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October 19, 2010

Dave Bartesko
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Dave.bartesko@gov.ab.ca

Dear Mr. Bartesko:

Re: Comments on the Lower Athabasca Regional Advisory Council's Advice to the Government of Alberta Regarding a Vision for the Lower Athabasca Region ("the RAC Document")

This letter sets out some of the Mikisew Cree First Nation, the Athabasca Chipewyan First Nation and the Chipewyan Prairie Dene First Nation's ("First Nations") comments on the RAC Document and Cabinet's powers in respect of the Lower Athabasca Regional Plan ("LARP"). We have also attached an appendix to this letter which provides a chart showing all of the references to "aboriginal peoples" in the RAC Document, the RAC vision for each item, and the problems with the vision. Please note that the First Nations will be providing additional information to the Government of Alberta, including their respective visions for the LARP, on or before November 11, 2010, as per Melody Lepine's discussion with Dave Bartesko on October 15, 2010.

Background Comments

As you are aware, the RAC Document does not incorporate the First Nations' information, or incorporates, at best, limited information that was publically available at the time that the RAC Document was being completed. The RAC Document should be

updated after careful consideration of the information submitted by the First Nations in consultation with the First Nations.

All three First Nations have made various requests with Alberta, including specific proposals with Alberta in their October 2008 submissions on the Land Use Framework for developing data regarding land and resource use requirements of First Nation; data which is critical for credible land use planning.[1] Alberta did not respond in any way to the requests of the First Nations to develop the data and information (including thresholds) required to properly assess and accommodate Section 35 rights in the LARP. Therefore, the RAC document does not include the types of specific information that would have come from a traditional land and resource use plan.

The RAC Document does not consider the questions previously tabled by the First Nations with the Land Use Secretariat concerning specific potential impacts on section 35 rights.[2] As a result, while there are occasional references to "rights" in the RAC Document, there is no analysis provided as to how (if at all) the recommended areas for protection took into account any of the information necessary to protect section 35 rights.

It is important to recognize that both MCFN and ACFN requested the development of a mutually acceptable consultation protocol to guide the development of LARP. Both First Nations also set out, in their funding request for participation in LARP[3], approaches to consultation that they wished to pursue. Alberta unilaterally imposed its own approach to consultation and has not responded to the consultation approaches set forth by the First Nations. This lack of procedural consultation by Alberta is problematic both from a constitutional standpoint and also from a pragmatic standpoint given that the RAC itself was constituted primarily of industry and government representatives and not First Nations.

The RAC Document perpetuates what the First Nations consider to be Alberta's flawed approach towards aboriginal issues by not using a rights-based focus. Indeed, none of the other processes referenced in the RAC Document, such as the IFN, use a rights-based focus. As such, the RAC Document and the proposals that it contains are insufficient to meet Alberta's constitutional obligations towards aboriginal peoples.

[1] Chipewyan Prairie First Nation and Mikisew Cree First Nation's October 2008 Joint Submission on the Land Use Framework included the need to develop a Traditional Resource Use Plan. Athabasca Chipewyan First Nation's October 2008 Proposal for Co-management of Richardson Backcountry also included the need to develop a traditional resource use plan in addition to a planning and decision-making framework that respects the Treaty relationship and priority rights of First Nations.

[2] CPFN and MCFN tabled these questions in their October 2008 submission on the Land Use Framework, while ACFN tabled them in their April 2009 submission on the LARP.

[3] ACFN's submitted their funding proposal July 31, 2009; MCFN submitted their funding proposal on August 19, 2009.

Because of the above problems with the adequacy of information, consultation and methodology, it is impossible to tell how RAC came to the conclusion that the proposed conservation and mixed use areas will assist in protecting section 35 rights when all indications are that the RAC Document proposals will, instead, facilitate yet more development that has the potential to adversely impact and infringe the section 35 rights of the First Nations.

As a final background point, it is troubling that the RAC Document provides no guarantee that even if certain areas are protected, that they will remain protected. This is because, as is discussed in greater detail below, under the Alberta *Land Stewardship Act* Cabinet can override various protection-related decisions, even if they initially accept them.

Specific Comments on the RAC Document

The lack of a rights-based approach in the RAC Document means that there is little or no recognition in LARP that the existing level of development in some areas is already adversely affecting and infringing section 35 rights. The potential consequences of this lack of recognition are exacerbated by the unwillingness of the Crown to conduct proper studies or consider freezing development in certain areas until more information is known about potential direct and cumulative impacts, including on section 35 rights.

At page 7 of the RAC Document, it is stated that "the *Alberta Land Stewardship Act* ("ALSA") makes regional plans binding on…all provincial government departments and decision-making boards and agencies", but it remains unclear what the relationship is between LARP and any project-specific decisions that must be made by regulatory agencies or individual line ministries. Also, while there is a recommendation at page 12 to strengthen the capacity of government boards to support the social and economic assessments of major projects, this recommendation is meaningless if the boards will simply apply ALSA.

There is no analysis in the RAC Document of the direct and cumulative impacts of existing and planned development on section 35 rights, and no attempt is made to distinguish between impacts of different kinds of development (e.g., mineable oil sands, SAG-D, mineral extraction, exploration, transportation and infrastructure). There appears to be an assumption, without any analysis of adverse impacts on section 35 rights, that various kinds of land uses (including First Nations land use) and industrial development can occur side by side in the large mixed use zone. This is particularly troubling in light of the broad range of activities, which the RAC Document assumes will continue to increase, without providing any basis for that assumption. An analysis of the impacts of these various uses on Section 35 rights (including an assessment of thresholds for the meaningful practice of rights), is required.

Throughout the RAC Document, there is no explanation of what is being assessed or should be assessed in terms of impacts in the planning area. What is clear is that there is no attempt to assess potential direct and cumulative impacts on section 35 rights. The disregard for section 35 rights goes even further, for in addition to not assessing effects on those rights, the RAC Document also virtually ignores the importance of the constitutional protection of section 35 rights.

This is reflected at page 3 where impacts to "aboriginal communities" are mentioned only after consideration of community development, physical and social infrastructure needs, recreation and tourism development, population growth and labour needs and impacts to local communities.

This is also reflected in the five land-use classifications in the document. The RAC Document assumes, without any analysis, that aboriginal and treaty rights can be exercised in "conservation" areas and in other areas. Moreover, it makes this assumption even though the various changes that Alberta Sustainable Resource Development is proposing in mechanisms such as the Proposed *Public Lands Administration Regulation* raise questions as to whether First Nations can even exercise their rights in the conservation areas. It also makes this assumption even though its strategies, such as the strategy to "stimulate private sector development of recreation areas with long-term leases" and "partner with the private sector to develop a tourism industry with opportunities based on the Lower Athabasca Region's industries, culture and heritage" may adversely affect the exercise of section 35 rights as well. The same sort of pro-development without analysis of impacts on section 35 rights is also contained in the Regulatory Enhancement Project ("REP") work that Alberta is undertaking – the focus of REP is on increasing "regulatory efficiency", without setting out how section 35 rights will be dealt with. The First Nations have filed separate submissions to Alberta on REP (Appendix 1) .

The RAC Document refers, at page 5, to management frameworks offering "a system for understanding priority values and how those values are affected by land-use decisions." Yet, despite the constitutional framework and various Supreme Court of Canada decision, the RAC Document does not treat constitutionally-protected rights as a priority value at all.

The RAC Document fails in certain methodological respects as well. For one, while there are references to "cumulative impacts" throughout the document, there is no recognition that existing, planned and reasonably foreseeable industrial development has adversely affected and infringed, and has the potential to further adversely affect and infringe, the ability of the First Nations to meaningfully exercise[4] their rights now

[4] "Meaningful practice" of Section 35 rights requires access to tangible and intangible resources (including, but not limited to, air, water, minerals, timber, fish, small and large game animals, cultural landscapes, and resources of traditional knowledge and learning) of adequate quality and quantity for

and in the future. Moreover, there is no methodology set out for how such effects and impacts are to be assessed and there is no consideration of incorporating different methods of assessment for such impacts. Similarly, while there is a discussion of management frameworks at p. 6, there is no analysis of how things like thresholds and triggers will be developed and upon what sorts of considerations both generally and in relation to the meaningful exercise of section 35 rights.

It is clear that the overriding principle of the RAC Document is that of economic growth and that protection of other interests is secondary: page 8 states, "[m]any economic benefits are realized through our land and resources. The land and its renewable and non-renewable resources must provide quality of life for Albertans now and in the future." This is a very one-sided notion of "quality of life." The focus is on citizens of Alberta, including First Nations, "thriving" in terms of economic growth. While economic growth is critical to First Nation people, there appears to be no recognition in the RAC Document of the costs involved and who bears those costs. See, for example, the list of items at pages 8-9 under "the economic potential of the oil sands is optimized" and "the economic contribution of forestry is optimized." There is also no recognition of the impacts of existing disturbances on section 35 rights or any other interests. Rather, the RAC Document contemplates activities that will likely significantly affect section 35 rights: take, for example, the statement at page 9 that within the LARP Alberta should "revise regulatory processes **to be competitive** in the development of oil sands and other key industries." (emphasis added)

The First Nations note that the first real discussion of "aboriginal peoples" comes only at page 11 of the RAC Document, and even then the discussion is not in relation to constitutionally-protected rights, but in relation to "increased participation of aboriginal peoples in the regional economy." Again, economic opportunities for First Nations people are important, but they cannot be considered without also understanding the impacts of development on the exercise of rights.

At page 11, there is also a reference to the need to "work with aboriginal peoples to develop aboriginal centres of excellent pertaining to traditional knowledge, stewardship practices, aboriginal cooperative management opportunities, roles and responsibilities in environmental monitoring, integration with western science, etc." and "collaborate with aboriginal peoples to address compensation matters and concerns relating to the infringement of treaty rights and other constituently protected rights." Contrary to constitutional requirements that the Crown respect aboriginal and treaty rights, the focus here is not on preserving the rights, but appears to be focused on monitoring impacts and compensating for infringement.

First Nations members to practice their mode of life with confidence, in the preferred manner and location, to sustain their health and the health of their families, and to provide a reasonable and moderate livelihood.

There is a recommendation at page 12 to "create a new process to assess the infrastructure, social and economic implications of major projects and the growth they create in a manner that parallels the application approval process". This is a good idea, but that process needs to include impacts such as cultural impacts and impacts to constitutionally-protected rights. It also needs to involve meaningful consultation with First Nations people at all key decision making steps, starting with scoping of projects, terms of reference, etc. The RAC Document does not set the framework for either.

Another interesting recommendation on page 12 is to "work with and support aboriginal peoples who develop sustainable social and economic development plans, consistent with traditional stewardship plans." Unfortunately this recommendation is largely meaningless because it is not clear how this can be done when LARP creates a framework that allows Traditional Territories to continue to be developed over the objections of First Nations regardless of impacts on their rights.

There are a number of recommendations at page 15 concerning the need to better understand environmental issues. While many of the recommendations concerning aboriginal issues (see page 16 – "work with aboriginal peoples to utilize aboriginal knowledge of historical changes in water quality and quantity, air quality, land and biodiversity to establish firm baselines for measurement in the region") are good ideas, they are ultimately flawed. First, the recommendations are meaningless without regulatory change to actually incorporate those perspectives into decision making. Second, there is no discussion of section 35 rights or accommodation in these recommendations. Equally troubling, the recommendation to support development of "education programs to present the region's unique cultural and aboriginal history" essentially leads to what Tom Berger said years ago, namely, that development without considering the needs of First Nations may lead to a situation where First Nations and their cultures are analyzed as things of historical interest, rather than as living, vibrant cultures.

The recommendation at page 17 that a cap be placed on the amount of the LARP Region's land base in mixed-use areas that can be disturbed for oil sands extraction footprint at any one time is a good idea; however, this recommendation needs to be expanded to include all development zones and also needs to consider placing a limit on all kinds of development depending on cumulative impacts, not just in terms of oil sands extraction.

At page 17 there is a recommendation that calls for use of aboriginal traditional knowledge to enhance understanding of cumulative effects and develop appropriate mitigation/minimization strategies. This is generally a good idea, but it will only work if there are regulatory changes to require incorporation of such knowledge at an early point in project and application planning.

There are various recommendations, beginning at page 17, for incorporating planning and analysis into reclamation and inclusion of aboriginal peoples at that stage. This focus on reclamation without assessing impacts on rights beforehand is problematic by itself. It is made more problematic by the failure of the RAC Document to counter the apparent assumption that any kind of plants or grasses, for example, in an area is fine in reclamation, irrespective of what the pre-disturbance conditions were. This "reclamation as mitigation" approach essentially reflects an understanding that it is acceptable for First Nations to suspend their exercise of rights in an area for decades without analyzing what the cultural impacts may be if that occurs.

There is a recommendation at page 18 that aboriginal peoples be included in terms of conservation and enhancement of regional biodiversity and ecosystem function and in respect of developing a traditional knowledge base of the variety and intensity of impacts of individual and cumulative industrial activities on biodiversity and ecosystem functions through time. The problem, again, is that this recommendation has no context, for it does not address when this will occur, how it will influence LARP or future project-specific decision making, etc.

There are references at page 22 to valuing cultural diversity and protection of significant historical resources, including maintaining opportunities for community traditional use activities such as hunting, fishing, trapping, country foods and camping, preservation of historical sites, etc. Again, these are important concepts, but so long as the regulatory system ignores or downplays rights and traditional uses, these statements are largely meaningless.

Outcome 7 expressly deals with Aboriginal People's Rights, Traditional Uses and Values and says they should be respected and reflected in planning. Some of the recommendations in Outcome 7 and the First Nation's comments on them include:

- *Ensure meaningful consultation with aboriginal peoples*: it is unclear how this is to be done, particularly when Alberta's Consultation Guidelines do not reflect the current state of the law[5];

- *Work with aboriginal peoples to improve quality of information to inform and co-ordinate current planning processes, infrastructure and services planning*: This is an positive idea, but the RAC Document does nothing to assist First Nations when they raise information needs in project-specific TORs or in other processes and are ignored;

- *Work with aboriginal peoples to develop formal roles and responsibilities for aboriginal peoples in land-use planning and environmental assessment*: this is a

[5] Please note that all of the Treaty First Nations of Alberta have submitted a detailed letter to the Government of Alberta setting out their concerns with Alberta's Consultation Guidelines (Appendix 2).

good idea, especially if the role is in relation to rights and unique First Nation issues, and not merely as stakeholders. However, it can only work if there is a real chance to influence planning and project decision making at all levels, and the RAC Document offers nothing to make that happen;

- Other recommendations in this section are positive as well, but are hindered by current realities that are overlooked by the RAC Document: significant areas are already leased out, economic development is the overriding imperative in the RAC Document, and the current regulatory system and consultation approach does not meaningfully incorporate First Nation issues and concerns;

The First Nations note that the RAC Document fails to consider the potential adverse impacts of things like conservation areas and parks on the exercise of rights. Although "parks" sound like a good idea, the exercise of section 35 rights is usually restricted in those parks and Alberta must carefully consider the scope and nature of those restrictions in order to avoid infringing constitutional rights.

Problems such as those just identified run through the remainder of the RAC Document as well. For your consideration, attached as Appendix 3 hereto is a chart showing all of the references to First Nations or Aboriginal peoples in the RAC Document, together with the weaknesses, flaws or questions that the various references raise in respect of the First Nations and their rights.

Comments on the Power of Cabinet over the Implementation of RAC Proposals and Conservation Efforts

The RAC Document notes at page 7 that the Alberta *Land Stewardship Act* governs the implementation of regional plans, including LARP. Under the *Land Stewardship Act* the responsibility for designating regions for planning purposes, adopting regional plans and all other significant powers rests with the Lieutenant Governor in Council. In short, the Lieutenant Governor in Council has absolute and unfettered authority over regional plans. For example, pursuant to the *Land Stewardship Act*:

- the Lieutenant Governor in Council has exclusive and final jurisdiction over all regional plans [s.13(1)];

- the Lieutenant Governor in Council can amend regional plans regardless of the views or advice of a regional advisory council or the land use secretariat [s.5(1)];

- there are no limitations on the Lieutenant Governor in Council's authority to repeal regional plans [s.5(2)];

- the Lieutenant Governor in Council has authority to determine and amend planning boundaries [s.3(1)];

- the Lieutenant Governor in Council has regulation-making authority in respect of all aspects of the process for amending regional plans, including who may be consulted [s.4(2)];

- the Lieutenant Governor in Council sets the terms for the 10 year review of each regional plan [s.6(2)];

- the Lieutenant Governor in Council has the sole authority to determine how and by whom stewardship units are created [s.46]; and

- the Lieutenant Governor in Council has the sole authority to create and regulate "off-set programs" [s.47] and transfer of development credit schemes [s.48].

The authority of the Lieutenant Governor in Council to unilaterally amend or disregard parts of regional plans renders even the positive proposals of the regional plan regarding conservation and aboriginal rights – such as the proposal to develop formal roles and responsibilities for aboriginal peoples in land-use planning – potentially meaningless, for any commitment to include aboriginal peoples in planning decisions and management frameworks can be set aside by the Lieutenant Governor in Council.

Comments on the RAC Conservation Approach

In addition to the foregoing, below we set out specific comments on the flaws with the LARP approach to "conservation."

1) General Comments on the RAC Document and Conservation

At the heart of the RAC Document is a suggested planning philosophy that environmental effects are to be *balanced* with social and economic goals. At the outset we note that this planning philosophy fails to recognize that this balancing exercise must take place within the constitutional framework of Canada. The constitutional framework requires that aboriginal and treaty rights be recognized and protected and, where the province considers any action which may adversely impact or infringe those rights – **including conservation actions** – that there be meaningful consultation and, in the case of any infringement, that the infringement be justified according to the ***Sparrow*** test. A balancing exercise that does not have the Constitution at its heart renders the conservation promises in LARP largely meaningless.

At various points, the RAC Document makes reference to the need to *integrate* aboriginal traditional knowledge in the regional planning process. While including aboriginal peoples and the traditional knowledge that they possess in the regional planning process is important for Alberta to be able to fulfill its constitutional obligations to protect aboriginal and treaty rights and for Alberta to have adequate

information for implementing its conservation approach, references to integrating aboriginal traditional knowledge in the RAC's approach to conservation planning are largely meaningless given the following:

- the overall scheme of the RAC Document is to promote and optimize economic growth of the oil sands, forestry, tourism and agriculture. Neither conservation nor aboriginal rights are given serious consideration in the proposed Outcomes or in the land-use classification system;

- the RAC Document does not describe how aboriginal knowledge will be used in regional planning or conservation processes. Nor does it contain a methodology or demonstrable commitment to incorporate that knowledge. Nor does it contain any criteria, methods or thresholds for assessing the direct and cumulative impacts of existing, planned and reasonably foreseeable development on the meaningful exercise of section 35 rights or any criteria, methods, or thresholds for what is required to sustain those rights – both of which the First Nations have been asking for throughout the development of LARP;

- the RAC Document does not describe what baselines will be used in assessing the pace of development and cumulative impacts in the LARP region; and

- under the *Land Stewardship Act*, the Lieutenant Governor in Council can reject or amend any planning advice from the regional advisory councils or the land use secretariat. As such, any proposed integration of aboriginal traditional knowledge can be disregarded at the discretion of the Lieutenant Governor in Council.

The lack of meaningful consideration of conservation is also demonstrated by looking at the conservation tools available under the *Land Stewardship Act.* Specifically, nowhere does the RAC Document identify any of the range of statutory conservation tools (e.g. direct and indirect expropriation for conservation, conservation easements, conservation directives, stewardship units, etc.) created by the *Land Stewardship Act* for regional planning purposes in respect of the conservation areas proposed by RAC.

Rather, the RAC Document undermines conservation efforts in two ways. First, it prioritizes economic activities associated with resource development within the majority of the LARP area, even though a central purpose of its authorizing statute, the *Land Stewardship Act,* is to manage land-use activities to meet the foreseeable needs of future generations of Albertans and aboriginal peoples. Second, rather than utilize authority under the *Land Stewardship Act* to compensate title holders for conservation efforts and to otherwise facilitate conservation, the RAC Document identifies the strategy to compensate aboriginal peoples for infringing their constitutionally-protected rights. In other words, the RAC Document contemplates paying for the right to avoid

seriously conserving land, whereas the *Land Stewardship Act* contemplates conservation.

The only time that "conservation strategies" are mentioned in the RAC Document is in the description of "conservation areas" at page 27, where the RAC Document states that aboriginal uses will be permitted where those uses will be consistent with overall conservation strategies. This is inconsistent with the constitutional promise of section 35. It is also important to note that the document does not describe how conservation objectives are to be selected. Nor does it describe the implementation and monitoring of those objectives.

2) Comments on Specific "Outcomes" & Conservation

As the main purpose of Objective 1 is to promote natural resources development, the First Nations note that Alberta's resource allocation and regulatory regimes, insofar as they relate to the LARP area, will be modified to promote development rather than conservation or the protection of section 35 rights. Because the recommendations relating to aboriginal peoples are not tied to a regulatory regime, LARP will not have the same direct consequences for aboriginal peoples and rights as it does for the oil sands, forestry, agriculture and tourism.

The infrastructure and community development plans identified in Outcome 2 are predicated on rapid economic and population growth, not conservation. As the RAC Document does not create any thresholds for the achievement of objectives or for the assessment of the pace of development and cumulative impacts generally or in respect of section 35 rights, it is difficult to see how a conservation approach can be meaningfully applied to RAC's desired infrastructure development. Furthermore, even though infrastructure projects – such as major transportation systems and high capacity transmission systems – are likely to have environmental, social and cultural impacts on aboriginal and treaty rights, the infrastructure strategies and plans in Objective 2.2 only minimally address the impacts of population growth and infrastructure on the environment and on section 35 rights in the LARP region and the involvement of aboriginal peoples in addressing those impacts.

The First Nations note that in Outcome 3, the RAC Document proposes to engage aboriginal people only in monitoring and reporting on issues relating to management systems. At no point in this outcome does RAC consider involving aboriginal people in the creation and design of management systems: for the environment's natural processes and natural resources to be understood and for conservation to be seriously advanced, aboriginal knowledge and use of the land must be utilized and respected, *not merely presented*.

In Outcome 3 the RAC Document also fails to consider involving aboriginal peoples in the setting of appropriate baselines on which to base management systems – and by

extension, conservation – decisions. Aboriginal people should be consulted regarding appropriate baselines and how their knowledge will be utilized in assessing changes, mitigating impacts and ensuring protection of aboriginal and treaty rights. The proposals under this outcome fall short of these.

In Outcome 4.2, the RAC Document proposes to develop an integrated reclamation land management plan in the mixed-use resource area. It is inappropriate for this outcome, which relates to responsible and sustainable land uses, to consider aboriginal peoples only at the stage of reclamation. Moreover, the RAC document operates on the assumption that reclamation is acceptable and will be successful (again without considering reclamation in relation to the exercise of section 35 rights).

Furthermore, developing a reclamation plan to blanket the entire mixed use resource area (60% of the LARP area) demonstrates a failure to seriously address which lands are in more urgent need of conservation within that area, which lands are socially and culturally more important for the exercise of aboriginal and treaty rights, and other requirements under s.35(1) of the *Constitution Act.* Additionally, given that the land-use classification system defines how competing uses are to be balanced within land areas, the proposal to meaningfully incorporate aboriginal knowledge provides no guarantees that conservation priorities will be effectively taken into account. Also, as noted above, the absolute and unfettered authority of the Lieutenant Governor in Council to reject planning advice renders the promise to establish conservation areas and management plans largely meaningless.

There is no mention of aboriginal peoples or rights in Outcome 5, which guides responsible stewardship for air and water. This undercuts the RAC Document's purported attempt to involve aboriginal peoples and aboriginal traditional knowledge in the planning decisions, let alone conservation decisions.

Similarly, limiting the role of elders in Outcome 6 to be a tool for cultural diversity:

(1) minimizes the role that elders and aboriginal knowledge holders should play in the land-use planning and land conservation process;

(2) minimizes the link between their information and the protection of treaty rights; and

(3) undercuts the purported effort to involve aboriginal peoples and aboriginal traditional knowledge in conservation efforts.

The proposal in Outcome 6 – to support aboriginal communities' leadership to develop management procedures as appropriate to preserve and protect aboriginal peoples' historic and ceremonial sites that are significant to aboriginal peoples – is exceedingly vague, particularly in light of the RAC Document's priority on economic, infrastructure

and resource development and so is unlikely to promote conservation of these sites. The proposal is also largely meaningless given the unfettered discretion of the Lieutenant Governor in Council to reject any such management procedures.

We note that the proposals in Outcome 7 for including aboriginal peoples in land management planning are insufficient to meet Alberta's constitutional obligations towards aboriginal peoples, let alone seriously advance conservation in the LARP area. For example, the RAC Document does not acknowledge that Alberta must accommodate aboriginal peoples where appropriate and must justify all infringements of aboriginal rights in additional to consulting meaningfully with aboriginal peoples.

The proposal in Outcome 7 to balance aboriginal peoples constitutionally protected rights with the interests of all Albertans does not meaningfully advance conservation because it:

(1) fails to recognize priority allocation of resources to aboriginal peoples when balancing access to limited resources requiring conservation;

(2) fails to ensure no impairment or minimal impairment of section 35 rights or the justification of any infringement of aboriginal and treaty rights as required under the constitutional framework of Canada;

(3) fails to set appropriate baselines from which to assess such infringement of rights and the level of environmental and cumulative impacts;

(4) fails to acknowledge that the ability of aboriginal peoples to exercise traditional uses of the land may be linked to specific lands and territories, as well as tangible and intangible resources, which require conservation for the ability of aboriginal peoples to exercise traditional uses to be maintained;

(5) fails to recognize that intended land uses in mixed use areas are too broad and mutually exclusive to be incorporated in one single land class;

(6) provides no guidance regarding how traditional use information base is to be incorporated or used together with other scientific and socio-economic data and how that information is to be safeguarded;

(7) proposes to involve aboriginal peoples at the stages of mitigation and reclamation rather than seriously considering conservation options such as limiting development or creating conservation easements or conservation directives as allowed under the *Land Stewardship Act*; and

(8) fails to recognize the ability of the Lieutenant Governor in Council to substitute its own balancing views under the *Land Stewardship Act*.

We look forward to discussing these comments with you and to your response on the specific points that are included in this letter.

Sincerely,

Melody Lepine, Director, Mikisew GIR	Lisa King, Director, ACFN IRC	Shaun Janvier, Director, CPDFN IRC

cc: Chief and Council, MCFN
Chief and Council, ACFN
Chief and Council, CPDFN
The Hon. Mel Knight, Minister, SRD
Morris Seiferling, Land Use Secretariat
The Hon. Diana McQueen, Chair, Regulatory Enhancement Task Force

APPENDIX 1 – Joint Submission on the Regulatory Enhancement Program

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October 15, 2010

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Dear Ms. McQueen,

Please accept this submission on behalf of Athabasca Chipewyan First Nation, Mikisew Cree First Nation and Chipewyan Prairie Dene First Nations (herein after referred to as "the Nations") who respectfully raise the following issues with the Government of Alberta's Regulatory Enhancement Project ("REP").

This initiative, as stated by Project organizers, was prompted by the Government of Alberta's determination that the regulatory process was inhibiting the realization of the vision of the future of a "*prosperous province where all Albertans enjoy a high quality of life built on a healthy environment, a competitive economy and vibrant communities.*"[1]

Further, in order to realize the substantial benefits that all Albertans enjoy, the Government of Alberta must "*continue to attract significant levels of oil and gas investment*" and that a comprehensive review of Alberta's regulatory system for oil and gas would facilitate a streamlined and improved policy assurance system **that would attract increased levels of oil and gas investment** (emphasis added). Finally, the three stated outcomes of the regulatory process itself of "*environmental protection,*

[1] Updated REP Backgrounder, dated June 9, 2010.

general public safety and resource conservation" would be the focus of the REP to outline improvements.

There are several fundamental flaws with the above GOA statements and approach. Firstly, the stated GOA vision assumes that *all* Albertans benefit economically and socially from increased oil and gas investment or that they "benefit" in the same way. This is not the case for the majority of Aboriginal communities, including the Nations. In fact, the contrary is true; with each new oil and gas project comes an incremental loss of the ability to exercise Section 35 rights with no corresponding accommodation to the Nations for their loss of livelihood. Initiating the REP with this fundamentally incorrect assumption will ensure the Nation's Section 35 rights will be further eroded if not addressed. All Albertans have the right, if qualified, to work in the oil and gas industry. However, to be clear, the fact that some members of the Nations may be employed in oil and gas-related jobs is not an accommodation of their section 35 rights.

This vision also assumes that the interests of **all** Albertans can be balanced and managed successfully, through tradeoffs occurring between the environment and economics within the regulatory process. This is also not the case. The constitutionally projected Section 35 rights of the Nations are fundamentally different than those of non-Aboriginal Albertans involved in the regulatory process. While non-Aboriginal Albertans' rights can be balanced with broad economic and environmental tradeoffs achieved through outcome setting within the regulatory process, the Nations rights require a separate consideration. The Government of Alberta itself must reconcile these two different set of rights. This is the basis and purpose for Aboriginal consultation. Unfortunately, this is currently not occurring, and the REP Task Force (including the Design Team) gave no indication or assurances that this was being considered in the selection of regulatory models under consideration.

Stan Rutwind's presentation on September 16th, where some members of the Nations were present, highlighted this lack of understanding by the Government of Alberta. Mr. Rutwind, if we understood him correctly, described the GOA position as preferring that disagreements over consultation matters (including constitutional issues) proceed directly to court and not be resolved by the appropriate regulatory body. This option was described by Mr. Rutwind as "just as cost effective" for First Nations as appearing at a hearing, and would be preferable because "boards and agencies do not have the expertise or capacity to competently consider Aboriginal matters." This position, as articulated by Mr. Rutwind and if we understood him correctly, will have tremendous consequences and influence on any modifications or changes of the regulatory system proposed by this Task Force. The Nations would like to highlight that this discussion is not reflected in the "*What We Heard Report – First Nations Engagement*" dated October 12, 2010.

Any board, agency or regulatory authority created by Alberta to approve oil and gas activity **must** have the ability to consider matters related to Treaty and Aboriginal rights. Further, in order to ensure sufficient expertise and capacity, it is the Nations recommendation (and suggested directly by Chief Adams at an REP session) that any revised regulatory authority have Aboriginal representation reflected in its makeup, or direct First Nation involvement in regulatory decision making.

This fundamental lack of understanding by the Government of Alberta is central to the Nation's concern over any proposed regulatory changes contemplated by the REP. This position by the Government of Alberta on the role of regulatory decisions and Aboriginal consultation does not

support the spirit of reconciliation that the Courts have expressed time and time again as the basis for the Crown relationship with First Nations.

It was also clear that the members of the REP Task Force did not have the necessary information about the role of Aboriginal consultation within the regulatory process until the last stages of 'stakeholder engagement' of this initiative. No presentation was provided by Aboriginal Relations to the Task Force prior to September, 2010. Nor was there any mention in the background information, interim report or oral presentation materials prepared by the REP Task Force which referenced the role of Aboriginal and treaty rights within the regulatory process. Mr. Rutwind stated that the Government of Alberta's First Nation Consultation Guidelines would be amended or changed following the outcomes and recommendations of the REP Task Force.

What appears to be missing from the REP process is the issue of how meaningful consultation is to be carried out with First Nations. Despite years of objections from the Nations, Alberta continues to follow its First Nation ***Consultation Policy*** and Departmental Consultation Guidelines. Yet there is nothing in the REP process that discusses how consultation can be properly fit into the regulatory system. Instead, it appears to be an after-thought or is not being considered at all.

The Nations would like to raise the issue of how consultation or lack thereof occurred for the REP initiative. The chronology for initiation of this Project is as follows:

Phase 1	Project Start Up (Prior to December 2009)
Phase 2	Readiness Tasks (December 2009-March 2010)
	Stakeholder Engagement Approach
Phase 3	System Design (April 2010-March 2010)
90 Day Report	June 2010
Phase 4	Testing and Validation (October 2010-November 2010)
Phase 5	Recommendations (December 2010)

First Nations were not directly advised of the REP initiative until August 12, 2010. This first meeting was only allotted 1.5 hours for discussion. Less than two weeks notice was provided to Nation representatives to attend this meeting. No capacity funding was provided. Please see the attached letter for additional concerns regarding the manner in which consultation occurred prior to August, 2010.

It was only after repeated calls for additional discussion that a second meeting for First Nation scheduled for September 16-17th in Edmonton. However, the stated objectives of this second meeting as to "gather more feedback from First Nations participants..." and "build relationships between GOA and First Nations" only reinforced to the Nations that the REP Task Force does not appreciate what constitutes meaningful Aboriginal consultation or how to go about it. Finally on October 1, 2010, the Nations were encouraged to attend the 'Final Stakeholder Engagement Session' where all stakeholders were invited to attend. "Stakeholders" included ENGOs, landowners, municipalities, industry, and GOA staff. Again, this is not an acceptable venue for Nation-to-Nation discussions.

As the Government of Alberta unilaterally determined in advance that the REP initiative did not negatively impact Aboriginal and treaty rights of the Nations, and therefore did not consult, but "engaged" communities, the substance of discussions and subsequent consideration of the Nation's comments was not adequate:

"While the REP anticipates no potential adverse impacts on rights or traditional uses through this process, Alberta recognizes that First Nations may have unique insights into the regulatory process and encourages you to participate in these meetings on the enhancement of Alberta's regulatory process. If you are unable to attend the meeting, we would appreciate if you could send one senior representative in your place[2].

The Nations recognize that the current regulatory process is disjointed, overly complex and confusing. There is little or no coordination between SRD, ERCB and AENV. There are different consultation standards depending on which department, field office or government representative is supposed to deal with consultation matters. There is no consistent approach on the ground as to when or if consultation is required within the Government of Alberta. There are extremely good reasons for reviewing and revising the regulatory process.

There are also benefits to both a "one window" and "one regulator" model approach that may address the current regulatory shortcomings, including lack of coordination; standardization of Aboriginal consultation requirements, etc. However the Nations would like to raise a number of concerns for a streamlined regulatory model based on a risk-management approach.

The REP Design Team member described a regulatory system based on a risk management approach (or "risk-to-outcome" based) as one of the pre-requisites for improving regulatory performance. This is extremely problematic. As none of the current outcomes of land management currently being considered by the Government of Alberta includes sufficient land for the exercise of Aboriginal and treaty rights (particularly in the Lower Athabasca), the basis for regulatory enhancement is flawed from the beginning. As an example, the recently released RAC Vision Document barely mentions constitutionally protected rights of the Nations at all, and places economic development as a priority far above the protection of section 35 rights. A "risk-to-outcome" approach is vague at best. Based on the experience of the Nations, such an approach, in practice, focuses on the risks to economic development rather than on the risks to the meaningful exercise of section 35 rights by the Nations.

The Nations also do not want the Alberta 'one-window/one regulator to resemble and embody the flaws found in the British Columbia Oil and Gas Commission ("OGC") in its approach to managing effects on the environment. Those flaws include, but are not limited to: inadequately considering Aboriginal consultation matters; short regulatory timelines; and total lack of pre-Application consultation with First Nations. We do recommend, however, that Alberta take note of revenue sharing in British Columbia, and the distinction between procedural and Crown consultation that is made by the OGC.

To be clear, the Nations are of the view that a one-window approach is a very good idea. But it will only work if the Government of Alberta requires companies to involve First Nations early in any application process, before applications are filed, to ensure that those Nations are consulted on the design of biophysical and other studies; that the Nations have some input into project design, scoping of projects that require environmental assessments, and in respect of designing the terms of reference for any EAs. Such aboriginal input cannot be anything other than legally mandated, particularly if Alberta continues to delegate most, if not all, of its consultation obligations to industry. The approach

[2] August 27, 2010 invitation letter to Nations

will only work if there is clarity around consultation: when are proponents and the Crown required to consult (how early in any decision-making process?); what are the triggers for consultation? What are the procedural and substantive aspects of consultation involved? If there is a one-window approach, who consults? If the one-window approach involves both consultation and decision making, which is the OGC model in British Columbia, how are those roles distinguished, particularly so that there is no conflict of interest in terms of the roles?

Any consideration of a one-window approach must take into account the financial needs of First Nations for meaningful consultation. Alberta has actually reduced core consultation funding, even though Alberta keeps increasing the processes and issues on which it purports to consult with First Nations. The REP process does not deal with this issue at all.

Aboriginal consultation is the process of first identifying and then seeking to address potential adverse impacts (including direct, indirect, and cumulative) to the exercise of Aboriginal and treaty rights. Aboriginal consultation is a legal responsibility of the Crown to identify, assess and if necessary accommodate those potential impacts brought about through Crown decision or action. It is also recognized that certain procedural aspects of consultation can be delegated to industry. Although there are profound differences of opinion between the Crown and the Nations on how far such delegation can go, it is recognized that the primary role of the duty to consult remains with the Crown.

Meaningful Aboriginal consultation involves two distinct steps: ***assessment and accommodation.*** *Assessment* will determine the extent, scope and size of the potential direct, indirect and cumulative impacts on biophysical, cultural, social and economic systems of a proposed activity. *Accommodation* discussions will determine appropriate mitigation steps to offset those impacts.

Accommodation may include options, such as:

- Avoidance of impacts,
- Minimization or mitigation of impacts, and,
- Economic measures to offset identified residual impacts to the exercise of those rights.

Accommodation discussions occur only after the proposed activity has been properly assessed. It is critical for the Crown to have accurate and credible information about the potential negative/positive direct, indirect and cumulative impacts on biophysical, cultural, social and economic systems in order to properly assess the impacts on the rights and interests of potentially affected Nations.

Aboriginal consultation requires the Crown to inquire and determine what potential effects a proposed decision has on the exercise of Aboriginal and treaty rights. Regulatory processes in all Canadian jurisdictions are meant to gather and identify information about both potential positive and negative environmental and socio-economic effects of a proposed activity.

Under existing regulatory processes, Proponents themselves are required to predict the potential effects of their proposed project before approval can be granted by the appropriate Regulating Authority. To predict those effects, Proponents are required to undertake assessments of various biophysical (including air, hydrology, wildlife, vegetation, fish and fish habitat, and soils), socio-economic and

cultural systems. Proponents use specialists to compile this information needed for inclusion in their applications to the appropriate Regulating Authority.

If the regulatory process (as recommended by the REP Task Force and Design Team) minimizes any opportunity for the Nations to be consulted on the potential impacts of a project occurring within the areas to which they have a right to exercise their Section 35 rights, this will have a negative effect on that ability to exercise.

In the majority of cases, involvement of or consultation with Nations on potential impacts to their rights occurs only ***AFTER*** applications are ready for submission or have been submitted to Regulating Authorities (including SRD, AENV and ERCB). Applications contain completed, or nearly completed, assessment information compiled by the Proponent. **This is too late in the process**. When this occurs, Nations do not have the necessary information or time to properly identify issues and concerns in relation to the proposed activity.

The Government of Alberta has initiated several 'projects' over the last several years, including:

- Land Use Framework
- Alberta Land Stewardship Act
- Lower Athabasca Regional Plan
- Comprehensive Regional Infrastructure Plan
- SRD Public Land Access Regulations

Alberta has refused in each instance to work with the Nations to implement a mutually agreeable consultation process in relation to these initiatives and have downplayed any analysis that focuses on what is needed to sustain the meaningful exercise of section 35 rights in those processes. To the extent that the REP process includes or incorporates LARP, ALSA and related processes, this will simply exacerbate the existing infringement of section 35 rights. There must be clarity, which the Nations have sought, as to the relationship between things like LARP, ALSA, and actual regulatory decision making – whether by individuals or by bodies such as the ERCB.

Finally, the Nations also require more information on two initiatives described in the "Enhancing Assurance: The First 90 Days" report, issued by the REP Task Force in June, 2010. Neither of these two initiatives was disclosed by the Task Force in the two meetings with the Nations (August 12; September 16, 17; October 1). They are described as follows:

1. **Memorandum Of Understanding on First Nations consultation information** – A Memorandum of Understanding will facilitate the ERCB receiving information on SRD's consultation decision-making under Alberta's First Nations Consultation Policy on Land Management and Resource Development . This will support the ERCB in making timely decisions on whether First Nations may be directly and adversely affected by applications made to the ERCB through the provisioning of information.
2. **Coordinated First Nation consultation approach** – In an effort to give industry and First Nations more clarity and improved process around consultation, Energy, Environment and SRD are implementing a coordinated First Nation consultation approach, starting with environmental impact assessments. This coordinated approach means that the three ministries are working together to provide more consistent direction to industry regarding First Nations consultation that interfaces across the business of the three ministries. The goal is to provide clear First Nations consultation direction on

behalf of all three ministries to industry earlier on in the regulatory process which in turn will provide First Nations the opportunity to raise consultation concerns in a timely manner. Ultimately, this coordination should eliminate duplication of consultation activities that consume First Nation's and industry's time and efforts.

These two initiatives may have far-reaching consequences for First Nations. What, exactly, do they entail and what steps is Alberta going to take to consult the Nations prior to implementing them?

We have also attached our recent proposal submitted to AEVN on September 20, 2010. Although this concept was raised with the Government of Alberta as early as October 2008, the Nations would like to highlight that developing this type of information is necessary to facilitate informed regulatory decision making in the Athabasca region.

The Nations reiterate their request for a one-on-one meeting with the Task Force (including Design Team members) before finalizing their recommendations in December.

Sincerely,

Shaun Janvier
CPDFN IRC Director

Melody Lepine
MCFN GIR Director

Lisa King
ACFN IRC Director

cc: Honourable Ron Liepert, Minister of Energy
Chief and Council, Chipewyan Prairie Dene First Nation
Chief and Council, Athabasca Chipewyan First Nation
Chief and Council Mikisew Cree First Nation
Robert Freedman, JFK Law Corp

Encl/2

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September 20, 2010

Alberta Environment
Environmental Stewardship
Environmental Relations
111 Twin Atria Building
4999 – 98 Avenue
Edmonton, AB T6B 2X3

Attention: Alvaro Loyola, Senior Advisor, Aboriginal Relations

Canadian Environmental Assessment Agency
61 Airport Road NW
Edmonton, AB T5G 0W6

Attention: Sheila Risbud, Aboriginal Affairs

Dear Mr. Loyola and Ms. Risbud:

Re: Proposal to Develop Athabasca Chipewyan First Nation (ACFN) and Mikisew Cree First Nation (MCFN) Traditional Land and Resource Use Management Plans (TLRUMP)

We are pleased to submit our proposal to develop TLRUMP for our First Nations. The TLRUMP concept builds on the Traditional Resource Use Plan concept that was tabled with Alberta in submission on the Land Use Framework, Lower Athabaca Regional Plan, and in respect to various regulatory applications (namely Shell's Jackpine Mine and Pierre River Mine projects, and Total's Joslyn North project). Our joint proposal provides further detail on the rationale for TLRUMPs and our estimate of the time and resources required to develop a TLRUMP. We look forward to a positive response from your departments. We would be happy to discuss this proposal with you and answer any questions that you might have.

Sincerely,

(original signed) *(original signed)*

Lisa King
ACFN IRC, Director

Melody Lepine
MCFN GIR Director

cc: ACFN Chief and Council
MCFN Chief and Council
Dave Bartesko, Land Use Secretariat

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Proposal to Develop Athabasca Chipewyan First Nation and Mikisew Cree First Nation Traditional Land and Resources Use Management Plans (TLRUMP)

Submitted to:

Alvaro Loyola, Alberta Environment

Sheila Risbud, Canadian Environmental Assessment Agency

Submitted by:

Lisa King, Athabasca Chipewyan First Nation Industry Relations Corporation

Melody Lepine, Mikisew Cree First Nation Government and Industry Relations

September 20, 2010

1. Introduction

The Athabasca Chipewyan First Nation (ACFN) and Mikisew Cree First Nation (MCFN) are proposing to each individually develop Traditional Land and Resource Use Management Plans (TLRUMP). A TLRUMP would provide information necessary to understand the land and resource uses, interests and rights of the First Nations in Provincial and Federal land and resource management planning, decision-making and consultation processes.

This concept was first first provided to the Government of Alberta (Alberta Sustainable Resources Development) as a "Traditional Resource Use Plan" in the October 31, 2008 joint submission of MCFN and Chipewyan Prairie Dene First Nation (CPFN) on the Land Use Framework. In a letter to Alberta Environment and Shell Canada on December 18, 2009, ACFN asked whether the parties were prepared to work with and fund ACFN, prior to any project approvals on the Jackpine Mine Expansion and Pierre Rive Mine projects, on developing a TLRUMP in order to determine the resources on which ACFN relies to exercise their rights. Subsequent to that letter, Alberta Environment requested more information on the TLRUMP concept, and ACFN provided a brief proposal as an appendix to a letter dated February 1, 2010 to Alberta Environment and Shell Canada.

AENV and CEAA have requested a more detailed proposal from ACFN and MCFN. This proposal for a TLRUMP includes the following:

- Study Purpose and Objectives
- Study Rationale
- Study Methodology
- Study Work plan
- Summary of TLRUMP Deliverables
- Timelines and budget

ACFN and MCFN are presenting this proposal to AENV, CEAA, and potential Industry funders.

2. Study Purpose and Objectives

The purpose of the Traditional Resource Use Plan is to provide scientifically credible and culturally appropriate information on the land and resource requirements of ACFN and MCFN for the meaningful exercise of Treaty 8 rights now and into 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., 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;

Developing the TLRUMP will require in-depth community consultation, rigorous socio-economic research, and tools for managing, analyzing, and communicating this information as explained in the methods section of this proposal.

3. Study Rationale

Current land and resource use planning and decision-making (including regulatory EA processes) in Alberta do not analyze adequately the direct, indirect and cumulative impacts of development and land use on First Nations land and resource use, Aboriginal and treaty rights and interests. Project-specific approaches to environmental assessment, especially in absence of an appropriate cumulative effects management framework, do not yield a comprehensive understanding of impact to the First Nations. These gaps are compounded by a lack of capacity in First Nations communities to bring forward credible and relevant information to these processes in a timely fashion. The result is often errors in decision-making, misunderstandings, and conflicts due to inadequate information. This is particularly troublesome in the Lower Athabasca Region given the sheer number of operating, proposed and potential oil sands development in the Traditional Lands of the two First Nations.

A TLRUMP is meant to be a tool facilitating more timely and effective integration of ACFN and MCFN information and interests into decision making and planning processes. This will result in greater capacity for each First Nation to provide critical inputs of information at all stages of the EIA/regulatory process, allowing EIA and consultation to proceed substantively at the same time, and establishing earlier in the process how Aboriginal and treaty rights may be impacted. Meaningful and adequate accommodation measures can then be built into the EIA mitigation process. The coherent TLRUMP and supporting studies are expected to increase the First Nations-specific data consistency, timeliness and availability for proponents.

Developing a TLRUMP would have benefits for Crown consultation, land and resource use planning, environmental impact assessment, regulatory stages of approvals, cumulative effects monitoring and management, and other elements of decision-making. Benefits include:

- Timely data that is accessible by project for government and proponents;
- Data consistency;
- A streamlined consultation process; and
- Increased capacity for ACFN and MCFN.

4. Study Methodology

Geographic scope of study

The studies will be limited to impacts on traditional use and practices within ACFN and MCFN traditional lands, as well as mobile resources (e.g., water, air, wildlife) that seasonally reside within or travel through traditional lands that may be impacted by activities outside those lands.

Temporal scope of study

A principle of good EIA practice is that the baseline conditions wherever possible should be those conditions that were present prior to industrial development occurring (in this case, around 1965), or where that data is not available or sparse, an examination of trends in conditions over time somewhere in between "pre-development" and the "present case" should be used. This study will ground the framework as far back in time as possible. Where data gaps are evident and assertions of change are uncertain, these will be identified and noted as limitations of the analysis.

Issues scope

The focus of the TLRUMP differs from that of many other impact assessment studies by focusing on the intersection of impacts on rights and impacts on resources.

The First Nations maintain that each have Treaty and Aboriginal rights protected by section 35 of the *Constitution Act, 1982.* For the purposes of the study, Treaty rights include hunting, fishing, trapping and gathering. This includes incidental rights that support the meaningful practice of the treaty right, including sufficient quality and quantity of required traditional resources within traditional lands. For example, the right to hunt can only be meaningfully practiced when there is adequate amounts of *healthy* game (e.g., within the range of natural variation for the species; healthy as evaluated from the perspective of the harvester) within areas that are accessible to harvesters.

Identification of First Nations-specific limits of acceptable change for key "rights-based resources" is thus central to both EIA and Crown s.35 consultation.

In addition, the practice of these rights may be influenced by a variety of other factors related to environmental impact concerns, such as a lack of faith in the health associated with consuming country foods. Thus, while these underlying Treaty and Aboriginal rights and the resources required to

meaningfully practice these rights are at the foundation of the proposed TLRUMP, the First Nations will take a broader perspective on what the exercise of those rights mean in terms of social, economic, and cultural health and well-being of each First Nation. A community vision concerning the relationship between the land and the people (including health, well-being and culture) is required in order to define this broader perspective. The community vision will provide the basis for an assessment framework for linking impacts to traditional resources to impacts to culture, community health and well-being.

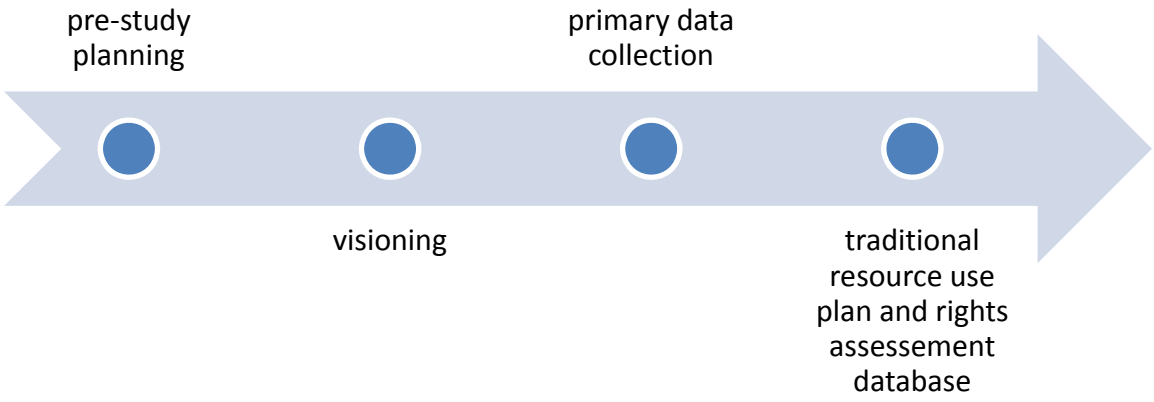
Project capacity and staff

A committee from each Nation will be formed to provide input into key research stages, to work closely with the interdisciplinary research team to understand the key issues of concern, to advise on liaising with the remainder of the community and on the selection of participants for workshops, interviews (and fieldwork).

We anticipate that an interdisciplinary research team consisting of people with social science, landscape ecology, GIS mapping expertise, traditional use practitioners, ecology, land and resource planning and project management expertise would be key to successful completion of the TLRUMP

5. Study Work Plan

The First Nations propose a four phase Work Plan for this study proceeding from high-level planning and visioning, through detailed data collection, to the production of tools and deliverables.



Phase 1: Pre-Study Planning

In this phase, we will build the project team, hold government to government meetings, agree on project methodology, set up data management and communications protocols, define research protocols (e.g., Traditional Knowledge or Ethics Protocols) and finalize the study scope.

Phase 2: Visioning

Phase 2 focuses on developing a community vision for the Traditional Land Use Plan. Sessions in Fort Chipewyan, Fort McMurray, Fort Smith and Edmonton will focus on culture and well-being in relation to traditional resources. For example, what vision do people have for continuing their way of life? What are the key practices, resources and relationships needed for health and well-being to be maintained? The vision that is identified through these sessions will be used to identify the first draft of the core valued components for the TLRUMP.

A research and gaps analysis exercise will be done to surface any existing knowledge and data related to these valued components, the result of which will be a State of Knowledge report. Sources will include:

- Collection and analysis of existing secondary data from environmental assessments. This will involve drawing together all existing completed environmental assessment reports on operating and proposed developments in the region. Analysis of the reports will focus on the core areas of focus, such as traditional use, food security issues, culture and social and economic impacts, with reports and data mainly from consulting companies hired by the oil sands producers.
- Collection and analysis of existing secondary data from internal community sources. This will involve drawing together all the data that has been collected in the past by consultants.

Full-day workshops, open to all First Nation community members, are then envisioned again in Fort Chipewyan, Fort McMurray, Fort Smith and Edmonton. The Project Team will provide short presentations about the valued components, criteria and indicators that have emerged through the vision sessions, and the "State of Knowledge" report.

Community members can provide input on whether these are the culturally relevant and accepted valued components to understand the present and trends in the health of the environment and the associated ability to exercise land-based Aboriginal and Treaty rights. They will then be asked to suggest management objectives and planning tools (e.g., zoning, restricted areas, among others) for each valued component.

These visioning sessions will allow community members to provide input on the accuracy of the State of Knowledge report, to review proposed study scopes, parameters, and methods, and to identify any additional work being conducted (or already completed) by any other stakeholders in the region (e.g., developers, AENV, and CEMA).

The key goal of this phase will be to build a preliminary model for the TLRUMP, to be tested and validated in the next phase.

Phase Three: Primary data collection and analysis

Data will be gathered on selected valued components, criteria and indicators related to the TLRUMP. This will include surveys, interviews, focus groups, TUS and TEK inputs, mapping and modelling exercises. The focus of this work will be to establish the conditions needed for the practice of rights, and gather the data on all the key valued components that were identified in earlier phases.

The focus of the interviews, focus groups and research in this stage will be to establish the geographic scale for resources for practicing rights, the required condition of the resources, and the future strategies that might need to be implemented to protect rights. Research in this phase will:

- Identify why the protection of resources is culturally important to both First Nations, including ACFN and MCFN defined concepts of environmental stewardship;
- Identify what pressures (e.g., road access and habitat fragmentation) have been threats to the meaningful practice of Treaty 8 rights;
- Identify what resources are integral to the meaningful practice of Treaty 8 rights;;
- Integrate the information into an appropriate management tool format (e.g., GIS; planning documents) for use by decision-makers;
- Determine the socio-cultural, ecological and economic conditions (including desired conditions of manageable or acceptable change) that support the meaningful practice of Treaty 8 rights for each identified resource currently;
- Recommend landand resource management strategies, including monitoring, that would ensure the continued meaningful exercise of Treaty 8 rights (e.g., protected or conservation areas; hunting restrictions; setbacks; timing windows; etc.); and,
- Develop Aboriginal and treaty rights enhancement strategies and a suite of mitigation measures for the exercise of rights that are grounded in cultural realities.

Phase Four: Traditional Land and Resource Use Management Plan (TLRUMP)

The purpose of the TLRUMP is to provide credible, sufficient, defensible, and reliable information on the land and resource needs of the First Nations for the meaningful exercise of their Treaty 8 rights within their Traditional Lands now and into the future. At this point, the TLRUMP will be presented to the communities, with a focus on reporting on the current state of the traditional resources. This effort will be twinned with proactive development of strategies and tools for maintaining the health of the traditional resources of the region that people depend on for practice of Aboriginal and treaty rights. A variety of management options will already have been developed, which will then be field tested with the communities, and negotiated in government to government tables, where appropriate. For example, where there is an existing threat to traditional resources, there may need to be both government and community strategies in place for management and mitigation.

6. Summary of TLRUMP Deliverables

The specific outcomes of developing the TLRUMP will include:

- Baseline and trend dataset for valued components related to traditional resources, with qualitative and quantitative components;
- A State of Knowledge report on the valued components that have been community selected, bringing together data and knowledge from disparate sources;
- A pressure-state-response framework from the cultural framework that illustrates pathways of change. This will enable future impact assessments to accurately model their own impact pathways and predict changes;

- Mapping of areas of special sensitivity (confidentiality provisions may apply to external use); and,
- Replicable, community-accepted methods of assessment (thus applicable for both future project-specific and cumulative effects assessments).

The primary deliverable to Government will be a **Traditional Land Resource Use Plan Management and Assessment Framework** that includes the following:

- MCFN and ACFN Guidelines for assessing Traditional Land and Resources. This guidance document will provide clear expectations for proponents regarding the process for accessing traditional land and resource data from MCFN and ACFN, as well as guidelines for quality traditional use, socioeconomic and ecological research;
- Management objectives, criteria and thresholds for traditional lands and resources; and
- Management and mitigation options for traditional lands and resources.

In order to enable implementation of the TLRUMP, it is necessary to develop internal capacity within ACFN and MCFN. This will consist of an internal database, data management procedures and formalizing functional roles within each organization. While this "deliverable" is internal, we can provide a report to our external funders on the structure of this system (the guidance document mentioned above).

7. Timelines and Budget

Provided the required funding is made available, this project will be completed within two years, with the following schedule, deliverables and updates to funders. The cost for each individual First Nation (ACFN and MCFN) to complete a TLRUMP specific to their First Nation is anticipated to be $1,435,500 (total budget of $2,871,000).

Project Phase/Step	Estimated Timeline	Deliverables	Consultants	Community engagement	Project Manager	
Phase 1	Month 1	Project team formation	$10,000	0	$5,000	
Phase 2	Months 2-4	Vision sessions	$25,000	$100,000	$15,000	
	Months 5-8	State of knowledge report	$60,000	0	$15,000	
	Months 8-10	Testing of VCs, criteria and indicators with communities	$25,000	$100,000	$10,000	
	Months 7-16	Design of dataset for VCs, criteria and indicators	$200,000	$50,000	$50,000	
Phase 3	Months 15-19	Community data reports and management systems	$300,000	$50,000	$15,000	
Phase 4	Months 18-24	TLRUMP planning and validation	$150,000	$100,000	$25,000	
		Subtotal of costs	$770,000	$400,000	$135,000	$1,305,000
		Administration (10%)				$130,500
		Total project value per First Nation				**$1,435,500**
		x 2				**$2,871,000**

Chipewyan Prairie
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August 18, 2010

Diana McQueen
Parliamentary Assistant, Alberta Energy
Government of Alberta
#620 Legislature Annex
9718 107 Street
Edmonton, AB T5K 1E4

RE: Regulatory Enhancement Project
"Stakeholder Engagement" Process

Dear Mrs. McQueen,

I would like to take this opportunity to offer a preliminary response to the Government of Alberta on their current Regulatory Enhancement Project (REP).

The expressed purpose of the REP is to ultimately "increase competitiveness" of the Alberta regulatory process to "ensure that Alberta captures the appropriate levels of investment and protects valuable industry activity." In the effort to increase competitiveness, the REP will "consult a broad range of interest groups," including First Nations, to gather input for consideration by the Design Team, who will present recommendations to the MLA Task Force to improve Alberta's policy assurance system.

The purpose of this government initiative and how the initiative is being implemented is troubling to the people of Chipewyan Prairie Dene First Nation for several reasons.

Firstly, the economic prosperity enjoyed by the rest of the province resulting from oil and gas activity, is not felt by the majority of our Nation. The assertion that:

> The benefits [of oil and gas activity] will affect literally hundreds of communities and thousands of businesses and jobs - with sustained economic growth supported by increased spending, labour income, GDP, etc....In fact, almost one in seven Albertans are directly or indirectly employed in the energy industry. These [regulatory]

changes are expected to create 8,000 more jobs in 2010-11 and 13,000 more jobs annually thereafter in all sectors of the economy.

Our Nation faces high levels of unemployment, and conversely, our community's physical infrastructure (including housing, roads, schools, and health centres) is not supported by funds derived from oil and gas revenues (including royalties) collected by the Province of Alberta. Oil and gas activity occurring within our Traditional Territory has not resulted in significant improvements to Chipewyan Prairie Dene First Nation members lives. Until that occurs, our Nation does not have the same interest in ensuring oil and gas activity levels remain. An honest and open discussion about sharing the benefits of oil and gas activity occurring on CPDFN traditional territory between CPDFN and the Government of Alberta would be a good starting point.

Secondly, the oil and gas activity that is occurring within our Traditional Territory has resulted in the permanent and long term 'taking up' of land' by the Government of Alberta, so that the exercise of CPDFN Section 35 rights (including hunting, trapping, fishing and gathering) is negatively affected, influencing our ability to provide food for our families, and our ability to pass on our culture and language to our youth. The displacement of traditional activities by oil and gas activities is the primary concern of the CPDFN. To determine how oil and gas activity is negatively affecting the exercise of CPDFN Section 35 rights, the Government of Alberta (including all departments and quasi-judicial boards and agencies) is supposed to consult with CPDFN to identify both potential impacts to those rights, and proposed accommodation measures to deal with those impacts.

Thirdly, the prospect of regulatory relaxation in any form greatly disturbs both CPDFN members and its leadership. Whether termed, 'streamlining,' 'simplification', or 'risk-based,' the regulatory system is the **primary** mechanism to carry out meaningful Aboriginal consultation with CPDFN. The proponent who is proposing the project is required to gather the necessary information about the potential effects of the project and provide that information to the Regulatory Authority. A lessening of current Aboriginal consultation requirements would effectively extinguish CPDFN's ability to voice concerns, and prevent the identification of potential negative effects of proposed projects. CPDFN has a concern that if a risk-based approach is used, only the largest scoped project will have Aboriginal consultation requirements attached. This is unacceptable.

What became very clear at the session held in Red Deer on August 12th was the MLA Task Force did not have adequate information about the Government of Alberta First Nation Consultation Guidelines, and the implications of 'improving' the oil and gas regulatory process would have on the Aboriginal consultation requirements. This is absolutely required before the Task Force moves forward in creating recommendations.

After quickly reviewing the document, *"What We Heard Report: Issues and Opportunities,"* dated August 4, 2010, a reference in the Oil and Gas Industry Meeting summary (Section 3.5.2) the comment of ***"Aboriginal consultation during the approvals stage is perceived to be lengthy and there is a need to improve the process"*** is particularly troubling. CPDFN interprets this comment as support for a relaxation of current Aboriginal consultation requirements that is viewed by CPDFN as already insufficient process to identify potential impacts to the exercise of our Section 35 rights.

Finally, the manner by which the 'engagement' process was structured for the REP causes CPDFN extreme concern. CPDFN believes that the Task Force did not structure a meaningful or sufficient Aboriginal consultation process for this initiative itself. The fundamental problems with how the Task Force attempted to 'involve' Aboriginal people include:

- The Government of Alberta have determined that the REP initiative will have no negative effect on the exercise of Aboriginal and treaty rights; therefore a formal consultation process is not required. CPDFN fundamentally disagrees with this assessment, and believes this initiative will result in negative effects to the exercise of Section 35 rights. Any lessening of Aboriginal consultation requirements, based on this review will result in negative consequences
- The first time CPDFN was made aware of the material associated with the REP was August 12, 2010; the Task Force had met on 6 other occasions with various other non-Aboriginal groups to discuss the initiative and gather feedback
- Only 2 weeks notice was provided to CPDFN to attend the Red Deer session
- The session was scheduled during the summer holiday season, when key personnel are out of the office
- No capacity was provided to CPDFN to attend, even though the invitation specified that a "senior representative" should attend the session
- The timeline for this initiative (delivery of final report by December 2010) is completely unrealistic, due to lack of capacity for sufficient review and lack of time allotted to meet with CPDFN directly
- CPDFN objects to an Aboriginal consultation process based on inclusion with other 'stakeholders.' Time and time again, direction has been provided by the Supreme Court of Canada that Aboriginal consultation must be a direct and unique process with potentially affected Aboriginal Nations. Due to the nature of Section 35 rights, an separate Aboriginal consultation process is necessary
- No working lunch was provided at the session, which is simply bad manners and minimized discussions.

At minimum, CPDFN requires a more thorough review of this document, and other supporting material related to this initiative. This will require more time and sufficient capacity for a directed review.

Finally, CPDFN would like to invite the Task Force to a meeting with CPDFN leadership as soon as is practical to discuss these issues before the Task Force has concluded it's solicitation of input for their final report and recommendations.

We look forward to your response.

Sincerely,

Shaun Janvier

Shaun Janvier
Director, CPDFN IRC

cc: Robert Freedman, JFK Law

Appendix 2 Treaty 8 Alberta Chief's Position Paper on Consultation (September 30, 2010)

TREATY 8 FIRST NATIONS OF ALBERTA

To protect, promote, bring to life, implement and sustain the true Spirit and intent of Treaty No. 8 as long as the sun shines, the grass grows, and the rivers flow.

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September 30, 2010

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Honourable Len Webber
Minister of Aboriginal Relations
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Re: Treaty 8 Alberta Chiefs' Position Paper on Consultation

Elders and Chiefs from the Treaty 6, 7 & 8 First Nations in Alberta gathered from April 12 to 14, 2010, from June 2 to 4, 2010, on August 24 and 25, 2010, and Treaty No. 8 Alberta Chiefs met on September 20th, 2010 to discuss consultation. Based on these deliberations, our objectives in this Position Paper (*Position Paper*) are threefold:

1. To set out our common consultation objectives, interests and principles including livelihood participation and greater participation in decision making;

2. To discuss our concerns with Alberta's current approach to consultation and the resulting general failure to respect our Treaty rights (in Appendix A); and

3. To provide our views (in Appendix B) of what we consider to be the core elements of a new, mutually developed, approach to consultation.

As stated in the letter of September 3, 2009 to the Premier, in the event that our concerns and interests are not satisfactorily addressed, we will take steps to develop our own province-wide First Nations' approach to consultation as an alternative to Alberta's *First Nations Consultation Policy on Land Management and Resource Development* ("Consultation Policy") and related guidelines. Some First Nations have, in fact, already developed their own consultation protocols. However, before more First Nations take this step, we the undersigned Chiefs of Treaty 8, invite your Government to enter into a negotiating process involving Alberta, Canada where appropriate, industry representatives and Alberta First Nations with a goal of jointly developing an agreement, not a policy, on consultation. This Position Paper would serve as our opening position in such negotiations. We note that a similar negotiating process has recently met

with success in Nova Scotia were the provincial government, Canada, and First Nations have ratified an agreement on consultation.

INTRODUCTION:

1. Treaty Centred Consultation

A core concern emerged from our discussions: Treaty No. 8 is the foundation of our relationship with the Crown. As Treaty 8 First Nations, we have the honour of being entrusted with these lands by our ancestors, and the obligation to future generations to be responsible stewards of these lands and our Treaty. It is through our Treaty that First Nations have maintained our historic and ongoing connection to our lands.

Failure to honourably and meaningfully consult with First Nations is disrespectful of our connection to the land as well as to our Treaty that reflects this connection. We need to change Alberta's record in this regard. For both Alberta and First Nations to continue to benefit from the Treaty, we must mutually respect and honour the Spirit and Intent of the Treaty No. 8.

We look to the Treaty as having its own life. The quintessential phrase from our oral history framing the Treaty is: "as long as the grass grows, the sun shines, and the rivers flow". This is a reflection of the living nature of the Treaty. Our Treaty can and will adapt over time, but we must always ensure that the core elements of the Treaty is upheld. Consultation is the forum through which we can ensure this balance takes place.

Our Nations also have protocols and ceremonies that we use to understand, maintain and balance the intent of the Treaty. Our protocols and ceremonial traditions give us the tools and legitimacy within our territories to make decisions on how we treat the land and its resources. Our processes pass on critical teachings and a management system based on generations of knowledge and information about our lands. These traditional processes vary from Nation to Nation and are key to interpreting the Treaty; further, these processes cannot be replicated by the Crown. However, Alberta's approach to consultation has not involved any significant attempt to incorporate our protocols and ceremonies into a mutually-agreeable approach.

Our Nations do not look at consultation as just a series of land use decisions, but also at the "big picture" of our relationship with Alberta and Canada. Consultation is about ensuring balance. Our perspectives and positions are guided by a number of different interplaying factors regarding our members, communities, economic interests and connections with the land. We do not see our traditional lands as set aside for the exclusive use of 'Albertans,' but rather to be shared with all people within Treaty 8 borders. We want to ensure our people and communities can sustain themselves with the same access to opportunities that others are entitled to and, at the same time, ensure that our Treaty and way of life is protected.

Our Treaty needs to be fulfilled for our people. We cannot have our rights defined so narrowly so as to make our rights useless or meaningless. Alberta needs to identify strategies with First Nations to ensure Treaty rights and developments are balanced in a mutually acceptable manner. There are areas of particular concern to many Nations that will require a detailed level of planning, discussions, and accommodations to ensure that Treaty rights continue to be viable and meaningful.

First Nations have expressed many concerns, on many occasions, about Alberta's approach to consultation since the introduction of the Consultation Policy by Alberta in 2005. We have experienced a

negative form of consultation by which Alberta has attempted to avoid responsibility while maintaining the appearance of 'consulting' with First Nations. This needs to change. We have signed on to the Protocol Agreement and engaged in the Consultation Policy review process because we want positive and mutually beneficial change. It is incumbent on Alberta to demonstrate, by changing its own approaches and attitudes, that we are not misplacing our optimism in a renewed relationship.

Although our primary relationship is with the Federal Crown, Alberta and First Nations must address the reality that we share the same lands and home. We can only mutually succeed if we are willing to work together. Consultation is the tool to ensure mutual success. It will only be successful if we attempt to address each other's issues in a manner that will get us closer to our goals.

The honour of the Crown and the Treaty relationship are sources of the duty to consult and accommodate which also require respect for, adherence to, and recognition of the Treaty. Any approach to consultation that is not grounded in the Treaty relationship cannot achieve the fundamental objective of reconciliation that has been called for by the Supreme Court of Canada. As the Supreme Court of Canada made clear in the *Taku River* and *Haida* cases, at paragraphs 24 and 45 respectively:

> The Crown's honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).
>
> * * *
>
> The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake.

Any approach to consultation going forward must recognize that our Treaty rights are protected by the *Constitution*. With respect, Alberta and Canada cannot simply pay lip service to those rights: consultation and accommodation processes must respect and accommodate our rights. While we are open to discussing how we can protect our Treaty rights, we are not open to an approach unilaterally developed by Alberta which ignores those rights in practice.

Our strong emphasis on the Treaty in the context of consultation is not simply a matter of principle or law – it is also a point of great practical importance for First Nations. Across Treaty 8 Alberta, First Nations are gravely concerned about the continued viability of our Treaty rights and our traditional ways of life. Resource development, urban growth, and other forms of development around Alberta are threatening First Nations' ability to hunt, fish, gather and trap. This has placed enormous stress on First Nation communities. Growth and development has increased pressures on the remaining areas of Crown land in these Treaty areas diminishing First Nations' ability to exercise our Treaty rights. The massive existing and planned development of the oil sands in the Treaty No.8 area has already affected and will continue to affect, the ability of those First Nations to exercise their rights. First Nations across the province face increasing pressures on their reserve lands, including the water resources within these lands, from increased resource development and/or the growth of neighbouring municipalities.

Respect for the Treaty goes well beyond being a matter of principle; respect for the Treaty is critical to the long term survival of First Nations' culture, way of life, and the well-being of our communities. We are troubled that in correspondence, many of our First Nations are told by Alberta that, essentially, our Treaty did not guarantee that our traditional ways of life would be maintained forever. We recognize that development will continue to take place. However, Alberta's approach is often selective and ignores the promises that were made in our Treaty. A fair "balancing" of rights and interests has to provide for the

meaningful exercise of our Treaty rights in the face of development, as well as, ways in which our First Nations can benefit from the development that does come.

The *United Nations Declaration on the Rights of Indigenous Peoples* also lends moral force to our call to Alberta and Canada to respect and adhere to the Treaties. The *Declaration* was broadly supported by 143 countries and acknowledged that "treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States." Accordingly, the *Declaration* affirmed in Article 37(1) that:

> *Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.*

The *Declaration* articulates certain principles that are paralleled in the Canadian legal tradition. It is well established that the Treaties are sacred agreements and that pursuant to the honour of the Crown, there is a requirement to respect and adhere to the terms of the Treaties.[1]

In addition to the discussion of the principles of consultation and other related matters in this Paper, First Nations also call on Alberta and Canada to do more, in cooperation with First Nations, to promote an improved level of awareness and understanding of our Treaty, including potentially:

- Treaty Day - The creation of a Treaty Day in Alberta to acknowledge the importance of our Treaties (T6, T7 & T8) to all Albertans and to increase the level of public understanding that the Treaties relationship between First Nations, the Crown and society in general, is fundamental to living in Alberta because our Treaties are sacred living documents that remind us where we've been and where we should be going.

- Treaty Commissioner - A commitment by Alberta to work with our First Nations and the Government of Canada to create a trilateral process, developed with and overseen by an independent Treaty Commissioner, to promote and work towards an improved and common understanding of Treaty No. 8 in Alberta.

2. Challenges Created by Alberta's Approach to Consultation to Date

A second theme also emerged from the meetings that pose a significant challenge for the review of the *Consultation Policy.* There is a pervasive sense of scepticism among our First Nations - many feel that Alberta's leadership and officials do not understand Treaty No. 8 and, therefore, do not have the political will to honour the Treaty and the Crown's duty to consult and accommodate. Alberta has acknowledged the Treaty in the text of the *Consultation Policy* and the *Protocol Agreement;* however, far more often than not Alberta's actions have failed to demonstrate respect for the Treaty and a genuine intention to fulfill the Crown's duty to consult and accommodate.

Our sense of scepticism stems from First Nations' experiences during the development of the *Consultation Policy* in 2005 and Alberta's approach to consultation since 2005. First Nations at the April, June, August, and September meetings this year expressed widespread disbelief that in 2010 it is still necessary to talk to Alberta about implementing the principles of *Mikisew Cree First Nation v.*

[1] *R. v. Badger,* (1996) 133 D.L.R. (4th) 324 (SCC), para. 41.

Canada ("*Mikisew"*)[2], a decision released by the Supreme Court of Canada in 2005. Alberta ought to have immediately revisited and revised the *Consultation Policy* in 2005 to ensure that it complied with *Mikisew*. "Better late than never" is not good enough to uphold the honour of the Crown. While there is room for debate about the meaning and implications of *Mikisew* and other decisions, what is of the greatest concern to the First Nations is that Alberta, in developing its consultation approach, has unilaterally decided what those cases mean in terms of consultation.

Our scepticism and mistrust are also the result of our collective practical experiences of trying to consult with Alberta. No matter what the *Consultation Policy* says, and no matter what the courts say about the Treaty and the duty to consult and accommodate, in practice Alberta has adopted the narrowest possible interpretation of the Treaty and the most minimal application of the duty to consult. Since 2005, it has been the nearly universal experience of First Nations that Alberta's approach to consultation rarely, if ever, involves anything more than notice (often at a late date), some information, and perhaps a meeting or two to fill in the Crown's consultation log. Meaningful consultation is exceptionally rare and accommodation has been entirely absent. Alberta's justification for this approach has been that it must "balance" First Nations' rights and concerns with the interests of the broader public. On the ground, this has meant that our Treaty rights are consistently trumped by the economic interests of government and industry. There has been no true balancing of interests. You cannot achieve reconciliation when terms are imposed by one side based on solely on the interests of the broader public.

On numerous occasions, First Nations have sought to enter into good faith consultation with Alberta on consultation matters including but not limited to: First Nation water rights in the context of water management and allocation; fish and wildlife management; development of the Land Use Framework, and subsequently the LARP and SSRP; the process for conducting Environmental Assessments; various oil sands policy reviews; and forestry issues. In those consultations, the input and suggestions of the First Nations on both the procedural and substantive aspects of our rights have been ignored or downplayed by Alberta.

There is no legal impediment to making some of the changes to the consultation processes sought by our First Nations. Rather, Alberta has simply decided that its approach is correct, or at least that it has more resources than First Nations to litigate these issues if challenged in court. A good example of Alberta's troubling approach is in respect of the Land Use Framework ("LUF"). Many First Nations dedicated significant time and resources to provide Alberta with input on the LUF. Nonetheless, Alberta largely ignored that input, approved the LUF, then proceeded to produce a "response" to First Nations' concerns and input well after the fact and in direct contradiction to the principle in law and in the *Consultation Policy* that consultation will occur in good faith and *before* decisions are made. Further, in respect of LARP and SSRP, and over the objections of the affected First Nations, Alberta simply imposed a consultation approach. This was done despite the fact that certain First Nations actually provided their suggestions on how consultation ought to occur and on what issues needed to be addressed during the development of the LUF. This sort of approach to consultation does not further reconciliation. Rather, it furthers the distrust and cynicism of the First Nations.

Those problems have only been exacerbated by Alberta's decision to end funding for Traditional Use Studies and significantly **reduce** core consultation funding to First Nations for 2010-2011, even as the number of project specific and general consultation matters for which Alberta purports to consult continues to increase. It is simply unrealistic for Alberta to expect First Nations to hire, train and retain

[2] 2005 SCC 69.

competent staff without realistic, long-term funding, particularly given the volume of consultation in which First Nations are expected to participate.

It is amidst this difficult climate of scepticism, doubt and growing mistrust that the Treaty 8 Alberta Chiefs has developed this Position Paper. First Nations and Alberta must build a new and better relationship on the foundation of our Treaty. To move in that direction, Alberta must take two concrete steps: 1) enter into negotiations with First Nations to reach a new agreement on consultation that incorporates the central points of this Position Paper, and 2) honour the Treaty and the Crown's duty to consult and accommodate. Where Alberta disagrees with any of the points raised in this Paper, we expect Alberta to identify the points of disagreement and to discuss them in good faith. A key concept of consultation is for the parties to hear each other's views and to try to understand and address them. This cannot be done, as has been the approach in the past, by Alberta simply declaring that it has met some of the First Nation's concerns without actually responding to First Nations' input or meeting and discussing why, in the First Nations' view, concerns have been not been addressed.

The September 3rd, 2009 letter indicated that any new approach to consultation must fairly and adequately reflect the core principles of *Mikisew* **and other relevant cases**. The letter set out some specific principles from *Mikisew* which represent the minimum standard for consultation. It is not necessary to repeat those principles here except to say that they remain part of our position. Elders and Chiefs from around Alberta met at the April 12-14, 2010 Consultation Meeting where Alberta's *Draft Policy Discussion Paper* was reviewed and the consensus was that Alberta's attempt to incorporate the principles of *Mikisew* is seriously deficient. To begin with, the *Draft Policy Discussion Paper* is premature because it was developed prior to Alberta receiving the input of First Nations through the Consultation Policy review process and this Position Paper. The exclusive focus on *Mikisew* principles is also inadequate. Further, Alberta's restatement of the *Mikisew* principles are selective, often qualified or cast in a context that is favourable only to Alberta and which departs from the intent of the principles as set out by the Supreme Court. First Nations cannot accept policy efforts to water down, soften, or otherwise diminish the principles of consultation and accommodation as set out in the case law.

In addition to the *Mikisew* principles, any new approach to consultation must address the principles and issues discussed below. We have also provided a model process for consultation that reflects the principles of consultation and should serve as the basis for any new consultation guidelines. This model process is set out in Appendix B to this Position Paper.

KEY CONSULTATION OBJECTIVES OF THE FIRST NATIONS

The objectives of our First Nations in respect of consultation and accommodation are, at a minimum, the following:

1. To maintain and protect our way of life, including our history, culture, language, tradition and economy, all of which are inextricably connected to our lands (reserve lands and traditional lands);

2. To ensure that we have the capacity and opportunity to build, enhance and maintain, a strong and secure culture, language, traditions and economy connected to our lands (reserves and lands within our Traditional Territories), our inherent and Treaty rights, and the history of our Peoples;

3. To ensure the security and protection of our constitutionally-protected rights – that we have a meaningful opportunity to exercise those rights now and in the future;

4. To ensure the meaningful participation of our First Nations in decision-making processes related to the planning and management, use and disposition of the lands and resources throughout our Traditional Territories and with respect to potential impacts on our reserve lands;

5. To ensure that we have an equal opportunity to share in the wealth of the Province – through capacity and training measures relevant to our People, through the acquisition of project-related benefits (award of jobs and contracts and various forms of participation in project benefits), and through more general measures, such as revenue sharing, to ensure that we receive an equitable share of the wealth of the Province (related to the fees, incomes, and economic benefits that are derived from resource extraction within our Traditional Territories); and

6. To enable our First Nations to attain and maintain a level of economic, social and political self-sufficiency, as individuals and as distinct Peoples, to standards that are at least equal to those prevailing in the rest of Canada;

With respect to point 6 in particular, we seek to ensure that there is a proper balance between protection of our rights and the environment and ecosystems on which our Treaty rights rely, and responsible industrial development, urban growth, and other forms of development.

While it is true that the courts have called for a balancing of various interests, that balancing cannot mean that the "public interest" or "economic goals of the Province" trump the protection and exercise of our Treaty rights. In other words, Alberta must always be mindful of the fact that the duty to consult and accommodate is a constitutional obligation that must take precedence over other interests.

This is not to say that there cannot be dialogue and a genuine attempt to work out a mutually acceptable approach to dealing with First Nation rights and interests. Indeed, this is why we are calling on Alberta to negotiate a new agreement on consultation. However, whether or not Alberta is serious about working together with First Nations to achieve a meaningful level of protection of Treaty rights depends entirely on whether or not we share a common objective. Alberta's approach to consultation is focused on attempting to minimize the importance and significance of First Nation rights and interests and "court proof" Alberta against any challenges to decisions it has made.

What is particularly troubling and disappointing is that while Alberta purports to work with our First Nations on consultation issues, Alberta continues to make decisions (grants of tenure and other dispositions, project approvals, adoption of legislation and policy) which adversely affect and infringe the rights and interests of our First Nations. Even more troubling is the fact that Alberta has simply refused to meaningfully engage with First Nations on critical issues such as revenue sharing, water allocation, fish and wildlife management, changes to environmental and regulatory approval processes, and other fundamental issues.

The principles of consultation set out in this Paper also apply equally to the Government of Canada regarding any federal initiatives, projects, regulatory processes or other decisions that have the potential to impact First Nation's rights and interests. On a similar note, many First Nations in Treaty No. 8 Alberta have traditional territories that include portions of the Northwest Territories, Saskatchewan and British Columbia and/or are signatories to Treaty No. 8 that extend into these other jurisdictions. Accordingly, the principles set out in this Paper also apply to any decisions or actions taken by those other governments that may adversely impact our First Nations' rights and interests.

INTERESTS OF OUR FIRST NATIONS

Our First Nations share the following key interests, namely, ensuring that adequate consultation and accommodation includes:

- That all processes are structured so that the Province is not the party that can make decisions without being required to take into account our rights and interests in those decisions and without taking into consideration our procedural concerns about consultation.
- The full protection of our Treaty and inherent rights now and for future generations.
- Protecting the use and enjoyment of our reserve lands and lands within our, Traditional Territories, and lands acquired pursuant to TLE entitlements and other land claims, for present and future generations.
- Achieving greater participation in the social and economic benefits flowing from development.
- Protecting, preserving, encouraging and enhancing the cultural, social, economic and environmental connection of our First Nations to lands and resources.
- That the regulatory review of projects properly incorporates the procedural and substantive concerns of our First Nations through all phases – from the early conceptualization and design of the process through to decision-making, monitoring, enforcement and reclamation.
- That any consultation process properly takes into account the legal principles recognized by the courts and that accommodation options allow for the full range of First Nations' concerns to be taken into account in decision making.
- Development of a forum for broader economic, social, and environmental issues to work with Alberta and Canada in addressing and developing solutions to these issues, while respecting the Federal, Provincial, and First Nations jurisdictions.
- That our First Nations have full information to assess potential impacts of Crown decision making on our rights and that our First Nations play a meaningful role in determining what information is required by the Crown, Industry and First Nations to determine such impacts.
- That traditional knowledge is respected and incorporated into decision making.
- That any decisions do not impair, or infringe, the rights and interests of our First Nations.
- When such an infringement occurs, accommodation of the infringement will be in the interest of the effected First Nation.
- That industrial development, urban growth, and other kinds of economic development take place in a way which minimizes the direct, indirect and cumulative social, health, cultural, economic and environmental impacts on our First Nations' rights and on our communities.
- That our First Nations benefit socio-economically from any development that does take place – both in terms of direct project benefits as well as in sharing the wealth of the Province.

In addition, First Nations recognize that consultation requirements may be different among our First Nations depending, among other things;

- on the potential impacts of a proposed development on the exercise of our rights,
- the severity and duration of the impacts,
- the proximity of a First Nation to a large urban centre,
- a First Nation's perspective on the significance or importance of the rights affected,
- the proximity of a First Nation to large scale proposals,
- the extent of existing and planned development in the vicinity of the area,
- cumulative impacts on our rights,
- the history and culture of our First Nations, and
- the nature of existing development and other related factors.

It is also obvious that consultation will be more complex in relation to some kinds of development (such as mines, agriculture, forestry, oil sands and conventional oil and gas projects, urban regional planning, water and land management planning, hydro electric generation, transmission lines, nuclear power, and infrastructure projects) than it is for other kinds of development.

As noted earlier, any adequate approach to consultation must recognize and reflect these differences in relation to required funding, the triggers for consultation, capacity and the way in which consultation is carried out. For example, projects requiring an assessment under Environmental Protection and Enhancement Act ("*EPEA*") or Canadian Environmental Assessment Act ("*CEAA*") will normally require more time and resourcing than other kinds of projects. Moreover, guidance needs to be given to decision makers to determine the level of consultation required in relation to potential impacts. Further, Alberta has to take significant steps to improve key policy and legislative initiatives, such as the current review of the water allocation system and development of regional land use plans, to build First Nation participation into the process so that major studies and reports are not undertaken based on scoping and terms of reference that are not broad enough to consider First Nation rights and concerns. Consultation with First Nations must occur at the earliest possible stage in the process of project development and not be left as a footnote to be addressed in the final stages of such processes.

KEY PRINCIPLES

As explained in more detail below, our approach is based on the key principles set out in the decided cases on consultation and accommodation and Treaty rights:

1. The Treaty is not a finished land use blueprint (*Mikisew*);

2. Consultation is an ongoing process and is <u>always</u> required (*Haida*);

3. Consultation is a "two-way" street with obligations on each side;

4. Consultation and accommodation are constitutional obligations (*Kapp*);

5. When the duty is triggered, First Nations have a clear constitutional right to Crown performance of that duty *(Haida, Mikisew*);

6. The duty to consult applies to a broad range of Crown actions, initiatives and decisions, including Crown officials charged with developing regulations and legislation that has the potential to impact First Nations rights and interests (*Haida, Delgamuukw, Tsuu T'ina Nation*)[3];

7. Claimed Treaty rights can give rise to the Crown's duty to consult and accommodate. The Crown has a duty to assess the strength of claimed rights and consult and accommodate accordingly (*Marshall, Sioui, Sundown, Simon*). This point is addressed in more detail below;

8. First Nations' input must be seriously considered, substantially addressed and, as the context requires, accommodation may be necessary (*Mikisew, Halfway River*);

9. Stakeholder processes are not sufficient to discharge the Crown's duty to consult (*Mikisew*) nor are public processes open to First Nations, such as participation in Public Hearings (*Dene Tha'*);

10. The Crown has a positive duty to provide full information on an ongoing and timely basis, so that First Nations can understand potential impacts of decisions on their rights (*Jack, Sampson, Halfway*) and such information must be responsive to what the Crown understands to be the concerns of the First Nations (*Mikisew*);

11. The Crown must properly discharge both its procedural and substantive duties in any consultation process (*Mikisew*) and a failure to properly satisfy process-related concerns of First Nations, irrespective of the ultimate impact on substantive rights, may be a basis upon which a decision can be struck down (*Mikisew*);

12. The Crown must have sufficient, credible information in decision making and must take into account the long-term sustainability of section 35 rights (*Roger William*). This is particularly so in light of Alberta's constitutional duty to ensure the sustainability of Treaty hunting, fishing and trapping rights pursuant to the *Constitution Act, 1930* (*R. v. Badger* [ABCA]);

13. The purpose of consultation is reconciliation and not simply the minimization of adverse impacts (*Dene Tha'*);

14. Consultation must take place early, before important decisions are made – at the "strategic planning" stage (*Haida, Dene Tha', Squamish Nation*);

15. Consultation cannot be postponed to the last and final point in a series of decisions (*Squamish Nation*)[4];

16. Consultation is required in respect of the design of the consultation process itself (*Huu-ay-aht*). Scoping, terms of reference and other preliminary processes cannot be used to narrow consultation

[3] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 at para. 62; *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 at para. 168; *Tsuu T'ina Nation v. Alberta (Environment),* 2010 ABCA 137 at para. 55.

[4] A concern of our First Nations in the EA context or in virtually all regulatory applications (even if a formal environmental assessment is not required) is that consultation often does not take place until project design is well under way and until studies have been completed as part of an application submission. This puts First Nations in the position of having to ask for more studies, amendments to studies, or for changes to terms of reference for studies. This situation could be avoided by consulting early with First Nations in respect of terms of reference for environmental assessments – scoping of projects, information requirements placed on proponents, etc.

to excuse the Crown from consulting about First Nations' legitimate and relevant rights and concerns[5];

17. First Nations must be consulted about aspects of the design of environmental and regulatory review processes (*Dene Tha'*);

18. Consultation cannot just be in respect of "site specific impacts" of development – but must also take into account the cumulative impacts, derivative impacts, and possible injurious affection resulting from development (*Dene Tha', Taku River, Mikisew, Roger William*);

19. The Crown must approach consultation with an open mind and must be prepared to alter decisions depending on the input received (*Haida*); and

20. Consultation cannot be determined simply by whether or not a particular process was followed, but on whether the results are "reasonable" in light of the information presented, degree of impacts, and related matters (*Wil'itsxw)*.

These principles go to ensuring the full and meaningful protection and recognition of our rights. Without precision with respect to how consultation and accommodation will take place – procedurally and substantively – our rights will remain at risk. Further, Alberta has consistently taken an approach to consultation and discussions regarding the legal principles of consultation and accommodation that fails to pay due regard to what is being consulted about – our Treaty rights. Consultation and accommodation in Alberta is primarily about Treaty rights and therefore must also always involve full consideration and application of the following principles relating to the Treaty:

1. **A Treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred. The Crown's honour requires an assumption that the Crown intended to fulfill its promises;**

2. Aboriginal Treaties constitute a unique type of agreement and attract special principles of interpretation;

3. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories;

4. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed;

5. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed;

6. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties;

7. The words of the treaty must be given the sense which they would naturally have held for the parties at the time;

[5] *West Moberly First Nation v. British Columbia,* 2010 BCSC 359, para.54 & 55; *Dene Tha' First Nation v. Canada,* 2006 FC 1354

8. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen in time at the date of signature. Treaty rights must be interpreted to provide for their modern exercise. This involves determining what modern practices are reasonably incidental to the core Treaty rights in a modern context;

9. A technical or contractual interpretation of treaty wording should be avoided; and

10. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic.[6]

A specific approach to consultation

In light of the foregoing, the obvious question is: What do First Nations want in terms of consultation and accommodation? Individual First Nations have provided Alberta with input on this important question. Alberta has also engaged in various processes such as the Protocol Working Group process. In short, Alberta is well aware, in general terms, of what our First Nations are looking for. In our view, the only way to achieve greater clarity and certainty, for First Nation, Industry and the Crown, is to negotiate a new agreement on consultation.

As noted earlier, the contents of consultation will necessarily differ with the nature of the project or issue in question, the degree of potential impact on First Nations' rights, and the interests and concerns of the particular First Nations. Keeping the need for flexibility in mind, we have set out an approach to consultation in Appendix B that should serve as the starting point for negotiations with Alberta to develop a mutually acceptable consultation process. Appendix A sets out the mistakes and issues that have arisen since the introduction of the *Consultation Policy;* it will help ensure that negotiations will avoid the mistakes of the past five years.

Yours truly,

Treaty 8 Chiefs of Alberta

[6] *R. v. Marshall*, [1999] 3 S.C.R. 456, para. 78 (citations removed); *R. v. Badger*, [1996] 133 D.L.R. (4th) 324, paras. 41 and. 47*; R. v. Frank*, [1978] 1 S.C.R. 95; *R. v. Sundown*, [1999] 1 S.C.R. 393 at para. 32

SIGNATURE PAGE ATTACHED

cc: Treaty No. 8 Alberta Chiefs
Ted Morton, Minister of Finance and Enterprise
David Hancock, Minister of Education
Iris Evans, Minister of International and Intergovernmental Relations
Ron Liepert, Minister of Energy
Luke Ouellette, Minister of Transportation
Mel Knight, Minister of Sustainable Resource Development
Alison Redford, Minister of Justice and Attorney General
Rob Renner, Minister of Environment
Gene Zwozdesky, Minister of Health and Wellness
Yvonne Fritz, Minister of Children and Youth Services
Jack Hayden, Minister of Agriculture and Rural Development
Ray Danyluk, Minister of Infrastructure
Mary Anne Jablonski, Minister of Seniors and Community Supports
Lindsay Blackett, Minister of Culture and Community Spirit
Heather Klimchuck, Minister of Service Alberta
Cindy Ady, Minister of Tourism, Parks and Recreation
Hector Goudreau, Minister of Municipal Affairs
Jonathon Denis, Minister of Housing and Urban Affairs
Thomas Lukaszuk, Minister of Employment and Immigration
Darryel Sowan, Director of Livelihood
Chiefs Livelihood Committee (CLC)
Consultation Technical Team (CTT)

APPENDIX A

GENERAL CONCERNS WITH ALBERTA'S APPROACH TO CONSULTATION

As explained more fully below, discussions at the April, June, August and September meetings identified the following flaws and issues with Alberta's current approach to consultation under the *Consultation Policy*:

1. Alberta has too narrow a view of First Nations' rights

Alberta takes a very limited approach to what constitutes the section 35 rights of our First Nations, it ignores the oral promises made in the Treaty No. 8 and the dynamic nature of the Treaty, and it lacks any focus on what information and processes are required for the long-term sustainability of those rights.

The Treaty is a living document that continues to evolve and it is well established that our Treaty rights are not "frozen in time".[7] The written text of the Treaty is not a static and final accounting of our rights. Alberta approaches our Treaty rights as a noun, rather than a verb, as though our rights are written in stone, that they do not change, and that the places in which we exercise our rights do not and cannot change. Many cases have established that rights can, and in some cases must, be read into the Treaty to give meaning to express Treaty terms or to provide meaningful contemporary applications of rights.[8] As an obvious example, if First Nations are pushed out of areas due to industrial development, we will have to move elsewhere. Rather than understand that we have always had to adapt to changing circumstances, Alberta's approach, in fact, does the opposite. It ignores the impacts of development and Alberta officials have, in fact, been trying to confine us to smaller and smaller "consultation areas." That approach does not serve our interests or reflect the nature of our Treaty rights – it appears to be an attempt by Alberta to artificially create non-overlapping areas where consultation must take place.

Further, the entrenchment of our rights in s. 35 of the *Constitution Act, 1982*, was not an acknowledgement of a static set of rights, but rather, it was a recognition and affirmation of a body of generative rights which bind the Crown to take positive steps to identify First Nations' rights in a contemporary form, with the active participation of our First Nations.[9] As the Supreme Court of Canada stated clearly in *Sparrow*, section 35 was not enacted to maintain the *status quo*.

Alberta has refused to address claimed Treaty rights in the course of consultation under the current *Consultation Policy.* This approach is not defensible and is inconsistent with the dynamic and flexible nature of Treaty rights. The Supreme Court clearly sets out a framework for addressing claimed rights in the context of consultation and accommodation in the *Haida* case. First Nations must sufficiently describe the rights we are claiming and provide some evidence and reasoning in support of the rights. For its part, the Crown is obliged to assess strength of the claimed right and consult (and accommodate) accordingly. Dealing with claimed rights is not easy but simply denying the existence

[7] *R. v. Sundown,* [1999] 1 S.C.R. 393, para. 32.
[8] *Sundown,* supra.; *Marshall,* supra, para. 78.; see also: *R. v. Sappier,* 2004 NBCA 56; *R. v. Cote,* [1996] 3 S.C.R. 136; *R. v. Sioui,* [1990] 1 S.C.R. 1025; *R. v. Simon,* [1985] 2 S.C.R. 387; *Claxton v. Saanichton Marina Ltd.,* [1989] 3 C.N.L.R. 46 (BCCA);
[9] *Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700, para 1364; See also Brian Slattery, *Aboriginal Rights and the Honour of the Crown,* (2005), 29 S.C.L.R. (2d), pp. 435-443; and Brian Slattery, *The Generative Structure of Aboriginal Rights,* (2007) 38 S.C.L.R. (2d).

of a claimed right is not an acceptable approach.[10] Indeed, the Supreme Court has given clear direction that Treaty rights should be accommodated through negotiation and consultation rather than by litigation. [11]

The duty to consult and accommodate similarly applies to land claims, particularly those that have been accepted by either Canada or Alberta for negotiation. It is not honourable for the Crown to deal with lands and resources that are the subject of accepted land claims without significant consultation and accommodation.

First Nations and Alberta also have divergent views with respect to the effect of the Treaty on claims to Aboriginal rights and title. There is no definitive case on this point. Accordingly, it is not honourable for Alberta to unilaterally impose its position on these matters. Consultation must afford an opportunity to those First Nations who are advancing Aboriginal title and rights claims to present evidence and arguments in support of such claims.

2. Alberta's approach to consultation lacks precision

There is very little discussion of process-related issues concerning consultation and accommodation, such as how potential adverse impacts on First Nation rights and interests are to be determined (i.e., when will the duty be triggered), nor is there any guidance on how a decision maker would assess the strength (or weakness) of a First Nation's claim and the degree of consultation required - e.g., who will determine the required level of impact and therefore consultation required? Presumably, it leaves this important decision to Alberta officials but does not provide guidance on what information is required, what criteria should be employed, etc. This lack of precision has, in turn, allowed for inconsistent approaches within Alberta government departments, and across Alberta government departments as to whether consultation is required and as to the degree of requisite consultation. Consultation has also been significantly challenged by the fact that Alberta decision makers often claim that they do not have the authority or mandate to make independent decisions with respect to consultation and how it affects our Treaty rights.

3. There are no standards against which to assess consultation and accommodation

Alberta's approach lacks a mutually agreed-upon set of standards or objectives against which consultation and accommodation can be measured. This has also lead to wildly varying approaches to consultation from one ministry to another and even within the same ministry. It also promoted inconsistent approaches to consultation with industry project proponents.

4. Alberta has failed to recognize and implement the Duty to Accommodate

Alberta minimizes and downplays the need for accommodation and the means by which accommodation might take place and what kinds of accommodations may be available (in *R.* v. *Kapp*, the majority of the court makes it clear that both consultation and accommodation are constitutional duties). Alberta simply assumes that any form of mitigation proposed by a company, no matter how minimal, will be acceptable.

Consultation and accommodation with respect to our Treaty hunting, fishing, trapping and gathering must also take into account other binding legal principles. Alberta has a constitutional duty to ensure a

[10] *Haida*, supra, para. 3 – 38; see also: *R. v. Badger*, [1996] 1 S.C.R. 771, para.97.
[11] *R. v. Marshall (2)*, [1999] 3. S.C.R. 533, para. 22; *Haida*, supra., para. 47.

sustainable supply of fish and game for Treaty rights.[12] The reduction or degradation of habitat that supports fish and wildlife can constitute an infringement of Treaty rights and an unreasonable limitation of these rights.[13] When the Crown is making decisions about the management and allocation of fish and game and the management of related habitat, the *Sparrow* doctrine of priority must not only be respected, it must be a central consideration in any consultation and accommodation.

5. Alberta delegates substantive aspects of project specific consultation to industry

Alberta allows for a great deal of delegation of consultation obligations to industry – in a number of instances, it is not only the procedural aspects of consultation that are being delegated, but virtually the entire substantive duty as well – Alberta appears to see its duty as that of a "referee" – delegating practically all aspects of consultation to industry is akin to putting the fox in charge of the hen-house – industry has the goal of pushing forward its projects and of minimizing the concerns of First Nations. In addition, Alberta has no clear understanding of what is procedural or substantive consultation.

6. Environmental Assessments and similar processes are developed without the participation of First Nations

First Nations have repeatedly raised concerns about the lack of any meaningful inclusion of our rights in environmental assessment processes either generally or as a specific topic in Environmental Assessments ("EA") and other processes. To be clear, Alberta has rejected an approach that states that the impacts of proposals and developments will be measured against the ability of First Nations to exercise our rights now and into the future. This plays out in areas such as the scoping of projects for EA development of information requirements in terms of reference, etc. Those concerns have been downplayed and ignored. Alberta's consultation approach does not address this important issue and allows decision makers to continue to ignore First Nations procedural and substantive concerns about our rights in this important area. Time and time again, our concerns about EA are ignored by Alberta Environment. Some of our concerns include:

- Failure to develop any thresholds, criteria or measures to assess the impacts of development on our ability to exercise our section 35 rights now and into the future.

- Failure to seriously consider and accommodate our procedural concerns with respect to terms of reference for EA.

- Failure to assess direct, indirect and cumulative effects of resource development of our rights, including a failure to consider what information is required to undertake assessments on direct, indirect, and cumulative impacts of development on our rights.

- Failure to understand, much less address, the key cultural and social impacts of development on our rights – Alberta simply assumes that standard EA processes will deal with these concerns – this relates to the failure to consider the Aboriginal perspective in decision making – the importance of place, and the cultural elements underlying the passing down and exercise of our rights is ignored by Alberta.

- Failure to consult with us on the scoping of projects for Environment Assessments (EA) purposes.

[12] *R. v. Badger*, [1993] C.N.L.R. 143; 1993 CarswellAlta 306 (ABCA), paras.29-30; *Badger* (SCC), supra., paras. 7 & 9, 47, 70.
[13] *Tsilhqot'in,* supra., paras. 1272-75, 1288.

- Failure to undertake cumulative effects assessment to all resource allocation development decisions.

7. Consultation must be structured on a government-to-government basis

Consultants working for industry tend to approach selected groups of members or Elders and, in many cases, bypass First Nation governments. Alberta should be more directly involved in consultation to ensure consultation is aboveboard and that such practices are not accepted. Any new approach to consultation must make it clear that this cannot be allowed.

8. The capacity to consult is a persistent hindrance to meaningful consultation

There are no specifics in respect of capacity including that the government does not direct industry to provide capacity funding to participate in the process of consultation. A regulatory review of a large project can be costly and time-consuming. There appears to be an assumption among Alberta officials that First Nations have endless amounts of money and capacity to conduct large baseline studies, to gather information, to participate in all kinds of consultation processes, and the like. We require the capacity to consult our members, to attend meetings, to hire technical experts to review the voluminous submissions and to otherwise participate meaningfully in those processes. A small amount of capacity funding is wholly inadequate, yet the policy does not require industry to provide capacity funding to First Nations for industry-driven projects. For example, this leads to the problem that SRD approves projects over the capacity-related objections of First Nations, on the basis that industry is not required to provide funding. This also allows certain industry groups to avoid paying for any capacity, while other companies do provide some capacity.

9. There is a general lack of clarity regarding what role First Nations input should have

There is no discussion of how our input will be taken into account, what role First Nations will play in terms of determining what information is required to determine potential adverse impacts or infringements, or what information ought to be required in decision-making about resource development. As things now stand, First Nation's concerns about information requirements are largely ignored. There is no real attempt by Alberta to listen to First Nations about our funding and process-related concerns. The scepticism discussed earlier is especially acute in terms of funding issues – as Alberta pushes forward with all kinds of decisions, absent First Nations having sufficient capacity to gather information and participate, it is easy to draw the inference that Alberta's concern is more about court proofing than reconciliation.

10. Consultation occurs on a project-by-project basis, devoid of critical information about cumulative impacts on First Nations' rights

A particularly contentious issue is the degree to which the direct, indirect and cumulative impacts of development ought to be assessed in decision-making processes and what studies and information are required to assess those kinds of impacts on our rights. We have long sought a say in developing terms of reference or criteria by which impacts ought to be assessed against our ability to exercise our rights now and in the future. There is no requirement in the policy that this sort of input will be seriously considered – in fact, Alberta Environment and Sustainable Resource Development consistently ignore such input.

11. Consultation rarely, if ever, occurs at the strategic planning stage

Alberta Energy expressly refuses to consult at the tenure-granting stage. This is extremely troubling. The granting of tenures/mineral dispositions is a key strategic planning stage. Once tenures are granted or dispositions made, there is an expectation on the part of the purchaser or disposition holder that development will be permitted. Certain legislation may, in fact, require development to take place. Once the tenure is granted, the possibility of no development taking place in a particular area may be foreclosed and other kinds of accommodation may be foreclosed, irrespective of the concerns raised by First Nations. Since there is no current process by which Alberta analyzes existing development or planned development on tenures that have already been granted and how such current or future development affects section 35 rights, it is crucial that such analysis be done before more tenures are granted. There is no legal impediment to consultation prior to posting lands for sale or disposition. British Columbia, as one example consults prior to the grants of tenure/sale of lands. This is simply a choice by Alberta and one we feel is ill-advised.

12. There is a Duty to Consult in relation to Private Lands

The policy is silent on whether or not consultation ought to take place in respect of what the Province terms "private" lands. We do not accept that there is no duty to consult or accommodate where lands are deemed to be "private." *Badger* and other cases state that Treaty rights may be exercised on private lands where there is no visible, incompatible use of those lands. We are also not consulted on decisions to turn Crown lands into private lands. Moreover, we note that consultation is required, notwithstanding that the lands are private, where:

- There are renewals or extensions of any approvals, tenures, and leases that created the private lands;
- Where development on private lands has the potential to directly, indirectly, or cumulatively adversely impact upon the meaningful exercise of our inherent and Treaty protected rights on Crown land or on other lands to which we have a right of access; and
- Where development on private lands has the potential to injuriously affect our inherent Treaty protected rights on Crown lands or on other lands to which we have a right of access.

13. The Duty to Consult and Accommodate applies to decisions that affect Reserve Lands

The current *Consultation Policy* does not adequately address the critically important issue of the duty to consult and accommodate as it relates to reserve lands. Although Alberta does not have jurisdiction to make decisions directly with respect to reserve lands, Alberta can make decisions and take actions affecting traditional lands that have affects on reserve lands along with having lasting and profound impacts on our ability to use and enjoy reserve lands. Negative impacts of decisions concerning off reserve lands can have an adverse impact on reserve lands and constitute an interference with fundamental Treaty rights.

Reserves lands are a core term of the Treaty. It is well established that it was the common intention of both First Nations and the Crown that reserve lands would serve as the basis for a transition to a new economy.[14] First Nations have an established Treaty right to their respective reserve lands and to the

[14] For example: Richard H. Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights,* Canadian Institute of Resource Law, Saskatoon, April 1988, pp. 19-20, 26; Arthur J. Ray, Jim Miller, and Frank Tough, *Bounty and Benevolence,* McGill-Queen's University Press 2000, Montreal, pp. 71, 137-139, 168, 199; Treaty 7 Elders, et al, *The True Spirit and Original Intent of Treaty 7,* McGill-Queen's University Press 1996, Montreal, pp. 121-123, 146, 210, 312-313; Sarah Carter, *Lost*

use and benefit of those lands – this is beyond dispute.[15] In addition to being a term of the Treaty, First Nations' interests in reserve lands are a form of Aboriginal title derived from our prior historic occupation of our lands.[16] Moreover, constitutionally, there are a number of provincial laws which cannot apply on our reserves. Accordingly, any potential impacts on reserve lands are impacts on a core Treaty right and our Aboriginal title to reserve lands. Therefore, there is always a duty to consult with respect to potential impacts on our reserve lands. Most often, such impacts will require deep consultation, and in those instances where potential impacts are significant, the full consent of a First Nation will be required.[17]

14. Municipal decisions and actions can impact First Nations' rights

Alberta's approach to consultation fails to address the reality that the decisions of municipal districts, towns and cities have significant potential to impact First Nations' rights and interests. Municipal authority and powers are delegated from the provincial Crown. Many functions and decisions of municipalities can impact First Nations. For example, decisions to locate waste disposal sites, feedlots, construct highways, and zone development can have significant impacts on First Nations' reserve lands and other Treaty rights. More general planning decisions and policy initiatives can influence long term land use, infrastructure planning, and water quality and quantity, in ways that impact First Nations. Many First Nations repeatedly expressed this concern to Alberta during the development of the *Consultation Policy* but the issue has remained unaddressed. Any new approach to consultation has to acknowledge that as delegates of the Crown, municipalities can make decisions and set policies that may impact First Nations and, therefore, engage the duty to consult. Alternatively, Alberta must ensure that, where necessary, it exercises oversight to ensure the adequacy of consultations related to municipal decisions to ensure that the Crown's duty to consult is satisfied. Addressing municipal consultation would be consistent with the approach taken by other provinces.[18]

15. Alberta has an obligation to be forthright about consultation

Alberta has been unwilling to confirm, verbally or in writing, whether certain meetings and processes are consultation or part of the consultative process. On occasion, Alberta officials have been so inconsistent as to communicate that certain processes are both consultation and not consultation. Some First Nations have been assured by Alberta Environment officials that a meeting or series of meetings are not consultation, only to be told later by Alberta Justice that such assurances cannot be relied on. In regulatory processes, First Nations have had to ask for consultation records that industry delivers to Alberta officials, in which industry purports to have "consulted." This is the case even though Alberta is relying on those records as part of meeting its own consultation obligations. The honour of the Crown does not support a "shell game" approach to consultation. First Nations are entitled to clarity,

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Harvests: Prairie Indian Reserve Farmers and Government Policy, McGill-Queen's University Press 1990, Montreal, pp. 43-44, 49, 52, 55-57, 78; Richard T. Price, ed., *The Spirit and Intent of the Alberta Indian Treaties*, 3rd ed., University of Alberta Press, Edmonton, 1999, pp. 31, 141.

[15] See: s.10 of Schedule (2), *Constitution Act, 1930*; Since 1876 the *Indian Act* has contained the recognition that reserves are for the "use and benefit" of First Nations: *Indian Act,* S.C. 1876, c. 18, s. 4; *Indian Act,* S.C. 1880, c. 28, s. 6; *Indian Act,* R.S.C. 1886, c. 43, s. 2(k); *Indian Act,* R.S.C. 1906, c. 81, s. 2(i); *Indian Act*, R.S.C. 1927, c. 98, s. 2(j); and *Indian Act,* S.C. 1951, c. 29, s. 2(0); *Indian Act*, R.S.C., C.I-5, s.2(1).

[16] *Guerin v. Canada*, [1984] 2 S.C.R. 335, para.86.

[17] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 168-169.

[18] Government of Saskatchewan, *Draft First Nations and Métis Consultation Framework;*

honesty, and forthrightness from the Crown and its representatives. Nothing less will meet with the honour of the Crown obligations.[19]

Across Alberta, we have consistently been presented with pre-determined, fully developed consultation plans. Rarely, if ever, are First Nations asked by Crown officials for input into consultation processes. Project proponents have no better record in this regard. Consultation about the scope and terms of the consultation process itself is a critical matter that can determine whether consultation can be meaningful. The Crown must work with First Nations at the earliest stages to determine what rights and interests are at issue, understand which First Nation officials and communities need to be involved and to ensure that Crown officials involved in the consultation process have the capacity and authority to meaningfully consult and accommodate if necessary.[20]

16. Alberta must be flexible and conduct itself honourably with respect to Traditional Territories and Traditional Knowledge

Alberta's approach to consultation must be sensitive to and respect the reality that First Nations' traditional territories overlap and that some First Nations have different, and occasionally contrary, perspectives with respect to traditional territories. Any efforts by Alberta to create maps or databases that claim to represent discrete and non-overlapping traditional territories would be, simply put, untrue and an attempt to oversimplify consultation for the benefit of government and industry. First Nations are also concerned that Alberta's undue emphasis on "dots on a map" and traditional use sites of an historical nature, has resulted in a serious loss of focus on impacts to on-going Treaty hunting, fishing, trapping, gathering, and other traditional land uses on reserve lands. This approach to studying traditional use and building into the consultation process does not reflect our historical land use patterns and the way in which our peoples continue to use the land for Treaty rights and traditional use purposes.

[19] *Mikisew Cree First Nation v. Canada,* 2005 SCC 69, para.33; *Haida Nation v. British Columbia,* 2004 SCC 73, para.41; *R. v. Marshall,* [1999] 3 S.C.R. 456, para. 49.
[20] *West Moberly First Nation v. British Columbia,* 2010 BCSC 359, para.54 & 55; *Dene Tha' First Nation v. Canada,* 2006 FC 1354.

APPENDIX B

SUGGESTED APPROACH TO CONSULTATION

In our view, a negotiated consultation agreement should also include a consultation process or protocol containing the following elements:

A. A mutually agreed-upon set of objectives and interests (see our views on this matter above) against which consultation will be measured.

B. Individual First Nations may use the following principles to assess the adequacy of consultation:

- The Crown's "taking up" of lands and resources for development are subject to the duty to consult and accommodate.

- Consultation is an ongoing process and is always required.

- Consultation must be conducted with the genuine intention of seriously considering and substantially addressing the concerns of First Nations and wherever possible, demonstrably integrating the concerns of the First Nations within any Proposal – this extends to both procedural (process) and substantive concerns.

- Consultation must take place early in any Proposal before important decisions are made, including at the strategic planning stage of any Proposal and the tenure-granting/land sale stage.

- The duty to consult is not met by addressing only the site-specific impacts of any decision, but must also seriously consider and substantially address the potential indirect, derivative, induced and cumulative impacts of other existing, planned, or reasonably foreseeable industrial development(s) on our rights, including injurious affection related thereto.

- First Nations need adequate resources to assess the potential impacts of any decision on their rights and interests, including the identification of any mitigation and accommodation opportunities in relation to any decision. In order to be able to consult in a meaningful fashion, the Crown and third parties must be required to negotiate adequate funding with First Nations that enables us to carry out our consultation obligations and the Crown will not authorize development until companies have demonstrated that they have provided such funding.

- In carrying out consultation in relation to any Proposal, First Nations, the Crown and, if appropriate, third parties, have reciprocal obligations of reasonableness, good faith, and cooperation.

- Any consultation process and its outcome must be responsive to the interests and concerns of our First Nations.

- The nature of consultation, compensation and accommodation will vary depending upon the degree of potential adverse impacts on and infringements of the rights of our First Nations.

- Unless a First Nation delegates consultation to another entity or organization, any Crown and third party consultation must be specific to the rights, claims and traditional land uses of the particular First Nation which may be adversely affected or infringed by a decision.

- Communication must be open, honest and clear.

- The Crown and third parties have a positive obligation to provide full information to our First Nations on an ongoing basis, including new information as it becomes available, so that we can understand the potential direct, indirect and cumulative impacts of any decision on our rights and interests before a decision is made – where First Nations lack sufficient information to assess impacts, the Crown and industry may have to develop additional information through studies and reports – First Nation requests for additional information must be seriously considered – this is why First Nations input into terms of reference are critical.

- Based on the resources available, First Nations will outline their concerns with clarity, focusing on the potential direct, indirect and cumulative impacts of any development or issue on their rights.

- In any public regulatory process, the Crown and third parties must consult with us about the design of any regulatory review process for any Proposal, including the role of our First Nations in any such process; the screening and scoping of a proposal for environmental assessment under federal and/or provincial law; the drafting of Terms of Reference ("TOR") for an Environmental Impact Assessment ("EIA") or its equivalent under federal or provincial law; and the development of cumulative effects assessment and socio-economic impact assessment. More generally, the Crown must consult with us about the design of any consultation process, including the Alberta ***Consultation Guidelines*** and revisions thereto, as well as the design of any consultation processes for any Crown initiatives such as the LUF.

- Consultation with First Nations is a separate and distinct process from any public consultations conducted by the Crown or by Crown agencies through legislation, regulations or policy and the carrying out of any public hearings for Proposals under federal or provincial law is not a substitute for discharge of the Crown's duty to consult, although aspects of such consultation could be used in a separate and distinct process.

- In addition to the foregoing, if a decision has the potential to <u>infringe</u> a First Nation's Treaty or Aboriginal rights, justification and accommodation of such a potential infringement of that First Nation's rights requires the following:

    - ***Priority*** to be given to the First Nation's rights versus those of non-First Nation stakeholders;

    - ***Minimal impact*** on a First Nation's rights;

    - ***Mitigation measures*** to avoid impacts and to ensure that any impact that does occur is "as little as possible" and to ensure that First Nation concerns are "demonstrably integrated" into any plan of action;

    - ***Fair compensation*** for unavoidable infringements; and

- ***Other efforts*** to ensure sensitivity and respect of the First Nation's rights.

Although these consultation requirements are pre-requisites for the validity of government action in our view, they do not end at the decision-making stage. They are ongoing and continue through the life of any Proposal, including the construction, operation and de-commissioning stages.

Process for Consultation

a. Initial Information Requirements

Although our First Nations may have different suggestions for how consultation will take place on the ground, an agreed-upon consultation should provide the following kinds of specific detail:

- A list of specific decisions that will trigger the duty to consult, and which will ensure early notification – this should be based on an agreed-upon set of decisions which do and do not trigger the duty to consult – to the extent that procedural aspects of consultation are delegated to industry, any notification should be well before the application is submitted to the regulator or decision maker, so that First Nations have time to give their input on various process-related matters (required studies, TOR, etc.).

- Each party involved in the consultation should appoint, in writing, someone responsible for carrying out the consultation and the consultation policy should make clear that any attempt to circumvent the "official" person or body responsible for consultation will not constitute the legally-required consultation.

- Our First Nations expect to receive copies of all applications, policies or other decisions which trigger the duty to consult in both electronic and hard copy form.

- In order to allow us to understand the issue that forms the basis of consultation, we expect to receive information on:

    - the nature and scope of the decision;

    - the nature and scope of any future contemplated conduct, such as regulatory documentation related to the decision, or applications for future growth phases related to the decision;

    - the reasons for or purpose of the decision;

    - the timing of the contemplated conduct, including all applicable regulatory timelines;

    - the location of the contemplated conduct;

    - the duration of the contemplated conduct;

    - the potential risks associated with the contemplated conduct;

    - the proposed measures to be undertaken and methods to ensure inclusion of Traditional Use and Traditional Ecological Knowledge of our First Nations;

- a plan for how we will be consulted and included in the development of studies related to the decision, including in the pre-application phase and in all aspects of the regulatory review of the decision;

- the identification of alternatives to the contemplated conduct; and

- identification of who will be involved in carrying out the contemplated conduct, including any agents or contractors working for the Crown or third parties.

- Documents available to be reviewed, in hard copy and electronic form including, but not limited to:

    i. applications;

    ii. studies;

    iii. reports, such as in respect of seismic or exploration phases of the decision;

    iv. any previous assessments, studies or reports in respect of any phase of the decision including the exploratory stage, or in the vicinity of the decision that are known to or in the possession of the Crown or industry;

    v. information on applicable legislation, policies, guidelines and regulations related to the decision or which decision;

    vi. information on any deadlines or filing dates related to the decision; and

    - the names, addresses, emails, fax and telephone numbers for any relevant Crown decision makers related to the Proposal as well as identification of contacts for industry Proponents

    - If there is any change to information required to be delivered to the First Nation, or if new or additional information becomes available during the pre-application or regulatory review of the decision, this further information shall be delivered to the First Nation.

b. Processing of Information – General Kinds of Decisions

Again, while the particular steps may differ from one First Nation to another, some of the key components of a consultation approach would be:

- The First Nation will conduct a preliminary review of the information in a specified period of time and indicate whether it wishes to be consulted further and, if so, the First Nation will set out a preliminary list of its concerns.

- The consultation policy will specify such time periods that are mutually acceptable, and will ensure that time periods for response respect the culture of the First Nation and do not "count against" the First Nation when the First Nation is closed, such as in the Christmas season.

- The First Nation may request, and the Crown and industry shall attend, any preliminary meetings to discuss among other things:

    - the nature of the decision and the Crown's regulatory review process or other approval process contemplated, the First Nation's initial questions or concerns about the regulatory review process, if any, as well as time lines for the First Nation's review of the decision;

    - the consultation obligations of the Crown and third party in relation to the decision, how and when they will be carried out, including appropriate and acceptable time lines for the First Nation to consult in relation to the decision;

    - appropriate information requirements, including identification of information gaps, for the Crown and third parties to facilitate the First Nation's ability to determine and assess the potential impacts of the Proposal on their rights and interests; and

    - an appropriate budget provided by the Crown and/or industry and work plan for the First Nation's review of the decision and for the First Nation to engage fully and meaningfully in the regulatory review process for the decision.[21]

- As noted earlier, Alberta must recognize that First Nations' ability to participate fully and meaningfully in consultation is dependent on receiving adequate funding to do so. Provided that adequate technical/financial assistance is made available by the Crown and/or industry to our First Nations, we will conduct a technical review of the decision and will hold internal discussions with our Leadership and Community to determine and document our issues and concerns in relation to the direct, indirect and cumulative impacts of the decision on our rights and interests.

- Following the above steps, the First Nation will communicate any concerns arising thereunder to the Crown and the third party, as well as recommendations on how such concerns can be addressed, accommodated, or mitigated, including in relation to any compensation related thereto that may be required.

- The Crown and the third party will engage in consultation with the First Nations to seek to address and accommodate those concerns**.**

- If consultation is delegated to a third party, the third party will provide monthly reports/consultation summaries to the First Nation before submitting those reports to the Crown, so

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[21] Depending on the nature of the decision and the potential adverse impacts on our First Nations rights and interests, the budget and work plan will include items such as the carrying out of a traditional use study and collection to traditional ecological knowledge, if such information has not already been gathered within the vicinity of the project or decision, or an updating of information relevant to the vicinity of the project or decision; funding for legal and technical advice related to the decision, funding for a third party review of the decision as the context requires (including, but not limited to, a federal or provincial environmental assessment process), funding for community meetings and information sessions related to the decision and other related matters. The work plan will also set out time lines and a process for First Nation internal community engagement in respect of the decision. The work plan may also include time lines for our First Nation's review of, and input into, various stages of the environmental or regulatory review process such as commenting on TOR for an EA, scoping of the EA, identification of impacts to be studied in the EA, and related matters.

Any such funding would be in addition to the core funding provided by AAND.

that the First Nation can verify the accuracy of the information contained therein. If the Crown produces consultation reports or summaries, the First Nation will be provided with copies of such information on a monthly basis in order to verify the accuracy of the information contained therein.

- Prior to making a decision, if requested by the First Nation, the Crown will meet with the First Nation to discuss, among other things, the basis upon which the decision will be made, how the First Nation's issues and concerns were addressed, including concerns in relation to information gaps and, if those concerns have not been addressed, the reason(s) why those concerns have not been addressed.

- In the event that the concerns or some of those concerns cannot be resolved, the First Nation will discuss with the Crown and third parties alternative methods of resolving the dispute, including various forms of Alternative Dispute Resolution ("ADR"). However, if the First Nation's concerns cannot be resolved in any process set out herein or through ADR, our First Nations retain their full right to participate in any regulatory proceedings related to the referral and to raise its concerns in relation to potentially impacted rights in any court or other proceeding.

- Once a decision is made, if requested by the First Nation, the First Nation will receive a written copy of the decision including information on how its concerns were addressed. If those concerns were not addressed, the First Nation will receive a written explanation for why those concerns were not addressed.

- All TUS and TEK information that the First Nation provides to the Crown or third parties in relation to a decision will be kept in strict confidence and that information will not be released to any third party without the written consent of the First Nation unless disclosure of such information is required by law or unless that information is already in the public domain. The First Nation will treat Crown and third party information in the same manner.

- The First Nation will negotiate with the Crown or any third party the terms and conditions upon which any information can be used in any regulatory review processes, other public processes or court proceedings.

c. Consultation Process for Complex Decisions

In addition to the processes and steps set out above, the following additional consultation would be required in respect of any large-scale projects or processes such as those related to oil sands development, uranium, hydro-electric, nuclear power, any decision which triggers a federal or provincial environmental assessment, as well as in respect of any Crown-led initiative such as LARP and IFN.

- If requested by the First Nation, the Crown and any industry proponent of a decision will engage in face-to-face consultation concerning the development of TOR for a project. Among other things, such consultation will focus on the information required to be developed by the Proponent (including information required to assess potential direct, indirect and cumulative impacts on our rights and interests, the screening and scoping of the Proposal for regulatory review purposes, the identification of cumulative impacts and effects to be assessed, how our First Nations will be consulted in the regulatory review

process and how TUS/TEK will be considered and incorporated in the environmental assessment ("EA") or EIA for the project.

- If requested by our First Nations, the Crown will consult with us prior to any determination that an application for a project is complete for regulatory approval.

- We expect to be consulted on the information to be developed for any decision or process so as to ensure that potential impacts on our rights and interests will be taken into account – that might include baseline information, biophysical or other studies to be carried out, etc.

- Many of our First Nations have asked Alberta to work with us to carry out a traditional resource plans or studies which examine the current and future resource, environmental and ecosystem needs of the First Nation to meaningfully carry out their rights now and in the future including, but not limited to:

    i. Quality and quantity of wildlife species required;
    ii. Quality and quantity of aquatic species required;
    iii. Quantity and quality of plants or other things gathered; and
    iv. Quantity and quality, as the context requires, of air, water and ecosystems required to support the exercise of the First Nation's rights;
    v. Inclusion or understanding of information to consider the cultural impacts of decisions on our rights

- Meaningful incorporation of our TUS/TEK information in relation to the assessment of impacts through consultation and in respect of the regulatory review of any decision;

- A mechanism to ensure that information gaps in any decision or in any regulatory review process are identified and addressed prior to the issuance of any federal and/or provincial approval of a decision;

- Ensuring that the full social, cultural, environmental, health and economic impacts of decisions are assessed against our rights;

d. Accommodation

Depending on the results of the consultation carried out, our First Nations will work with the Crown and industry to identify forms of accommodation that are acceptable to our First Nations to address our concerns. Such forms of accommodation may include, but are not limited to:

a. the decision maker rejecting a decision or project, delaying a decision on a decision or project, revocation of the proposal by a third party or other proponent, or changing the decision or project based on the concerns and/or views expressed by the First Nation through consultation;

b. addressing the procedural concerns of our First Nations, by for example developing specific information requirements to assess the potential impacts of the decision on our rights within the regulatory review process or other public processes;

c. early engagement of our First Nations in planning related to a decision, including development of the regulatory review process for a decision or other public processes and our roles and participation in such processes;

d. negotiation of an Impact-Benefit Agreement, including funding to enable our members and businesses to take advantage of any employment and/or economic opportunities related to the Proposal, including forms of economic benefit beyond jobs or contracts;

e. inclusion of our First Nations in revenue sharing or some other means by which we share in the wealth of the Crown, outside of provisions in an Impacts-Benefit Agreement;

f. mitigating the impacts of a project, including a meaningful First Nation role in the monitoring of impacts of a project – this would need to involve a specific discussion of so-called reclamation – as we are concerned about the continued reliance of the Crown and industry on measures that have not been tested and which effectively tell us to suspend the exercise of our rights in certain areas for 40 years or more;

g. compensation for adverse impacts on, or infringements of, our rights, including financial or non-financial compensation (such as protected areas for exercising our rights); and

h. Negotiation of other kinds of agreements, such as exploration agreement related to development.

APPENDIX 3 – REFERENCES TO ABORIGINAL PEOPLES AND INTERESTS IN THE RAC VISION DOCUMENT AND PROBLEMS WITH SUGGESTED RAC APPROACHES

Page	Section	Subheading	Issue	Proposed Resolution under the LARP	Comments
2	1.0: Introduction: Background	1.1.2: Lower Athabasca Region	"The scope and pace of development has had significant impacts on aboriginal peoples in the region and their way of life."		There have been and continue to be adverse impacts on aboriginal and Treaty rights. The RAC Document largely ignores those impacts on rights.
3	1.0: Introduction: Developing the Lower Athabasca Regional Plan	1.2.1: Regional Planning Process	Next stages in determining the content of the LARP	Development of LARP will continue to be informed by Albertans through public, stakeholder and aboriginal consultations.	
3	1.0: Introduction: Developing the Lower Athabasca Regional Plan	1.2.1: Regional Planning Process	Components of a comprehensive planning process	Aboriginal traditional knowledge should be incorporated in planning processes to the extent possible.	A commitment to integrate aboriginal traditional knowledge is not reflected in the scheme or priorities of the RAC Document.
6	1.0: Introduction: Developing the Lower Athabasca Regional Plan	1.2.2: Key Components for Phase One of the Lower Athabasca Regional Plan	Understanding priority values and how those values are affected by land-use decisions	Aboriginal traditional knowledge should be utilized, and aboriginal knowledge holders involved early on in the process.	Aboriginal traditional knowledge is just one of 10 other factors and the RAC Document contains no methodology or demonstrable commitment to incorporate it.
8	2.0 Lower Athabasca Regional Plan	2.1: Vision Statement	Balancing sustainable economic, social and environmental outcomes	Consider aboriginal knowledge when considering traditional and community knowledge, sound science, innovative thinking, and accommodation of rights and interests of all Albertans.	To the extent that LARP is a balancing exercise, that balance must take place within the constitutional structure of Canada which requires that section 35 rights be recognized and protected. What parts of the LARP Vision demonstrate that aboriginal knowledge and rights were seriously considered in the RAC Document?

Page	Section	Subheading	Issue	Proposed Resolution under the LARP	Comments
11	2.0 Lower Athabasca Regional Plan	2.2: Outcome 1: The Economy of the Region Grows and Diversifies	Objective 1.6: Increased participation of aboriginal peoples in the regional economy.	Strategies include increasing education, promoting aboriginal business capacity, and collaborating on compensating for infringement of constitutional rights	The language utilized here is more aspirational than the other objectives in this regional economic growth objective. Furthermore, many of the items listed here are repetitions of the same basic ideas (b, c, d, and g all relate to increased business opportunities; a, e, and f are different ways of restating the need to increase educational opportunities). While business opportunities are important to First Nations, they cannot be a substitute for maintenance of section 35 rights, at least not unless First Nations agree. If a regional plan is serious about mitigating impacts on aboriginal peoples and protecting their constitutional rights, why is compensation for ongoing and future infringements part of the plan? Why is compensation the focus, rather than preservation of the rights?
12	2.0 Lower Athabasca Regional Plan	2.2: Outcome 2: Infrastructure and Community Development Needs are Anticipated, Planned and Provided Effectively and Efficiently	Objective 2.1: Communities are sustainable, liveable, and use sound land-use planning principles	In addition to 7 non-aboriginal strategies, work with aboriginal peoples who develop sustainable social and economic development plans, consistent with traditional stewardship principles.	The Crown should work with all aboriginal peoples affected in the LARP area. None of the infrastructure strategies listed in this objective addresses aboriginal peoples or interests or section 35 rights.

Page	Section	Subheading	Issue	Proposed Resolution under the LARP	Comments
13	2.0 Lower Athabasca Regional Plan	2.2: Outcome 2: Infrastructure and Community Development Needs are Anticipated, Planned and Provided Effectively and Efficiently	Objective 2.2: Infrastructure is provided to support population growth and economic development	Give consideration to, among 11 other factors, the special/unique circumstances of aboriginal peoples in planning and funding allocations for physical and social infrastructure.	The infrastructure strategies and plans in Objective 2.2 only minimally address aboriginal peoples and do nothing to address the impacts of population growth and infrastructure, such as transmission lines, on aboriginal and treaty rights in the Lower Athabasca region, including protecting aboriginal access to lands.
15	2.0 Lower Athabasca Regional Plan	2.2: Outcome 3: Economic Growth is Achieved Through Integrity and Respect for Management Systems	Objective 3.1: The environment's natural processes and natural resources are understood, respected and cared for.	In addition to 5 other strategies, support development of education programs to present the region's unique cultural and aboriginal history.	For the environment's natural processes and natural resources to be understood, aboriginal knowledge and use of the land must be utilized and respected, not merely presented. This objective completely avoids aboriginal traditional knowledge, preferring to incorporate aboriginal history as if aboriginal cultures were dead.
15	2.0 Lower Athabasca Regional Plan	2.2: Outcome 3: Economic Growth is Achieved Through Integrity and Respect for Management Systems	Objective 3.2: Land, air, water and biodiversity are monitored and reported	Work with local communities and aboriginal peoples to identify stewardship responsibilities, aboriginal knowledge of historical changes and roles for aboriginal peoples in various monitoring and reporting measures.	This commitment to work with aboriginal peoples is hollow as 1) no process or thresholds are contemplated with input from First Nations and 2) the Lieutenant Governor in Council is given the authority to disregard, amend and reject any stewardship recommendations under the *Land Stewardship Act*.

Page	Section	Subheading	Issue	Proposed Resolution under the LARP	Comments
16	2.0 Lower Athabasca Regional Plan	2.2: Outcome 3: Economic Growth is Achieved Through Integrity and Respect for Management Systems	Objective 3.2: Land, air, water and biodiversity are monitored and reported	Work with aboriginal peoples to utilize aboriginal knowledge of historical changes in water quality and quantity, air quality, land and biodiversity and establish firm baselines for measurement in the region.	Aboriginal people must be consulted regarding appropriate baselines and how their knowledge will be utilized in assessing changes, mitigating impacts and ensuring protection of aboriginal and treaty rights. This objective falls short of all of these.
17	2.0 Lower Athabasca Regional Plan	2.2: Outcome 4: Land Uses are Responsible and Sustainable to Conserve Ecosystems and Biodiversity	Objective 4.1: Landscapes are managed to maintain and enhance ecological integrity and human health	In addition to 8 other strategies for maintaining ecological integrity, use aboriginal traditional knowledge to enhance understanding of cumulative effects and develop appropriate mitigation/minimization strategies.	Any assessment of cumulative effects must include an analysis of whether aboriginal or treaty rights have been infringed. The plan should also describe how the enhanced understanding of cumulative effects will be used in the planning process and should make provision for further research into the health effects of development in the LARP area. Again, under the *Land Stewardship Act*, the Lieutenant Governor in Council can disregard, amend or reject any effort to address cumulative effects in LARP.

Page	Section	Subheading	Issue	Proposed Resolution under the LARP	Comments
18	2.0 Lower Athabasca Regional Plan	2.2: Outcome 4: Land Uses are Responsible and Sustainable to Conserve Ecosystems and Biodiversity	Objective 4.2: Disturbed land is reclaimed in a timely, progressive and aggressive manner	Make researching successful reclamation methods a priority, but start now to work with aboriginal peoples and multi-stakeholder organizations to co-ordinate reclamation.	It is inappropriate for this objective, which relates to responsible and sustainable land uses, to consider aboriginal peoples only at the stage of reclamation. Also, this and other references to "reclamation "continues the "just trust us it will work" approach to reclamation, which is inappropriate. Developing a reclamation plan for the entire mixed use resource area (60% of the LARP area) demonstrates a failure to seriously address which lands are socially and culturally more important to First Nations, the potential for mutually exclusive land uses in the mixed use area, and requirements under s.35(1) of the *Constitution Act* such as minimal impairment. Timelines must be created in consultation with First Nations for this objective.
18	2.0 Lower Athabasca Regional Plan	2.2: Outcome 4: Land Uses are Responsible and Sustainable to Conserve Ecosystems and Biodiversity	Objective 4.3: Regional biodiversity and ecosystem function is conserved and enhanced	Create management plans for conservation areas and multi-use areas which utilize traditional aboriginal knowledge and involve aboriginal knowledge holders.	Again, the creation of management plans is a hollow promise given the scheme of the *Land Stewardship Act*. Furthermore, given that RAC Document's land-use classification system already defines how competing uses are to be balanced, the promise of meaningfully incorporating aboriginal knowledge provides nothing to LARP.

Page	Section	Subheading	Issue	Proposed Resolution under the LARP	Comments
18	2.0 Lower Athabasca Regional Plan	2.2: Outcome 4: Land Uses are Responsible and Sustainable to Conserve Ecosystems and Biodiversity	Objective 4.3: Regional biodiversity and ecosystem function is conserved and enhanced	In addition to other knowledge bases, develop a traditional knowledge base of the impacts of individual and cumulative industrial activities on biodiversity and ecosystem functions through time.	LARP provides no guidance how this knowledge base is to be incorporated or used together with other scientific and socio-economic data.
19	2.0 Lower Athabasca Regional Plan	2.2: Outcome 5: The Integrity of Air and Water are Managed Through Responsible Stewardship	Objective 5.2: Water quality and quantity is managed to enhance and maintain ecological integrity and human health	Recognize downstream water requirements of the NWT and Saskatchewan.	Why are downstream water requirements of the NWT and Saskatchewan to be recognized, but not First Nation downstream water requirements within the LARP area?
22	2.0 Lower Athabasca Regional Plan	2.2: Outcome 6: People-friendly Communities are Created Throughout the Region	Objective 6.3: Cultural diversity is valued	Develop opportunities to work with aboriginal elders and peoples to develop cultural-historical learning opportunities in the region.	Using elders and other aboriginal knowledge holders as a tool for cultural diversity minimizes the role they should play in the land-use planning process and minimizes the link between their information and treaty rights.
22	2.0 Lower Athabasca Regional Plan	2.2: Outcome 6: People-friendly Communities are Created Throughout the Region	Objective 6.3: Cultural diversity is valued	Maintain opportunities for community traditional use activities such as hunting, fishing, trapping, country foods and camping.	This is a constitutional requirement.

Page	Section	Subheading	Issue	Proposed Resolution under the LARP	Comments
22	2.0 Lower Athabasca Regional Plan	2.2: Outcome 6: People-friendly Communities are Created Throughout the Region	Objective 6.3: Cultural diversity is valued	Develop a place name program and consider converting culturally/historically significant sites/features to those names.	Aboriginal *control* over culturally/historically significant sites is vital for the protection of aboriginal and treaty rights and for LARP to seriously address cultural diversity. Renaming sites is not a sufficient land-use plan. Furthermore, simply protecting sites while other parts of the Traditional Territories around those sites are effectively run over does not live up to the requirements of section 35.
22	2.0 Lower Athabasca Regional Plan	2.2: Outcome 6: People-friendly Communities are Created Throughout the Region	Objective 6.4: Significant historical resources are protected and historical themes are identified and developed.	Support aboriginal communities' leadership to develop management procedures to preserve and protect aboriginal peoples' historic and ceremonial sites that are significant to aboriginal peoples so that they can be preserved and protected as appropriate under existing legislation.	Aboriginal *control* over these sites is vital for the protection of aboriginal and treaty rights and for LARP to seriously address cultural diversity. Furthermore, simply protecting sites while other parts of the Traditional Territories around those sites are effectively run over does not help.
23	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.1: Aboriginal peoples are included in land management planning		Again, the creation of land management plans is a hollow promise given the absolute and unfettered authority of the Lieutenant Governor in Council under the *Land Stewardship Act*.

Page	Section	Subheading	Issue	Proposed Resolution under the LARP	Comments
23	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.1: Aboriginal peoples are included in land management planning	Work with aboriginal peoples to develop local learning opportunities for youth regarding cultural values, social responsibility, stewardship roles, etc.	While education is important, the limited protection of aboriginal rights and interests and the minimal guarantees of meaningful inclusion of aboriginal peoples in management planning limit the efficacy of this proposal.
23	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.1: Aboriginal peoples are included in land management planning	Ensure meaningful consultation with aboriginal peoples.	This is a constitutional requirement and includes, where appropriate, accommodation. The consultation process between the Crown and affected aboriginal peoples should be defined. Alberta's Consultation Policy and Guidelines are unilaterally imposed and do not meet legal requirements.
23	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.1: Aboriginal peoples are included in land management planning	Work with aboriginal peoples to improve quality of information to inform and co-ordinate current planning processes, infrastructure and services planning.	The value of this recommendation is uncertain given other flaws set out in this letter. The RAC Document provides no guidance or assurances as to what is to be done with this information.
23	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.1: Aboriginal peoples are included in land management planning	Provide information and funding assistance to aboriginal peoples to participate in the development of land-use plans.	Funding must be sufficient for meaningful participation and requires meaningful incorporation of First Nation views.

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23	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.2: Land-use planning processes balance the constitutionally protected rights of aboriginal peoples and the interests of all Albertans	Balance aboriginal rights with many other interests.	Constitutionally protected aboriginal rights are not subject to s.1 of the *Charter* and cannot be simply balanced with other non-constitutionally protected interests. For "balancing" not to violate the Constitution, it must be done under the justified infringement analysis required by s.35(1) of the *Constitution Act, 1982*.
23	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.2: Land-use planning processes balance the constitutionally protected rights of aboriginal peoples and the interests of all Albertans	Work with aboriginal peoples to develop formal roles and responsibilities for aboriginal peoples in land-use planning and environmental assessment/ monitoring.	Again, this conflicts with the absolute and unfettered authority of the Lieutenant Governor in Council under the *Land Stewardship Act*. Furthermore, how environmental assessment and monitoring data will be used under LARP must be defined for this to demonstrate a real commitment to respect aboriginal and treaty rights.
23	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.2: Land-use planning processes balance the constitutionally protected rights of aboriginal peoples and the interests of all Albertans	Work with aboriginal peoples to develop engagement strategies for aboriginal peoples in land planning and decision-making.	Again, this conflicts with the absolute and unfettered authority of the Lieutenant Governor in Council under the *Land Stewardship Act*. For "balancing" not to violate the Constitution, it must be done under the justified infringement analysis required by s.35(1) of the *Constitution Act, 1982*.
23	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.2: Land-use planning processes balance the constitutionally protected rights of aboriginal peoples and the interests of all Albertans.	Assess the state of knowledge of fish and wildlife resources and effectively manage allocations that affect aboriginal peoples' rights.	How this data will be used under LARP must be defined for this to demonstrate a real commitment to respect aboriginal and treaty rights. Under the *Land Stewardship Act* the Lieutenant Governor in Council can disregard any such information.

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23	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.2: Land-use planning processes balance the constitutionally protected rights of aboriginal peoples and the interests of all Albertans	Work with aboriginal peoples to generate land-use options for mitigation, accommodation and reconciliation of rights.	Where and how is this to happen? There is no recommendation for legislative and regulatory change and the RAC Document is focused primarily on pushing ahead on development, with little or no concern with section 35 rights.
23	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.2: Land-use planning processes balance the constitutionally protected rights of aboriginal peoples and the interests of all Albertans	Support the ability of aboriginal peoples to exercise traditional uses of the land.	This is a constitutional requirement, but the LARP proposal is so minimally described as to render any assurances meaningless. For "balancing" not to violate the Constitution, it must be done under the justified infringement analysis required by s.35(1) of the *Constitution Act, 1982*.
23	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.2: Land-use planning processes balance the constitutionally protected rights of aboriginal peoples and the interests of all Albertans	Encourage aboriginal peoples to share traditional use information.	For this proposal to have meaning, LARP must ensure adequate safeguards exist for the protection and appropriate use of such information and for the information to be integrated into planning at an early stage. Moreover, depending on the information received, there needs to be a recognition that some development should be limited or non-existent in certain areas.
23	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.2: Land-use planning processes balance the constitutionally protected rights of aboriginal peoples and the interests of all Albertans	Work with aboriginal peoples in establishing roles pertaining to reclamation and reuse of reclaimed lands for traditional uses.	Aboriginal peoples should be involved in land use decisions prior to reclamation. Moreover, reclamation is often guess work with no demonstrable results showing that the reclaimed land can support the exercise of rights from an Aboriginal perspective.

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24	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.2: Land-use planning processes balance the constitutionally protected rights of aboriginal peoples and the interests of all Albertans	Assess the impacts of development and increased regulation on local trapping and treaty activities.	This is an obligation of the Crown at all times and must include an assessment of preferred locations for exercising treaty rights, undue hardship, and alternatives for minimal impairment, among other considerations. In addition to assessing impacts, LARP must also include planning strategies that address limiting or preventing development when treaty activities are affected.
24	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.3: Opportunities for traditional uses within the region are maintained and enhanced		This is an obligation of the Crown at all times. Again, this conflicts with the absolute and unfettered authority of the Lieutenant Governor in Council under the *Land Stewardship Act*.
24	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.3: Opportunities for traditional uses within the region are maintained and enhanced	Support aboriginal communities' ability to exercise traditional uses.	This is an obligation of the Crown at all times.
24	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.3: Opportunities for traditional uses within the region are maintained and enhanced	Maintain populations of game species to support aboriginal traditional use and recreational hunting and fishing, including commercial guide outfitting.	This is an obligation of the Crown at all times.

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24	2.0 Lower Athabasca Regional Plan	2.2: Outcome 7: Aboriginal Peoples' Rights, Traditional Uses and Values are Respected and Reflected in Planning	Objective 7.3: Opportunities for traditional uses within the region are maintained and enhanced	Support aboriginal communities to undertake community subsistence/ traditional use needs assessment.	Recognizing and protecting aboriginal and treaty rights is a constitutional obligation at all times.
26	3.0: Land-use Classification System	3.1.2 Conservation	Criteria for the classification of conservation areas	One criterion for the conservation classification is that an area support aboriginal traditional uses.	This fails to assess lands that formerly supported aboriginal traditional uses and the cultural, social spiritual and historical reasons why some lands may be of more importance than others.
26	3.0: Land-use Classification System	3.1.2 Conservation	Incorporation of aboriginal uses in conservation areas	Aboriginal uses will be permitted where they will be consistent with overall conservation strategies.	Even where there are valid conservation objectives, any infringement of aboriginal and treaty rights must meet the standard of justified infringement, including priority allocation of resources. To the extent that permits are to be required, the province must justify this prima facie infringement, keeping in mind the jurisprudence and the legal obligations under Treaty 8 not to restrict access for hunting, fishing and trapping. When read together with SRD's **Proposed *Public Lands Administration Regulation*** and other parts of the RAC Document, exercise of section 35 rights and traditional uses becomes a low-level priority, with ever more restrictions placed thereon. The RAC Document makes planning proposals without consideration of the other restrictions being considered and implemented by Alberta already.

Page	Section	Subheading	Issue	Proposed Resolution under the LARP	Comments
27-8	3.0: Land-use Classification System	3.1.3 Mixed-use Resources	60% of the LARP land area is classified as mixed-use resource, and therefore intended to "encourage and support economic activities associated with resources development"	Respect the integrity of known significant cultural resources and aboriginal traditional use, while maintaining the long-term priority of harvesting forests and extracting bitumen.	This fails to recognize priority in access to resources, minimal impairment, preferred means for exercising rights, consultation requirements, etc. and makes exercise of constitutionally-protected rights less important than permitted industrial uses.
32	3.0: Land-use Classification System	3.1.5 Recreation and Tourism	Increasing regional recreation and tourism opportunities through the creation of new recreation areas and enhancements	Include aboriginal peoples in the planning of recreation and tourism opportunities and in the creation of aboriginal tourism opportunities. Classified Lake Athabasca as "Semi-Primitive Mechanized" where recreation and tourism is to be the primary use.	Aboriginal uses in areas over which treaty guarantees access, hunting, fishing, trapping and gathering must be primary uses for LARP to respect the constitutional framework of Canada. Furthermore, given that LARP's land-use classification system defines how competing uses are to be balanced, the promise of meaningfully incorporating aboriginal knowledge provides nothing to LARP.
33	3.0: Land-use Classification System	3.2.2 Multi-use Corridor Overlay	Multi-use corridors are a priority on the Land-use Framework	Use a multi-stakeholder planning process. Manage access and use in river corridors to protect the traditional practices of aboriginal peoples, and consider aboriginal traditional knowledge in developing management tools.	This overlooks the absolute and unfettered authority of the Lieutenant Governor in Council under the *Land Stewardship Act*.

Page	Section	Subheading	Issue	Proposed Resolution under the LARP	Comments
34	3.0: Land-use Classification System	3.2.River Corridor Overlay	River corridors are an important landscape feature	The maintenance of aboriginal traditional uses and cultural resources is “important”.	The minimal mention of aboriginal use of the Athabasca River and other waterways for travel and for the exercise of treaty rights demonstrates a lack of understanding of aboriginal and treaty rights in the area.