



JFK LAW CORPORATION

Suite 816 – 1175 Douglas Street
Victoria, BC V8W 2E1
Phone: 250.405.3460 Fax: 250.381.8567
www.jfklaw.ca

December 1, 2014

Mark Gustafson
Direct Line: 250.405.3570
E-mail: mgustafson@jfklaw.ca

Delivered by email: LUF@gov.ab.ca

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

File No. 1051-041

Dear Review Panel:

Re: Review of the Lower Athabasca Regional Plan

We represent the Mikisew Cree First Nation (Mikisew) in connection with the above noted review under section 19.2 of the *Alberta Land Stewardship Act*.

We write to provide Mikisew's position on the Government of Alberta's (GOA) response to Information Request #4 (IR#4).

General Reply

Mikisew notes that nothing in GOA's response to IR#4 has required Mikisew to modify the information Mikisew provided in its October 22, 2014 submission. Mikisew respectfully requests that its October 22, 2014 submission be read in conjunction with this reply submission.

Request #1 in IR#4 from Panel:

Text of Request

The GOA collaborates with aboriginal communities toward protecting traditional use locations of culture and spiritual significance. Update Status

Mikisew Reply to GOA's Response to Request #1:

- Alberta's response fails to provide the Panel with information regarding the limited scope of the culture and spiritual locations that would qualify for protection under the *Heritage Resources Act*. Mikisew set out some of the deficiencies with existing provincial legislation discussed in LARP in its June 2011 submission on LARP, including the following:¹

While it is positive that Alberta recognizes that population growth and infrastructure development have already adversely affected cultural activities and cultural heritage, the Historical Resources Act is not an adequate mechanism for protecting constitutionally protected rights. For example, the Historical Resources Act gives the minister discretion over what to designate as a historical resource and also allows the minister to remove or sell historical resources. Furthermore, the Historical Resources Act does not allow First Nations to have control over these resources.

Recommending that the Historical Resources Act be used as the main legal avenue for protecting cultural activities and cultural heritage treats First Nations culture and practices as antiquities and not as living cultures. This is problematic for many reasons: from a legal perspective it is problematic because it fails to acknowledge that s.35 of the Constitution Act, 1982 provides for the meaningful practice of aboriginal and treaty rights in the present day.

It is unclear what is meant by "the Alberta government collaborates with aboriginal communities toward protecting traditional use locations of cultural and spiritual significance", particularly in light of Alberta's refusal to fund studies like the TRLUMP that would identify or further identify such information and given the disregard of site specific information of areas of cultural and spiritual significance submitted by ACFN and MCFN throughout the LARP process and in other submissions made to Alberta by the First Nations in regulatory and other contexts.²

Given these limitations, among other reasons, it has not been Mikisew's experience that the *Historical Resources Act* has effectively protected traditional use locations of culture and spiritual significance to Mikisew.

- GOA's partial response fails to provide the Panel with an understanding of how the GOA excludes most concerns about adverse impacts to traditional use locations of culture and spiritual significance from consultation. Attached hereto are notes from a recent meeting between Mikisew and the GOA, wherein the GOA explained that it does not consider impacts to locations of culture and spiritual significance during consultation, let alone address those impacts, unless the location is the footprint of an established burial site,

¹ See Mikisew's supporting materials – appendix 6 - https://landuse.alberta.ca/Forms%20and%20Applications/MCFN%20-%20Application%20App%206%20-%20June%202011%20LARP%20Submission_2014-03-05_PUBLIC.pdf at page 3 of cover letter

² Ibid at page 27 of Tab 2 of Appendix 6

because such impacts are to be dealt with through LARP.³ Unfortunately, LARP lacks any mechanism to do so.

Request #2 in IR#4 from the Panel

Text of Request

In developing a biodiversity management framework and a landscape management plan, the GOA will work with First Nations to consider how First Nations' exercise of constitutionally protected rights to hunt, fish and trap for food can continue to occur within reasonable proximity of First Nations' main population centers. Update status.

Mikisew Reply to GOA's Response to Request #2

- The GOA's response is deficient as it provides no information about what, if anything, the GOA has done or is doing to consider how First Nations' exercise of their constitutionally protected rights will be protected under LARP.
- As set out in Mikisew's October 22, 2014 submission (and incorporated herein), it is Mikisew's experience during consultation on the biodiversity management framework that the GOA has not taken any steps to: develop a clear or effective consultation process; provide adequate capacity funding to support Mikisew's participation in consultation; provide sufficient or timely information to allow Mikisew to effectively participate in consultation; provide feedback or responses to information submitted by Mikisew; identify or assess potential impacts; incorporate information provided by Mikisew; or otherwise take any steps to "consider how First Nations' exercise of constitutionally protected rights to hunt, fish and trap for food can continue to occur".⁴
- Mikisew notes that the GOA has not provided information regarding any of the following regarding the Landscape Management Plan: how Alberta intends to consult; how treaty rights will be incorporated in the Plan; how Alberta will address the fact that the scope and success of the LMP is undermined by LARP's prioritization of massive new development on top of the already significant amounts of development that is impacting/infringing Mikisew's rights; how will the LMP address situations where there is already too much disturbance on the landscape to support ecological, cultural and rights-based values; among others.

³ Attachment 1 – entitled "LTR MCFN to ACO - Aug 29 2014"

⁴ See Attachment 2 to Mikisew's October 22, 2014 submission - https://landuse.alberta.ca/Forms%20and%20Applications/RFR_MCFN%20Reply%20to%20IR2%20Response%20Attach%202014-10-22.pdf

Request #3 in IR#4 from the Panel

Text of Request

Engagement with aboriginal communities is desired as air, water, land and biodiversity strategies and plans are developed. Identify which Aboriginal communities have been engaged.

Mikisew Reply to GOA's Response to Request #3

- Mikisew strongly disagrees with GOA's assertion that air, water, land and biodiversity strategies and plans have been developed in a manner that integrates Mikisew's input. Mikisew notes that the GOA has not provided any information to substantiate its assertion that it has incorporated First Nation input into any air, water, land and biodiversity strategies and plans, despite numerous opportunities in this review process to do so.
- Mikisew refers the Panel to Mikisew's October 22, 2014 submission, wherein Mikisew set out how the biodiversity management framework will adversely impact Mikisew as a result of the GOA's failure to consider input from Mikisew or to meaningfully engage Mikisew.⁵ The GOA has provided no information to contradict Mikisew's October 22, 2014 submission.
- Although the GOA has many letters in its possession regarding Mikisew's concerns with how the air, water, land and biodiversity strategies and plans under LARP will adversely affect Mikisew if Mikisew's concerns are not addressed through consultation, the GOA has declined to provide any of those materials to the Panel in its response to this information request. To address this information gap, Mikisew refers the Panel to Appendix D of Mikisew's written submission, dated October 1, 2012, in connection with the public hearing for Shell Canada's Jackpine Mine Expansion Project, to which Mikisew attached correspondence providing examples of where Alberta had declined to consider and incorporate input from Mikisew in various air, water, land and biodiversity strategies and plans under LARP.⁶
- Mikisew also attaches recent correspondence highlighting Alberta's failure to incorporate input from Mikisew into the surface water framework for the Athabasca River as well as two technical reviews commissioned by Mikisew that identifies concerns with the same framework.⁷

⁵ See Mikisew's October 22, 2014 submission - https://landuse.alberta.ca/Forms%20and%20Applications/RFR_MCFN%20Reply%20to%20IR2%20Response_2014-10-22.pdf

⁶ Mikisew Cree First Nation Submission In the Matter of Energy Resources Conservation Board Application No. 1554388, dated, October 1, 2012. The materials attached to Appendix D are available online at <http://www.ceaa.gc.ca/050/document-eng.cfm?document=81917>.

⁷ Attachment 2 - entitled "letters regarding surface water framework"

Request #4 in IR#4 from the Panel

Text of Request

The GOA is committed to achieving naturally sustaining woodland caribou populations. Planning and implementation will consider: a) provincial and federal legislative requirements; b) First Nations rights and traditional uses; c) social/economic impacts; and d) stakeholder interests. Submit policy update which First Nations have been consulted.

Mikisew Reply to GOA's Response to Request #4

- Mikisew notes that neither the protection areas set out in LARP nor the Biodiversity Management Framework, as it currently exists, contains measures to address Mikisew's submission in November, 2010 regarding the protection necessary for the remaining large tracts of habitat suitable for woodland caribou.⁸
- Mikisew notes that neither the protection areas set out in LARP nor the Biodiversity Management Framework, as it currently exists, contains measures to address Mikisew's submission in June, 2011 regarding the protection necessary for the remaining large tracts of habitat suitable for woodland caribou.⁹
- In reply to the GOA's assertion that consultation took place as part of the development of the Woodland Caribou Policy for Alberta, Mikisew attaches a joint ACFN-Mikisew letter dated July 29, 2011 regarding the lack of consultation on that policy and how it will result in further impacts to Mikisew's rights.¹⁰
- Mikisew notes that LARP prioritizes develop in potential protection areas for caribou habitat, and, despite what may be in the Woodland Caribou Policy for Alberta, the *Alberta Land Stewardship Act* requires decision-makers to follow the prioritization scheme in LARP.

⁸ Mikisew's supporting documents for its LARP review request, Appendix 4 at page 52:
https://landuse.alberta.ca/Forms%20and%20Applications/MCFN%20-%20Application%20App%204%20-%20November%202010%20LARP%20Subm_2014-03-05_PUBLIC.pdf

⁹ Mikisew's supporting documents for its LARP review request, Appendix 6, Tab 2 at page 6 and page 9

¹⁰ Attachment 3 – entitled “LTR, MCFN and ACFN re Woodland Caribou Policy”

Request #5 in IR#4 from the Panel

Text of Request

Government will engage with first Nations and stakeholders' on initiatives to designate motorized areas such as identification of trails or areas when developing the regional parks plan and regional trail system plan. Update status

Mikisew Reply to GOA's Response to Request #5

- Mikisew notes that the GOA's response acknowledges that no consultation with aboriginal peoples has taken place and that the GOA does not intend to carry out consultation on these plans itself.
- Mikisew notes that the GOA's response makes no reference to treaty rights, developing a methodology for incorporating First Nation concerns into the plans or addressing potential impacts to treaty rights during any upcoming engagement. In Mikisew's experience, this is consistent with the GOA's failure to consider impacts to treaty rights and incorporate/address concerns raised by First Nations during consultation on initiatives identified under LARP.
- As described in Mikisew's October 22, 2014 submission, the GOA has already failed to consult First Nations on many of the restrictions and prohibition on traditional use activities on trails, in recreation areas and on public lands more generally.

Request #6 in IR#4 from the Panel

Text of Request

The GOA will invite First Nations who have expressed an interest in the Richardson Backcountry to be involved in a sub-regional initiative called the First Nations - Richardson Backcountry Stewardship Initiative. Update status

Mikisew Reply to GOA's Response to Request #5

- Mikisew notes that the GOA's response makes no mention of considering treaty rights, requiring that steps be taken to address potential impacts to treaty rights or developing a methodology for incorporating First Nation concerns into the plans.

Request #7 in IR#4 from the Panel

Text of Request

The GOA will also work with aboriginal people to identify tourism and cultural synergies which could provide economic opportunities to aboriginal communities. Update status.

Mikisew Reply to GOA's Response to Request #7

- The GOA's response acknowledges that no assessment has been completed for Fort Chipewyan or most other areas in the Lower Athabasca Region.
- The GOA response does not identify any specific steps or plans for working with aboriginal people to identify tourism and cultural synergies that could provide economic opportunities to aboriginal communities.
- The GOA response does not identify how Alberta will deal with tourism opportunities that may conflict with the exercise of treaty rights or even be possible in light of the increasing contamination of aquatic, avian and terrestrial resources with further development in the region. For example, the GOA's response demonstrates that the GOA has done no analysis of how the promotion of tourism will adversely affect the exercise of treaty rights by, among other things, increasing competition for already diminishing resources necessary for the exercise of Mikisew's rights, decreasing opportunities for traditional use due to increased safety concerns restricting hunting opportunities; and increasing traffic and other human activity, which could not only increase wildlife mortality, and the time and inconvenience of accessing its lands for traditional use, but which are also incompatible with the exercise of Mikisew's rights.

Request #8 in IR#4 from the Panel

Text of Request

The GOA will consult with aboriginal communities concerning traditional knowledge. What consultation has taken place regarding this issue?

Mikisew Reply to GOA's Response to Request #8

- In response to an information request relating to a commitment that is of central importance to Mikisew and the protection of Mikisew's treaty rights, the GOA provides the following statement: "GoA staff are working to better inform themselves about Traditional Knowledge and in September of 2014, some ESRD staff gathered together to hear presentations from Elders, Traditional Knowledge holders and experts." Mikisew submits that this comment – from which the only information that can be gleaned is that *some staff* with *some role* within the ESRD listened to *some aboriginal people* say

something, possibly about traditional knowledge, but *did not do anything* with what was heard – is demonstrative of GOA’s failure to credibly consider traditional knowledge in LARP.

- The GOA’s response fails to acknowledge that neither The Government of Alberta’s Policy on Consultation with First Nations on Land and Natural Resource Management, 2013 nor The Government of Alberta’s Guidelines on Consultation with First Nations on Land and Natural Resource Management makes any reference to traditional knowledge. Indeed, it is Mikisew’s experience that the GOA routinely excludes traditional knowledge from consultation or fails to give it any weight.

Request #9 in IR#4 from the Panel

Text of Request

Implementing key recommendations in "Connecting the Dots: Aboriginal Workforce and Economic Development in Alberta. What recommendations have been implemented?

Mikisew Reply to GOA’s Response to Request #9

- The GOA’s response fails to provide any information on what recommendations have been implemented. The document provided by GOA identifies strategies, but does not provide the information requested by the Panel.

Request #10 in IR#4 from the Panel

Text of Request

Work collaboratively with local aboriginal communities, the private sector and local governments to enlarge and expand the supply of tourism products and infrastructure. Update status.

Mikisew Reply to GOA’s Response to Request #10

- See reply to Request #7 in IR#4 above.

Request #11 in IR#4 from the Panel

Text of Request

Complete tourism opportunity assessments beginning with Quarry of the Ancestors, Bitumont and Fort Chipewyan. The assessments will identify a range of potential

aboriginal opportunities, including guided tours, education progress, attractions, exhibits or interpretive sites. What assessments have been completed?

Mikisew Reply to GOA's Response to Request #11

- See reply to Request #7 above.

Request #12 in IR#4 from the Panel

Text of Request

Develop a "Biodiversity Management Framework" for public lands in the Green Area and provincial parks by the end of 2013 (include aboriginal communities). Status on Framework Agreement?

Mikisew Reply to GOA's Response to Request #12

- See reply to Request #2 above and Mikisew's October 22, 2014 submission

Request #13 in IR#4 from the Panel

Text of Request

Develop an integrated water-shed based "Landscape Management Plan" for public land in the green area by the end of 2013 (include aboriginal communities). Update status.

Mikisew Reply to GOA's Response to Request #13

- See reply to Request #2 above

Request #14 in IR#4 from the Panel

Text of Request

In collaboration with aboriginal and other communities, stakeholders and partners, coordinate the development of the Lower Athabasca Regional Trail System Plan. Update status.

Mikisew Reply to GOA's Response to Request #14

- See reply to Request #5 above

Request #15 in IR#4 from the Panel

Text of Request

Outcome 7-Inclusion of Aboriginal Peoples in Land Use Planning Strategies (a-f).
Update status.

Mikisew Reply to GOA's Response to Request #15

- See reply to Requests 2, 3, 5, 6, 7, 8 and Mikisew's October 22, 2014 submission.

Request #16 in IR#4 from the Panel

Text of Request

Note 6 - Hunting, Fishing, and Trapping (Including Aboriginal Peoples). Update status.

Mikisew Reply to GOA's Response to Request #16

- Mikisew agrees with the reply of Chipewyan Prairie First Nation in its December 1, 2014 reply to the GOA's response to IR#4.

Concluding remarks

Mikisew trusts that this reply to the GOA's response to IR#4 assists the Panel. Mikisew remains concerned that GOA continues to frustrate this review process by failing to provide full or sufficient responses to the Panel's information requests.

Respectfully submitted,

JFK Law Corporation

Per:


Mark Gustafson

MAG/mag/nf

cc. Melody Lepine (melody.lepine@mcfngir.com)
Witek Gierulski, Alberta: WitekGierulski@gov.ab.ca
Will Randall, Alberta: will.randall@gov.ab.ca
Keltie Lambert counsel to Cold Lake First Nation: klambert@wittenlaw.com
Mark Gustafson counsel to Mikisew First Nation: MGustafson@jfkclaw.ca
Jenny Biem counsel to Athabasca Chipewyan First Nation: jenny@woodwardandcompany.com
Melissa Daniels counsel to Athabasca Chipewyan First Nation: melissa@woodwardandcompany.com
Tarlan Razzaghi counsel to Fort McKay First Nation: trazzaghi@henningbyrne.com