Henning Byrne LLP

Barristers and Solicitors

Tarlan Razzaghi
e: trazzaghi@henningbyrne.com
o: 780.421.1707 ext.309

October 21, 2014

LARP Review Panel
c/o Land Use Secretariat
9th Floor, Centre West Building
10035 – 108 Street N.W.
Edmonton, AB T5J 3E1

VIA EMAIL: LUF@gov.ab.ca

Dear LARP Review Panel:

Re: Review of Lower Athabasca Regional Panel
Information Request #2 Directed to the Crown

We write on behalf of Chipewyan Prairie Dene First Nation ("**CPDFN**"). On September 3, 2014, the Panel established to conduct a review of the Lower Athabasca Regional Plan Review (the "**Panel**") issued Information Request #2 to the Crown ("**IR #2**"). On September 18, 2014, the Crown did not provide the Panel with the information it was seeking but instead responded by indicating that the information requested: a) was already in possession of the Panel; b) did not exist c) could not be provided without the consent of the Applicants; d) should be obtained from the Applicants; or d) is outside of the Panel's jurisdiction. Pursuant to IR #2, this letter is to respond to Crown's response of September 18, 2014.

Introduction

The Crown's response to IR #2 is similar to its narrow interpretation of and uncooperative approach to responding to the Panel's Information Request #1 on August 19, 2014 ("**IR #1**"). CPDFN still awaits the Panel's ruling on the legal issues raised by the Crown's response to IR #1, and seeks the same with respect to IR #2. CPDFN submits that both of the Panel's information requests seek valuable information "necessary to permit a full and satisfactory understanding of the matters in the review" and are "relevant to the proceeding" in accordance with Rules 28 & 29 of the *Rules of Practice for Conducting Reviews of Regional Plans (March 2014)*, including how CPDFN is directly and adversely affected by the LARP and whether the regional plan meets the purposes and objectives of the *Alberta Land Stewardship Act*, S.A. 2009 c.A-26.8 (the "*Act*") as required.

As provided in CPDFN's Reply Submissions of August 25, 2014, the Panel has a broad public interest mandate to ensure regional plans made by Alberta meet the broad public purposes of the *Act*, including ensuring the future needs of aboriginal peoples, consistent with the

Crown's constitutional obligations. To discharge its mandate, the Panel must adopt a generous and liberal interpretation of its jurisdiction and LARP and reject the Crown's narrow interpretation of the Panel's authority and the scope of the Review as Alberta's interpretation would effectively defeat the legislative intent of the *Act* in providing an opportunity to review a regional plan within one year of it coming into force.

CPDFN objects to the Crown's response to IR #1, which effectively confirms that the Crown has no intention of participating in any meaningful way in this Review of LARP. Despite making commitments in LARP to include aboriginal peoples in land-use planning decisions in the region, the Crown's refusal to cooperate with the Panel's information requests is further evidence of the failure by Alberta to operationalize its obligations to meaningfully engage with CPDFN on land use planning decisions and to protect CPDFN's constitutional rights.

Part 1 of Information Request #2

In Part 1 of IR #2, the Panel requested the Crown provide Schedule G of LARP: LARP Digital Map ("**Schedule G**") with three additional theme layers. The additional layers requested were a) LARP's proposed Conservation Areas; b) LARP designated Historical Resource Sites; and c) Traditional Use Areas for the Applicants.

The Crown responded to the request by stating:

a) Schedule G already shows the proposed conservation areas;

b) LARP does not designate historical resource sites, but rather references those already designated under the *Historical Resources Act* and therefore the information "does not exist;"

c) The Crown does not regulate, designate or set aside "traditional use areas" for any particular First Nation and therefore the information "does not exist;" any traditional land use information the Crown has in this regard cannot be disclosed without the consent of the Applicants; and the information should be obtained from the Applicants.

CPDFN submits that the Crown in providing its response to IR#2 has misinterpreted the information request defeating its intent and purpose. CPDFN submits that the Crown does have adequate information in its possession to meet the intent and purpose of IR #2 and assist the Panel in discharging its mandate in this Review of LARP.

It is evident from IR #2 that the Panel is seeking to have the three additional data layers placed on Schedule G all together. This is a reasonable information request in order to obtain a better understanding of the direct and adverse impacts of LARP on CPDFN, and the other Applicants. It seems the Crown has incorrectly interpreted the information request to

mean that the Panel is seeking this information generally rather than as map layers on a single map, for instance it says, the Panel should just obtain the information from the Applicants. The Crown should presume the Panel knows it could obtain this information from the Applicant (as it requested from Onion Lake) and presume that the Panel knows it already has the information in its possession for CPDFN. Therefore, the Crown should provide the information request specifically made of it rather than interpret it in such a way so as to refuse to provide any information.

a) Conservation Areas

CPDFN agrees with the Crown that Schedule G does include the new proposed LARP conservation areas. However, the other layers requested are not included although the Crown does have the ability to add to Schedule G all the layers requested.

b) Historical Resources Sites

As stated by the Crown in its response to IR #2, LARP at page 22 references historic resources designated pursuant to the *Historical Resources Act* and directly links such designation of resources with the protection of aboriginal traditional land use of cultural and spiritual significance. Additionally, in its response to IR#2, the Crown references its *Response to Aboriginal Consultation on the Lower Athabasca Regional Plan*, which relies on historic resource designations pursuant to the *Historical Resources Act*, to assure Aboriginal peoples that it has considered their concerns with respect to LARP's impacts on traditional land use (p.11). Therefore, while there may not technically be "LARP Designated Historical Resource Sites," the Crown should take a purposive interpretation of IR #2 and read it within the context of its own documents to provide information on historical resources that LARP relies upon for protecting traditional land use locations.

To assist the Panel, CPDFN provides the following information in submitting that LARP's reliance on historic resources designated under the *Historical Resources Act* is inadequate in protecting its traditional land use locations.

Alberta Culture and Tourism is responsible for designating and protecting historic resources under the *Historical Resources Act*. Pursuant to the *Listing of Historic Resources – Instructions for Use* published by Alberta Culture and Tourism (Attachment A), aboriginal use locations of an *historic resource nature* are categorized as "HRV4c" in the *Listing of Historic Resources*, which means the resource "may require avoidance" (pp. 2 & 5). While such designation requires project proponents to obtain a "Historic Resource Clearance" (p.4) i.e. consent from the Alberta Culture and Tourism to destroy, disturb, alter, or remove the historic resource site, CPDFN submits such clearance is not effective in protecting potential traditional land use locations and generally does not act as a constraint to development. For example, unlike historic resources designated as "HRVs1-3," a proponent can apply for and obtain regulatory approvals from the Alberta Energy Regulator before it obtains clearance from Alberta Culture (Attachment A at p.4), and proponents generally need only provide notice to Alberta Culture is required for any historical resource discovered during operation of oil sands activity without undertaking any further work to

protect the resource (Attachment at p.6). CPDFN understands that Historical Resource Impact Assessments that could locate further traditional land use locations are rarely required (usually only for projects triggering environmental impact assessments that are also becoming increasingly rare).

While LARP claims that Alberta works collaboratively with aboriginal communities in protecting these resources (p.22), CPDFN's experience does not reflect this. For instance, CPDFN in its submissions to Alberta on the Draft of LARP provided the locations of some of its traditional land use locations of a historical nature, including burial grounds and ceremonial locations (See, CPDFN - Application App LARP Fig3 CRWS 12Apr10 Appendix B.pdf). To this date, CPDFN has not been informed by Alberta whether such locations have been designated as historic resources by Alberta Culture and Tourism as referenced in LARP. CPDFN would like to know what areas within its traditional territory have been designated for some form of protection under the *Historical Resources Act*, and by copy of this letter requests this information from Alberta. Spatial files of the geographic locations would be appreciated.

Similarly, no such commitment is made by Alberta Culture and Tourism to work with First Nations to designate historic resources. This is confirmed by the *Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management (2014)* at section iii. Alberta Culture only states that it *may* require proponents to consult with aboriginal groups when such designated historic resources may be adversely affected. No commitment is made by Alberta to consult with aboriginal peoples when activities may impact designated historical resources when consultation is not been delegated to a proponent (Attachment A at page 5).

a) Traditional Use Areas

We assume as the Crown did in its response to IR#2 that the Panel refers to "Traditional Use Areas" as CPDFN'S traditional territory, which is the lands that CPDFN historically and currently occupies and uses for the exercise of its treaty and aboriginal rights.

The Crown claims in its response to the IR #2 that Traditional Land Use areas for the Applicants *does not exist* because the Crown does not "regulate, designate or set aside traditional land use areas" for any particular Nation. CPDFN objects to any claims that such information does not exist and submits that a) the Crown does regulate the public lands that encompass CPDFN's traditional use areas (except for the portions in Saskatchewan); and b) has an obligation to know CPDFN's traditional land use area in meeting its constitutional obligations.

Alberta as a party to Treaty 8 is deemed to know the contents of CPDFN's treaty rights, including the geographic area in which these rights exist. Further, the Crown is under an obligation to inform itself of the impacts of its decisions on CPDFN's treaty and aboriginal rights, which inevitably requires the Crown to know the location of traditional use areas.

CPDFN has provided maps and land use studies providing its traditional land use areas to Alberta multiple times.

Grassy Narrows First Nation v. Ontario (Natural Resources), 2014 SCC 48 at para. 52.
Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69 at paras. 34 & 47.

Alberta also claims it cannot disclose such information of traditional land use areas because it has told the Applicants it would not release such information, but Alberta could have requested CPDFN's consent to respond to IR #2, and did not. In any event, a map of CPDFN's traditional territory is public information; it was provided in CPDFN's submission to the Panel, which is published on the Land Use Secretariat's website. If Alberta needs the geospatial files to respond to the Panel's IR#2, CPDFN is able and willing to provide them to Alberta.

Finally, Alberta concludes by stating that the Panel, rather than asking the Crown for traditional use areas, should obtain the information from the Applicants. It is evident that the Panel understands its power to make such a request from the Applicants, and the Crown should presume that the Panel has noted CPDFN's traditional territory in its submissions. Instead, the Panel has asked the Crown for CPDFN's traditional territory as a map layer on Schedule G. The Crown should cooperate and take a liberal approach to the Panel's information requests rather than a technical interpretation intended to defeat the information request.

Part 2 of Information Request #2

The Panel in Part 2 of IR#2 requests the Crown provide the Panel for *its view* of the implications of traditional use in conservation and recreational areas designated under LARP when implementing LARP. The Crown responded by refusing to provide such information stating the Panel's jurisdiction is limited to reviewing the content of LARP; the Panel cannot review the process leading up to the enactment of LARP; and in any event, the Crown's views on the matter are outlined in its *Response to Aboriginal Consultation on Lower Athabasca Regional Plan*.

CPDFN objects to the Crown's response. The Panel has broad jurisdiction in this Review of LARP and the Crown is preventing the Panel from discharging its mandate by refusing to provide the Panel with information it considers relevant and material in doing so. The Crown's approach is contrary to the principles of administrative law. The Panel alone must decide what is relevant and material in its conduct of the Review of LARP. CPDFN submits that the Crown's views on how it incorporated CPDFN's traditional use areas into LARP is wholly necessary and relevant in determining if the content of LARP has such effect.

Further, the *Response to Aboriginal Consultation on Lower Athabasca Regional Plan* that the Crown relies on in its response indicates that the Crown did not adequately consider the implications of LARP'S proposed Conservation Areas; Recreation and Tourism Areas, and

Public Land Areas for Recreation/Tourism; and the Lakeland Country Iconic Tourism Destination on CPDFN's traditional land use.

The Conservation Areas of LARP are generally located outside of or on the periphery of CPDFN's traditional territory. As indicated in CPDFN's Application for the Review of LARP, CPDFN provided submissions to Alberta on the Draft version of LARP including a map of the proposed conservation areas that CPDFN considered necessary for the protection of its constitutional rights, along with a series of maps and rationale for the protection of the lands, including cultural and ecological reasons (CPDFN - Application App Cover Letter-For Submission on Protected Lands.pdf; CPDFN - Application App Ecological Considerations by MSES.pdf; and Figures 1-9 at Appendix B; CPDFN - Application App CPDFN Planning Considerations.pdf). In these submission, CPDFN emphasized the importance of the Kai'Kos' Deseh (Christina River) Watershed to CPDFN's continued exercise of treaty and aboriginal rights. Therefore, Alberta's selection of conservation areas indicates the Crown did not adequately consider CPDFN's traditional use implications when implementing LARP as the Conservation Areas largely do not overlap with lands needed to address with the cultural and ecological needs of CPDFN's treaty and aboriginal rights.

While LARP designates a very small portion of the Kai'Kos' Deseh watershed on its boundary, as a new Conservation Area, the Dillon River conservation area (which has not yet been formally designated a conservation area under the *Provincial Parks Act* or the *Public Lands Act*),[1] Alberta has submitted no evidence indicating this small portion of watershed overlapping the conservation area can protect CPDFN's traditional territory for the exercise of treaty and aboriginal rights and address the cultural and ecological concerns raised by CPDFN.

In the *Response to Aboriginal Consultation on Lower Athabasca Regional Plan*, Alberta did acknowledge the concern of First Nations that LARP's proposed conservation areas would provide little protection of traditional land use. At page 10 of the document it states:

> It was felt that very little of some aboriginal communities' traditional territory will be protected, and there will be no protected conservation areas close to those communities. Some said this severely limits practical and meaningful traditional-use opportunities for community members in these conservations areas, and does not meet the requirement for conservation areas to "support aboriginal traditional land uses" as stated in the LARP. They added that a priority land-use classification needs be established for aboriginal use.

[1] Schedule F of LARP labels the Dillon River Conservation Area as a "Conservation Area" that pursuant to LARP would be designated under *Public Lands Act* and at the time LARP was made effective, was under the responsibility of the Minister of Environment and Sustainable Resource Development. In Schedule G the Dillon River Conservation Area is labelled as "Wildland Park" that pursuant to LARP would be designated under the *Provincial Parks Act*, and was responsibility of the Minister of Parks. Only recent changes made by Premier Jim Prentice, did ESRD obtain jurisdiction over *Provincial Parks Act*.

However, in Alberta's response to such concerns at page 11 of the *Response to Aboriginal Consultation on Lower Athabasca Regional Plan*, no comment is made. Therefore, it can safely be assumed Alberta overlooked or failed to appreciate the concerns of First Nations.

In the *Response to Aboriginal Consultation on Lower Athabasca Regional Plan*, Alberta also acknowledged the concern of First Nations that LARP's proposed Recreational Areas would adversely affect traditional land use. At page 18 of the document it states:

> First Nations and Métis organizations want a formal process created for the selection of targeted recreation areas that do not adversely impact aboriginal and treaty rights, and which also offer opportunities for the communities to be involved in economic opportunities arising from recreation and tourism.

However, in Alberta's response to such concerns at pages 18-19 of the *Response to Aboriginal Consultation on Lower Athabasca Regional Plan,* Alberta did not commit to a formal process for selection of recreation areas, or make any comment on the concern. Instead, the response indicates Alberta is committed to promoting and increasing recreation and tourism in the region. Therefore, it can safely be assumed Alberta overlooked or failed to appreciate the concerns of First Nations. This assumption is clearly evident by the selection of seven out of 14 Recreation/Tourism and Public Land Areas for Recreation/Tourism within the Kai'Kos' Deseh (Christina River) Watershed, including the Winifred Lake Provincial Recreation Area and Cowper Lake Provincial Recreation Area, both which are in close proximity to CPDFN's reserve lands. This was despite CPDFN providing advising Alberta indicating that Kai'Kos' Deseh is historically and currently significant for CPDFN's traditional land use (See, CPDFN - Application App Cover Letter-For Submission on Protected Lands.pdf; CPDFN - Application App Ecological Considerations by MSES.pdf; and Figures 1-9 at Appendix B; CPDFN - Application App CPDFN Planning Considerations.pdf).

It is important for the Panel to consider the Land-Use Framework (2008) ("LUF") which provides direction on the development of each regional plan, including LARP. The LUF states at page 16 that "government decision making and choices will be informed by science, evidence, and experience, including the traditional knowledge of aboriginal peoples". Alberta has not provided any evidence on how or if traditional knowledge and traditional use informed the development of LARP. The LUF also acknowledges Alberta's obligation to be "Respectful of the constitutionally protected rights of aboriginal communities" and the Crown's duty to consult on matters that impact these rights (page 16). Consultation includes "substantially addressing the concerns of aboriginal peoples" and accommodating them, where needed. There is no evidence that this has occurred.

Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73 at para. 42.
Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69 at para.55.

Conclusion

As in its response to IR #1, the Crown has failed to engage in meaningful participation of this Review of LARP in responding to IR #2. Rather it has chosen to adopt a technical interpretation of IR #2 that flies in the face of the information request's intent and purpose. CPDFN submits that the Crown's response to IR#2, could provide the Panel with valuable information in its conduct of the Review of LARP, including in determining whether and how LARP directly and adversely affects CPDFN. CPDFN submits that based on the information available to CPDFN, the Crown has not adequately considered the implications of LARP's conservation areas and recreational and tourism lands on its traditional land use areas. The Crown's failure to provide any evidence that it has done so, confirms this conclusion.

Sincerely,

Tarlan Razzaghi
Barrister and Solicitor

tr

cc: Witek Gierulski: Witek.Gierulski@gov.ab.ca
Keltie Lambert counsel to Cold Lake First Nation: klambert@wittenlaw.com
Mark Gustafson counsel to Mikisew First Nation: MGustafson@jfklaw.ca
Jenny Biem counsel to Athabasca Chipewyan First Nation: jenny@woodwardandcompany.com
Will Randall: will.randall@gov.ab.ca
Jodie Hierlmeier: jodie.hierlmeier@gov.ab.ca