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Condensed Analysis of RAC Vision Document

Joint Submission of the Mikisew Cree First Nation, the Athabasca Chipewyan First Nation and the Chipewyan Prairie Dene First Nation ("the First Nations"), October 19, 2010

1) Lack of analysis concerning potential impacts on Section 35 rights

At the heart of the RAC Document is a planning philosophy that purports to balance environmental effects of various activities with social and economic goals. The balancing exercise envisioned in this planning philosophy must take place within the constitutional framework of Canada, which requires that aboriginal and treaty rights be recognized and protected. The constitutional framework further requires that where the Crown considers any action which may infringe rights, the interference with those rights be justified pursuant to the justification analysis set out by the Supreme Court of Canada. Where the Crown contemplates conduct that may adversely affect those rights, at a minimum, the Crown must engage in meaningful consultation, which may lead to the need to accommodate those rights.

The RAC Document is flawed in making virtually no mention of the importance of the constitutional protection of section 35 rights or even the need to consider those rights. While section 35 rights are not absolute, the RAC Document discounts them severely and provides no analysis concerning specific potential impacts on section 35 rights. Accordingly, the RAC Document and the proposals that it contains are insufficient to meet Alberta's constitutional obligations towards aboriginal peoples.

The following are just a few examples of how the RAC Document is flawed in respect of the Crown's constitutional obligation to protect aboriginal and treaty rights:

- Where the RAC Document focuses on aboriginal and treaty rights, the RAC proposes to monitor impacts and compensate for infringement of those rights, not to protect the rights as required by the Constitution.
- There is no analysis of the direct and cumulative impacts of existing and planned development on section 35 rights. For example, none of the infrastructure strategies in objective 2.1 address section 35 rights, despite the potential for adverse impacts and infringements.
- The RAC Document contains little or no recognition that the existing level of development in some areas is already adversely affecting and infringing section 35 rights. The RAC Document displays no willingness to do proper studies and freeze development in certain areas until more information is

known about potential direct and cumulative impacts on section 35 rights, or even to examine how different and potentially exclusive uses can co-exist within a single land class, such as in the mixed use classification.

- The proposals for including aboriginal peoples in land management planning are themselves insufficient to meet Alberta's constitutional obligations. For example, proposals such as those in Outcome 7 do not recognize that Alberta must accommodate aboriginal peoples where appropriate and that all infringements of Section 35 rights must be justified under the test set out by the Supreme Court of Canada.
- The land use classifications are flawed insofar as they are not appropriate for addressing section 35 rights: they fail to consider a) rights on lands that formerly supported aboriginal traditional uses, b) that the ability of aboriginal peoples to exercise section 35 rights may be linked to specific lands and territories with differing cultural, social, spiritual and historical importance, c) the constitutional requirements of priority access to resources, minimal impairment, preferred means for exercising rights, and d) constitutional consultation and accommodation requirements, among other things. They also assume, without justification, that the protection of Section 35 rights can coincide with development in all cases within Mixed-Use zones.

Additionally, the RAC Document does not analyze or even consider the questions concerning specific potential impacts on Section 35 rights tabled by the First Nations with the Land Use Secretariat.

Given the limited acknowledgement of Section 35 rights, a fundamental flaw of the RAC Document is that LARP will not provide meaningful assistance in protecting section 35 rights, for the RAC cannot balance competing uses and goals without knowing what is being balanced. To be clear, absent an understanding by RAC of what is needed to protect the ability to meaningfully exercise the rights, it is hard to understand how a balancing can take place. All three First Nations have tabled 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] Had =Alberta agreed to actually engage in discussions as to how to carry out the land use and traditional resource use plans proposed by the First Nations, and provided funding and assistance in doing so, this information would now be available. The fact that some Alberta departments are now apparently interested in the Traditional Resource Use Plan concept is positive[2], but one and a half or two years of time have been missed, which could have been used to develop the data and information (including thresholds) necessary to properly assess and accommodate Section 35 rights in the LARP.

2) The Lieutenant Governor in Council's exclusive control over regional plans

The RAC Document notes that the ***Land Stewardship Act*** governs the implementation of regional plans. Under the ***Land Stewardship Act***, the Lieutenant Governor in Council has absolute and unfettered authority over

[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] Alberta Environment and the Canadian Environmental Assessment Agency requested that ACFN and MCFN provide more detailed proposals on the Traditional Resource Use Plan concept. An updated proposal was tabled with both agencies on September 20, 2010, and then with the Land Use Secretariat on September 28, 2010.

regional plans. This exposes a significant flaw in the RAC document: 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 and the proposals in Objectives 3.2, 4.1, 4.3, 7.1, 7.2, and 7.3 – 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. Even the land use classifications at the root of LARP can be adjusted or overruled by the Lieutenant Governor in Council at its discretion.

In short, LARP provides no guarantee that even if certain areas are protected on the recommendation of the RAC, that those areas and rights will remain protected, as Cabinet can override various protection-related decisions, even if they initially accept them.

3) Need for regulatory change

Many of the recommendations concerning aboriginal issues (e.g. "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 but require regulatory change to incorporate those perspectives into decision making. The RAC Document does not identify any regulatory regimes that will be modified to incorporate aboriginal participation and perspectives, despite such authority being authorized in the Land Stewardship Act.[3] Accordingly, LARP will not have the same direct beneficial consequences for aboriginal peoples as it does for the oil sands, forestry, agriculture and tourism industries.

For example, Outcome 7.2 refers to working with aboriginal peoples to generate land-use options for mitigation, accommodation and reconciliation of rights. But Outcome 7.2 makes no recommendation for legislative and regulatory change. This flawed approach, particularly in light of the fact that the RAC document is focused primarily on promoting economic development with little or no concern for section 35 rights, renders statements calling for use of aboriginal traditional knowledge largely meaningless.

In addition to the need for regulatory changes to be implemented for many LARP recommendations to be meaningful, the RAC Document is currently flawed in its failure to consider the regulatory processes and proposals being considered *by other branches* of the Government of Alberta and how those process and proposals are interrelated with the recommendations of the RAC Document. For example, Alberta Sustainable Resource Development is currently pushing forward the **Proposed *Public Lands Administration Regulation***, which, if enacted, will raise questions as to whether First Nations can even exercise their constitutionally-protected rights in the areas set aside under LARP as conservation areas. Moreover, the Government of Alberta is engaged in a Regulatory Enhancement Project which aims to "increase competitiveness" in terms of Alberta's regulatory approach. Until the RAC document carefully and transparently considers how its recommendations will be affected by other enactments and processes, RAC recommendations and the protection of section 35 rights are of limited utility.

[3] Chief Allan Adam has called publically for direct First Nations participation in regulatory decision-making in this region and this recommendation is represented in ACFN's October 2008 co-management proposal. There is no evidence that this type of structure is considered in the RAC Vision document.

4) Lack of triggers and thresholds

The RAC Document identifies management frameworks as one of four key components of land and resource management in the LARP area. At no point in the discussion of frameworks, however, is there consideration of how important decision-making criteria – such as thresholds and triggers – will be developed and utilized. Nor does the RAC Document describe what baselines will be used in assessing the pace of development and cumulative impacts in the LARP region, despite the importance of such baselines in assessing impacts on Section 35 rights and the rights of others.

This exposes a series of flaws in the proposals to work with aboriginal people and aboriginal knowledge. For one, LARP provides no guidance on how the aboriginal knowledge base is to be incorporated into management plans or how it is to be used together with other scientific and socio-economic data. Second, LARP must define how data regarding the state of knowledge of fish and wildlife resources and the effective management of fish and wildlife allocations affecting aboriginal peoples' rights is to be utilized if it is to create a real commitment to respect aboriginal and treaty rights. It does no such thing. Third, even where RAC proposes to consider aboriginal knowledge, as in Outcome 3, RAC proposes to utilize aboriginal knowledge but stops short of consulting aboriginal people regarding setting appropriate baselines, regarding how aboriginal knowledge will be utilized in assessing changes, regarding mitigation of impacts and regarding protection of aboriginal and treaty rights. Finally, LARP fails to demonstrate a real commitment to respect aboriginal and treaty rights because it fails to define how environmental assessment and monitoring data collected by aboriginal peoples will be used under LARP. Moreover, the First Nations have consistently been raising the need for criteria, measures and thresholds in LARP for assessing impacts on section 35 rights. There has been commitment to do so in LARP, and the RAC document contains none of this information. We also note that there is no explicit mention in the RAC document, under its own heading, of any plan for how section 35 rights can and will be exercised under LARP. As noted elsewhere, there is an assumption that those rights can and will be exercised either in Conservation Areas or misxed use areas, without any analysis of how this would play out practically.

5) Weaknesses regarding conservation

The ***Land Stewardship Act*** creates a range of statutory conservation tools (e.g. direct and indirect expropriation for conservation, conservation easements, conservation directives, stewardship units, etc.). Nowhere in the RAC Document is there an identification of how those tools would actually be used in practice in terms of the identified conservation areas. Quite the reverse: the RAC Document contemplates paying aboriginal people for the right to avoid seriously conserving land rather than utilizing authority under the Land Stewardship Act to facilitate conservation. While the First Nations are not opposed to economic opportunities, they cannot be considered without assessing the impacts on the exercise of Section 35 rights and without acknowledging that one purpose of the Land Stewardship Act is to manage land-use activities to meet the foreseeable needs of future generations of Albertans and aboriginal peoples.

The flawed approach to conservation is underscored by the simple fact that the RAC Document only mentions "conservation strategies" in the description of "conservation areas", at page 26 of the Document. This flaw is exacerbated by the fact that the Document does not describe how conservation objectives and criteria are to be selected. Nor does it describe the implementation and monitoring of those objectives and criteria.

Finally, the RAC Document is legally flawed when it states that aboriginal uses will be permitted where those uses will be consistent with conservation strategies. Even where the province has valid conservation objectives, any infringement of aboriginal and treaty rights must still meet the standard of justified infringement, including priority allocation of resources.

6) Limited, vague and meaningless mechanisms for aboriginal involvement

The first real discussion of "aboriginal peoples" comes at p. 11 of the RAC Document and deals solely with "increased participation of aboriginal peoples in the regional economy" without consideration of constitutionally-protected rights or other obligations owed to First Nations. This is indicative of a larger flaw in the RAC Document, namely limited, untimely, vague and at times meaningless mechanisms for aboriginal involvement in LARP.

Many of the recommendations in the RAC Document – inclusion of First Nations in all fundamental aspects of planning, maintaining populations of game and supporting aboriginal traditional uses – while positive, are flawed insofar as they neglect to address current realities. RAC fails to address how to meaningfully include aboriginal peoples and rights as required by the Constitution when many areas in the LARP area are already leased out, when economic development is the overriding imperative in the RAC Document, when section 35 rights are given no consideration, and when the current regulatory system and consultation approaches do not meaningfully incorporate FN issues and concerns.

In other instances the RAC Document arbitrarily limits meaningful involvement by aboriginal people. This is seen clearly in Outcome 3, where the RAC Document only proposes to engage aboriginal people in monitoring and reporting on issues relating to management systems, but not in the design of those management systems. Similarly, when addressing responsible and sustainable land uses, the RAC Document proposes only to consider aboriginal peoples only at the stage of reclamation, and there is no mention of aboriginal peoples whatsoever in Outcome 5, which guides responsible stewardship for air and water. These flaws seriously undercut the RAC Document's purported attempt to involve aboriginal peoples and aboriginal traditional knowledge in the planning decisions, let alone conservation decisions.

Developing a reclamation plan for the entire mixed use resource area (60% of the LARP area) demonstrates a failure to meaningfully address which lands are socially and culturally more important to aboriginal people, minimal impairment, and other requirements under s.35(1) of the Constitution Act. Likewise, given that LARP's land-use classification system already defines how competing uses are to be balanced, the promise of meaningfully incorporating aboriginal knowledge in LARP areas has limited utility.

Lastly, as noted above, any proposal to work with aboriginal peoples is qualified by the fact that the Lieutenant Governor in Council has the authority to disregard, amend and reject any stewardship recommendation under the Land Stewardship Act without First Nation input.