissions of the Government of Alberta; page 35, paragraph 114

²⁴ Dr. Pat McCormack: *An Ethnohistory of the Athabasca Chipewyan First Nation* (Ethnohistory of the ACFN); pages 108-139

"[Europeans and Euro-Canadians have poorly understood Aboriginal land use and concepts of lands.] The Athabasca Chipewyan First Nation, with other indigenous peoples, has been asked to identify boundaries where their legitimate interest in the land stop and start. Such boundaries are European constructions, and are not part of traditional Chipewyan land management practices, which are instead grounded in the understanding of the land as autonomous living being."²⁵

At different times, the Athabasca Chipewyan First Nation have used tools such as maps and planning units or zones in an attempt to explain its use and occupation on its Traditional Lands in a manner that might be understood by non-Chipewyan decision-makers. For example, although Footprints on the Land attempted to explain the core areas of the Athabasca Chipewyan First Nation's Traditional Lands in part through the use of a map, which Shell has inappropriately relied upon to draw a regional study area for the assessment of the Jackpine Mine Expansion project, the author's of Footprints on the Land and the accompanying Traditional Land Use:

"In the context of the large, nomadic territory likely occupied by the Chipewyan people and the context of the [continually] evolving culture and adaptation of these Aboriginal People, it is inappropriate to speak of boundaries."²⁶

"Further, in an attempt to communicate its land use values in a manner which the government of Alberta's representative could understand, the Athabasca Chipewyan First Nation presented some of its lands in the form of planning units in its submissions on the LARP. These Cultural Protection Areas/Zones include Homeland Zones — areas of critical importance to past, present and future practice of the Athabasca Chipewyan First Nation's rights within core Traditional Lands. Proximate zones are another type of Cultural Protection Area/Zone, which is relied upon for the practice of rights by the increasing number of the Athabasca Chipewyan First Nation members living in and around Fort McKay and Fort McMurray."²⁷

"The Athabasca Chipewyan First Nation have been clear that the planning areas/zones represented on the LARP maps are just that — planning areas/zones based on traditional use and other factors — subsets of the Traditional Lands, rather than definitive statements regarding the entirety of Athabasca Chipewyan Traditional Lands.

The Traditional Territory of the Athabasca Chipewyan First Nation is geographically defined by social networks. It [ACFN] did not in the past, nor does it now, have clear boundaries that can be surveyed. The use of maps by the Athabasca Chipewyan First Nation is for communication purpose[s] with other governments and represents its [ACFN's] good faith attempts to reconcile an Indigenous concept of territory that is broad in nature with a Euro-Canadian concept of territory that is intended to erect boundaries and confer restricted rights of ownership and use."²⁸

"Due to the inherent difficulties in defining and delineating Traditional Land Use areas, the Athabasca Chipewyan First Nation provided the Government of Alberta with a comprehensive vision, including concrete tools to achieve the vision, for how a regional planning process could consider and protect the Athabasca Chipewyan First Nation's Aboriginal and Treaty rights. The document also provides information on the rights incidental to the Athabasca Chipewyan First Nation's Aboriginal and Treaty rights to hunt, trap, fish and gather and delineates "Cultural Protection Zones" that, if specifically managed, could contribute to the continued ability of Athabasca Chipewyan First Nation members' to exercise their Aboriginal and Treaty rights. Further, in the said document, the Athabasca Chipewyan First Nation:

1. Explains to the Government of Alberta how the LARP conflicts with the protection of the Athabasca Chipewyan First Nation's Treaty rights and traditional use needs;
2. Provides detailed feedback on how the LARP could be protective of its [ACFN's] Treaty and Aboriginal rights; and

²⁵ Ethnohistory of the ACFN; pages 108, 110, 115 ²⁶ Ethnohistory of the ACFN; page 123 ²⁷ Ethnohistory of the ACFN; pages 178-183 ²⁸ Ethnohistory of the ACFN; page 125

3. Advises how the Athabasca Chipewyan First Nation had not been consulted with on critical questions that set the direction of the LARP process at the outset regarding regional priorities, assumptions, land-use conflicts and key land use questions.”²⁹

D. CHIPEWYAN PRAIRIE DENE FIRST NATION (CPDFN)

“The Treaty Rights include the right to harvest specific species in specific locations, as well as incidental rights essential to the meaningful exercise of the Treaty Rights, such as:

- routes to access and transportation;
- sufficient water quality and quantity;
- sufficient quality and quantity of resources in referred harvesting areas;
- cultural and spiritual relationships with the land;
- abundant berry crops in preferred harvesting areas;
- traditional medicines in preferred harvesting areas;
- the experience of remoteness and solitude on the land;
- construction of shelters on the land to facilitate hunting, trapping, gathering and/or fishing;
- use of timber to live on the land while hunting, trapping, gathering and/or fishing (e.g. to build shelters and fires);
- the right to instruct younger generations on the land;
- access to safe lands within which to practice rights;

- the right to feel safe and secure in the conduct of such practices and activities;
- lands and resources accessible within constraints of time and cost;
- socio-cultural institutions for sharing and reciprocity; and
- spiritual sites and associated practices.”³⁰

Kai’ Kos’ Dehseh Dene’ – The Red Willow River (Christina River) People – A Traditional Land Use Study of the Chipewyan First Nation (2007)³¹

“The Chipewyan Prairie Dene First Nation and their ancestors have endured many changes throughout history. Despite this, many people today have retained an intricate knowledge of and relationship with their Traditional Territory and its resources. However, the reduction in the traditional way of life continues to threaten the identity and culture of the Chipewyan Prairie Dene Peoples.”³²

“The first significant industrial changes were in transportation; the river became a commercial transportation highway, improving access to the north and making room for the developments of industries like salt, fishing, forestry and oil and gas. The first industry to develop in the area was a commercial fishery. However, larger development did not occur in Northeastern Alberta until the oil sands activities began in the mid 1960s.”³³

The Kai’ Kos’ Dehseh Dene’ study indicates chapters on such TLU activities as trapping, big game, fishing, birds, berries, plants and medicines, traditional diet, work, leisure and culture.

The Chipewyan performed various traditional activities throughout the year. Figure 7.3 on page 53 of the study shows a visual representation of the typical annual activities followed by a seasonal breakdown of the Traditional Land Use in their TLU territory.

²⁹ ACFN Response to Information Request #6; page 3 ³⁰ Chipewyan Prairie Dene First Nation Application (CPDFN); page 2 ³¹ CPDFN Submission; Binder 1, Tab 10

³² Kai’ Kos’ Dehseh Dene’ – The Red Willow River (Christina River) People – A Traditional Land Use Study of the Chipewyan First Nation (2007); page 2 ³³ Kai’ Kos’ Dehseh Dene’ – The Red Willow River (Christina River) People – A Traditional Land Use Study of the Chipewyan First Nation (2007); page 42

E. MIKISEW CREE FIRST NATION (MCFN)

In Dr. P. Elias' study, prepared for MCFN, entitled Patterns of Mikisew Cree Land and Resource Use (November 9, 2010),³⁴ the Executive Summary notes that six TLU studies involving MCFN have been conducted in the past seven years. They have provided a wealth of detail describing Mikisew Cree land and resource use since the signing of Treaty 8 in 1899.

Dr. Elias' report is divided into the historical Mikisew Cree land use, current and future use of land and resources, and protecting MCFN territory for the future.

MCFN's Application described Traditional Lands as follows:

"MCFN's Traditional Lands extend around Lake Athabasca, over the Peace-Athabasca Delta, and south to and including Fort McMurray and Clearwater River.

MCFN's Traditional Lands have always been a central location for the harvesting activities and other rights-based activities vital to the cultural continuity of our members. The ability to use our Traditional Lands for a range of practices is extremely important to MCFN members, for the land is at the heart of our culture, traditions, identity, well-being, spirituality and rights. The practices conducted on the land have been integral to our physical and cultural survival, and healthy and sustained Traditional Lands are critical for ensuring our ability to pass on our culture to future generations and meaningfully exercise our rights. As such, we are not merely concerned about the LARP's potential to directly and adversely affect our health, income and quiet enjoyment of property. MCFN is concerned about the LARP's potential to undermine our ability to exercise our Aboriginal and Treaty Rights and the sustainability of our community into the future".³⁵

MCFN's Application noted a number of its rights in the signing of Treaty 8:

"And Her Majesty the Queen hereby agrees with the said Indians that they shall be *right to pursue their usual vocations of hunting, trapping and fishing*

throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and expecting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." (Emphasis added)

The MCFN Consultation Protocol articulates the Treaty rights of their members as follows:

"The Mikisew Cree is determined to preserve, develop and transmit to future generations our ancestral territories and our distinct ethnic identity in accordance with our own cultural patterns and social institutions. The Mikisew Cree considers Treaty 8 to be a sacred agreement and views the oral and written promises of the Treaty Commissioners to be sacred promises. MCFN has endured periods where responsibilities of the Crown have failed to live up to their Treaty promises and constitutional obligations. MCFN honours the promises under Treaty 8 and expects the Crown to do the same. The Mikisew Cree wishes to protect and preserve its cultural, spiritual and economic relationship to its Traditional Lands and the resources on those lands. MCFN's connection to the land is holistic and is an integral part of its culture and identity. It is critical that the MCFN are able to meaningfully carry out their rights now and in the future including, but not limited to:

- Quality and quantity of wildlife species required;
- Quality and quantity of aquatic species required;
- Quality and quantity of plants or other things gathered; and
- Quantity and quality, as the context requires, of air, water and ecosystems required to support the exercise of MCFN's rights."³⁶

In collaboration with ACFN, MCFN developed a Proposal to Develop ACFN and MCFN Traditional Land and Resource Use Management Plans (TLRUMP) (September 20, 2010). The objectives of these plans are more fully described in Tab 3 of ACFN's submission.

³⁴ Mikisew Cree First Nation (MCFN) Application; Tab 9 ³⁵ MCFN Application; Tab 3, page 14 ³⁶ MCFN Application; page 4

In its Application, MCFN referred to the Shell Jackpine Review Panel decision:

"...The Panel acknowledges that the intent of the LARP is to take more of a cumulative-effects based approach to managing environmental effects in the Lower Athabasca Region, but notes that the LARP does not specifically address TLU issues."³⁷

F. FORT MCKAY FIRST NATION (FMFN)

FMFN noted in its submission:

"The LARP, as approved, does not meet the Terms of Reference (ToR) approved for its development in 2009. Pages 17-18 of the ToR state: "It will be important that continued opportunities exist for Aboriginal traditional uses to be in close proximity to First Nations and Métis communities." No such opportunities are incorporated in the LARP with respect to Fort McKay, via the Strategic Plan, Implementation Plan, or objectives. This goal is mentioned in connection with the contemplated biodiversity framework."³⁸

"The ToR³⁹ also states that "land use must be managed to include Aboriginal traditional use" and the criteria for establishing conservation areas included "areas that support Aboriginal uses."⁴⁰

The proposed conservation areas do not support Traditional Land Use by Fort McKay, beyond a de minimus level. Only a fraction of Fort McKay's Traditional Land sites are located within the conservation areas."

"The ToR also directed that the LARP consider how lands under federal jurisdiction, such as First Nation lands, will be impacted and the long-term needs of these lands. Fort McKay is unable to identify any provision of the LARP that ensures the sustainability of its lands for the community's long-term cultural, social, or economic needs. Specifically, how terrestrial resources on its Reserves will support Traditional Land Use, how water quality and quantity on its lands will support its domestic and commercial needs or how air quality will protect

members health. Potential impacts to Reserve Lands are not addressed at all by the LARP."⁴¹

"The LARP recognizes both First Nation and Métis communities have constitutionally protected rights, and say they will be consulted and invited to participate in land use planning (LARP; page 5). However, with respect to the biodiversity framework, the LARP says only the rights of First Nations will be "considered" with respect to a biodiversity framework (LARP; page 29)."⁴²

In FMFN's response submission to the Crown's argument, under the heading of "The Content of the LARP:"

"The Crown says that the LARP's content may only be reviewed and therefore the content of the LARP must directly and adversely affect Fort McKay to engage the Panel's jurisdiction. Alberta then says that the LARP balances interests, which is unreviewable. However, Fort McKay's point is that its interests are not incorporated in any tangible way and therefore not "balanced" in the LARP. Specific provisions of the LARP say that Alberta will consult First Nations if their rights may be adversely affected by decisions. The Crown's response to the Application paradoxically says First Nations are not affected by the LARP. The Panel, as well as the Stewardship Minister, must comply with the intent and provisions of the [Alberta Land Stewardship] Act, and respect the rights of Fort McKay as a First Nation and as the community most "directly and adversely affected" by the Plan and the effects of land use that the Plan is intended to ameliorate. The Review is intended to serve the broader public interests of the Act and the Panel's role is to advise the Minister if the Plan does or will likely adversely affect the rights of Fort McKay and to make recommendations to improve the Plan to avoid such effects."⁴³

³⁷ MCFN Application; page 15 ³⁸ Fort McKay First Nation (FMFN) Application; page 9, paragraph 35 ³⁹ LARP Terms of Reference; pages 11 and 14 ⁴⁰ FMFN Application; page 9, paragraph 36 ⁴¹ FMFN Application; page 10, paragraph 38 ⁴² FMFN Application; page 10, paragraph 39 ⁴³ FMFN's Reply to the Government of Alberta's Response; page 14, paragraph 40

III. Observations and Suggestions to the Minister

It is important to note that section one of the ALSA specifically includes reference to the needs of current and future generations of Albertans, including Aboriginal Peoples.

The purposes of the Act are described as follows:

1(1) In carrying out the purposes of this Act as specified in subsection (2), the Government must respect the property and other rights of individuals and must not infringe on those rights except with due process of law and to the extent necessary for the overall greater public interest.

(2) The purposes of this Act are:

- a. to provide a means by which the Government can give direction and provide leadership in identifying the objectives of the Province of Alberta, including economic, environmental and social objectives;
- b. to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, *including Aboriginal Peoples*; (Emphasis added)
- c. to provide for the co-ordination of decisions by decision-makers concerning land, species, human settlement, natural resources and the environment;
- d. to create legislation and policy that enable sustainable development by taking account of and responding to the cumulative effect of human endeavour and other events.

It is clear that Outcome 7 in the LARP is to include Aboriginal Peoples in land-use planning. Such an objective would be meaningless if it is not intended to include consideration of the land-based rights of the First Nations' Treaty and Aboriginal rights. The Review Panel is concerned that failing to include the

impacts of industrial development on First Nations' rights in the LARP would be inconsistent with the purposes described in the ALSA.

Excluding the possible impacts of such rights would also be inconsistent with the statements concerning Aboriginal Peoples in the LARP. The LARP states:

"Alberta recognizes that those First Nations and Métis communities that hold constitutionally protected rights are uniquely positioned to inform land-use planning. Consulting Aboriginal communities on regional planning, particularly those aspects that have the potential to adversely impact their constitutionally protected rights, and reconciling interest are essential to achieving the regional vision. In accordance with applicable government policy as it may be from time to time, the Government of Alberta, will continue to consult with Aboriginal Peoples when government decisions may adversely affect the continued exercise of their constitutionally protected rights, and the impact from such consultations continues to be considered prior to the decision."⁴⁴

The LARP sets out a vision that is inclusive of Aboriginal Peoples and, in fact, goes above and beyond expectations for First Nation consultation. The review panel observes, however, that the actual implementation of this vision falls short, as it doesn't integrate First Nations in finding a solution. To be frank, what Alberta said it would do, and what it actually did, are very different things. The Panel suggests that government integrate Aboriginal Peoples' input into the implementation and suggests that a TLU management framework is the best way to achieve this.

The Review Panel recommends that, for any effective land-use planning to proceed in the Lower Athabasca Region, the Government of Alberta must initiate plans to develop a Traditional Land Use Management Framework. Failing to implement such a framework leaves industry, regulators, stakeholders, governments and First Nations asking important questions about Aboriginal Peoples' constitutionally-protected rights in their Traditional Land Use territories, which conflict with future development activities in the Lower Athabasca Region.

⁴⁴ LARP; page 5

The Review Panel strongly suggests that failing to address this important issue leaves the remainder of the LARP land-use plans and strategies in a state of uncertainty and non-compliance. In order to comply with the purposes described in the ALSA, it is necessary for a TLU Management Framework to be developed as an integral part of the LARP as soon as possible.

The LARP⁴⁵ outlines the necessary strategies to implement Outcome 7 — the “inclusion of Aboriginal Peoples in land-use planning” — in the document. It seems clear to the Review Panel that there is a consistent theme throughout the six First Nations’ Applications to these proceedings. That theme is that their constitutionally-protected rights, under either their respective treaties or under section 35 of the *Constitution Act, 1982*, have not been taken into account in the derivation of any thresholds or frameworks under the LARP. Several of the Applicant First Nations contend that many industrial developers are relying on the LARP to support unimpeded development, without the consideration of impacts to First Nations’ rights, as described above. These Applicants have argued, in their written submissions to this Review Panel, that the LARP does not contain any outcomes, thresholds, frameworks or management plans for managing adverse impacts to First Nation lands with respect to their respective Treaty and Aboriginal rights for Traditional Land Use on these Territorial Lands.

In addition to these concerns, the Review Panel sees consistent, ongoing development now, and in the future, encroaching on First Nations’ Territorial Lands and Reserves by municipal growth, resource development activities, population increases etc. Such development affects the rights of First Nation members in effectively using their Traditional Lands on a daily basis.

MCFN’s submission to the LARP Review Panel, noted a decision in the report by the Shell Jackpine Joint Review Panel (JRP):⁴⁶

“The [JRP] acknowledges that the intent of the LARP is to take more of a cumulative-effects based approach to managing environmental effects in the

Lower Athabasca Region, but notes that the LARP does not specially address TLU issues.”⁴⁷

In addition to the existing management frameworks in the LARP, which are either in existence or being developed, the Review Panel suggests to the Minister, based on the evidence provided to the Review Panel by all six First Nation Applicants, that a TLU Management Framework also be incorporated as an important component of the LARP. Such a framework will assist in land-use planning for the government, industry regulators and Aboriginal groups residing, working and operating in the Lower Athabasca Region.

The Review Panel strongly suggests for the implementation of this management framework that:

- The TLU Management Framework be completed by 2017;
- The Government of Alberta develop the framework in conjunction with the Government of Canada, other stakeholders and all Aboriginal Peoples affected by development activities in the Lower Athabasca Region;
- The TLU Management Framework be incorporated and integrated into the LARP with the other proposed management frameworks;
- In developing a TLU Management Framework, governments will collaborate and accommodate with First Nations communities in the decision-making process to draft an effective document to be included in the LARP and to assist in reaching the goals and purposes as described in the various planning systems in this document;
- The Government of Alberta should consider examining the TLRUMP proposal submitted by ACFN and MCFN to these proceedings, in the development of a TLU Management Framework.
- The management framework should honour the deep and holistic connection that Aboriginal Peoples have with the land and the critical role that this connection plays in the physical and spiritual health of Aboriginal Peoples, for the past, present and future.

⁴⁵ LARP; pages 63-64 ⁴⁶ 2013 ABAER 011 ⁴⁷ MCFN Application; page 15

- The Traditional Knowledge (TK) Framework being developed by the Cumulative Environmental Management Association (CEMA) should also be considered in the development of the TLU Management Framework. This document is due to be forwarded to the Government of Alberta by September 2015.

“The [TK] Framework is anticipated to provide guidance and standards for meaningful inclusion of Aboriginal traditional knowledge and Aboriginal knowledge-holders in regional planning, regulatory processes and environmental assessment, monitoring and follow-up. A successful TK framework may be a major step toward protecting Aboriginal communities’ rights and values, and improving environmental outcomes, regulatory certainty and public trust regarding critical environmental decisions and processes that affect the region.”⁴⁸

- The Review Panel recognizes, in the evidence submitted by the Crown — based on their respective treaties executed by the First Nations — that each has their own unique Territorial Lands, outside Reserve boundaries. In short, the Reserves are small areas within the larger Traditional Territories. Although the Government of Alberta maintains in the LARP that First Nations can carry out their TLU activities in the new designated conservation and recreation areas, it is unclear to the Review Panel in the Crown’s evidence whether they recognize and acknowledge such Territorial Lands outside of these specified areas. The problem that seems to remain is clarifying the boundaries as described in the maps submitted by each First Nation Applicant concerning their Territorial Lands with the TLU boundaries agreed to by the Government of Alberta for each First Nation Applicant.
- The Review Panel, therefore, suggests to the Minister that it is imperative that such inconsistencies be resolved in the TLU Management Framework in order to confirm a common territorial boundary for each First Nation Applicant living within the Lower Athabasca Region.

⁴⁸ Government of Alberta Response to Information Request #11; page 3

Cumulative Effects Management

Introduction

The term “effects” is defined in the *Alberta Land Stewardship Act* (ALSA) as follows:

Section 2(1)(h):

- i. “any effect on the economy, the environment, a community, human health or safety, species or an objective in a regional plan, regardless of the scale, nature, intensity, duration, frequency, probability or potential of the effect; and
- ii. a cumulative effect that arises over time or in combination with other effects.”

The categories of potential areas of harm are somewhat similar between the Act and Regulation. However, the difference lies in the extent of the harm caused. The Act notes in the definition of “effect” that, “regardless of the scale, nature, intensity etc.” in any of the various categories, harm could be shown. The Act appears to follow the common law approach to “directly and adversely affected,” whereby the Applicant must prove on a “balance of probabilities” or a “reasonable probability” that the Lower Athabasca Regional Plan (LARP) or project will harm them, if they fall within one or some of the categories, such as health or the environment.

On the other hand, section 5(1)(c) of the Regulation refers to a person “directly and adversely affected” by the LARP. This section states that “there is a reasonable probability that a person’s health, property, income or quiet enjoyment of property, or some combination of them, is being or *will be more than minimally harmed by the regional plan.*” (Emphasis added)

On the basis of the Regulation, it appears the Applicant must adhere to a stricter application test than that of the Act. How is the term “more than minimally harmed” to be interpreted by the Review Panel when compared with the definition of the effect in section 2(1)(h) of the Act?

Can an argument be made that the definition of “effect” in the Act supersedes the term “directly and

adversely affected” in the Regulation, in determining whether an Applicant falls within the category of cumulative effects as described in the LARP?

The Oxford Dictionary defines:

- “Effect: Result, consequence, having that result or implication.”
- “Affect: Feeling, emotion, desire, as leading to action.”

Although the terms “affect” and “effect” are homonyms and are considered to have different meanings, they are both used in the context of “change.”

“Affect,” as a verb, is often used to produce a change; whereas “effect,” as a noun, is used as a change that has occurred.

As noted earlier, if an Applicant relies on “effect” as defined in the Act — which could be interpreted as being very broad and expansive in its meaning and forms part of “cumulative effects” as one of the primary purposes of the LARP — could it not be argued that such a definition trumps the stricter definition of “affect,” as described in section 5(1)(c) of the Regulation?

If an Applicant relies on its evidence to demonstrate there has been a “cumulative effect” in one or more of the four categories described in the Regulation or Rule 38 of the Rules, could it not override the onus of the Applicant noted in Regulation 5(1)(c) that they must be “more than minimally harmed” by the regional plan?

It is interesting to note that the Act was published in 2009, the Regulation in 2011 and, finally, the Rules in March 2014.

Cumulative Effects Management (CEM) as defined by Chipewyan Prairie Dene First Nation

Cumulative Effects Management is an approach that establishes outcomes for an area by balancing environmental, economic and social conditions and implementing appropriate plans and tools to ensure those outcomes are met.

"Cumulative effects management is:

- Outcomes-based: clearly defined, desired end-state
- Place based: meeting the differing needs of regions within the province
- Performance management-based: using adaptive approaches to ensure results are measured and achieved
- Collaborative: building on a culture of shared stewardship, using a shared knowledge base
- Comprehensively implemented: using both regulatory and non-regulatory approaches."¹

I. Government Documents Pertaining to Cumulative Effects Management

A. CUMULATIVE EFFECTS IS DESCRIBED ON ALBERTA ENVIRONMENT AND SUSTAINABLE RESOURCE DEVELOPMENT'S WEBSITE AS FOLLOWS:

"It is the combined effects of past, present and foreseeable human activities, over time, on the environment, economy and society in a particular place.

...

Alberta needs a more effective and efficient management system that considers the cumulative effects of all activities. The current system is evolving and adapting to place-based challenges, which allows decision-makers to see the big picture and help those on the landscape to be more strategic and responsible in their development activities."

B. THE LAND-USE FRAMEWORK DESCRIBES THE USE OF CUMULATIVE EFFECTS MANAGEMENT AT A REGIONAL LEVEL:

Cumulative effects denotes the combined impact of past, present and reasonable foreseeable human

activities on a region's environmental objectives. The environmental objectives are established based on our understanding of environmental risks and socio-economic values. Once the objectives are set, cumulative effects systems manage those environmental outcomes.

Cumulative effects management recognizes that our watersheds, airsheds and landscapes have a finite carrying capacity. Our future well-being will depend on how well we manage our activities, so that they do not exceed the carrying capacity of our environment.

Alberta's current regulatory system is based on a project-by-project approval and mitigation of the adverse effects of each project. Until now, the approach has been to control the impact of each project. While this may be acceptable for low levels of development, it does not adequately address the cumulative effects of all activities under the current pace of development.

Cumulative effects cannot be managed as an "add-on" to existing management approaches; nor is it about shutting down development. It is about anticipating future pressures and establishing limits; not limits on new economic development, but limits on the effects of this development on the air, land, water and biodiversity of the affected region. Within these limits, industry would be encouraged to innovate in order to maximize economic opportunity.

The Government of Alberta will develop a process to identify appropriate thresholds, measurable management objectives, indicators, and targets for the environment (air, land, water and biodiversity), at the regional levels and, where appropriate, at local levels. Land-use planning and decision-making will be based on *balancing these environmental factors with economic and social considerations*.² (Emphasis added)

C. THE GOVERNMENT OF ALBERTA'S TERMS OF REFERENCE FOR DEVELOPING THE LOWER ATHABASCA REGIONAL PLAN MAKES REFERENCE TO CEM:

"Cumulative effects management will be used at the regional level to manage the impacts of development on land, water and air..."³

¹ Chipewyan Prairie Dene First Nation Response to Crown's Submission; binder 2; <http://esrd.alberta.ca/focus/cumulative-effects/default.aspx>

² Land-use Framework (2008); page 31 ³ Terms of Reference for Developing the Lower Athabasca Regional Plan (2009); page 1

D. THE 2012 LARP REFERS TO THE TERM “CEM” IN SEVERAL PLACES:

Under the heading of “Purpose” it stated that the LARP:

“Uses a cumulative effects management approach to balance economic development opportunities and social and environmental considerations.”⁴

It is also noted in the LARP that:

“Cumulative effects management focuses on achievement of outcomes, understating the effects of multiple development pressures (existing and new), assessment of risk, collaborative work with shared responsibility for action and improved integration of economic, environmental and social considerations.”⁵

On the same page, the document listed the “Elements of a Cumulative Effects Management System” as:

- Outcomes-based;
- Place-based;
- Knowledge-based;
- Adaptive; and
- Shared stewardship.

The LARP stated:

“The cumulative effects of population growth and economic development in the region are increasing pressures on the region’s air, water, land and biodiversity. The Alberta government is committed to responsible development. Alberta’s current environmental management system is intended to reduce and minimize the impacts of development on the environment.”⁶

The document further described CEM:

“The vision describes a desired future state for the Lower Athabasca in which the region’s diverse economic opportunities are *balanced with social*

and environmental considerations using a cumulative effects management approach. Cumulative effects management focuses on achievement of outcomes, understanding the effects of multiple development pressures (new and existing), assessment of risk, collaborative work with shared responsibility for action and improved integration of economic, environmental and social considerations. (Emphasis added)

The Government of Alberta recognizes that to meet the challenges we face, environmental management needs to shift a cumulative effects management approach in order to maintain an acceptable level of air, water, land and biodiversity integrity, while enabling long-term economic benefits for the region and the province.”⁷

And later, concluded with:

“The Alberta government is committed to managing cumulative effects at the regional level. The use of management frameworks is a new approach to accomplish this. Management frameworks establish outcomes and objectives along with the strategies and actions to achieve them.”⁸

E. IN THE GOVERNMENT OF ALBERTA’S RESPONSE TO ABORIGINAL CONSULTATION ON THE LOWER ATHABASCA REGIONAL PLAN (JUNE 2013), REFERENCE IS MADE TO “CUMULATIVE EFFECTS MANAGEMENT”:

Under the heading “Development of Cumulative Effects Management – What We Heard,” the following statements were made:

- “It was felt that the “cumulative effects management approach” and frameworks must guide decision-makers so that land-use decisions are made in a way that respects and accommodates Aboriginal knowledge and constitutionally protected rights.
- Some stated a need to complete a regional cumulative environmental, cultural and socio-economic assessment to ensure that frameworks meet the objectives of protecting air, water, and biodiversity, and traditional resources and land use.

⁴ Lower Athabasca Regional Plan (LARP); page 2 ⁵ LARP; page 3 ⁶ LARP; page 18 ⁷ LARP; page 23 ⁸ LARP; page 27

- Regular community-based monitoring of cumulative effects is believed to be needed on the health of Aboriginal community members and environment.
- Input reflected that the Government of Alberta, together with Aboriginal Peoples, must develop criteria, methods and thresholds for assessing the direct and cumulative impacts of existing, planned or reasonably foreseeable development on the meaningful exercise of section 35 Constitutional Rights.
- Some said a holistic understanding of the effects of development is needed. They felt that the LARP should describe how the enhanced understanding of cumulative effects will be used in the planning process, and should make provisions for further research into the health effects of development in the LARP area.
- Many First Nations and Métis organizations indicated they are willing to work with the Government of Alberta to establish regional and local cumulative effects management thresholds. The thresholds should be developed through both scientific measures and traditional knowledge and experience from local Aboriginal communities, and should cross regional boundaries when appropriate.
- The receipt of funding/capacity for traditional knowledge was believed to be critical to meaningful participation in the development of CEM thresholds.”⁹

In the same document, the Government of Alberta responded to the issue of CEM, as follows:

“Through regional planning, as well as other initiatives, Alberta is shifting to a more effective and efficient management system that considers the cumulative effects of all activities and improves integration across the economic, environmental and social pillars.

...

Cumulative effects management focuses on achievement of outcomes, understanding the effects

of multiple development pressures (existing and new), assessment of risk, collaborative work with shared responsibility for action and improved integration of economic, environmental and social considerations.

Outcomes and objectives are established, along with the strategies and actions that will be used to achieve them. Integrated monitoring, evaluation and reporting systems are essential as they are used to assess achievement of outcomes and objectives. *The elements of a cumulative effects management system are outcomes-based, place-based, knowledge-based, adaptive and shared stewardship.* (Emphasis added)

It is recognized that managing cumulative effects on air, water, land and biodiversity is important to the needs of Aboriginal communities in the region that hold constitutionally protected rights. Accordingly, the engagement with these communities is desired as air, water, land and biodiversity strategies and plans are developed, for example:

- Enhancing the regional network of conservation areas to support biodiversity and ecosystem function by increasing conservation areas in the region; and
- Developing a sub-regional plan using a strategic environmental assessment approach, for the south Athabasca oil sands area. Undertaking this assessment at a sub-regional scale will contribute to the management of cumulative effects and support efficiencies in the regulatory review process for in-situ oil sands operation.”¹⁰

F. IN THE GOVERNMENT OF ALBERTA'S LAND-USE FRAMEWORK REGIONAL PLANS PROGRESS REPORT, A REVIEW OF OUR PROGRESS IN 2013 (JULY 2014), REFERENCE IS MADE TO THE SUB-REGIONAL PLAN FOR THE SOUTH ATHABASCA OIL SANDS AREA:

Under the heading “Progress and Outlook”:

- “The regional strategic assessment uses modelling and other approaches to proactively assess the effects of in-situ oil sand activities in

⁹ Response to Aboriginal Consultation on the Lower Athabasca Regional Plan; page 16 ¹⁰ Response to Aboriginal Consultation on the Lower Athabasca Regional Plan; page 17

the south Athabasca oil sands area. Stakeholder information sessions to discuss this initiative are planned for February and March 2014. The assessment is anticipated to be completed in 2014, and will inform decision-making through a sub-regional plan. The sub-regional process is under development with completion targeted for 2014. Formal approval and implementation may extend into 2015.”¹¹

G. THE CUMULATIVE ENVIRONMENT MANAGEMENT ASSOCIATION (CEMA) WAS CREATED AND DESIGNED TO ADDRESS THE CUMULATIVE EFFECTS OF LARGE OIL SANDS DEVELOPMENT IN THE ATHABASCA REGION.

Although several First Nations were involved in the establishment of this association, Athabasca Chipewyan First Nation (ACFN) and Mikisew Cree First Nation (MCFN) withdrew from the association. CEMA is supposed to create a Traditional Knowledge Framework by September 2015.

II. Responses from the First Nations Regarding Cumulative Effects Management

A. ONION LAKE CREE NATION (OLCN)

“The LARP does not provide any mechanism to address or prevent cumulative effects on the exercise of TLU in the Lower Athabasca Region. This was recognized by the Joint Review Panel in its decision in the Shell Canada Energy Jackpine Mine Expansion Project.¹² In order to ensure the continuation of TLU, the LARP must incorporate some type of TLU management framework to inform land use planning and allow for a better assessment of cumulative effects on TLU. The absence of any type of framework or thresholds that are specific to Traditional Land Use make it impossible to evaluate the impact of land use decision on TLU. The failure of the LARP to address cumulative impacts on TLU by First Nations will result in a direct and adverse effect on the practice of Treaty rights by OLCN members.”¹³

B. COLD LAKE FIRST NATIONS (CLFN)

“The LARP does not provide any mechanism to address or prevent cumulative effects on the exercise of TLU in the Lower Athabasca Region. This was recognized by the Joint Review Panel in its decision in the Shell Canada Energy Jackpine Mine Expansion Project. In order to ensure the continuation of TLU, the LARP must incorporate some type of TLU management framework to inform land use planning and allow for a better assessment of cumulative effects on TLU. The absence of any type of framework or thresholds that are specific to Traditional Land Use make it impossible to evaluate to impact of land use decision on TLU. The failure of the LARP of address cumulative effects on TLU by Aboriginal communities will result in a direct and adverse effect on the practice of Treaty and Aboriginal rights by CLFN members.”¹⁴

“When all the encroachments with *Denne Ni Nennè*, Cold Lake First Nations’ Traditional Lands, agriculture, hydro carbon developments and parks, are taken into account, little remains for the Nation’s members to exercise their constitutionally protected rights.”¹⁵

Under the heading “Cumulative Impacts”:

“Due to the impacts of incremental cumulative encroachments through time throughout *Denne Ni Nennè*, but especially with respect to those areas of particular cultural significance for Cold Lake First Nations occupancy and use, i.e. ancestral settlement areas and gathering on the land places, Cold Lake First Nations members are reporting that Berry Point is the last remaining ancestral settlement gathering on the land which is sufficiently intact to support the continuity of meaningful *Denesutine* occupancy and use.”¹⁶

Under the heading of “Conclusions,” The Cumulative Effects of Historic, Current and Future Land-Uses on the Peoples and Landscape of Cold Lake First Nations, prepared by A Landscape Cumulative Effects Simulator (ALCES) in October 2012 noted:

“Hemmed in by croplands to the south and an air weapons range to the north, the CLFN community of today has very few remaining areas on which to

¹¹ Land-Use Framework Regional Plans Progress Report, a Review of our Progress in 2013 (July 2014); pages 5-6 ¹² 2013 ABAER 011 ¹³ Onion Lake Cree Nation (OLCN) Application; page 5 ¹⁴ Cold Lake First Nations (CLFN) Application; page 8 ¹⁵ CLFN Application; Tab 3 - Cold Lake First Nations’ Berry Point Report (Feb. 2012); page 50, paragraph 4.3.5 - Cumulative Encroachments ¹⁶ Berry Point Report; page 133, paragraph 6.2.4

participate in traditional activities. Not surprisingly, these natural landscape remnants experience high levels of traditional resource use and may be readily over-exploited. No longer able to access their Traditional Lands extensively, CLFN have few remaining venues to satisfy the existing appetite for traditional activity.

However, time is not standing still and neither is land use. As much as the CLFN Traditional Territory has changed during the past 100 years, current plans for future land-use reveal expansion of croplands onto those remaining forests with arable soils to the south, expanding towns and rural residential, and a rapidly growing network of seismic lines, wellpads, access roads, pipelines and processing plants as the hydrocarbon sector delineates, extracts, processes and translocates bitumen and heavy oil to southern markets. In a cumulative sense, the boreal landscape of CLFN Traditional Territory will continue its transformation.”¹⁷

C. ATHABASCAN CHIPEWYAN FIRST NATION (ACFN)

“Although the Crown secured the right to “take up” lands from time to time under the Treaty, this right is itself subject to the Crown’s duty to consult and accommodate ACFN’s interests before reducing the area over which ACFN members may continue to pursue their hunting, trapping and fishing rights. This duty to consult and accommodate extends to ACFN’s concerns about the cumulative impacts of development on its Traditional Lands and the meaningful exercise of its Treaty Rights”.¹⁸

Regional Municipality of Wood Buffalo Cumulative Effects Study, by ALCES Group (September, 2010):

- Key Findings:

“Industrial activity (primarily the energy, forestry and transportation sectors), and residential development, are the main human activities that will have future effects on land, water and fish and wildlife populations.

...

Under all scenarios, woodland caribou are likely to be lost from the region within the coming decades unless sufficiently large area[s] of undisturbed forest are set aside and wolf populations are aggressively reduced.”¹⁹

- Summary and Conclusions:

“The adverse social and ecological effects resulting from the rapid pace of development have directly affected local Aboriginal communities. Development of the bitumen resource has adversely affected valued indicators, and these effects will continue, and possibly increase, in the future. Increasing land-use activity and human population growth will continue to present significant management challenges if maintenance of today’s conditions is desired.

Industrial activity (primarily the energy, forestry and transportation sectors), and residential development, are the main human activities that will have future effects on land, water, and fish and wildlife populations. Increasing industrial activity and population growth will further reduce the amount of forest lands and natural areas in the region. The numbers of linear features will increase, resulting in a more fragmented landscape than today. If future industrial activity unfolds as assumed, remaining undisturbed areas will be restricted to protected areas or in locations not underlain by recoverable bitumen reserves, such as around Lake Athabasca.”²⁰

As Long As the Rivers Flow: Athabasca River Use, Knowledge and Change - ACFN Community Report (August 16, 2010):

This report is based on ACFN-specific information resulting from an Athabasca River Use and Traditional Ecological Knowledge (TEK) study conducted in 2010. The key issues raised by the ACFN participants include issues of lower water levels and reduced water quality.²¹

One of the major issues raised by ACFN participants was the difficulty of accessing Traditional Lands at low

¹⁷ Berry Point Report; page 150, paragraph 10 ¹⁸ Athabasca Chipewyan First Nation (ACFN) Application; page 3 ¹⁹ Regional Municipality of Wood Buffalo Cumulative Effects Study, by ALCES Group (Sept. 2010); page ii ²⁰ Regional Municipality of Wood Buffalo Cumulative Effects Study, by ALCES Group (Sept. 2010); page 48, paragraph 7

²¹ As Long As the Rivers Flow: Athabasca River Use, Knowledge and Change - ACFN Community Report (Aug. 16, 2010); page 11

river water levels because of challenges in navigating the main stream of the Athabasca River between Fort Chipewyan and Fort McMurray, or because of an inability to access smaller creeks and rivers running into the Athabasca due to shallow water.²²

Recommendation three of the report noted:

“Encourage the Crown to sit with ACFN and MCFN to establish an Athabasca River Consultation and Accommodation Framework to govern future water management.”²³

Recommendation five of the same report stated:

“In collaboration with ACFN and MCFN, additional work and action is required to further understand and address water quality issues and concerns including psychosocial factors, and resulting adverse effects on Treaty and Aboriginal rights, along the Athabasca River delta and adjoining tributaries. In particular, the Crown should work with ACFN and MCFN to enable the Phase 2 Framework process to meaningfully consider, address and monitor the relationship between Athabasca River water levels, and water quality, including potential contaminant concentrations at various flow levels and seasons.”

D. CHIPEWYAN PRAIRIE DENE FIRST NATION (CPDFN)

“CPDFN’s Traditional Lands, including but not limited to the Christina River Watershed have undergone rapid and momentous change over the past 40 years. This change has significantly reduced CPDFN members’ ability to exercise their Treaty Rights on their Traditional Lands proximate to the places where the vast majority of CPDFN members reside and in turn has resulted in significant pressure on their culture and identity. While several factors have contributed to this change, the single most significant contributing factors has been industrial development projects such as bitumen extraction, pipelines, power lines and substations, gravel pits, camps, disposal wells, landfills, oil sands and gas exploration, forest harvesting and the associated access footprints.”²⁴

CPDFN’s response to the Crown’s submission, under the heading “Introduction,” noted:

“The LARP, as it exists today, creates dangers as it purports to be a plan and system for managing the impacts of cumulative development but does not deliver on its intentions. The management system provided contains worthy concepts and goals; but it is skeletal and conceptual and includes no mechanism to address and protect CPDFN’s Constitutional Rights. It lacks the detail necessary for an effective cumulative effects management system. This failure is of greatest concern to CPDFN, as the Plan in its current state enables cumulative effects, in the form of continued rapid industrial development in the region, but contains no effective provisions for managing the negative impacts of this development or for stewarding to other values such as the protection of ecological and cultural integrity. The danger is confirmed by giving legal effect to the Plan as direction to decision-makers before it is complete, and key elements needed to protect Constitutional Rights, missing. Another danger is that the LARP is being coupled with a streamlined, faster regulatory system to “fast track” approvals, which relies on an underdeveloped system to manage cumulative effects to rationalize intensive development.”²⁵

Under the heading “The Gap in Addressing Cumulative Effects in the Existing Regulatory Regime” of the above submission:

“Alberta may believe that the LARP cannot directly and adversely affect CPDFN because it simply adds a “layer to the existing regulatory structure.” However, this is incorrect for two reasons: a) the LARP was created because of Alberta’s recognition that the current regulatory process is ineffective in addressing existing and rising cumulative effects; and b) the LARP is being used by decision-makers to justify authorizing further impacts on CPDFN while also acknowledging the LARP tools needed to protect Constitutional Rights are not in place. This indicates a flaw in the content of the LARP and how it is being used.”

The ineffectiveness of the existing regulatory system to manage regional impacts is admitted by Alberta in

²² *As Long As the Rivers Flow: Athabasca River Use, Knowledge and Change* - ACFN Community Report (Aug. 16, 2010); page 18, paragraph 4.2 ²³ *As Long As the Rivers Flow: Athabasca River Use, Knowledge and Change* - ACFN Community Report (Aug. 16, 2010); page 24, paragraph 6 ²⁴ Chipewyan Prairie Dene First Nation (CPDFN) Application; page 3 ²⁵ CPDFN Response to the Crown’s Submission; page 3, paragraph 3

the Land-use Framework created by Alberta in 2008 to guide the development of regional plans:

"Our current land management system, which served us well historically, risks being overwhelmed by the scope and pace of activity. What worked for us when our population was only one or two million will not get the job done with four, and soon five million. We have reached a tipping point, where sticking with the old rules will not produce the quality of life we have come to expect."

...

"Alberta's current regulatory system is based on a project-by-project approval and mitigation of the adverse effects of each project. Until now, the approach has been to control the impact of each project. While this may be acceptable for low levels of development, it does not adequately address the cumulative effects of all activities under the current pace of development."²⁶

CPDFN noted²⁷ that the Joint Review Panel, in its decision respecting the Shell Jackpine Mine Expansion Project, also recognized the ineffectiveness of the existing regulatory process in addressing cumulative effects that harm CPDFN's constitutional rights and the inability of an incomplete LARP to address the gap in the regulatory system, as per the Shell Jackpine Mine Expansion Project decision of the Alberta Energy Regulator in 2013:²⁸

From the Jackpine decision, CPDFN referred to the following recommendations in this document:

"The Panel finds that the Project would likely have significant adverse environmental effects on wetlands, traditional plant potential areas, wetland-reliant species at risk, migratory birds that are wetland-reliant or species at risk, and biodiversity. *There is also a lack of proposed mitigation measures that have been proven to be effective.* The Panel also concludes that the Project, in combination with other existing, approved, and planned projects, would likely have significant adverse cumulative environmental effects on wetlands; traditional plant potential areas;

old-growth forests; wetland-reliant species at risk and migratory birds; old-growth forest reliant species at risk and migratory birds; caribou; biodiversity; and *Aboriginal Traditional Land Use (TLU), rights, and culture.* Further, there is a lack of proposed mitigation measures that have proven to be effective with respect to identified significant adverse cumulative environmental effects.

It is apparent to the Panel that the mitigations being proposed by individual project proponents are not effective at avoiding significant adverse cumulative effects on TLU in the Project region. The Panel acknowledges that the intent of the LARP is to take more of a cumulative-effects-based approach to managing environmental effects in the Lower Athabasca Region, but notes that the LARP does not specifically address TLU issues. Instead, the LARP provides for continued consultation and engagement with Aboriginal Peoples to help inform land and natural resource planning in the region. Several of the Aboriginal groups expressed concern that the LARP does not address their concerns and does nothing to ensure ongoing traditional use of the land or to protect their Aboriginal or Treaty rights. The absence of a management framework and associated thresholds for TLU makes it very difficult for Aboriginal groups, industry, and panels such as this one to evaluate the impact of individual projects on TLU. The Panel believes that to inform land use planning and allow better assessment of both project and cumulative effects on Aboriginal TLU, rights, and culture, a TLU management framework should be developed for the Lower Athabasca Region.

...

The Panel acknowledges the potential role of the LARP and the pending biodiversity management framework in providing a more regional approach to managing cumulative effects in the oil sands region. The Panel recognizes that cumulative effects in the oil sands region cannot be managed on an individual project basis and that they require collaboration and strategic planning across government, industry, Aboriginal Peoples, and nongovernmental organizations.

²⁶ CPDFN Response to the Crown's Submission; paragraphs 44-45 ²⁷ CPDFN Response to the Crown's Submission; paragraph 46 ²⁸ 2013 ABAER 011

...

While the LARP is an essential first step, its value will be fully realized only when all of its frameworks and thresholds are in place. The Panel encourages the Government of Alberta to continue the processes associated with implementation of the LARP on an urgent basis.

...

The Panel acknowledges that the LARP and other Alberta regulations and policies do not currently mandate the use of conservation offsets in the oil sands region. While the use of conservation offsets is contemplated under division 4 of part 3 of the *ALSA*, the biodiversity management framework under the LARP and the new wetlands policy have not been finalized and the implementation date for these initiatives is uncertain.”²⁹

E. MIKISEW CREE FIRST NATION (MCFN)

In its submission, MCFN remarked on the implications of CEM and the LARP regarding the impacts on MCFN members:

“Moreover, the LARP indicates that frameworks will use disturbance levels, triggers and thresholds based on future anticipated oil sands development rather than on pre-disturbance levels, or current disturbance levels. By focusing on future development, the air and water quality frameworks will fail to capture and address cumulative effects of pre-existing development. Again, this directly affects MCFN’s right to have the Crown take positive steps to ensure the continued ability of our members to exercise their rights and culture, taking into account the conditions and preferred location/manner of exercising those rights.

In addition, the scope and utility of the proposed frameworks are seriously limited by:

- excluding important elements such as odours, flaring, CO₂, and particulates from air quality thresholds;

- not setting baseline levels and excluding PAHs (polycyclic aromatic hydrocarbons) from surface water quality thresholds;
- basing the ground management framework on self-reported industry data and by excluding wetland health from that framework; and by
- basing land disturbance plan on future anticipated oil sands development.

To this end, we [MCFN] note that the final the LARP increased the amount of contamination allowed under the LARP frameworks. This increase in potentially harmful emissions and contaminants was done without any regard for the health impacts of downstream communities, such as Fort Chipewyan. We note that the recent report of the Joint Review Panel for the Shell Jackpine Mine noted that Alberta has not conducted necessary health studies.

These limitations and flaws minimize the efficacy of the frameworks as a tool to ensure that the Lower Athabasca Region is a healthy ecosystem that sustains its biodiversity over the next 10 to 50 years. Because the exercise of Aboriginal and Treaty Rights depends, among other things, on biodiversity and healthy ecosystems, this flawed conservation approach is likely to result in adverse effects and potential infringements to MCFN’s section 35 Rights. In turn, this will have a “direct and adverse affect” on our livelihood and our quiet enjoyment of our Traditional Lands and resources for the purposes of exercising our section 35 Rights.”³⁰

The MCFN elaborated further:

“As a result of the emphasis on economic interests in the LARP, MCFN will lose the lands, waters and resources that are required for the continued exercise of MCFN’s way of life. The LARP directs decision-makers to meet the objective of maximizing the development of the oil sands, but also to maintain and diversify other industries, including forestry, agriculture, tourism, and, importantly, energy, mineral and coal exploration and extraction and the extraction of surface materials. This is particularly concerning because the LARP plans for a massive expansion

²⁹ Shell Jackpine Mine Expansion Project, 2013 ABAER 011; paragraphs 9, 36, 1025, 1806 and 1825 [Tab B] ³⁰ Mikisew Cree First Nation (MCFN) Application; page 17

of infrastructure in the region, as well as, at least a doubling of oil production in the area. Maximizing these priorities will require decisions to put land uses that are inconsistent with our section 35 Rights and will directly and adversely affect our ability to access our Traditional Lands for rights-based activities and the earn our livelihood and obtain sustenance through those rights-based activities.”³¹

F. FORT MCKAY FIRST NATION (FMFN)

In its submission, FMFN noted:

“Fort McKay’s cumulative effects studies completed in 2013 found 57% of the Territorial Territory is distributed or within 500 m of disturbed land — mostly oil sands development.”³²

“The recent decision of the Joint Review Panel with respect to the Shell Jackpine Mine Expansion, found, in relation to the 2,300 million hectare regional study area [assessed] by Shell, that despite the LARP’s new conservation areas, the cumulative impacts on wildlife have exceeded or are reaching thresholds resulting in significant adverse effects on biodiversity, some of which are likely permanent.”³³

“The fact that current and planned development is exceeding thresholds, for biodiversity and wildlife population is serious. It is a threat to Alberta’s future that was identified in the Land-use Framework, and one that was intended to be avoided by the development of cumulative effects management through regional plans.”³⁴

FMFN continued:

“The LARP is essentially an expression of intention to manage cumulative effects, but its skeletal content is resulting in the unchecked escalation of cumulative effects, particularly to terrestrial resources, Traditional Land Use, Treaty and Aboriginal Rights, and impacts to Fort McKay’s Reserves.”

“Perversely, the fact that the LARP was intended to manage cumulative effects, but does not, is resulting in an increase, and likely irreversible,

environmental degradation and loss of meaningful opportunities for the exercise of Traditional Land Use and rights, and protection of “healthy communities” and a “healthy environment.”

“At least 6 new projects have been approved in Fort McKay’s Traditional Territory since the effective date of the LARP.”³⁵

“The LARP states that the Region will be developed using a cumulative effects management approach to balancing environmental and social objectives with development and “cumulative effects management focuses on outcomes” (LARP; page 23). But no outcomes and objectives have been established in several areas leading to compromised environmental and community health and impairment of Fort McKay’s rights.”³⁶

FMFN noted in the LARP:

“Cumulative effects management recognizes that our watersheds, airsheds, and landscapes have a finite carrying capacity. Our future well-being will depend on how well we manage our activities so that they do not exceed the carrying capacity of our environment.”³⁷

Adamache, L. and Spink D study: Cumulative Effects: Concerns to Fort McKay regarding the Impacts of Emissions to Air from Industrial Development (September 2012, Tab 7)

FMFN’s reply to the Crown’s argument stated that:

“Alberta may believe that the LARP cannot directly and adversely affect Fort McKay because it simply adds a “layer to the existing regulatory structure”. However, this is incorrect for two reasons: a) the LARP was created because of Alberta’s recognition that the current regulatory process is ineffective in addressing existing and rising cumulative effects; and b) the LARP is being used by decision-makers to justify authorizing further impacts on Fort McKay while also acknowledging the LARP tools needed to protect Constitutional Rights are not in place. This indicates a flaw in the content of the LARP and how it is being used.”³⁸

³¹ MCFN Application; page 21 ³² ALCES Group Cumulative Effects Technical Report (2013); Tab 10 ³³ 2013 ABAER 011; paragraph 31 ³⁴ Fort McKay First Nation (FMFN) Application; pages 16-17, paragraphs 72-76 ³⁵ FMFN Application; pages 17-18, paragraphs 80-84 ³⁶ FMFN Application; page 9, paragraph 34 ³⁷ LARP; page 31

³⁸ FMFN’s Response to Crown’s Argument; page 17, paragraph 44

"The LARP, as it exists today, creates dangers as it purports to be a plan and system for managing the impacts of cumulative development but does not deliver on its intentions. The management system provided contains worthy concepts and goals; but it is skeletal and conceptual. It lacks the detail necessary for an effective cumulative effects management system. This failure is of greatest concern to Fort McKay, as the Plan in its current state enables cumulative effects, in the form of continued rapid industrial development in the region, but contains no effective provisions for managing the negative impacts of this development or for stewarding to other values such as protection of ecological and cultural integrity. The danger is confirmed by giving legal effect to the Plan as direction to decision-makers before it is complete, and key elements intended to protect Constitutional Rights missing. Another danger is that the LARP is being coupled with a streamlined, faster regulatory system to "fast track" approvals, which relies on an underdeveloped system to manage cumulative effects to rationalize intensive development. Regulators and industry rely on the Plan to justify further development on the assumption that impacts are or will be managed but they are not managed by the Plan and may not be in the future. This results in very significant impacts on the constitutionally protected rights of the longest-term land users in the region, Aboriginal Peoples."³⁹

III. Recent Litigation/ Studies Relating to Cumulative Effects Management

- a. The Review Panel recently noted a filing in the B.C. Supreme Court of a dispute between the Blueberry River First Nations (BRFN) and the Province of British Columbia.⁴⁰ BRFN is a beneficiary of Treaty 8 and its Traditional Territory is located in the Upper Peace River region of northeastern B.C. As part of its Statement of Claim, its introduction stated:

"Blueberry River First Nations brings this claim against the Crown to stop the consistent and increasingly accelerated degradation of the Nation's Traditional Territory, and to protect and

enforce the Nations' constitutionally protected rights under Treaty 8 against the cumulative impacts of Crown authorized activities on their Traditional Territory.

At the time of making the Treaty, the Crown assured the ancestors of the Blueberry River First Nations that it was in both parties' interests that the Nations must be able to carry out their traditional and economic activities so as to maintain themselves productively in good health and well-being, and so as not to become dependent upon the Crown; however, the Crown has not maintained its promises. Instead of furthering or protecting Blueberry River First Nations' interests, the Crown in right of British Columbia has consistently made choices to undertake or allow land alienation, resource extraction and industrial activities in the Traditional Territories upon which the Nations' culture, economy and Treaty rights depend. These activities have damaged the forests, lands, water, fish and wildlife that are integral to the Nations' mode of life, and upon which the Nations' rely. Rather than protecting the Blueberry River First Nations' mode of life, these Crown choices have contributed significantly to an impoverishment of it.

The cumulative impacts of these activities have consistently and increasingly pushed the Blueberry River First Nations to the margins of their Traditional Territory, and have now left the members with almost no Traditional Territory within which to meaningfully pursue their constitutionally protected cultural and economic activities."

- b. The Review Panel noted that a recent case in the Alberta Court of Appeals by the Beaver Lake Cree Nation (BLCN) was heard in 2013. BLCN is an adherent to Treaty 6.

"The central tenant of their action is that the cumulative effect of the individual "authorizations" of developments related to oil and gas, forestry, mining, and other activities significantly impacts their "core lands."⁴¹

³⁹ FMFN's Response to Crown's Argument; page 3, paragraph 3 ⁴⁰ Notice of Civil Claim; filed March 3, 2015 ⁴¹ *Lameman v. Alberta*, 2013 A.B.C.A. 148;

The Alberta Court of Appeal held that the cumulative effects of development on the exercise of their Treaty rights is a legitimate issue of trial and sent the case back to the case management judge in advance of the trial

- c. The Review Panel also reviewed the study Models and Data: What they are saying about cumulative effects on wildlife species important to the community of Fort McKay?; L. Gould (September 2012).⁴²
- d. The Review Panel reviewed the document "A Critical Update on the Latest Case Law Impacting Cumulative Effects." As noted, the paper reviews the latest case law with respect to this issue.⁴³
- e. In the paper "The Quandary of Cumulative Effects - Fitting a Science Peg in a Law Hole," the author reviewed cumulative effects with respect to the LARP, on pages 6-8.⁴⁴

Under the heading of "Challenges and Concerns Regarding Cumulative Effects Management," she stated on page 8 of her paper:

"Initial steps to implement cumulative effects management highlight the challenge of shifting to a predominately science-based concept to a regulatory and legal platform. Two significant concerns are the fit between cumulative effects management and the current Canadian environmental quasi-criminal regulatory system and the burden of proof and process it entails, and ensuring enforceability and accountability in relation to cumulative effects management."

IV. Observations and Suggestions to the Minister

1. In order for the Government of Alberta to achieve an effective cumulative effects management system to "balance" economic development opportunities and social environmental considerations through the LARP, it must first complete and implement all the proposed management frameworks. This includes one framework specific to Traditional Land Use for First Nations residing in the Lower Athabasca Region.

2. Many of the Territorial Lands or Traditional Territory of the First Nations in the Lower Athabasca Region are being encroached and surrounded by industrial development projects such as: bitumen, conventional oil and natural gas extraction; pipelines; power lines and substations; gravel pits; camps; disposal wells; landfills; oil sands and gas exploration; forest harvesting; and municipal growth.

The LARP must recognize that the Terrestrial Land footprints of the First Nation Applicants are being reduced every year as a result of increased resource development in the region. As noted in the evidence of FMFN, "6 new projects were approved in Fort McKay's Traditional Territory since the effective date of the LARP."⁴⁵

3. The Review Panel suggests that the future of the Athabasca River is important to many First Nations members relying on this waterway for navigation and food sources. Active monitoring of the river must be continual to ensure the safety issues of quantity, quality and potential contaminant concentration are addressed, and rectified, if required.

In a recent article, Martin Olszynski, an Associate Professor at the University Of Calgary's Faculty Of Law, described the term "ecosystem management" (EM):

"EM can be considered as having two aspects: the "ecosystem" part and the "management part." The ecosystem part of the equation recognizes that sectoral or jurisdictional approaches to environmental problems are generally inadequate, "under an ecosystem approach, decisions are made by measuring effects on systems rather than constituent parts." ...The management aspect has more or less the same connotation as when it is used in other contents, such as "business management."

One of the more established examples of EM in the oil sands is the Lower Athabasca River Water Management Framework (LAR). This Framework is intended to guide decision-making with respect to water withdrawals from the Lower Athabasca River and is "designed to protect the ecological integrity of the river during oil sands development."⁴⁶

⁴² FMFN Submission; Tab 15 ⁴³ R.C. Secord and Yuk-Sing Cheng, Ackroyd LLP; November 18, 2014 ⁴⁴ C. Chiasson, Environmental Law Centre, University of Calgary; March 23-24, 2012 ⁴⁵ FMFN Application; page 18, paragraph 84 ⁴⁶ (2014) 10 McGill J.S.D.L.P. 1-44

Olszynski also described the operation of Phase 1 of the Lower Athabasca River (LAR):

“Naturally occurring flows are divided into green, yellow and red conditions. The green condition implies no restrictions on withdrawals, while the red condition means that water levels are unusually low and withdrawals need to be restricted in order to minimize the loss of fish habitat. Thus, the Lower Athabasca River aquatic ecosystem is being managed to try to suit both human and ecological needs rather than being subject to prohibitions and authorizations in the abstract with the importance of environmental monitoring made plain by the LAR Framework. Managers need to know flow conditions in order to take the right management actions under the Framework.”

Question to the Minister from the Review Panel:
Is the LAR Framework working effectively and will Phase II be initiated to deal with the longer-term management of the Athabasca River?

4. As noted by CPDFN in its submission:

“Alberta’s current regulatory system is based on a project-by-project approval and mitigation of the adverse effects of each project. Until now, the approach has been to control the impact of each project. While this may be acceptable for low levels of development, it does not adequately address the cumulative effects of all activities under the current pace of development.”⁴⁷

The Review Panel agrees with this assessment. The regulatory regime must look at the overall proliferation of resource development projects and the impact of such major developments on the people living in that area.

5. In its submission to the Review Panel, MCFN made a number of recommendations concerning CEM:

“The LARP should rely on pre-existing disturbance levels, triggers and thresholds besides relying on future anticipated oil sands development only, resulting in the following:

- The LARP should set baseline levels;
- Basing the ground management framework on self-reported industry data only and excluding wetland health from that framework;
- Basing land disturbance plans on future anticipated oil sands development only.”⁴⁸

6. As a result of possible potential emissions and contaminants in the Athabasca River, the Joint Review Panel for Shell Jackpine Mine noted that Alberta has not conducted the necessary health studies.

The Review Panel suggests that it is critical that such a health study for the Athabasca River be considered as soon as possible. As recommended in the Jackpine decision, this Review Panel agrees that “Alberta Health and Wellness and Health Canada [should] complete a regional baseline health study focused on First Nations, Métis and other Aboriginal groups that considers all relevant health factor, including environmental exposures and potential exposure pathways, such as a water, air and consumption of traditional foods.”⁴⁹

7. As noted by the Joint Review Panel with respect to the Shell Jackpine Mine decision that, despite the LARP’s new conservation areas, the cumulative impacts on wildlife have exceeded or are reaching thresholds resulting in significant adverse effects on biodiversity, some of which are likely permanent.⁵⁰

Question to the Minister from the Review Panel:
Will the proposed Biodiversity Management Framework alleviate such impacts on wildlife in the Lower Athabasca Region?

⁴⁷ CPDFN Submission; paragraph 45 ⁴⁸ MCFN Application; page 17 ⁴⁹ Shell Jackpine Mine Expansion Project, 2013 ABAER 011; page 180, paragraph 1069 ⁵⁰ Shell Jackpine Mine Expansion Project, 2013 ABAER 011; paragraph 31

Country Foods and Health Concerns

Introduction

Since the release of the Lower Athabasca Regional Plan (LARP), a recent study entitled Environmental and Human Health Implications of the Athabasca Oil Sands for the Mikisew Cree First Nation and the Athabasca Chipewyan First Nation in Northern Alberta (July 7, 2014) has found that wild-caught foods in northern Alberta have higher-than-normal levels of pollutants.¹ The report was prepared by University of Manitoba environmental science professor Stéphane McLachlan and funded by the National First Nations Environmental Contaminants Program, Health Canada, and the two First Nations communities.

The research found contaminants in traditional foods such as muskrat and moose. It also found that Aboriginal community members feel less healthy than they did a generation ago. In the study, wildlife was tested for environmental contaminants, including heavy metals and polycyclic aromatic hydrocarbons. Some of the findings found arsenic levels were high enough in muskrat, moose and duck that they were of concern for young children. Mercury levels were also high for duck muscle, kidneys and livers as well as moose and muskrat kidneys.

The report remarked that community members are eating less “country foods” because they have been warned off. The research paper also noted that “Substantial employment opportunities are generated by the oil sands. Yet, this development as well as upstream hydro projects, compromises the integrity of the environment and wildlife, which, in turn, adversely affects human health and well-being.”

The article also referred to Professor David Schindler of the University of Alberta, the fresh water ecologist, referring to two recent Environment Canada reports showing high levels of mercury in snow within 50 kilometres of Fort McMurray, and another showing increasing levels of mercury in bird eggs in the Athabasca River Delta.

I. Responses from the First Nations Regarding Health Concerns

A. COLD LAKE FIRST NATIONS (CLFN)

In its Application, CLFN stated:

“The health of the CLFN community is tied to the nutrition, satisfaction, active lifestyle and fulfillment of social and spiritual relationships that are a part of a traditional diet.² Traditional land uses are also important for building relationships amongst community members (psychological health) - whether from time spent on the land sharing knowledge and skills or from sharing the harvest with family and other community members. A decrease in the ability to engage in TLU adversely affects the physical and psychological health of CLFN members and of the community as a whole. CLFN elders and members frequently report how difficulties in harvesting traditional foods contribute negatively to their health and wellness. Many are of the view that increased rates of diabetes, heart disease, and cancer are related to decreasing availability of traditional foods.”

“Traditional land users are likely to ingest greater amounts of soil than urbanites. Consequently, the threshold for certain levels of contamination that would be acceptable or low risk in an urban environment are not likely to be protective of human health for Traditional Land users. This disparity is important when considering the failure of the LARP to address cumulative effects as they relate to TLU. The LARP’s limits and thresholds don’t appear to consider that Traditional Land users may be affected by cumulative effects in a different way than the general population of Albertans. This creates an increased concern that the health of CLFN members may be negatively impacted by the policy decisions expressed in the LARP.”³

¹ Globe and Mail; July 7, 2014 ² *Cultural and Ecological Value of Boreal Woodland Caribou Habitat*, A Joint Report by the Assembly of First Nations and David Suzuki Foundation (June 2013) ³ Cold Lake First Nations (CLFN) Application; page 14

B. CHIPEWYAN PRAIRIE DENE FIRST NATION (CPDFN)

In its Application, CPDFN identified adverse “health effects” caused by the LARP, which include, but are not limited to the following:

- Loss of food security.
- Health impacts linked to changes in diet from traditional to store-bought foods, as well as to contamination of country foods, and change in lifestyle as Traditional Land Use opportunities decrease.
- Concerns of development projects results in increased noise, dust, contamination of air, waterways, other traditional resources, and other factors.
- CPDFN views the land as a living being. Injury to parts of the body affect the health of the whole.
- Chronic fears around traditional food and medicine safety.
- Chronic fears around air and water quality.
- Impact to CPDFN’s ability to exercise Dene spiritual practices.⁴

C. ATHABASCA CHIPEWYAN FIRST NATION (ACFN)

In its Application, ACFN referred to page 51 of the LARP:

“Surface water quality objective does not incorporate Treaty Rights or Traditional Land Use, in particular avoidance behaviour, health concerns, and the right to clean water.”⁵

ACFN referred to the Jackpine Mine Expansion decision on page 10 of its Application:⁶

- a. the effects of the offsets on existing Traditional Land Use and the need to maintain areas for traditional use by Aboriginal Peoples, including areas containing traditional plants and other culturally important resources (paragraph 12);
- b. the need to preserve the suite of species and ecosystems in the region and to maintain local and regional biodiversity as well as the need to preserve unique environments and species (paragraph 996); and
- c. the need for conservation offsets to address the impacts of some migratory birds. (paragraph 936)

Some adverse “health effects” listed in ACFN’s Application included:

- Loss of culture.
- Loss of food security.
- Increased risks, and perceived risks, associated with consumption of traditional foods.
- Health impacts linked to changes in diet from traditional to store-bought foods, as well as to contamination of country foods, and change in lifestyle as Traditional Land Use opportunities decrease.
- Loss of ability to access fishing, hunting and trapping due to water quantity issues in the Athabasca River and the Peace Athabasca Delta.
- [Increased oil sands development results in increased] noise, dust, contamination of air, waterways and other traditional resources, and other factors.
- Psychological impacts [regarding] failure to fulfill cultural obligations to ensure that seven generations from now, ACFN members can exercise their Rights and culture.
- Impact to ACFN’s ability to exercise Dene spiritual practices.⁷

⁴ Chipewyan Prairie Dene First Nation (CPDFN) Application; pages 10-11 ⁵ Athabasca Chipewyan First Nation (ACFN) Application; page 7, paragraph 28 ⁶ ACFN Application; page 10 ⁷ ACFN Application; pages 11-13

D. MIKISEW CREE FIRST NATION (MCFN)

In its Application, MCFN stated:

“The Lower Athabasca River System, which includes the Peace-Athabasca Delta, is absolutely critical for the ability of our [MCFN] members to practice their Treaty 8 Rights, and to sustain their unique Aboriginal livelihoods, cultures, and identities as Cree and Dene peoples. Our First Nations have depended upon the bountiful ecology of the Delta to sustain our families, cultures, and livelihood for generations. The Athabasca River itself is our main travel route into the heart of our Traditional Lands. Without adequate water quality or quantity in the river system, we cannot access our important culture, spiritual and subsistence areas and we cannot sustain the health and well-being of our families on the traditional foods that we have always obtained from the river system.”⁸

MCFN’s Application noted:

“MCFN has repeatedly raised concerns about the effects of intensive oil and gas development throughout its Traditional Territory on the health of its members. Recently, in response to MCFN’s concerns, the Joint Review Panel for the Shell Jackpine Mine Expansion recommended that Alberta Health and Wellness and Health Canada:

‘complete a regional baseline health study focused on First Nations, Métis, and other Aboriginal groups that considers all relevant health factors, including environmental exposures and potential exposure pathways, such as water, air, and consumption of traditional foods.’

The Joint Review Panel [JRP] observed that there was a gap in knowledge about contamination of country foods from the development in the region (the Shell Jackpine Mine Expansion is within the Lower Athabasca Region) and noted that recent research on atmospheric deposition indicates that the concerns MCFN has been raising (together with other First Nations) are not unfounded. As such, continuing to manage land use in the region according to the LARP, which prioritizes economic

development and development of the oil sands in particular, without first collecting that health information puts the health of MCFN members who consume country foods harvested pursuant to our Treaty rights at a very real risk.”⁹

MCFN recommends the “development of a regional baseline health study focused on the health of First Nations, Métis and other Aboriginal groups and impacts from the environmental effects of oil sands development in the Lower Athabasca Region.”¹⁰

E. FORT MCKAY FIRST NATION (FMFN)

In its Application, FMFN stated:

“Industrial development in proximity to Fort McKay’s Reserves will also change the ecology of these Lands. For example, the Moose Lake Reserves (174A and 174B) will not be fit for their designated purpose of supporting cultural land use, including harvesting of country foods, with the development of projects within 20 km of its borders. The intensity and proximity of development to the borders of conservation areas (such as parks) has been shown to be directly and adversely related to the ability of the conservation area to support biodiversity, including wildlife. The neighbouring development creates a population sink within the conservation area and this is particularly acute in areas the size of Reserves 174A and 174B.”¹¹

FMFN also stated:

“In the development of the LARP, the Government of Alberta used [A Landscape Cumulative Effects Simulator] ALCES simulation modeling¹² to evaluate planning options in the region. Moose and fisher habitat quality were used as terrestrial wildlife indicators to assess the impacts of development if it continued at the current rate. The simulations measured changes from NRV. The computer simulations of the baseline found that moose and fisher habitat quality declined rapidly. Moose and fisher were 30% below NRV as of 2009. Within 20 years fisher and moose habitat quality was at least 60% below the NRV.”¹³

⁸ Mikisew Cree First Nation (MCFN) Application; page 15 ⁹ MCFN Application; page 19 ¹⁰ MCFN Application; page 23 ¹¹ Fort McKay First Nation (FMFN) Application; page 14

¹² ALCES Group (2009) ¹³ FMFN Application; page 15, paragraph 70

Under the Heading of “Adverse Health Impacts From Loss of Traditional Land Use,”¹⁴ FMFN argued that:

“The LARP adversely affects Fort McKay’s social and cultural health which in turn affects the health of community members. This is largely due to the loss of opportunities to pursue Traditional Land Use and cultural activities in clean, accessible and culturally relevant areas. The LARP also adversely affects the health of community members by facilitating increased development with its associated pollution, in the absence of tools to manage and mitigate this pollution.

Cultural heritage is inextricably linked to the land and the values expressed and preserved through Traditional Land Use. Traditional environmental knowledge, history and identity are linked to specific landscapes and locations. Even if reclamation was successful at restoring the pre-disturbance landscape and ecology, this would not occur for several generations. Fort McKay is permanently adversely affected by loss of intergenerational knowledge transfer.

The *Cultural Heritage Baseline Report* and *Cultural Heritage Impact Assessment*, contained in the attached *Fort McKay Specific Assessment* (2010), documents that significant adverse effects have already occurred to Fort McKay’s cultural heritage, including Traditional Land Use, as a result of existing oil sands and related development. This is directly related to loss of cultural landscapes, the ability to practice Treaty rights, loss of cultural values, (including language and traditional knowledge) and loss of social integration through rapid socio-economic changes since the advent of oil sands development.

The Shell JRP found that “the cumulative effects on some elements of Fort McKay’s cultural heritage are already adverse, long-term, likely irreversible, and significant.” (Shell JRP Decision at paragraph 1742).

These effects will increase as a result of the authorization of continued development and the lack of conservation areas and land management adequate to preserve cultural landscapes and land based activities.

The practice of Traditional Land Use and simply “going out on the land” are important health determinants because they are linked to physical health. They are an important source of physical activity to maintain fitness for Fort McKay members. Harvesting activities provide country foods, which is associated with much better health status in Aboriginal communities than processed food. Decrease in harvesting and consumption of country foods is associated with higher levels of obesity, diabetes, and other health conditions. (see Earle, *Traditional Aboriginal Diets and Health*, (National Collaborating Centre for Aboriginal Health 2011)). This is true also for Fort McKay.

According to research commissioned by Fort McKay, existing and approved development will result in Fort McKay being able to sustainably harvest from its Moose Lake Reserves and environs, enough moose (a key traditional food) to provide 1/3 of one ounce of dry meat per person, per year (ALCES, 2011, *Conserving Opportunities for Traditional Activities*). This is a severe reduction in the amount of food harvested and processed by Fort McKay and abrogation of the Treaty right to meaningful opportunities to hunt.

The LARP does not contain any objectives or management systems for addressing the cumulative loss of wildlife and other traditional foods, as well as access to harvest them. These losses will increase as a result of the LARP.”

II. Observations and Suggestions to the Minister

The Review Panel suggests that Alberta Health and Wellness and Health Canada jointly complete a regional baseline health study focused on First Nations, Métis and other Aboriginal groups to consider all relevant health factors, including environmental exposures and potential exposure pathways, such as water, air and the consumption of traditional foods in the Lower Athabasca Region. The study is recommended to be completed by 2017, at the latest.

¹⁴ FMFN Application; pages 20-21, paragraphs 92-99

Report of the Joint Review Panel Shell Canada Energy Jackpine Mine Expansion Project

Several First Nations, in their respective Applications, included the July 9, 2013¹ Shell Canada Energy Jackpine Mine Expansion Project² in their evidence packages; noting a number of pertinent issues which were also included in the Lower Athabasca Regional Plan (LARP). The Joint Review Panel was established by the federal Minister of the Environment and, at that time, the Alberta Energy Resources Conservation Board.

The LARP Review Panel felt it would be useful to highlight the Joint Review Panel's determinations with respect to the following issues:

ISSUE: Caribou

Page/Paragraph of Jackpine regulatory decision:
144/852

Remarks from Joint Review Panel:

The Panel recommends that the Government of Alberta — in consultation with the Government of Canada and interested Aboriginal Groups in the oil sands area — produce a range plan for caribou in the designated cultural habitat of the Richardson Range as soon as possible.

ISSUE: Caribou, wood bison and moose

Page/Paragraph of Jackpine regulatory decision:
201/1201, 1206

Remarks from Joint Review Panel:

The Panel notes that caribou and wood bison are species at risk in the oil sands region and populations are already considered not to be self-sustaining.

The Panel finds that populations of woodland caribou will require considerable protection and wood bison will need informed management, if they are to be self-sustaining and available as a resource for Aboriginal People.

The Panel finds that the evidence presented for woodland caribou, wood bison and moose suggests that the needs of the Aboriginal People are currently adversely affected.

ISSUE: Species at Risk

Page/Paragraph of Jackpine regulatory decision:
303/1821, 1822

Remarks from Joint Review Panel:

The Panel understands that any identified critical habitat must be protected using provincial mechanisms because oil sands projects occur on provincial Crown land.

The Panel recommends that the governments of Alberta and Canada work cooperatively to:

- meet the goals outlined in recovery strategies for species at risk, including protecting critical habitat, meeting population recovery objectives and achieving any other management initiatives put in place for listed species;
- complete recovery strategies as soon as possible for wood bison, Canada warbler, olive-sided fly-catcher, common night hawk, and rusty blackbird;
- complete management plans for species of special concern; and
- develop action plans to provide the mechanisms required to protect identified critical habitat as well as other actions required to protect the listed species (eg. range plans for caribou in the Richardson Range).

¹ ACFN, CPDFN, CLFN, MCFN ² 2013 ABAER (Alberta Energy Regulator) 011

ISSUE: Biodiversity Framework**Page/Paragraph of Jackpine regulatory decision:**
166/991**Remarks from Joint Review Panel:**

The Panel understands that Alberta intends to establish a biodiversity management framework under the LARP, by the end of 2013, that will set targets and thresholds for biodiversity indicators — including vegetation, aquatic components, and wildlife — in order to maintain ecosystem function and landscape connectivity.

The Panel acknowledges that the pending the LARP biodiversity management framework represents the Government of Alberta's desire to take a regional approach to managing cumulative effects. Implementing standards for biodiversity management framework may include an objective to avoid or mitigate land disturbance to biodiversity. Currently no biodiversity standards have been developed under the LARP.

ISSUE: Biodiversity**Page/Paragraph of Jackpine regulatory decision:**
302/1815**Remarks from Joint Review Panel:**

The Panel concludes that there is a potential for irreversible loss of biodiversity in the oil sands region. Many wetlands cannot be reclaimed; old growth forests take a significant amount of time to re-establish; species at risk and other wildlife species are declining; and ecosystems are being reclaimed from lowlands to uplands.

Reclamation is still the main mitigation measure for oil sands projects, yet there is insufficient evidence to demonstrate that reclamation works or will work as intended.

ISSUE: Reclamation**Page/Paragraph of Jackpine regulatory decision:**
175/1039, 1040**Remarks from Joint Review Panel:**

The Panel notes that the LARP encourages timely and progressive reclamation and states that Alberta's new progressive strategy includes a suite of initiatives to improve clarity, security, and environmental performance. This includes an enhanced reclamation certificate program, a transparent reporting system, and a new progressive reclamation security policy.

The Panel understands that, due to the operational methods of oil sands mining, regardless of the measures outlined for progressive reclamation until later in the life of the mine.

ISSUE: Country Foods**Page/Paragraph of Jackpine regulatory decision:**
180/1069**Remarks from Joint Review Panel:**

The Panel notes that there is a gap in knowledge about contamination of country foods. The recent work by the University of Alberta's Dr. Schindler and Environment Canada (EC) on atmospheric deposition seems to indicate that the Aboriginal groups' concerns about country food contamination are unfounded.

The Panel also believes that studies examining contamination of country foods are important and should be a focus of health studies conducted by Alberta and Canada. These studies should analyze the effects on human health as a result of impacts from the oil sands industry. Any analysis should consider water quality and impacts related to fish contamination, potential impacts on air quality, and contamination of traditionally harvested plants used as food or medicine.

The Panel recommends that Alberta Health Services and Health Canada (HC) complete a regional baseline health study focused on First Nations, Métis and other Aboriginal groups. This study should consider all relevant health factors, including environmental exposures and potential exposure pathways, such as water, air and consumption of traditional foods.

ISSUE: Traditional Land Use (TLU)**Page/Paragraph of Jackpine regulatory decision:**
202/1211**Remarks from Joint Review Panel:**

The Panel finds that the Jackpine Mine Expansion Project will significantly affect the availability of traditional plants. The Panel acknowledges that this will, in turn, affect the TLU of the Aboriginal People and the transmission of Aboriginal culture.

ISSUE: TLU**Page/Paragraph of Jackpine regulatory decision:** 217/1281, 1284**Remarks from Joint Review Panel:**

The Panel notes that all of the Aboriginal groups, including those that withdrew their objections to the Jackpine Project, have experienced concern about the assessment and management of cumulative effects in the oil sands region. There are also concerns about the potential impact of these effects on their TLU, Aboriginal and Treaty rights, and culture.

The Panel finds that the Project — in combination with other existing, approved and planned projects — is likely to result in significant and adverse cumulative effects in TLU activities, including hunting and gathering.

The Panel finds that significant areas already have been, or will be, lost for the purposes of TLU as a result of existing, approved, and planned activities, as well as natural disturbances and other resources important for the practice of Aboriginal TLU, rights and culture. Wetlands, old-growth forests, traditional plants, migratory birds, and wildlife species such as caribou have been, or will be, subject to significant and adverse cumulative effects.

The Panel recognizes that disturbed areas will eventually be reclaimed, but not for many years. Some types of habitat cannot be reclaimed and in some instances, the landscape is significantly altered or there is irreversible species loss. The long-term and possibly irreversible nature of these effects has significant implications for the sustainability of traditional ecological knowledge (TEK), TLU practices, Aboriginal and Treaty rights, and culture.

ISSUE: TLU**Page/Paragraph of Jackpine regulatory decision:** 220/1301**Remarks from Joint Review Panel:**

Because Aboriginal culture is closely tied to TLU activities and the exercise of Aboriginal and Treaty rights, the Panel concludes that the Jackpine Project — in combination with other existing and planned development and activities — is also likely to result in significant and adverse cumulative effects on Aboriginal culture.

The increased loss of lands and resources for TLU activities has significant implications for the sustainability of TLU and cultural practices. Some of the cumulative socioeconomic effects associated with regional development — such as increased access to the wage economy, the availability and high cost of housing, and significant increases in the regional population — will further contribute to cultural changes for the Aboriginal groups in the Regional Municipality of Wood Buffalo.

ISSUE: TLU**Page/Paragraph of Jackpine regulatory decision:** 221/1304**Remarks from Joint Review Panel:**

While the stated intent of the LARP is to take more of a cumulative-effects approach to managing environmental effects in the Lower Athabasca Region, the Panel notes that the LARP does not specifically address TLU issues. Instead, it provides for continued consultation and engagement with Aboriginal Peoples to help inform land and natural resource planning in the region. Several of the Aboriginal groups expressed concern that the LARP does not address their concerns and does nothing to ensure ongoing traditional use of the land. The absence of a management framework, and associated thresholds for TLU, makes it very difficult for both industry and panels to accomplish and inform land-use planning. A TLU management framework should be developed for all Aboriginal People affected by industrial development in the Lower Athabasca Region.

ISSUE: TLU**Page/Paragraph of Jackpine regulatory decision:** 301/1809, 1811**Remarks from Joint Review Panel:**

The Panel finds that regional effects are significant to Aboriginal TLU. It is apparent to the Panel that the mitigations suggested by project proponents to lessen effects on TLU are not entirely effective. Currently, the main mitigation measure used in oil sands development is reclamation, which intends to mitigate most effects on the environment. This measure has yet to be proven to mitigate environmental effects, and it is clear that it does *not* mitigate most effects of TLU.

The LARP does not specifically address TLU but, instead, provides for continued engagement with Aboriginal Peoples to help inform land and natural resource planning in the region. Several of the Aboriginal groups expressed concern that the LARP does not address their concerns and does nothing to ensure ongoing traditional use of the land. Also, the absence of a management framework and associated thresholds makes it very difficult for both industry and the Panel to evaluate the impact of individual projects on TLU.

The Panel believes that to be better able to accomplish this and inform land-use planning, a TLU management framework should be developed for the Lower Athabasca Region. The Panel recommends that Alberta develop and implement this TLU management framework for the Lower Athabasca Region as a component of the LARP. The Panel recommends that the Government of Alberta develop this framework in conjunction with the Government of Canada, other stakeholders, and all Aboriginal People affected by the industrial development who practice their rights in the oil sands region.³

The Panel recommends that this framework be maintained and adapted over time to ensure the protection of Aboriginal land use and Treaty rights in the oil sands region.⁴

ISSUE: Athabasca River Navigation

Page/Paragraph of Jackpine regulatory decision: 219/1292, 1293

Remarks from Joint Review Panel:

The Panel has included several recommendations that address concerns raised by the Aboriginal groups related to water management and navigation:

- The governments of Canada and Alberta consider the precautionary cut-off flow approach to address impacts of water withdrawals during extreme low-flow conditions, and potential impacts on navigation.
- Department of Fisheries and Oceans (DFO), Alberta Environment and Sustainable Resource development (ESRD), the oil sands industry and other involved stakeholders dedicate necessary

resources to ensure that Phase 2 of the Water Management Framework for the Lower Athabasca River is completed and implemented in a comprehensive manner by January 2016, and recommended in the [Phase 2 Framework Committee] P2FC report.

The Panel also recommends that Environment Canada, in collaboration with ESRD and interested Aboriginal groups, conduct joint research and report on the causes of perceived drying of the Athabaskan oil sands region and the Peace-Athabasca Delta, and that Aboriginal concerns on this issue be considered in any Phase 2 water allocations.

ISSUE: Conservation Offsets

Page/Paragraph of Jackpine regulatory decision: 304/1828

Remarks from Joint Review Panel:

The Panel recommends that before other provincial and federal approvals are issued, the governments of Canada and Alberta cooperatively consider the need for conservation offsets to address the significant, adverse project effects on: wetlands; wetland-reliant species at risk; migratory birds that are wetland-relevant or species at risk; and biodiversity. They should also consider the significant, adverse cumulative effects to: wetlands; traditional plant potential areas; old-growth forests; wetland-related species at risk and migratory birds; old-growth forest-reliant species at risk; migratory birds biodiversity; and Aboriginal traditional use.

In considering the need for conservation offsets, Alberta and Canada should have regard for proposed environmental objectives for the Athabasca oil sands region and current and proposed policy frameworks, including but not limited to: the proposed biodiversity management framework under the LARP; Alberta's proposed new wetlands policy; and Environment Canada's Operational Framework for Use of Conservation Allowances. Integration of Aboriginal traditional use needs should be part of the implementation process. Where possible, the requirements for conservation offsets should be formalized through permitting or approval conditions.

³ 2013 ABAER (011); page 8, paragraph 36 ⁴ 2013 ABAER (011); page 221, paragraph 1304

ISSUE: Air Quality**Page/Paragraph of Jackpine regulatory decision:**
305/1829**Remarks from Joint Review Panel:**

The Panel notes that the LARP provides a management framework for air quality that has been approved for implementation. The LARP indicates that these frameworks will establish ambient environmental limits and triggers for NO₂ and SO₂.

The Panel stresses the importance of the air quality framework as being key to limiting the cumulative effects on the region's airshed. The Panel recommends that the Government of Alberta consider establishing ambient environmental limits and triggers for other air quality compounds in the future, as a part of the LARP, in addition to SO₂ and NO₂.

ISSUE: Water Quality/Quantity**Page/Paragraph of Jackpine regulatory decision:**
305, 306/1832, 1834**Remarks from Joint Review Panel:**

The Panel is aware that Phase 2 of the Lower Athabasca Water Management Framework is currently being developed. The Panel recommends an "ecosystem base flow" (EBF) be set as part of this framework, taking into account stakeholder needs. Recognizing the important implications flowing from this framework, the Panel urges the governments of Canada and Alberta to conclude the development process and implement this framework expeditiously.

The Panel notes Alberta's commitment, through the LARP, to implement the surface water quality management framework and to complete and implement the groundwater management framework. The Panel recommends that the Government of Alberta complete and implement these as quickly as possible to ensure the quality of water in the region is within the regulatory aquatic life guideline values. The LARP indicates that the information *will* be reported; The Panel recommends that this [information] be made available to the public. The Panel stresses the importance of the water quality frameworks as being key to limiting the cumulative effects on the region's surface water and groundwater quality.

ISSUE: Regional Monitoring**Page/Paragraph of Jackpine regulatory decision:**
306, 307/1838, 1839**Remarks from Joint Review Panel:**

The Panel believes that regional strategic monitoring plans are required for the oil sands region. The monitoring plans are required to assess observed levels of compounds against thresholds established in the management frameworks. The Panel notes that Alberta and Canada have the Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring to provide a monitoring program that will ensure environmentally-responsible development of the oil sands resource.

This plan's monitoring data will provide information on air and water quality, aquatic ecosystem health, wildlife toxicology, and much more. Interested parties raised concerns regarding the above issues during the review process. The Panel recognizes the commitment from Alberta and Canada to implement this plan and provide for a transparent process. The Panel encourages the governments to work with all stakeholders and Aboriginal groups to ensure this plan is effective. The Panel believes that information obtained during the monitoring *must* be made available to the general public in an understandable fashion. The Panel encourages the use of adaptive management at both the project and regional levels if monitoring indicator thresholds are being approached or exceeded. Adaptive management plans should be developed as soon as possible so that they can be used without delay if and when needed.

Biodiversity Management Framework – Woodland Caribou/Wood Bison

Introduction

The Lower Athabasca Regional Plan (LARP) states that the Biodiversity Management Framework will address, “caribou habitat needs in alignment with provincial caribou policy.”¹

As part of this policy, the LARP notes:

“The Government of Alberta is committed to achieving naturally sustaining woodland caribou populations. Stabilizing, recovering and sustaining woodland caribou population is an investment in maintaining Alberta’s diverse natural environment. Successfully achieving this result will require the identification, maintenance and restoration of sufficient caribou habitat.

Within the context of sustaining Alberta’s caribou populations, planning and implementation will consider:

- provincial and federal legislative requirements;
- First Nations rights and traditional uses;
- social/economic impacts; and
- stakeholder’s interests.”²

A number of the Applicant’s submitting written evidence to the LARP Review Panel also addressed similar concerns before the Joint Review Panel of the Shell Canada Energy Jackpine Mine Expansion Project,³ regarding the decline of woodland caribou in the Lower Athabasca Region.

In its decision on July 9, 2013, the Joint Review Panel noted the following concerns with respect to this issue:

“The [JRP] recommends that the Government of Alberta, in consultation with the Government of Canada and interested Aboriginal Groups in the oil

sands area, produce a range plan for caribou in the designated critical habitat of the Richardson Range as soon as possible.”⁴

- “The Panel notes that caribou and wood bison are species at risk in the oil sands region, and populations are already considered not to be self-sustaining.
- The Panel finds that populations of woodland caribou will require considerable protection and wood bison will require informed management, in order to be self-sustaining and available as a resource for Aboriginal People.”⁵
- “The Panel finds that the evidence presented for woodland caribou, wood bison and moose suggests that the *needs of the Aboriginal People are currently adversely affected*.”⁶ (Emphasis added)

The Joint Review Panel recommended that the Government of Alberta and Canada work cooperatively to:

- “meet the goals outlined in recovery strategies for species at risk, including protecting critical habitat and meeting population recovery objectives and any other management initiatives put in place for listed species;
- complete recovery strategies as soon as possible for wood bison, Canada warbler, olive-sided fly catcher, common nighthawk, and rusty blackbird;
- complete management plans for species of special concern; and
- develop action plans to provide the mechanisms required to protect identified critical habitat as well as other actions required to protect the listed species (eg. range plans for caribou in the Richardson Range).”⁷

¹ Lower Athabasca Regional Plan (LARP); page 28 ² LARP; page 29 ³ 2013 Alberta Energy Regulator (ABAER) 011 ⁴ 2013 ABAER 011; page 144, paragraph 852

⁵ 2013 ABAER 011; page 201, paragraph 1201 ⁶ 2013 ABAER 011; page 201, paragraph 1206 ⁷ 2013 ABAER 011; page 303, paragraph 1821, 1822

I. Responses from the First Nations Regarding Biodiversity Management Framework – Woodland Caribou/Wood Bison

A. COLD LAKE FIRST NATIONS (CLFN)

In addressing Issue Two of its submission, “whether the LARP should address the management of ongoing Traditional Land Use,” CLFN stated:

- “The LARP contains no data relating to Aboriginal land and resource requirements;
- The LARP does not consider existing land and other disturbances that are already affecting Treaty and Aboriginal Rights;
- In noting CLFN’s specific adverse effects as a result of the LARP, it notes, “a decrease in the ability to practice subsistence hunting and gathering effects the income of its members.”

B. CHIPEWYAN PRAIRIE DENE FIRST NATION (CPDFN)

The Applicant listed potential adverse effects that they are suffering, or expect to suffer or result from the LARP:

- “Decisions are being and will be made, and development is being and will steamroll ahead without the information or planning required to maintain CPDFN’s Treaty Rights, traditional uses, and ability to access and peacefully use and occupy its Reserve Lands.
- Loss of food security.
- The LARP’s goals of increasing recreation and tourism will have direct and adverse impacts upon CPDFN by increasing competition for resources, reducing harvest success.”⁸

CPDFN’s submission makes reference to a study on the area’s caribou population.⁹ On page 4 of the study it notes:

“Designating a protected area for caribou is challenging. This is in part because of the large seasonal movements of caribou (estimates of home-range size are from 500 km² to several thousand km²). Moreover, the mapping of caribou quality by means of remote sensing is difficult because the abundance and quality of lichen is difficult to detect on satellite images... In addition, discussions with members of CPDFN yielded qualitative information on the location of key Woodland Caribou habitat within the CPDFN Traditional Land Use areas.”¹⁰

C. ATHABASCA CHIPEWYAN FIRST NATION (ACFN)

In addressing Issue Three of its submission, ACFN observed; “the LARP is being applied by decision-makers and relied upon by oil sands companies to preclude the protection of Aboriginal and Treaty Rights and Traditional Land Use,” and ACFN noted that: “the LARP is being applied by decision-makers to effectively rule out the possibility of establishing areas that can be set aside for Traditional Land Use and the exercise of Treaty rights. ACFN referred to the Jackpine Mine Expansion decision, which recommended the following:”¹¹

“The need to preserve the suite of species and ecosystems in the region and to maintain local and regional biodiversity as well as the need to preserve the unique environments and species.” (paragraph 996)

D. MIKISEW CREE FIRST NATION (MCFN)

MCFN maintained that the Government of Alberta finalized the LARP without working with MCFN “to develop a knowledge base of what resources, conditions and criteria are needed for MCFN to sustain its livelihood and protect its rights and culture... Simply put, the LARP does not meet even the minimum definitions or processes for proper planning and falls short of other planning initiatives in Canada where First Nations rights and concerns have been integrated into planning.”¹²

⁸ Chipewyan Prairie Dene First Nation (CPDFN) Application; page 9 ⁹ Management and Solutions in Environmental Science; Appendix A - CPDFN “Ecological Considerations for Designated Areas for Protection” (Tab 14) ¹⁰ CPDFN Submission; tab 14 ¹¹ LARP; page 28 ¹² Mikisew Cree First Nation (MCFN) Application; page 19

E. FORT MCKAY FIRST NATION (FMFN)

"Terrestrial Ecosystem Management Framework (TEMF) in 2008 found that caribou, fisher, moose and black bear habitat indicators were below or at the lower limit of their natural range of variation (NRV). The TEMF report indicated that aggressive steps needed to be taken immediately to preserve those indicators in the Regional Municipality of Wood Buffalo (RMWB) and recommended wildlife populations be maintained within 10% of the lower limit of NRV."¹³

"Fort McKay's cumulative effects studies completed in 2013 (tab 10) found 57% of the Traditional Territory is disturbed or within 500 m of disturbed land — mostly oil sands development. Some wildlife populations are already below sustainable levels over the next 50 years, fish population will decrease 99% NRV; fisher 66% below NRV; and moose by 55%. All of these changes fall within the "threatened" or "endangered" standards set by The International Union of Conservation of Nature Conventions."¹⁴

"It is highly likely the development planned for the area near the Reserves will [consider] harvesting of wildlife unsustainable from these Reserves in the near future. (ALCES, Moose Lake Protected Report (2013) Tab 9) Fort McKay also wants to preserve the ecological integrity of its Lands, and the LARP is currently inconsistent with achieving this objective." (Alberta Landscape Team, Management Options Report (2009))¹⁵

"Alberta and Canada's Caribou Policies call for the preservation of existing habitat and restoration of habitat to meet a threshold of 65% of intact habitat in each endangered caribou herd. The ranges for the endangered Red Earth and [West Side of Athabasca River] WSAR herds overlap or are adjacent to Reserves 174A and 174B. The Alberta Landscape Team identified the WSAR range as having the greatest probability of success for preventing extirpation through habitat restoration and mortality control and recommended establishment of a conservation area adjacent to the Birch Mountain Wildland Park comprised of "thousands of square

kilometers." This would also be adjacent to the Moose Lake Reserves and therefore overlap Fort McKay's requested buffer area and serve the dual purposes of preserving the integrity of the Reserves, Traditional Land Use in the area and the caribou."¹⁶

II. Additional Documents Pertaining to Woodland Caribou

This Review Panel is concerned, based on the written evidence of several Applicants, that the Province of Alberta continues to sell leases to energy developers endangering caribou habitat in the Lower Athabasca Region.

- a. In 2004, the province introduced a woodland caribou recovery plan to improve protection of the species by engaging Aboriginal groups and industry and implementing a short-term predator management plan.
- b. A 2013 report, however, which included the province's own caribou specialist, Dave Hervieux, confirmed woodland caribou are declining across Alberta.¹⁷ The report suggested that the population viability of caribou is compromised and supports recovery-based actions to reverse the trend. The report indicates that the province continues to approve industrial development in key caribou ranges, including such activities as forestry and oil and gas operations. The report also refers to the fact that Ottawa has initiated plans to recover both mountain and woodland caribou in Alberta, though the province continues to issue energy leases in these habitat areas.

In the same report, data compiled by the Alberta Wilderness Association shows that 33,000 square kilometers of caribou range have been auctioned off for new oil and gas leases since the recovery plan was introduced. In May 2014, Alberta Energy auctioned off 1,700 hectares north of Grande Cache, which is prime mountain caribou habitat for the Narraway Caribou herd.¹⁸ That sale happened about two weeks after a

¹³ Fort McKay First Nation (FMFN) Application; page 15, paragraph 69 ¹⁴ FMFN Application; page 16, paragraph 72 ¹⁵ FMFN Application; page 17, paragraph 77

¹⁶ FMFN Application; page 17, paragraph 79 ¹⁷ Calgary Herald; November 6, 2014, page A9 ¹⁸ Calgary Herald; June 6, 2014, page C7

panel of federal scientists concluded that all Alberta's mountain caribou herds should be elevated to a "threatened status."

- c. In the spring of 2014, a biologist working with Environment Canada's Committee on the Status of Endangered Wildlife in Canada said that mountain caribou numbers have fallen by 60 per cent in 10 years, due mostly to "industrial disturbance" and "everything from snowmobiles to helicopter skiing."¹⁹ In the last two-and-a-half years, 136 new wells were drilled in the Little Smokey Caribou herds range.
- d. In 2012, the federal government released a strategy for preserving the woodland caribou, which is listed under the *Species at Risk Act*, noting some herds have declined by 50 per cent between 2005 and 2013.²⁰ Provinces and territories were given until 2017 to create plans for protecting or restoring, to an undisturbed condition, at least 65 per cent of the range of each caribou herd within their jurisdiction.
- e. According to a report released on December 16, 2014, the Canadian Parks and Wilderness Society (CPAWS) stated that just six of the 51 plans are in various stages of development and none have been completed. Alberta confirmed that it expects to complete the first of its range plans by the spring of 2015 and will have another three or four finished by the end of 2015.

Thousands of oil and gas wells continue to be drilled on caribou habitat lands despite an approaching deadline for Alberta to come up with a plan to restore those ranges. An industry database shows drilling has almost completely disrupted areas where new exploration has been banned, according to University of Montana biologist Mark Hebblewhite.²¹ The database clearly shows that development continues on ranges that are already well past the 35 per cent disturbance level considered the maximum for caribou survival. The Cold Lake range is about 72 per cent disturbed by energy and forestry. During 2013-14, the database shows that 2, 272 new wells were drilled.

On the Little Smoky range, which is 95 per cent disturbed and under a moratorium on new lease sales, another 147 wells were drilled over the last two years.

The continued disturbance comes as the province is under a federal deadline to come up with plans by 2017 to restore the caribou ranges. According to Hebblewhite, one 2010 study has already estimated the cost of restoration of all caribou ranges in the hundreds of millions of dollars.

Without major changes, Alberta is going to have to consider which of its 18 woodland caribou herds it wants to save, Hebblewhite argues.

III. Observations and Suggestions to the Minister

The Review Panel is concerned that the Government of Alberta is still issuing energy leases in key habitats occupied by the endangered woodland caribou in the Lower Athabasca Region.

In 2012, the Government of Canada issued a strategy for preserving the woodland caribou, which is listed under the *Species at Risk Act*. As part of this strategy, the province is required to complete a number of range plans for these species. It is recommended that Alberta initiate a completion schedule for such plans and meet the population recovery objectives established in this initial strategy. Such plans should be established in consultation with First Nations residing in the Lower Athabasca Region.

¹⁹ Calgary Herald; February 25, 2015 ²⁰ Globe and Mail; (December 16), 2014, page A3 ²¹ Edmonton Journal (April 17, 2015) page A10

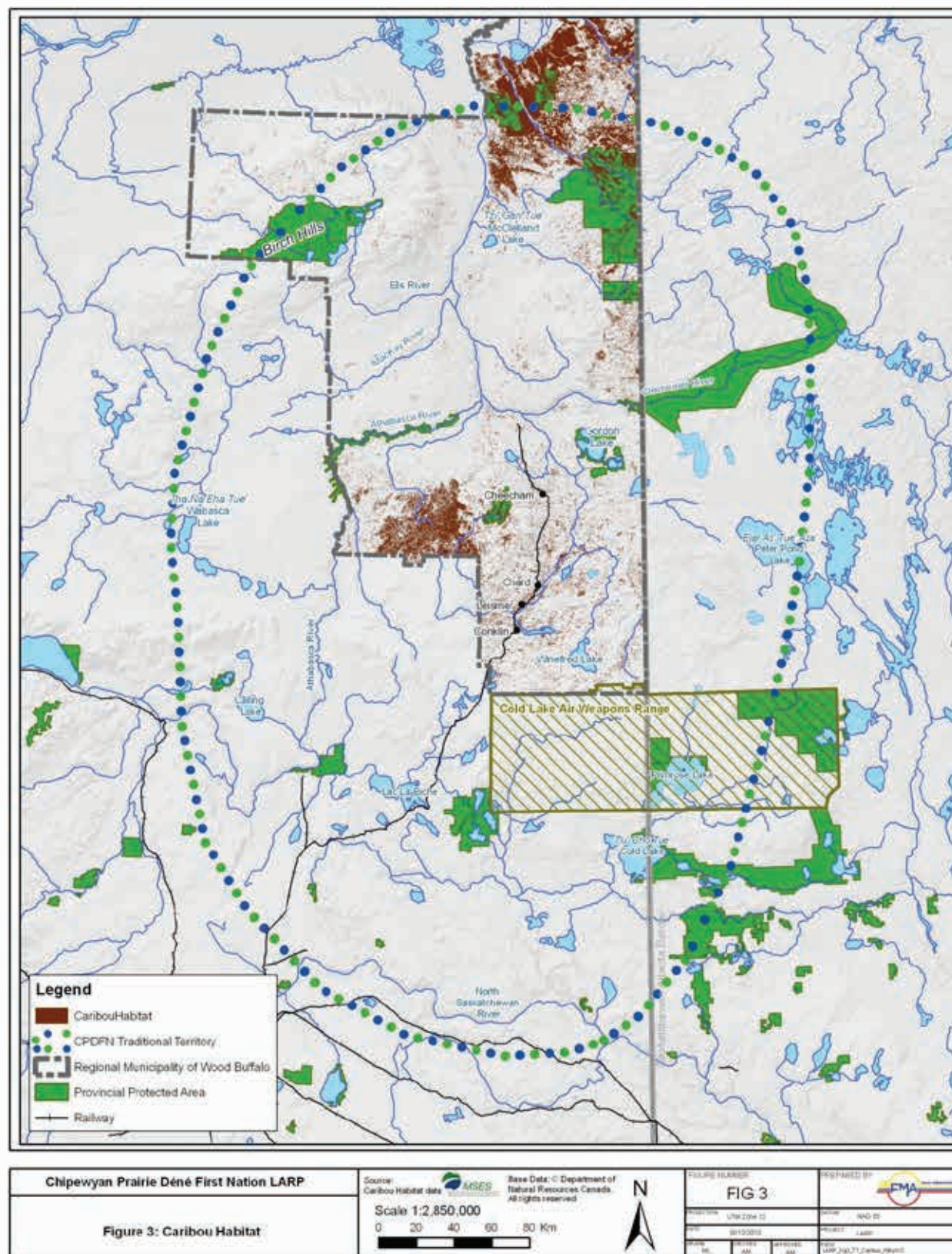
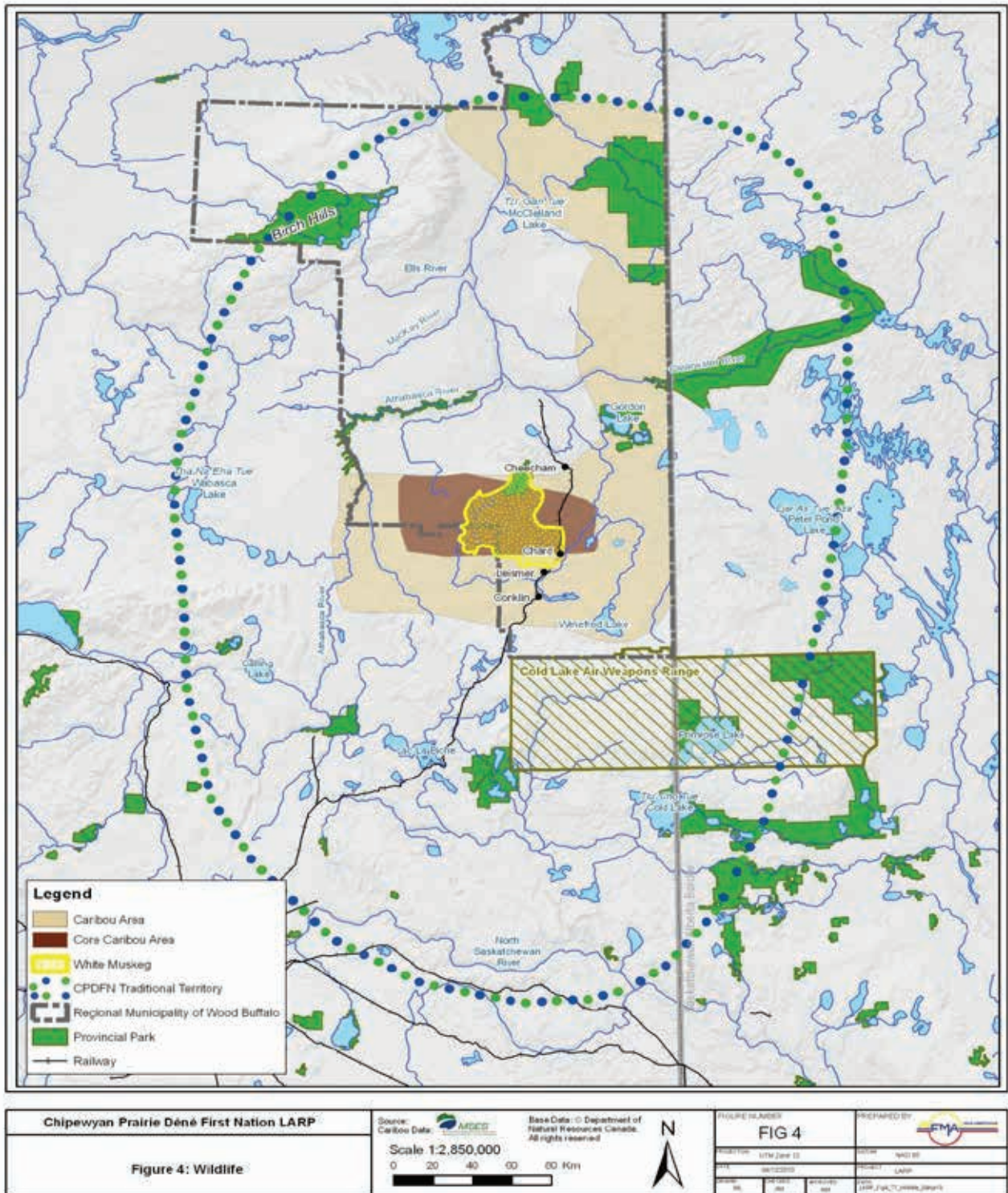


FIGURE 2:
Caribou Habitat Distribution within CPDFN Traditional Lands (Elders/Harvesters Traditional Land Use Map)
(CPDFN Binder 2, Tab 14)



Appendices

Appendices

Appendix 1: Abbreviations

AAAQO – Alberta Ambient Air Quality Objectives

ABAER – Naming Convention for Alberta Energy Regulator Legislation

ABF – Aboriginal Base Flow

ABMI – Alberta Biodiversity Monitoring Institute

ABX – Aboriginal Extreme Flow

ACFN – Athabasca Chipewyan First Nation

AEMERA – Alberta Environmental Monitoring Evaluation and Reporting Agency

AENV – Alberta Environment

AER – Alberta Energy Regulator

AESRD – Alberta Environment and Sustainable Resource Development

ALCES – A Landscape Cumulative Effects Simulator

ALSA – *Alberta Land Stewardship Act*

APJA – *Administrative Procedures and Jurisdiction Act*

BLCN – Beaver Lake Cree Nation

BRFN – Blueberry River First Nation

CEAA – Canadian Environmental Assessment Agency

CEAA, 2012 – *Canadian Environmental Assessment Act, 2012*

CEM – Cumulative Effects Management

CEMA – Cumulative Environment Management Association

CLAWR – Cold Lake Air Weapons Range

CLFN – Cold Lake First Nations

CNRL – Canadian Natural Resources Limited

CO₂ – Carbon Dioxide

CPAWS – Canadian Parks and Wilderness Society

CPDFN – Chipewyan Prairie Dene First Nation

CRISP – Comprehensive Regional Infrastructure Sustainability Plan

CWA – *Canadian Wildlife Act*

DFO – Department of Fisheries and Oceans

DND – Department of National Defense

EBF – Ecosystem Base Flow

EIA – Environmental Impact Assessment

EIS – Environmental Impact Statement

EM – Ecosystem Management

EPEA – *Environmental Protection and Enhancement Act*

ESRD – Alberta Environment and Sustainable Resource Development

FMMFN – Fort McKay First Nation and Fort McKay Métis Community Association

Fort McKay Fort McKay First Nation and FMMCA/ Métis Local #63

GHG – Greenhouse gases

GoA – Government of Alberta

HC – Health Canada

IFN – Instream Flow Needs

ILM – Integrated Land Management

IR – Information Request

IUCN – International Union of Conservation of Nature

JME – Jackpine Mine Expansion

JRP – Joint Review Panel for the Shell Jackpine Mine Expansion

Km – kilometres

LAR – Lower Athabasca River Management Framework

LARP – Lower Athabasca Regional Plan

LICA – Lakeland Industry and Community Association

LUF – Alberta's Land-use Framework

M – metre

MCFN – Mikisew Cree First Nation

MSES – Management and Solutions in Environmental Science

NO₂ – Nitrogen Dioxide

NRTA – *Natural Resources Transfer Agreement*

NRV – Natural Range of Variation

NWPA – *Navigable Waters Protection Act*

OLCN – Onion Lake Cree Nation

PAH – Polycyclic Aromatic Hydrocarbon

PLAR – *Public Lands Administration Regulation*

PLART – Public Land Area for Recreation and Tourism

RAMP – Regional Aquatic Monitoring Program

RDP – Regulatory Details Plan

RFMA – Registered Fur Management Areas

RMWB – Regional Municipality of Wood Buffalo

RSA – Regional Study Area

SARA – *Species at Risk Act*

SO₂ – Sulphur Dioxide

TEK – Traditional Ecological Knowledge

TEMF – Terrestrial Ecosystem Management Framework

TK – Traditional Knowledge

TLRUMP – Traditional Land and Resource Use Management Plan

TLU – Traditional Land Use

ToR – Terms of Reference for Developing the Lower Athabasca Regional Plan

TRUMP – Traditional Resource Use Management Plan

WBEA – Wood Buffalo Environmental Association

WPA – Wildlife Preservation Area

WSAR – West Side of Athabasca River

Appendix 2: Information Requests Issued by the Review Panel

To: Government of Alberta

From: J. G. Gilmour, Chair, LARP Review Panel

Re: Information Request No. 1

Date: July 30, 2014

In accordance with Rule 29 of the Rules of Practice for Conducting Reviews of Regional Plans, the LARP Review Panel is seeking the current status of various initiatives described in the Plan which came into effect September 1, 2012.

The Panel is interested in knowing the status of the various departmental initiatives after two years of implementation, prior to reviewing each of the six applications. The requests are divided into two parts; one general information requests and the other for commitments made in LARP to the aboriginal people.

It is requested that the information requests be forwarded to the Review Panel by September 15, 2014.

Part I Status Report from GoA LARP 2012-2022 Initiatives		
	Statement	Status - Update by GOA (Identify Department Responsible)
Page in LARP		
17	Aquifers in the region have the potential to become affected by resource extraction development, any other activities in the region	Current Status of Aquifer
18	The Lower Athabasca Region represents the fastest growing regional source of greenhouse gas emissions (GHG)	Reference Auditor General Report of July 9, 2014 on GoA strategy on Green House Emissions
19	Explain Integrated Land Management (ILM)	
20/21	Joint Canada - Alberta implementation plan for Oil sands monitoring 2011 - Phased implementation over 3 years	Update on monitoring activities. Any annual reports filed?
21	Oil Sands Data Management Network (OS-DMN)	Status, annual reports?
21	Environmental Monitoring Working Group	Status, annual reports?
21	Letter of Intent - GoA/Fort McKay Sept 26 2011	Status, annual reports?
25	Integrated Land Management (ILM)	Who has participated in these practices? Only Voluntary?
26	Reclamation Strategy	File Copy
26	Tailings Management Framework	File Copy
27/28	Management Frameworks	
	a) Surface Water Quantity	
	b) Phase 2 Water Management	Timetable for Completion?
	c) Surface Water Quality	
	d) Air Quality	Any annual reports submitted?
	e) Groundwater	
	f) Biodiversity	
28	A Regional Landscape Management Plan by 2013	Status?
30	Selected conservation areas may allow a limited level of ecosystem forestry or natural disturbance based vegetation management	Identify any of these areas
31	The GOA is undertaking Comprehensive Regional Infrastructure Sustainability Planning for the three oil sands areas (CRISP)	CRISP for Athabasca Oil Sand Complete? Status for two remaining oil sands areas?
32	* Plan for Parks Strategy	

Part I Status Report from GoA LARP 2012-2022 Initiatives		
	* Alberta Recreation Corridor and Trails Designation Program	File Documents
	* Active Alberta	
33	* Tourism Development Strategy	
	* Recreation and Tourism Management	File Documents
	* Strategy for Public Land	
	* Plan for Parks	
39	* Wildlife Management Planning	Status?
	* Alberta Forest Products Roadmap to 2020	
40	Tourism opportunity assessments for Quarry of the Ancestors, Bitumount and Fort Chipewyan	Status?
40	Scenic Byways Network	Status?
41	Rules regarding physical access to energy, mineral and coal resources	Status?
41	Policies to promote new investments in energy, mineral and coal resources	Status?
45	Develop an Integrated Watershed Based Landscape Management Plan by 2013	Status?
46	Complete a Tailings Management Framework	Status?
	General Information Request	
	* Please identify the date and purpose of the "Science Advisory Council"	
	* Has the Council been enacted in legislation?	
	* Does the Council have to submit annual reports to Cabinet?	

Part II Status Report From GoA LARP Commitments to Aboriginal Peoples		
Page in Larp	Commitments to Aboriginal Peoples Statements	Status Update by GOA (Identify Department Responsible)
22	The GOA collaborates with aboriginal communities toward protecting traditional use locations of culture and spiritual significance.	Update Status
29	In developing a biodiversity management framework and a landscape management plan, the GOA will work with First Nations to consider how First Nations' exercise of constitutionally protected rights to hunt, fish and trap for food can continue to occur within reasonable proximity of First Nations' main population centers.	Update Status
29	Engagement with aboriginal communities is desired as air, water, land and biodiversity strategies and plans are developed.	Identify which Aboriginal communities have been engaged
29	The GOA is committed to achieving naturally sustaining woodland caribou populations. Planning and implementation will consider: a) provincial and federal legislative requirements; b) First Nations rights and traditional uses; c) social/economic impacts; and d) stakeholder interests.	Submit policy update which First Nations have been consulted
30	Government will engage with first Nations and stakeholders' on initiatives to designate motorized areas such as identification of trails or areas when developing the regional parks plan and regional trail system plan.	Update Status
34	The GOA will invite First Nations who have expressed an interest in the Richardson Backcountry to be involved in a sub-regional initiative called the First Nations - Richardson Backcountry Stewardship Initiative.	Update Status on initiative with First Nations
	The GOA will also work with aboriginal people to identify tourism and cultural synergies which could provide economic opportunities to aboriginal communities.	Update Status
	The GOA will consult with aboriginal communities concerning traditional knowledge.	What consultation has taken place regarding this issue?
38	Implementing key recommendations in "Connecting the Dots: Aboriginal Workforce and Economic Development in Alberta.	What recommendations have been implemented?
40	Work collaboratively with local aboriginal communities, the private sector and local governments to enlarge and expand the supply of tourism products and infrastructure.	Update Status
	Complete tourism opportunity assessments beginning with Quarry of the Ancestors, Bitumount and Fort Chipewyan. The assessments will identify a range of potential aboriginal opportunities, including guided tours, education progress, attractions, exhibits or interpretive sites.	What assessments have been completed?

Part II Status Report From GoA LARP Commitments to Aboriginal Peoples	
45C	Develop a "Biodiversity Management Framework" for public lands in the Green Area and provincial parks by the end of 2013 (include aboriginal communities). Status on Framework Agreement?
45D	Develop an integrated water-shed based "Landscape Management Plan" for public land in the green area by the end of 2013 (include aboriginal communities). Update Status
63D	In collaboration with aboriginal and other communities, stakeholders and partners, coordinate the development of the Lower Athabasca Regional Trail System Plan. Update Status
63	Outcome 7-Inclusion of Aboriginal Peoples in Land Use Planning Strategies (a-f) Update Status
90	Note 6 - Hunting, Fishing, and Trapping (Including Aboriginal Peoples) Update Status

To: Government of Alberta

From: J. Gilmour, Chair, LARP Review Panel

Re: Information Request No. 2

Date: September 3, 2014

In accordance with Rule 28 of the *Rules of Practice for Conducting Reviews of Regional Plans*, the Lower Athabasca Regional Plan (LARP) Review Panel is seeking clarifying information related to the LARP which came into effect September 1, 2012.

Following the review of the Government of Alberta's responses in the Matter of Requests for Review of the Lower Athabasca Regional Plan Pursuant to s. 19.2 of the *Alberta Land Stewardship Act* submitted by the:

- Athabasca Chipewyan First Nation (June 25, 2014, reference pages 24 and 25)
- Chipewyan Prairie Dene First Nation (June 25, 2014, reference pages 20 and 21)
- Cold Lake First nation (June 25, 2014, reference pages 21 and 22)
- Fort McKay First Nation and the Fort McKay Métis Community Association (June 25, 2014, reference pages 20 and 21)
- Mikisew Cree First Nation (June 25, 2014, reference pages 21 and 22)
- Onion Lake Cree Nation (June 25, 2014, reference pages 19 and 20)

The LARP Review Panel has an Information Request in two parts:

1. A request to the Government of Alberta to provide the following map information:
 - Using the digital map of the layered information on page 93 of the LARP, please add the following map theme layers
 - LARP Proposed new Conservation Areas or future additions to existing Conservation Areas
 - LARP Designated Historical Resource Sites
 - Traditional Use Areas for the six First Nation applications being considered by the LARP Review Panel, with the extended area into Saskatchewan for the Onion Lake Cree Nation.

Requested Date for delivery to the LARP Review Panel: September 19, 2014

2. A request to the Government of Alberta to provide information to the Review Panel on the implications from the Government of Alberta's view at the time of LARP approval of First Nations Traditional Use of:
 - Conservation Areas
 - Recreation and Tourism Areas including Provincial Parks and Protected Areas, Provincial Recreation Areas, and Public Land Areas for Recreation / Tourism
 - Lakeland Country Iconic Tourism Destination

Requested Dates for delivery to the LARP Review Panel: September 19, 2014 for the information and use by the Review Panel.

In accordance with Rule 32 of the *Rules of Practice for Conducting Reviews of Regional Plans* should the other parties wish to respond to this Information Request, they are asked to do so by October 21, 2014.

Prepared for Review by: J. Gilmour, Chair and W. Twin, Member, LARP Review Panel
Prepared by: J. Gendron, Member, LARP Review Panel
Date: Revised September 3, 2014

To: Onion Lake Cree Nation
From: J. Gilmour, Chair, LARP Review Panel
Re: Information Request No. 3
Date: September 3, 2014

In accordance with Rule 28 of the *Rules of Practice for Conducting Reviews of Regional Plans*, the Lower Athabasca Regional Plan (LARP) Review Panel is seeking clarifying information related to the LARP which came into effect September 1, 2012.

The request is based on the *Submission by the Onion Lake Cree Nation Request for Review of the Lower Athabasca Regional Plan* (August 29, 2013, pages 1 to 9).

Specific to the Onion Lake Cree Nation application, the LARP Review Panel respectfully requests that representatives provide:

- The Onion Lake Cree Nation's definition of Traditional Use, and
- A map outlining the Nation's Traditional Use Area.

Requested Date for delivery to the LARP Review Panel: September 19, 2014

In accordance with Rule 32 of the *Rules of Practice for Conducting Reviews of Regional Plans* should the other party wish to respond to this Information Request, they are asked to do so by October 21, 2014.

Prepared for Review by: J. Gilmour, Chair and W. Twin, Member, LARP Review Panel
Prepared by: J. Gendron, Member, LARP Review Panel
Date: Revised September 3, 2014

To: Government of Alberta

From: J. Gilmour, Chair, LARP Review Panel

Re: Information Request No. 4

Date: October 28, 2014

In accordance with Rule 28 of the *Rules of Practice for Conducting Reviews of Regional Plans*, the Lower Athabasca Regional Plan (LARP) Review Panel is seeking clarifying information related to the LARP which came into effect September 1, 2012.

Be advised that the Review Panel has carefully considered the objections set out in the letter dated August 19, 2014 from Mr. Gierulski. In addition, the Review Panel has reviewed the Applications by the six First Nations for a review of LARP, the Response Submissions filed by Alberta on June 25, 2014 in relation to these applications, and the replies filed by five First Nations to the Alberta Response. The Review Panel has decided that it has jurisdiction to proceed with this information request. Under Rule 31 a full and adequate response is now required of Alberta.

The Review Panel requires the assistance of Alberta to provide the information set out below which we understand to be in Alberta's possession.

Information Request:

The LARP Review Panel has the following Information Request:

A request to the Government of Alberta to provide the status reports set out in the attached Table.

Requested Dates for delivery to the LARP Review Panel: November 14, for the information and use by the Review Panel.

In accordance with Rule 32 of the *Rules of Practice for Conducting Reviews of Regional Plans* should the other parties wish to respond to this Information Request, they are asked to do so by November 30, 2014.

Status Report From GoA LARP Commitments to Aboriginal Peoples		
Page in Larp	Commitments to Aboriginal Peoples Statements	Status Update by GOA (Identify Department Responsible)
22	The GOA collaborates with aboriginal communities toward protecting traditional use locations of culture and spiritual significance.	Update Status
29	In developing a biodiversity management framework and a landscape management plan, the GOA will work with First Nations to consider how First Nations' exercise of constitutionally protected rights to hunt, fish and trap for food can continue to occur within reasonable proximity of First Nations' main population centers.	Update Status
29	Engagement with aboriginal communities is desired as air, water, land and biodiversity strategies and plans are developed.	Identify which Aboriginal communities have been engaged
29	The GOA is committed to achieving naturally sustaining woodland caribou populations. Planning and implementation will consider: a) provincial and federal legislative requirements; b) First Nations rights and traditional uses; c) social/economic impacts; and d) stakeholder interests.	Submit policy update which First Nations have been consulted
30	Government will engage with first Nations and stakeholders' on initiatives to designate motorized areas such as identification of trails or areas when developing the regional parks plan and regional trail system plan.	Update Status
34	The GOA will invite First Nations who have expressed an interest in the Richardson Backcountry to be involved in a sub-regional initiative called the First Nations - Richardson Backcountry Stewardship Initiative.	Update Status on initiative with First Nations
	The GOA will also work with aboriginal people to identify tourism and cultural synergies which could provide economic opportunities to aboriginal communities.	Update Status
	The GOA will consult with aboriginal communities concerning traditional knowledge.	What consultation has taken place regarding this issue?
38	Implementing key recommendations in "Connecting the Dots: Aboriginal Workforce and Economic Development in Alberta.	What recommendations have been implemented?
40	Work collaboratively with local aboriginal communities, the private sector and local governments to enlarge and expand the supply of tourism products and infrastructure.	Update Status
	Complete tourism opportunity assessments beginning with Quarry of the Ancestors, Bitumount and Fort Chipewyan. The assessments will identify a range of potential aboriginal opportunities, including guided tours, education progress, attractions, exhibits or interpretive sites.	What assessments have been completed?

Status Report From GoA LARP Commitments to Aboriginal Peoples		
45C	Develop a "Biodiversity Management Framework" for public lands in the Green Area and provincial parks by the end of 2013 (include aboriginal communities).	Status on Framework Agreement?
45D	Develop an integrated water-shed based "Landscape Management Plan" for public land in the green area by the end of 2013 (include aboriginal communities).	Update Status
63D	In collaboration with aboriginal and other communities, stakeholders and partners, coordinate the development of the Lower Athabasca Regional Trail System Plan.	Update Status
63	Outcome 7-Inclusion of Aboriginal Peoples in Land Use Planning Strategies (a-f)	Update Status
90	Note 6 - Hunting, Fishing, and Trapping (Including Aboriginal Peoples)	Update Status

To: Government of Alberta

From: J. Gilmour, Chair, LARP Review Panel

Re: Information Request No. 5

Date: October 28, 2014

In accordance with Rule 28 of the *Rules of Practice for Conducting Reviews of Regional Plans*, the Lower Athabasca Regional Plan (LARP) Review Panel is seeking clarifying information related to the LARP which came into effect September 1, 2012.

Be advised that the Review Panel has carefully considered the objections set out in the letter dated September 18, 2014 from Mr. Gierulski. In addition, the Review Panel has reviewed the Applications by the six First Nations for a review of LARP, the Response Submissions filed by Alberta on June 25, 2014 in relation to these applications, and the replies filed by five First Nations to the Alberta Response. The Review Panel has decided that it has jurisdiction to proceed with this information request. Under Rule 31 a full and adequate response is now required of Alberta.

The Review Panel requires the assistance of Alberta to identify, analyze and provide the information set out below which we understand to be in Alberta's possession. If the permission of First Nations to release any of this information is required, we expect Alberta to (1) seek that permission; or (2) notify the Review Panel so that it can take steps to secure the necessary permissions.

Preamble:

Following the review of the Government of Alberta's responses in the Matter of Requests for Review of the Lower Athabasca Regional Plan Pursuant to s. 19.2 of the *Alberta Land Stewardship Act* submitted by the:

- Athabasca Chipewyan First Nation (June 25, 2014, reference pages 24 and 25)
- Chipewyan Prairie Dene First Nation (June 25, 2014, reference pages 20 and 21)
- Cold Lake First nation (June 25, 2014, reference pages 21 and 22)
- Fort McKay First Nation and the Fort McKay Métis Community Association (June 25, 2014, reference pages 20 and 21)
- Mikisew Cree First Nation (June 25, 2014, reference pages 21 and 22)
- Onion Lake Cree Nation (June 25, 2014, reference pages 19 and 20)

Information Request:

The LARP Review Panel has the following Information Request:

A request to the Government of Alberta to provide information to the Review Panel on traditional land use, including maps, if available, for each applicant First Nation Applicant to determine if there are shared or overlapping traditional land use areas in relation to the following types of areas or regions:

- Conservation Areas;
- Recreation and Tourism Areas including Provincial Parks and Protected Areas, Provincial Recreation Areas, and Public Land Areas for Recreation / Tourism; and
- Lakeland Country Iconic Tourism Destination.

Requested Dates for delivery to the LARP Review Panel: November 14, for the information and use by the Review Panel.

In accordance with Rule 32 of the *Rules of Practice for Conducting Reviews of Regional Plans* should the other parties wish to respond to this Information Request, they are asked to do so by November 30, 2014.

Document #: 780399

To: Athabasca Chipewyan First Nation
From: J. Gilmour, Chair, LARP Review Panel
Re: Information Request No. 6
Date: October 28, 2014

In accordance with Rule 28 of the *Rules of Practice for Conducting Reviews of Regional Plans*, the Lower Athabasca Regional Plan (LARP) Review Panel is seeking clarifying information related to the LARP which came into effect September 1, 2012.

The request is based on the *Submission by the Athabasca Chipewyan First Nation Request for Review of the Lower Athabasca Regional Plan* (August 19, 2013).

Information Request:

Specific to the Athabasca Chipewyan First Nation application, the LARP Review Panel respectfully requests that representatives provide:

- The Athabasca Chipewyan First Nation's definition of Traditional Use, and
- A map outlining the ACFN's Traditional Use Area.

Requested Dates for delivery to the LARP Review Panel: November 14, for the information and use by the Review Panel.

In accordance with Rule 32 of the *Rules of Practice for Conducting Reviews of Regional Plans* should the other parties wish to respond to this Information Request, they are asked to do so by November 30, 2014.

To: Cold Lake First Nation (CLFN)

From: J. Gilmour, Chair, LARP Review Panel

Re: Information Request No. 7

Date: November 4, 2014

In accordance with Rule 28 of the *Rules of Practice for Conducting Reviews of Regional Plans*, the Lower Athabasca Regional Plan (LARP) Review Panel is seeking clarifying information related to the LARP which came into effect September 1, 2012.

The request is based on the *Submission by the Cold Lake First Nation Request for Review of the Lower Athabasca Regional Plan* (August 30, 2013).

Information Request:

1. Please indicate whether the new Dillon Conservation Area (the "Conservation Area") is within the CLFN traditional land use (TLU) area? If not, describe its location with reference to the CLFN TLU area. Provide a map to assist with your description.
2. What are your specific concerns with respect to this new Conservation Area? Please focus your answer on the CLFN's views about the effects of the Conservation Area in the CLFN's health, property, income or quiet enjoyment of property, or some combination of them.
3. Please indicate whether the two new provincial recreation areas at Clyde and Winifred Lakes (the "Recreation Areas"), are within the CLFN TLU area? If not, describe their location with reference to the CLFN TLU area. Provide a map to assist with your description.
4. What are your specific concerns with respect to these new Recreation Areas? Please focus your answer on the CLFN's views about the effects of the Conservation Area on the CLFN's health, property, income or quiet enjoyment of property, or some combination of them.
5. With respect to these Recreation Areas, please indicate whether CLFN has concerns other than multiple users hunting and fishing in the Recreation Areas? Is CLFN suggesting "exclusive use" of the Areas only for your members if these lakes are within your TLU area? If not, are you recommending a compromise between your members and the public? If that is the CLFN view, please describe your proposed management regime?

Requested Dates for delivery to the LARP Review Panel: November 13, for the information and use by the Review Panel.

In accordance with Rule 32 of the *Rules of Practice for Conducting Reviews of Regional Plans* should the other parties wish to respond to this Information Request, they are asked to do so by November 30, 2014.

To: Onion Lake Cree Nation (OLCN)

From: J. Gilmour, Chair, LARP Review Panel

Re: Information Request No. 8

Date: November 5, 2014

In accordance with Rule 28 of the *Rules of Practice for Conducting Reviews of Regional Plans*, the Lower Athabasca Regional Plan (LARP) Review Panel is seeking clarifying information related to the LARP which came into effect September 1, 2012.

The request is based on the *Submission by the Onion Lake Cree Nation Request for Review of the Lower Athabasca Regional Plan* (August 29, 2013).

Preamble:

The Rules of Practice for Conducting Reviews of Regional Plans, section 38(b) require that the Panel explain to the Stewardship Minister how an Applicant for a review will be adversely affected with respect to health, property, income or quiet enjoyment of property by the Plan. In the OLCN Application a number of claims are made suggesting that the First Nation is directly and adversely affected, including:

1. A loss of wildlife as food consumables;
2. The loss of trapping activities resulting in a loss of income;
3. The possible loss of quiet enjoyment as a result of activities in the TLU area;
4. The health and wellness impact on First Nation members as a result of not enjoying activities in the TLU area;
5. The impact of having no conservation areas close to your reserve; and
6. The adverse impacts of recreation and tourism areas on the TLU lands.

Information Request:

1. Please provide the Review Panel with any studies or reviews which have been relied on by OLCN to substantiate the claims in your August 29, 2013 submission.
2. Does OLCN have any Traditional Use Data or studies to show the impact on culture and ceremony practices conducted on the land?
3. Does the OLCN have any Traditional Use Data to identify the types of Medicinal Plants, berries, and shrubs that are gathered for traditional use?

Requested Dates for delivery to the LARP Review Panel: November 13, for the information and use by the Review Panel.

In accordance with Rule 32 of the *Rules of Practice for Conducting Reviews of Regional Plans* should the other parties wish to respond to this Information Request, they are asked to do so by November 30, 2014.

To: Government of Alberta

From: J. Gilmour, Chair, LARP Review Panel

Re: Information Request No. 9

Date: November 18, 2014

In accordance with Rule 28 of the *Rules of Practice for Conducting Reviews of Regional Plans*, the Lower Athabasca Regional Plan (LARP) Review Panel is seeking clarifying information related to the LARP which came into effect September 1, 2012.

Be advised that the Review Panel has carefully considered the objections to previous Information Requests set out in correspondence from counsel for Alberta Justice. In addition, the Review Panel has reviewed the Applications by the six First Nations for a review of LARP, the Response Submissions filed by Alberta on June 25, 2014 in relation to these applications, and the replies filed by five First Nations to the Alberta Response. The Review Panel has decided that it has jurisdiction to proceed with this information request. Under Rule 31 a full and adequate response is now required of Alberta.

The Review Panel requires the assistance of Alberta to identify, analyze and provide the information set out below which we understand to be in Alberta's possession.

Information Request:

1. With report to LARP Progress Report for 2013 ("the Report"), page 9, please confirm LARP plans and respective completion dates for the following frameworks/ strategies:
 - Air quality
 - Surface water quality
 - Biodiversity
 - Tailings
 - Surface water quantity
 - Groundwater
 - Strategy for reclamation
2. On page 3 of the Report, under the LARP Outcome heading "Air and Water are managed to support human and ecosystem needs", it states that the Groundwater Management Framework is complete. On page 12 of the Report it notes that "the Regional Groundwater Monitoring Network is ongoing".

3. On page 3 of the Report, under the LARP Outcome heading “Air and Water are managed to support human and ecosystem needs”, it states that the Groundwater Management Framework is complete. On page 12 of the Report it notes that “the Regional Groundwater Monitoring Network is ongoing”.
 - Please file a copy of the Groundwater Management Framework if it is complete.
 - Describe more fully the “Network” plans and the activities planned to enforce the Network.
 - Have the locations of the monitoring stations been determined? If so, provide the geographical location or legal land description.
4. On page 3 of the Report for 2013, it states that the Air Quality and Surface Water Quality Management Framework agreement implementation is still on-going. It is the Panels understanding that both of these documents have been implemented in 2013 and Annual Reports for 2012 were filed for both of these documents in March 2014. Please confirm.
5. In the “Executive Summary” of the Annual Report for 2012 for the above two Management Framework Agreements, it refers to “triggers” being initiated in ten monitoring air stations for NO₂ and for SO₂.
 - How many air monitoring stations are there for the Lower Athabasca Region? Where are they located?
 - Describe the function of such stations to the Clean Air Strategic Alliance Data Warehouse;
 - What agency/agencies operates these monitoring stations?
 - On the basis of the Alberta Ambient Air Quality Objectives, could there be additional industrial pollutants in the air in the Lower Athabasca Region besides NO₂ and SO₂?
6. In the “Executive Summary” of the Annual Progress Report for 2012 for the Water Quality Framework Agreement it refers to three of the thirty-eight water quality indicators being triggered at the Old Fort Station.
 - Where is the Old Fort Station Located?
 - Is the Old Fort Station the old monitoring station for water quality in the Region? If so, why is there only one monitoring station for water quality in the Region?
7. Mention is made in the above Report that progress has been made on “Verification and preliminary assessments for both air and water quality and “investigation” has been initiated for air quality only.
 - When will the “interpretation” phase be completed for both air and water quality?
 - The Report mentions that “ERSD will determine the need for further investigation to identify potential management actions”. Will this report be available in 2014?
 - If the 2012 progress reports for the above two management framework agreements were not published until March 2014, when will the annual reports for these two agreements be published for 2013?

8. The 2013 Progress Report for LARP in its introduction places considerable weight on the monitoring of the framework agreements. On page 65 of LARP, it decides the importance of government lead departments developing effective monitoring, evaluation and reporting with respect to the various strategies and outcomes they are responsible for. Page 67 of LARP in Part 8 of the document notes the “Regulatory Details Plan for Monitoring and Reporting”. Describe how such monitoring and reporting will be achieved by the GOA.
9. On page 9 of the Report, it notes that in 2013 the Alberta Environmental Monitoring Evaluation and Reporting Agency (AEMERA) was created in legislation.
 - Describe the enabling legislation which created this agency. Has it been proclaimed yet?
 - Describe the roles and functions of this agency and how after it reports to the GOA.
 - How this agency commenced to operate. If not when will it make its first report to the GOA?
10. On the same page of the above Report, it refers to the “Canada Alberta Oil Sands Environmental Monitoring Information Portal”
 - What is this agencies mandate and responsibilities?;
 - Is this agency operating? When do you anticipate a report from them? If they have filed a report with the GOA, please file a copy with the Secretariat.
11. At the bottom of page 19 of LARP, it refers to “Monitoring, evaluation and reporting initiatives and programs in the region are conducted by the Government of Alberta as well as:
 - Wood Buffalo Environmental Association;
 - The Lakeland Industry and Community Association;
 - Regional Aquatics Monitoring Program
 - Alberta Biodiversity Monitoring Institute.
 - Describe how each of the above from organizations assist the GOA with monitoring, evaluating, and reporting the region’s air, water, land and biodiversity strategies described in LARP;
 - Besides AEMERA and the Canada-Alberta Oil Sands, and the four organizations described above, are there any other organizations or agencies which assist the GOA in monitoring, evaluating and reporting on the various air, water, land and biodiversity strategies described in LARP?

Requested Dates for delivery to the LARP Review Panel: December 8, 2014, for the information and use by the Review Panel.

In accordance with Rule 32 of the *Rules of Practice for Conducting Reviews of Regional Plans* should the other parties wish to respond to this Information Request, they are asked to do so by December 31, 2014.

To: Chipewyan Prairie Dene First Nation (CPDFN)

From: J. Gilmour, Chair, LARP Review Panel

Re: Information Request No. 10

Date: November 27, 2014

In accordance with Rule 28 of the *Rules of Practice for Conducting Reviews of Regional Plans*, the Lower Athabasca Regional Plan (LARP) Review Panel is seeking clarifying information related to the LARP which came into effect September 1, 2012.

Be advised that the Review Panel has carefully considered the objections to previous Information Requests set out in correspondence from counsel for Alberta Justice. In addition, the Review Panel has reviewed the Applications by the six First Nations for a review of LARP, the Response Submissions filed by Alberta on June 25, 2014 in relation to these applications, and the replies filed by five First Nations to the Alberta Response. The Review Panel has decided that it has jurisdiction to proceed with this information request. Under Rule 31 a full and adequate response is now required of Alberta.

The Review Panel requires the assistance of Alberta to identify, analyze and provide the information set out below which we understand to be in Alberta's possession.

1. Please identify the concerns you have regarding the creation of the new Dillon Conservation Area.

The Crown in their response to your submission, dated June 25, 2014 paragraph 93 on page 19 that:

- a. The area is relatively small, and
- b. The area is contiguous with the Gipsy- Gordon conservation area designated under LARP (pages 84 and 93 in LARP)
- c. New forestry harvesting and mineral activities are not contemplated within either of these two conservation areas (LARP, page 98)

2. Where is the Dillon Conservation Area in relation to your TLU lands?

Requested Dates for delivery to the LARP Review Panel: December 12, 2014, for the information and use by the Review Panel.

In accordance with Rule 32 of the *Rules of Practice for Conducting Reviews of Regional Plans* should the other parties wish to respond to this Information Request, they are asked to do so by December 31, 2014.

To: Government of Alberta

From: J. Gilmour, Chair, LARP Review Panel

Re: Information Request No. 11

Date: November 27, 2014

In accordance with Rule 28 of the *Rules of Practice for Conducting Reviews of Regional Plans*, the Lower Athabasca Regional Plan (LARP) Review Panel is seeking clarifying information related to the LARP which came into effect September 1, 2012.

Be advised that the Review Panel has carefully considered the objections to previous Information Requests set out in correspondence from counsel for Alberta Justice. In addition, the Review Panel has reviewed the Applications by the six First Nations for a review of LARP, the Response Submissions filed by Alberta on June 25, 2014 in relation to these applications, and the replies filed by five First Nations to the Alberta Response. The Review Panel has decided that it has jurisdiction to proceed with this information request. Under Rule 31 a full and adequate response is now required of Alberta.

The Review Panel requires the assistance of Alberta to identify, analyze and provide the information set out below which we understand to be in Alberta's possession.

1. In your response to Information Request No. 4 paragraph 8, page 5 concerning the issue of traditional knowledge in Aboriginal communities, you refer to the "Cumulative Environmental Management Association" (CEMA). Traditional Knowledge Working Groups who are in the process of developing a Traditional Knowledge Framework. Could you please provide the following information:
 - Who chairs this group?
 - What First Nations have participated in this Group?
 - How many First Nations are still remaining in the Group?
 - What is the Groups mandate?
 - When is the Framework due to be submitted to the GOA?
 - When the Framework is complete, how is it intended to assist both the GOA and the First Nations communities?
2. In the document provided "Connecting the Dots: Progress Highlights" published in October 2013, it states that the Aboriginal Workforce Strategy Steering Committee, which was assembled in 2012, established the nine strategies in the document. Could you please provide the following clarification:
 - Are any of the Applicant FN's on this Steering Committee?
 - Who chairs this Committee? Who sits on the Committee?
 - As a result of these strategies, has the unemployment rate for Aboriginal peoples improved this past year?
 - What significant steps are being taken "to support young Aboriginal Albertans to be successful in school and the workplace".

Requested Dates for delivery to the LARP Review Panel: December 8, 2014, for the information and use by the Review Panel.

In accordance with Rule 32 of the *Rules of Practice for Conducting Reviews of Regional Plans* should the other parties wish to respond to this Information Request, they are asked to do so by December 31, 2014.

To: Mikisew Cree First Nation (MCFN)
From: J. Gilmour, Chair, LARP Review Panel
Re: Information Request No. 12
Date: January 12, 2015

In accordance with Rule 28 of the *Rules of Practice for Conducting Reviews of Regional Plans*, the Lower Athabasca Regional Plan (LARP) Review Panel is seeking clarifying information related to the LARP which came into effect September 1, 2012.

The Review Panel requires the assistance of Alberta to identify, analyze and provide the information set out below which we understand to be in Alberta's possession.

Information Request

1. In your written evidence, you stated that any new conservation area proposed in LARP was remote. Could you please name the conservation area you refer to and how far is it located from your TLU territory?
2. Are there any new recreational areas located within your TLU territory? If so, please refer to their location.

Requested Dates for delivery to the LARP Review Panel: January 23, 2015, for the information and use by the Review Panel.

In accordance with Rule 32 of the *Rules of Practice for Conducting Reviews of Regional Plans* should the Government of Alberta wish to respond to this Information Request, they are asked to do so by January 30, 2015.

To: Onion Lake Cree Nation (OLCN)

From: J. Gilmour, Chair, LARP Review Panel

Re: Information Request No. 13

Date: January 12, 2015

In accordance with Rule 28 of the *Rules of Practice for Conducting Reviews of Regional Plans*, the Lower Athabasca Regional Plan (LARP) Review Panel is seeking clarifying information related to the LARP which came into effect September 1, 2012.

The request is based on the *Submission by the Onion Lake Cree Nation Request for Review of the Lower Athabasca Regional Plan* (August 29, 2013).

The Review Panel requires the assistance of Alberta to identify, analyze and provide the information set out below which we understand to be in Alberta's possession.

Information Request:

1. Could you please confirm whether there are any recreational areas (Winifred Lake or Clyde Lake) within your TLU territory in Alberta?

Requested Dates for delivery to the LARP Review Panel: January 23, 2015, for the information and use by the Review Panel.

In accordance with Rule 32 of the *Rules of Practice for Conducting Reviews of Regional Plans* should the Government of Alberta wish to respond to this Information Request, they are asked to do so by January 30, 2015.

To: All First Nation Applicants

From: J. Gilmour, Chair, LARP Review Panel

Re: Information Request No. 14

Date: January 12, 2015

RE: LEGAL MEANING - "QUIET ENJOYMENT OF PROPERTY"

In accordance with Rule 28 of the *Rules of Practice for Conducting Reviews of Regional Plans*, the Lower Athabasca Regional Plan (LARP) Review Panel is seeking clarifying information related to the LARP which came into effect September 1, 2012.

Section 36 of the ALSA Rules requires that the Panel provide advice on whether "... the applicant is directly and adversely affected ... by a specific provision or provisions in a regional plan." Paragraph 5(1)(c) of the ALSR defines "directly and adversely affected". That definition includes reference to "quiet enjoyment of property" as one of the protected matters which should be no more than minimally harmed by a regional plan.

The Review Panel has received evidence and written argument from several Applicants that suggest that "quiet enjoyment" of Traditional Land Use (TLU) areas will be adversely affected by the LARP.

In order to fully and satisfactorily understand these submissions, Review Panel requests that interested First Nations Applicants submit a legal brief by setting out their views on the relationship between "quiet enjoyment of property" and the alleged effects of LARP on TLU areas.

The Review Panel encourages Counsel for Alberta to respond to any submissions received in accordance with Rule 32.

Requested Dates for delivery to the LARP Review Panel: January 23, 2015, for the information and use by the Review Panel.

In accordance with Rule 32 of the *Rules of Practice for Conducting Reviews of Regional Plans* should the Government of Alberta wish to respond to this Information Request, they are asked to do so by January 30, 2015.

cc: GOA

Appendix 3: Jurisdictional Ruling by the Review Panel

Introduction

The Lower Athabasca Regional Plan (LARP) is a regional plan approved by the Government of Alberta (Alberta) under the authority of the *Alberta Land Stewardship Act* (ALSA) to provide for long term sustainable development in the Lower Athabasca Region of the province. The LARP was tabled before the Legislative Assembly in August 2012 and became effective on September 1, 2012.

Section 19.2 of the ALSA and the *Alberta Land Stewardship Regulation* (ALSR) provide an opportunity for persons who claim that they are “directly and adversely affected” by the LARP to apply for a review of the LARP, within 12 months of the date that the LARP comes in to force. Six First Nations applied for such a review of the LARP. They are Athabasca Chipewyan First Nation (ACFN), Mikisew Cree First Nation (MCFN), Cold Lake First Nations (CLFN), Onion Lake Cree Nation (OLCN), Fort McKay First Nation and Fort McKay Métis Community Association (FMFN), and Chipewyan Prairie Dene First Nation (CPDFN) (the Applicants).

Upon receipt of the completed applications from the Applicants, the Stewardship Minister was required to appoint a Review Panel to conduct this review in accordance with the legislation. Under the ALSA *Rules of Practice for Conducting Reviews of Regional Plans* (the Rules), the Review Panel constituted to conduct the review is restricted to consideration of written submissions. These submissions include the original applications from the First Nations, received in the latter part of August 2013, a response to each of the six applications, filed by Alberta on June 25, 2014, and replies by five of the six Applicants to Alberta’s submissions.¹

These written submissions set out strongly divergent views about the scope of the Review Panel’s jurisdiction. Alberta’s response to many of the concerns raised by

the Applicants was to assert that those issues were outside the Review Panel’s jurisdiction.²

The Review Panel subsequently issued Information Requests (IR) to Alberta and the Applicants (the Parties) pursuant to section 28 of the Rules. Alberta’s response to several of the Information Requests repeated its views about the limited scope of the Panel’s jurisdiction,³ consistent with its June 25, 2014 responses.

In the circumstances, the Review Panel is of the view that it is necessary to set out its interpretation of its jurisdiction. The jurisdictional issues raised by Alberta affect all of the applications. In order to complete its review and provide its advice to the Stewardship Minister in the time allowed by Rule 40, the scope of the Review Panel’s authority must be determined.

This ruling should guide the Parties in all future submissions and responses to Information Requests from the Review Panel.

The Review Panel thanks all of the Parties for their extensive and detailed submissions on these jurisdictional questions.

Statutory Interpretation

The scope of the Review Panel’s authority depends directly on its jurisdiction. In order to determine its jurisdiction the Review Panel must look to and interpret, the ALSA and the ALSR. The first question to be addressed then is how to characterize the proper approach to this statutory interpretation exercise.

Based on its review of the submissions and relevant authorities, the Review Panel has concluded that, when interpreting the provisions of its authorizing legislation, it should give a remedial and purposive interpretation to the provisions of the Act (ALSA) and Regulation (ALSR). A purposive approach considers the whole context of the legislative scheme.⁴ The

¹ OLCN did not provide a Reply to Alberta’s Response to its Request for Review. ² For the citation of specific points made by Alberta, unless otherwise noted, the Review Panel will refer to paragraph numbers in the Alberta response to CLFN (the “Alberta Response”), however, the arguments in Alberta’s responses to all six First Nations Applicants were virtually identical. ³ See in particular Alberta’s responses to Panel IRs #9 and #11 dated December 8 and 12, 2014 respectively. ⁴ Several of the First Nations emphasized that Alberta’s narrow interpretation of the statutory provisions in its Response restricts their right of review in a way which is not consistent with the principles of statutory interpretation.

common law, the ALSA and the *Alberta Interpretation Act* (AIA) all require a remedial and purposive interpretation of these authorities.⁵ In addition, the Review Panel notes the legislative hierarchy which exists. The Rules should not be interpreted in a way which prevents statutory objects from being achieved. The overall scheme should be interpreted so that these authorities work together harmoniously.

In the Review Panel's view, the approach to the overall interpretation of these authorities proposed in the Alberta submissions and, of the Review Panel's jurisdiction in particular, is narrow and restrictive. Alberta's argument seems, to the Review Panel, too narrowly focused on sections 5(1)(c) of the ALSR and on Rules 35-39. Greater recognition and weight should have been given to the ALSA section 1 "Purposes of the Act", section 2 "Definitions" and in particular subsection 2(h), and section 13 which leads us to the text of the LARP as a means for determining the meaning of the Plan.

It is a principle of statutory interpretation that the Legislature does not intend to produce absurd consequences.⁶ The Review Panel finds the Alberta argument which concludes that the Review Panel has no jurisdiction to consider questions of constitutional law, consultation during the development of the LARP, "harms" that pre-date the LARP, "harms" related to future development activity, "harms" related to the implementation of the LARP, or "harms" related to omissions from the LARP reduces the Review Panel's role to a point approaching absurdity. For the reasons and in the instances set out below, the Review Panel finds that its jurisdiction is broader than that proposed in the Alberta Response.

Panel's Jurisdiction to Determine Questions of Constitutional Law

The Review Panel carefully considered Alberta's argument about the Review Panel's jurisdiction to determine questions of constitutional law. Alberta submits that the Review Panel is a decision-maker

bound by the *Administrative Procedure and Jurisdiction Act* (the "APJA") because other government officials have been found to be "decision-makers" within the meaning of that term in section 10 of the APJA. Alberta cites *Siksika First Nation v. Alberta (Director Southern Region Environment)*⁷ as authority for this proposition. Alberta submits correctly that the Review Panel is not included among the decision-makers listed in the *Designation of Constitutional Decision-Makers Regulation* 69/2006.⁸

Alberta's position is that the Review Panel cannot determine questions of constitutional law. Alberta asserts that a finding that the LARP infringes Aboriginal or Treaty rights would necessarily involve determining rights.⁹ Determining the rights of a First Nation would essentially require a constitutional analysis leading to a finding on a question of constitutional law. Alberta argues that the LARP does not change Canada's Constitution, and concludes that questions of constitutional law are not relevant to Review Panel jurisdiction.

The Replies from several of the Applicants on the Review Panel's ability to determine questions of constitutional law are in agreement with Alberta. However, these Applicants point out that they are not asking the Review Panel to determine their rights.¹⁰ In addition, the Applicants are not asking for a determination of the applicability or validity of the LARP under the Constitution.¹¹ Rather, they are asking that the Review Panel, in the course of its analysis, recognize rights that have already been determined and consider appropriate constitutional principles in the exercise of its review power.¹² The law is clear, they say. Alberta always has notice of the contents of First Nation Treaty rights.¹³ The Supreme Court of Canada has held that a tribunal may consider constitutional principles even where it is expressly prohibited from considering questions of constitutional law.¹⁴

The Review Panel's role is primarily to review the written submissions from the Applicants alleging the direct and adverse effects set out in section 5(1)(c) of the ALSR and, if the Review Panel finds those effects to be credible and probable, to provide

⁵ *Alberta Interpretation Act*, RSA 2000, c I-18 [AIA], AIA at s 10. The *Alberta Interpretation Act*, Section 10 sets out that "An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects." The AIA applies to all enactments (AIA at s 2).

⁶ *Re Rizzo & Rizzo Shoes Ltd*, [1998] 1 SCR 27 at 27. ⁷ 2007 ABCA 402 at para. 10. ⁸ MCFN Reply at 17. ⁹ "Response Submissions of the Government of Alberta to Cold Lake First Nation Request for Review of Lower Athabasca Regional Plan", dated June 25, 2014, at para. 53. [Alberta Response] ¹⁰ CLFN Reply s. 3 p.6. ¹¹ ACFN Reply at 12. CPDFN Reply at 53. CLFN Reply at s.3 p.6. ¹² ACFN Reply at 10; CLFN Reply at page 6; MCFN Reply at 17-18. ¹³ ACFN at 20; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388; 2005 SCC 69 at 34. ¹⁴ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, paras 68-73.

recommendations to the Stewardship Minister. The Review Panel does not have the power to make decisions impacting the rights of persons.¹⁵

The Review Panel's position is that it should take notice of existing constitutional rights in the normal course of its review¹⁶ to the extent that those rights can be related to "health, property, income, or quiet enjoyment of property" as set out in section 5(1)(c) of the ALSR. Whether Aboriginal rights or Treaty rights fall within the scope of this legislation is a statutory interpretation question for the Review Panel to answer, without determining or redefining the scope of such rights when they have already been determined through a Treaty or by the Courts.

Taking notice of a constitutional right that may be harmed by the LARP is distinct from determining a constitutional question. Neither the LARP nor its authorizing legislation is under review by way of a constitutional challenge. Notably, there is nothing in the ALSA, the ALSR or the Rules that would prevent the Review Panel from considering constitutionally protected First Nation rights in its review of the Applications and the LARP.

Panel's Jurisdiction to Consider Consultation During the LARP Creation or During the LARP Implementation

The Review Panel, Alberta and First Nations are in agreement that the Panel has no jurisdiction to address questions related to the adequacy of Crown consultation. The Review Panel lacks the authority to answer questions of law, a necessary prerequisite to performing an assessment of the adequacy of consultation.

Several of the Applicants argue that the Review Panel, while unable to assess the adequacy of Crown consultation, does have the jurisdiction to consider the consultation process that was a part of the LARP planning activity. They argue that the LARP consultation record informs the Panel of the degree to which First Nation interests could be impacted by the LARP. The Review Panel notes that s.5 of the ALSA required consultation in the development of the LARP. That

term is not defined in the ALSA but the Review Panel finds that it refers to the planning process and not the consultation requirement imposed by case law when the Crown undertakes actions which may infringe Aboriginal or Treaty rights. The Alberta Response tends to conflate these consultation activities.

ACFN in particular made a number of submissions on this point. The Review Panel notes ACFN's helpful reminder that the Alberta Consultation Office has jurisdiction to consider consultation issues although it does not have the power to assess the adequacy of Crown consultation efforts.¹⁷

ACFN goes on to argue that the Review Panel may review the LARP as a whole. The Review Panel's position is that it may not review the LARP in its entirety, such that it may recommend changes to the structure or purpose of the document. The ALSR restricts the Review Panel to consideration of specific provision or provisions.¹⁸

The Review Panel's position is that it may look to the LARP consultation record for the purpose of assessing whether a harm to "health, property, income, or quiet enjoyment of property" exists or will likely occur, and to make recommendations to the Stewardship Minister on mitigating those harms. Consultation was mandatory in the development of the LARP and features in the commitments set out in the LARP going forward. This consultation contributed to the contents of the LARP. A review of the LARP consultation record may inform the Review Panel in the formulation of any recommendations that it makes to the Stewardship Minister. The Review Panel's focus will not be on adequacy of this consultation in the context of Aboriginal rights jurisprudence, but on the content of the LARP.

Panel's Jurisdiction to Consider Alleged Harms from Activities which Pre-Date the LARP

Alberta submits that the Review Panel has no jurisdiction to consider harms which are alleged to have occurred due to activities which were carried out or approved prior to the coming in to force of the

¹⁵ *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3 at 10 (b). ¹⁶ See FMFN Reply at 4, page 3 for a helpful summary of its members' section 35 Constitutional Rights. ¹⁷ ACFN Reply at 14. ¹⁸ *Rules of Practice for Conducting Reviews of Regional Plans* at s. 37-38

LARP.¹⁹ Alberta argues that the Review Panel is thus restricted from considering the effect of pre-existing development impacts and overlapping land uses on the exercise of Aboriginal Treaty rights.²⁰

The Applicants generally reject Alberta's position and submit that impacts from prior projects are within the jurisdiction of the Review Panel.²¹ The Applicants' position is that one of the clear objects and purposes of the LARP is to respond to the cumulative effects from past developments.²² ACFN submits that Alberta provides no statutory authority for the proposition that the Review Panel cannot consider past activities and associated harms.²³

The Review Panel acknowledges the analysis provided by CPDFN about legislative markers indicating the boundaries of its jurisdiction to consider past development. Section 7 of the ALSR refers to adverse effects a person is "suffering or expected to suffer". Further, Section 2(1)(h) of the ALSA contains a broad definition of "effect", which includes cumulative effects. Sections 7-9 of the ALSA require that the LARP content be generated in consideration of the history of the planning region. In addition, it seems unusual to the Review Panel that a statutory framework intended to ensure sustainable development in the Lower Athabasca region would be required to do so with no reference to past events and changes to the landscape.

The Review Panel's position is that it may consider effects that pre-date the LARP in assessing whether the Applicants have sustained harm from the implementation of the LARP. The LARP is a strategic land-use planning initiative. An inability to make a baseline assessment would be an absurd outcome of a narrow interpretation of the ALSA and the ALSR. In the Review Panel's view, statutory authority for this proposition may be found as described by CPDFN in the ALSA, ALSR and LARP.

The Review Panel may not, however, make recommendations based on past harms, or recommend any fresh consultation activity that is intended to remedy past harms. The Review Panel must focus on the LARP as a prospective document, while taking cognizance of existing development.

Panel's Jurisdiction to Consider Applicants' Allegations of Harms Related to Potential Future Development Activities

Alberta submits that alleged harms related to potential future activities are not caused by the LARP and are outside of the Panel's jurisdiction. Alberta argues that the LARP does not authorize any particular activity or development, and that all future development activities remain subject to the existing regulatory process.²⁴ Alberta submits that the LARP does not increase the potential for any alleged harms, but reduces the likelihood that harms will occur.²⁵

The Applicants generally disagree with Alberta's position. They assert that the LARP is prospective and that the ALSA necessarily contemplates future development.²⁶

ACFN provided case law and statutory analysis to support its position. ACFN observes that a clear object of the ALSA is to support the needs of future generations, including Aboriginal Peoples.²⁷ It submits that Alberta provides no statutory authority for the proposition that the Review Panel cannot consider past and future activities and associated harms.²⁸ ACFN relies on the decision in *Rio Tinto v. Carrier Sekani Tribal Council* and *R. v. Douglas* for its rebuttal of Alberta's position on future activities stemming from the LARP.²⁹ The Supreme Court of Canada in *Rio Tinto* held that strategic decisions may adversely affect First Nation rights without those decisions having any immediate impact on lands or resources.³⁰

After considering these diverging arguments, the Review Panel's position is that its jurisdiction extends to considering future development as part of its review of the LARP. The LARP is a prospective and strategic document. However, the Review Panel must confine its review to activities and outcomes that are reasonably probable and supported by evidence.

The Review Panel notes that the ALSA contemplates impacts from future development as one of the purposes of the LARP.³¹ The ALSA also uses language

¹⁹ Alberta Response at 61. ²⁰ Alberta Response at 62. ²¹ ACFN Reply; CPDFN Reply at 58; MCFN Reply at 22. ²² ACFN Reply at 69; CPDFN Reply at 59; MCFN Reply at 23.

²³ ACFN Reply at 72; MCFN Reply at 29. ²⁴ Alberta Response at 67. ²⁵ Alberta Response at 73. ²⁶ MCFN Reply at 26. ²⁷ ACFN Reply at 70 to 88; MCFN Reply at 26.

²⁸ ACFN Reply at 72. ²⁹ *R. v. Douglas*, 2007 BCCA 265. ³⁰ *Rio Tinto*, *supra* note 14 at 47. ³¹ ALSA at s 1(2)(b).

about “probability” of an effect, contemplating future effects that have not yet occurred.³² The Rules use language about the harms that a person “is suffering or expects to suffer as a result of the specific provision(s) identified” (Emphasis added).³³ Each of these provisions supports the conclusion that the Review Panel may consider harms from future development.

Panel’s Jurisdiction to Consider Allegations of Harms Related to the Implementation of the LARP

Alberta argues that the Review Panel may not consider how the implementation of the LARP may harm the Applicants. Alberta argues that the Review Panel may only consider harms arising from the “content” of the LARP. It cannot consider how the LARP is or may be applied or interpreted by industry or regulatory decision-makers.³⁴ Alberta’s position is that the LARP does not take away from a person’s ability to raise concerns about a specific project or activity’s impact on constitutionally protected rights.³⁵

The Applicants disagree with this description of Review Panel jurisdiction. Arguments against Alberta’s position include allegations that the LARP has already caused harm to the Applicants, that the review was meant to take place after the LARP was already in effect, and that the effect of implementation is relevant if the goals of the LARP cannot be fulfilled due to administrative problems or delays in completing frameworks proposed by the LARP.³⁶

The Review Panel’s position is that it has jurisdiction to consider implementation of the LARP to the extent that implementation may or likely will harm “health, property, income, or quiet enjoyment of property.”

The LARP is, after all, binding on other decision-makers and has regulatory effect. The issue is not as Alberta puts it “the alleged harms caused by how the LARP is or may be applied or interpreted by industry or regulatory decision-makers...” The problem is that the LARP is binding on other regulators and that the Applicants allege harm resulting from the implementation of an incomplete plan.

Nothing in the ALSA or the ALSR restricts the Review Panel from considering implementation of the LARP. Further, timelines for implementation of the LARP provisions are included in the content of the Plan. Evidence that those timelines are not being met, and that regulators have been required to make decisions in the absence of the LARP guidance, goes to an assessment of the effects of the LARP.

The Courts have clearly indicated that government’s strategic decisions and plans can have adverse effects on the exercise of Aboriginal and Treaty rights.³⁷ A review of the implementation of the LARP does not affect the jurisdiction or activities of regulators such as the Alberta Energy Regulator. In addition, it is difficult to see how, in a practical way, the “content” of the LARP referred to by Alberta can be separated from the effects of implementation.

Panel’s Jurisdiction to Consider Omissions from the LARP

The Parties diverged widely on whether the Review Panel has jurisdiction to consider omissions from the LARP. Each Party offered extensive argument for its position.

Alberta submits that the Review Panel only has jurisdiction to consider alleged harms flowing from the specific provisions of the LARP, which the Review Panel understands to mean the existing contents of the LARP. Alberta submits that measures alleged to be missing from the LARP cannot be addressed by the Review Panel. Alberta submits that where the LARP is silent, the regulatory regime remains unchanged.³⁸ Alberta also argues that maintaining status quo in the regulatory system is not an adverse effect, and relies on *Tsuu T’ina Nation v. Alberta*³⁹ for that proposition.⁴⁰ Alberta also expressed concern that a consideration of omissions could lead to overstepping the bounds of the federal-provincial division of powers.

The Applicants generally submit that the Review Panel has jurisdiction to consider omissions from the LARP. The Applicants, in their various submissions, rely on both the common law of negligence and

³² ALSA at 2(1)(h)(i). ³³ *Rules of Practice for Conducting Reviews of Regional Plans* at section 38. ³⁴ Alberta Response at 74. ³⁵ Alberta Response at 77. ³⁶ ACFN Reply at 91; CLFN Reply at page 5; CPDFN Reply at 49. ³⁷ *Rio Tinto*, *supra* note 14 at 47. ³⁸ Alberta Response at 78-79. ³⁹ 2010 ABCA 137 at para. 89. ⁴⁰ Alberta Response at 79.

Aboriginal rights decisions to show that an omission can cause “harm”. The Applicants argue that a purposive reading of the ALSA shows that the Legislature intended a review that would encompass omissions. Finally, the Applicants assert that an interpretation that does not include a consideration of omissions could result in an absurd limitation on the jurisdiction of the Review Panel.

CLFN argues that just because the LARP is silent on an area does not mean that the status quo has been maintained. Where the LARP has an objective, but omits content necessary to achieve that objective, the omission may cause harm. CLFN relies on *Crocker v. Sundance Northwest Resorts Ltd* and *Daniels v. Canada* to support its contentions. Daniels addresses Canada’s obligations to pass legislation regarding Métis and non-status Indians. In that case the Court rejected the argument that only actions could be challenged, as opposed to inactions⁴¹ CLFN also provide submissions on the omission of the Cold Lake Air Weapons Range. CLFN submits that Alberta can regulate in this area, so it is not prevented from including this land in the LARP.⁴²

Further to the points above, MCFN submits that an omission causes harm by leaving space for a regulatory decision maker to not consider factors important to the MCFN because of the gap under the LARP. MCFN argues that this has already happened in decisions made by the Alberta Energy Regulator.⁴³

CPDFN argues that Sections 7-9 of the ALSA outline the content of the “regional plan” and that the matters set out fall within the Panel’s jurisdiction irrespective of whether Alberta considered and excluded them from the LARP in its current form.⁴⁴ CPDFN submits that while the LARP was intended to meet the objectives of the ALSA, it does not meet those objectives. CPDFN argues that the Review Panel is tasked with assisting the Crown to meet the purposes of the ALSA.⁴⁵

Several of the Applicants also argue that the Supreme Court of Canada decisions in *Tsilhqot’in Nation v. British Columbia* and *Grassy Narrows v. Ontario* clearly show that the federal-provincial division of powers can no longer

be used to rationalize a provincial failure to act in a manner which respects Treaty and Aboriginal rights.⁴⁶

After a careful review of each of the Parties’ submissions on this point, the Review Panel’s position is that it may consider omissions from the LARP to the extent that those omissions cause harm in relation to the matters enumerated in section 5(1)(c) of the ALSR.

The ALSA, the ALSR and the Rules do not restrict the jurisdiction of the Review Panel to consider harms arising from omissions. In fact, they do not address this issue explicitly. A purposive interpretation of the ALSA and the ALSR should ensure that the Review Panel may consider the specific provisions of the LARP in the whole of the legislative context. If specific provisions together reveal a gap in the planning framework, the Review Panel may have jurisdiction to consider this gap if it leads to harm to “health, property, income, or quiet enjoyment of property.”

The Review Panel’s purpose, broadly speaking, is to review complaints from persons directly affected by the LARP and make recommendations based on a review of all the evidence. To fulfill this purpose, in the case of omissions, the Review Panel will review the Applicants’ concerns about the omissions, and the Crown’s responses to each of these complaints. In particular, the Review Panel may look to whether the matters omitted were considered by the Crown during the planning stages, and whether during the balancing process inherent in land use planning the Crown omitted these matters for a particular reason. Upon a review of the applications and the evidence they include, the Review Panel may determine whether these alleged omissions have caused harm in the context of section 5(1)(c) of the ALSR and, if such a finding is made, direct a recommendation to the Stewardship Minister.

The gap in the LARP may be ascertained from a failure to include actions contemplated in content outlined in the ALSA at Sections 7-9.⁴⁷ These sections of the ALSA outline a list of the contents that may be included in a regional plan. The Review Panel may recommend

⁴¹ *Crocker v. Sundance Northwest Resorts Ltd*, [1988] 1 SCR 1186 at 17-24; *Daniels v. Canada*, 2013 FC 6; overturned in part 2014 FCA 101. ⁴² CLFN Reply at page 4.

⁴³ MCFN Reply at 35. ⁴⁴ CPDFN Reply at 20. ⁴⁵ CPDFN Reply at 43. ⁴⁶ CPDFN Reply at 30; CPDFN Reply at 78; MCFN Reply at 37. The Review Panel notes in fairness that the *Grassy Narrows* decision was released after the date when Alberta filed its Response. ⁴⁷ ALSA at s 7-9.

that the Stewardship Minister reconsider omitting such content where an Applicant's evidence discloses an identifiable and eligible harm resulting from a gap in the LARP provisions. The Review Panel finds that it may consider evidence of omissions from the LARP where there is evidence that the omission will harm the "health, property, income, or quiet enjoyment of property" and the omitted material is clearly within the objectives of the ALSA under section 1 and the powers of the Stewardship Minister under sections 7-9.

The Review Panel finds that the constitutional division of powers does not prevent Alberta from acting in a way that will uphold its obligations under the Treaties. The federal and provincial Crowns share the responsibility for implementing measures to protect Treaty rights. As the provincial Crown may benefit from a Treaty, it must uphold its responsibilities through its actions.⁴⁸

Panel's Jurisdiction to Consider Harms Alleged to be Caused by Legislation Other Than the LARP

Alberta submits that the Review Panel does not have authority to consider alleged harms caused by legislation other than the LARP. Alberta submits that the Review Panel does not have this jurisdiction because it cannot recommend amendments to legislation. The Review Panel's authority is restricted to recommending changes to the LARP.

Under this umbrella, Alberta submits that the Review Panel may not consider how the laws related to conservation areas restrict access to preferred areas, restrict the harvesting of plants or animals, restrict firearm discharge, and restrict overnight camping. Alberta concedes that the Review Panel does have jurisdiction to recommend that an area designated by the LARP as a conservation area, provincial recreation area or PLART not be designated at all, or be given a different type of designation. Alberta submits that the Review Panel's jurisdiction in this regard is limited – the Review Panel may only recommend an alternate designation from the existing set of designations under existing provincial legislation. Alberta submits that the Review Panel cannot create new designations

as it does not have authority to recommend changes to the provincial legislation governing land designations as they are outside the LARP.

Alberta relies on *R. v. Morris* for the proposition that a First Nation can be compelled indirectly through legislation to exercise a treaty right in an alternative way, without infringing the treaty right. The Review Panel disagrees. An infringement on a treaty right may be on the right-holder's preferred means of exercising that treaty right. Treaty rights holders may exercise their treaty rights using modern methods. In the case of *R. v. Morris*, the First Nation person was exercising a modern version of a previous practice of hunting at night with lights.⁴⁹ The Court found that a modern practice, such as using a truck to hunt, was the legitimate continuation of a treaty right. The effect of the Alberta argument would be to equate the changes to harvesting activities resulting from regulatory restrictions in conservation areas to changes in methods of harvesting made voluntarily by Aboriginal hunters as a result of modern technologies. This ignores the effect of the regulatory regime applicable in a conservation area on the rights holder's preferred method of exercising that right.

The Review Panel's position is that it does not have the jurisdiction to make recommendations about amendments to legislation. The Review Panel may consider how the LARP interacts with other legislation especially when those legislative initiatives are the result of the LARP provisions. The Review Panel is not restricted by the ALSA or the ALSR from considering the legislative context beyond the LARP. If the Review Panel were so restricted, then the content of the LARP could not be placed in a broader context. For example, the Review Panel would have no way to assess the importance of a conservation area designation versus an industrial designation in achieving the goals of the ALSA.

Date: _____

Jeffrey G. Gilmour, *Review Panel Chair*

Date: _____

Winona Twin, *Review Panel Member*

⁴⁸ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at 152. *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48. ⁴⁹ *R. v. Morris*, 2006 SCC 59 at 116.

Appendix 4: Lower Athabasca Regional Advisory Council Report 2010

OUTCOME 7: ABORIGINAL PEOPLE'S RIGHTS, TRADITIONAL USES AND VALUES ARE RESPECTED AND REFLECTED IN PLANNING

There are 18 First Nations and four Métis Settlements within, or adjacent to, the Lower Athabasca Region. Aboriginal consultation must be an integral part of the planning process for the region to ensure that impacted Aboriginal Peoples' rights, interests and perspectives are considered in planning.

OBJECTIVE 7.1: ABORIGINAL PEOPLES ARE INCLUDED IN LAND MANAGEMENT PLANNING.

Strategies

- a. Work with Aboriginal Peoples and elders to develop local learning opportunities for youth regarding cultural values, social responsibility, stewardship roles, etc.
- b. Ensure meaningful consultation with Aboriginal Peoples.
- c. Work with Aboriginal Peoples to improve quality of information (especially economic, environmental and social impacts) to inform and co-ordinate current planning processes, infrastructure and services planning.
- d. Provide information and funding assistance to Aboriginal Peoples to participate in the development of land-use plans.

OBJECTIVE 7.2: LAND-USE PLANNING PROCESSES BALANCE THE CONSTITUTIONALLY PROTECTED RIGHTS OF ABORIGINAL PEOPLES AND THE INTERESTS OF ALL ALBERTANS.

Strategies

- a. Work with Aboriginal Peoples to develop formal roles and responsibilities for Aboriginal

Peoples in land-use planning and environmental assessment/monitoring.

- b. Work with Aboriginal Peoples to develop engagement strategies for Aboriginal Peoples in land planning and decision-making.
- c. Assess the state of knowledge of fish and wildlife resources and effectively manage allocations that affect Aboriginal Peoples' rights.
- d. Work with Aboriginal Peoples to generate land-use options for mitigation, accommodation and reconciliation of rights (e.g., offsets, joint planning in a development area).
- e. Support the ability of Aboriginal Peoples to exercise traditional uses of the land.
- f. Encourage Aboriginal Peoples to share traditional use information for the purposes of land management and planning.
- g. Work with Aboriginal Peoples in establishing roles pertaining to reclamation and reuse of reclaimed lands for traditional uses.
- h. Assess the impacts of development and increased regulation on local trapping and Treaty activities.

OBJECTIVE 7.3: OPPORTUNITIES FOR TRADITIONAL USES WITHIN THE REGION ARE MAINTAINED AND ENHANCED.

Strategies

- a. Support Aboriginal communities' ability to exercise traditional uses.
- b. Maintain populations of game species to support Aboriginal traditional use and recreational hunting and fishing, including commercial guide outfitting.
- c. Support Aboriginal communities to undertake community subsistence/traditional use needs assessment to support land-use decision-making.

Appendix 5: A Summary of the Government of Alberta Report Response to Aboriginal Consultation on the Lower Athabasca Regional Plan (June 2013)

The mandate of the Lower Athabasca Regional Plan (LARP) Review Panel is not to review the consultation process between the Government of Alberta (GoA) and the various Aboriginal Applicants. However, the Review Panel considered it useful to consider some of the commitments and statements in the LARP, after it was published, from the Government of Alberta to the First Nations. These commitments and statements were based on comments raised by the Aboriginal Peoples in the preparation of the LARP.

In the Response of the Crown to Aboriginal Consultation on the Lower Athabasca Regional Plan it is stated that, “during development of the LARP, every effort was made to balance all input received while recognizing Aboriginal Peoples’ constitutionally protected rights, including Treaty rights.”¹

In the same document, “The Government of Alberta has not recognized assertions of Métis Aboriginal rights in the province as being credible.”²

Under the heading “Participation in Land-Use Planning,” the Government of Alberta response was as follows:

- “The Lower Athabasca Regional Plan reflects an ongoing commitment to engage Aboriginal Peoples in land-use planning. The Government of Alberta recognizes that those First Nations and Métis communities, which hold constitutionally protected rights are uniquely positioned to inform land-use planning.”³
- The Government of Alberta will provide opportunities for Aboriginal Peoples in land-use planning, as well as opportunities to provide input into decision-making in recognition of the cultural and economic importance of land use to those

Aboriginal communities with constitutionally protected rights. This will provide both Aboriginal communities and the Government of Alberta with a basis for better addressing current and potential land-use conflict in a manner supportive of Aboriginal traditional uses, such as the exercise of Treaty rights.

- The Lower Athabasca Regional Plan’s Outcome 7 describes an objective, strategies and indicators for inclusion of Aboriginal Peoples in land-use planning.

Objective

To encourage Aboriginal Peoples’ participation in land-use planning and input to decision-making in recognition of the cultural and economic importance of land use to those Aboriginal communities with constitutionally protected rights. This will provide both Aboriginal communities and the Government of Alberta with a basis for better addressing current and potential land-use conflicts, in a manner supportive of Aboriginal traditional uses, such as the exercise of Treaty rights.

Strategies

- a. In accordance with applicable government policy, as it may be from time to time, the Government of Alberta will continue to consult with Aboriginal Peoples in a meaningful way when government decisions may adversely affect the continued exercise of their constitutionally protected rights, and the input from such consultations continues to be considered prior to the decision.
- b. Engage Aboriginal communities in the development of the Lower Athabasca Regional Trail System Plan.

¹ Response to Aboriginal Consultation on the Lower Athabasca Regional Plan; page 2 ² Response to Aboriginal Consultation on the Lower Athabasca Regional Plan; page 4

³ Response to Aboriginal Consultation on the Lower Athabasca Regional Plan; pages 6-8

- c. Engage Aboriginal communities in the development of a surface water quantity management framework for the Lower Athabasca River.
- d. Engage Aboriginal communities on initiatives to support tourism development including:
 - Tourism opportunity assessments for the Quarry of the Ancestors, Bitumount and Fort Chipewyan;
 - The promotion of cross-cultural awareness and sharing cultural experience through visitor-based activities;
 - Opportunities to align...partnerships at the provincial, regional and local levels to enhance Alberta's range of authentic products while promoting and protecting natural cultural resources and heritage lifestyles;
 - Opportunities to balance tourism product expansion with the needs of communities through business opportunities (e.g. potential opportunity to focus on revenue generation by promoting small- and medium-sized businesses, and developing careers and education thereby increasing employment opportunities); and
 - The development of partnerships based on the sensitive provision of authentic traditional tourism products, experiences, stories and imaginative product diversification.
- e. Invite First Nations expressing an interest in the Richardson Backcountry to be involved in a sub-regional initiative called the First Nations-Richardson Backcountry Stewardship Initiative (Richardson Initiative). Within the Richardson area, this initiative will consider:
 - Impact to Treaty rights to hunt, fish and trap for food;
 - Fish and wildlife management, access management and economic/business opportunities; and
 - Management of new wildland provincial parks and public land areas for recreation and tourism.
- f. In developing a biodiversity management framework and a landscape management plan, the Government of Alberta will work with First Nations to consider:
 - How First Nations' exercise of constitutionally protected rights to hunt, fish and trap for food can continue to occur within reasonable proximity of First Nations' main population centres; and
 - How to minimize land disturbance in the Athabasca River corridor north of Fort McMurray.

Indicators

- Participation rate of First Nations in the Richardson Initiative; and
- Aboriginal Peoples continue to be consulted when Government of Alberta decisions may adversely affect their continued exercise of their constitutionally protected rights, and the input from such consultations continues to be reviewed prior to the decision.

The Government of Alberta will look for opportunities to engage these communities and invite them to share their traditional ecological knowledge to inform land and natural resource planning in this region. For example, the regional parks plan for the Lower Athabasca Region will explore and present potential new approaches to draw on the rich cultural, ecological and historical knowledge and stewardship practices of these communities into planning for new and existing parks within the provincial parks system.

Métis Settlements will maintain their responsibility and authority for local land-use planning and development on Settlement patented land.

Under the heading of “Land-Use Planning and Tradition Use,” the Government of Alberta’s response to the First Nations concerns was as follows:

“The Alberta government will continue to collaborate with Aboriginal communities toward protecting traditional-use locations of cultural and spiritual significance. These places can be determined to be historic resources and be subject to protection under the *Historical Resources Act*. The Government of Alberta appreciates that the extent of Traditional Land Use does not necessarily coincide with the boundaries of the regional planning areas. The Government of Alberta believes Aboriginal communities were provided with opportunities to address this concern through their involvement in the LARP, where Traditional Land Use continues.

The Alberta government will look for opportunities to engage Aboriginal communities and invite them to share their traditional ecological knowledge to inform land and natural resource planning.

In developing a biodiversity management framework and a landscape management plan, all Aboriginal communities, stakeholders and public will have the opportunity to participate. The Government of Alberta will work specifically with First Nations to consider how First Nations’ exercise of constitutionally protected rights to hunt, fish and trap for food can continue to occur within reasonable proximity of First Nations’ main population centres.

The biodiversity management framework will include indicators, targets and thresholds. Measures of biodiversity will follow International Union of Conservation of Nature (IUCN) conventions for legally designated species. For non-designed species, a risk-based approach informed by IUCN protocols will be used.

The landscape management plans will include landscape assessment, scenario modeling and landscape planning. These will build on the success of voluntary integrated land management approaches by industrial and commercial operators as a means of reducing the extent and duration of land disturbance and development footprint.

A progressive reclamation strategy will be implemented which will provide mechanisms to define, measure and report on the return of equivalent capability – including the return of a suite of acceptable land uses such as commercial forestry, wetlands, wildlife and biodiversity, traditional use and recreation.

In collaboration with Aboriginal and other communities, stakeholders and partners, coordinate the development of the Lower Athabasca Regional Trail System Plan to designate trails, routes and areas. This will link, communities, destinations and other jurisdictions with the region’s parks, recreation features and open spaces. The development of the regional trail system plan will include the gathering and analysis of environmental, resource, land-use, Aboriginal and other social data and land-use commitments.

In addition, the Government of Alberta is committed to achieving naturally sustaining woodland caribou populations. Stabilizing, recovering and sustaining woodland caribou populations is an investment in maintaining Alberta’s diverse natural environment. Successfully achieving this result will require the identification, maintenance and restoration of sufficient caribou habitat.

Within the context of sustaining Alberta’s caribou populations, planning and implementation will consider:

- provincial and federal legislative requirements;
- First Nation rights and traditional uses;
- social/economic impacts; and
- stakeholder interests.

In accordance with applicable government policy, as it may be from time to time, the Government of Alberta will continue to consult with Aboriginal Peoples when government decisions may adversely affect the continued exercise of their constitutionally protected rights, and ensure the input from such consultations continues to be considered prior to the decision.”⁴

⁴ Response to Aboriginal Consultation on the Lower Athabasca Regional Plan; pages 11-12

Under the heading of “Emphasis on Environmental and Social Outcomes” in the report, the Government of Alberta responded as follows:

- “Specifically, the Government of Alberta wishes to engage Aboriginal communities in the development of a surface water quantity management framework for the Lower Athabasca River. In addition, as the provincial government develops a biodiversity management framework and a landscape management plan, the Government of Alberta will work with First Nations to consider:
- How First Nations’ exercise of constitutionally protects rights to hunt, fish and trap for food can continue to occur within reasonable proximity of First Nations’ main population centres;
- How to minimize land disturbance in the Athabasca River corridor north of Fort McMurray; and
- A Letter of Intent was signed between the Fort McKay community and the Government of Alberta, on September 26, 2011, to design and implement a community health assessment in Fort McKay.⁵

In the report, Government of Alberta is committed to the following:

- Complete and implement a surface water quantity management framework for the Lower Athabasca River, ensuring Aboriginal communities engage in the development.⁶

Under the report heading “Development of Cumulative Effects Management,” the Government of Alberta responded to what they heard from the First Nations communities:

- “It is recognized that managing cumulative effects on air, water, land and biodiversity is important to the needs of the Aboriginal communities in the region that hold constitutionally protected rights. Accordingly,

engagement with these communities is desired as air, water, land and biodiversity strategies and plans are developed, for example:

- Enhancing the regional network of conservation areas to support biodiversity and ecosystem function by increasing conservation areas in the region; and
- Developing a sub-regional plan, using a strategic environmental assessment approach, for the south Athabasca oil sands area. Undertaking this assessment at a sub-regional scale will contribute to the management of cumulative effects and support efficiencies in the regulatory review process for in situ oil sands operations.”⁷

Under the heading of “Economic Development Opportunities” in the report, the Government of Alberta responded to the issues raised by the First Nations:

- “The Alberta government will work with Aboriginal People to identify tourism and cultural experiences which could provide economic opportunities for Aboriginal communities. Specifically, the LARP will engage Aboriginal communities on initiatives to support tourism development including:
- Developing and implementing the Lakeland County Destination Development Strategy and Tourism Opportunity Plan in collaboration with Aboriginal Peoples, municipalities and local stakeholders;
- Working collaboratively with local Aboriginal communities, the private sector and local governments to enhance and expand the supply of tourism products and infrastructure including attractions, activities, amenities and accommodations;
- Identifying, designating and marketing tourism development nodes in consultation with Aboriginal Peoples, municipalities and stakeholders;

⁵ Response to Aboriginal Consultation on the Lower Athabasca Regional Plan; page 14 ⁶ Response to Aboriginal Consultation on the Lower Athabasca Regional Plan; page 15

⁷ Response to Aboriginal Consultation on the Lower Athabasca Regional Plan; page 17

- The completion of tourism opportunity assessments beginning with Quarry of the Ancestors, Bitumount and Fort Chipewyan. The assessments will help identify a range of potential Aboriginal tourism opportunities, including guided tours, education programs, attractions, exhibits or interpretive sites;
- The promotion of cross cultural awareness and sharing culture experience through visitor based activities; and
- The development of partnerships based on the sensitive provision of authentic traditional tourism products, experiences, stories and imaginative product diversification.”⁸

The report goes on to say that the Government of Alberta will implement key recommendations in “Connecting the Dots: Aboriginal Workforce and Economic Development in Alberta,” to increase labour force participation and economic development opportunities for Aboriginal People.

Under the heading “Final Statements,” the report concludes:

- “The Lower Athabasca Regional Plan increases the amount of land protected from development that may be incompatible with hunting, fishing and trapping for food. In many cases, the protected land will include areas where a particular First Nation most often exercises Treaty rights. Management of a protected area could impact a First Nation’s member’s access; however, the First Nation would continue to be consulted as management details for new conservation areas are worked out.”⁹

⁸ Response to Aboriginal Consultation on the Lower Athabasca Regional Plan; page 18 ⁹ Response to Aboriginal Consultation on the Lower Athabasca Regional Plan; page 20

Appendix 6: Responsible Actions: A Plan for Alberta's Oil Sands

Link

http://www.energy.alberta.ca/pdf/OSSgoaResponsibleActions_web.pdf

Relevant pages

2, 7, 9, 10, 11, 13, 29, 30, 31

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