

October 22, 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 Fort McKay First Nation. 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.

Correction to Fort McKay’s Response to Information Request #1

We take this opportunity to correct a statement made in our correspondence of October 17, 2014 wherein we advised the Panel at pages 5 and 8 that “no consultation has begun” with respect to the Biodiversity Management Framework. We can advise that Fort McKay did attend an information session on the biodiversity framework in March 2014 as outlined in paragraph 62 of Fort McKay’s reply submission of August 25, 2014. Fort McKay met again with ESRD in September of 2014 regarding the framework at which time Alberta confirmed no traditional land use objectives would be incorporated into the framework as outlined on page 6 of our October 17, 2014 letter.

Introduction to Response to Information Request #2

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**”). Fort McKay 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. Fort McKay 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 Fort McKay 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 Fort McKay'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.

Fort McKay objects to the Crown response to IR #2. 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 Fort McKay on land use planning decisions and to protect Fort McKay'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 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 Applicants' consent and the information should be obtained from the Applicants.

Fort McKay submits that the Crown in providing its response has misinterpreted the information request defeating its intent and purpose; and the Crown has adequate information in its possession to provide to the Panel in assisting it to discharge its mandate in this Review of LARP.

It is evident from the IR #2 that the Panel is seeking to have the three additional data layers placed on Schedule G all together. This is a reasonable request in order to obtain a better understanding of the direct and adverse impacts of LARP on Fort McKay, and to determine whether LARP meets the intent and purposes of the *Alberta Land Stewardship Act*. It seems the Crown has incorrectly interpreted IR #2 to request that the information be provided to the Panel generally rather than as map layers on a Schedule G. For instance the Crown says, the Panel should just obtain the information from the Applicants. The Crown should presume that the Panel knows it could obtain this information from the Applicant (as it requested from Onion Lake) and knows it already has the information in its possession for Fort McKay. Therefore, the Crown should provide the information request specifically made of the Crown and interpret the IR #2 as request to supplement the information already provided by Fort McKay.

a) Conservation Areas

Fort McKay 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 information to add them to on Schedule G, in addition to the conservation areas, as requested by the Panel.

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 resources with the protection of aboriginal traditional land use lands 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 such historic resource designations to assure Aboriginal peoples that it has considered their concerns with 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 provide information on historical resources that LARP relies upon for protecting traditional land use sites.

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

While LARP claims that Alberta works collaboratively with aboriginal communities in protecting these resources (p.22), this is not Fort McKay's experience. Not only has Alberta not worked collaboratively with Fort McKay to designate such resources, Alberta relies on

the existing regulatory system to protect the sites, which have not been effective in doing so.

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, Fort McKay 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 A at p.6). 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).

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).

Fort McKay 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. Fort McKay understands that very few historic resources have in fact been designated in the LARP region.

a) Traditional Use Areas

We assume as the Crown did in its response to IR#2 that the Panel uses the term “Traditional Use Areas” to refer to Fort McKay’s traditional territory, which is the lands that Fort McKay historically and currently occupies and uses for the exercise of its treaty and aboriginal rights.

The Crown claims in its response to IR #2 that it cannot provide the traditional land use information requested because it does not exist as the Crown does “regulate, designate or set aside traditional land use areas” for any particular Nation.

Fort McKay objects to the Crown’s position that such information does not exist and submits that a) the Crown does regulate the public lands that encompass Fort McKay’s traditional use area and b) does, in effect, designate traditional use areas. Alberta has created maps for consultation notification purposes for Fort McKay. It uses these maps to direct project proponents on which First Nations are potentially affected by a project and therefore which First Nations must be consulted. These maps were created by review of the traditional territory maps submitted by First Nations, the data supporting the First Nation’s territory maps, and ESRD’s internal data sources such as location of Indian fishing licenses and encounters between wildlife officers and First Nation hunters and trappers. We attach as Attachment B, a map depicting Fort McKay’s traditional territory, provided in its Application for Review, and a map as Attachment C, showing the area which Alberta acknowledges as Fort McKay’s traditional territory. You will see they are very similar.

Additionally, Alberta as a party to Treaty 8 is deemed to know the contents of Fort McKay’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 Fort McKay’s treaty and aboriginal rights, which invariably requires the Crown to know the location of traditional use areas. Fort McKay has provided maps and land use studies to Alberta multiple times, including the land use studies upon which these maps are based. Additionally, Fort McKay’s historical land use studies are available in public libraries¹.

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.

For the Panel’s convenience, attached as Attachment D is a map created by Fort McKay in January 2014 of Fort McKay’s traditional territory which includes an overlay of the LARP

¹ Garvin, Terry. *There is still survival out there; a traditional land use and occupancy study of the Fort McKay First Nations*. Fort McKay: Arctic Institute of North America, 1994 Available at: Alberta Government Library – Great West Life, Edmonton; Referenced by Alberta: <http://www.aboriginal.alberta.ca/documents/TUS2 - Library.pdf>; and University of Calgary Gallagher Library. Fort McKay Tribal Administration, *From Where We Stand*, Fort McKay (1983) Available at: University of Alberta Cameron Library, Circumpolar Institute Referenced by Alberta: <http://www.aboriginal.alberta.ca/documents/TUS2 - Library.pdf>. And see Indian Claims Commission, *Inquiry into the treaty land entitlement claim of the Fort McKay First Nation* (1995) Available at: Alberta Library – Great West Life; University of Alberta Cameron Library

Conservation Areas. If Fort McKay can create this map from Alberta's LARP geospatial files, surely Alberta can easily provide a map with the layers requested by the Panel.

Additionally, while Alberta claims it cannot disclose such information because it has told Fort McKay it would not release such information without consent, Alberta could have requested Fort McKay's consent – and has not. In any event, a map of Fort McKay's traditional land use area is public information; it was provided in Fort McKay's submission to the Panel and is published on its website: <http://fmsd.fortmckay.com/>. If Alberta needs the geospatial files to respond to the Panel's IR #2, Fort McKay is ready, able and willing to provide them to Alberta (again).

Alberta concludes by stating that the Panel should obtain traditional use areas from the Applicants. It is evident that the Panel understands this power, and the Crown should presume it has noted that Fort McKay has already included it in its Application for a Review of LARP. Instead, the Panel has asked the Crown for map layers, which the Crown should presume is intended to assist the Panel discharge its mandate. The Crown should cooperate.

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 refusing to provide such information stating the Panel's jurisdiction is limited to reviewing the content of LARP and cannot review the process leading up to the enactment of LARP; and in any event, its views on the matter are outlined in its *Response to Aboriginal Consultation on Lower Athabasca Regional Plan*.

Fort McKay provides the following response. The Panel has broad jurisdiction in this Review of LARP and the Crown is preventing the Crown from discharging its mandate by refusing to it provide it with information it considers relevant and material in discharging its mandate. The Crown's approach 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. Fort McKay submits that the Crown's views on how it incorporated traditional use into LARP is wholly relevant in determining if the content of LARP has such effect. Additionally, the *Response to Aboriginal Consultation on Lower Athabasca Regional Plan* that the Crown relies on in its response to IR #2 indicates that the Crown disregarded any implication of Fort McKay's traditional land use of LARP'S proposed conservation areas.

The Conservation Areas of LARP are generally located on periphery of Fort McKay's traditional territory. As indicated in Fort McKay's Application for the Review, in 2011 Fort McKay provided its submissions to Alberta on the Draft version of LARP including a map of the proposed conservation areas of LARP within Fort McKay's traditional territory. Fort McKay in its submissions indicated to Alberta at the time that: proposed conservation areas

only overlap with Fort McKay's proposed conservation areas by 5% and are located a great distances from the hamlet of Fort McKay.

In Fort McKay's Application for a Review of LARP, Fort McKay attached a 2013 expert report on mitigation measures for the Dover Commercial Project proposed in closed proximity to the proposed Birch Mountain Conservation Area. The TLU Report found that the LARP conservation areas are of modest cultural value to Fort McKay as they are located on the periphery of Fort McKay's territory (See FMFN - Application App 9 ALCES IEG Landscape Planning.pdf at p.20).

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

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.

However, in Alberta's response to such concerns at page 11 *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.

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 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 paras.55-56.

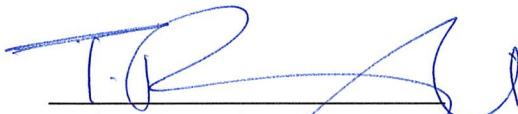
We also note that the Fort McMurray-Athabasca Oil Sands Subregional Integrated Resource Plan (as amended 2002) is incorporated into the LARP and this remains a current land use planning document (p.4). It states at pages 29-30 of the Fort McMurray-Athabasca Oil Sands Subregional Integrated Resource Plan that the management intent for the Athabasca River Valley includes its ecosystem, resources and values will be protected and adverse

impacts of development will be protected. This includes “important traditional land use areas for First Nations peoples”. There is no evidence that this objective informed the development of LARP so far.

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. Fort McKay 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 Fort McKay and whether LARP meets the purpose and intent of the *Alberta Land Stewardship Act*. Fort McKay submits that based on the information available to Fort McKay, the Crown has not adequately considered the implications of LARP’s conservation areas Fort McKay’s traditional land use area. The Crown’s failure to provide any evidence that is done so, confirms this conclusion.

Sincerely,



Tarlan Razzaghi

Barrister and Solicitor

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