

Appendix 1
ACFN Information Requests, May 16, 2011

ACFN Information Requests

Set out below in question form are a number of submissions which ACFN has made throughout the LARP process. It is unclear whether Alberta considered these submissions and/or how Alberta incorporated them into the Draft Plan. Incorporation of these submissions is essential for ensuring that the Draft Plan respects and accommodates ACFN's ability to meaningfully exercise its constitutionally-protected rights now and into the future in the region.

We would appreciate knowing how Alberta has responded to each of the following submissions and how Alberta has incorporated the submissions listed below in the Draft Plan. Where Alberta is of the view that the submission is incorporated in the Draft Plan, could you please also indicate where ACFN can find that material the Draft Plan. Where Alberta has not responded or has declined to incorporate the submission in the Draft Plan, please explain why. ACFN is happy to meet with Alberta to discuss these issues.

ACFN Submission	How ACFN's submission is incorporated or reflected in the Draft Plan	Location of response	Alberta's reason(s) for declining to respond to or incorporate ACFN's submission
CONSULTATION ON LARP			
How did Alberta consider and integrate the consultation proposals submitted by ACFN in consulting and accommodating regarding LARP?			
How were land designations in the Draft Plan determined through consultation with ACFN and how were co-management mechanisms part of that consultation and accommodation?			
GENERAL INFORMATION REQUIREMENTS			
How does the Draft Plan establish and adequately fund information collection activities to inform land-use planning, including development of an ACFN Traditional Lands and Resource Use Management Plan?			
How does the Draft Plan require the collection of sufficient			

<p>data before setting frameworks, particularly in cases where there are identified data gaps (e.g., water quality at Firebag, variability at Muskeg River, lack of data for unmonitored elements, temporal resolution, exceedence effects, baseline data for water quality, data on groundwater quality)? In cases where data is missing or uncertain, how does the Draft Plan ensure that land use planning will respect and accommodate the exercise of ACFN's section 35 rights?</p>			
<p>Serious impacts to ACFN rights have already been experienced by ACFN members as a result of industrial development, government policies, increased population in the region, and other sources.</p> <p>How does the Draft Plan take into account the existing industrial development within ACFN's traditional territories and the adverse affect it has already had on ACFN's ability to exercise its rights?</p>			
<p>How does the Draft Plan take into account evidence regarding the levels and rate of land disturbances in the region?</p>			
<p>How does the Draft Plan take into account the impacts of the grants and tenures throughout ACFN's traditional territories on its ability to exercise its rights?</p>			
<p>Was a full cumulative effects analysis conducted by Alberta to assess impacts to ACFN from oil sands mining and exploration as requested by ACFN? If this was conducted, how was it incorporated in the Draft Plan?</p>			
<p>ACFN submitted a report entitled "Regional Municipality of Wood Buffalo Cumulative Effects Study." How does the Draft Plan take into account the study's disturbance analysis in the Regional Municipality of Wood Buffalo and the study's</p>			

<p>finding regarding the impacts to ACFN's ability to exercise its section 35 rights?</p>			
<p>How does the Draft Plan ensure that the direct, indirect and cumulative impacts of existing, planned and reasonably foreseeable residential, commercial and industrial development on ACFN's rights are incorporated into the Draft Plan?</p>			
<p>Please describe how ACFN's TEK was collected and incorporated in the Draft Plan?</p>			
<p>Please describe how the Draft Plan incorporates the Aboriginal perspective of what is necessary for the meaningful practice of ACFN's rights.</p>			
<p>ACFN sent its review of Shell's Socioeconomic Assessment regarding the Jackpine Mine project to the LUS so that the LUS would better understand what information was necessary to assess impacts of land-use planning to ACFN's rights:</p> <p>How does the Draft Plan incorporate the following:</p> <ul style="list-style-type: none"> • the socio-economic impacts that have already been imposed on ACFN in the region • the need to study the cultural and traditional land use of the First Nations and to model and assess the impacts of planning assumptions on traditional land use tipping points • the need to identify possible thresholds, and the effects of crossing those thresholds, on traditional use • the need to develop appropriate land-use mechanisms, such as timing restraints and access management, in the region • that the continuation of ACFN's section 35 rights 			

depends on maintaining the ecological, sociocultural and economic conditions that support the meaningful of those rights.			
How did the Draft Plan incorporate answers to each of the questions posed by ACFN in its April 16, 2009 submission?			
<p>Please describe how Alberta incorporated the materials submitted by ACFN in the LARP process in their totality.</p> <ul style="list-style-type: none"> • If only certain information or submissions were considered and incorporated, please specify which submissions and materials those were. • If Alberta identified gaps in the First Nations' submissions, please specify what it identified and how/when Alberta conveyed this information to the First Nations. 			
LAND-USE PLANNING APPROACH			
How does LARP adhere to a rights-based approach to land use planning?			
How does the Draft Plan identify and protect the lands and resources that ACFN requires to sustain themselves now and into the future? How was information regarding the lands and resources required to sustain ACFN collected? On what basis does Alberta consider that it has collected adequate information?			
How has the need to ensure the meaningful exercise of ACFN's section 35 rights now and in the future been incorporated as a purpose of land planning?			
Treaty 8 must be a foundation of the Vision for LARP. How does the Vision Statement in the Draft Plan reflect the			

<p>constitutional requirement to protect section 35 rights? How does the Vision Statement promote outcomes and strategies that adequately protect and accommodate section 35?</p>			
<p>How does the LARP planning process in the Draft Plan take the connectivity of ecosystems in the region into consideration when designating use areas and establishing frameworks?</p>			
<p>How does the Draft Plan avoid a planning process that takes a site- and use-specific approach, rather than an ecosystem approach? If the Draft Plan uses a site- and use-specific approach, please describe how the Draft Plan appropriately considers the impacts of development on or the function of traditional land use?</p>			
<p>Please describe how First Nation land uses for traditional livelihood and cultural purposes are treated as a “land use”, just as conservation, recreational, agricultural and oil sands developments are “land uses” in Draft Plan.</p>			
<p>How does the Draft Plan acknowledge the subsistence economy as part of the region and a necessary element of the planning process?</p>			
<p>How does the Draft Plan establish and adequately fund, a collaborative sub-regional planning process with ACFN for all ACFN cultural protection area designations (homelands, proximate zones, and critical waterway zones)?</p>			
<p>How does the Draft Plan use a precautionary approach to land use planning? Does the Draft Plan require a precautionary approach to all land use decision in the LARP area? Does the Draft Plan require a precautionary approach where environmental, social, cultural, or socioeconomic data is missing or where the Draft Plan calls for details in frameworks</p>			

and plans to be added at a later date?			
How does the Draft Plan require that when a planning decision adversely impacts section 35 rights an immediate “management response” is triggered, the impact is a “driver” for required change (e.g. such as establishing offsets), or land-use decisions can be rescinded or amended?			
How does the Draft Plan create a land-use planning process that can require different scales and paces of bitumen developments in the region, depending on existing and future impacts to section 35 rights?			
How does the Draft Plan employ a planning approach that requires linear disturbances to be prevented and eliminated? Similarly, how does the Draft Plan ensure that contiguous habitats are protected?			
How does the Draft Plan use a planning approach that ensures that there is no net loss of wetland functions?			
How does the Draft Plan ensure that conservation areas are connected by, among other measure, comprehensive river buffers and protected ecosystems?			
How does the Draft Plan require that land-use decision made in the context of project-specific regulatory review processes are made in a way that protects and accommodates the exercise of section 35 rights?			
How does the Draft Plan require that Traditional Land and Resource Use requirements of ACFN are understood before land-use decisions are made? In particular, how does the Draft Plan require decision-makers to conduct or review the following before making land-use decision:			

<ul style="list-style-type: none"> • comprehensive cultural and social impact assessments for aboriginal peoples; • a comprehensive cumulative impact assessment of livelihood rights for aboriginal peoples; • traditional land, resource-use and management plans; • co-management systems to control the pace and scale of development; • aboriginal representation on regulatory decision-making boards 			
MEANINGFUL PRACTICE OF RIGHTS			
<p>How does the Draft Plan ensure that ACFN has sufficient lands and resources for the exercise of their rights? In this regard,</p> <ul style="list-style-type: none"> • How does the Draft Plan use a definition of “sufficient” that refers not only to quantity but quality, but uses the perspective of what is required to fulfill subsistence requirements and cultural needs of the First Nation now and into the future? • How does the Draft Plan use a definition of “sufficient” that encompasses a suite of interconnected tangible and intangible resources that underlie the meaningful practice of practice of rights? These “resources” include, but are not limited to: routes of access and transportation; water quality and quantity; healthy populations of game in preferred harvesting areas; cultural and spiritual relationships with the land; abundant berry crops in preferred harvesting areas; traditional medicines in preferred harvesting areas; the experience of remoteness and solitude on the land; feelings of safety and security; lands and resources accessible within constraints of time and cost; sociocultural institutions for sharing and reciprocity; 			

spiritual sites; etc.			
How did Alberta consider and incorporate the land qualities used by ACFN members when selecting land for hunting purposes when designated conservation, recreation and mixed use zones? In particular, how did Alberta consider and incorporate ACFN's definition of suitable hunting, fishing, gathering and trapping terrain when designating lands?			
What quantitative and qualitative information on current and historical uses of lands for hunting, fishing, trapping, gathering plants and medicines, spiritual and cultural uses, and traditional economic pursuits was incorporated into the Draft Report to ensure that the LARP would result in planning decisions that respect and accommodate section 35 rights?			
How does the Draft Report incorporate the information that would have been collected through the TLRUMP process?			
How does the Draft Plan provide concrete means for how the rights and livelihoods of Aboriginal peoples will be ensured into the future?			
In designating the land-use areas in the Draft Plan, how does the Draft Plan recognize that ACFN's traditional land use has changed over time and how does the Draft Plan take into account that some areas are now used more intensively?			
How does the network of protected areas designated in the Draft Plan take into account the culturally significant and sensitive areas that are integral to the long term ability of ACFN to meaningfully practice their traditional pursuits?			
How does the Draft Plan accommodate any loss of use of areas outside of conservation areas in planning area?			

How does the Draft Plan ensure that the exercise of ACFN's section 35 rights is protected and accommodated in mixed use areas?			
How does the Draft Plan clarify and revise the regulatory scheme regarding access management, conservation areas and mixed use so that the exercise of ACFN's section 35 rights is protected and accommodated in the LARP area? In this regard, how does the Draft Plan establish regulatory backstops to ensure that section 35 rights can be practiced in the LARP area?			
How does the Draft Plan ensure that ACFN members have priority access to sufficient quantity and quality of tangible and intangible resources that underlie the meaningful practice of rights?			
How does the Draft Plan address the fact that the number of recreational land users is already at levels that cause increased competition, safety issues and conflict that adversely impacts the exercise of section 35 rights?			
How does the Draft Plan ensure that where LARP, itself, or any decision taken under LARP, has the potential to infringe ACFN's rights, priority must be given to those ACFN rights? How does the Draft Plan ensure that the priority given to "conservation uses" in conservation areas is consistent with the exercise of section 35 rights?			
Homeland Zones are the specific areas that ACFN identified as of critical importance to past, present and future practice of ACFN's section 35 rights and where ACFN history, culture and livelihood are most firmly rooted. These are areas where ACFN members have a cultural as well as familial and			

<p>spiritual connection to the land, and are areas that are central to the cultural survival of ACFN. Please explain how the designation as conservation areas of less than 17% of the areas defined by ACFN as Homeland Zones in the Draft Plan adequately protects and accommodates ACFN's section 35 rights.</p>			
<p>Proximate Zones are relied upon for the practice of rights by an increasing number of ACFN members living in and around Fort Chipewyan, Fort McKay, and Fort McMurray. A reliable process for consultation and accommodation in consideration of Treaty 8 rights would be required in these zones. How is this reflected in the Draft Plan?</p>			
<p>Critical waterways recognize the integral importance of water quality and quantity to the ACFN membership and their practice of rights. These include the Athabasca, Firebag, Maybelle, Old Fort, Richardson and Clearwater rivers. Please explain how the designation in the Draft Plan of only approximately 10% of the critical waterways listed by ACFN as conservation areas adequately protects ACFN's section 35 rights in these areas.</p>			
<p>The Draft Plan does not designate the Athabasca River as a conservation area, despite numerous submissions regarding the importance of that River, among others, to ACFN's culture and to the exercise of its section 35 rights. Specifically, the Athabasca River is a vital transportation corridor that gives ACFN and MCFN access to a large part of their traditional territories and harvesting sites. The Draft Plan does not designate any waterways as conservation areas. Please explain how the Draft Plan adequately protects the exercise of ACFN's section 35 rights on the River and how it adequately protects the exercise of ACFN's rights that depend on the quality and quantity of water in the Athabasca.</p>			

How does the Draft Plan incorporate ACFN's recommendation that the LARP establish ACFN Conservation Areas totalling at least 40% of the total area (including waters) of each of the three ACFN homeland zones?			
How does the Draft Plan incorporate ACFN's recommendation that, for lands outside of an ACFN Conservation Area but within an ACFN homeland, LARP establish a 'no-net loss' policy requiring any new taking up of lands or waters to be compensated through restoration of a similar or greater area of land, within the homeland affected?			
How does the Draft Plan incorporate ACFN's recommendation that, for lands outside of an ACFN Conservation Areas but within an ACFN homeland, LARP establish a 'no-net increase' policy in relation to roads and linear developments (including seismic work) within each ACFN homeland?			
How does the Draft Plan ensure that no development whatsoever can occur in conservation areas?			
FRAMEWORKS			
How does the Draft Plan include current and future of aboriginal and treaty rights in the frameworks? Please describe how rights-based thresholds are incorporated in the Draft Plan.			
How was ACFN meaningfully involved in establishing local and regional thresholds, triggers and benchmarks for air and water quality, wildlife/wildlife habitat, fish, plants?			
Please describe how the thresholds and frameworks in the Draft Plan:			

<ol style="list-style-type: none"> 1. Established objectives that meaningfully and properly take Treaty and Aboriginal rights into account; 2. Determined and established culturally appropriate thresholds for sociocultural and ecological indicators; 3. Identified priority areas and issues for protection and integration into protected areas networks; 4. Provided a basis for cumulative effects assessment on treaty and aboriginal rights 			
<p>Please describe how the frameworks are based on a pre-disturbance baseline concerning the First Nations' use of lands and resources (i.e., 1965). If Alberta only considered "post disturbance" baseline information, please describe how this adequately relates to ensuring the practice of section 35 rights.</p>			
<p>How does the Draft Plan consider the land disturbance levels in relation to what is necessary to sustain ecological integrity and to sustain section 35 rights?</p>			
<p>Please describe how the need for a terrestrial ecosystem management framework was incorporated in the Draft Plan.</p>			
<p>The First Nations' Phase 2 Framework Committee report, jointly submitted by the First Nations in July 2010, raises a number of issues and concerns that should have been included in the Draft Plan. In particular, how does the Draft Plan:</p> <ol style="list-style-type: none"> 1. Take the importance of the Athabasca River to the First Nations into account 2. Consider and set the criteria, thresholds and measures that support the meaningful exercise of rights along the river 3. Set frameworks that reflect that the First Nations' rights in the region have already been affected because of water issues 			

<ol style="list-style-type: none"> 4. Consider and implement the Aboriginal Base Flow (ABF), Aboriginal Extreme Flow (AXF) and Ecosystem Base Flow thresholds (EBF) 5. Consider and implement precautionary thresholds for use in adjudicating future water licence applications 6. Require Alberta to work with First Nations to develop additional thresholds, criteria and measures to assess potential impacts on Treaty and rights using a traditional resource use plan model 7. Require additional studies and other steps to address the scientific and knowledge gaps to determine the appropriate instream flow needs, including the EBF, ABF and AXF, before implementing the LARP? 8. Consider delaying the regional plan until these scientific and knowledge gaps had been identified? 9. Establish an appropriate framework for joint decision making regarding water management once a Phase 2 framework is in place? 10. Require a TRUP consisting of a comprehensive regional planning level study of aboriginal knowledge, use, Treaty and aboriginal rights related to the Athabasca River and adjoining watersheds 11. require a regional cumulative effects assessment on the aboriginal and treaty rights of the first nations 12. Requiring that frameworks include an adaptive management plan that addresses the actual degree of scientific uncertainty? 			
<p>The First Nations' As Long as the Rivers Flow report, jointly submitted by the First Nations in July 2010, raises a number of issues and concerns that need to be included in the Draft Plan. In particular, how do the frameworks in the Draft Plan:</p> <ol style="list-style-type: none"> 1. Incorporate the information regarding the First Nations' preferred modes of practicing their section 35 			

<p>rights</p> <ol style="list-style-type: none"> 2. Incorporate the information on knowledge and use of the Athabasca River which shows how water quality and quantity have changed over time 3. Ensure that rights-based thresholds are implemented 4. Ensure that thresholds and triggers are set at levels that protect what is necessary for the full practice of section 35 rights on the river, in the delta and along adjoining tributaries 5. Incorporate the ABF, AXF framework information and rationale 6. Require rights-based cumulative effects thresholds for the tangible and intangible factors that underlie the exercise of section 35 rights 7. Include First Nations in water management? 			
<p>How do the frameworks address the declining indicators of ecosystem integrity in the region that adversely affects the exercise of section 35 rights?</p>			
<p>How is traditional ecological knowledge included in the frameworks?</p>			
<p>How does the Draft Plan require decision-makers to work collaboratively with ACFN to establish, and provide adequate funding for, an ACFN community based monitoring and enforcement program? This program would collect data, and regularly review and report on rights-based performance indicators identified in sub-regional plans for ACFN cultural protection zones. The intent of this monitoring would be early identification of, and response to, changes that (a) May affect the use and access of ACFN members within cultural protection areas and (b) May affect wide ranging species relied upon for cultural use.</p>			

CO-MANAGEMENT & ACCESS MANAGEMENT			
How does the Draft Plan incorporate ACFN's October 22, 2008, November 11, 2010 and January 24, 2011 proposals regarding co-management of the Richardson Backcountry?			
How does the Draft Plan require the establishment of co-management boards, or other cooperative land and resource management arrangements, guided by the principles of shared decision-making and joint stewardship for lands and resources of critical importance to the continued practice of rights?			
How does the Draft Plan establish and implement co-management arrangements with ACFN for shared watershed planning and cumulative effects management for the ACFN Critical Waterways?			
How does the Draft Plan establish and adequately fund a collaborative process with ACFN to consider and negotiate establishment of an appropriate co-management framework, including co-management tables, or other mechanisms, for planning and shared decision making on lands and resources critical to the current and future practice of ACFN rights?			
How does the Draft Plan require the meaningful involvement of aboriginal peoples in scoping, terms of reference and throughout the process to assess infrastructure, social and economic implications of major projects?			

Appendix 2
MCFN Information Requests

MCFN Information Requests

Set out below in question form are a number of submissions which MCFN has made throughout the LARP process. It is unclear whether Alberta considered these submissions and/or how Alberta incorporated them into the Draft Plan. Incorporation of these submissions is essential for ensuring that the Draft Plan respects and accommodates MCFN's ability to meaningfully exercise its constitutionally-protected rights now and into the future in the region.

We would appreciate knowing how Alberta has responded to each of the following submissions and how Alberta has incorporated the submissions listed below in the Draft Plan. Where Alberta is of the view that the submission is incorporated in the Draft Plan, could you please also indicate where MCFN can find that material the Draft Plan. Where Alberta has not responded or has declined to incorporate the submission in the Draft Plan, please explain why. MCFN is happy to meet with Alberta to discuss these issues.

MCFN Submission	How MCFN's submission is incorporated or reflected in the Draft Plan	Location of response	Alberta's reason(s) for declining to respond to or incorporate MCFN's submission
CONSULTATION ON LARP			
How did Alberta consider and integrate the consultation proposals submitted by MCFN in consulting and accommodating regarding LARP?			
How were land designations in the Draft Plan determined through consultation with MCFN?			
GENERAL INFORMATION REQUIREMENTS			
How does the Draft Plan establish and adequately fund information collection activities to inform land-use planning, including development of a MCFN Traditional Lands and Resource Use Management Plan?			
How does the Draft Plan require the collection of sufficient data before setting frameworks, particularly in cases where there are identified data gaps (e.g., water quality at Firebag,			

<p>variability at Muskeg River, lack of data for unmonitored elements, temporal resolution, exceedence effects, baseline data for water quality, data on groundwater quality)? In cases where data is missing or uncertain, how does the Draft Plan ensure that land use planning will respect and accommodate the exercise of MCFN's section 35 rights?</p>			
<p>Serious impacts to MCFN's rights have already been experienced by MCFN members as a result of industrial development, government policies, increased population in the region, and other sources.</p> <p>How does the Draft Plan take into account the existing industrial development and disturbance levels within MCFN's traditional territories and the adverse affect it has already had on MCFN's ability to exercise its rights and various environmental indicators?</p>			
<p>How does the Draft Plan take into account the impacts of the grants and tenures throughout MCFN's traditional territories on its ability to exercise its rights?</p>			
<p>Was a full cumulative effects analysis conducted by Alberta to assess impacts to MCFN from oil sands mining and exploration as requested by MCFN? If this was conducted, how was it incorporated in the Draft Plan?</p>			
<p>How does the Draft Plan take into account the cumulative effects and disturbance level analyses contained in MCFN's submissions to Alberta regarding LARP, including, inter alia, MCFN's November 11, 2010 LARP submission, MCFN's materials submitted from the Joslyn North hearing (such as expert reports and witness statements), and MCFN's TEMF review, among others?</p>			

<p>Please describe how MCFN's TEK, including evidence of observed changes, was collected and incorporated in the Draft Plan?</p>			
<p>Please describe how the Draft Plan incorporates the Aboriginal perspective of what is necessary for the meaningful practice of the First Nations' rights.</p>			
<p>How did Alberta consider and incorporate MCFN's evidence regarding the importance of big game and other species for the exercise of their rights when Alberta designated land use areas?</p>			
<p>How did Alberta consider and incorporate the evidence of MCFN land, water, and ice travel routes in the Draft Plan?</p>			
<p>MCFN sent Alberta links to the materials MCFN submitted in connection with the ERCB hearing regarding the Joslyn North Mine so that Alberta would better understand what information was necessary to assess impacts of land-use planning to MCFN's rights:</p> <p>How does the Draft Plan incorporate the following:</p> <ul style="list-style-type: none"> • the need to study MCFN's cultural and traditional land use and to model and assess the impacts of planning assumptions on traditional land use tipping points • the need to identify possible thresholds, and the effects of crossing those thresholds, on traditional use • the socio-economic and cultural impacts that have already been imposed on MCFN in the region • the need to develop appropriate land-use mechanisms, such as timing restraints and access management, in the region 			

<p>How did Alberta consider and incorporate the following information from MCFN's Joslyn North submissions</p> <ul style="list-style-type: none"> • Evidence of how oil sands developments adversely affect the exercise of section 35 rights • Evidence of how the increase in recreational users in the region adversely affects the exercise of section 35 rights • Evidence of how oil sands projects have direct, indirect and cumulative impacts on section 35 rights • Evidence of how the quantity of land already taken up for industrial purposes in the region already constitutes an infringement of MCFN's rights • Evidence from MCFN members, including transcripts and witness statements, regarding current use patterns, current difficulties in exercising their rights because of industrial and other disturbances, current difficulties in maintaining cultural continuity because of industrial and other disturbances • Detailed evidence from MCFN members, including transcripts and witness statements, describing the environmental and geographic requirements for the meaningful exercise of their rights 			
<p>How did the Draft Plan incorporate answers to the questions in MCFN's October 2008 submission regarding the LUF?</p>			
<p>Please describe how Alberta incorporated the materials submitted by MCFN in the LARP process in their totality.</p> <ul style="list-style-type: none"> • If only certain information or submissions were considered and incorporated, please specify which submissions and materials those were. • If Alberta identified gaps in MCFN's submissions, please specify what it identified and how/when Alberta conveyed this information to MCFN. 			

LAND-USE PLANNING APPROACH			
How has the need to ensure the meaningful exercise of MCFN’s section 35 rights now and in the future been incorporated as a purpose of land planning?			
How does the Draft Plan identify and protect the lands and resources that MCFN requires to sustain itself now and in the future? How was information regarding the lands and resources required to sustain MCFN collected?			
Treaty 8 must be a foundation of the Vision for LARP. How does the Vision Statement in the Draft Plan reflect the constitutional requirement to protect section 35 rights? How does the Vision Statement promote outcomes and strategies that adequately protect and accommodate section 35?			
How does the LARP planning process in the Draft Plan take the connectivity of ecosystems in the region into consideration when designating use areas and establishing frameworks?			
How does the Draft Plan avoid a planning process that takes a site- and use-specific approach, rather than an ecosystem approach? If the Draft Plan uses a site- and use-specific approach, please describe how the Draft Plan appropriately considers the impacts of development on or the function of traditional land use?			
Please describe how First Nations’ land uses for traditional livelihood and cultural purposes are treated as a “land use”, just as conservation, recreational, agricultural and oil sands developments are “land uses” in Draft Plan.			
How does the Draft Plan require that when a planning decision adversely impacts section 35 rights an immediate			

<p>“management response” is triggered, the impact is a “driver” for required change (e.g. such as establishing offsets), or land-use decisions can be rescinded or amended?</p>			
<p>How does the Draft Plan create a land-use planning process that can require different scales and paces of bitumen developments in the region, depending on existing and future impacts to section 35 rights?</p>			
<p>How does the Draft Plan employ a planning approach that requires linear disturbances to be prevented and eliminated? Similarly, how does the Draft Plan ensure that contiguous habitats are protected?</p>			
<p>How does the Draft Plan use a planning approach that ensures that there is no net loss of wetland functions?</p>			
<p>How does the Draft Plan ensure that conservation areas are connected by, among other measure, comprehensive river buffers and protected ecosystems?</p>			
<p>How does the Draft Plan require that land-use decision made in the context of project-specific regulatory review processes are made in a way that protects and accommodates the exercise of section 35 rights?</p>			
<p>How does the Draft Plan require that Traditional Land and Resource Use requirements of MCFN are understood before land-use decisions are made? In particular, how does the Draft Plan require decision-makers to conduct or review the following before making land-use decision:</p> <ul style="list-style-type: none"> • comprehensive cultural and social impact assessments for aboriginal peoples; • a comprehensive cumulative impact assessment of livelihood rights for aboriginal peoples; 			

<ul style="list-style-type: none"> • traditional land, resource-use and management plans; • co-management systems to control the pace and scale of development; • aboriginal representation on regulatory decision-making boards 			
MEANINGFUL PRACTICE OF RIGHTS			
<p>How does the Draft Plan ensure that MCFN has sufficient lands and resources for the exercise of their rights? In this regard,</p> <ul style="list-style-type: none"> • How does the Draft Plan use a definition of “sufficient” that refers not only to quantity but quality, but uses the perspective of what is required to fulfill subsistence requirements and cultural needs of the First Nation now and into the future? • How does the Draft Plan use a definition of “sufficient” that encompasses a suite of interconnected tangible and intangible resources that underlie the meaningful practice of practice of rights? These “resources” include, but are not limited to: routes of access and transportation; water quality and quantity; healthy populations of game in preferred harvesting areas; cultural and spiritual relationships with the land; abundant berry crops in preferred harvesting areas; traditional medicines in preferred harvesting areas; the experience of remoteness and solitude on the land; feelings of safety and security; lands and resources accessible within constraints of time and cost; sociocultural institutions for sharing and reciprocity; spiritual sites; etc. 			
<p>How did Alberta consider and incorporate the land qualities used by MCFN members when selecting land for hunting purposes when designated conservation, recreation and mixed</p>			

use zones? In particular, how did Alberta consider and incorporate MCFN's definition of suitable hunting, fishing, gathering and trapping terrain when designating lands?			
What quantitative and qualitative information on current and historical uses of lands for hunting, fishing, trapping, gathering plants and medicines, spiritual and cultural uses, and traditional economic pursuits was incorporated into the Draft Report to ensure that the LARP would result in planning decisions that respect and accommodate section 35 rights?			
How does the Draft Report incorporate the information that would have been collected through the TLRUMP process?			
How does the Draft Plan provide concrete means for how the rights and livelihoods of Aboriginal peoples will be ensured into the future?			
In designating the land-use areas in the Draft Plan, how does the Draft Plan recognize that MCFN's traditional land use has changed over time and how does the Draft Plan take into account that some areas are now used more intensively?			
How does the network of protected areas designated in the Draft Plan take into account the culturally significant and sensitive areas that are integral to the long term ability of MCFN to meaningfully practice their traditional pursuits?			
How does the Draft Plan accommodate any loss of use of areas outside of conservation areas in planning area?			
How does the Draft Plan ensure that the exercise of MCFN's section 35 rights is protected and accommodated in mixed use areas?			

<p>How does the Draft Plan clarify and revise the regulatory scheme regarding access management, conservation areas and mixed use so that the exercise of MCFN's section 35 rights is protected and accommodated in the LARP area? In this regard, how does the Draft Plan establish regulatory backstops to ensure that section 35 rights can be practiced in the LARP area?</p>			
<p>How does the Draft Plan ensure that MCFN members have priority access to sufficient quantity and quality of tangible and intangible resources that underlie the meaningful practice of rights?</p>			
<p>MCFN submitted that a 5km buffer along the Athabasca River is required as part of protecting the meaningful exercise of MCFN's rights. How did Alberta consider and incorporate in the Draft Plan the need for a 5km buffer along the Athabasca River?</p>			
<p>MCFN submitted that a buffer that takes into account TLU features, intact forests, ungulate populations, waterways and other factors within and around the Peace-Athabasca Delta is required as part of protecting the meaningful exercise of MCFN's rights. How did Alberta consider the need for a buffer which takes in the areas of importance to MCFN within and around the Peace-Athabasca Delta?</p>			
<p>MCFN submitted that industrial impacts on all remaining intact landscapes must be eliminated or limited as part of protecting the meaningful exercise of MCFN's rights. How did Alberta consider the need to limit or eliminate industrial impacts on all remaining intact landscapes in the LARP region?</p>			
<p>How does LARP ensure adequate protection for large tracts of</p>			

habitat suitable for moose, bison and woodland caribou that are vital for the meaningful exercise of section 35 rights?			
How did Alberta incorporate MCFN's submission that a buffer one kilometre wide on each side of category 1, 2 and 3 streams throughout MCFN traditional use territory and a buffer one kilometre wide around all lakes are needed?			
How did Alberta incorporate and accommodate the almost 24,000 land and resource use sites and features identified by MCFN? Did Alberta conduct its own statistical and distributional analysis on the MCFN TLU data points? If so, did Alberta identify different factors than MCFN regarding the factors that MCFN members take into account in their definition of terrain favourable for the exercise of their rights and how did Alberta provide feedback to MCFN and incorporate the factors into the LARP?			
How did Alberta determine that leaving 70% of MCFN's TLU sites outside of proposed protected areas was sufficient to ensure the protection of MCFN's rights?			
How did Alberta determine that leaving 86% of MCFN's travel routes outside of proposed protected areas was sufficient to ensure the protection of MCFN's rights?			
The Draft Plan does not designate the Athabasca River as a conservation area, despite numerous submissions regarding the importance of that River, among others, to MCFN's culture and to the exercise of its section 35 rights. Specifically, the Athabasca River is a vital transportation corridor that gives ACFN and MCFN access to a large part of their traditional territories and harvesting sites. The Draft Plan does not			

designate any waterways as conservation areas. Please explain how the Draft Plan adequately protects the exercise of MCFN's section 35 rights on the River and how it adequately protects the exercise of MCFN's rights that depend on the quality and quantity of water in the Athabasca.			
FRAMEWORKS			
How does the Draft Plan include current and future of aboriginal and treaty rights in the frameworks? Please describe how rights-based thresholds are incorporated in the Draft Plan.			
How was MCFN meaningfully involved in establishing local and regional thresholds, triggers and benchmarks for air and water quality, wildlife/wildlife habitat, fish, plants?			
<p>Please describe how the thresholds and frameworks:</p> <ol style="list-style-type: none"> 1. Established objectives that meaningfully and properly take Treaty and Aboriginal rights into account; 2. Determined and established culturally appropriate thresholds for sociocultural and ecological indicators; 3. Identified priority areas and issues for protection and integration into protected areas networks; 4. Provided a basis for cumulative effects assessment on treaty and aboriginal rights 			
Please describe how the frameworks are based on a pre-disturbance baseline concerning the First Nations' use of lands and resources (i.e., 1965). If Alberta only considered "post disturbance" baseline information, please describe how this adequately relates to ensuring the practice of section 35 rights.			
How does the Draft Plan consider the land disturbance levels in relation to what is necessary to sustain ecological integrity			

and to sustain section 35 rights?			
Please describe how the need for a terrestrial ecosystem management framework was incorporated in the Draft Plan.			
<p>The First Nations' Phase 2 Framework Committee report, jointly submitted by the First Nations in July 2010, raises a number of issues and concerns that should have been included in the Draft Plan. In particular, how does the Draft Plan:</p> <ol style="list-style-type: none"> 1. Take the importance of the Athabasca River to the First Nations into account 2. Consider and set the criteria, thresholds and measures that support the meaningful exercise of rights along the river 3. Set frameworks that reflect that the First Nations' rights in the region have already been affected because of water issues 4. Consider and implement the Aboriginal Base Flow (ABF), Aboriginal Extreme Flow (AXF) and Ecosystem Base Flow thresholds (EBF) 5. Consider and implement precautionary thresholds for use in adjudicating future water licence applications 6. Require Alberta to work with First Nations to develop additional thresholds, criteria and measures to assess potential impacts on Treaty and rights using a traditional resource use plan model 7. Require additional studies and other steps to address the scientific and knowledge gaps to determine the appropriate instream flow needs, including the EBF, ABF and AXF, before implementing the LARP? 8. Consider delaying the regional plan until these scientific and knowledge gaps had been identified? 9. Establish an appropriate framework for joint decision making regarding water management once a Phase 2 			

<p>framework is in place?</p> <ol style="list-style-type: none"> 10. Require a TRLUMP consisting of a comprehensive regional planning level study of aboriginal knowledge, use, Treaty and aboriginal rights related to the Athabasca River and adjoining watersheds 11. Require a regional cumulative effects assessment on the aboriginal and treaty rights of the first nations 12. Requiring that frameworks include an adaptive management plan that addresses the actual degree of scientific uncertainty? 			
<p>The First Nations' As Long as the Rivers Flow report, jointly submitted by the First Nations in July 2010, raises a number of issues and concerns that need to be included in the Draft Plan. In particular, how do the frameworks in the Draft Plan:</p> <ol style="list-style-type: none"> 1. Incorporate the information regarding the First Nations' preferred modes of practicing their section 35 rights 2. Incorporate the information on knowledge and use of the Athabasca River which shows how water quality and quantity have changed over time 3. Ensure that rights-based thresholds are implemented 4. Ensure that thresholds and triggers are set at levels that protect what is necessary for the full practice of section 35 rights on the river, in the delta and along adjoining tributaries 5. Incorporate the ABF, AXF framework information and rationale 6. Require rights-based cumulative effects thresholds for the tangible and intangible factors that underlie the exercise of section 35 rights 7. Include First Nations in water management? 			
<p>How is traditional ecological knowledge included in the</p>			

frameworks?			
How do the frameworks address the declining indicators of ecosystem integrity in the region that adversely affects the exercise of section 35 rights?			
How does the Draft Plan require decision-makers to work collaboratively with MCFN to establish, and provide adequate funding for, an MCFN community based monitoring and enforcement program? This program would collect data, and regularly review and report on rights-based performance indicators. The intent of this monitoring would be early identification of, and response to, changes that (a) may affect the use and access of MCFN members within cultural protection areas and (b) may affect wide ranging species relied upon for cultural use.			
CO-MANAGEMENT & ACCESS MANAGEMENT			
How does the Draft Plan adequately protect MCFN's access rights?			
How does the Draft Plan require the establishment of co-management boards, or other cooperative land and resource management arrangements, guided by the principles of shared decision-making and joint stewardship for lands and resources of critical importance to the continued practice of rights?			
How does the Draft Plan include MCFN in shared watershed planning and cumulative effects management?			
How does the Draft Plan require the meaningful involvement of aboriginal peoples in scoping, terms of reference and throughout the process to assess infrastructure, social and economic implications of major projects?			

Appendix 3

Additional Recommendations of ACFN and MCFN with Respect to LARP

Additional Recommendations of ACFN and MCFN with Respect to LARP
June 3, 2011

ACFN and MCFN recommend that the following measures are included in the final LARP. Please note that these recommendations are not meant to be exhaustive. GoA representatives are again invited to read in detail the three Reports accompanying this cover letter as well as the detailed ACFN and MCFN submissions from the fall of 2010 as well as the comments that the two First Nations made in respect of the RAC Vision Document, as well as the Firelight Group (2010) As Long as the River Flows report.

1. Treaty and Aboriginal Rights

- (a) The LARP must explicitly recognize the constitutional protection afforded to Treaty and Aboriginal rights and the need for these rights to be taken into account in land use planning, management and decision-making. The recommendations provided in the JFK Law review are specific to this issue.

2. Recommendations Specific to “Outcome 7: Inclusion of aboriginal peoples in land-use planning”

The LARP must include, as part of its strategy for “Outcome 7: Inclusion of aboriginal peoples in land-use planning”:

- (a) Add a strategy as follows: **Develop, in collaboration with aboriginal groups, specific Traditional Land and Resource Use Management Plans.** This initiative would consider:
 - The vision and goals of each aboriginal group with respect to the meaningful practice of their food, social, ceremonial and livelihood rights currently and into the future;
 - The tangible and intangible resources that are necessary to support that vision;
 - The culturally-appropriate criteria and indicators that can be used to evaluate each aboriginal group’s ability to practice their rights in respect of their vision and goals;
 - The historical baseline and current conditions of the tangible and intangible resources identified;
 - The likely future nature and extent of these resources based on thresholds that have been identified based on sound, scientific methodology and traditional knowledge;
 - Appropriate land and resource management strategies and tools that would support and improve these resources; and,
 - Recommendations (and commitment to) their adoption and application in regulatory decision-making, cumulative effects management and monitoring.

(b) Add a strategy as follows: **Establish a co-management board, or other cooperative land and resource management arrangement, guided by principles of shared decision-making and joint stewardship for lands and resources of critical importance to the continued practice of rights.**

- Appoint a representative on behalf of the Crown to begin discussions on the specific mechanisms for establishment of a co-management body with ACFN and other interested aboriginal groups.
- These discussions will be funded by Alberta, with mutually-agreed upon work plans, time lines and budgets.
- The discussions must consider, among other things:
 - Establishing zones that consider the specific areas that are identified by the aboriginal groups as critical to their rights and culture;
 - The criteria for decision-making and a detailed consultation and accommodation protocol, for each zone;
 - The legislative mechanism(s) by which the co-management approach would be implemented; and,
 - That in those areas critical to the aboriginal groups rights and culture, that no industrial or other activity is permitted which would adversely affect or infringe the aboriginal groups' constitutionally-protected rights until the co-management approach is completed and enshrined in provincial legislation.

(c) Add a strategy as follows: **Incorporate and consider, in consultation with First Nations, the information from Traditional Land and Resource Use Plans in the strategies under Outcome 3, Outcome 4, Outcome 5 and Outcome 6.**

(d) Revise the “Richardson Initiative” strategy as follows:

- “Invite First Nations expressing an interest in the Richardson Backcountry to be involved in a sub-regional planning and co-management initiative. This initiative will be based on principles of shared decision-making and joint stewardship of lands and resources. This initiative will be funded by Alberta, with mutually agreed-upon work plans, time lines and budgets. The first step will be appointing a representative on behalf of the Crown to begin discussions on the most appropriate framework and mechanisms for this planning initiative. The initiative will consider:
 - The appropriate sub-regional planning boundary, taking into consideration the specific areas that are identified by First Nations as critical to their rights and culture.
 - The vision and goals of the First Nations with respect to the practice of their livelihood rights in to the future;

- Management of the tangible and intangible resources that are critical to sustaining First Nations livelihood rights;
- Access management including the cultural needs of the First Nations, as well as other appropriate land and resource management strategies and tools that will support and improve the resources critical to First Nations;
- A framework and implementation plan for First Nations inclusion in future decision-making, planning, management and monitoring in this area;
- Any applicable changes to existing, or development of new, legislation to enable the above.

(e) The Indicators should include:

- Adoption of First Nations-specific resource use requirements, criteria and indicators into the environmental and cumulative effects management plans and frameworks proposed in LARP.
- Successful application of First Nations-specific resource use requirements, criteria and indicators in decision-making, monitoring and management.

3. Recommendations Specific to “Outcome 3: Landscapes are managed to maintain ecosystem function and biodiversity”

Amend “Outcome 3: Landscapes are managed to maintain ecosystem function and biodiversity” as follows:

- (a) Strategy “a) Increase the amount of provincial Crown land under a conservation designation” requires further analysis (based on appropriate ecological and cultural information as well as legal consideration of treaty and aboriginal rights) to identify appropriate conservation areas and rules on use of those areas that protect the rights of First Nations and which give priority use to First Nations.
- (b) Strategy “b) Develop a biodiversity management framework...” must include, in addition to those items listed:
 - Conservation of wood bison outside of Wood Buffalo Nation Park, including the Ronald Lakes Herd [See ACFN’s October 13, 2010 letter to Minister Mel Knight, which is attached as Appendix 3]
 - Conduct further analysis, based on ecological data, existing disturbance data, and First Nations resource use and needs (from a traditional land and resource use and management plan), to inform the development of the framework, its targets and its strategies.
 - There should be limits on development in the LAR until this framework is completed.

- (c) We have serious concerns with respect to caribou and that the draft LARP does not provide concrete or strong enough consideration of caribou. The proposed provincial caribou policy contains serious flaws and loopholes that subjugate caribou protection to economic interests (see Appendix 3). The strategies to address caribou habitat needs must include, among other things (see Appendix 4):
- No net loss of woodland caribou habitat
 - No net increase in linear disturbance within caribou habitat
 - Restoration of historical caribou range that is already disturbed by industrial activities
 - Protection of all local populations throughout their historical and current ranges in northeastern Alberta
 - Involvement of First Nations in planning, management and monitoring of caribou
- (d) Strategy “c) Develop a land disturbance plan for public land...” must include:
- Consideration and incorporation of First Nations resource use and needs (from a traditional land and resource use and management plan) into the analysis of land disturbance limits and pre-limit management triggers.
 - Setting of limits must include involvement of First Nations and be based in part on the thresholds, triggers and limits for the meaningful practice of section 35 rights, as specified in traditional land and resource use and management plans.
 - There should be limits on development in the LAR until this framework is completed
- (e) Strategy “c)” contains a loophole in that “limits will recognize that to meet economic outcomes, land disturbance is projected to increase substantially from current levels as oil sands are further developed.” This invalidates the whole process of setting the limits in the first place. The limits must be set based on ecological and rights-based requirements, not on economic imperatives; otherwise there is no real ecological value in setting those limits for the purpose maintaining ecosystem function and biodiversity. We recommend that this sentence be removed.
- (f) Include a new strategy to “determine the rates of human disturbance of the landscape and degradation of indicators and to determine how fast actions must be implemented in order to keep degradation of indicators within acceptable limits.”
- (g) Include a new strategy to “develop an Athabasca River corridor conservation area” which has connectivity to other conservation areas and biodiversity hotspots in the LARP area. This corridor must extend from Ft. McKay to the Delta and should be at least 5 km on either side of the Athabasca River and

managed so that no new disturbance is allowed within that corridor. The corridor should be designated for ecological conservation and for First Nations traditional use. The corridor must extend up other important tributaries used for traditional use (as identified in the Firelight Group 2010 As Long as the River Flows report; for example: Firebag River, Grayling Creek, Ells River, Richardson River).

4. Recommendations Specific to “Outcome 4 Air and Water are managed to support human and ecosystem needs”

Strategies under “Outcome 4 Air and Water are managed to support human and ecosystem needs” should be revised as follows:

- (a) Air Quality Strategy “a. implement the Air Quality Management Framework for the Lower Athabasca Region” must be improved as currently the framework only includes NO_x and SO_x. Furthermore, as discussed in the MSES review, the management actions described in the framework have no real teeth for ensuring that triggers and limits will be enforced or to bring current exceedences under control. The language used in this Outcome is also unclear: is it written to give the impression that air and water ARE being managed appropriately or that strategies are needed so that they can be managed properly. We are of the view that new strategies are required which include the kinds of measures ACFN and MCFN have suggested in processes like the Phase II Water Management Framework. The strategy should include adopting thresholds and measures developed as part of traditional land and resource use plans.
- (b) Surface Water Strategy “a) Implement the Surface Water Quality Management Framework for the Athabasca River” must be extended to surface water quality of all waterbodies in the LAR, or at least other critical waterbodies, which would be identified through aboriginal consultation and further sub-regional planning. Additional water monitoring stations are also required. Furthermore, as discussed in the MSES review, the management actions described in the framework have no real teeth for ensuring that triggers and limits will be enforced or to bring current exceedences under control. The strategy should include adopting thresholds and measures developed as part of traditional land and resource use plans.

Appendix 4

**October 7, 2010 to Minister Mel Knight from ACFN
Regarding Protection of the Ronald Lake Bison Herd**

ATHABASCA CHIPEWYAN FIRST NATION
INDUSTRY RELATIONS CORPORATION

110B-9816 HARDIN STREET, FORT McMURRAY, ALBERTA T9H 4K3 • TEL 780-791-3311 • FAX 780-791-3632



October 7, 2010

The Honourable Mel Knight
Minister of Alberta Sustainable Resources Development
#404 Legislature Building
10800-97 Avenue
Edmonton, AB T5K 2B6
Phone: (780) 415-4815
Fax: (780) 415-4818
Mel.knight@gov.ab.ca

The Honourable Jim Prentice
Minister of the Environment Canada
Les Terrasses de la Chaudière
10 Wellington Street, 28th Floor
Gatineau, PQ K1A 0H3
Phone: 819-997-1441
Fax: 819-953-0279
Jim.Prentice@ec.gc.ca

Dear Sirs:

Re: The Need to Protect the Ronald Lake Bison Herd and First Nations Livelihood Rights from Oil Sands Impacts

Athabasca Chipewyan First Nation has raised concerns about the need to protect the Ronald Lake bison herd with Alberta and with Canada on numerous occasions (Appendix A). This herd is utilized for subsistence by ACFN members, and ACFN's subsistence and livelihood needs require that this herd be sustained in its current range for future generations. The herd is threatened by habitat loss from proposed oil sands mines, and by the possibility for increased sports hunting as new access is opened into the area.

The Ronald Lake bison herd range lies on the west side of the Athabasca River, south of Wood Buffalo National Park (Figure 1). The area of the herd range is still relatively undeveloped; however, it can already be seen that large intact forest tracts are dwindling and, given current rates of development and proposals for oil sands development, the range of the herd will have no

intact forests left within about one decade (Figure 2). Intact forests and limited access for humans and predators are essential for the survival of the herd.

Recently, ASRD waterways staff and ACFN found that there is a mutual interest in sustaining the Ronald Lake bison herd in its same area and around the same size in perpetuity. However, despite ASRD's stated intent for sustaining the Ronald Lake herd, there is very little action being taken towards achieving this objective. ASRD officials explained that there is little they can do to protect the bison because:

- the bison are not protected under the Alberta *Wildlife Act* and so ASRD cannot regulate sports hunting of the bison; and,
- ASRD cannot limit their approvals because Alberta Energy has already granted the leases and requires proponents to develop them.

ASRD staff said there is little they can do other than work with proponents to manage timing and access.

ACFN considers ASRD's actions to be inadequate. In the interest of protecting ACFN's subsistence and livelihood rights in respect of the Ronald Lake bison, it will be necessary to move beyond existing policies. ACFN recommends the following steps be taken immediately by Alberta:

1. **The core winter range of the Ronald Lake herd from Red Clay Creek to Ronald Lake be established as a conservation area under the Lower Athabasca Regional Plan.** Management rules must specify that no industrial development and no sports hunting may be allowed in the Ronald Lake conservation area. This will require that portions of oil sands leases must be bought back, or that development on these portions of the leases be disallowed through regulation and possibly through incentives. Limiting sports hunting access into a conservation area would not require that bison be protected under the *Wildlife Act*, as there are other land management tools that could be enabled.
2. **A cooperative management body be established for this conservation area through agreements between the Province and participating First Nations.** ACFN would be interested in discussing with you and your officials how such an arrangement might work in Alberta.
3. **Alberta must implement meaningful legislation to identify, protect and recover species at risk, and to protect the habitat of these species.** Alberta's legislation currently provides grossly inadequate protection for species at risk, and no automatic protection at all for the remaining habitat of the relatively few species that are listed as "endangered" or "threatened" under the *Wildlife Act* and *Wildlife Regulation*. Alberta's inadequate legislation directly threatens the ongoing meaningful exercise of ACFN's and other First Nations' rights protected under s. 35 of the *Constitution Act, 1982*.

ACFN also requests that the federal government take immediate steps under the *Species at Risk Act* to protect the Ronald Lake bison herd from sports hunting and from further habitat degradation, particularly in light of Alberta's inadequate response to date.

We look forward to a positive response on this issue.

Yours Truly,

A handwritten signature in black ink, appearing to be 'LK' or similar initials, written in a cursive style.

Lisa King

Director

Cc:

ACFN Chief and Council
Melody Lepine, Mikisew Cree IRC Director
Dave Bartesko, Land Use Secretariat

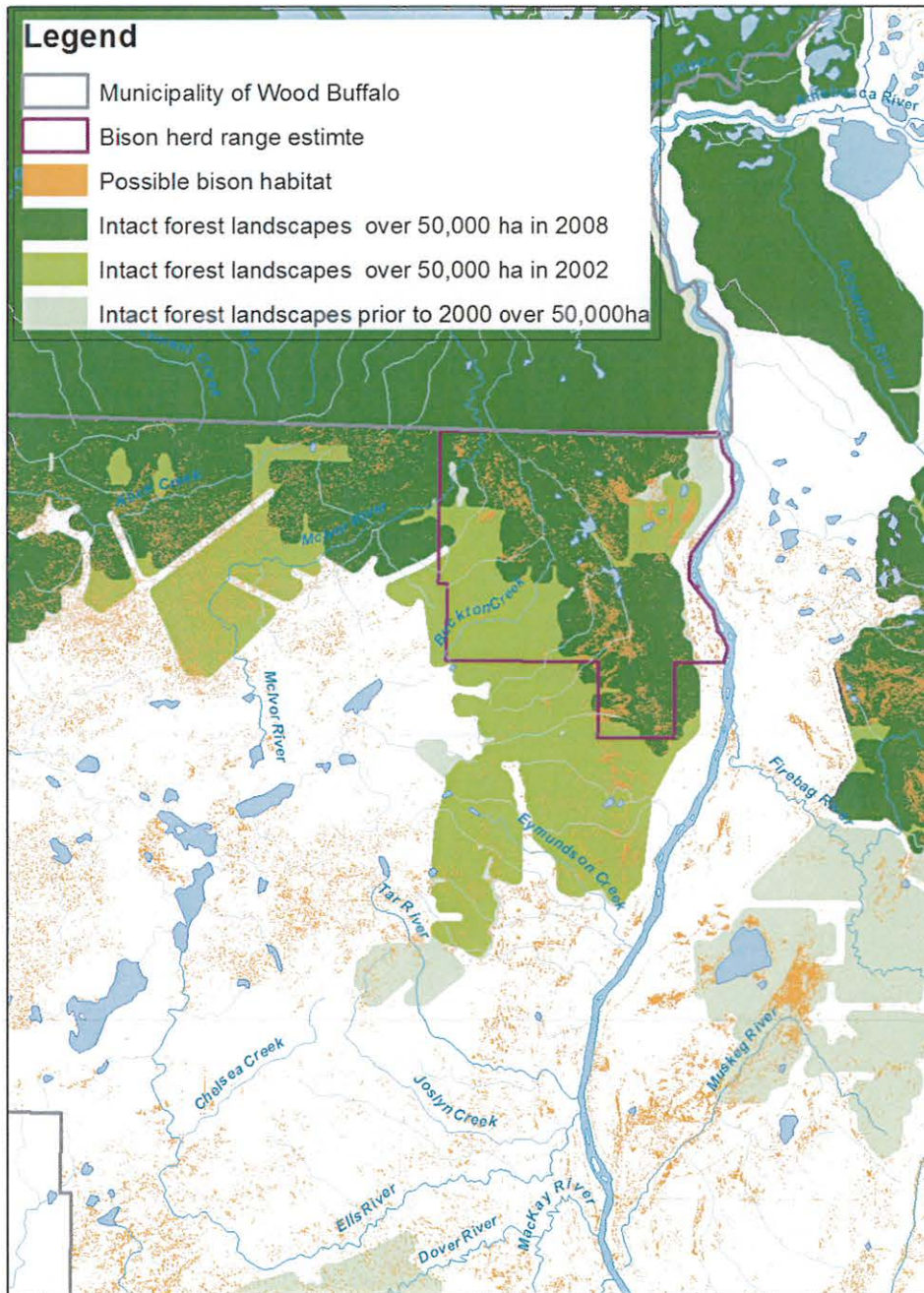


Figure 1 – Estimated Ronald Lake Bison Herd Range.

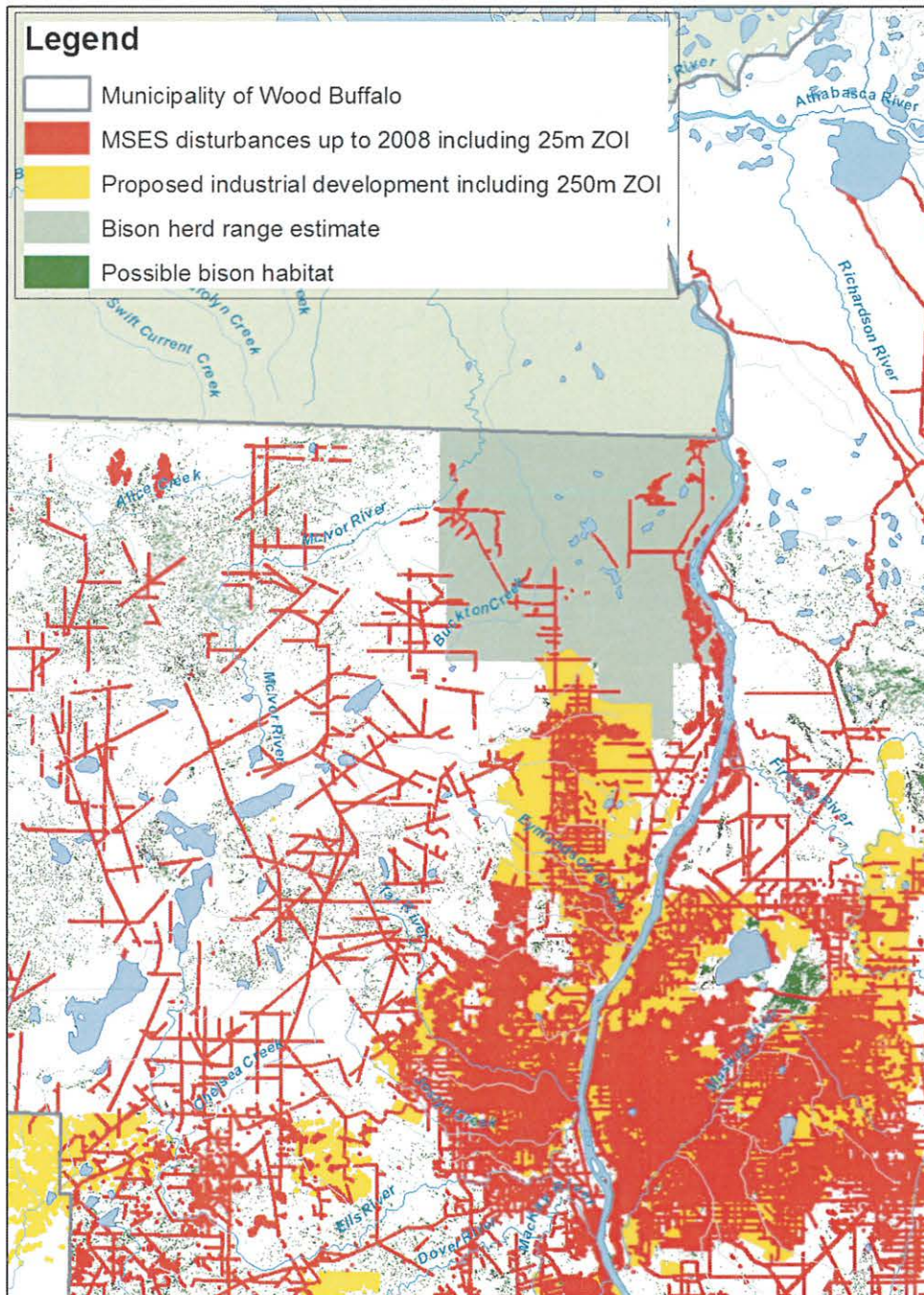


Figure 2 – Estimated Ronald Lake Bison Herd Range and Current and Proposed Disturbances

Appendix A – Previous ACFN Submissions Regarding the Need to Protect Bison

- A1 Letter dated October 9, 2009 to Tim Burggraaff, Resource Management Advisor, ASRD, from Lisa King, Director, ACFN IRC, Re: The Need to Protect Bison.
- A2 Supplementary Submission of Athabasca Chipewyan First Nation to the Federal Statutory Review of the Species at Risk Act, April 13, 2010
- A3 Letter dated September 27, 2010 to Tim Burggraaff, Resource Management Advisor, ASRD, from Lisa King, Director, ACFN IRC, Re: Meeting with ASRD, UTS/Teck, and ACFN IRC and Elders to discuss bison protection.

**ATHABASCA CHIPEWYAN FIRST NATION
INDUSTRY RELATIONS COPORATION**

110B-9816 Hardin Street, Fort McMurray, Alberta T9H4K3 Phone (780) 791-3311 Fax (780) 791-3632



October 9th, 2009

Tim Burggraaff
Resource Management Advisor, Lac La Biche Area
Consultation and Aboriginal Relations Unit
Alberta Sustainable Resource Development
2nd Floor, Provincial Building
Box #450, 9503 Beaverhill Road
Lac La Biche, Alberta, T0A 2C0

Tel: 780-623-5455
Fax: 780-623-4584
Email: tim.burggraaff@gov.ab.ca

Dear Tim,

Re: The Need to Protect Bison

On behalf of the Athabasca Chipewyan First Nation (ACFN), the ACFN IRC is writing to you today to strongly urge ASRD to consider protecting bison on Provincial lands outside of the Wood Buffalo National Park (WBNP). ACFN members consider bison a culturally significant species, and continue to harvest bison from these herds as they have throughout the generations and in accordance with their hunting rights protected under Section 35 of the *Constitution Act*. ACFN has expressed concern on numerous occasions to your department about the need to regulate bison hunting, and restrict non-Aboriginal sport hunting. We understand that ASRD's position is that the Wildlife Act allows anyone to hunt the bison outside of the WBNP because the bison are considered an "introduced" species.

According to ACFN Elders there are herds outside of WBNP that have been there "since living memory". These herds are in the vicinity of ACFN's Poplar Point and Point Brule reserves. One herd is on the west side of the Athabasca River in the area of Ronald Lake, and one on the east side of the Athabasca River along the Firebag River. According to ACFN Elders, these bison herds have been hunted "since living memory" and are not herds that originated from the relocation of Plains Bison to Wood Buffalo National Park. ACFN Elder Pat Marcel can recount stories of his mother and his grandmother, who lived in at the "micro-villages" near Poplar Point and Point Brule, about their use of the bison from these herds. Interestingly, a non-ACFN trapline holder who has encountered the Ronald Lake herd on his trapline has told ACFN IRC staff, quite independently of conversations with ACFN Elders, that there are two herds in that area: one which is a Plains-hybrid herd, and another that is a "pure" Wood Bison herd.

The bison of these herds currently are hunted for subsistence purposes by ACFN members who also continue to practice traditional management techniques in respect to bison harvesting. The members that harvest these bison prefer traditional foods to store bought foods. Traditional foods, such as wild meat, are known to have more health qualities far above supermarket foods, and the consumption of traditional foods as part of a healthy diet is important for preventing diabetes in Aboriginal communities. When a bison is harvested by one member, the meat of the bison is shared amongst family and friends – this sharing is an important cultural practice linked to community cohesiveness and is a key value in Dene culture. Part of sustaining the culture is the ability to hunt these animals, which depends on the continued presence of healthy bison herds, having sufficient (quantity and quality) lands to sustain these herds, and continuation of ACFN access to these lands and herds. These Treaty and Aboriginal rights of ACFN are protected by Section 35 of the Constitution Act.

While ACFN members continue to manage their use of the herds to ensure the continuation of these life-giving creatures within ACFN Traditional Lands, the Government of Alberta refuses to acknowledge that these creatures belong to this place, and deserve a relationship of respect and stewardship with the recognized managers of Alberta's lands and resources.

Sincerely,

A handwritten signature in blue ink, appearing to be 'LK' or similar initials, written in a cursive style.

Lisa King
Director

cc: ACFN Chief and Council
Pat Marcel, ACFN Elder
Tod Powell, ASRD
Stu McMillan, Parks Canada

Supplementary Submission of Athabasca Chipewyan First Nation to the Federal Statutory Review of the Species at Risk Act

April 13, 2010

Introduction

This submission is being made further to the April 9, 2010 submission by Athabasca Chipewyan First Nation (ACFN) to the Federal Statutory Review of the Species at Risk Act. The April 9th submission included an introduction to ACFN, as well as a brief scientific report on woodland caribou in the Treaty 8 area. This submission is intended to provide additional information on the concerns and interests of ACFN in respect of woodland caribou and wood bison.

Woodland Caribou

Woodland Caribou are in decline and are vulnerable to impacts from increased habitat fragmentation, edge effects, and human-caribou interactions that result from the cumulative Industrial footprint in the Lower Athabasca Region of Northeastern Alberta. Linear disturbances have negative effects on woodland caribou populations as a result of increased direct mortality, increased susceptibility to poaching, altered predator-prey dynamics, habitat avoidance, and increased energy expenditure. Extirpation of woodland caribou in the Regional Municipality of Wood Buffalo (RMWB) is predicted within the next 100 years.¹

ACFN members recognize that woodland caribou are at risk and, following age old practices of traditional resource management, limit their harvest accordingly. ACFN considers woodland caribou as an indicator species for the ecological integrity of their Traditional Lands. If woodland caribou cannot persist in the industrialized landscape, ACFN feels that their ability to practice their rights and traditional uses will also be lost.

Establishing protected areas that would contribute to woodland caribou conservation in the RMWB is one strategy, that, in combination with access management and minimizing linear footprint, could help to conserve woodland caribou in the RMWB.² While Alberta is undertaking a land use planning exercise for the Lower Athabasca Region (which includes the RMWB), there is little evidence to suggest that the protection of woodland caribou is being given the weight which it should be. Instead, it is likely that there will be trade-off between bitumen extraction and the maintenance of all woodland caribou herds in the region. This trade-off will occur without proper consultation with First Nations.

ACFN is pursuing funding from the Federal Government to conduct a traditional knowledge-based study about the woodland caribou - more information about the concerns and interests of ACFN in regards to woodland caribou will be forthcoming, should the study proceed.

¹ Cumulative Environmental Management Association. 2008. Terrestrial Ecosystem Management Framework for the Regional Municipality of Wood Buffalo, June 5, 2008, p. 30.

² Ibid, p. 30

Bison

ACFN members consider bison a culturally significant species, and continue to harvest, as they have throughout generations, the bison from herds that range to the south of the Wood Buffalo National Park (WBNP). According to ACFN Elders there are herds outside of WBNP that have been there “since living memory”. These herds are in the vicinity of ACFN’s Poplar Point (IR 201G) and Point Brule (IR 201F) reserves.

One herd is on the west side of the Athabasca River in the area of Ronald Lake, and one on the east side of the Athabasca River along the Firebag River. According to ACFN Elders, these bison herds have been hunted “since living memory” and are not herds that originated from the relocation of Plains Bison to Wood Buffalo National Park. ACFN Elder Pat Marcel can recount stories of his mother and his grandmother, who lived at the “micro-villages” near Poplar Point and Point Brule, about their use of the bison from these herds. Current ACFN hunters have also stated that they consider the Ronald Lake herd that they harvest to be “pure” woodland, and not plains hybrids. A non-ACFN trapline holder who has encountered the Ronald Lake herd on his trapline has told ACFN IRC staff, quite independently of conversations with ACFN Elders, that there are two herds in that area: one which is a Plains-hybrid herd, and another that is a “pure” Wood Bison herd.

The bison of these herds currently are hunted for subsistence purposes by ACFN members who also continue to practice traditional management techniques in respect to bison harvesting. The members that harvest these bison prefer traditional foods to store-bought foods. Traditional foods, such as wild meat, are known to have more health qualities far above supermarket foods, and the consumption of traditional foods as part of a healthy diet is important for preventing diabetes in Aboriginal communities. When a bison is harvested by one member, the meat of the bison is shared amongst family and friends – this sharing is an important cultural practice linked to community cohesiveness and is a key value in Dene culture. The acts of harvesting are important for the transmission of traditional knowledge to younger ACFN members and the continuation of the culture. These are only a few examples of the relationship of the Bison to ACFN rights and community well-being. ACFN is pursuing funding from the Federal Government to conduct a study about these Bison herds – more information about the relationship between the Bison and ACFN’s rights and well-being will be forthcoming, should the study proceed.

ACFN members have observed wasteful and disrespectful harvesting practices by non-Aboriginal recreational and sports hunters. For example, they have witnessed bison carcasses where only the prime cuts of meat have been taken, leaving the rest to waste. As well, there are accounts of observing hunters accessing the bison by use of helicopters.

While ACFN members continue to manage their use of the herds to ensure the continuation of these life-giving creatures within ACFN Traditional Lands, the Government of Alberta itself does not regulate non-Aboriginal bison harvest. ACFN has expressed concern on numerous occasions to the Province about the need to regulate bison hunting, and restrict non-Aboriginal sport hunting. In the 1920s, Canada introduced plains bison to Wood Buffalo National Park, leading to the hybridization of the plains bison and non-native livestock diseases (brucellosis and bovine

tuberculosis) were introduced. ACFN's harvest of bison in WBNP was disallowed, leading to impacts in the community at that time.³ Now, due to concerns about the spread of disease, Alberta will not regulate the harvest.

Alberta recognizes that some bison populations outside of the Park have been there for a very long time and are not likely the result of the plains bison introduction. While Alberta professes to envision a future where wild bison may repopulate their former range in northern Alberta, Alberta wildlife managers hold that the diseases associated with bison herds within WBNP create risk of infection for bison outside of WBNP. Part of the Alberta strategy to minimize the risk of the spread of disease is by maintaining open entry into harvest of the bison. The Alberta position is that regulating bison hunting and increasing their population in the area will increase the risk of the spread of disease throughout uninfected herds.⁴

In addition to concerns about harvesting, ACFN is also concerned about the threat of oil sands development to the ecology of the habitat upon which the bison depend. For example, the Ronald Lake herd is threatened by oil sands development. While the main range for the herd is still undeveloped, and therefore relatively inaccessible for recreational hunters, the proposed Shell Pierre River Mine and the proposed UTS Frontier and Equinox Mines will open new access into the area, and will take up the bison habitat. Furthermore, these developments will impact the ability of ACFN members to harvest the bison, as result of limiting access (due to access management policies), through increased competition (should non-Aboriginal sports hunters gain increased access), and by reducing the abundance of the bison, and possibly by increased concerns about contamination of the meat as a result of proximity to industrial development.

What must be done?

While the Federal Government reviews the SARA, decisions on developments that will impact the woodland caribou and wood bison continue to be made, industrialization of the region continues, and ACFN rights and traditional uses continue to be threatened. ACFN is currently preparing submissions for the Alberta Lower Athabasca Regional Plan, which will include requests for preservation of bison herd habitat, and woodland caribou habitat, in order that these animals will be protected and ACFN's rights in respect to them may be sustained. While ACFN sees opportunities to work within these planning and policy processes, there is fear that if immediate action is not taken to protect SARA species then it may be too late to address the cumulative impacts to these species, as well as ACFN's rights. ACFN wishes to be consulted on what should be done to preserve these species and their habitats and is very open to working together with the Federal Government to find a solution. Until such a solution can be found, perhaps a moratorium on oil sands development should be considered.

³ Fumoleau, R. 1975. *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11 1870-1939*. McClelland and Stewart Limited: Toronto, ON; Weatherell, D.G., and R.A. Kmet. 2000. *Alberta's North: A History, 1890-1950*. Edmonton, AB: Canadian Circumpolar Institute Press, the University of Alberta Press and Alberta Community Development.

⁴ Email communication dated December 14, 2009 from Tim Burggraaff, Resource Management Advisor, Waterways District, Alberta Sustainable Resources Development to Nicole Nicholls, Project Manager, Athabasca Chipewyan First Nation Industry Relations Corporation, Ft. McMurray, Alberta.

ATHABASCA CHIPEWYAN FIRST NATION
INDUSTRY RELATIONS CORPORATION

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September 27, 2010

Tim Burggraaff - RPFT

Resource Management Advisor
Waterways and Lac La Biche Districts
Sustainable Resource Development
Office: (780) 623-5455
Cell: (780) 404-7764
Fax (780) 623-4584
tim.burggraaff@gov.ab.ca

Dear Tim:

Re: Meeting with ASRD, UTS/Teck, and ACFN IRC and Elders to discuss bison protection

I am writing as follow-up to (1) ACFN's letter of July 15, 2010 to UTS/Teck and copied to yourself, and (2) the August 31, 2010 meeting between ACFN IRC and ASRD.

In our letter of July 15, I requested a meeting between ACFN IRC and Elders, UTS/Teck, and ASRD, with the following objectives:

1. to communicate ACFN's concerns to ASRD and UTS/Teck;
2. to understand ASRD's current position with regard to the protection of Bison and to discuss the possibility of changes in the level of protection;
3. to explore whether opportunities exist for UTS/Teck to (a) minimize the impact of their project on Bison, and (b) to contribute funding or resources to enhanced Bison protection.

In response to this letter, you requested an initial meeting between ACFN and ASRD to clarify items #1 and #2 above, prior to holding a meeting with a project proponent. This initial meeting was held on August 31, and focused on current management practices and potential changes in bison management.

During the meeting, ASRD and ACFN found that there is a mutual interest in sustaining the Ronald Lake bison herd in its same area and around the same size in perpetuity. However, despite ASRD's stated intent for sustaining the Ronald Lake herd, there is very little action being taken towards achieving this objective. ASRD explained that they have a bison management program, but were unable to provide much detail on this program. ASRD also explained that

while they can ask proponents to incorporate timing and access mitigations, there are challenges that prevent ASRD from protecting the Ronald Lake herd, specifically, that:

- it is not known to what extent the herd is diseased;
- testing to prove the herd disease-free would be financially and logistically prohibitive;
- as long as there is some potential that the herd is diseased, management of the herd will not change;
- there are no plans to test and determine the disease status of the herd.

ACFN voiced a number of concerns and provided some recommendations:

- ACFN is very concerned about the lack of action to protect the bison, as outlined above;
- regardless of the disease status of the Ronald Lake herd, ACFN requests a change in management so that the herd is protected;
- ACFN recommends and requests that a management objective be identified, with clear goals and targets for management of the Ronald Lake herd;
- ACFN recommends and requests the development and implementation of a management plan/strategy for protection of the Ronald Lake herd.
- ACFN recommends that the range of the Ronald Lake herd from Red Clay Creek to Ronald Lake be established as a conservation area under the Lower Athabasca Regional Plan and that First Nation's livelihood rights be respected in the management of the conservation area.
- ACFN recommends that ASRD enter into joint stewardship of the Ronald Lake herd with ACFN.

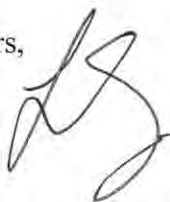
We look forward to your responses to our comments and recommendations that were made at the August 31 meeting.

Given that the threat of oilsands development to bison habitat is an issue that ASRD is doing little to manage at this time, we have reconsidered our initial request to meet with UTS/Teck, and would like to propose a multi-proponent meeting instead. Specifically, in addition to UTS/Teck, BP and Shell are proposing to develop projects in the area where the herd will be affected. We would like to include these proponents in the discussion of bison management, and potentially other proponents as relevant. UTS/Teck had asked previously about the possibility of a multi-proponent meeting and we feel that this idea will be received favourably.

I am interested to know whether ASRD would consider proceeding with a multi-proponent meeting. In addition, I look forward to responses to the issues and recommendations in this letter.

Sincerely yours,

Lisa King
Director



Appendix 5

**May 6, 2011 Letter to Dave Hervieux from ACFN and MCFN
Regarding the Draft Alberta Caribou Policy**

**ATHABASCA CHIPEWYAN FIRST NATION
INDUSTRY RELATIONS CORPORATION**

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May 6, 2011

David Hervieux
Fisheries and Wildlife Program Manager
Fish and Wildlife
Sustainable Resource Development
Box 23, Main fl Provincial Building
10320 - 99 Street
Grande Prairie, AB T8V 6J4
P: 780 538-5618
F: 780 538-5622

[Via email: david.hervieux@gov.ab.ca]

Dear Mr. Hervieux:

RE: Proposed Woodland Caribou Policy for Alberta

The Athabasca Chipewyan First Nation (ACFN) Industry Relations Corporation (IRC) and Mikisew Cree Government and Industry Relations (GIR) have reviewed the Government of Alberta's *Proposed Woodland Caribou Policy for Alberta* (the "Policy"), and participated in your April 18, 2011 information session on the policy in Ft. McMurray.

Since at least 2009 it has been recognized that woodland caribou will not persist in Alberta for more than 20 to 40 years without "immediate and aggressive management intervention."¹ Clearly, immediate action is necessary to ensure that woodland caribou herds can be sustained in Alberta.² While we recognize that the intent of the proposed Policy is to "provide high-level direction to guide conservation actions... to maintain and restore caribou habitat" and to undertake "detailed planning and implementation" we respectfully submit the following concerns and comments and recommendations on the Policy on behalf of ACFN.

¹ Athabasca Landscape Team. 2009. *Athabasca Caribou Landscape Management Options Report*. Alberta Caribou Committee, p. i. Accessed April 29, 2011 from:
<http://www.albertacariboucommittee.ca/PDF/Athabasca-Caribou.pdf>

² Alberta Caribou Committee Athabasca Caribou Landscape Team Governance Board. N.d. Alberta Caribou Committee Recommendations to the Deputy Minister of Sustainable Resource Development for the Athabasca Caribou Landscape. Accessed April 29, 2011 from:
<http://www.albertacariboucommittee.ca/landscape/ACCGB.pdf>

The letter provides a brief description of the importance of woodland caribou to ACFN and MCFN and the overarching goal of both First Nations with respect to planning and management. Next, the concerns of the First Nations with respect to the policy are provided. The letter concludes with the recommendations of ACFN and MCFN to Alberta to improve the policy.

1. Importance of Woodland Caribou to the Culture, Treaty Rights and Aboriginal Rights of ACFN and MCFN

Woodland caribou are an important species for the traditional uses, treaty rights, aboriginal rights and culture of ACFN and MCFN. While MCFN has not yet had the opportunity to conduct information gathering on the use and importance of woodland caribou, ACFN has done some preliminary work (for example, see Appendices 1 and 2). ACFN Elders and harvesters have noticed a marked decrease in woodland caribou herds whose range has been impacted by industrial development. According to Chief Allan Adam (see Appendix 1): *"The tar sands have had a drastic impact on the routes the woodland caribou have always used. Their numbers are dwindling. Somewhere down the line they're going to be extinguished... by the amount of development that's happening in this region. Our traditional hunting grounds are important to us. The whole area needs to stay intact for woodland caribou."* The survival and recovery of woodland caribou is of fundamental importance to ACFN, to our way of life, and to the meaningful exercise of our hunting rights in our traditional lands. The disappearance of woodland caribou in ACFN traditional lands is an indicator that the extent of industrial disturbance is near or at the threshold beyond which ACFN members will have no meaningful ability to practice their treaty rights, which are protected under Section 35 of the *Constitution Act, 1982*.

ACFN has been expressing concern to the Federal and Provincial Governments about the decline of woodland caribou in ACFN traditional lands due to lack of protection for the species and lack of management of industrial impacts to their habitat (Appendices 3 and 4). Recently, ACFN, along with Beaver Lake Cree Nation and Enoch Cree Nation, took legal action respecting the failure of the Federal Minister of Environment to complete a recovery strategy for Woodland Caribou and the failure of the Federal government to put any interim protection in place pending completion and implementation of the final recovery strategy (See Appendix 5). The disappearance of woodland caribou is of utmost concern to ACFN: *"It is important that the government protect the full ranges of the woodland caribou. They have a duty to do so. The caribou will be gone if they don't act now"* (ACFN Elder Pat Marcel, see Appendix 2).

Both ACFN and MCFN consistently have communicated to Alberta that their goal is to ensure that any land and resource use planning and decision-making that occurs within their traditional lands is undertaken in a way that allows their Treaty 8 rights to be practiced and sustained for current and future generations. Woodland caribou are a critical traditional resource necessary to the meaningful practice of Treaty 8 rights for ACFN and MCFN. Further, as a sensitive species, the health of woodland caribou is a good indicator of the general health of the ecosystems that support the long-term

meaningful exercise of treaty rights. The intent of both First Nations is to ensure that woodland caribou, and their habitat, are protected and restored throughout their current and historical ranges within ACFN and MCFN traditional lands.

For the reasons outlined in the following sections, both ACFN and MCFN are concerned that the policy lacks the substance and direction required to ensure that woodland caribou, and the associated treaty and aboriginal rights of the First Nations, can be sustained in the face of rampant industrial development that has been approved and is planned for the Lower Athabasca Region over the next 50 years.

2. Concerns and Comments with Respect to the Policy

Overall, ACFN and MCFN are concerned that the Policy:

- a) lacks the substance required to ensure protection of Woodland Caribou;
- b) will not likely be implemented;
- c) relies inappropriately on land use planning and “approvals” to address caribou needs;
- d) erroneously claims that woodland caribou habitat has not yet been identified;
- e) lacks clarity on the allocation of ecological, sociocultural, economic priorities; and,
- f) does not provide capacity for First Nations consultation and involvement in reviewing the Policy, and subsequent implementation activities.

These concerns are explained further below.

(a) The Policy lacks the substance required to ensure protection of Woodland Caribou

While we understand that the Policy is a high-level guidance document, it provides insufficient direction for protection of woodland caribou and their habitat. The appendix to the Policy provides nothing more than broad and non-specific direction on planning and implementation. We note that Alberta already requires proponents to develop caribou protection plans, but these plans are obviously not working because caribou are ever closer to extirpation³. Lack of specific targets and measures is one reason caribou protection plans fail.

Further, although the Policy provides a rating of the urgency for predator management and habitat restoration for each herd, it does not provide direction on timelines for

³ Athabasca Landscape Team, Athabasca Caribou Landscape Management Options Report , May 2009. (“ALT 2009 Report”). Available on-line at: <http://www.albertacariboucommittee.ca/PDF/Athabasca-Caribou.pdf>, pp. 6 and 46.

planning and implementation of the Policy for caribou herds. Instead, Alberta will depend on industry willingness to fund planning efforts as the basis for decisions on which herds will have priority status for planning and implementation (ASRD representatives, April 18, 2011 information meeting). Planning and implementation must be based on urgency, not on industry willingness.

Moreover, implementation of the Policy is meant to take place in the context of land use planning and approvals. This approach is completely inadequate as explained further in section 2(d) below.

Therefore, there is no assurance that the implementation plans that are meant to be developed under the Policy will be any better than standard caribou protection plans, unless the Policy provides clear, concrete and measurable targets for caribou protection including firm timelines for herd-specific planning.

ACFN and MCFN strongly feel that it is important that all local herds in north eastern Alberta are given an equal opportunity to recover. Therefore, we are not supporting caribou protection off sets, where more protection effort is placed on herds in less developed regions than herds in the oil sands region. Rather, we demand no net increase in linear disturbance within caribou habitat as well as restoration of historical caribou range that is already disturbed by industrial activities. It is further important to note that ACFN and MCFN are not in favour of predator management instead of habitat restoration as a caribou protection action measure. Scientific studies and TEK suggest that predators are of integral importance to the ecosystem and we can not afford the elimination of one species at the expense of another. Furthermore, since the increase in predation on caribou calves is directly caused by habitat disturbance, more effort should be placed on restoring disturbed areas (including linear features) and preventing further development.

(b) It is likely that there will be a failure to implement the Policy

ACFN and MCFN are concerned that the Policy will likely suffer the same fate as every other Alberta caribou policy or recovery strategy: government failure to implement. The history of government action on woodland caribou issues shows a disturbing trend. Despite legitimate scientific and social concern about the risks of industrial development to woodland caribou since the late 1980s, government has avoided taking any real action to implement the many plans and strategies for woodland caribou conservation.

For example, the Alberta Woodland Caribou Recovery Plan was approved by Sustainable Resource Development in 2005, but was never submitted for approval by the Alberta government as a whole. The Alberta Caribou Committee Athabasca Landscape Caribou Team produced their Athabasca Caribou Landscape Management Options Report in May 2009. These plans and reports recommended immediate action, and yet nothing has been done.

The Policy does not provide assurance that immediate management actions will be taken, nor does it provide clear direction on how it will be implemented in the context of land use planning and approvals. The only thing that the Policy makes certain is that Woodland caribou habitat and populations will continue to decline while nebulous consideration of the Policy occurs in disconnected planning and approvals processes.

(c) The Policy relies inappropriately on land use planning and “approvals” to address caribou needs.

One of the key flaws of the Policy is that it proposes to address caribou habitat needs through “land use planning and approvals” (p. 1).

The draft Lower Athabasca Integrated Regional Plan (LAIRP) is an example of the inadequacy of land use planning to ensure caribou conservation. According to a recently released report by the Pembina Institute, the draft Lower Athabasca Integrated Regional Plan (LAIRP) “does little to address caribou habitat needs” and only states vaguely that a “new biodiversity management framework” will be developed to address caribou habitat needs.⁴ Only 11% of the caribou range in the Lower Athabasca region is covered by the proposed conservation areas in the LAIRP, “substantially less than would be required to stabilize caribou populations. As proposed, development of existing oil and gas leases would be allowed in all of these areas.”⁵

Similarly, “approval” processes (i.e. project- or activity-specific mitigation) have singularly failed to date to halt decline (let alone recover) woodland caribou in Alberta. As noted in the Athabasca Landscape Team 2009 Report (at pp. 6 & 46), current project- or activity-specific approaches to caribou management, including project-specific mitigation measures, are not preventing an ongoing decline in caribou numbers. Rather, the rate of decline of monitored caribou populations in the Athabasca Landscape area appears to be increasing in spite of “considerable” efforts to mitigate effects.⁶

As it currently stands, both processes are inadequate for protecting woodland caribou, unless the Policy provides strong direction and sets clear objectives, thresholds and measures.

(d) The Policy erroneously characterizes the need to do further work to map woodland caribou habitat

The Policy statement claims that “identification” of “sufficient caribou habitat” is required (p. 1). This is either an erroneous statement or it is a “loop-hole” to allow reduction of herd ranges to an area considered “sufficient” (although no definition, standards or criteria are provided to determine “sufficiency” or the allocation of priority

⁴ Grant, Jennifer, Simon Dyer, Danielle Droitsch, and Marc Huot. 2011. Solving the Puzzle: Environmental Responsibility in Oilsands Development. Pembina Institute. Accessed May 2, 2011: <http://pubs.pembina.org/reports/solving-puzzle-oilsands.pdf>

⁵ Ibid.

⁶ ALT 2009 Report

among conservation, economic and First Nations' cultural and livelihood needs in that determination). In fact, herd ranges in Alberta are well-mapped, and several government reports⁷ have clearly stated that the entirety of each of the herd ranges needs to be protected as caribou critical habitat to prevent further decline of the species in Alberta and to allow for recovery. The Policy should also require this.

(e) The policy lacks clarity on the allocation of ecological, sociocultural, economic priorities

The Policy contains no meaningful guidance about how government proposes to allocate “priority” of conservation needs, First Nations cultural, sustenance and livelihood needs, and other possible land-uses (e.g. industrial development).

For example, while the Appendix to the policy states that “social/economic” impact will be considered during planning and implementation, it does not provide any clarity on what this means specifically. During the April 18th information session, Alberta representatives explained this as meaning that the policy does not commit Alberta to sustaining caribou above all other considerations. The example that they offered was that Alberta would not shut down industry in an area where there are not enough woodland caribou left to repopulate the area and make it worthwhile.

Thus, there is some indication that economic interests will have priority over woodland caribou protection. Furthermore, the last paragraph on page 3 indicates that economic considerations will be given greater weight than caribou conservation. The paragraph states:

“While caribou conservation is the over-riding objective, policy implementation will consider the costs of foregone/deferred economic development and add-on costs of mitigation where these might be required to retain caribou habitat. These costs can fluctuate considerably with changing circumstances (e.g., natural resource values) and the nature and extent of conservation measures (e.g., application of project-specific mitigation versus creation of no-development zones).”

Despite the assurances of Alberta representatives at the April 18th meeting that this only means that economics will be considered and does not mean that industry comes first, this paragraph makes the policy ineffective to achieve the stated policy intent: namely, the stabilization, recovery and sustainability of woodland caribou populations. The policy statement itself recognizes that successful achievement of this goal will require “identification, maintenance and restoration of sufficient caribou habitat” (p. 1). Implementation of the policy is also meant to apply to all individual caribou herds throughout the province (p. 1).

⁷ E.g. Environment Canada. 2008. Scientific Review for the Identification of Critical Habitat for Woodland Caribou (*Rangifer tarandus caribou*), Boreal Population, in Canada. August 2008. Ottawa: Environment Canada. 72 pp. plus 180 pp. Appendices (“EC 2008”). See also detailed maps of herd ranges in ALT 2009 Report, *supra*.

Doing so will require conservation of habitat and management of industrial development activities in each of the ranges of those individual caribou herds, which will be very costly:

"It is clear that for some caribou ranges in Alberta, past landscape management practices and fire history will make it exceedingly difficult to recover populations based on habitat restoration alone. Reversing caribou population declines by restoring functionally lost habitat will require an enormous effort, both in time and money. Because linear features (seismic lines, roads, and pipelines) represent >90% of the industrial footprint in most ranges, it is likely that anthropogenic lines will need to be substantially reduced or restored to stabilize ... declining populations. Increasing functional habitat may partially be achieved through an active program of line reclamation...However, enhanced reclamation is unlikely to be sufficient; new and innovative industrial methods will also be required to limit the loss of functional habitat at the time of development... Application of these types of industrial practices will likely be required by all industrial sectors to conserve caribou habitat throughout the province." (Sorenson, et al. 2008, p. 904)⁸

Thus, if the Policy is to successfully achieve conservation of woodland caribou, there will have to be a trade-off of economic development for caribou protection – it is fundamentally required to ensure success. Unless the Policy provides strong support for this trade-off, implementation will surely fail to protect woodland caribou.

(f) Lack of capacity for First Nations consultation and involvement in reviewing the Policy and subsequent implementation activities

Given the importance of woodland caribou to the treaty and aboriginal rights, culture and livelihood of ACFN and MCFN, consultation and involvement with the First Nations is required not only on the Policy but on any implementation planning and management.

Not only was there no meaningful consultation on the Policy itself, but the Policy does not provide firm commitment that First Nations will be involved in a meaningful way in implementation.

Implementation planning and management must be done in a way that respects the lands, rights and ways of life of First Nations. This involves, at minimum, that:

⁸ Sorensen, Troy, Philip D. McLoughlin, Dave Hervieux, et al. 2008. "Determining Sustainable Levels of Cumulative Effects for Boreal Caribou. *The Journal of Wildlife Management* (72)4: 900-905.

- The leadership role of First Nations in achieving conservation goals on their Traditional Lands is respected and acknowledged;
- First Nations are included in ways that respects their governance of the land and their traditional knowledge;
- Traditional knowledge is collected and utilized, in accordance with the protocols of the First Nations, to inform planning and management of woodland caribou;
- The criteria, thresholds and measures necessary to support treaty rights in regards to woodland caribou are identified and applied; and,
- Adequate capacity is provided to support all of the above.

3. Recommendations

- (a) Clarify the prioritization of social, cultural, economic and ecological objectives. First Nations sustenance, livelihood and cultural requirements must be assessed, considered and given priority weight in any analyses, planning and decision-making regarding woodland caribou.
- (b) Clearly state that the entirety of each of the herd ranges needs to be protected as caribou critical habitat to prevent further decline of the species in Alberta and to allow for recovery.
- (c) Provide firm and clear direction about First Nations involvement in developing implementation plans and in managing woodland caribou, including, but not limited to:
 - a. Develop government-to-government co-jurisdictional management regimes and enter into stewardship agreements with Aboriginal governments to implement recovery plans and manage caribou habitat.
 - b. Be explicit about the intended uses of Traditional Knowledge, and the need for prior and informed consent. Protocol agreements respecting the ownership and confidentiality of Indigenous Knowledge are required.
 - c. Traditional Knowledge holders must be directly engaged in the application of their knowledge to ensure respect for traditional laws and cultural views, as well as accurate interpretation. This engagement must occur on a government-to-government basis through protocols and agreements.
 - d. As with Western Science, provide appropriate levels of compensation and acknowledgement to Traditional Knowledge-Holders.
 - e. Recognize Traditional Knowledge and Western Knowledge as distinct knowledge sets and weight them equally in the decision-making process and all regulatory processes, including environmental assessment. Support knowledge development at the community and Nation level.
 - f. Engage Aboriginal governments in the development of range recovery plans for threatened caribou herds on a government-to-government basis.

Mechanisms which assist Aboriginal governments to implement recovery measures in accordance with their own knowledge, laws and traditions are preferred.⁹

- (d) Follow the recommendations of the Alberta Caribou Committee and demonstrate that all caribou ranges in Alberta meet science-based objectives to maintain and restore caribou populations through a combination of establishing protected areas, setting thresholds on maximum levels of development in caribou habitat, and establishing biodiversity offsets in caribou habitat.¹⁰
- (e) Include strong measures that all implementation plans must incorporate, including, but not limited to:
 - a. No net loss of woodland caribou habitat
 - b. No net increase in linear disturbance within caribou habitat
 - c. Restoration of historical caribou range that is already disturbed by industrial activities
 - d. Protection of all local populations throughout their historical and current ranges in northeastern Alberta

Please do not hesitate to contact us if you need more information, or if you wish to discuss any of these concerns or recommendations further. We look forward to engaging with Alberta further on planning and management of woodland caribou within our traditional lands.

Sincerely,

Melody suchills
for: _____

Lisa King
ACFN IRC, Director

Melody Lepine for: _____

Melody Lepine
Mikisew GIR, Director

cc: Chief Allan Adam, ACFN (via email)
Chief Roxanne Marcel, Mikisew Cree (via email)
Treaty 8 First Nations of Alberta (via email to Joseph Jobin jjobin@treaty8.org)
Scott Milligan, Alberta Sustainable Resource Regional Planning Lead (via email: scott.milligan@gov.ab.ca)
Dave Bartesko, Senior Consultation Manager, Land Use Secretariat (via email: dave.bartesko@gov.ab.ca)

⁹ Items 3.c) a. through f. are adapted from the Boreal Leadership Council's (BLC) DRAFT Recommendations to Environment Canada on Engagement of Aboriginal Governments in the Recovery Planning Process for Woodland Caribou, which we understand are under discussion currently within the BLC.

¹⁰ Grant, Jennifer, Simon Dyer, Danielle Droitsch, and Marc Huot. 2011. Solving the Puzzle: Environmental Responsibility in Oilsands Development. Pembina Institute. Accessed May 2, 2011: <http://pubs.pembina.org/reports/solving-puzzle-oilsands.pdf>

Appendix 1 – Affidavit of Chief Allan Adam

Affidavit #1 of Allan Adam
Sworn October 1, 2010
No. T-1437-10

FEDERAL COURT

BETWEEN:

**ALLAN ADAM on his own behalf and on behalf of all other members of Athabasca
Chipewyan First Nation; ATHABASCA CHIPEWYAN FIRST NATION;**

**ALPHONSE LAMEMAN on his own behalf and on behalf of all other members of
Beaver Lake Cree Nation; BEAVER LAKE CREE NATION;**

**HARRY SHARPHEAD on his own behalf and on behalf of all other members of
Enoch Cree Nation; and ENOCH CREE NATION**

Applicants

AND:

MINISTER OF THE ENVIRONMENT and

ATTORNEY GENERAL OF CANADA

Respondents

AFFIDAVIT OF ALLAN ADAM

I, Allan Adam, of 117 Henry Drive, Fort Chipewyan, Alberta SWEAR THAT:

1. I have personal knowledge of the facts and matters deposed to in this Affidavit, save and except where the same are stated to be on information and belief, in which case I believe those facts, and the information and belief on which they are founded, to be true.

2. I am the elected Chief of the Athabasca Chipewyan First Nation (“ACFN”). I bring this action on my own behalf and on behalf of all other members of ACFN.
3. ACFN is a Treaty 8 Nation. Our ancestors signed on to Treaty 8.
4. We are Dene people. We call ourselves Denesuline, which means people of the land.

The Connection Between the Caribou and ACFN People

5. ACFN people have traditionally hunted woodland caribou. Hunting caribou an integral part of the traditional way of life of ACFN people. However, because of the dwindling numbers in the herds, we can’t hunt the caribou now. Hunting caribou is our heritage. The Dene people have always lived side by side with the caribou. This connection is part of our history. We know that if the caribou are extinguished, then we will lose that connection, so the Dene refuse to hunt the woodland caribou. We are letting the caribou run free and wild.
6. We have a spiritual connection and relationship with the caribou. There’s a story that if you were starving out in the bush and you came across the caribou and you had no hunting gear to kill it, by the connection of the spirits of the two species, between the Dene and the caribou, you could make a spear out of a stick and the caribou would just stand there and you could kill it. The caribou would give up his own life. The connection must be very strong when an animal will give up his own life to sustain the life of another species.
7. The Dene have always lived off the caribou, regardless of whether its woodland or barren ground, there has always been a connection.
8. The woodland caribou is bigger, so people know the difference between the two kinds. Both are important to us. Caribou is caribou.
9. We don’t have any choice but to protect the woodland caribou, so that they survive, so that their very existence remains intact.

Traditional ACFN Caribou Hunting Grounds

10. The woodland caribou hunting usually took place in the back country south of Lake Athabasca and east of the Athabasca River. ACFN elders have told me that they used to hunt woodland caribou around Old Fort Bay area to the Saskatchewan border and down Old Fort River area. Even today, you can still see caribou tracks in that area in the winter months, you can still see the caribou that are around there. You don't see them as often, but they are in that area.

11. The elders also speak about hunting woodland caribou in the area south of Lake Athabasca, where all the lakes and rivers are, north and west of Marguerite River Wildland Provincial Park. The woodland caribou were all in around those lakes there. The elders know all the names of those lakes in our language. It would take a long time to say all the names of those lakes, there are so many lakes and rivers in there. The elders of our community told me that they travelled through all those lakes, they lived there when they were young, that's where they spent the majority of their time. Their kids, the generation after them, we weren't allowed to live on the land. For us it was different because we were brought into town for school. We were taken away from our land, so we didn't get to see that side of our traditional way of life, the way that my father and everyone lived on the land.

12. The elders also told me that they hunted woodland caribou in the areas south of the lakes area I just talked about and all the way down around the Firebag River area. The woodland caribou's route goes right through the tar sands. The elders told me that the woodland caribou range goes south of Firebag River and further south all the way towards Lac La Biche and around Mariana Lake and Wandering River.

13. People in our community still use the hunting grounds that I just described. They don't belong to certain families, although certain families used to have cabins out on those lands there, like the Mercredis, Marcells, Tripderoches, Cypriens, and Fletts. Those lands are for all of us to use. Everyone can use the land equally.

14. The tar sands have had a drastic impact on the routes the woodland caribou have always used. Their numbers are dwindling. Somewhere down the line they're going to be extinguished. We Dene people are not going to be the ones that extinguish them. That is going to happen by the amount of development that's happening in this region. Our traditional hunting grounds are important to us. The whole area needs to stay intact for the woodland caribou. We need to leave it to them. We do not want government to develop this area. It would be different if development companies could prove that they can do their activities in a safe, environmentally friendly way, but instead they come to us and say "we're going to come take your oil" and then displace a number of species. If development displaces species and destroys our land, then it is interfering with our livelihood as First Nations people, which was promised to us when we signed the treaty for sharing the land with the newcomers of this country.

Traditional Use and Hunting of Caribou

15. Going out on the land is the way we pass on our culture. We can't go out on a yearly basis and practice our cultural beliefs and traditional practices toward caribou anymore. We can't go out and kill caribou and practice our culture, because we know that the caribou are endangered. If there are only 300 or 400 woodland caribou in an area, and we have a population of about 900 members, if we were all to go out there and hunt caribou, it wouldn't be long before the herd was extinguished.

16. If it wasn't for the caribou, our very existence today would not be possible. It's the caribou that have kept us alive all these years, because our ancestors and my parents and their generation fed off the caribou herds. We are here because we survived on caribou meat. We use caribou for tools, we use it for everything. It wasn't only to eat, it was the survival of our people that relied on the caribou.

17. People made arrowheads out of the bones. They also made tanning tools out of the bones, for tanning hides. We can make spear heads out of the bone. I was told by our elders that they and our ancestors used everything right from the hide right down to the bone and ate all the meat. They normally used the fur to put on the ground, to

sleep on the ground. For the winter months, they put one caribou hide on the ground and then another on top so they were all covered up. The fur is very thick and dense so it holds the heat. So when they make their clothes and everything out of it.

18. We view every animal as an indicator as to whether anything is wrong with the environment. When you start seeing species disappearing, then we know something is wrong. When the woodland caribou herds are decreasing in numbers over the years, it doesn't take much to know that something is going wrong in the area.

19. Caribou are hard to spot. It's the dwindling numbers, but I think they also know that they are endangered. They stay away from predators and they do things to protect their own species.

20. We're worried not only about the caribou herds, but also the environmental impacts of development and our very existence in this region. We the Denesuline people will not stand for it anymore. We will not be relocated into other areas. We've been relocated twice in the last hundred years. We've been displaced from our homestead. We're worried we'll be displaced again. If the government continues to allow these industrial sites, eventually this land will become so toxic that we won't be able to live here anymore. We will become environmental refugees.

21. In order to have a sustainable, healthy population of caribou, and to ensure their very existence, we have to leave them alone in their habitat area and let them survive in that area. They will be able to have their own breeding grounds and re-establish themselves.

22. If the caribou populations were healthy enough, people would go out again and hunt the woodland caribou and do it as more of a connection to the caribou.


Demand Letter to the Federal Environment Minister

23. We sent a demand letter to the federal environment Minister demanding that the full ranges of the woodland caribou herds be protected. The government has not

responded to us at all. We're waiting for their letter to come. There's been no answer to our demands and concerns that have been put forward.

24. The reason why we are participating in this court action is because we want to make sure that the government lives up to its commitments under the *Species at Risk Act*, and because they've allowed the woodland caribou numbers to diminish over the years, they have failed to do so. We are the users of the land. We are the only ones who can speak for the animals out there. We speak for them because they cannot speak for themselves, but they show us in their numbers that there is something wrong.
25. ACFN representatives presented their concerns regarding the woodland caribou to the House of Commons Committee on the Environment and Sustainable Development (the "Committee") earlier this year. Attached as **Exhibit A** is a copy of ACFN's submissions made to the Committee April 9-10, 2010.
26. It is very important the federal government protects the full range of the woodland caribou, regardless of what has to be done to do so. They have to enforce their laws.
27. In regards to our treaty rights, we have a right to harvest, gather and to fish and to navigate the waters and to utilize the land as freely as if we never signed into Treaty. At this point in time, our Treaty is not being kept up, and it is not a failure on the First Nation's part.
28. The governments have no choice but to act right away, and this includes having provincial legislation to protect the caribou. The provincial government has to recognize our jurisdiction too.

This is Exhibit " A " referred to in the
affidavit of Allan Adam
sworn before me at Fort Chipewyan
this 1st day of October, 20 10


A Commissioner for taking Affidavits
Within British Columbia

A. The Athabasca Chipewyan First Nation

The Athabasca Chipewyan First Nation (ACFN) is an Aboriginal group within the meaning of section 35 of the **Constitution Act, 1982**. It has a registered population of approximately 900 members. The Reserves of ACFN include 06704 Chipewyan 201, 06705 Chipewyan 201A, 06706 Chipewyan 201B, 06707 Chipewyan 201C, 06708 Chipewyan 201D, 06709 Chipewyan 201E, 06710 Chipewyan 201F and 06711 Chipewyan 201G.

B. ACFN interest in woodland caribou pursuant to Treaty 8

ACFN holds rights under **Treaty 8**, to which the ancestors of the present-day ACFN adhered between 1900 and 1914. Prior to this time, the ancestors of what is now the ACFN lived in the vicinity of lands in which rampant oil sands development is currently taking place in northern Alberta. They used the lands in these areas to sustain their traditional lifeways. Members of ACFN continue to hold the rights guaranteed by **Treaty 8**, including hunting, trapping, gathering and fishing rights. ACFN members actively exercise their Treaty rights throughout their Traditional Territory and carry out their traditional activities, as their ancestors have for generations, throughout the First Nation's Traditional Territory.

Treaty 8 guarantees the following rights to ACFN:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes. [emphasis added]

In **R. v. Badger** (1996), 133 D.L.R. (4th) 324, Cory J., for the majority, held, at par. 39, that:

...it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties. The report of the commissioners who negotiated Treaty No. 8 on behalf of the government underscored the importance to the Indians of the right to hunt, fish and trap. The Commissioners wrote:

There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges. We pointed out...that the *same means of earning a livelihood would*

continue after the Treaty as existed before it, and that the Indians would be expected to make use of them.

* * *

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, *we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.* [emphasis in original]

The Court also adopted the following testimony of Treaty Commissioner David Laird:

The Indians' primary fear was that the treaty would curtail their ability to pursue their livelihood as hunters, trappers and fishers. Commissioner David Laird, as cited in Daniel, "The Spirit and Terms of Treaty Eight", at p. 76, told the Lesser Slave Lake Indians in 1899:

Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they now are.

In return for this the Government expects that the Indians will not interfere with or molest any miner, traveler or settler. [emphasis added]

***Badger*, supra**, at paras. 39 and 55.

The promise in the text of ***Treaty 8*** that the Indians could continue their "usual vocations of hunting, trapping and fishing" further reinforces the conclusion that the aboriginal signatories would be able to continue carrying out these activities as freely as before. "Vocation" connotes an activity to which one is seriously dedicated. A hunting and trapping vocation is only possible if there are adequate, accessible hunting and trapping grounds populated by sufficient wildlife. One of the species that ACFN traditionally harvested was woodland caribou.

In ***R. v. Horseman***, [1990] 1 S.C.R. 901, at p. 919, Justice Wilson, dissenting on other

points, also emphasized that the way of life of the Aboriginal signatories of **Treaty 8** would be protected: “The *whole emphasis* of Treaty 8 was on the preservation of the Indians’ traditional way of life.” [italics in original, emphasis added] For the ACFN, the woodland caribou is a keystone cultural species that is integral to their very way of life. It is part of who they are as a people, and it is therefore of paramount importance that woodland caribou be protected and sustained.

C. ACFN interests in woodland caribou pursuant to section 35 *Constitution Act*

In addition to the rights that it holds under **Treaty 8**, ACFN also holds rights pursuant to section 35 of the ***Constitution Act***. Section 35 provides:

35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, “Aboriginal Peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

As part of its rights under section 35, ACFN holds rights to harvest, and to act as regional stewards with respect to, the woodland caribou.

D. Woodland Caribou Facing Threats in Treaty 8 Traditional Territory

As set out above, ACFN holds Treaty and Aboriginal rights that give it a direct collective interest in the wellbeing of woodland caribou populations. ACFN members have traditionally relied on woodland caribou for sustenance, cultural and spiritual purposes. Unfortunately, in large part because of the widespread industrial (and oil sands in particular) development that is currently occurring in ACFN Traditional Territory, this species that is of critical importance to ACFN is now in dire straits. It is not receiving the protection that it requires to ensure its long-term survival and is not benefiting from the measures contemplated in SARA. The precarious state of the woodland caribou and the need to address Aboriginal concerns regarding this species were recently highlighted in the B.C. Supreme Court case of *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359.

A brief review of the status of the woodland caribou in the **Treaty 8** area follows below. The review is authored by Dr. Cormack Gates, a well-established expert on woodland caribou.

A Brief Review of the Status of Woodland Caribou in the Treaty Eight Area

C. Cormack Gates, Ph.D., Professor of Environmental Science and Planning

April 8, 2010

What is the woodland caribou and how is it different from barren-ground caribou?

Two species of caribou co-occur in the boreal forest of the Treaty Eight area, the woodland caribou (*Rangifer tarandus caribou*) and the barren-ground caribou (*R. t. groenlandicus*). The barren-ground caribou traditionally migrates into the taiga¹ and may venture further south into the boreal forest during the winter. Large herds migrate distances of up to several hundred kilometers from winter ranges to calving grounds on the tundra and normally remain north of tree line during the breeding season in October. The breeding ranges of barren-ground caribou and woodland caribou are widely separated, thus minimizing interbreeding between the two subspecies.

There are two forms (ecotypes) of woodland caribou in western Canada. The **mountain caribou** occurs in the cordillera (mountains and adjacent forests) in Alberta, British Columbia, the Northwest Territories, and Yukon. Mountain caribou occur as small herds that calve and spend summer in alpine areas then migrate to lower elevation habitat during the winter months. The other form of woodland caribou is called the **boreal woodland caribou**. It was once widely distributed throughout the boreal forest where they occur in small herds associated with large areas of wooded peatland. As with barren-ground caribou, lichens produced in these habitats provide important forage for both ecotypes of woodland caribou.

What effects do industrial activities have on woodland caribou?

In western Canada woodland caribou are not as abundant as barren-ground caribou. Being rare and occurring in small herds are suggested to be adaptations for avoiding being detected by their main predator, wolves. Ecologists refer to this adaptation as 'spacing out'. Woodland caribou occur in habitats that support very few other big game animals (moose, deer and elk) or the omnivorous black bear, because they provide limited forage for those species. In the case of mountain caribou, large patches of old growth forest produce lichens eaten by caribou, but provide little woody browse that moose and other species need, or plants that black bears use. Similarly, wooded peatlands produce lichens, but limited woody browse. Hence, in areas most suitable for woodland caribou the main prey species for wolves occur at very low densities and black bears are not abundant. Ecologists refer to this strategy by woodland caribou as 'spacing away' from bears, and from wolves and their main prey.

Whereas forest fire was once the main disturbance in the boreal forest, commercial forest harvesting and oil and gas development are now the dominant forces of change over large landscape areas. Following disturbance by fire or harvesting, forage species favored by moose and black bears increase in abundance. Both species have high reproductive capacities and their populations can respond rapidly to improved forage availability. More moose support more wolves, which prey

¹ The taiga is the transitional subarctic evergreen coniferous forest located south of the tundra. It provides mats of ground lichens that serve as the main forage for barren-ground caribou in the winter.

opportunistically on caribou. Since caribou are relatively rare to begin with and have a relatively low birth rate, they are sensitive to increased predation. Black bears prey on caribou calves; hence more bears present greater risk to caribou calves. These effects of large-scale industry disturbance of boreal forest in or adjacent to woodland caribou habitat can be referred to as a 'trophic cascade'. Changes at one level (habitat) produce a cascade of effects among species in other trophic levels.

Other human activities can alter predator prey relationships and can create behavioral impacts on woodland caribou. Roads and seismic lines cut in the forest may facilitate wolf movements and create access for them to refuge habitat used by caribou^{2 3}. Vehicle traffic can cause behavioral disturbance leading to caribou moving away from areas near roads⁴. Activities associated with energy development can cause similar displacement and may have energetic consequences⁵.

In a recent summary of caribou research M. Hebblewhite⁶ offered the following insights:

- short-term disturbances from energy development do not cause the most significant population level impacts;
- it is the amount of habitat disturbed by humans, not habitat fragmentation effects, that drives caribou population declines;
- cumulative impacts are not always evident in individual studies, and require scaling up to regional scales;
- by the time population-level impacts are detected, it is almost too late to recover populations, or the level of restoration activities required are not feasible.

What is the status of woodland caribou?

Boreal ecotype caribou are declining throughout most of their range in North America⁷. Both woodland caribou ecotypes are currently listed as “threatened” by the Committee on the Status of Endangered Wildlife in Canada (2002). More than 60% of identified herds in Canada are declining because of some form of industrial development⁸. In Alberta, the woodland caribou has been listed as threatened since 1987 and is currently designated as threatened in Schedule 6 of the Alberta Wildlife

² Stuart-Smith, A., K. Bradshaw, S. Boutin, D. Hebert, and B. Rippen. 1997. Woodland caribou relative to landscape patterns in northeastern Alberta. *Journal of Wildlife Management* 6: 622-633.

³ James, A. and A. Stuart-Smith. 2000. Distribution of caribou and wolves in relation to linear corridors. *Journal of Wildlife Management* 64: 154-159.

⁴ Dyer, S. J.P. O'Neill, S. Wasel, and S. Boutin. 2001. Avoidance of industrial development by woodland caribou. *Journal of Wildlife Management*; 65(3): 531-542.

⁵ Bradshaw, C., S. Boutin, Stan and D. Hebert. 1997. Effects of petroleum exploration on woodland caribou in northeastern Alberta. *Journal of Wildlife Management*; 61(4): 1127-1133.

⁶ Hebblewhite, M. 2008. A Literature review of the effects of energy development on ungulates: Implications for Central and Eastern Montana. Prepared for: Windy Davis Energy Specialist Biologist Montana Fish, Wildlife and Parks Region 7, Headquarters Miles City, MT, 59301.

⁷ McLoughlin, P. D., E. Dzus, B. Wynes, and S. Boutin. 2003. Declines in populations of woodland caribou. *Journal of Wildlife Management* 67: 755–761.

⁸ Alberta woodland caribou recovery team. 2005.

Regulations. Industrial land use is the leading cause of the decline. There are no boreal caribou ranges in Alberta without a substantial level of industrial development⁹.

In 2008 a scientific review of the identification of critical habitat for boreal woodland caribou¹⁰ concluded no herds in Alberta are self-sustaining due to current range conditions including habitat fragmentation and proximity of young forests caused by logging. Provincial planning efforts to provide protection for remaining boreal caribou and their habitat have not been successful and are controversial owing to the negative impacts that habitat protection would have on industrial land use projects.

The recovery plan developed in 2005 by the Alberta Woodland Caribou Recovery Team proposed to create caribou range management plans and set habitat targets. The plan provided recommendations that would have resulted in a moratorium on development in caribou ranges. Subsequently, the Recovery Team was disbanded and replaced with the Alberta Caribou Committee, which is mandated to consider socioeconomic implications in its assessments. Alberta's boreal woodland caribou herds continue to decline.

⁹ Sorensen, T., P. McLoughlin, D. Hervieux, E. Dzus, J. Nolan, B. Wynes, S. Bouting. 2008. Determining sustainable levels of cumulative effects for boreal caribou. *Journal of Wildlife Management* 72: 900 - 905.

¹⁰ Environment Canada. 2008. Scientific Review for the Identification of Critical Habitat for Woodland Caribou (*Rangifer tarandus caribou*), Boreal Population, in Canada. August 2008. Ottawa: Environment Canada. 72 pp. plus 180 pp Appendices.

Appendix 2 – Affidavit of Pat Marcel

FEDERAL COURT

BETWEEN:

**ALLAN ADAM on his own behalf and on behalf of all other members of Athabasca
Chipewyan First Nation; ATHABASCA CHIPEWYAN FIRST NATION;**

**ALPHONSE LAMEMAN on his own behalf and on behalf of all other members of
Beaver Lake Cree Nation; BEAVER LAKE CREE NATION;**

**HARRY SHARPHEAD on his own behalf and on behalf of all other members of
Enoch Cree Nation; and ENOCH CREE NATION**

Applicants

AND:

MINISTER OF THE ENVIRONMENT and

ATTORNEY GENERAL OF CANADA

Respondents

AFFIDAVIT OF PATRICK MARCEL

I, Patrick William Marcel, of 105 Meller Avenue, Fort Chipewyan, Alberta

SWEAR THAT:

1. I have personal knowledge of the facts and matters deposed to in this Affidavit, save and except where the same are stated to be on information and belief, in which case I believe those facts, and the information and belief on which they are founded, to be true.
2. I am an Elder and member of the Athabasca Chipewyan First Nation (“ACFN”).

3. I am 72 years old. I grew up on the land. I have hunted, trapped, gathered and fished my entire life.
4. I am a fluent Dene speaker. I grew up surrounded by Dene speakers. Among ourselves, we still try most of time to speak our language.
5. ACFN is a Treaty 8 Nation.
6. I was Chief of ACFN from 1987 to 1990.
7. I am the chairman of the ACFN Elders Committee.
8. I made a presentation on behalf of ACFN on April 13, 2010 to the House of Commons Committee on the Environment and Sustainable Development when they conducted the Federal Statutory Review of the *Species at Risk Act*.
9. When I speak of caribou in my affidavit, I am speaking about woodland caribou.

Traditional Hunting of Woodland Caribou

10. Hunting woodland caribou is an integral part of the way of life of ACFN people. We hunted them when we were travelling across the land. We would take one whenever we had the opportunity.
11. Before we were moved off the land and into the community of Fort Chipewyan in the 1960s and 70s, we were nomadic people. We were forever following the changing seasons and the animals' patterns of life. We built cabins for the winter, but we travelled out from there throughout the year, for different lengths of time. The reason we travelled was to gather food at different times of the year, like when the moose are running or the fish are spawning. Those were our reasons for travelling. We would take the caribou whenever we came across them. Hunting caribou is good for when you're travelling. You can pack it along with you, unlike moose. They were smaller, I could pack one myself. One pack of caribou weighs about 200 pounds. Not like a moose, which provides so much meat that we had to dry it to conserve it.

12. The Richardson Backcountry is one of most important hunting grounds of the ACFN people. It is that way now, and when I was young, as well as for my parents and grandparents. My grandparents lived their lives on this land as well. My grandfather, Narcisse Marcel, from ACFN, died in 1948 and he was 80 something years old. Richardson Backcountry is the heartland of our traditional territory.
13. The Richardson Backcountry is the area where we hunted woodland caribou. Caribou live in swampy, boggy areas, like in that area.
14. The Richardson Backcountry is the area from Fort Chipewyan to the Saskatchewan border, south down the border to the 27 baseline, and then across to Firebag River. Firebag River is our line in the sand for development encroachment on our traditional territory. From Firebag River it goes across to the Athabasca River and back to Fort Chipewyan.
15. Starting when I was seven, I would go out on the land for the summer with my father and grandfather, both of whom have now passed. We would leave in June and come back in late August or early September. We'd travel through the Richardson Backcountry. If my father and grandfather came across a caribou on these travels, they'd take it.
16. My mother's mother, Ester Piche, from ACFN, would take a caribou whenever she could. It was windfall for her and a feast for everyone else. My grandfather at that point couldn't get out and hunt anymore, so she could take a caribou and pack it out.
17. I've only ever taken one caribou. That was in the early 1960s, before the development got really heavy the way it is now. I wouldn't take one now, because there are not enough of them. Conservation is also our way of life.
18. Caribou hide is very good. My personal use is to stretch it out and clean it off. I carried it with me when I travel by dog sled and put it on the ground in the tent when I camped in the winter. It is really good for insulating someone from the ground and keeping them warm. If you have a caribou hide, you won't feel the cold.

19. You can make a lot of tools out of the bones, like tanning tools. You can make a knife handle out of the horn, and it will fit perfectly in your hand.

Caribou Habitat and the Impact of Development

20. Caribou are always moving. They eat a bit in one area and then they move on. They do a vast circuit and then they do it again. They only live in the boreal forest in the wet lands.

21. I've only seen three or four together at a time, at the most. That's just the way caribou are. That's the way they survive. If they get to be a bigger size herd, like around eight, then they'll splinter off into two groups and find a new home range. That's one of the survival tactics they use, so that they always have food.

22. From my observations, the linear development, cut line after cut line, winter exploration and sonic booms are pushing the caribou out their home ranges. Caribou spook easily and if there's development, then they all get chased away.

23. I'm not hearing reports about people seeing them in the Richardson Backcountry very often anymore.

24. Most of the ACFN hunters that I've spoken to don't hunt the caribou anymore, because we know that their numbers are declining, mostly due to development.

25. The people of Fort McMurray think the Richardson Backcountry is their playground and there are hundreds of snowmobiles in the winter and quads the rest of the year. This disturbs the caribou as well.

26. We knew 35 years ago that the caribou were in decline. Development had started already. The oil sands had already started in 1964. We didn't realize at the time that the oil sands would cause such destruction and pollution.

27. The destruction of the habitat starts with the exploration and the cut lines. The cut lines are narrower now than when they started out, but they still destroy the habitat.

28. The oil exploration happens in the wet lands, which is where the caribou live.
29. The government and the development can only push us so far up in our traditional territory. We are literally being pushed up and away by the development. This winter at Jackfish and south of there they are doing exploration for uranium. If they develop the south of our traditional territory, in the Richardson Backcountry, we will not be able to feed ourselves. Lots of ACFN people go south of Lake Athabasca to get their wild meat. Life on the reserve cannot sustain itself without the wildlife in the south. There are too many of us and we will not have enough to eat.
30. When we were moved off the land to Fort Chipewyan, we could no longer feed ourselves, and then we were dependent on welfare. We were displaced. It seems like the government is trying to make sure that we don't use those lands. Like they are trying to make sure that we can't go there to live as we always have. This displacement is still happening with this development.

Traditional Practices and the ACFN Traditional Territory

31. I have treaty rights guaranteed by the Constitution. Those rights mean that I have the ability to hunt, including for caribou and bison, to feed myself. If these animals are gone, then that infringes our treaty rights, it infringes the rights of all the ACFN people.
32. We have a right to hunt in our traditional territory. If it's developed, or if we can't access the areas or animals that we need, then we have to go elsewhere to hunt. We have to include the cost of gas and our time. What's it going to cost to get caribou meat now? \$2000 to go somewhere else? The cost of meat has just gone up.
33. I wonder how long I will be able to practice my Treaty rights in my traditional territory. Not for long.
34. The government took my generation off the land. The young people are born in Fort Chipewyan now. They have jobs. They might go out to the land on the weekends, but they can't live in the bush now like we used to. If we went out in the bush in our

traditional territory and put up a cabin and tried to live the way we used to, the way I did when I was young, someone would come kick us off and say that we were on someone else's lease.

35. We're losing contact with the land. It seems like the government doesn't want us to have contact with the land.

36. We are working to fight against this. We are still teaching our young. We have to fight for our young.

37. Our culture is being on the land. Being on the land, surviving on the land, is what our culture is. I can show someone how to set a trap in town, but we need to be out on the land setting traps to learn the culture.

38. We've lost too much already. We had put our faith in the government that they would protect our lands and wildlife so that we could practice our rights and live off the animals. If we have no land left, there's nowhere for us to go to practice our rights. I can't and don't want to go to BC to hunt. It's getting impossible.

39. We're losing the lands that we need to survive and practice our rights. Creator put us on these lands and gave us all the wildlife we need to survive. Our task is to be good stewards of the land. We've tried to live that way, but from under our feet, the government has given so many permits away that we no longer have the ability to stop these lands from being developed. This is why we're going to court.

Importance of Protecting the Caribou Habitat


40. It is important that the government protect the full ranges of the woodland caribou. They have a duty to do so. The caribou will be gone if they don't act now.

41. My life and my children's, my grandchildren's and great-grandchildren's lives will be impacted if the government doesn't protect this habitat. We need this land to practice our God-given rights and the rights given by treaty.

42.I hope the judge will understand and hear the voice of the elders when I speak about my children and grandchildren.

43.I would like the judge to hear that we cherish our land. We need it so that our children can use it in the future. Only the law can do that.

SWORN BEFORE ME at)
Fort Chipewyan in the Province of)
Alberta this 1st day of October,)
2010.)



A Commissioner for the Taking of)
Affidavits in British Columbia/Notary Public)



Patrick Marcel

LEIGH ANNE BAKER
WOODWARD & COMPANY
Barristers & Solicitors
2nd Floor - 844 Courtney Street
Victoria, BC V8W 1C4

Appendix 3 - Supplementary Submission of Athabasca Chipewyan First Nation to the Federal Statutory Review of the Species at Risk Act, April 13, 2010

Supplementary Submission of Athabasca Chipewyan First Nation to the Federal Statutory Review of the Species at Risk Act

April 13, 2010

Introduction

This submission is being made further to the April 9, 2010 submission by Athabasca Chipewyan First Nation (ACFN) to the Federal Statutory Review of the Species at Risk Act. The April 9th submission included an introduction to ACFN, as well as a brief scientific report on woodland caribou in the Treaty 8 area. This submission is intended to provide additional information on the concerns and interests of ACFN in respect of woodland caribou and wood bison.

Woodland Caribou

Woodland Caribou are in decline and are vulnerable to impacts from increased habitat fragmentation, edge effects, and human-caribou interactions that result from the cumulative Industrial footprint in the Lower Athabasca Region of Northeastern Alberta. Linear disturbances have negative effects on woodland caribou populations as a result of increased direct mortality, increased susceptibility to poaching, altered predator-prey dynamics, habitat avoidance, and increased energy expenditure. Extirpation of woodland caribou in the Regional Municipality of Wood Buffalo (RMWB) is predicted within the next 100 years.¹

ACFN members recognize that woodland caribou are at risk and, following age old practices of traditional resource management, limit their harvest accordingly. ACFN considers woodland caribou as an indicator species for the ecological integrity of their Traditional Lands. If woodland caribou cannot persist in the industrialized landscape, ACFN feels that their ability to practice their rights and traditional uses will also be lost.

Establishing protected areas that would contribute to woodland caribou conservation in the RMWB is one strategy, that, in combination with access management and minimizing linear footprint, could help to conserve woodland caribou in the RMWB.² While Alberta is undertaking a land use planning exercise for the Lower Athabasca Region (which includes the RMWB), there is little evidence to suggest that the protection of woodland caribou is being given the weight which it should be. Instead, it is likely that there will be trade-off between bitumen extraction and the maintenance of all woodland caribou herds in the region. This trade-off will occur without proper consultation with First Nations.

ACFN is pursuing funding from the Federal Government to conduct a traditional knowledge-based study about the woodland caribou - more information about the concerns and interests of ACFN in regards to woodland caribou will be forthcoming, should the study proceed.

¹ Cumulative Environmental Management Association. 2008. Terrestrial Ecosystem Management Framework for the Regional Municipality of Wood Buffalo, June 5, 2008, p. 30.

² Ibid, p. 30

Bison

ACFN members consider bison a culturally significant species, and continue to harvest, as they have throughout generations, the bison from herds that range to the south of the Wood Buffalo National Park (WBNP). According to ACFN Elders there are herds outside of WBNP that have been there “since living memory”. These herds are in the vicinity of ACFN’s Poplar Point (IR 201G) and Point Brule (IR 201F) reserves.

One herd is on the west side of the Athabasca River in the area of Ronald Lake, and one on the east side of the Athabasca River along the Firebag River. According to ACFN Elders, these bison herds have been hunted “since living memory” and are not herds that originated from the relocation of Plains Bison to Wood Buffalo National Park. ACFN Elder Pat Marcel can recount stories of his mother and his grandmother, who lived at the “micro-villages” near Poplar Point and Point Brule, about their use of the bison from these herds. Current ACFN hunters have also stated that they consider the Ronald Lake herd that they harvest to be “pure” woodland, and not plains hybrids. A non-ACFN trapline holder who has encountered the Ronald Lake herd on his trapline has told ACFN IRC staff, quite independently of conversations with ACFN Elders, that there are two herds in that area: one which is a Plains-hybrid herd, and another that is a “pure” Wood Bison herd.

The bison of these herds currently are hunted for subsistence purposes by ACFN members who also continue to practice traditional management techniques in respect to bison harvesting. The members that harvest these bison prefer traditional foods to store-bought foods. Traditional foods, such as wild meat, are known to have more health qualities far above supermarket foods, and the consumption of traditional foods as part of a healthy diet is important for preventing diabetes in Aboriginal communities. When a bison is harvested by one member, the meat of the bison is shared amongst family and friends – this sharing is an important cultural practice linked to community cohesiveness and is a key value in Dene culture. The acts of harvesting are important for the transmission of traditional knowledge to younger ACFN members and the continuation of the culture. These are only a few examples of the relationship of the Bison to ACFN rights and community well-being. ACFN is pursuing funding from the Federal Government to conduct a study about these Bison herds – more information about the relationship between the Bison and ACFN’s rights and well-being will be forthcoming, should the study proceed.

ACFN members have observed wasteful and disrespectful harvesting practices by non-Aboriginal recreational and sports hunters. For example, they have witnessed bison carcasses where only the prime cuts of meat have been taken, leaving the rest to waste. As well, there are accounts of observing hunters accessing the bison by use of helicopters.

While ACFN members continue to manage their use of the herds to ensure the continuation of these life-giving creatures within ACFN Traditional Lands, the Government of Alberta itself does not regulate non-Aboriginal bison harvest. ACFN has expressed concern on numerous occasions to the Province about the need to regulate bison hunting, and restrict non-Aboriginal sport hunting. In the 1920s, Canada introduced plains bison to Wood Buffalo National Park, leading to the hybridization of the plains bison and non-native livestock diseases (brucellosis and bovine

tuberculosis) were introduced. ACFN's harvest of bison in WBNP was disallowed, leading to impacts in the community at that time.³ Now, due to concerns about the spread of disease, Alberta will not regulate the harvest.

Alberta recognizes that some bison populations outside of the Park have been there for a very long time and are not likely the result of the plains bison introduction. While Alberta professes to envision a future where wild bison may repopulate their former range in northern Alberta, Alberta wildlife managers hold that the diseases associated with bison herds within WBNP create risk of infection for bison outside of WBNP. Part of the Alberta strategy to minimize the risk of the spread of disease is by maintaining open entry into harvest of the bison. The Alberta position is that regulating bison hunting and increasing their population in the area will increase the risk of the spread of disease throughout uninfected herds.⁴

In addition to concerns about harvesting, ACFN is also concerned about the threat of oil sands development to the ecology of the habitat upon which the bison depend. For example, the Ronald Lake herd is threatened by oil sands development. While the main range for the herd is still undeveloped, and therefore relatively inaccessible for recreational hunters, the proposed Shell Pierre River Mine and the proposed UTS Frontier and Equinox Mines will open new access into the area, and will take up the bison habitat. Furthermore, these developments will impact the ability of ACFN members to harvest the bison, as result of limiting access (due to access management policies), through increased competition (should non-Aboriginal sports hunters gain increased access), and by reducing the abundance of the bison, and possibly by increased concerns about contamination of the meat as a result of proximity to industrial development.

What must be done?

While the Federal Government reviews the SARA, decisions on developments that will impact the woodland caribou and wood bison continue to be made, industrialization of the region continues, and ACFN rights and traditional uses continue to be threatened. ACFN is currently preparing submissions for the Alberta Lower Athabasca Regional Plan, which will include requests for preservation of bison herd habitat, and woodland caribou habitat, in order that these animals will be protected and ACFN's rights in respect to them may be sustained. While ACFN sees opportunities to work within these planning and policy processes, there is fear that if immediate action is not taken to protect SARA species then it may be too late to address the cumulative impacts to these species, as well as ACFN's rights. ACFN wishes to be consulted on what should be done to preserve these species and their habitats and is very open to working together with the Federal Government to find a solution. Until such a solution can be found, perhaps a moratorium on oil sands development should be considered.

³ Fumoleau, R. 1975. *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11 1870-1939*. McClelland and Stewart Limited: Toronto, ON; Weatherell, D.G., and R.A. Kmet. 2000. *Alberta's North: A History, 1890-1950*. Edmonton, AB: Canadian Circumpolar Institute Press, the University of Alberta Press and Alberta Community Development.

⁴ Email communication dated December 14, 2009 from Tim Burggraaff, Resource Management Advisor, Waterways District, Alberta Sustainable Resources Development to Nicole Nicholls, Project Manager, Athabasca Chipewyan First Nation Industry Relations Corporation, Ft. McMurray, Alberta.

Appendix 4 – Letter dated February 18, 2009 to ASRD from ACFN IRC

**ATHABASCA CHIPEWYAN FIRST NATION
INDUSTRY RELATIONS COPORATION**

110B-9816 Hardin Street, Fort McMurray, Alberta T9H 4K3 Phone (780) 791-3311 Fax (780) 791-3632
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February 18, 2009

Tim Burggraaff
Resource Management Advisor, Lac La Biche Area
Consultation and Aboriginal Relations Unit
Alberta Sustainable Resource Development
2nd Floor, Provincial Building
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Lac La Biche, Alberta, T0A 2C0

Tel: 780-623-5455
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Email: tim.burggraaff@gov.ab.ca

Re: ACFN IRC – ASRD Meeting in Edmonton on January 26th, 2009

Dear Tim:

Thank-you for your email on February 4th, 2009 that provides information on some of the items we spoke about on the January 26th meeting in Edmonton. We appreciate your response. Your email is attached to this letter for reference. Because this letter is lengthy, I have used topical headings to improve readability.

Wolf Survey

Your email mentions that Fish and Wildlife is conducting wolf surveys to assess potential changes in wolf numbers and their possible effects on moose, deer and caribou numbers. Wolves, as well as the ungulates with which they have a relationship, are culturally significant creatures in the traditional Denesuline cosmology, and we would respectfully like to request that ACFN traditional scientists have an opportunity to inform, and perhaps participate in, that study. It is well known that local and traditional knowledge can significantly improve assessments of wildlife populations and health. It is ACFN's position that any such studies occurring within ACFN traditional lands should include consultation with ACFN.

Caribou Protection Plans

On the note of culturally significant species, something that was discussed in at the January 26th meeting but that was not addressed in your email was an issue regarding caribou management plans. I would like to clarify the issue here.

Recently, we had reviewed EnCana's Borealis Caribou Protection Plan. The plan noted that "the Borealis 2D program will consist of approximately 36.0 km of 2D lines *of which only* 3.0 km is located within the caribou range" (p. 7;12; emphasis added). This wording, whether intentionally or inadvertently, downplays the degree of potential impact and does not help to understand the cumulative effect of linear disturbance in caribou habitat. It would be more useful to know the cumulative amount of linear disturbance within the caribou range and to compare that to a threshold.

Second, the plan states that "disturbed sites will be *restored* as near as *reasonably possible* to the original land capability" (p. 13, emphasis added). Is it true that areas will be restored, or is the intent to *reclaim*? We understand the term restore to mean that the land will be put back in its original predisturbance state. Please clarify if SRD accepts the intention to only reclaim and if so, only to the extent "reasonably possible". We understand that legal requirement is to reclaim to the original land capability – not to reclaim to a lesser standard, And what is the "equivalent land capability" contemplated in Encana's plan?

In a previous letter to EnCana, which was copied to your department, ACFN has expressed concern about the cumulative effects of linear disturbance on woodland caribou populations, which have now declined below their range of natural variation. It is ACFN's request that any future caribou protection plans seek to incorporate ACFN-defined thresholds and recommended management strategies.

More critically, is there a plan by the GoA to restore caribou populations and prevent any further erosion of their habitat and its productivity? The ACFN is very concerned about the very real imminent potential extirpation of the caribou.

Bison

Although this issue was on the agenda for the January 26th meeting, we were not able to attend to it so I am bringing it forward now. ACFN members hunt bison for sustenance purposes and have witnessed active buffalo herds near the Poplar Point Reserve. ACFN members also have encountered numerous non-Aboriginal hunters who have said they are hunting bison. ACFN members are concerned about the lack of protection for the bison and request that, within ACFN traditional lands, ASRD restrict the hunting of bison by non-Aboriginal hunters.

LOC Applications and Access Management

ACFN is very concerned about access management within ACFN traditional lands, including not only the use of access, but the opening of new access into areas that were previously relatively inaccessible. Please be advised that ACFN expects to be consulted on any LOC applications concerning access roads because this is causing a cumulative significant erosion of the ACFN's treaty rights.

In addition, can you please provide more information on the criteria that Integrated Land Management staff would use to justify approval of excessive clearing?

As well, in our January 26th meeting, there was some talk about the Waterways Access Management Plan. We respectfully request consultation regarding this access management plan and would also like to request that you provide us with a copy.

Cumulative Effects

ACFN is concerned about the cumulative effects of industrial development on the landscape and ecology of ACFN traditional lands. It could be argued that the decisions being granted to take up land by these many small projects reflect a policy vacuum around the regulatory management of cumulative effects. Considering that this issue has been fairly well represented in media and Albertan academia over the last few years, there is no doubt that the Government of Alberta has been aware of the potential cumulative effects of these project-specific approvals. The Land Use Framework acknowledges that cumulative effects must be incorporated into the land use planning and decision-making regime under the regional plans that will be developed over the coming years. We acknowledge that your department has recognized that the Land Use Framework will help to bring cumulative effects considerations into decision-making. That said, however, it is easy to speculate that on-going lack of regulatory management of cumulative effects in the interim between recognition that cumulative effects are an issue and an eventual plan that will deal with them, reflects an implicit policy decision that such effects do not matter. It is the position of ACFN that any project-specific approval should be considered only within on-going substantive discussions around the implications of specific projects in relation to the potential cumulative effects on the Aboriginal and Treaty Rights of ACFN. With the information from CEMA (SEWG) in relation to declining wildlife numbers of key species, we are concerned that the continuing incremental approach to project approvals is resulting, or will result in the near future, in critical ecological thresholds being exceeded, thereby infringing the ACFN's treaty rights.

21-day Consultation Window

Regarding the 21-day consultation window stipulated in the *Alberta's First Nations Consultation Guidelines on Land Management and Resource Development*, we would like to reiterate here that ACFN does not accept that the 21 day response window is valid or binding upon ACFN for several reasons. As you know, the ATC chiefs have rejected the application of these guidelines in to its member First Nations because they were not consulted about them and they do not meet the legal requirements for consultation, The Alberta Consultation Guidelines do not supersede or replace the Constitutional Law on the Duty to Consult. Adequate consultation imposes an obligation to ensure that a First Nation is provided with all necessary information in a timely way so that the First Nation can have an opportunity to express their interests and concerns, and to ensure that their concerns are seriously considered and, where possibly, explicitly integrated into the proposed action (*Mikisew v, Canada* SCC 2005 69). There is also a duty on the government to gather full information as to the First Nation's views on the proposed decision or activity and to avoid imposing unreasonable time frames upon Aboriginal participants in the process (Potes, Passelac-Ross and Bankes, 2006).

You noted that a possible solution that SRD would support is for ACFN to send a quick letter acknowledging receipt of information, stating that it is under review and what additional info is needed so ACFN can properly respond. That may be fine, but you should also understand that First Nations are dealing with capacity issues and the few staff that make up a consultation office are dealing with the same volume of applications and consultation activities that the departments of SRD, as well as Alberta Environment, are. "No response" within an arbitrary deadline can hardly be considered an indication that there are no issues of concern and there may be no response because the information has become buried in the hundreds of emails that come in daily. I would like to point out that the onus is on the Crown to ensure that a First Nation has received adequate information and that, perhaps, a variety of communication methods should be used to ensure that communication occurs prior to the passing of a deadline. It seems unacceptable that the Alberta Government would impose a 21 calendar day timeline and not also require that near the end of the 21 day period that the proponent follow-up to ensure that there are no issues of concern, rather than just allowing the timing window to elapse. Furthermore, issues of concern that are brought forward after the 21-day response window is complete cannot be considered as non-existent.

Moreover, as it is common that consultation on larger projects will take place over months, and even years, the 21-day "window" may not concern substantive discussions, as began on the consultation regarding the EnCana Winter Drilling Program (where the issue became how concerns presented after the 21-day window had passed), but rather only the obligation to provide continuing notice. Although it is the practice of the Government of Alberta to consider seismic and exploratory drilling projects in isolation, these types of projects are the front-end activities for larger, future planned projects.

Please be advised that ACFN does not consider that "notification" (as per page six of the Guidelines) is complete until ACFN has received:

- the .shp files of all proposed development locations, including all relevant contextual information (e.g., attribute description, datum, meta-data)
- project plan maps in hardcopy format
- any management plans (e.g., caribou protection plans) or assessments (e.g., environmental field reports) associated with the application, if prepared
- information regarding how the proposed activity/project fits into longer term development plans
- information regarding the specific regulatory approval being applied for
- whether or not the proposed activities will result in ecological thresholds being approached or exceeded

Other information that is option, but would greatly assist in our review of a project includes:

- current areal or satellite imagery for the project development area(s)
- Alberta vegetation index data for the project development area(s)

We also require that we be provided, for our review and comment prior to a decision being taken on an application, all records of consultation/communication between EnCana and ACFN.

Please let your Forest Officers know that ACFN requires this information. Not only can they provide this information to proponents, the Forest Officers should review consultation files on applications with these information requires in mind.

Improving Communication and Consultation

As you noted in your letter, we discussed the idea of a monthly consultation meeting where we could discuss all applications received for the month. I acknowledge the limitations to this approach for streamlining the consultation process and I also agree that it would be beneficial for ACFN IRC and ASRD to meet more often to discuss issues that ACFN has with consultation.

In a letter to EnCana, dated November 15th, 2007 and copied to your department, ACFN IRC had suggested a “general development plan” approach similar to one used integrated land management and in the forestry sector (area operating agreements). The approach would require that a proponent (or group of proponents) to provide ACFN IRC with a more comprehensive “general development plan” that would outline their overall proposed exploration, drilling, production, pipeline, and access scenarios and options within ACFN traditional lands. In order to retain flexibility, and to acknowledge that development plans for different development projects and types (e.g., seismic versus exploratory drilling versus pilot project, etc.) are often not designed in a comprehensive or time-coordinated fashion this general development plan would be recognized as preliminary and flexible. The GDP could be submitted annually, and throughout the year, could be amended. I would also like to take this opportunity to suggest that it would be most helpful if all Proponents of industrial development projects within ACFN traditional lands would work together to develop a cumulative development plan that could be presented to us on a yearly, or bi-annual basis. The point is to get an idea of how much development to expect, where to expect it, and to see the entire potential proposed footprint all together. We would like to work on the details of what this GDP could include, when it would be submitted, etc., with EnCana (and other Industry proponents).

We thought that this idea, although just in conceptual development, could help to streamline the consultation process, assist ACFN IRC in planning and resourcing so that we can respond more efficiently in this consultation process, and to enable ACFN to have a better understanding of the cumulative footprint of project development. Such a concept may also be beneficial to your department, especially in terms of understanding potential cumulative effects, as well as for managing work flow for your staff.

It would also greatly assist the ACFN (and SRD) if a specific time period was set by SRD by which all companies are required to submit all of their applications for exploration, drilling and other activities for the following year.

In addition, thank-you for considering our suggestion that ACFN members accompany ASRD staff on field inspections as a way of improving communication and understanding. We look forward to hearing back about the possibilities to do so.

Conditions of Approval

Regarding what you referred to as “SRD requiring environmental monitors from ACFN”, I would like to re-state what was talked about on January 26th. We had asked whether ASRD could, as a condition on an approval, include the need to involve environmental monitors from ACFN where this was requested by ACFN as a way to address concerns about effects to Aboriginal and Treaty Rights. It is interesting that your department would say that this would be acceptable only if it was agreed to by both parties. Regulation, and the need to issue conditions on an approval, imply some degree of requirement to stipulate actions that a developer would otherwise not choose to do. Are you not the regulator, who has, as part of their duties, a fiduciary obligation towards First Nations? In regards to such a condition being outside of your mandate, other government agencies (for example, Department of Fisheries and Oceans) have found a way to incorporate such conditions, notwithstanding a narrow interpretation of mandate.

The topic of ensuring that conditions of approval can include some reference to further involvement of First Nations in the planning and development of a project is also germane to the concern that we explained in the January 26th meeting regarding “closing the loop” on consultation. The following example should illustrate the concern on “closing the loop”. Let’s consider a case where, during consultation, ACFN identifies that a proposed development overlaps a previously recorded TLUOS site. As such, ACFN requests that a field-based assessment of the development take place and the developer agrees to support such a study. It is possible that the regulator reviewing this consultation record could decide that adequate had occurred and issue the approval. However, it is ACFN’s position that consultation should not be considered complete until the field-based assessment is complete, has been reported upon, and any issues of concern identified as a result of that field-based assessment have been addressed (for example, by agreeing to shift development boundaries to avoid an area of concern). Furthermore, the means by which the issue of concern will be addressed by the proponent should be included in the conditions of approval issued by your department.

ACFN Trap Lines

ACFN members have brought forward a concern regarding the trap line application process. We would like to request further information on the steps necessary to apply for a trap line, including the necessary training requirements. To assist ACFN members in navigating the application process, would it be possible to hold the training sessions in the community of Fort Chipewyan and/ or Fort McMurray?

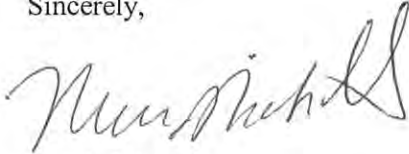
Cabins / Lodges in ACFN Traditional Lands

ACFN members have witnessed cabins and lodges that have been constructed within ACFN traditional lands without any consultation with ACFN having taken place. Can you please provide information to us on how your department regulates the construction of back-country cabins and lodges within ACFN traditional lands, including information on the application process, if any. Please be advised that ACFN considers the construction of back-country cabins and lodges to have the potential to adversely impact ACFN Aboriginal and Treaty Rights, and therefore, consultation is required prior to approving any such activities. Information required by ACFN upon notification of such activities includes the UTM coordinates of the proposed cabin/lodge location. As well, ACFN requests that ASRD provide the coordinates of any existing cabins and lodges within the Waterways Area.

Closure

Despite what the length of this letter may indicate, I felt that we had a very positive meeting on the 26th and I look forward to working with you to build a positive relationship into the future.

Sincerely,

A handwritten signature in cursive script, appearing to read "Nicole Nicholls".

Nicole Nicholls
Project Manager – Government Relations

cc: Rick Bennett, Director, ACFN IRC

Appendix 5 - Notice of Application



Court File No. T-1437-10

FEDERAL COURT

BETWEEN:

ALLAN ADAM on his own behalf and on behalf of all other members of Athabasca
Chipewyan First Nation; ATHABASCA CHIPEWYAN FIRST NATION;

ALPHONSE LAMEMAN on his own behalf and on behalf of all other members of
Beaver Lake Cree Nation; BEAVER LAKE CREE NATION;

HARRY SHARPHEAD on his own behalf and on behalf of all other members of
Enoch Cree Nation; and ENOCH CREE NATION

Applicants

AND:

MINISTER OF THE ENVIRONMENT and
ATTORNEY GENERAL OF CANADA

Respondents

NOTICE OF APPLICATION

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED by the applicants. The relief
claimed by the applicants appears on the following pages.

THIS APPLICATION will be heard by the Court at a time and place to be
fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of
hearing will be as requested by the applicants. The applicants request that this
application be heard at **Edmonton, Alberta**.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any
step in the application or to be served with any documents in the application, you or a

solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicants' solicitor, or where the applicants are self-represented, on the applicants, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: SEP 08 2010

Issued by: **ORIGINAL SIGNED BY
JENNIFER SORVISTO
A SIGNÉ L'ORIGINAL**

Address of
local office: Federal Court of Canada
Scotia Place – Tower 1
10060 Jasper Avenue
Edmonton, Alberta

TO:

MINISTER OF THE ENVIRONMENT
c/o the Attorney General of Canada and the Department of Justice
284 Wellington Street
Ottawa, ON K1A 0H8
Tel: (613) 992-4621
Fax: (613) 990-7255

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the

day of SEP 08 2010 A.D. 20

ATTORNEY GENERAL OF CANADA
and Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8
Tel: (613) 992-4621
Fax: (613) 990-7255

Dated this SEP 08 2010 day of SEP 08 2010 20

Jennifer Sorvisto
**JENNIFER SORVISTO
REGISTRY OFFICER
AGENT DU GREFFER**

APPLICATION

This is an application for judicial review in respect of the failure or refusal of the federal Minister of Environment (the “Minister”), on or before August 30, 2010, to discharge his statutory duties to protect and provide for the recovery of the boreal population of woodland caribou (*Rangifer tarandus caribou*) (“woodland caribou”) under the *Species at Risk Act*, S.C. 2002, c. 29.

In particular:

- a) the Minister has failed to prepare a recovery plan for woodland caribou within the time period mandated by the *Species at Risk Act*;
- b) in addition, or in the alternative, the Minister has failed or refused to exercise his duty pursuant to s. 80 of the *Species at Risk Act* to recommend that the Governor in Council (“Cabinet”) make an emergency order to provide for the protection of woodland caribou in northeastern Alberta.

The applicants make application for:

1. An order declaring that the Minister has failed to prepare a recovery strategy for woodland caribou and to include it on the Species at Risk public registry within the time period mandated by section 42(2) of the *Species at Risk Act*.
2. An order in the nature of *mandamus* compelling the Minister to comply with his duties under s. 80(2) of the *Species at Risk Act* to recommend that Cabinet make an emergency order to provide for the protection of woodland caribou in northeastern Alberta.
3. In addition or in the alternative to the relief requested in paragraph 2, an order or orders:
 - a. declaring that the Minister’s delay in responding to the applicants’ demand that the Minister make a recommendation pursuant to s. 80(2) of the *Species at Risk Act* constitutes a refusal to make such a recommendation;
 - b. declaring that the Minister’s failure or refusal to recommend that Cabinet make an emergency order to provide for the protection of the woodland caribou in northeastern Alberta is unlawful or unreasonable or both; and/or
 - c. declaring that, in failing or refusing to recommend an emergency order, the Minister erred in law or acted unreasonably, or both, by failing to consider the following factors adequately or at all:
 - i. the applicants’ Treaty Rights (as defined below);

- ii. the honour of the Crown;
 - iii. the Minister's ongoing breach of his mandatory obligation to prepare a recovery strategy for woodland caribou and include it on the Species at Risk public registry within the time period mandated by section 42(2) of the *Species at Risk Act*;
 - iv. the potential impacts on the applicants' Treaty Rights from the Minister's ongoing failure to identify and protect woodland caribou critical habitat in northeastern Alberta; and/or,
 - v. the purposes of the *Species at Risk Act*, which include: to prevent wildlife species from being extirpated or becoming extinct; and to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity.
4. Interim and/or interlocutory relief pending final resolution of the issues raised in this application.
 5. If this application is successful in whole or in part, an order that the respondents shall pay costs to the applicants; if this application is dismissed, an order that the applicants shall not be required to pay costs to the respondents.
 6. Such further and other relief as to this Honourable Court may seem just.

The grounds for the application are as follows:

Parties

1. The applicants Allan Adam, Alphonse Lameman and Harry Sharphead (collectively, the "Representatives") are the elected Chiefs of Athabasca Chipewyan First Nation, Beaver Lake Cree Nation and Enoch Cree Nation, respectively. They bring this action on their own behalf and on behalf of all other members of their respective bands.
2. The applicants Athabasca Chipewyan First Nation, Beaver Lake Cree Nation and Enoch Cree Nation are bands within the meaning of the *Indian Act*, R.S.C. 1985, are aboriginal peoples within the meaning of s. 35 of the *Constitution Act, 1982*,¹ and are the successors to aboriginal groups that signed or adhered to Treaty 6 or Treaty 8 (together with the Representatives, the "Applicant First Nations").

¹ Full cite: *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

3. Under the terms of Treaty 6 or Treaty 8, as modified by the *Natural Resource Transfer Agreement*,² the Applicant First Nations have (at a minimum) the constitutionally-protected right to hunt woodland caribou for sustenance on all unoccupied Crown lands, and on all other lands to which they have a right of access, within their respective traditional territories (the “Treaty Rights”). The Applicant First Nations have traditionally hunted woodland caribou as a preferred means of exercising their treaty right to hunt.
4. The Applicant First Nations share the interest of all Canadians both in the survival and recovery of woodland caribou, and in the Minister of Environment’s compliance with his mandatory duties under the *Species at Risk Act*.
5. In addition, the Applicant First Nations have a direct and substantial interest in the survival and recovery of woodland caribou in Canada, and particularly (pursuant to their Treaty Rights) in the survival and recovery of woodland caribou in Treaty 6 or Treaty 8 lands in Alberta. The Applicant First Nations have a direct interest in the health, survival and recovery of the following woodland caribou local populations or herds: Alberta Cold Lake Air Weapons Range herd; Alberta East Side Athabasca River herd; Alberta West Side Athabasca River herd; Alberta Red Earth herd; Alberta Richardson herd; and Alberta Slave Lake and Nipisi herds (collectively, the “Herds” or the “Northeastern Herds”).
6. The federal Minister of Environment is the “competent minister” under the *Species at Risk Act* with respect to woodland caribou, and is generally responsible for the administration of the *Species at Risk Act* with respect to woodland caribou.
7. The Attorney General of Canada is named as a representative of Cabinet and, pursuant to s. 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, as a representative of the federal Crown. The Minister and the Attorney General of Canada are together subject to all the obligations, duties and liabilities which the Crown has or owes to the Applicant First Nations pursuant to the Treaty Rights.

Status of woodland caribou and of the Northeastern Herds

8. In 2002, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) designated woodland caribou as a “threatened” wildlife species, which means that it is “likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction”. COSEWIC is a committee of experts established under the *Species at Risk Act*

² Full cite: *Natural Resource Transfer Agreement* (enacted by the *Constitution Act 1930* (U.K.) 20-21 George V, c. 26).

that carries out its functions on the basis of the best available information on the biological status of a species, including scientific knowledge, community knowledge and aboriginal traditional knowledge

9. Woodland caribou are listed as “threatened” under Schedule 1 of the *Species at Risk Act*.
10. Each of the Northeastern Herds has been rated as “not self-sustaining” in a 2008 Environment Canada report, the *Scientific Review for the Identification of Critical Habitat for Woodland Caribou* (*Rangifer tarandus caribou*), *Boreal Population, in Canada* (the “*Scientific Review*”). This means that there is a probability of 50 percent or less that each of the Northeastern Herds will continue to exist over the long term without intensive intervention.
11. The *Scientific Review* reports the population trend for two of the Northeastern Herds as “rapidly declining”, two as “declining” and three as “unknown”.
12. According to the *Scientific Review*, the likely root cause of decline in the population and habitat conditions of the Northeastern Herds is landscape disturbance, for example from seismic lines, roads and well-sites.
13. The Northeastern Herds face serious threats to their survival or recovery as a result of landscape disturbance from existing and planned industrial development and activities in their ranges.
14. The *Scientific Review* recommends (at a minimum) that the current range conditions and extent for the Northeastern Herds cannot be allowed to deteriorate any further, and that the entire current ranges of the Northeastern Herds should be set aside as their critical habitat to restore the potential for self-sustaining populations in those Herds.

Minister’s Duty to Prepare a Recovery Plan and Failure to Do So

15. Pursuant to s. 37(1) of the *Species at Risk Act*, the Minister must prepare a recovery strategy for woodland caribou. Pursuant to s. 41 of the Act, a recovery strategy must address threats to a listed species’ survival, including habitat loss, and identify the critical habitat of the listed species to the extent possible, based on the best available information.
16. Pursuant to s. 42(2) of the *Species At Risk Act*, the Minister was required to include the recovery strategy for woodland caribou on the Species at Risk public registry by June of 2007.
17. As of the date of this application, the Minister has failed to prepare a recovery strategy for woodland caribou and to include it on the Species at Risk public registry.

Applicant First Nations' Demand for an Emergency Order

18. By letter of July 15, 2010, the Applicant First Nations clearly informed the Minister that, *inter alia*:

- a) the Applicant First Nations have a direct interest in the health, survival and recovery of the Northeastern Herds;
- b) the federal government has more than enough information to identify and protect the critical habitat of the Northeastern Herds;
- c) during the Minister's ongoing delay in preparing a recovery strategy and in protecting critical habitat, populations of woodland caribou in northeastern Alberta have continued to decline;
- d) woodland caribou will likely be extirpated from most of northeastern Alberta, and in many other parts of Canada, unless conservation actions are implemented immediately, including full protection of remaining woodland caribou ranges in northeastern Alberta from any further industrial development; and,
- e) the federal government cannot rely on the Alberta provincial government to conserve the Northeastern Herds, as the Alberta government has taken no active steps to prevent the further decline of, or to recover, woodland caribou in northeastern Alberta.

19. In their letter of July 15, 2010, the Applicant First Nations:

- a) notified the Minister that his continuing failure to prepare a recovery strategy for woodland caribou made it necessary for the federal government to provide interim emergency protection for the populations and ranges of the Northeastern Herds; and,
- b) demanded an emergency order under s. 80 of the *Species at Risk Act* that identifies the entire current range of woodland caribou in northeastern Alberta as "the habitat that that is necessary for the survival or recovery" of woodland caribou in that area, and that prohibits any further industrial activity or development in woodland caribou range.

20. The Applicant First Nations gave the Minister 45 days from the date of the letter to comply with his duties under s. 80(2) of the *Species at Risk Act*.

Minister's Duty to Recommend an Emergency Order

21. Under s. 80(2) of the *Species At Risk Act*, the Minister must recommend to Cabinet that it make an emergency order to provide for the protection of a listed wildlife species if the Minister is of the opinion that the species faces imminent threats to its survival or recovery.
22. When deciding whether to recommend an emergency order to protect the Northeastern Herds, the Minister must adequately consider:
 - a. the Applicant First Nations' Treaty Rights;
 - b. the honour of the Crown;
 - c. the Minister's ongoing breach of his mandatory obligation to prepare a recovery strategy for woodland caribou and include it on the Species at Risk public registry within the time period mandated by section 42(2) of the *Species at Risk Act*;
 - d. the potential impacts on the applicants' Treaty Rights from the Minister's ongoing failure to identify and protect woodland caribou critical habitat in northeastern Alberta; and/or,
 - e. the purposes of the *Species at Risk Act*, which include: to prevent wildlife species from being extirpated or becoming extinct; and to provide for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity.
23. The Minister must exercise his duties and powers under s. 80 of the *Species at Risk Act* in a manner that respects the Applicant First Nations' Treaty Rights and upholds the honour of the Crown.
24. The evidence before the Minister is that the survival or recovery of the Northeastern Herds requires an immediate halt to further landscape disturbance caused by human activities in the current ranges of those Herds.

Minister's Failure or Refusal to Recommend an Emergency Order

25. As of the date of this application, the Minister has failed or refused to recommend to Cabinet that it make an emergency order to provide for the protection of the Northeastern Herds (in this application, a refusal to recommend includes a decision by the Minister to not recommend an emergency order under s. 80 of the *Species at Risk Act*).

Grounds for Seeking Relief Against the Minister

26. The Minister's continuing failure to prepare a recovery strategy for woodland caribou and to include the recovery strategy on the Species at Risk public registry, beyond the time period mandated by section 42(2) of the *Species at Risk Act*, is an error of law or jurisdiction or both.
27. The Minister's failure or refusal to recommend an emergency order in relation to the Northeastern Herds is an error of law or jurisdiction or both.
28. In failing or refusing to recommend an emergency order in relation to the Northeastern Herds, the Minister failed to consider relevant factors adequately or at all, and/or failed to uphold the honour of the Crown.
29. In addition, or in the alternative, the Minister's failure or refusal to recommend an emergency order in relation to the Northeastern Herds was unreasonable in light of the information before him.
30. In the further alternative, the Minister's refusal to recommend an emergency order in relation to the Northeastern Herds was based on an erroneous finding of fact that the Minister made without regard to the material before him.
31. The Applicant First Nations rely on sections 18, 18.1, 18.2 and 18.4(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the *Federal Courts Rules*, the *Species at Risk Act*, and on such additional provisions and grounds as counsel may identify and this Honourable Court may consider.

This application will be supported by the following material:

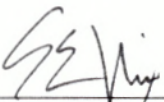
1. Affidavits from members of the Applicant First Nations, to be served.
2. The expert report of Dr. Stan Boutin, already served on the Minister and the Attorney General of Canada by letter of July 15, 2010 from the Applicant First Nations' legal counsel.
3. The record before the Minister and the Department of the Environment.
4. Such further and additional materials as counsel may advise and the Court may allow.

Rule 317 request:

The applicants request that the Minister send a certified copy of the following material that is not in the applicants' possession but is in the Minister's to the applicants, and to the Registry:

1. The record of materials before the Minister and the Department of the Environment to the date of this application concerning the Minister's duties under section 80 of the *Species At Risk Act* with respect to the Northeastern Herds;
2. If the Minister has refused to make a decision to recommend, or has made a decision to not recommend, an emergency order in relation to, or in response to, the letter of July 15, 2010 from the Applicant First Nations' legal counsel, the record of materials before the Minister and the Department of the Environment at the time the Minister made this refusal or made this decision and any written reasons for the Minister's refusal or decision; and,
3. Such further and other material that may be in the possession, power or control of the Minister and the Department of the Environment and which may be relevant to these proceedings.

Date: September 8, 2010



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Sean Nixon
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June 3, 2011

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[Via email]

Dear Mr. Bartesko:

Re: Final Submissions of ACFN and MCFN in Respect of the Draft Lower Athabasca Integrated Regional Plan [draft LARP]

On behalf of Athabasca Chipewyan First Nation (ACFN) and the Mikisew Cree First Nation (MCFN), the ACFN Industry Relations Corporation (IRC) and MCFN Government and Industry Relations (GIR) have reviewed the draft LARP and are submitting issues and concerns to you for consideration) in devising the final LARP. To inform our review of the draft LARP, we commissioned the following reviews, which are enclosed for your consideration:

1. Legal Review of the Draft Lower Athabasca Regional Plan prepared for Athabasca Chipewyan First Nation and Mikisew Cree First Nation by Janes Freedman Kyle Law Corporation (JFK Law).
2. Review of the Draft Lower Athabasca Integrated Regional Plan, prepared for Athabasca Chipewyan First Nation by Management and Solutions in Environmental Science (MSES), May 2011.
3. Review of the Draft Lower Athabasca Integrated Regional Plan, prepared for Mikisew Cree First Nation by Management and Solutions in Environmental Science (MSES), May 2011.

4. Review of the Draft Lower Athabasca Integrated Regional Plan prepared for Mikisew Cree First Nation and Athabasca Chipewyan First Nation by Cizek Environmental Services, June 2011.

In addition, gap analyses were completed comparing recommendations and requests made in previous ACFN and MCFN submissions to the draft LARP. These gap analyses were appended to a letter sent to you dated May 16, 2011, and are appended here as Appendices 1 and 2. We ask you to read the three Reports in detail, as well as the other information that has been submitted by ACFN and MCFN throughout the LARP process.

Overall, our review demonstrates that¹:

- The draft LARP does not reflect the input that was provided to Alberta from ACFN and MCFN over the last three years, first on the Land Use Framework, then on the LARP. It was created without any feedback from Alberta to ACFN and MCFN on the materials that were provided by the First Nations to Alberta, despite consistent requests from both First Nations for such feedback.
- The draft LARP is not based on proper and transparent planning methods and has major data gaps. These data gaps include: past, present and future human disturbance of the land; past and present vegetation, habitat and range maps for fauna; and aboriginal land and resource use requirements. Additional information that is informed by traditional knowledge and reputable, independently reviewed scientific studies is required. Without this information, it is not possible to evaluate trade-offs in any rationale way.
- LARP is not based on ecological analyses for the region that would support the design of conservation areas nor does it provide any rules or criteria on how conservation areas reflect the request by First Nations to protect their rights within or outside of conservation areas of the LAR. Rather, conservation areas (including the 20% target for conservation areas) proposed in LARP appear to be based on avoiding lands leased to industry.
- As currently proposed, the LARP does not support an integral ecosystem that is required to support current and future traditional land uses. For example, LARP does not protect important rivers, tributaries or other water bodies. Alberta has received numerous submissions from both ACFN and MCFN regarding the importance of the Athabasca River and water to their cultures. By failing in protecting the important rivers and water bodies, LARP is failing to protect ACFN's and MCFN's ability to exercise their section 35 rights. Conservation areas are fragmented and isolated. In addition, many of the proposed conservation areas are already disturbed and disturbance is on the rise. Furthermore, conservation areas are designated for multiple uses (including exploration) that are incompatible with traditional use. While a percentage of the areas identified in

¹ The comments set out herein are not meant to be exhaustive. GoA representatives are again invited to read in detail the three Reports accompanying this cover letter as well as the detailed ACFN and MCFN submissions from the fall of 2010 as well as the comments that the two First Nations made in respect of the RAC Vision Document.

the previous ACFN and MCFN submissions may be within proposed conservation areas, the conservation areas are meaningless unless the proper cultural and ecological analysis are done to determine whether or not this is sufficient in terms of ecological and cultural protection.

- The cumulative effects management approach, including the frameworks and additional planning initiatives proposed in the draft LARP, do not recognize or consider what is necessary for the meaningful exercise of treaty and aboriginal rights and, therefore, lack essential thresholds and triggers relating to the protection of these rights. Despite the First Nations' consistent message that a Traditional Land and Resource Use Management Plan could help to address that gap, there is no mention of such a plan in LARP. Furthermore the cumulative effects frameworks do not provide the tools needed to bring regional exceedence of triggers and limits under control. Moreover, the proposed Land Disturbance Plan and the Biodiversity Management Framework are not required until 2013, presumably after far more industrial development is approved in the LAR. Land use zones cannot be designated under LARP without a well informed understanding of existing land disturbance and its impacts on the environment as well as aboriginal and treaty rights.
- The draft LARP fundamentally misunderstands what is required to meaningfully involve aboriginal peoples in land use planning. For example, it offers only an inadequate sub-regional initiative (the "Richardson Initiative") for participation of aboriginal peoples that does not reflect the extensive input of ACFN on a meaningful co-management framework. Furthermore the Richardson Initiative presupposes certain outcomes without consideration of First Nation input and focuses on certain issues that Alberta has unilaterally deemed to be important.
- The draft LARP and its draft regulations fail to address the fact that current land use legislation, including current regulations under the Parks Act and proposed regulations under the Public Lands Act, have the potential to adversely impact and potentially infringe the exercise of treaty and aboriginal rights in conservation, recreation and mixed use areas. A number of uses that are or have the potential to be adverse to the exercise of section 35 rights are permitted in conservation areas, including certain exploratory work. The conservation areas, rather than contributing to the protection of the rights of ACFN and MCFN, may actually restrict the exercise of rights therein.
- The draft LARP, as it currently stands, gives no consideration to land and other disturbances which are already adversely affecting and infringing the rights of ACFN and MCFN and, without the kind of analysis that the two First Nations have been calling for throughout the development of LARP. This will set the stage for further adverse effects or infringements on ACFN and MCFN rights. Furthermore, LARP does not make any provision for allocating priority to aboriginal land uses, as required by the Canadian Constitution.

To address these issues we recommend that further consultation and discussion occur with ACFN and MCFN with respect to the concerns that we have raised prior to

finalization of the LARP. We also direct you to the recommendations provided in the enclosed Reports, as well as those in Appendix 3 to this letter.

As always, we are willing to discuss our concerns and issues with you further and are open to any questions you may have. We have heard, and understand, the Government of Alberta's perspective that LARP is about trade-offs and that, at the end of the day, it is unlikely that all interests will be satisfied. The point of us raising these concerns and issues is not because we expect that everything will be satisfied; it is because we want this taken into account, and we want to be involved in the analysis and evaluation of the trade-offs. It is critical to a meaningful consultation process to have a clear understanding of what of our rights has essentially been "traded-off" for economic development of the region. We again request that, prior to GoA implementing LARP, GOA (including technicians and drafters of LARP) meet with us to go through our submissions in detail, to ask us questions, and to engage in a real dialogue so that we can be assured that you have understood and sought to address our issues and concerns. This is the least that can be done considering the great efforts our First Nations have put into participating in the LARP. Our cultural survival and our existence as Mikisew Cree and Athabasca Chipewyan people rely on this plan. We are thus asking, once more, for you to demonstrate how this plan supports our needs.

Sincerely,



Lisa King
ACFN IRC Director



Melody Lepine
MCFN GIR Director

Encl.

Cc: ACFN Chief and Council
MCFN Chief and Council

From: Nicole Nicholls [<mailto:n.nicholls@acfn.com>]

Sent: June-03-11 3:03 PM

To: 'Dave Bartesko'

Cc: lisa.king@acfn.com; 'Melody Lepine'; 'Sebastien Fekete'; linda.aidnell@shawbiz.ca; doreen.somers@acfn.com; Christopher Vandeborn (christopher.vandeborn@gov.ab.ca)

Subject: Final Submission of ACFN and MCFN RE Draft Lower Athabasca Regional Plan

Good afternoon Dave,

I am pleased to be providing to you the final submission of ACFN and MCFN on the Draft Lower Athabasca Integrated Regional Plan. I will be sending the submission in multiple emails that transmit the following documents:

- Cover letter (attached here)
- Appendices 1, 2 and 3 to the cover letter
- Appendix 4 to the cover letter
- Appendix 5 to the cover letter
- Legal Review of the Draft Lower Athabasca Regional Plan prepared for Athabasca Chipewyan First Nation and Mikisew Cree First Nation by Janes Freedman Kyle Law Corporation (JFK Law).
- Review of the Draft Lower Athabasca Integrated Regional Plan, prepared for Athabasca Chipewyan First Nation by Management and Solutions in Environmental Science (MSES), May 2011.
- Review of the Draft Lower Athabasca Integrated Regional Plan, prepared for Mikisew Cree First Nation by Management and Solutions in Environmental Science (MSES), May 2011.
- Review of the Draft Lower Athabasca Integrated Regional Plan prepared for Mikisew Cree First Nation and Athabasca Chipewyan First Nation by Cizek Environmental Services, June 2011.

Please confirm receipt of all documents.

We will also hand deliver these documents to Alberta representatives at the June 6 Chief-Minister meeting.

Thank-you,

Nicole

Nicole Nicholls

Project Manager

Athabasca Chipewyan First Nation

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LEGAL REVIEW OF THE DRAFT LOWER
ATHABASCA INTEGRATED REGIONAL
PLAN

Prepared For the Athabasca Chipewyan First Nation and the Mikisew
Cree First Nation | Janes Freedman Kyle Law Corporation

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I. Introduction

The purpose of this review of the Draft Lower Athabasca Integrated Regional Plan (the “Draft Plan”) is to set out how the Draft Plan stands to adversely impact and potentially infringe the constitutionally protected rights of the Mikisew Cree First Nation and the Athabasca Chipewyan First Nation (“MCFN and ACFN” or the “First Nations”). That is, it is the purpose of this review to assess whether the proposed land-use planning approach in the Draft Plan upholds Alberta’s constitutional obligation to recognize, affirm and protect MCFN and ACFN’s rights under section 35 of the *Constitution Act, 1982* so that the First Nations’ Treaty 8 rights can be practiced and sustained for current and future generations.

Section 35 of the *Constitution Act, 1982* guarantees MCFN and ACFN, at a minimum, the right, among others, to hunt, trap, gather and fish within their traditional territories as well as through the Treaty 8 area and that their use of the lands for traditional purposes would exist in a meaningful form for perpetuity.

The Supreme Court of Canada has been consistently clear in this regard. For example, in *R. v. Badger* (1996), 133 D.L.R. (4th) 324, Cory J., for the majority, held, at par. 39, that:

...it is clear that for the Indians the guarantee that hunting, fishing and trapping rights would continue was the essential element which led to their signing the treaties. The report of the commissioners who negotiated Treaty No. 8 on behalf of the government underscored the importance to the Indians of the right to hunt, fish and trap. The Commissioners wrote:

There was expressed at every point the fear that the making of the treaty would be followed by the curtailment of the hunting and fishing privileges. We pointed out...that *the same means of earning a livelihood would continue after the Treaty as existed before it*, and that the Indians would be expected to make use of them.

* * *

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, *we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.* [italics in original, underlining added]

The Court also adopted the following testimony of Treaty Commissioner David Laird:

The Indians' primary fear was that the treaty would curtail their ability to pursue their livelihood as hunters, trappers and fishers. Commissioner David Laird, as cited in Daniel, "The Spirit and Terms of Treaty Eight", at p. 76, told the Lesser Slave Lake Indians in 1899:

Indians have been told that if they make a treaty they will not be allowed to hunt and fish as they do now. This is not true. Indians who take treaty will be just as free to hunt and fish all over as they now are. [emphasis added. *Badger*, *supra*, at paras. 39 and 55]

Since the *Badger* case, the Supreme Court of Canada has also confirmed that Alberta has a constitutional obligation to meaningfully consult and, where appropriate, accommodate, the First Nations in respect of potential adverse impacts to their section 35 rights [*Haida*, *Mikisew*]. At par. 46 of its decision in the *Haida Nation* case, the Supreme Court of Canada, quoting from a New Zealand document relating to consultation with the Maori, set out what it considered to be aspects of meaningful consultation, as follows:

Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed . . . (at s. 2.0 of Executive Summary)

. . . genuine consultation means a process that involves . . . :

1. gathering information to test policy proposals
2. Putting forward proposals that are not yet finalized
3. seeking Māori opinion on those proposals
4. informing Māori of all relevant information upon which those proposals are based
5. not promoting but listening with an open mind to what Māori have to say
6. being prepared to alter the original proposal
7. providing feedback both during the consultation process and after the decision-process. (at s. 2.2 of Deciding) (emphasis added)

It is clear that substantive feedback is a fundamental element of meaningful consultation, as is explaining the information upon which draft proposals are based. The Supreme Court of Canada has recently reiterated that consultation and accommodation must take place in respect of strategic and high level government actions, among others [*Rio Tinto*].

The purpose of this review – ensuring that land use planning respects the First Nation’s section 35 rights – is made more urgent by the Draft Plan, which represents a significant step backwards from the advice submitted to Alberta by RAC in August 2010. It is deeply concerning that Alberta is in the process of finalizing a long-term development plan for areas that are central to the culture of MCFN and ACFN and to the exercise of their rights without Alberta having: properly assessed what is required for the current and future exercise of the First Nations’ rights and the existence of their cultures; properly assessed the impacts of the past, present and future developments in the region on the First Nations’ rights; meaningfully addressed MCFN and ACFN’s concerns regarding such impacts to their rights; and meaningfully included MCFN and ACFN in the land use planning process.¹

¹ In this regard, we also note that the Draft Plan, just as Alberta’s previous LARP drafts and communications, does not consider the questions, appended hereto, previously tabled by the First Nations concerning specific potential impacts on section 35 rights. Those questions were tabled with Alberta in submissions made by MCFN in their October 2008 submission on the Land Use Framework and ACFN in their April 2009 submission on LARP as well as in a joint meeting of the First Nations and officials from the LUS on September 16, 2009 and November 19, 2009. It is also notable that in their submissions dated July 31, 2009, August 28, 2009 and January 29, 2010 the First Nations asked for Alberta to work with them on the development of a consultation agreement or protocol to

Our analysis of whether the Draft Plan upholds the honour of the Crown to meaningfully consult, and where appropriate, accommodate the First Nations and whether the Draft Plan adequately ensures that the First Nations' section 35 rights will be protected under the LARP is based on a review of the Draft Plan (including the Strategic Plan, the Implementation Plan and the Draft Regulations), relevant jurisprudence and the information that the First Nations have provided Alberta concerning LARP in recent years. This includes the detailed submissions made by the First Nations to the Land Use Secretariat ("LUS") with respect to the August 2010 Vision Document provided by the Lower Athabasca Regional Advisory Committee ("RAC") in both written form by way of a joint submission made on October 19, 2010 and individual submissions on November 11, 2010 (MCFN) and November 22, 2010 (ACFN) as well as in meetings between the First Nations and the LUS. To date Alberta has not provided any substantive feedback on the materials the First Nations have submitted in connection with LARP.

This review first sets out how the Draft Plan stands to adversely impact and potentially infringe the constitutionally protected rights of the MCFN and ACFN by examining various components of the Draft Plan, the proposed management Frameworks, the regulatory scheme for conservation and mixed use areas, and the so-called involvement of aboriginal people in land-use planning in the Lower Athabasca Region. The review concludes by presenting recommendations to assist Alberta in ensuring that MCFN and ACFN's rights are respected and sustained within the Lower Athabasca Region now and into the future. We also attach as an appendix to this submission a chart that lists all of the references to "aboriginal people" in the Draft Plan and comments on whether those references reflect a commitment or action by Alberta to uphold its constitutional obligation to respect aboriginal and treaty rights.

II. Overview of Concerns

A brief review of the Draft Plan's "Vision" for the Lower Athabasca Region provides a useful introduction to how the Draft Plan has the potential to adversely affect and potentially infringe the First Nations' constitutionally protected aboriginal and treaty rights and illustrates the Draft Plan's flawed approach to section 35 rights. Reviewing the Draft Plan's vision statement is also important given that under the Land Use Framework, all aspects of land use planning – such as regional outcomes, objectives and strategies – must flow from a regional plan's vision statement.

The Draft Plan describes the LARP Vision in this way:

The Lower Athabasca region is a vibrant and dynamic region. People, industry and government partner to support development of the region and its oil sands reserves. Economic opportunities abound in forestry, agriculture, infrastructure development, the service industry and tourism. The region's air, water, land and biodiversity support healthy ecosystems and world class conservation areas. Growing communities are supported by infrastructure, and people can enjoy a wide array of recreational and cultural opportunities.

guide consultations on LARP. Alberta refused to do so and has continuously followed a unilaterally-imposed consultation process in respect of LARP.

This is a marked departure from the Vision contained in the RAC's advice to Alberta in 2010:

The Lower Athabasca Region is an exceptional mosaic of peoples, communities, forests, rivers, wetlands, lakes and grasslands that are cared for and respected. It is a vibrant, dynamic region that is a major driver of the Canadian economy supported by strong, healthy, prosperous and safe communities. Sustainable economic, social and environmental outcomes are balanced through the use of aboriginal, traditional and community knowledge, sound science, innovative thinking, and accommodation of rights and interests of all Albertans.

When comparing these two vision statements, it appears that even the minimal reference to aboriginal peoples and their traditional knowledge contained in the RAC Vision is no longer included in the LARP Vision. Despite the constitutional framework of Canada requiring that MCFN and ACFN be consulted regarding decisions that have the potential to affect their rights and despite Canada's constitutional framework also requiring that aboriginal and treaty rights be recognized and respected, the Draft Plan's Vision neither mentions participation by aboriginal people in the region nor respect for their rights. This is not a vision that promotes outcomes, that further reconciliation between the constitutional rights of aboriginal peoples and the interests of non-aboriginal Albertans, as mandated by decisions of the Supreme Court of Canada.

For example, whereas the RAC envisioned a region that, at least in certain ways, included aboriginal people in land use planning, the new vision places its emphasis on the interests of industry and "growing populations" and excludes mechanisms for including aboriginal people in land use planning except for a few vague references. This is made more problematic by the fact that it is clear that "growing populations" refers to the tens of thousands of people who have moved to the region to participate in oil sands developments and the many thousands more that the Draft Plan hopes to attract as oil sands production potentially doubles or triples. The increases in population and oil sands production will be accompanied by increases in infrastructure called for in the recently released CRISP Report. The CRISP Report was completed with almost no consultation with First Nations.

Second, not only has a consideration of traditional ecological knowledge been removed from the RAC Vision, there is now no mention of the need to understand and include the requirements of "healthy and sustainable forests, rivers, wetlands, lakes and grasslands", which are necessary to support the exercise of the section 35 rights of First Nations in land use planning. Rather, the Draft Plan's vision avoids all consideration of aboriginal knowledge of what land and resources are necessary to sustain First Nations' traditional practices presently and in the future.

Third, while the RAC's Vision acknowledged that there are rights in the region and that Alberta has an obligation to accommodate those rights, the draft LARP Vision no longer recognizes the existence of legal rights, referring only to "opportunities" for cultural activities.²

Next, the way in which the Draft Plan interprets the relationship between the three pillars of the vision – (1) increased oils sands and other economic developments, (2) healthy ecosystems, and

² Bill 10, *an Act to Amend the Alberta Land Stewardship Act*, would amend the legislation governing the LARP so that the regional plan must respect the property rights of fee simple title holders. Bill 10 does not require that aboriginal and treaty rights be respected by regional plans.

(3) growing populations supported by increased infrastructure and other opportunities – will further facilitate adverse impacts to and potential infringements of aboriginal and treaty rights. For example, by focusing the baselines and thresholds for healthy ecosystems on future expanded land disturbance and industrial activities, the Draft Plan really makes the second pillar support the first pillar: this has the potential to guide decision makers to approve developments that could result in further irreparable and adverse impacts to the air, water, land and biodiversity in the region on which MCFN and ACFN rely for the continued exercise of their Aboriginal and Treaty rights because it does not direct decision makers to consider how current developments already adversely impact and infringe section 35 rights. As discussed below, this vision is made more problematic by Alberta's refusal to assess what quality and quantity of healthy ecosystems and related resources are necessary for the meaningful exercise of section 35 rights and Alberta's refusal to assist the First Nations in creating a plan for the protection of the baseline land, water and resource requirements for the continued exercise of rights into the future.

Further, the primacy of oil sands development, forestry, agriculture, infrastructure development, tourism and recreation in the Vision appears to downplay or entirely ignore section 35 rights and is built upon the assumption that such increased activity will not directly or cumulative adversely affect or infringe those rights nor has it done so in the past. The Draft LARP appears to ignore submissions made by the First Nations showing how parts of the Lower Athabasca Region have already been greatly disturbed by industrial development.³ This approach ignores that:

- (a) the environment (land, water, air and quantity and quality of resources available) upon which the exercise of Aboriginal and Treaty rights depends, and
- (b) the ability of First Nations to exercise their Aboriginal and Treaty rights given the competing (and largely incompatible) land uses from the expansion and development of the oil sands

have already been adversely impacted and infringed through parts of the First Nations' traditional territories. In ignoring these impacts, Alberta appears to have ignored the information submitted to it by the First Nations regarding the current, adverse impacts to their section 35 rights.⁴ Until the LARP Vision takes this information and these concerns seriously – by Alberta working with the First Nations to collect necessary information, establish more comprehensive ecological and environmental frameworks and create various co-management arrangements – the Draft Plan is likely to enable further adverse impacts and potential infringements of section 35 rights.

³ See, for example, submissions of MCFN and ACFN in fall 2010 setting out desired protected areas and including disturbance analysis maps. See also similar maps in MCFN submissions in Total Hearing.

⁴ Among other things, the First Nations have individually and jointly filed extensive material with Alberta related to actual and potential adverse impacts to and infringements of their section 35 rights in their LARP submissions filed in the fall of 2010, in various regulatory proceedings including, but not limited to, the recent Total Joslyn North Hearing and other ERCB hearings and regulatory reviews, and in regard to other processes in Alberta, including, the First Nations' submissions in respect of the Terrestrial Ecosystem Management Framework, the Land Use Framework, the Comprehensive Regional Infrastructure Sustainability Plan, the Regulatory Enhancement Project, the Regional Aquatic Monitoring Plan, the Instream Flow Needs, and the Phase 2 water management Framework.

In short, the Draft Plan's vision for the Lower Athabasca Region contains a number of flaws concerning the Crown's duty to recognize, respect and accommodate section 35 rights. As will be discussed in more detail below, the Draft Plan's "vision" translates into the following serious flaws in the outcomes, objectives and strategies in the LARP and in respect of Alberta's obligation to protect and respect MCFN and ACFN's constitutionally recognized rights:

- The "cumulative effects management" approach that the Draft Plan uses to guide the balancing of interests in the Lower Athabasca Region is too unclear to be applied in a principled fashion that guarantees that aboriginal and treaty rights will be respected;
- The Draft Plan contains no recognition that the existing levels of development in some areas in the region is already adversely affecting and infringing section 35 rights;⁵
- The proposed environmental frameworks and disturbance plans were developed without consideration of what is necessary for the meaningful exercise of aboriginal and treaty rights and, therefore, lack essential thresholds and triggers relating to the protection of aboriginal and treaty rights⁶;
- The Draft Plan designates conservation areas and mixed use areas without taking any steps to ensure that the legal regime for these areas is capable of protecting and accommodating aboriginal and treaty rights. Presently, the regulatory scheme for conservation areas stands to adversely impact or infringe aboriginal and treaty rights;
- The Draft Plan fails to recognize that proposed changes to land use legislation and regulations have the potential to further adversely impact and potentially infringe the exercise of aboriginal and treaty rights in conservation and mixed use areas while giving priority to the rights of fee simple owners of land in these areas;
- The Draft Plan does not recognize or respect the access rights for the exercise of their treaty rights that Treaty 8 and the NRTA guarantee to MCFN and ACFN. Without access management, carried out with the participation of the First Nations, the Draft Plan does not protect aboriginal and treaty rights in conservation, recreation or mixed use areas;
- The areas designated as conservation areas and mixed use areas were set without regard to the quality and quantity of land and other resources that are necessary for the exercise of aboriginal and treaty rights presently and into the future. Nor do these areas appear to have been set based on a meaningful consideration and incorporation of the concerns

⁵ Among other places, such adverse impacts and infringements were expressly set out in MCFN's submissions in the recent Total Hearing. Those submissions were sent to Alberta in November, 2010 in respect of the upcoming Shell Jackpine and Pierre River Public Hearings and they were also referenced by MCFN in their meeting with the LUS on January 27, 2011, where MCFN expressly asked the LUS to consider those and a variety of other submissions in the preparation of the Draft LARP.

⁶ "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 suitable for the collection and passing down of traditional knowledge and learning) of adequate quality and quantity for 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.

submitted by MCFN and ACFN regarding impacts to their aboriginal and treaty rights. Accordingly, many of these areas neither adequately protect section 35 rights nor uphold the Crown's obligation to meaningfully consult and accommodate MCFN and ACFN;

- The Draft Plan neither addresses the numerous ways in which the Plan may result in adverse impacts to or infringements to section 35 rights nor makes any provision for allocating priority to aboriginal land uses, as required by the constitutional framework of Canada;
- The Draft Plan does not include aboriginal peoples in land use planning processes and therefore restricts aboriginal people from being consulted regarding land use decisions at strategic and high levels, despite consultations at these levels being required to uphold the honour of the Crown. In this regard, the proposal to merely conduct ad hoc consultations on individual decisions made under LARP is insufficient for meeting the Crown's constitutional consultation obligations and is insufficient for ensuring that section 35 rights are protected and accommodated;
- The Draft Plan was created without any feedback from Alberta to the First Nations on the materials the First Nations gathered, drafted and submitted to Alberta regarding LARP
- The Draft Plan offers only an inadequate sub-regional initiative for participation of aboriginal peoples that is not a meaningful co-management initiative;
- The Draft Plan fundamentally misunderstands what is required to meaningfully involve aboriginal people in land use planning. For example, the Draft Plan judges whether Outcome 7 (i.e., inclusion of aboriginal peoples in land-use planning) is successful based on the level of participation of aboriginal peoples rather than on whether the sub-regional initiative or ad hoc consultation provides meaningful inclusion of aboriginal peoples and knowledge in land planning processes and whether section 35 rights are protected.

How each of these stands to result in adverse impacts to or potential infringements of Aboriginal and Treaty rights will be discussed below.

III. The “Cumulative Effects Management Approach” provides insufficient guidance to decision makers to protect Section 35 Rights

The Draft Plan states that land-use planning decisions and priorities are to be guided by a “cumulative effects management approach”. This approach is described as follows:

Cumulative effects management focuses on achievement of outcomes, understanding the effects of multiple development pressures, assessment of risk, collaborative work with shared responsibility for action and integration of economic, environmental and social considerations.

What this means, and how it is to guide decision makers and land-use planners, is not clear. Specifically, in addition to not providing guidance regarding how responsibilities and risks will be shared in the region or how economic, environmental and social considerations will be integrated, this approach provides no guidance regarding how section 35 rights are to be “integrated” in a way that respects the constitutional framework of Canada or how Alberta’s constitutional obligations to respect section 35 rights will be honoured in applying this approach.

Another problem is the absence of an understanding that the adverse impacts of development in the LARP area on the exercise of Aboriginal and Treaty rights must be considered in the context of the current and increasing pressure on the lands and resources relied upon by the First Nations to support the continued existence and exercise of their rights. The Draft Plan’s cumulative effects management approach ignores the existing and potential future adverse impacts and infringements on the First Nations’ section 35 rights and, in fact, takes the opposite approach: it calls for population levels in the region to be increased by attracting workers from across Canada, for trails and recreational activities to be expanded into areas which are important for the exercise of aboriginal and treaty rights and for regulatory functions to be streamlined to facilitate increased energy developments. In short, the description of the outcomes and strategies in the Draft Plan suggest that this planning approach will guide decision makers to consistently choose land-use options that adversely impact and potentially infringe MCFN and ACFN’s section 35 rights. This approach turns the constitutional obligations of the Crown on their head, protecting and prioritizing commercial and recreational interests over constitutionally-protected rights.

For example, the Draft Plan recognizes that oil sands activities and other development activities in the region rely upon groundwater and aquifers to support resource extraction. In addition, the Draft Plan states that there is a high degree of variability throughout the region on the water resources due to natural hydrogeologic complexity. But the “cumulative effects management” approach fails to recognize that increased oil sands development may add instability to the reliability of water resources in the region or that such an instability would adversely impact the First Nations who rely upon water for transportation, hunting, trapping and other practices related to the exercise of their Aboriginal and Treaty rights.⁷

In short, the cumulative effects management approach is vague and incapable of guiding decision makers. It also appears to be less a principled approach for responsible land-use planning and more a tool for validating land-use decisions that consistently give primacy to land uses that have the potential to adversely affect and infringe the section 35 rights of the First Nations. This approach is incapable of assisting decision makers in responsibly balancing the interests of the stakeholders in the LARP area and in respecting aboriginal and treaty rights as Alberta is required to do under the constitutional framework of Canada. One of the greatest concerns of the

⁷ Data and analysis regarding instability in the reliability of water resources in the region, how that instability has and will adversely impact and infringe the exercise of section 35 rights, and steps to prevent further problems with water resources in the region were presented in the Report entitled “As Long as the Rivers Flow: Athabasca River Use, Knowledge and Change” which has been submitted to Alberta numerous times, including in ACFN’s November 22, 2010 LARP submission and in the Report entitled “Athabasca Chipewyan First Nation and Mikisew Cree First Nation Review of the Phase 3 Framework Committee Recommendations” which was submitted to Alberta on October 13, 2010, and in the Report entitled “Patterns of Mikisew Cree Land and Resource Use” which was submitted to Alberta on November 9, 2010.

First Nations in LARP and in other Crown-led processes is that words like “trade offs” and “balancing” are used without the Crown understanding, or trying to understand, what is being “balanced” and “traded off” in terms of the rights of First Nations. Without the Crown making real attempts to understanding the meaning of constitutionally-protected rights and what is needed to sustain those rights, any balancing or trading off exercise will (and historically has) short changed First Nations.

IV. The Proposed Frameworks & Monitoring Must Include Section 35 Rights

The Draft Plan calls for a variety of frameworks to be developed and implemented in the region. While Alberta’s inclusion of frameworks in the Draft Plan is a positive step, the framework approach included in the Draft Plan is problematic for constitutional and conservation reasons. In fact, rather than maintain healthy ecosystems that can support the meaningful exercise of section 35 rights, the frameworks have the potential to facilitate further adverse impacts and potential infringements of aboriginal and treaty rights.

Regarding conservation and the maintenance of healthy ecosystems, the Draft Plan suggests that the frameworks will use disturbance levels, triggers and thresholds based on future anticipated oil sands development rather than on pre-disturbance levels, current disturbance levels, or on levels, triggers and thresholds necessary for the meaningful practice of aboriginal and treaty rights. It is disconcerting that two important frameworks – those related to disturbance and ecosystems – are not required to be developed until 2013. By then, several more large oil sands projects will have been approved. Similarly, the scope and utility of the proposed frameworks are seriously limited by:

- excluding important elements such as odours, flaring, CO₂, and particulates from air quality thresholds;
- not setting baseline levels and excluding PAHs (polycyclic aromatic hydrocarbons) from surface water quality thresholds;
- basing the ground management framework on self-reported industry data and by excluding wetland health from that framework; and by
- basing land disturbance plan on future anticipated oil sands development.

These limitations and flaws minimize the efficacy of the frameworks as a tool for ensuring that the Lower Athabasca Region is a healthy ecosystem that sustains its biodiversity over the next 10 to 50 years. Because the exercise of aboriginal and treaty rights depends, among other things, on biodiversity and healthy ecosystems, this flawed conservation approach is likely to result in adverse effects and potential infringements to the First Nations’ section 35 rights.

From a consultation perspective, the proposed frameworks are problematic because the levels, thresholds and triggers have been set without regard to the First Nations’ submissions regarding appropriate environmental thresholds, because First Nations were excluded from the development of these frameworks, and because Alberta provided no feedback to the First Nations regarding the many submissions they made regarding frameworks. For example, the Aboriginal Base Flow, Aboriginal Extreme Flow and Ecosystem Base Flow thresholds are not

incorporated into frameworks or the Draft Plan in any way.⁸ Also, Alberta appears to have rejected a terrestrial ecosystem management framework (“TEMF”), despite submissions of the First Nations noting that the TEMF may more adequately address cumulative effects associated with the rapid pace of development in the region than other initiatives considered by Alberta.⁹

Aside from the failure to meaningfully consider, respond to and integrate the First Nations’ concerns and comments regarding the frameworks, the Draft Plan provides no assurance that the thresholds and triggers in the frameworks relate in any way to ensuring the meaningful exercise of constitutionally protected aboriginal and treaty rights.

One reason for this is that Alberta never engaged the First Nations in a dialogue regarding what was necessary to protect their rights and because Alberta refused to assist the First Nations in the development of a Traditional Land and Resources Use Management Plan [TLRUMP].¹⁰ The TLRUMP would have identified: what lands and resources are integral to the meaningful practice of Treaty 8 rights; the socio-cultural, ecological and economic conditions that support the meaningful practice of Treaty 8 rights; the pressures that threaten the meaningful practice of Treaty 8 rights; and how to integrate the information into an appropriate management tool. Without collecting and including this information, there is no basis for concluding that the frameworks ensure the protection or accommodation of the First Nations’ rights.

Another reason is that, despite the First Nations stating repeatedly that the meaningful practice of section 35 rights depends on sufficient lands and particular resources, the frameworks turn a blind eye to the area-specific and resource-specific concerns of the First Nations and fail to recognize that existing levels of development in some areas has already adversely affected and infringed section 35 rights. “Sufficient” refers not only to quantity but quality, and is evaluated from the perspective of what is required to fulfill not only subsistence requirements, but also cultural needs of a First Nation now and into the future. Determining what is “sufficient” encompasses a suite of interconnected tangible and intangible resources that underlie the

⁸ These were presented to Alberta in the Report entitled “As Long as the Rivers Flow: Athabasca River Use, Knowledge and Change”

⁹ CEMA’s report was submitted to Alberta in 2008. ACFN submitted its review of the TEMP to Alberta on April 8, 2009 and Alberta Sustainable Resources Development confirmed on August 14, 2009 that it had provided this review to the LUS for consideration in the LARP process.

¹⁰ The First Nations’ have requested that Alberta assist them in developing a Traditional Resource Use Plan (now termed a Traditional Land and Resources Use Management Plan) since the inception of the Land Use Framework in Alberta, that is, for over 2 1/2 years. 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 the 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. These requests were repeated by ACFN in their funding proposal of July 31, 2009 and by MCFN in their funding proposal on August 19, 2009. The requests were again repeated in the First Nations more recent LARP submissions in the First Nations’ LARP submissions in the fall of 2010. At the request of Alberta, the First Nations again submitted a request for assistance in developing a TLRUMP to Alberta on September 20, 2010. When, on March 4, 2011, Alberta finally responded to these requests, Alberta informed the First Nations that it would not assist with the TLRUMP. In the March 4, 2011 rejection letter, Alberta provided no reasons for its refusal and offered only to “define certain elements of the proposal that could be supported by way of existing initiatives”. Alberta has not responded to any requests for clarification regarding why the proposals were rejected, what Alberta meant by defining certain elements and what “existing initiatives” it had in mind and how those initiatives would address adverse impacts to section 35 rights.

meaningful practice of practice of rights. These “resources” include, but are not limited to: routes of access and transportation; water quality and quantity; healthy populations of game in preferred harvesting areas; cultural and spiritual relationships with the land; abundant berry crops in preferred harvesting areas; traditional medicines in preferred harvesting areas; the experience of remoteness and solitude on the land; feelings of safety and security; lands and resources accessible within constraints of time and cost; sociocultural institutions for sharing and reciprocity; spiritual sites; etc. Alberta never provided feedback to the First Nations regarding how this definition of “sufficient” was taken into account in the Draft Plan.

Finally, we note that the RAC contemplated the creation and implementation of a system of management frameworks to understand priority values in the region. This is an essential strategy, because where the Crown considers actions that may infringe aboriginal or treaty rights, demonstrating that priority was allocated to aboriginal uses of the land is one of the required components for justifying the impact or infringement, as per the *Sparrow* decision of the Supreme Court of Canada. By not assessing priority values and by excluding priority-based triggers from the frameworks, the Draft Plan fails to conform to this constitutional requirement.

In sum, frameworks that are reflective of the requirements for the continued practice of aboriginal and treaty rights are essential, because beyond conservation areas (the problems with which are discussed below), these frameworks are the only tool in the Draft Plan that could ensure that current and future approvals operate within constitutional limits and that could require that decision makers take necessary steps when the lands and resources on which the First Nations rely to sustain their cultures are adversely impacted by development. Unfortunately, the frameworks in the Draft Plan are not based on an understanding of what resources and ecosystems are fundamental to the exercise of aboriginal and treaty rights. This is precisely the kind of concern that the First Nations have been raising with Alberta generally for a number of years and with the LUS more recently. There is no legal impediment for Alberta to work with the First Nations on measures such as the TLRUMP or in other ways to understand what is needed to ensure the meaningful practice or section 35 rights now and in the future. Instead, Alberta has simply declined to do so.

V. Conservation and Mixed Use Areas must be Regulated in a way that respects Section 35 Rights

The Draft Plan notes that conservation areas will be enacted under the *Public Lands Act* and the *Provincial Parks Act* and that instruments such as the *Public Lands Act* will govern the use of and access to mixed use areas. Unfortunately, the Draft Plan designates conservation, recreation and mixed-use areas without taking any steps to ensure that the legal regimes for these areas are or will be capable of protecting and accommodating aboriginal and treaty rights. This is very problematic because the current regulatory scheme for the areas designated as conservation and mixed-use areas stands to adversely impact and potentially infringe aboriginal and treaty rights and is incapable of adequately respecting section 35 rights.

Specifically, the Draft Plan states that conservation areas will, in many cases, fall under the *Provincial Parks Act* and its related regulations. This is problematic as the *Provincial Parks Act* and its related regulations adversely impact and potentially infringe the exercise of aboriginal

and treaty rights. Section 3 of the *Provincial Parks Act* makes it clear that provincial parks were not designed to facilitate the exercise of aboriginal and treaty rights. Indeed, section 8.2 of the *Provincial Parks Act* absolutely prohibits all activities requiring permission or a disposition, unless specifically authorized to engage in the activity.

The *Provincial Parks Act* and its regulations prohibit or restrict the following activities that are part of the exercise of section 35 rights, unless Ministerial approval is obtained, and therefore may result in section 35 rights being unjustifiably infringed in conservation areas:

- A person cannot construct, reconstruct, maintain or add to an improvement or structure [s.9.1(1)(a)]
- A person cannot do anything that will or might alter the surface of park land [s.9.1(1)(b)]
- A person cannot store, cache or otherwise leave any equipment, supplies on park land [s.9.1(1)(c)]
- A person cannot collect or remove any plant life or animal life [s.9.2, General Regulations s.45(1)]
- A person cannot damage any park land (“damage” is not defined) [s.10(1)]
- A person cannot remove or move timber, soil, sand, rock, or other natural materials [s.10.1]
- No person can take up residence in a park (“residence” is not defined) [s.11(1)]
- A person cannot dress, hang or store big game in a park [General Regulation s.11.1]
- Firewood may not be removed from a park [s.14.1]
- Guiding is prohibited in a park [General Regulations 44(1)]
- Firearms cannot be possessed in a wildland park unless (1) the person has a permit OR unless there is an open season in that park and the person has a permit under the Wildlife Act [General Regulations s.46(1)]. In the case of a permit to have a firearm in a park, the Minister may make conditions on the permit, without limitation, including when and where the firearm may be used.
- Vehicles can only be used on marked trails [General Regulations s.27(1)]

The *Provincial Parks Act* and its regulations are also problematic because the significant powers they give to the Minister and conservation officers, including those listed here, allow the prohibition or restriction of activities that are part of the exercise of section 35 rights, even in conservation areas:

- The Minister can close or restrict access to any part of a park for any period [s.13(1)(a) and General Regulation s.9]
- The Minister can establish a framework for zoning a park to confine land uses [s.13(1)(b)]
- Officers may order the removal of any unauthorized improvement, structure or work [s.17(1)(b)]

- Officers may order a person to refrain from any activity that the officer considers to be dangerous to human life or health, detrimental to property in a park or detrimental to the use and enjoyment of the park by others [s.17(1)(c)]
- Officers may remove and dispose of any vehicle, boat or other equipment that the officer believes, on reasonable and probable grounds, is in a location where it is not allowed to be [s.17(2)]
- Persons using parks must keep the land in a condition “satisfactory to a conservation officer” [General Regulation s.5(1)]
- Officers may restrict uses which are a nuisance [General Regulation s.6(1)]
- Officers may prohibit vehicle entry [General Regulations s. 29]

Alberta’s parks legislation does not take into account a number of court decisions, most notably of the Supreme Court of Canada, concerning the exercise of section 35 rights in parks. Decisions such as *Sioui* and *Sundown* are focused on the exercise of section 35 rights in parks. The restrictions set out above in the *Provincial Parks Act* and its regulations would restrict, not protect, the exercise of section 35 rights. Moreover, depending on the nature of the restrictions and permit conditions (either through the parks legislation and regulations or through the *Public Lands Administration Regulation*), any restrictions or permitting conditions may themselves be impermissible as per the decision of the Supreme Court of Canada in the *Nikal* case. That decision says that while the requirement for a permit in certain instances may, itself, not be unconstitutional, the actual conditions contained in a permit may be unconstitutional.

If Alberta is envisioning another form of conservation other than in respect of the provincial parks legislation and regulations, it is not clear in the Draft Plan what is being contemplated. It is also clear, as previously stated, that the entire approach in the Draft Plan, including the establishment of conservation areas, has not accounted for what is required to exercise Treaty and Aboriginal rights now and in the future.

Additionally, the Draft Plan designates land-use areas without ensuring that access rights for the exercise of their treaty rights, which are guaranteed to MCFN and ACFN by Treaty 8 and the NRTA, are protected. Rather, the Draft Plan envisions enactments such as the *Provincial Parks Act* and the *Wildlife Act* governing access to conservation areas, even though these enactments limit the location, time and manner of accessing lands for practices protected under section 35 and even though these enactments create no priority scheme for aboriginal access to areas relied upon for the practice of these rights.¹¹ This is extremely problematic, because a central component of the right to hunt and trap under Treaty 8 is the right to access lands sufficient lands on which wildlife is located to preserve their way of life that depended on hunting, trapping and fishing [See *Badger* and *Horseman*, among others]. As a related point, the First Nations have raised concerns time and time again about how companies restrict access to their hunting, gathering and trapping areas by putting gates and other barriers on their leases. In effect, this puts the First Nations in the position of having to ask permission of companies to exercise their section 35 rights. The Draft Plan does not take into account this serious impediment to the

¹¹ The *Provincial Parks Act* is particularly problematic in this regard, as only marked trails can be used and the Minister is given absolute discretion to determine what areas of park lands can be accessed at any time. Similarly, the *Provincial Parks Act* also places no limits on the power of officers to prohibit vehicle entry into parks.

exercise of rights. The Draft Plan must address access management through co-management agreements with First Nations or, at a minimum, through deep consultation with First Nations.

The *Public Lands Act*, which the Draft Plan cites as another piece of legislation governing conservation and mixed use areas is also extremely problematic. For example, it allows the Minister to permit access to public lands for a wide range of activities, such as exploration activities on public land, even where access for such activities adversely impacts or potentially infringes section 35 rights. Similarly, the *Exploration Regulation*, Alta. Reg 284/2006, under the *Public Lands Act*, authorizes access on designated public lands for exploration activities. The Draft Plan is not clear whether any of these powers and provisions related to access management must be exercised or curtailed so as to allow for the meaningful exercise of section 35 rights.

Furthermore, the Draft Plan fails to recognize that recent and pending changes to land use legislation and regulations in Alberta have the potential to further adversely impact and potentially infringe the exercise of aboriginal and treaty rights in conservation and mixed use areas while simultaneously increasing the rights of fee simple owners of land in the same areas.

For example, the proposed *Public Lands Administration Regulation* (the “Regulation”) under the *Public Lands Act*, if enacted, will raise questions as to whether First Nations can even exercise their constitutionally-protected rights in the areas set aside as conservation areas. Alberta has described the intent behind the Regulation as “to make the *Public Lands Act* a better management tool for Alberta’s public lands, with regulations that improve management of access to vacant public land for recreation, increase Alberta’s ability to compete globally and streamline industrial activity” (emphasis added). The Regulation does not in any way distinguish constitutionally-protected uses from other uses, such as recreational uses. Obviously, this is a significant problem given that one of LARP’s primary goals is to increase the recreational opportunities for the tens of thousands of people coming to the region for oil sands employment.

The Regulation is particularly problematic from an access management perspective, for it contains numerous provisions setting out that access to public lands is prohibited without obtaining permits that limit land uses and the duration of time one can be on public lands. For example, under s. 26 of the Regulation, “every person” (regardless of whether they have constitutionally-protected rights) would be required to obtain an access permit to enter on and occupy vacant public land from SRD for a number of what are referred to as “recreational purposes”. Sections 29, 31, 33, 36, 41, among others, also restrict access on public lands and restrict traditional activities such as staying overnight on the land, using fires, dressing game, travelling on the land, using firearms and traps, gathering plants, etcetera.

The recent amendments to the *Land Stewardship Act* (“ALSA”) could also have negative consequences in relation to how land is set aside as conservation areas under ALSA and what land use restrictions are contained in regional plans. That is, the amendments create more protection for private and economic rights by clarifying that property rights cannot be infringed except with (1) due process, (2) to the extent necessary for the “overall greater public interest” and (3) with full compensation for any diminution in value. The amendments do not provide similar protection for Treaty or Aboriginal rights, thus creating an economic and political incentive to infringe Aboriginal land rights rather than private land rights. Similarly, while the

amendments create a right for fee simple owners to seek a variance of a regional plan (potentially to get an exemption from a restriction in a conservation area), the amendments leave aboriginal people without a legislative right to seek a variance of the same plan (or even in respect of the same conservation area that a private property owner could challenge). Thus, at a time when Alberta is creating a land use plan that designates small and poorly-defined conservation areas where section 35 rights are restricted, Alberta is ensuring that fee simple owners will be compensated and can potentially cause those conservation areas to be altered.

The Regulatory Enhancement Project (REP), which the Draft Plan notes continues to move ahead, aims to “increase competitiveness” in terms of Alberta’s regulatory approach to oil sands developments. This is likely to facilitate increased oil sands developments in the mixed use zones at a much faster pace than in the past as will CRISP. To date, the REP Task Force (including the Design Team) has given no indication that it is considering how to reconcile aboriginal and non-aboriginal interests and rights in the selection of regulatory models under consideration. The Draft Plan must ensure that REP does not further limit the already minimal consideration of aboriginal and treaty rights in the regulatory decision-making process.

In sum, the legal regime, both existing and proposed, for regulating conservation areas undermines the potential of even the minimal conservation areas created under the Draft Plan to facilitate the exercise of aboriginal and treaty rights. At best, it is unclear how section 35 rights may be exercised now and in the future in conservation areas. At worst, given existing and proposed provincial legislation, the exercise of section 35 rights, already in jeopardy in various areas, could be further curtailed. This approach is disconcerting and may be inconsistent with the honour of the Crown and with a number of decisions of the Supreme Court of Canada.

VI. The Conservation Areas selected in the Draft Plan are not based on meaningful consideration of the requirements necessary for the protection of aboriginal and treaty rights

Put simply, the areas designated for conservation purposes under the Draft Plan neither adequately protect section 35 rights nor uphold the Crown’s obligation to meaningfully consult and accommodate MCFN and ACFN.

First, the areas designated as conservation areas and mixed use areas were set without regard to the quality and quantity of land and other resources that are necessary for the exercise of aboriginal and treaty rights presently and into the future. As noted above, Alberta declined to support the First Nations in developing a TLRUMP.¹² The TLRUMP would have identified what resources are integral to the meaningful practice of Treaty 8 rights, would have identified the socio-cultural, ecological and economic conditions that support the meaningful practice of Treaty 8 rights including the areas that are required for sustaining aboriginal and treaty rights in light of the pressures that threaten the meaningful practice of these rights.

¹² As noted above, the First Nations have submitted proposals for assistance in developing a traditional land use plan since 2008 and have repeated their requests on numerous occasions in writing and in person throughout 2009-2010.

Second, in addition to declining to support a TLRUMP, Alberta declined to answer the questions posed by MCFN and ACFN regarding what steps, if any, Alberta had taken to establish thresholds and areas necessary for the exercise of the First Nations' exercise of their constitutionally protected rights now and for future generations.¹³ This included questions such as what steps Alberta had taken to determine the extent to which industrial development in the region, which has already been authorized by the Crown, has already deprived the First Nations of a meaningful opportunity to exercise their rights.

Third, the conservation and other areas show no indication that they were designated based on a meaningful consideration and incorporation of the submissions by MCFN and ACFN regarding impacts to their aboriginal and treaty rights. Alberta provided no feedback on these submissions.

Fourth, as discussed below, the draft LARP regulations show that Alberta has misconceived the role of conservation areas. To take just one example, the proposed LARP regulations require the designated minister to report on the ratio of conserved land to the total area of land in the region. With respect, the "ratio" of conserved to exploitable land shows a complete misunderstanding of the real issue and concerns of the First Nations, namely whether the air, water, biodiversity and land disturbance levels (qualitatively and quantitatively) in the region are maintained at levels capable of supporting vegetation, wildlife, water flow, land base and other traditional resources to ensure that the meaningful practice of aboriginal and treaty rights is sustained. Alberta's approach fundamentally misunderstands the ecosystem approach to assessing sustainable and responsible development. It also demonstrates Alberta's failure to understand that for upholding aboriginal and treaty rights, the appropriate thresholds that underlie the meaningful practice of rights (e.g., resource quality, resource quantity, proximity/access, spiritual values, and cultural connection to place) need to be identified and evaluated.

It is necessary to question the value of such ratios when: (a) conservation areas under the Draft LARP can be changed by Cabinet, meaning that even if conservation areas could allow for the meaningful protection of section 35 rights, they can be changed or removed; (b) certain industrial activity (such as exploratory work) is permitted in the conservation areas which can further adversely affect and infringe section 35 rights; (c) the enactments discussed above may restrict the exercise of section 35 rights in conservation areas; and (d) the Draft Regulations give priority to certain non-aboriginal uses in these areas.

Fifth, even by a quantitative standard, the conservation areas set out in the Draft Plan are not a meaningful reflection of the concerns and needs of the First Nations based on their submissions throughout the LARP process. The deficiencies with the lands designated as conservation areas in the Draft Plan are discussed in greater detail in accompanying submissions.

As another example of the flawed approach to conservation, we highlight that the Draft Plan does not designate the Athabasca River as a conservation area, despite Alberta having received numerous submissions from both MCFN and ACFN regarding the importance of that River,

¹³ MCFN tabled these questions in their October 2008 submission to Albert on the Land Use Framework and ACFN tabled these questions in their April 2009 submission on LARP. The questions were also tabled by the two First Nations in a joint meeting with officials from the LUS.

among others, to their cultures and to the exercise of their section 35 rights.¹⁴ Additionally, Alberta received technical reports describing the current impairment of the Athabasca River's water quality and quantity as well as information and maps showing how existing low water levels impair and potentially infringe the exercise of section 35 rights at current disturbance levels.¹⁵ By designating the Athabasca River as a recreation area, the Draft Plan places aboriginal use of the River, which crucial for the continued meaningful practice of MCFN and ACFN's section 35 rights, below recreational opportunities, tourism and natural resource development (s.45 of the Draft Regulations).

Finally, the Draft Plan is also flawed in that Alberta has provided no justification for limiting conservation areas to a number of fragmented areas. Merely implying that this outcome was the product of an undefined balancing act is insufficient to uphold the honour of the Crown. The First Nations have section 35 rights throughout the Lower Athabasca Region and Alberta has a corresponding obligation to limit those rights only accordance with the standard of justification defined by the Supreme Court of Canada. Alberta has a constitutional obligation to ensure that it can justify all parts of this Plan under the strict justification test set out by the Supreme Court of Canada and in accordance with the duty to consult and accommodate. The Draft Plan provides no such justification or explanation and is not the product of meaningful consultation.

VII. Involvement of Aboriginal Peoples in Revising and Implementing the LARP is Essential

We noted at the beginning of this review that the LARP vision is silent on Alberta's constitutional obligation to respect the First Nations' rights and to ensure the meaningful exercise of those rights. This is indicative of how the Draft Plan severely limits aboriginal peoples' involvement in land use planning. The limitations on aboriginal involvement in the Draft Plan can be seen most vividly by comparing the Outcome #7 as defined by the RAC with the same outcome as defined in the Draft Plan.

The RAC Outcome #7 and Supporting Strategies states:

Outcome 7: Aboriginal People's Rights, Traditional Uses and Values are Respected and Reflected in Planning

There are eighteen First Nations and four Métis Settlements within or adjacent to the Lower Athabasca Region. Aboriginal consultation must be an integral part of the planning

¹⁴ The Athabasca River is a vital transportation corridor that gives ACFN and MCFN access to large parts of their traditional territories and harvesting sites.

¹⁵ These reports and materials include the Report entitled "As Long as the Rivers Flow: Athabasca River Use, Knowledge and Change" which has been submitted to Alberta numerous times, including in ACFN's November 22, 2010 LARP submission and the Report entitled "Athabasca Chipewyan First Nation and Mikisew Cree First Nation Review of the Phase 3 Framework Committee Recommendations" which was submitted to Alberta on October 13, 2010. Other relevant reports and materials include in MCFN's submissions in the recent Total Hearing, which were sent to Alberta in November, 2010 in respect of the upcoming Shell Jackpine and Pierre River Public Hearings and they were also referenced by MCFN in their meeting with the LUS on January 27, 2011, where MCFN expressly asked the LUS to consider those and a variety of other submissions in the preparation of the Draft LARP, and MCFN's November 9, 2010 LARP submissions.

process for the region to ensure that impacted aboriginal peoples' rights, interests and perspectives are considered in planning.

Objective 7.1: Aboriginal peoples are included in land management planning.

Strategies

- a. Work with aboriginal peoples and elders to develop local learning opportunities for youth regarding cultural values, social responsibility, stewardship roles, etc.
- b. Ensure meaningful consultation with aboriginal peoples.
- c. Work with aboriginal peoples to improve quality of information (especially economic, environmental and social impacts) to inform and co-ordinate current planning processes, infrastructure and services planning.
- d. Provide information and funding assistance to aboriginal peoples to participate in the development of land-use plans.

Objective 7.2: Land-use planning processes balance the constitutionally protected rights of aboriginal peoples and the interests of all Albertans.

Strategies

- a. Work with aboriginal peoples to develop formal roles and responsibilities for aboriginal peoples in land-use planning and environmental assessment/monitoring.
- b. Work with aboriginal peoples to develop engagement strategies for aboriginal peoples in land planning and decision-making.
- c. Assess the state of knowledge of fish and wildlife resources and effectively manage allocations that affect aboriginal peoples' rights.
- d. Work with aboriginal peoples to generate land-use options for mitigation, accommodation and reconciliation of rights (e.g., offsets, joint planning in a development area).
- e. Support the ability of aboriginal peoples to exercise traditional uses of the land.
- f. Encourage aboriginal peoples to share traditional use information for the purposes of land management and planning.
- g. Work with aboriginal peoples in establishing roles pertaining to reclamation and reuse of reclaimed lands for traditional uses.
- h. Assess the impacts of development and increased regulation on local trapping and treaty activities.

Objective 7.3: Opportunities for traditional uses within the region are maintained and enhanced.

Strategies

- a. Support aboriginal communities' ability to exercise traditional uses.
- b. Maintain populations of game species to support aboriginal traditional use and recreational hunting and fishing, including commercial guide outfitting.

- c. Support aboriginal communities to undertake community subsistence/traditional use needs assessment to support land-use decision making.

With the LARP, Outcome #7 and supporting strategies are set out as follows:

Inclusion of aboriginal peoples in land-use planning

Objective:

- To encourage aboriginal peoples' participation in land-use planning and decision-making. This will provide both aboriginal communities and the Government of Alberta with a basis for better addressing current and potential land-use conflicts, in a manner supportive of aboriginal traditional uses such as the exercise of treaty rights.

Strategies:

- a) Invite First Nations expressing an interest in the Richardson Backcountry to be involved in a sub-regional initiative called the First Nations-Richardson Backcountry Stewardship and Tourism Initiative (Richardson Initiative). The initiative would consider:
 - o Fish and wildlife management, access management and economic/business opportunity,
- b) The Government of Alberta will continue to consult with aboriginal peoples in a meaningful way when government decisions may adversely affect the continued exercise of their constitutionally protected rights, and the input from such consultations continues to be reviewed prior to the decisions.

From this, it is clear that the Draft Plan has removed approximately 13 strategies for requiring aboriginal involvement in land use planning in the region. For example, regulatory decision makers no longer have to consider how Aboriginal people will be involved in monitoring environmental effects. Nor do they have to consider how Aboriginal people and Aboriginal knowledge will be formally included in land-use planning. Aboriginal people would have no role in the evaluation of data on environmental, social and cultural impacts, as that is now done exclusively by Alberta within the context of government. Capacity funding would no longer be mentioned as part of the planning process. Support would no longer be provided for aboriginal communities' ability to exercise traditional uses.

Instead, under the Draft Plan, aboriginal peoples' involvement in land use planning processes is restricted to two strategies: consultation and the "Richardson Initiative."

Regarding consultation, Alberta's proposal in the Draft Plan is to conduct ad hoc consultations on individual decisions made under LARP, not to meaningfully address and accommodate First Nations' concerns at the land-use planning stage. This ad hoc, single-decision approach restricts aboriginal people from being consulted regarding strategic land-use decisions, despite consultations at that level being required by the honour of the Crown [*Haida, supra*, and *Rio Tinto Alcan Inc. v. Carrier Sekani*, 2010 SCC 43]. Alberta's approach is insufficient for meeting the Crown's constitutional obligations and is insufficient for ensuring that decision makers consider First Nations concerns regarding impacts to section 35 rights at the appropriate level.

The First Nations have good reason to be concerned about Alberta's consultation approach. First, Alberta declined to work with the First Nations on the development of a consultation agreement or protocol to guide LARP, as requested by the First Nations. At various meetings Alberta declined to provide any explanation of how the various submissions made by the First Nations on LARP had been reflected in the Draft LARP.¹⁶ Most recently, Alberta noted that it will provide the First Nations a summary of what it views have been the themes in the First Nations' LARP submissions, but only after consultation has been deemed by Alberta to have been completed.¹⁷ The previous refusals by Alberta to engage meaningfully with the First Nations in respect of LARP do not give the First Nations any confidence that there will be meaningful consultation once LARP is implemented.

The Draft Plan envisions a "consultation light" approach to consultation. Specifically, Alberta only commits in the Draft Plan to "review" input from consultations prior to making decisions that have the potential to adversely affect section 35 rights. It does not acknowledge that the Supreme Court of Canada requires that Alberta must provide feedback to the First Nations with respect to their submissions or that the Crown must always intend to substantially address aboriginal concerns (*Haida* at para. 42) and must accommodate section 35 rights, where necessary. For consultation to be meaningful, the Crown must demonstrate that, in balancing the competing interests at stake, it listened to the First Nations' concerns with an open mind and must in good faith make an effort to understand and address those concerns, with a view to minimizing the adverse impact of the decision while providing reasonable accommodation.

Without revising the Draft Plan to provide clearer Crown obligations for consultation, it is likely that regulatory decision makers will continue to fail to meaningfully consult. This has been the experience of MCFN and ACFN to date with respect to the development of the LARP. Jointly and individually, the First Nations have provided numerous submissions to Alberta regarding land-use planning, their rights, and the impacts that land-use decisions in the region may have on their rights and culture. In written correspondence and in meetings with the LUS, the First Nations have repeatedly requested specific feedback from Alberta on how their information and concerns in their submissions have been taken into account in the draft LARP.

As noted in the introduction, the Supreme Court of Canada noted in *Haida* that meaningful consultation included, among other things, an obligation on the Crown to provide feedback to First Nations. Again, at par. 46 the court quoted as follows:

Consultation is not just a process of exchanging information. It also entails testing and being prepared to amend policy proposals in the light of information received, and providing feedback. Consultation therefore becomes a process which should ensure both parties are better informed . . . (at s. 2.0 of Executive Summary)

. . . genuine consultation means a process that involves . . . :

1. gathering information to test policy proposals
2. Putting forward proposals that are not yet finalized
3. seeking Māori opinion on those proposals

¹⁶ Such as MCFN's meeting with LUS on April 15, 2011 and a joint meeting with LUS on April 27, 2011

¹⁷ See minutes of the meeting between Alberta, ACFN and MCFN, held in Fort McMurray on April 27, 2011.

4. informing Māori of all relevant information upon which those proposals are based
5. not promoting but listening with an open mind to what Māori have to say
6. being prepared to alter the original proposal
7. providing feedback both during the consultation process and after the decision-process. (at s. 2.2 of Deciding) (emphasis added)

Unfortunately, Alberta has declined to work with the First Nations prior to the finalization of LARP to understand their concerns and ask questions about, or comment on, their information and approach. In short, Alberta has received information from MCFN and ACFN in this and other Crown-led processes, but has neither provided meaningful feedback nor established any process to engage with the First Nations.

Take, for example, the Richardson initiative. ACFN submitted a co-management approach to Alberta in October 2008 and again in November 2010. On January 18, 2011 ACFN was asked by Alberta to provide additional information regarding ACFN's views on co-management. ACFN provided a co-management discussion paper within a week, on January 24, 2011. To date, ACFN's requests that Alberta consult on and discuss these submissions with ACFN have been ignored and no feedback has been provided. The Richardson initiative in the draft LARP does not reflect in any way the substance or spirit of ACFN's submissions, even though it is only avenue for aboriginal participation in stewardship and co-management contained in the Draft Plan. For example, Alberta unilaterally determined that tourism and business development will be one of the primary purposes of the initiative.¹⁸

VIII. The Draft LARP Regulations must ensure that Section 35 rights are considered and respected

(a) Part I: Interpretation

Under sections 4(2) and 5(2) of the Draft Regulations, regulatory decision makers have a duty to consider the LARP Strategic and Implementation Plans. Unfortunately, without revisions to the Draft Plan, this "duty to consider" makes it more likely that regulatory decisions made under LARP will adversely impact and infringe section 35 rights.

This is because the duty requires consideration of a plan that (1) was created without meaningful consultation with the First Nations and without incorporating important information regarding the requirements to sustain section 35 rights, and (2) provides no guidance to regulatory decision makers regarding the need to respect section 35 rights and include aboriginal peoples in land-use planning, other than through a vague commitment to ad hoc consultations.

For example, as described above, considering the Vision contained in the Draft Plan as a guide for land-use decisions is problematic because neither aboriginal peoples, their traditional

¹⁸ The indicator by which Alberta plans to assess whether the Richardson initiative is successful demonstrates again Alberta's complete misunderstanding of what is required to uphold its obligations to protect aboriginal and treaty rights. The Draft Plan proposes to judge success for the initiative based on the level of participation of aboriginal peoples, not on whether the initiative provides meaningful co-management options. Alberta's attention only to the amount of participants suggests that the initiative is intended to have no meaningful involvement in co-management.

knowledge nor their rights are included in that Vision. As also described above, the “cumulative effects management approach” to decision-making is unclear and provides no guidance regarding how regulatory decision makers are to consider, inter alia, Alberta’s constitutional obligations to protect and respect aboriginal and treaty rights.

Indeed, the “duty to consider” is made even more problematic by the removal of the strategies contained in Outcome #7 of the RAC Vision, quoted above. Because of the Draft Plan’s almost complete silence on aboriginal rights and involvement, regulatory decision makers considering LARP will no longer be directed to consider issues such as formal roles for aboriginal peoples in land-use planning and environmental assessment/monitoring, or how a decision will help maintain populations of game species to support aboriginal traditional uses, among other considerations related to meaningful consultation and the protection of section 35 rights.

(b) Parts II & III: Conservation of Ecosystems

Divisions 1 and 2 of Part II of the Draft Regulations address conservation areas and lands. The Draft Regulations make no provision for the priority exercise of section 35 rights in these areas nor do they focus on what is needed to sustain those rights generally or by way of providing guidance to decision makers. Rather, Divisions 1 and 2 of Part II guide decision makers to consider non-aboriginal uses – including in some cases mining and timber activities – over aboriginal and treaty rights, undermining Alberta’s position that conservation areas support section 35 rights.

For no clear reason, the Draft Regulations create a two-tiered “conservation” system by distinguishing “conserved lands” from “conservation areas”. This distinction is confusing and results in diminished protection for section 35 rights in “conserved lands”.

Division 1 deals with “conserved lands”, which include the majority of the areas listed in Schedule B of the Implementation Plan. It is unclear why the Draft Regulations create this category, for the Draft Regulations create no new restrictions or limitations on activities in these lands. Nor do the Draft Regulations create a priority scheme that would facilitate the exercise of section 35 rights in these areas. Quite the contrary: under the Draft Regulations, these areas are regulated under the *Provincial Parks Act* and/or *Public Lands Act* and their related regulations, which, as discussed above, severely limit the exercise of section 35 rights. The only new requirement in respect of “conserved lands” is an obligation that the Minister monitor the “combined area” and evaluate the “ratio” of conserved land. As discussed above, focusing on an arbitrarily determined quantity of lands without assessing the quality of those lands and whether they support traditional uses and the thresholds that underlie those uses displays a fundamental misunderstanding of what is needed to protect section 35 rights.

Division 2 addresses “conservation areas”, which are those areas designated under Schedules 1-5 of the Draft Regulations. There are numerous problems with this Division. First, treaty rights are not mentioned as requiring protection in conservation areas. Accordingly, if activities protected under section 35 are to be allowed in conservation areas, they would apparently be included in the category of “any other objective consistent with the conservation objectives stated in the LARP Implementation Plan”. This means that section 35 rights given the lowest priority of any activities potentially allowed in conservation areas.

Second, section 15 of the Draft Regulations prohibits the Designated Minister from issuing “statutory consents” in conservation areas unless the Minister is of the opinion that the proposed activity will enhance the section’s enumerated objectives. The permits and authorizations required under the *Wildlife Act*, *Parks Act* and *Public Lands Act* constitute “statutory consents”: thus, even where Alberta can validly require a permit for the exercise of a treaty right (which is not clear with respect to these enactments), the Draft Regulations would allow a minister to withhold a permit if the exercise of the treaty right does not, in the opinion of the minister, promote a conservation objective. This leads to absurd results. For example, permits for activities related to section 35 rights could be withheld to maintain scenic views for non-Aboriginal people. In the case of the conservation areas set out in Schedules 4 and 5, section 35 rights could be prohibited to promote forestry activities or exploration activities. The Draft Regulations provides no guidance to decision makers avoid such arbitrary results.

Third, it is troubling that the Draft Regulations exempt certain activities under the *Mines and Minerals Act* and the *Public Lands Act* from the statutory consent rules, but do not exempt or give priority to any activities relating to the exercise of treaty rights.

Finally, this part of the Draft Regulations demonstrates the failure of Alberta to meaningfully consult with and include the First Nations in LARP because, contrary to the objective in the Draft Plan of including aboriginal peoples in land-use planning, aboriginal people are completely excluded from the “programs to manage objectives” set out in section 16. Section 16 also fails to direct the minister to evaluate and report on whether the conservation areas allow for the meaningful exercise of rights, thus limiting aboriginal involvement and the collection of data necessary to provide direction to regulatory decision makers.

This exclusion of aboriginal peoples, section 35 rights and aboriginal knowledge is also seen in each of the divisions relating to the LARP frameworks. Specifically, aboriginal and treaty rights are not considered in any of the programs to manage effects under any of the frameworks. We also note that the divisions relating to the frameworks are of limited efficacy in respect of enforcing the frameworks and protecting section 35 rights because of how vaguely the Draft Regulations address “management responses”. In particular, the Draft Regulations do not make it clear what the timelines are for management responses, what they must entail, how they will be enforced, or what the penalties will be. Concrete details and a reduction of the overly broad ministerial discretion regarding enforcement are required.

(c) Part IV: Recreation and Tourism

The Draft Plan emphasizes creating recreational activities. Part IV of the Draft Regulations suggests that recreational activities will be created at the expense of section 35 rights.

In particular, section 45 of the Draft Regulations sets out a series of objectives for the areas set out in Schedules 6-11 of the Draft Plan in order of priority. Promoting and supporting the exercise of section 35 rights do not appear at any point in this list: again, it appears that section 35 rights are lumped in the category of “any other objective”, which falls as fifth in the list of priorities. Furthermore, a number of the objectives listed in section 45 appear to be inconsistent

with the exercise of section 35 rights, or, at very least, will make it more difficult and potentially unsafe to exercise section 35 rights in these areas.

Alberta has provided no justification for why it selected the areas in Schedules 6-11 as recreation and tourism areas. Nor did Alberta meaningfully consult with the First Nations prior to designating these areas.

Part V: Transitional

The extensive “grandfathering” sections are troubling. Alberta must provide more information regarding how many statutory consents and other authorizations fall under this part of the Draft Regulations and how that will affect the meaningful exercise of section 35 rights.

IX. Recommendations

What is required to assess, accommodate and avoid infringing section 35 rights?

- The LARP must explicitly recognize the constitutional protection afforded to Treaty and Aboriginal rights in section 35 and the need for the LARP to take into account such rights in land use planning
- The LARP vision must include that section 35 rights can and will be able to be practiced at a level that sustains aboriginal rights holders in relation to their subsistence and livelihood rights.
- Alberta must work cooperatively with First Nations to develop studies, criteria and thresholds to sustain the exercise of section 35 rights now and in the future and to use that information to select conservation areas.
- The Government of Alberta must conduct proper studies and consider freezing development in certain areas until more information is known about potential direct and cumulative impacts of existing, planned and reasonably foreseeable development, including on section 35 rights and what is needed to practice and sustain those rights (ecosystem, environment, culture, lands, air, water, fish, wildlife)
- LARP must make express provision for the protection of section 35 rights and set out specifics on where and how those rights will be protected based on the studies referred to in the previous two recommendations.
- Alberta must recognize that any infringement of aboriginal and treaty rights must meet the standard of justified infringement, including priority allocation of resources.
- The “cumulative effects management approach” must be clarified so that it will guide decision makers to make land-use decisions in a way that respects and accommodates section 35 rights.

How can the frameworks ensure that section 35 rights are protected now and in the future?

- Thresholds in frameworks should not be based on future anticipated development. Frameworks must set thresholds and triggers that relate to the meaningful practice of aboriginal and treaty rights. Furthermore, where the proposed frameworks do not address issues that are important to the meaningful practice of section 35 rights, such as Aboriginal Base Flow, Aboriginal Extreme Flow and Ecosystem Base Flow measures, new frameworks must be established to address these issues.¹⁹
- Thresholds, including for the meaningful exercise of section 35 rights, should be set before further medium and large-scale industrial development is permitted – the current approach assumes a pre-determined level of development and plans for that scenario rather than on determining what level of development can be sustained in various parts of the Lower Athabasca area
- Alberta must work with aboriginal peoples to prepare a traditional land and resource use and management plan. The results must be included in the revised frameworks.
- Aboriginal knowledge of historical and recent changes in water quality and quantity, air quality, land and biodiversity must be incorporated into revised frameworks.
- Environmental assessment and monitoring data collected by aboriginal peoples must be used to revise and update frameworks.

How can conservation and mixed use areas be implemented in a way that complies with the constitutional framework of Canada by respecting and accommodating section 35 rights?

- Alberta must ensure that all of its regulatory and legislative mechanisms relating to land-use employ a rights-based focus and are consistent with section 35 rights.
- Alberta must ensure that aboriginal and treaty rights can be meaningfully exercised in “conservation” and other areas such as mixed use areas. This will require Alberta to revise existing and pending legislation and regulations based on consideration of the input of First Nations.
- Alberta must ensure that regional planning regulations and related legislation recognize the priority allocation of resources to aboriginal peoples and accommodation of aboriginal and treaty rights when balancing resource and land allocation.
- Alberta must ensure that regional planning regulations and related legislation acknowledge that the ability of aboriginal peoples to exercise traditional uses of the land

¹⁹ See the Report entitled “As Long as the Rivers Flow: Athabasca River Use, Knowledge and Change” which has been submitted to Alberta numerous times, including in ACFN’s November 22, 2010 LARP submission and the Report entitled “Athabasca Chipewyan First Nation and Mikisew Cree First Nation Review of the Phase 3 Framework Committee Recommendations” which was submitted to Alberta on October 13, 2010.

must be linked to specific lands and territories and the resources thereon, which require conservation for the ability of aboriginal peoples to exercise traditional uses to be maintained. Such conservation or related approaches must ensure protection of section 35 rights now and in the future.

- Alberta must explain and justify the conservation areas it designated in the Draft Plan prior to the adoption of LARP by Cabinet and must be prepared to add to or modify these areas based on meaningful consultation with the First Nations, if the outcome of such consultation leads to that result.
- Access management regimes must be developed with the First Nations and must ensure access to the areas where rights are exercised and must ensure that any restrictions on access (including gates put up by proponents and other such restrictions) are developed in consultation with First Nations and that such restrictions do not impair the rights of the First Nations to access their preferred hunting, fishing, trapping and gathering areas.

How can First Nations be meaningfully involved in land use planning in the Lower Athabasca Region in a way that facilitates reconciliation?

- Alberta must develop co-management regimes with the First Nations. The Richardson initiative is not a meaningful starting point for co-management in its present form as it contains certain pre-determined outcomes and it contains no information or details on First Nations would be involved and how their rights would be protected.
- There must be formal roles created for First Nations to influence planning and project decision making in land-use planning and environmental assessment at all levels, and planning processes and regulatory instruments must make that happen.
- LARP must reflect Alberta's constitutional obligation to consult and if required accommodate aboriginal peoples in regards to strategic and high level decisions and should be developed in collaboration with First Nations with respect to decisions which have the potential to adversely affect and infringe their rights under section 35.
- LARP must require the inclusion of traditional ecological knowledge in land use planning processes and decisions.
- Alberta must develop strategies akin to those in the Outcome #7 contained in the Advice of the Lower Athabasca Regional Advisory Council.

APPENDIX: REFERENCES TO ABORIGINAL PEOPLES AND INTERESTS IN THE LARP DRAFT

In addition to the comments raised in the body of this review, set out below are further issues, concerns and recommendations related specifically to parts of the Draft LARP which make specific reference to Aboriginal Peoples and their Interests.

Page	Section	Subheading	Issue	Reference	Comments
6	The Region Today	Economic Development	Opportunities in oil sands economy	Aboriginal peoples should participate in economic activities from oil sands developments as employees or entrepreneurs	<p>While participation in the economy is important to First Nation people, the Draft does not acknowledge the costs associated with oil sands developments and who bears those costs. Economic opportunities cannot be considered without understanding the impacts of oil sands developments on the exercise of First Nations’ constitutionally protected rights.</p> <p>The LARP must acknowledge the importance of the subsistence economy in the region. The Draft ignores this important part of the region’s economy, which results in land-use planning strategies that have the very real potential of ending the subsistence economy.</p> <p>It is not clear what is meant by the comment that economic opportunities exist, “particularly aboriginal peoples.” This comment is odd given that one of the main goals of the Draft is to prepare for the tens of thousands of people coming to the Athabasca region from elsewhere in Canada and the world to take advantage of these economic opportunities.</p> <p>Provision of jobs to Aboriginal peoples is not an accommodation or compensation for potential adverse impacts to or infringements of section 35 rights.</p>

Page	Section	Subheading	Issue	Reference	Comments
11	The Region Today	Human Development	Growing population levels, physical infrastructure and non-aboriginal use of lands has placed pressures on cultural activities and cultural heritage	Aboriginal peoples should rely on the Historical Resources Act to protect traditional use locations of cultural and spiritual significance	<p>While it is positive that Alberta recognizes that population growth and infrastructure development have already adversely affected cultural activities and cultural heritage, the <i>Historical Resources Act</i> 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 <i>Historical Resources Act</i> does not allow First Nations to have control over these resources.</p> <p>Recommending that the <i>Historical Resources Act</i> 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.</p> <p>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</p>

Page	Section	Subheading	Issue	Reference	Comments
					<p>ACFN and MCFN throughout the LARP process and in other submissions made to Alberta by the First Nations in regulatory and other contexts.</p> <p>Finally, this reference highlights clearly that the Draft contains no new planning concept, framework, information gathering process or monitoring program regarding protecting traditional use locations for Aboriginal peoples.</p>
13	The Future of the Region	Regional Vision	Lower Athabasca Regional Outcomes	Land-use planning balances the constitutionally protected rights of aboriginal peoples and the interests of all Albertans.	<p>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.</p> <p>Because the LARP downplays if not entirely ignores constitutionally-protected rights of First Nations, there is little or no information or process to guide decision makers on how “balancing” must take place to protect those rights now and into the future.</p> <p>Given the revisions to the strategic directions and outcomes of the LARP since the RAC Vision document, it is now even more unclear how</p>

Page	Section	Subheading	Issue	Reference	Comments
					<p>Alberta plans to balance aboriginal rights and other interests in a way that respects the constitution. Whereas previously one outcome of the LARP (in the RAC Vision) was to ensure that “aboriginal peoples’ rights, traditional uses and values are respected and reflected in planning” by developing formal roles for aboriginal peoples in land-use planning and environmental assessment/monitoring and support the ability of aboriginal peoples to exercise traditional uses of the land, now the LARP contemplates only consulting – but not accommodating – aboriginal peoples and has completely removed all formal roles for aboriginal peoples and all efforts to support the exercise of traditional uses of the land.</p>
14	The Future of the Region	How We Will Achieve the Vision	The LARP’s seven desired regional outcomes	Inclusion of aboriginal peoples in land use-planning is a desired outcome.	<p>As noted above, the desired outcome of the RAC Vision document was to ensure that “aboriginal peoples’ rights, traditional uses and values are respected and reflected in planning”. This was to be achieved by including in the LARP formal roles for aboriginal peoples in land-use planning and environmental assessment/monitoring and support the ability of aboriginal peoples to exercise traditional uses of the land, among other strategies.</p> <p>As described later in the Draft, this outcome will now be achieved by consulting (not necessarily deeply, without necessarily incorporating First Nation’s concerns, and without accommodation) aboriginal peoples and by inviting First Nations to participate in a dual stewardship-tourism initiative.</p>

Page	Section	Subheading	Issue	Reference	Comments
					<p>Regarding consultation, we note, as discussed above, that the description of consultation does not reflect the current state of the law and that consultation is always a constitutional requirement when aboriginal and treaty rights may be adversely affected, whether or not LARP exists. As such, the only new initiative in LARP to include aboriginal peoples in land-use planning is a stewardship-tourism initiative, which has business development as a primary objective.</p> <p>This stewardship-tourism initiative is not responsive to the co-management described and presented to Alberta by ACFN in respect of the Richardson Backcountry and the First Nations generally.</p>
18	Strategic Directions for the Region	Designating new conservation areas	Criteria for Conservation areas	Areas that support aboriginal traditional resources are a criteria for conservation areas	<p>Alberta has refused to assist the First Nations in the development of a Traditional Land and Resources Use Management Plan [TLRUMP]. The TLRUMP would have identified what resources are integral to the meaningful practice of Treaty 8 rights, would have identified the socio-cultural, ecological and economic conditions that support the meaningful practice of Treaty 8 rights, would have identified the pressures that threaten the meaningful practice of Treaty 8 rights, would have integrated the information into an appropriate management tool format and would have developed strategies to incorporate this information into the LARP. Absent this essential data, it is unclear what Alberta means by “support traditional uses”.</p>

Page	Section	Subheading	Issue	Reference	Comments
					<p>Furthermore, the Draft does not set out – and Alberta has not worked with First Nations in this regard – any methodology/criteria for selecting such lands or for determining how to “balance” development and conservation.</p> <p>It is troubling that Alberta plans to allow disruptive exploration and extractive activities on conservation areas.</p> <p>Additionally, without accepting that compensation for ongoing and future infringements of Aboriginal and treaty rights is an acceptable option, it is odd that whereas the RAC Vision document envisioned a duty to compensate aboriginal peoples where industrial or other activities authorized under the LARP resulted in infringements to aboriginal and treaty rights, the current Draft only contemplates compensating industrial proponents. As it stands now, the LARP neither avoids infringements to Aboriginal and treaty rights nor contemplates compensating for such infringements.</p>
22	Strategic Directions for the Region	Including aboriginal peoples in land-use planning		1 of the 7 strategic directions under the LARP is to include aboriginal peoples in land-use planning	This section of LARP is troubling, particularly given that it is the only portion of LARP that addresses Aboriginal involvement at any stage of the land-use process other than business opportunities in greatly expanded oil sands development. As noted above, the LARP no longer foresees Aboriginal peoples as having any formal role in the land-use process. Similarly, while there is a passing reference in the Draft to the need to balance the constitutionally protected rights of aboriginal peoples and the interests of

Page	Section	Subheading	Issue	Reference	Comments
					<p>Albertans (which is problematic for the reasons noted above), the new Draft no longer lists this as part of aboriginal involvement in land-use planning and focuses almost exclusively on consulting on an ad hoc decision by decision basis.</p> <p>It is surprising that, in a comprehensive land-use planning scheme that purports to comprehensively set the stage for 50 years of land usage in an area that overlaps with the traditional territories of a number of First Nations who still actively exercise or try to exercise their constitutionally protected rights on those lands, Alberta would restrict Aboriginal involvement (outside of the Richardson Initiative) in land-use planning to consulting First Nations on a government decision by government decision basis. That is not a land use plan.</p> <p>Alberta's apparent decision to remove the objective that "opportunities for traditional uses within the region are maintained and enhanced" is disturbing, but it is in keeping with the thrust of LARP as contained in the new Draft, namely that an upwards of a 500% increase in oil sands production and drastically increased trail systems and recreational usage take place without meaningful involvement of aboriginal peoples or the protection of their constitutionally protected rights.</p>
25	Implementation Plan	Outcome 1	Ensuring the economic potential of the oil sands	The Aboriginal Development Initiative should be implemented	The Aboriginal Development Initiative cannot be a substitute for proper consideration and accommodation of First Nations concerns

Page	Section	Subheading	Issue	Reference	Comments
			resource is optimized		regarding the detrimental aspects of the developments on their section 35 rights and traditional territories and in their treaty area.
27	Implementation Plan	Outcome 2	Tourism	Alberta should engage with aboriginal peoples to have them complete tourism opportunity assessments	Alberta should first engage with aboriginal peoples by supporting the TLRUMP and then integrating that information into the land-use plan. Otherwise, tourism is simply an economic development venture which bears little to no connection with the practice of aboriginal and treaty rights for social, cultural, spiritual, ceremonial and other purposes. While the First Nations are not opposed to working with Alberta on exploring tourism opportunities, this is not a substitute for incorporating measures and strategies in LARP to ensure that the First Nations aboriginal and treaty rights can be meaningfully practiced into the future in a way that sustains their communities and their culture.
35	Implementation Plan	Outcome 7	Inclusion of aboriginal peoples in land-use planning	Two strategies: (1) some level of consultation and (2) a stewardship-tourism initiative	It is unclear why Alberta chose to remove all of the strategies for including aboriginal peoples in land-use planning that were contained in the RAC Vision document, other than these two. While the numerous strategies contained in Outcome 7 were vague and needed additional clarification as set out in joint submissions of the First Nations filed with the LUS, it is not clear how completely removing them from the LARP – and simultaneously removing most mechanisms for aboriginal involvement in land-use planning – is a reasonable or appropriate response, given the volumes of materials submitted by the First Nations to Alberta regarding how aboriginal involvement in land-

Page	Section	Subheading	Issue	Reference	Comments
					<p>use planning could be achieved in a way that assists Alberta to operate within the constitutional framework of Canada by respecting and facilitating the exercise of aboriginal and treaty rights.</p> <p>It is not clear why Alberta has removed Aboriginal peoples and aboriginal knowledge of the land and environs from the LARP and from inclusion in the environmental management frameworks contemplated therein.</p> <p>Using aboriginal participation levels in the sub-regional initiative is the wrong measure of success. A proper measure of success would be to look at the incorporation of aboriginal knowledge in the initiative, how it respects and facilitates aboriginal and treaty rights, and how aboriginal peoples are part of a shared-decision making and co-management process.</p>
39	Implementation Plan	Table 1	Regional Outcomes and Supporting indicators	SRD, Tourism and AENV will be the Alberta Ministries leading the efforts to include aboriginal peoples	More clarification is needed.
40	Implementation Plan	Table 2	Regional Outcomes and strategies	The Aboriginal Development Initiative will assist in optimizing the oil sands resource	See comments above. Also, more clarification is needed.
41	Implementation Plan	Table 2	Regional Outcomes and strategies	Two strategies: (1) some level of consultation and (2) a stewardship-tourism initiative	See comments above. Also, more clarification is needed.

Review of the Draft Lower Athabasca Integrated Regional Plan

Prepared for

Athabasca Chipewyan First Nation IRC

May 2011

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Executive Summary

The government of Alberta (GOA) has produced the Draft Lower Athabasca Integrated Regional Plan (LARP) that they assert will help manage land and natural resources to achieve Alberta's long-term economic, environmental and social goals. GOA proposes that this plan will be used as a proactive regional planning tool for managing cumulative effects and thereby protecting resources in the Lower Athabasca Region (LAR). GOA states that contributions from the Lower Athabasca Regional Advisory Council, the public, First Nations and Métis communities and stakeholders have been considered during the development of the LARP. The Athabasca Chipewyan First Nation (ACFN) requested that Management and Solutions in Environmental Science (MSES) complete a technical review and assessment of LARP.

The ACFN have submitted and discussed with GOA their vision of land planning for the LAR that will enable First Nations to engage in traditional and cultural activities. We understand that ACFN's goal in regards to land and resource use planning is to ensure that the meaningful practice of their Treaty 8 rights can be sustained for future generations. ACFN have informed the GOA that, in order to do so, sufficient quality and quantity of traditional lands and resources must be protected. The purpose of this review is to evaluate how the LARP considers ecological resources that are important to First Nations.

Our overarching finding was that LARP is not informed by either ecological analyses or First Nation needs. In previous submissions to GOA, the ACFN provided recommendations for cultural protection areas that need to be established to preserve their right to exercise traditional pursuits and livelihood (November 22, 2010, submission entitled "Athabasca Chipewyan First Nation Advice to the Government of Alberta Regarding the Lower Athabasca Regional Plan"). LARP is purporting to protect 19% of the Cultural Protection Areas designated by the ACFN and it is unclear how and why these particular areas were selected in LARP over others. There is no evidence that GOA conducted any traditional resource use analyses to support their selection of lands to be protected. We recommend that further traditional resource use analyses be done to develop an understanding of how any selection of purportedly protected lands may accommodate the ACFN needs. Also, further analyses need to be done in terms of the spatial arrangement of protected lands. For example, none of the river corridors are protected. This means that access to the protected lands is likely restricted, important riparian habitats along the rivers and aquatic resources also appear to be unprotected. The amount of protection of ACFN lands aside, we find that LARP is unclear about how the proposed conservation areas may be deemed protective of traditional uses given that the conservation areas themselves are already disturbed and numerous activities that are incompatible with traditional uses are allowed under LARP.

From an ecological point of view it is unclear how the proposed conservation areas protect the wildlife and the vegetation that are important to the ACFN. Not only does LARP appear to lack the required analyses, but all indicators to date suggest that wildlife and vegetation resources are on the decline outside and inside of proposed protected areas.

Several overarching concerns regarding the draft report are apparent and are listed below:

- LARP uses terms that sound good (for example “*ecological integrity*,” “*conservation areas*”, or the “*balance*” of “*economic, environmental and social implications*”) but does not provide any tangible definitions of these terms. Without defining such terms the frameworks that would help to “*maintain ecosystem function and biodiversity*” lack the foundations needed for their implementation.
- LARP is not based on an understanding of how fast the boreal forests in LAR are running out of conservation options, and how conservation should protect “*ecosystem integrity*”, a term used throughout LARP.
- LARP is not based on ecological analyses for the region that would support the design of conservation areas nor does it provide any rules or criteria on how conservation areas reflect the request by First Nations to protect their rights within or outside of conservation areas of the LAR. Rather, conservation areas proposed in LARP appear to be based on avoiding lands leased to industry.
- LARP does not provide the ecological analyses necessary to first establish indicators, triggers and limits for the resources that are important to First Nations and then to measure the success of keeping industrial degradation within the limits for the indicators in the region. We understand that ACFN expressed that cultural analyses are also necessary alongside of ecological analyses to establish indicators, triggers and limits. However, we found no evidence in LARP that such analyses have been conducted. Given our finding that many areas of LAR are already disturbed beyond limits that would sustain viable populations of some threatened species, such analyses are urgently needed.
- LARP has not provided ecological information or develop the rules necessary to protect wildlife species and vegetation either within or outside of the conservation areas nor does it specifically protect traditional land use. LARP only includes traditional use as part of their criteria for identifying lands to be designated as conservation areas without giving an indication of how traditional use factored into the designation of conservation areas.
- LARP is mute on the fate of Key Wildlife and Biodiversity Zones (KWBZ) and Ecologically Significant Areas (ESA) outside of conservation areas and no information is provided on how KWBZ and ESAs and regional habitat restoration would fit into “*the balance between development and conservation in the region*”, which is LARP’s purported approach to designating conservations areas. While Alberta has established KWBZ and ESAs for ecological reasons, the

fact that these areas should receive special management considerations in Alberta does not seem to be recognized in LARP.

- LARP is mute on the conservation actions that that need to be taken outside of conservation areas. LARP does not indicate how the continuing erosion of healthy ecosystems in the region can be halted, let alone how a net-gain in healthy ecosystems in the region can be achieved.
- LARP does not provide the rates of degradation that are needed to understand how fast actions must be implemented to keep degradation of the indicators within the limits, either within or outside of conservation areas.
- LARP does not provide the tools needed to bring regional exceedances of triggers and limits under control.
- LARP has not provided the tools to manage the balance of Green House Gas emissions.
- LARP only protects 19% of ACFN's Cultural Protection Areas that they provided to GOA in their November 22, 2010, submission entitled "Athabasca Chipewyan First Nation Advice to the Government of Alberta Regarding the Lower Athabasca Regional Plan".
- LARP does not provide any rules or criteria on how the rights of First Nations would be protected throughout LAR, whether inside or outside of conservation areas.
- GOA does not provide any specific information, whether in LARP or in personal communications (meetings held April 15 and 27, 2011), on how the input from First Nations was used in the drafting process for LARP.

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1.0 Introduction

The government of Alberta (GOA) has produced the Draft Lower Athabasca Integrated Regional Plan (LARP) that they assert will help manage land and natural resources to achieve Alberta's long-term economic, environmental and social goals. GOA proposes that this plan will be used as a proactive regional planning tool for managing cumulative effects and thereby protecting resources in the Lower Athabasca Region (LAR). GOA states that contributions from the Lower Athabasca Regional Advisory Council, the public, First Nations and Métis communities and stakeholders have been considered during the development of the LARP. The Athabasca Chipewyan First Nation (ACFN) requested that Management and Solutions in Environmental Science (MSES) complete a technical review and assessment of LARP.

The ACFN have submitted and discussed with GOA their vision of land planning for the LAR that will enable First Nations to engage in traditional and cultural activities. We understand that ACFN's goal in regards to land and resource use planning is to ensure that the meaningful practice of their Treaty 8 rights can be sustained for future generations. ACFN have informed the GOA that, in order to do so, sufficient quality and quantity of traditional lands and resources must be protected. The purpose of this review is to evaluate how the LARP considers ecological resources that are important to First Nations.

Our overarching finding was that LARP is not based on ecological analyses for the region that would support the design of conservation areas nor does it provide any rules or criteria on how conservation areas reflect the request by First Nations to protect their rights within or outside of conservation areas of the LAR. Rather, the designation of conservation areas proposed in LARP is based on avoiding lands leased to industry. We recommend that traditional resource use analyses be done to develop an understanding of whether the selection and spatial configuration of lands purportedly protected under LARP will actually accommodate the ACFN needs.

Conclusions and recommendations directed at GOA and the authors of LARP are written in **bold** text throughout the document. Quotations from LARP are indicated in italics followed by the page numbers in parentheses.

1.1 Athabasca Chipewyan Vision for LARP

In November, 2010, ACFN provided their "Vision" for the LARP to Alberta for consideration in drafting the LARP. According to ACFN (2010, p. 1, emphasis in original):

“From the outset, ACFN has consistently declared in their correspondence on LARP, that their utmost concern in respect of land use planning is to ensure that the meaningful practice of their Treaty 8 rights can be sustained for future generations. For the purposes of this submission, the Treaty Rights of ACFN are understood to include, but are not limited to, hunting, fishing, trapping and gathering for sustenance and livelihood purposes. The full practice of these rights reasonably includes, and is not limited to, access to sufficient lands and resources in which the rights can be exercised. “Sufficient” refers not only to quantity but quality, and is evaluated from the perspective of what is required to fulfill not only subsistence requirements, but also cultural needs, of the First Nation now and into the future. Determining what is “sufficient” encompasses a suite of interconnected tangible and intangible resources that underlie the meaningful practice of practice of rights. These “resources” include, but are not limited to: routes of access and transportation; water quality and quantity; healthy populations of game in preferred harvesting areas; cultural and spiritual relationships with the land; abundant berry crops in preferred harvesting areas; traditional medicines in preferred harvesting areas; the experience of remoteness and solitude on the land; feelings of safety and security; lands and resources accessible within constraints of time and cost; sociocultural institutions for sharing and reciprocity; spiritual sites; etc.”

A draft map that depicts ACFN “cultural protection areas” was also provided. ACFN has informed us that the cultural protection areas include three types of coarse-scale planning zones: 1) homeland zones, 2) proximate zones, and 3) a network of critical waterway zones. ACFN has explained to us that these zones are set within the larger extent of ACFN’s practice of treaty rights as indicated on the map by critical and standard consultation areas. A number of recommendations were provided on the planning and management of the cultural protection areas (ACFN 2010, p. 19-21). ACFN recommended strongly that operationalizing their vision would require a traditional land and resource use plan (TLRUP) to be completed (ACFN 2010, p. 8). A TLRUP would provide a critical tool for identifying criteria and thresholds to be implemented in LARP planning and implementation. In addition to the information provided by ACFN specific to the consideration of their treaty rights in the planning and implementation of LARP, ACFN also provided a detailed analysis, comments and recommendations on the RAC Vision document.

The ACFN have stated to us as well as to GoA in meetings that we have attended that their objective is to have the LARP protect lands and resources which can still be used by First Nations for the exercise of their Aboriginal and Treaty rights.

However, it appears that the information provided by the ACFN (2010) has not been used during the development of the LARP draft. The ACFN have repeatedly requested that concrete, not conceptual, plans be developed in order to manage, mitigate and monitor effects on Treaty Rights (see third party

reviews by the ACFN submitted to GOA, e.g. letter 17 May, 2010, to ERCB re. TOTAL's application for the Joslyn North Mine Project).

In this review, we note that the ACFN, signatories to Treaty 8, have indicated their understanding of Treaty Rights as per the quote above.

1.2 Traditional Resources and Ecosystems

Ecosystem needs, indicators, targets, thresholds, acceptable levels of risk, and the required balance to maintain ecosystem processes need to be determined by the local people who are most affected by industrial disturbance (Wood 2003, Burgman 2005). MSES reviewed evidence about the availability of past, present and likely future key traditional resources in LAR and applied that evidence to the review of the draft LARP and the data and analyses used in the process of designating conservation areas under LARP.

For the purpose of this report, we consider several of the traditional resources that we assume are of concern to the ACFN, including remoteness, ecosystem processes, and wildlife species such as bison, caribou, moose, beaver, and waterfowl. We further understand that the health, continued viability, and the "sufficiency" of these traditional resources within LAR depends on ecosystem processes which include the availability of clean air, clean water, and the resilience of ecosystems to recover from human disturbance.

2.0 Technical Review of LARP

The Alberta government is currently developing plans which purport to balance environmental, social and economic interests in the province. The LAR planning region covers 93,260 km², nearly one third of the Alberta boreal forest (the other two thirds are subject to two other planning regions). To determine the balance between environmental, social and economic interests, the plans must set limits to forest degradation based on a threshold beyond which the forest would no longer provide the ecosystem services required for traditional use (ecosystem services include carbon capture, air and water purification, and renewable resources).

2.1 Boreal Forest Cover Decline is Not Properly Considered

Key Finding: LARP is not based on an understanding of how fast the boreal forests in LAR are running out of conservation options. GOA does not appear to have analyzed the rate

of ecosystem degradation and appears to be unaware about the past, current and future rate of erosion of “ecological integrity”.

Canadian boreal forests are managed through provincial regulations (except for National Parks which are under federal jurisdiction). The province of Alberta encompasses about 318,000 km² of boreal forests, 140,000 km² of which cover the oil sand deposit area (Government of Alberta 2011). Oil and gas exploration in Alberta is the primary cause of disturbance in the Alberta boreal forest (data obtained from AltaLIS (2008) and our own analysis, see below) but pressures from other forms of resource development, including mineral, forestry and agricultural industries are on the rise. The Alberta boreal forest has been identified as one of the global forest loss hotspots (Hansen et al. 2010).

Globally, boreal forests experience a high rate of degradation (Hansen et al. 2010). Canada’s boreal forests provide important ecosystem services such as carbon sequestration, but the Canadian forests are degrading rapidly (Kurz et al. 2008). The ability of forests to capture carbon is a reflection of their ability to provide other ecosystem services including the resources required for traditional use. Canada experienced the second largest loss of forest cover in the world (Hansen et al. 2010). It has been suggested that the conservation of Canadian boreal forests is running out of options because of changing land use (Schindler and Lee 2010).

In order to know whether conservation of Canadian boreal forests is in danger of reaching a point at which effective conservation action is no longer possible, the rate of forest cover loss must be determined so as to project when any given targets or thresholds for conservation may be reached or surpassed.

We note that the draft LARP proposes that 22% of LAR be set aside as conservation areas. Whether or not this is sufficient for the protection of ecosystem processes or whether this amount of protected areas will be endangered by the expanding development is a question that needs adequate ecological analyses.

2.2 Lack of Definition of Key Terms

Key Finding: LARP uses terms that sound good but no tangible definitions of these terms exist. These terms must be defined and used as foundations for frameworks that would help to “maintain ecosystem function and biodiversity” (p.40, 41). In particular, terms referring to traditional uses need to be explicit so as to maintain sufficient lands and resources for First Nations traditional resources and cultural needs.

Alberta’s criteria for conservation areas include (p.18):

- “little or no industrial activity,
- support of aboriginal traditional uses,
- representation of the biological diversity of the region, and
- areas of roughly 4,000-5,000 km² in size.”

There are numerous problems with a lack of definitions of the above terms:

- Although areas with “little activity” may well be found in remote areas of northern Alberta, the question remains what “little activity” means and, as noted in this and other ACFN submissions, certain kinds of activities will be permitted in “conservation areas” which may conflict with the exercise of Treaty rights;
- No definitions of “support of aboriginal traditional uses” exist anywhere in LARP and its supporting documents. Even in discussions with GOA (meetings held April 15 and 27, 2011), no definition was provided (see also section 3.0 below). ACFN (2010) has alerted GOA that additional information is required to determine what is needed to support the exercise of Treaty rights.
- *Biological diversity* in the region has not been evaluated in terms of:
 - what diversity means
 - where there are biodiversity hotspots (areas of high biological diversity)
 - what the natural range of variation is
 - how diversity and ecosystem health are linked
- Large areas are indeed desirable for the maintenance of “ecological integrity” (p.13) (see problems with definition below) but most areas designated for conservation under LARP already have some form of disturbance (we calculated that 12% of conservation areas are disturbed, see below). Moreover, large size alone is not a sufficient criterion for effective ecological conservation because areas need to be of adequate size to support a high biological diversity, a range of natural ecosystem processes, and because areas need to be interconnected. Perhaps, an interconnected network of intact forest landscapes the size of 500 km² as used by Potapov et al. (2008), may be a more realistic conservation target.

“Conservation” is used in Alberta’s plans to mean assurance of ecosystem integrity (p.19), but “integrity” of an ecosystem is not strictly defined, neither in LARP nor anywhere else. There are many challenges of using the complex notion of “ecosystem integrity” (Lackey 2001, DeLeo and Levin 1997, Wicklum and Davies 1995). Commonly used notions relate “ecosystem integrity” to the sound processes and healthy organisms composing an ecosystem which is unaffected by humans. However, all ecosystems in LAR are affected by humans. That is, perfect “ecosystem integrity” does not exist in LAR and must, therefore, be viewed on a scale from completely unaffected to fully affected by humans. LARP does not define the level of “ecosystem integrity” that would need to be maintained either within or outside of conservation

areas. LARP does not elaborate how “ecosystem integrity” will be measured. How, then, will “ecosystem integrity” be assessed or maintained?

2.3 The Design of Conservation Areas

Key Finding: LARP is not based on ecological analyses that would support the design of conservation areas. Rather, LARP appears to be based on avoiding areas leased by industry.

While LARP promises to design conservation areas with the intent to use them as “benchmark areas for assessing ecological integrity” (p.19), and for protecting threatened wildlife species such as caribou (p.29), there is no indication that LARP used any ecological analyses in designing conservation areas.

A design of conservation areas and the interconnecting network of corridors should include an evaluation of species richness hotspots and the relationships between species and the area they need to maintain viability for a variety of taxa (Fleishman et al. 2000, Wolters et al. 2006, Koh et al. 2010). Without such an analysis it cannot be known how the conservation areas will protect the species in the region, how conservation areas will represent ecosystems in the region, and how the conservation areas might maintain “ecological integrity”, and ultimately how the conservation areas will provide for sufficient lands and resources for First Nations’ traditional uses and cultural needs.

For example, it is not clear how these conservation areas will protect endangered species such as woodland caribou because the design of LARP’s conservation areas does not appear to consider GOA’s caribou ranges (ASRD 2011); the caribou ranges were delineated to protect this threatened species from further decline but almost none of the ranges are within conservation areas (Figure 1). Similarly, the conservation areas do not protect areas that would contain aggregations of habitat for either wood bison or moose. Finally, the conservation areas do not protect important systems of bogs and fens and other wetlands. All such considerations (caribou habitat, habitat for other valued wildlife, different types of wetlands) contribute to regional biodiversity and need to be included in an evaluation of species-area relationships and species richness hotspots.

It appears that of the criteria for selection of conservation areas, the “little or no industrial activity” was given most weight in selecting the conservation areas. Figure 2 shows that the conservation areas largely avoid the presence of oil sands leases. There is no evidence that, in designing conservation areas, GOA considered the ecosystems, the processes, and the diversity of species that might exist in LARP’s conservation areas. The conservation areas simply try to minimize already substantial disturbance of

land cover (Figures 3 and 4). In its plan, Alberta continues to disregard the requests for scientific analysis as a foundation for sound environmental planning decisions (RSC 2010, Oilsands Advisory Panel 2010).

2.4 “Economy Balanced with Society and Environment”

Key Finding: LARP has not provided ecological information to develop the rules necessary to protect wildlife species and vegetation outside of the conservation areas. While Alberta’s purpose in establishing KWBZ and ESAs was to protect ecological values, LARP is mute on the fate of KWBZ and ESAs outside of conservation areas and no information is provided on how KWBZ and ESAs and regional habitat restoration would fit into the balance.

The balancing act requires that rules for development be established not only within, but also outside of conservation areas. It has long been recognized that biodiversity cannot be maintained by merely setting aside protected areas; rather, conservation action must also occur in the matrix within which protected areas are located (Sinclair et al. 1995). In the case of the LARP, the “matrix” is the area comprised of the mixed use zone (“green area public land”) and “areas for recreation/tourism development.” The rules for conservation areas are set out in Schedule B of the draft LARP and permit a number of activities that disturb ecosystems, impact the sufficiency of lands and resources, and ultimately interfere with traditional use practices and cultural needs. However, the rules for lands outside of conservation areas are not described at all.

Although GOA staff provided assurance in meetings (April 15 and 27, 2011) that environmental protection measures would still be in place outside of the conservation areas, it is not clear how such measures will be put in place. It is also unclear what the measures might be, if they were put in place.

Under current conditions, the LARP boundary includes Key Wildlife and Biodiversity Zones (KWBZ) that encompass, according to our analyses, 9% of the LARP area. It also includes Ecologically Significant Areas (ESA) that encompass 28% of the LAR. Nearly all KWBZ (97%) and 80% of ESA areas are outside of conservation areas. According to GOA, these areas receive a special consideration when granting approvals for development but it is unclear how much and what quality of consideration. To our knowledge, the KWBZ and ESAs do not have protected area status which means development will be allowed within these areas.

An analysis is required to understand how, exactly, the conservation areas and the disturbance allowed will effectively protect ecosystems, biodiversity and traditional use. The effectiveness of conservation areas must be understood in terms of the balance that they provide in relation to the development,

especially in consideration of the lack of protection provided outside of the conservation areas where development is “*expected to more than double within the decade*” (p. 15). Analyses to balance disturbance with habitat restoration must be done while there is still time for restoration of native ecosystems outside of conservation areas. Trade-offs between habitat degradation and habitat restoration must be determined to protect biodiversity outside of conservation areas (Sinclair et al. 1995).

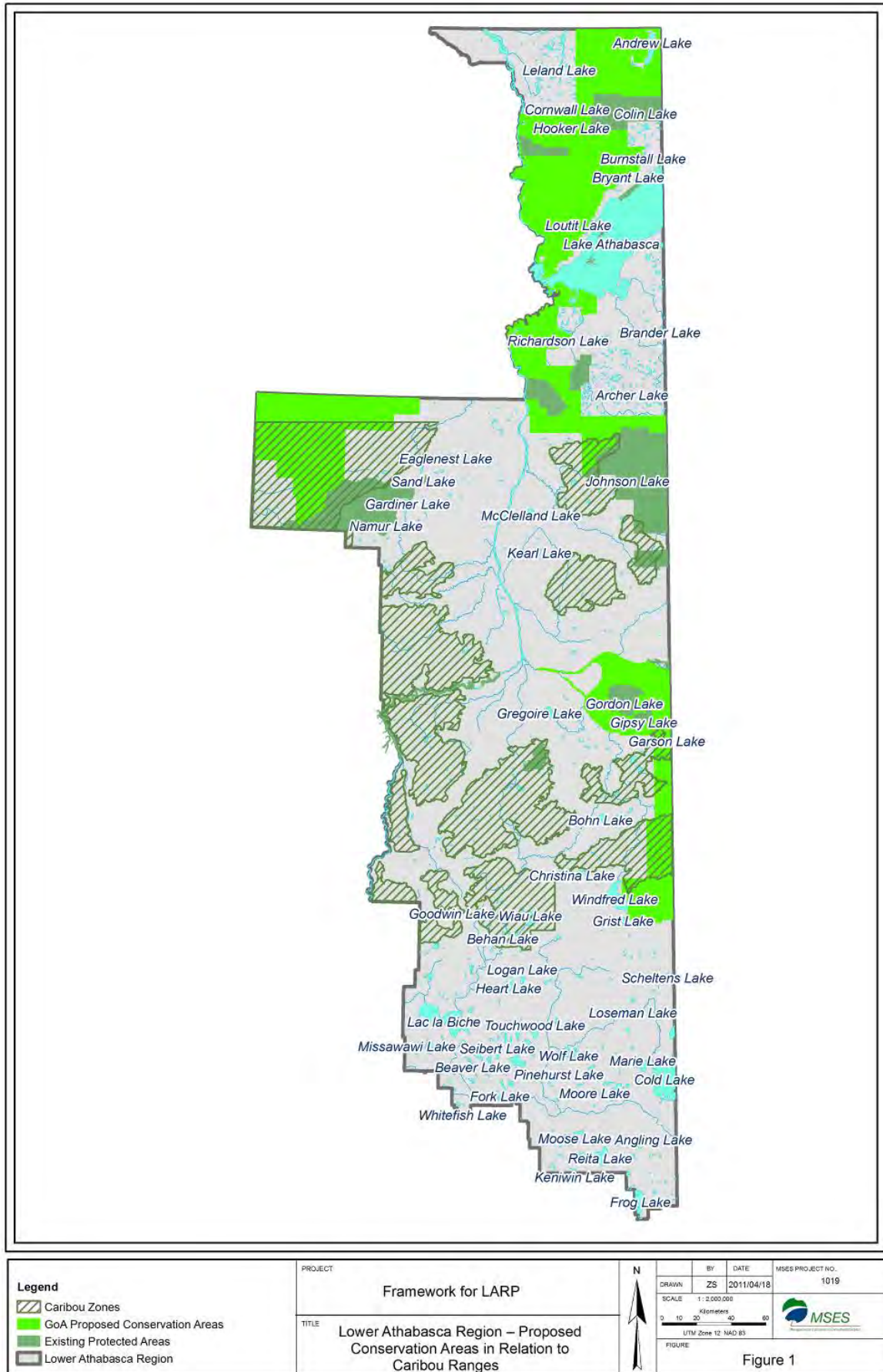


Figure 1: Lower Athabasca Region – Proposed Conservation Areas in Relation to Caribou Ranges

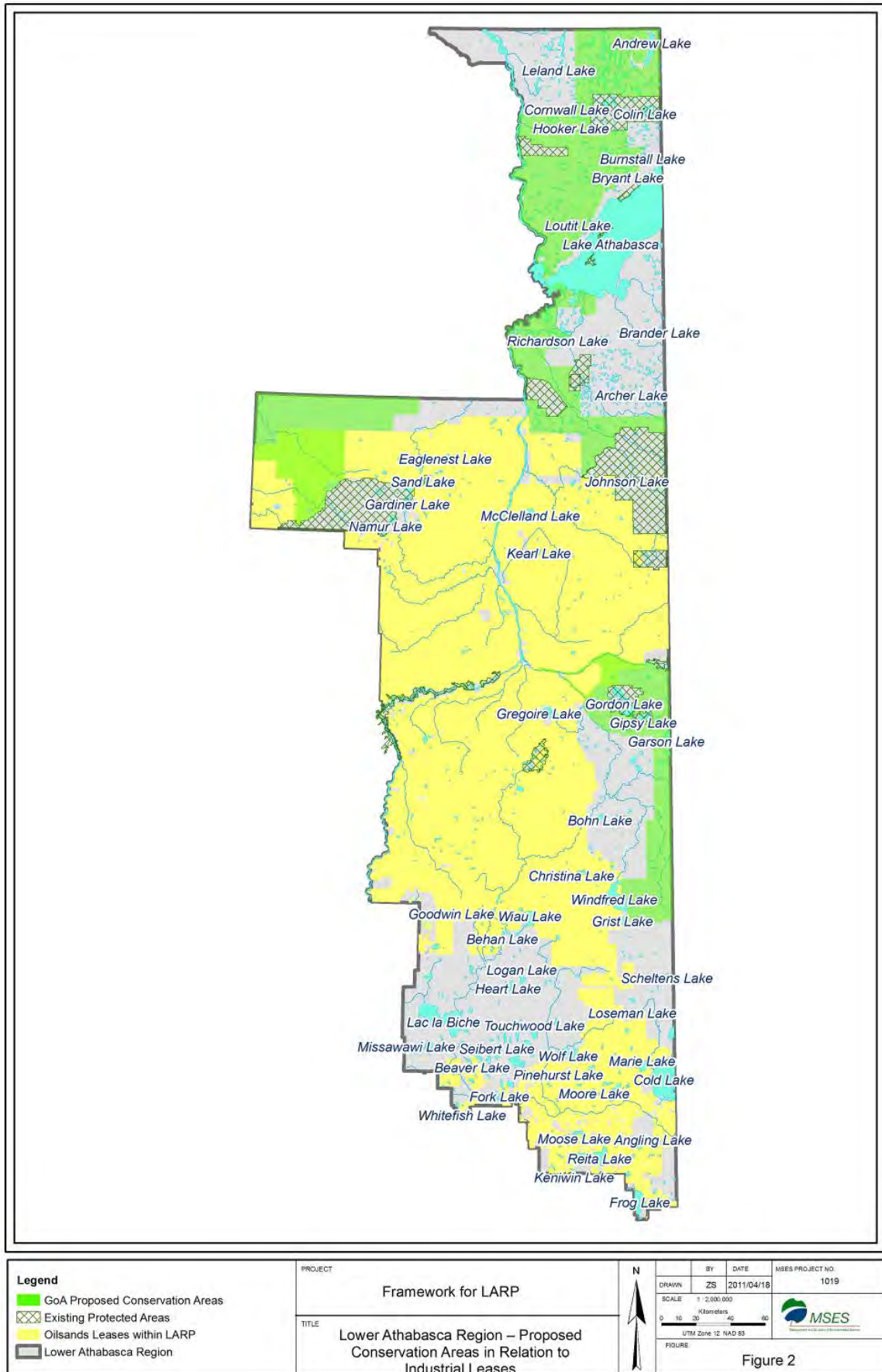


Figure 2: Lower Athabasca Region – Proposed Conservation Areas in Relation to Industrial Leases

2.5 Enforcement of Triggers and Limits

LARP relies on triggers and limits for environmental management. That is, Schedules B-E of the draft LARP show various environmental limits to development. LARP promises to keep the impacts of regional development within these limits. However, our review (August 2011, submitted to AENV) of the frameworks for air, surface water and ground water raised numerous issues regarding a lack of tangible measures and targets in the documents and a lack of management actions prescribed under the frameworks. Concrete action plans, setting the limits and triggers that need to be reflected in regulatory approvals, will be necessary to meet the goals set out in the frameworks. There is no evidence that LARP addressed the issues we raised in our review of the frameworks.

2.5.1. Tools to Control Regional Exceedences

Key Finding: LARP does not provide the tools needed to bring regional exceedences of triggers and limits under control.

When asked about how a regional limit will be enforced, GOA replied that it could alter regulatory approvals or limit new approvals from being issued until a given regional limit is managed and brought under control (communications with GOA April 15 and 27, 2011). However, past experience with enforcement of approvals does not lend support to this assurance, as the following examples demonstrate:

- Approvals typically ask for ecosystems (namely vegetation, wildlife diversity, wildlife habitat and habitat use) to be re-established to a level “*similar to what existed prior to disturbance*” (e.g. Approval No 20809-01-00 for the Muskeg River (Lease 13, 30 and 90) Oil Sands Processing Plant and Mine). However, when asked about how the compliance with such approval clauses would be assessed, we were told that such clauses were never tested (personal communication, Carrie Nugent, ASRD, June 2, 2010). Indeed, we are unaware of any monitoring program anywhere in the oil sands region that would measure the compliance with such clauses. How, then, would GOA be able to evaluate whether or not a limit has been reached? Even if GOA somehow did gather the information and it showed that the regional limit of a population or vegetation community would be reached, how would GOA re-set approval clauses which are already in force for any given project?
- When reviewing annual reports by Albian Sands we commented (Review of Albian Sands Energy Inc. Muskeg River Mine Project 2008 Annual Environment Report, prepared for MCFN, December 2009):

- “The report includes a list of the number of continuous monitoring events that were reportable, but does not provide a summary of the high concentrations nor an explanation for those high values. The report contains no information on stack monitoring results. Therefore, this clause is not satisfied.” or
- “Another example includes phenols, which consistently exceeded guidelines, yet no discussion was provided. The statement “the values do not appear to be significantly different from historical data” (page 55) is not an explanation of the results.”

These are only two of many examples where approval clauses have not been satisfied, yet, no action has followed, not even an explanation has been provided by GOA. If exceedences of guidelines are shrugged off for each and every project, how will GOA be able to manage the accumulation of these exceedances in the region?

As far as air quality monitoring is concerned, a great deal of uncertainty exists given the inconsistent data acquisitions that require coordination among the air and water monitoring programs. Acid deposition and regional acidification are an increasing challenge (RSC 2010, Oilsands Advisory Panel 2010). As it stands, baselines still need to be developed that would allow GOA to even start defining triggers and limits, let alone enforce them. The solid baselines (showing the natural or “pre-disturbance” levels of any given parameter including its range of variation) are required to set the benchmarks against which current and future disturbance will be measured. How long will it take to develop scientifically rigorous and credible data that can inform GOA about how much current measurements deviate from baselines? When and if it is developed, will there be a process in place that would allow for the amendments of existing approvals?

2.5.1. Lack of Ability to Keep Degradation within the Limits for Indicators

Key Finding: LARP does not provide the analyses necessary to measure the success of keeping industrial degradation within the limits for the indicators in the region. Nor does it provide the rates of degradation that are needed to understand how fast actions must be implemented to keep degradation of the indicators within the limits.

Page 30 of LARP lists indicators for use in evaluating the effectiveness of meeting *Outcome 3: Landscapes are managed to maintain ecosystem function and biodiversity*. For the indicators listed, current information shows that all of them are progressing in the wrong direction. For example:

- The “**status of Alberta species**”, particularly species at risk, is clearly deteriorating. Not only are populations dwindling (evidence for woodland caribou and moose is now strong and in GOA’s own records (ASRD 2011)); our analyses show the deterioration of remoteness, ecosystem processes, and wildlife species such as bison, caribou, moose, beaver, and waterfowl

(Effects on Traditional Resources of the Athabasca Chipewyan First Nation: The Joslyn Creek Project Specific and Cumulative Effects in the Oil Sands Region prepared for the ACFN August 2010), the habitats are steadily eroding. Moreover, as habitat is changing, deer and other invasive species compete with native wildlife and vegetation species (Latham and Boutin 2008, Latham et al. 2011).

- The “**area of land disturbance**” is rapidly increasing. Our analysis of land cover disturbance shows this clearly (Figures 3 and 4). Even the conservation areas, having been designed to avoid industrial disturbance to the extent possible, have experienced by 2008 a disturbance of 12% of their land cover. In addition to the disturbance foot print (Figure 4: note the disturbances recorded in the green areas), a great deal of fragmentation of the conservation areas is evident. When will LAR run out of options for the implementation of tangible and effective conservation action, within, and outside of conservation areas? The possibility that LAR has already run out of options to protect “*ecosystem integrity*” may be a real one.
- The “**status of biodiversity indicators**” is related to both the parameters noted above, namely species composition and abundance and landscape scale disturbance. Biodiversity is changing from a natural system to a man made one.
- As per our analyses, it is evident that the “**area of land retained in native vegetation**” is diminishing. Aside of the clearing of vegetation, land cover disturbance allows for the invasion of non-native species, which according to GOA’s own records is a major threat (ASRD 2004).
- The “**area of oil sands reclamation**” is not keeping pace with the rate of disturbance. As can be seen in our analysis of land disturbance, more and more land is disturbed without being returned to pre-disturbance conditions (see also section 2.6 below).
- The “**volume of fluid tailings**” is also increasing, as can be seen on any air photo or satellite image. With an increase in fluid tailings many issues of concern arise, including the increase in hazard for waterfowl (and other wildlife) deaths, water quality concerns, and reclamation challenges.
- Air quality indicators, particularly **nitrogen dioxide**, are also on the increase in certain areas. Regional acidifications as well as increasing green house gas emissions are of concern (RSC 2010, Oilsands Advisory Panel 2010).

Given the continuing degradation of parameters that are used in LARP as indicators for ecosystem function, it is impossible to set targets for balancing “economic, environmental, and social implications” because any desired balance is a moving target for which the rate of change is not understood. Furthermore, ACFN and other First Nations have made numerous submissions to GOA for the need to include information on what is needed to exercise their Treaty rights in order to identify indicators and setting targets (ACFN 2010, MCFN 2010). The rate of change in these indicators is also not understood. The ability of the land disturbance plan (p.29) to set limits and triggers appropriate from an

ecological standpoint is constrained because it must recognize that land disturbance will “*increase substantially*”.

The implementation plan for healthy ecosystems and environment, (p.40, Table 2) calls for the design of conservation areas by 2011 and for the development of a biodiversity management framework by 2013. Given that limited or no ecological or traditional land and resource needs analysis appear to have been used to date for the designation of conservation areas, and that many ecological parameters are poorly understood today, a great deal of research and analysis is still required before an understanding can be reached about how the limits can be set, where in the region they can be set, and how they can be managed.

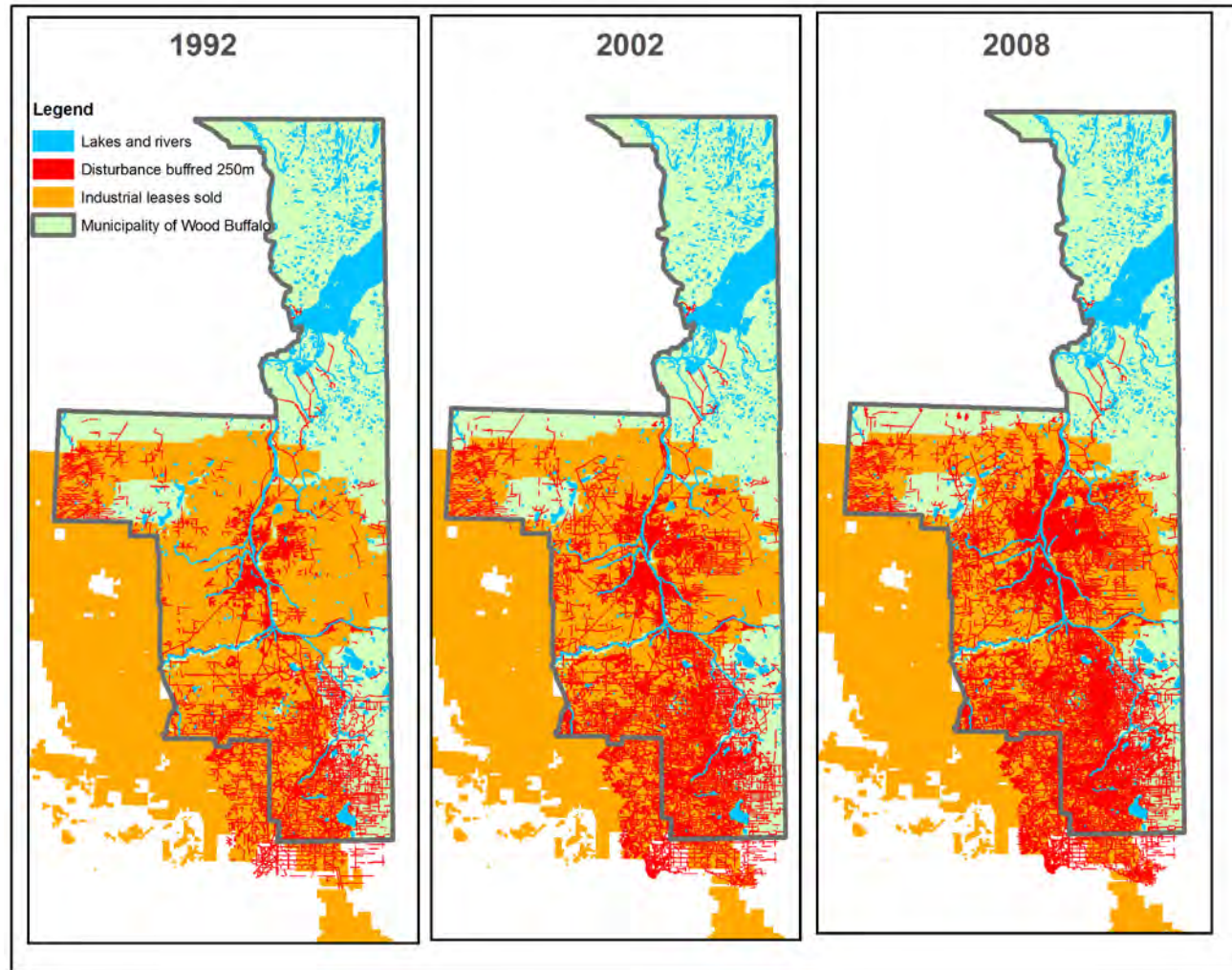


Figure 3: Increasing Disturbance of Natural Surfaces in Relation to Oil Sands Tenure (Leases) in the RMWB.
The disturbance shown here includes 250 m zones of influence around all industrial features and is based on satellite image analysis.

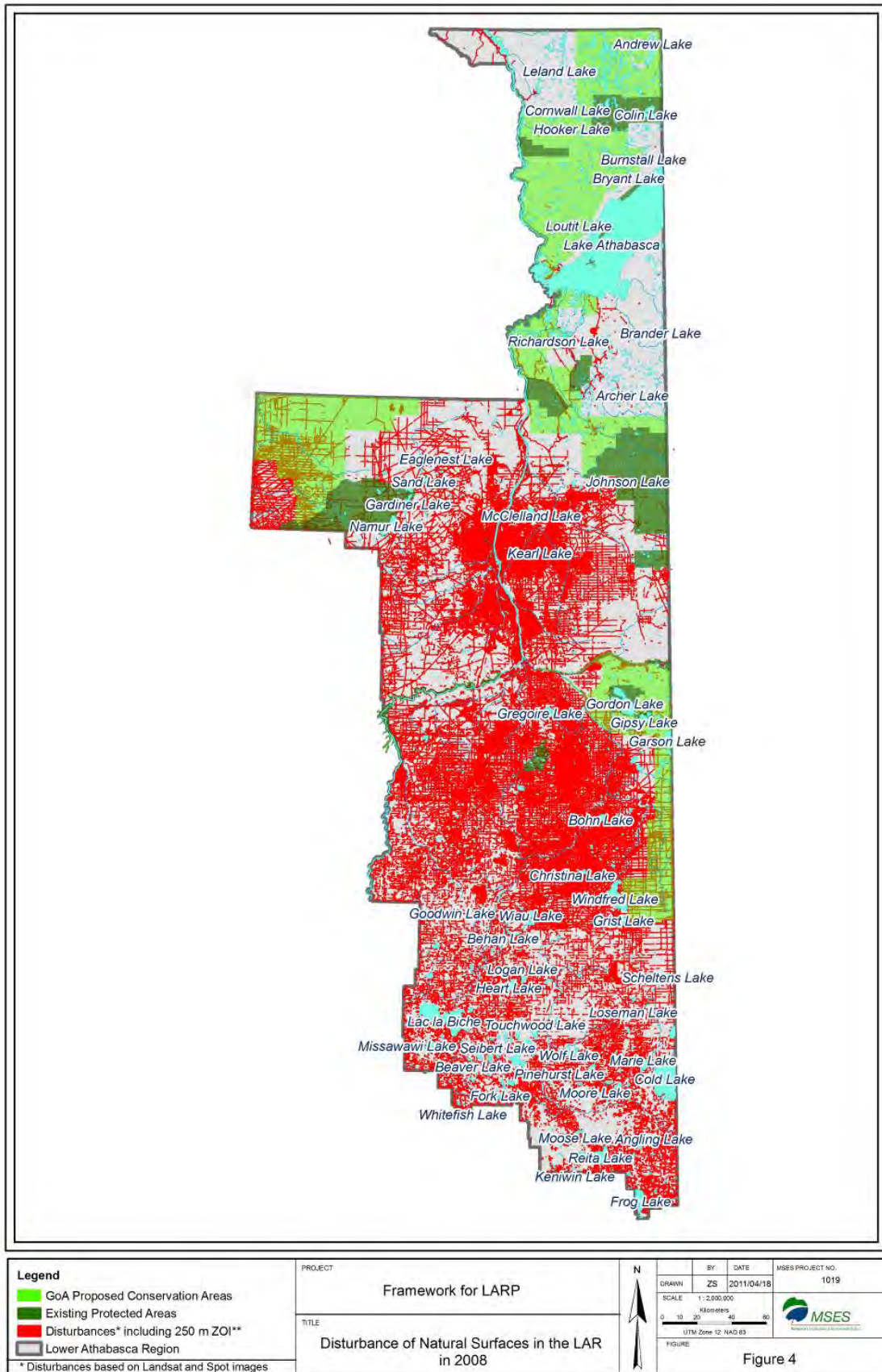


Figure 4: Disturbance of Natural Surfaces in the LAR in 2008. The analysis shown here includes SPOT satellite image analysis which is more a more detailed imagery than Landsat used to produce Figure 3.

2.6 Enhancing the Rate of Reclamation

Key Finding: LARP does not indicate how the continuing erosion of healthy ecosystems in the region can be halted, let alone how a net-gain in healthy ecosystems in the region can be achieved.

According to LARP (p.28), enhancing the rate of reclamation is one of the main objectives. In the Decision regarding the Joslyn North Mine Project by TOTAL, the Joint Review Panel stated (ERCB Decision Report p.128):

“The Panel believes that reclamation is a central mitigation strategy to address regional environmental sustainability issues that require adaptive management strategies.”

The Panel recommends that AENV establish measurable targets for increased indigenous vegetative biodiversity in the reclaimed landscape and the post-closure landscape (ERCB Decision Report p.129). The Panel’s recommendation echoes the comments from advisory panels reviewing the environmental management process in the Oil Sands (RSC 2010, Oilsands Advisory Panel 2010). It also reflects the repeated requests from First Nations to establish scientifically testable reclamation targets and procedures that would measure the success of re-establishing pre-disturbance vegetation communities. In the past, Alberta rebutted the First Nations requests, notably by stating that the First Nation requests would require a change in policy (Chris Powter, AENV, personal communications, spring 2008). As a result, the advisory panels noted that “reclamation is not keeping pace with the rate of land disturbance” (RSC 2010, p.1).

In support of the finding by RSC (2010), we found that in the central and southern portions of LARP, about 3% of disturbance is added each year to already existing disturbances (see also Figures 3 and 4). The reason for seeing the ever-increasing amount of disturbance is that past disturbances, including seismic lines and well pads, are left to recover naturally. The evidence for the lack of ecosystem re-establishment from natural encroachment of vegetation species into disturbed areas is overwhelming. The First Nations have noted this lack of ecosystem re-establishment repeatedly and they are now supported by the reviews of RSC (2010) and the Oilsands Advisory Panel (2010). Both reviews request that a central publically accessible data warehouse be established to facilitate the resolution of regional environmental sustainability issues. Measurable benchmarks and targets must be set. The success of reaching them must be tested with scientifically rigorous methods. It is not clear how GOA intends to satisfy this request.

Moreover, the ACFN stated that “Reclamation does not re-create cultural or ecological landscapes that are consistent with aboriginal traditions of knowledge or use. The practice of treaty rights is not only about access to subsistence resources, but also requires the ability to practice, and transmit, place-based cultural knowledge. A common standard of socio-cultural impact assessment is that when an area has been removed from aboriginal use for one generation (approximately 22 years), impacts to the transmission of knowledge regarding that area are considered permanent and irreversible” (ACFN 2010). In other words, even if pre-disturbance conditions were established at some point in the future, and even if reclamation would successfully restore pre-disturbance conditions (which to our knowledge has not yet been achieved in the Oil Sands), the ability of using the resources of the reclaimed area may be lost.

2.7 Lack of Tools to Manage Greenhouse Gas Emissions

Key Finding: LARP has not provided the tools to manage the balance of Green House Gas emissions.

Further to the need for reclamation, we add to the concern about greenhouse gas emissions raised by RSC (2010) that the challenge is not only in reducing the emissions per se, but also in protecting the carbon storage capacity of the ecosystem. This is because vegetation communities, particularly old growth forests, are Canada’s major carbon sink (Luyssaert et al. 2008, Kurz et al. 2008). In other words, not only are emissions increasing, but the capacity of ecosystems to clean the air is decreasing. The ability of the boreal forest to serve as a carbon sink is eroding in light of industrial disturbance (see also Figures 3 and 4). The carbon sequestration of boreal forests has received much attention in recent studies and in reviews of environmental management in the Oil Sands region (as cited above) because of the regional, national, and global implications of declining carbon sequestration. Moreover, because carbon sequestration requires large intact forests, it is also a reflection of the potential for viability of wildlife and vegetation populations. We recommend that Alberta and Canada develop clear and concrete targets for vegetation removal and restoration as part of a regional vegetation no-net-loss plan or, more appropriately, a net-gain plan. This plan would serve a multitude of functions, from the re-establishment of wildlife habitat for species at risk, to protecting traditional resource use, to improving the sink-to-source balance of greenhouse gas emissions.

3.0 Comparison of LARP to ACFN Cultural Protection Areas

Key Findings:

LARP only protects 19% of Cultural Protection Areas designated by ACFN. Yet, even for the lands selected for protection, there is no explanation provided in LARP to clarify whether this or any other amount and configuration of lands purportedly protected under LARP will actually accommodate the need for sufficient lands, flora and fauna to guarantee a meaningful right to exercise traditional pursuits and livelihood.

LARP does not provide any rules or criteria on how the LARP conservation areas reflect the request by First Nations to protect their rights. LARP does not protect traditional land use activities specifically, it only makes overarching statements about conservation “areas that support aboriginal traditional uses” (p.18).

LARP does not provide any rules or criteria on how the rights of First Nations would be protected outside of conservation areas. Furthermore, within conservation areas, it allows for activities that are incompatible with the exercise of rights.

GOA does not provide any information, whether in LARP or in personal communications, on how the input from the ACFN was used in the drafting process for LARP.

MSES conducted spatial analyses comparing the ACFN Cultural Protection Areas (ACFN 2010) versus the amount of proposed conservation areas (PCA) and the existing protected areas outlined in the LARP document.

Currently, there are only 5,896 km² (6% of the LARP area) considered protected within the LAR area as wildland or provincial parks. Under the LARP, GOA is proposing to designate an additional 15,081 km² (16% of the LARP area) for a conservation area total of approximately 20,977 km² (22% of LARP area). MSES evaluated these proposed conservation areas in light of current disturbances within those areas. Although GOA is proposing to designate 22% of LAR as conservation areas, 12% of the conservation areas are already disturbed. Moreover, as per Schedule B, a number of activities (e.g., recreational use, industrial development, forestry, grazing) are permitted within conservation areas that are incompatible with traditional land uses.

The ACFN has recommended that GOA designated 43% of the total LARP area as Cultural Protection Areas (Figure 5), that at least 40% of the ACFN Homeland Zone be protected and that the remaining areas of Homeland Zones be managed under rules established as part of TLRUP (the exact boundaries for conservation areas would be identified in a TLRUP, ACFN 2010). This recommendation is based on the recommendations by the Boreal Leadership Council for boreal forest conservation. Under current conditions, only 8% of the ACFN Cultural Protection Areas are protected and the proposed conservation areas outlined in LARP will only include an additional 11% of the area that the ACFN has requested to be protected. In other words, only 19% of the land that the ACFN require for the sustenance of their culture will have a “*protected*” status (Figure 5). There is no mentioning in LARP about how lands outside of the protected areas proposed under LARP would be managed for traditional land use, as was requested by the ACFN (2010). In its submission, the ACFN made a number of recommendations regarding the co-management of the non-protected areas of its Cultural Protection Areas. These recommendations were not heeded in LARP.

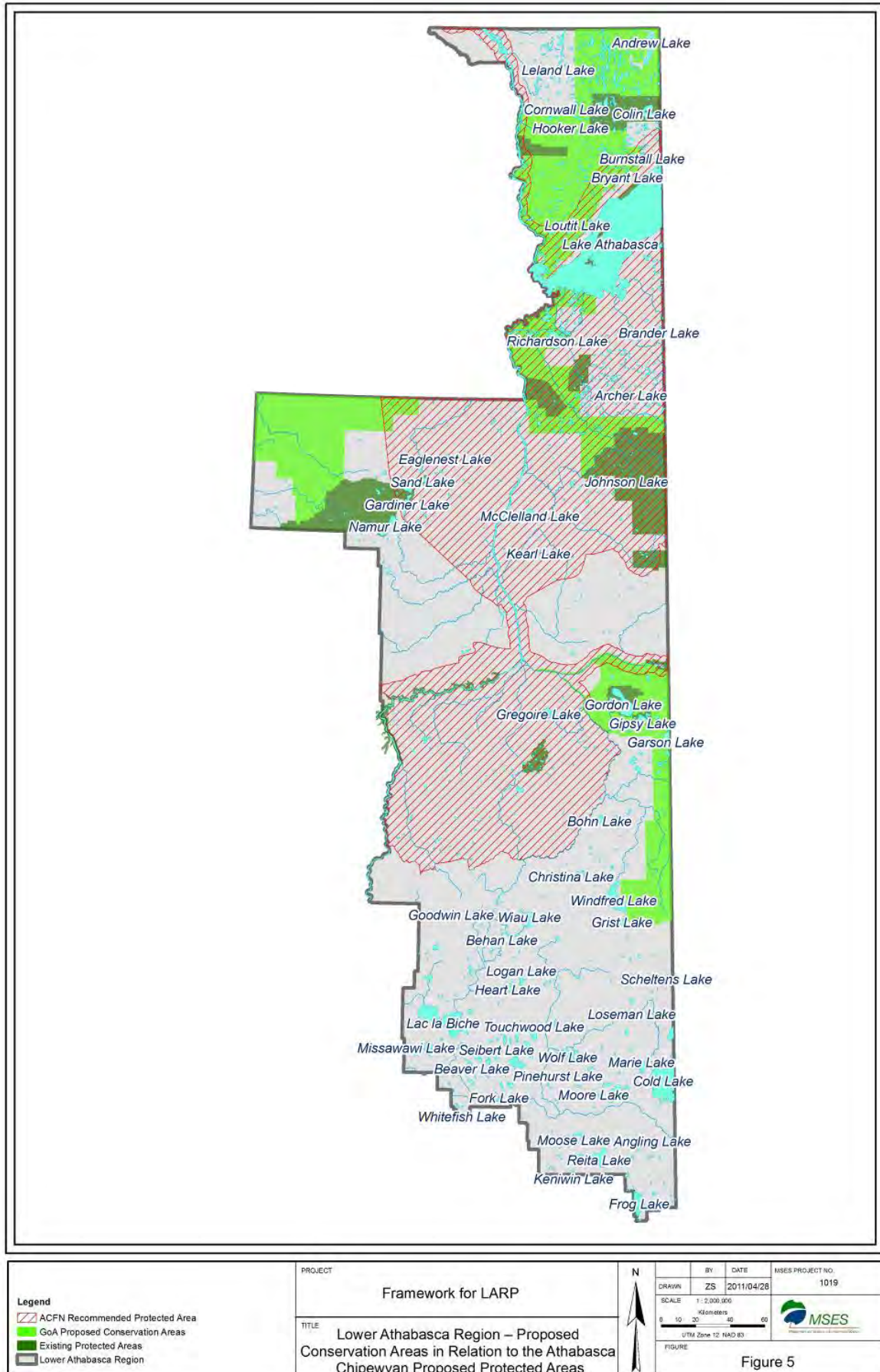


Figure 5: Lower Athabasca Region – Proposed LARP Conservation Areas in Relation to the Athabasca Chipewyan Cultural Protection Areas.

No matter how we look at the results and the requests of the ACFN, we conclude that only a fraction of the ACFN Cultural Protection Areas is designated for protection under LARP. The draft LARP is mute on how the input of First Nations was used in the design of protected areas. Likewise, communications during meetings with GOA (April 15 and 27, 2011) did not shed any light on how LARP was designed to protect the rights of First Nations. The only consistent criterion for the designation of conservation areas under LARP appears to be the avoidance of oil sands and mineral leases.

Aside of the amount of ACFN Cultural Protection Areas designated for protection under LARP, the problem lies in the designation itself. That is, conservation areas are not designed specifically for the protection of traditional land uses. Rather, conservation areas are designed as multi-use areas that will allow for recreational, forestry, grazing and some industrial activity, none of which are compatible with traditional land use practices. ACFN explained this concern in their submission and yet it seems not to have been taken into account in the LARP conservation areas (ACFN 2010).

Fifty-one percent of LAR is considered for oil sand development and much of this area is used by ACFN community members for traditional use. However, the proposed conservation areas avoid almost all (96%) of the leases, leaving an insignificant amount that may be protected. On leased land, GOA does not seem to be prepared to designate Cultural Protection Areas for protection or co-management, as recommended by the ACFN (2010).

4.0 Closure

MSES evaluated the LARP with the overall objective to facilitate continued dialogue surrounding the consequences for traditional resources of the proposed development scenarios in the LAR. We hope that this constructive critique and associated questions and comments will enable all parties to meaningfully contribute to current and future development plans. This review has focused on the value of LARP for maintaining ecological services and biodiversity, especially with respect to traditional use and cultural needs. This review is by no means a comprehensive overview of all of the concerns of ACFN with respect to LARP. As outlined in our review above, there remain many outstanding issues for the ACFN and other First Nations to be discussed through their continued communications with both the Government of Alberta and industry.

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Review of the Draft Lower Athabasca Integrated Regional Plan

Prepared for

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May 2011

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Executive Summary

The government of Alberta (GOA) has produced the Draft Lower Athabasca Integrated Regional Plan (LARP) that they assert will help manage land and natural resources to achieve Alberta's long-term economic, environmental and social goals. GOA proposes that this plan will be used as a proactive regional planning tool for managing cumulative effects and thereby protecting resources in the Lower Athabasca Region (LAR). GOA states that contributions from the Lower Athabasca Regional Advisory Council, the public, First Nations and Métis communities and stakeholders have been considered during the development of the LARP. The Mikisew Cree First Nation (Mikisew Cree) requested that Management and Solutions in Environmental Science (MSES) complete a technical review and assessment of LARP.

The Mikisew Cree have submitted and discussed with GOA their vision of land planning for the LAR that will enable First Nations to engage in traditional and cultural activities. We understand that the Mikisew Cree's goal in regards to land and resource use planning is to ensure that the meaningful practice of their Treaty 8 rights can be sustained for future generations. The Mikisew Cree have informed the GOA that, in order to do so, sufficient quality and quantity of traditional lands and resources must be protected. The purpose of this review is to evaluate how the LARP considers ecological resources that are important to First Nations.

Our overarching finding was that LARP is not informed by either ecological analyses or First Nation needs. In previous submissions to GOA, the Mikisew Cree provided recommendations for areas that need to be protected to preserve their right to exercise traditional pursuits and livelihood (November, 2010, submission entitled "Patterns of Mikisew Cree land and resource use"). LARP is purporting to protect 40% of the lands recommended by the Mikisew Cree and it is unclear how and why these particular areas were selected over others. There is no evidence that GOA conducted any traditional resource use analyses to support their selection of lands to be protected. We recommend that further traditional resource use analyses be done to develop an understanding of how any selection of purportedly protected lands may accommodate the Mikisew Cree needs. Also, further analyses need to be done in terms of the spatial arrangement of protected lands. For example, none of the river corridors are protected. This means that access to the protected lands is likely restricted, important riparian habitats along the rivers and aquatic resources also appear to be unprotected. The amount of protection of Mikisew Cree lands aside, we find that LARP is unclear about how the proposed conservation areas may be deemed protective of traditional uses given that the conservation areas themselves are already disturbed and numerous activities that are incompatible with traditional uses are allowed under LARP.

From an ecological point of view it is unclear how the proposed conservation areas protect the wildlife and the vegetation that are important to the Mikisew Cree. Not only does LARP appear to lack the required analyses, but all indicators to date suggest that wildlife and vegetation resources are on the decline outside and inside of proposed protected areas.

Several key concerns regarding the draft report are apparent and are listed below:

- LARP uses terms that sound good (for example “*ecological integrity*,” “*conservation areas*”, or the “*balance*” of “*economic, environmental and social implications*”) but does not provide any tangible definitions of these terms. Without defining such terms the frameworks that would help to “*maintain ecosystem function and biodiversity*” lack the foundations needed for their implementation.
- LARP is not based on an understanding of how fast the boreal forests in LAR are running out of conservation options, and how conservation should protect “*ecosystem integrity*”, a term used throughout LARP.
- LARP is not based on ecological analyses for the region that would support the design of conservation areas nor does it provide any rules or criteria on how conservation areas reflect the request by First Nations to protect their rights within or outside of conservation areas of the LAR. Rather, conservation areas proposed in LARP appear to be based on avoiding lands leased to industry.
- LARP does not provide the ecological analyses necessary to first establish indicators, triggers and limits for the resources that are important to First Nations and then to measure the success of keeping industrial degradation within the limits for the indicators in the region. We understand that the Mikisew Cree expressed that cultural analyses are also necessary alongside of ecological analyses to establish indicators, triggers and limits. However, we found no evidence in LARP that such analyses have been conducted. Given our finding that many areas of LAR are already disturbed beyond limits that would sustain viable populations of some threatened species, such analyses are urgently needed.
- LARP has not provided ecological information or developed the rules necessary to protect wildlife species and vegetation either within or outside of the conservation areas nor does it specifically protect traditional land use. LARP only includes traditional use as part of their criteria for identifying lands to be designated as conservation areas without giving an indication of how traditional use factored into the designation of conservation areas.
- LARP is mute on the fate of Key Wildlife and Biodiversity Zones (KWVZ) and Ecologically Significant Areas (ESA) outside of conservation areas and no information is provided on how KWVZ and ESAs and regional habitat restoration would fit into “*the balance between development and conservation in the region*”, which is LARP’s purported approach to designating

conservations areas. While Alberta has established KWBZ and ESAs for ecological reasons, the fact that these areas should receive special management considerations in Alberta does not seem to be recognized in LARP.

- LARP is mute on the conservation actions that that need to be taken outside of conservation areas. LARP does not indicate how the continuing erosion of healthy ecosystems in the region can be halted, let alone how a net-gain in healthy ecosystems in the region can be achieved.
- LARP does not provide the rates of degradation that are needed to understand how fast actions must be implemented to keep degradation of the indicators within the limits, either within or outside of conservation areas.
- LARP does not provide the tools needed to bring regional exceedances of triggers and limits under control.
- LARP has not provided the tools to manage the balance of Green House Gas emissions.
- LARP only protects 40% of the land that the Mikisew Cree requested for the protection of their culture and their rights in their November, 2010, submission entitled “Patterns of Mikisew Cree land and resource use”.
- LARP does not provide any rules or criteria on how the rights of First Nations would be protected throughout LAR, whether inside or outside of conservation areas.
- GOA does not provide any specific information, whether in LARP or in personal communications (meetings held April 15 and 27, 2011), on how the input from First Nations was used in the drafting process for LARP.

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1.0 Introduction

The government of Alberta (GOA) has produced the Draft Lower Athabasca Integrated Regional Plan (LARP) that they assert will help manage land and natural resources to achieve Alberta's long-term economic, environmental and social goals. GOA proposes that this plan will be used as a proactive regional planning tool for managing cumulative effects and thereby protecting resources in the Lower Athabasca Region (LAR). GOA states that contributions from the Lower Athabasca Regional Advisory Council, the public, First Nations and Métis communities and stakeholders have been considered during the development of the LARP. The Mikisew Cree First Nation (Mikisew Cree) requested that Management and Solutions in Environmental Science (MSES) complete a technical review and assessment of LARP.

The Mikisew Cree have submitted and discussed with GOA their vision of land planning for the LAR that will enable First Nations to engage in traditional and cultural activities. We understand that the Mikisew Cree's goal in regards to land and resource use planning is to ensure that the meaningful practice of their Treaty 8 rights can be sustained for future generations. The Mikisew Cree have informed the GOA that, in order to do so, sufficient quality and quantity of traditional lands and resources must be protected. The purpose of this review is to evaluate how the LARP considers ecological resources that are important to First Nations.

Our overarching finding was that LARP is not based on ecological analyses for the region that would support the design of conservation areas nor does it provide any rules or criteria on how conservation areas reflect the request by First Nations to protect their rights within or outside of conservation areas of the LAR. Rather, the designation of conservation areas proposed in LARP is based on avoiding lands leased to industry. We recommend that traditional resource use analyses be done to develop an understanding of whether the selection and spatial configuration of lands purportedly protected under LARP will actually accommodate the Mikisew Cree needs.

Conclusions and recommendations directed at GOA and the authors of LARP are written in **bold text** throughout the document. Quotations from LARP are indicated in italics followed by the page numbers in parentheses.

1.1 Mikisew Cree Vision for LARP

The Mikisew Cree have stated to us as well as to GOA in meetings that we have attended that their objective is to have the LARP protect lands and resources which can still be used by First Nations for the exercise of their Aboriginal and Treaty rights.

However, it appears that the information provided by the Mikisew Cree (2010) has not been used during the development of the LARP draft. As a result, Aboriginal and Treaty Rights of the Mikisew Cree are not considered in LARP. The Mikisew Cree have repeatedly requested that concrete, not conceptual plans be developed in order to manage, mitigate and monitor effects on Treaty Rights. GOA does not appear to have heeded the input by the First Nation and therefore the Mikisew Cree's request to address and mitigate impacts to Aboriginal and Treaty Rights is absent in LARP.

The starting point for any successful consultation process is a collective (joint) understanding of Aboriginal and Treaty Rights. In this case, from the perspective of the Mikisew Cree, LARP is viewed as having the potential to significantly and adversely impact Aboriginal and Treaty rights; therefore, an understanding of these rights is necessary in reviewing the extent to which the LARP accommodates them. In November, 2010, the Mikisew Cree provided their "Vision" for the LARP to Alberta for consideration in drafting the LARP. The Mikisew Cree, signatories to Treaty 8, have indicated that, among other things, Treaty Rights include the:

- Preservation of sufficient lands, flora and fauna to guarantee a meaningful right to exercise traditional pursuits and livelihood;
- Protection of reserves and other lands (such as traditional lands); and resources and the ability to maintain a healthy and self-sustaining community;
- Consultation and accommodation in an adequate, meaningful, and timely way when traditional lands are taken up for development.

A draft map that depicts Mikisew Cree "recommended protected areas" was also provided. A number of recommendations were provided on the planning and management of these protected areas (Mikisew Cree 2010, p. 60 and following). The Mikisew Cree recommended strongly that operationalizing their vision would require full participation of the First Nation in the planning process and would need more information that would need to be developed in Traditional Land and Resource Use Management Plans (TLRUMP) to be completed (Mikisew Cree 2010, Appendix B). A TLRUMP would provide a critical tool for identifying criteria and thresholds to be implemented in LARP planning and execution. In addition to the information provided by the Mikisew Cree specific to the consideration of their Treaty Rights in the planning and implementation of LARP, the Mikisew Cree also provided a detailed analysis, comments and recommendations on the Regional Advisory Council RAC Vision document.

1.2 Traditional Resources and Ecosystems

Ecosystem needs, indicators, targets, thresholds, acceptable levels of risk, and the required balance to maintain ecosystem processes need to be determined by the local people who are most affected by industrial disturbance (Wood 2003, Burgman 2005). MSES reviewed evidence about the availability of past, present and likely future key traditional resources in LAR and applied that evidence to the review of the draft LARP and the data and analyses used in the process of designating conservation areas under LARP.

For the purpose of this report, we consider several of the traditional resources that we assume are of concern to the Mikisew Cree, including remoteness, ecosystem processes, access to navigable water systems and wildlife species such as fish, bison, caribou, moose, beaver, and waterfowl. We further understand that the health, continued viability, and the “sufficiency” of these traditional resources within LAR depends on ecosystem processes which include the availability of clean air, clean water, and the resilience of ecosystems to recover from human disturbance. The continuance, maintenance, and preservation of Mikisew Cree Aboriginal and Treaty Rights, culture, health, and livelihood are dependent on a healthy productive environment.

2.0 Technical Review of LARP

The Alberta government is currently developing plans which purport to balance environmental, social and economic interests in the province. The LAR planning region covers 93,260 km², nearly one third of the Alberta boreal forest (the other two thirds are subject to two other planning regions). To determine the balance between environmental, social and economic interests, the plans must set limits to forest degradation based on a threshold beyond which the forest would no longer provide the ecosystem services required for traditional use (ecosystem services include carbon capture, air and water purification, and renewable resources).

2.1 Boreal Forest Cover Decline is Not Properly Considered

Key Finding: LARP is not based on an understanding of how fast the boreal forests in LAR are running out of conservation options. GOA does not appear to have analyzed the rate of ecosystem degradation and appears to be unaware about the past, current and future rate of erosion of “ecological integrity”.

Canadian boreal forests are managed through provincial regulations (except for National Parks which are under federal jurisdiction). The province of Alberta encompasses about 318,000 km² of boreal forests, 140,000 km² of which cover the oil sand deposit area (Government of Alberta 2011). Oil and

gas exploration in Alberta is the primary cause of disturbance in the Alberta boreal forest (data obtained from AltaLIS (2008) and our own analysis, see below) but pressures from other forms of resource development, including mineral, forestry and agricultural industries are on the rise. The Alberta boreal forest has been identified as one of the global forest loss hotspots (Hansen et al. 2010).

Globally, boreal forests experience a high rate of degradation (Hansen et al. 2010). Canada's boreal forests provide important ecosystem services such as carbon sequestration, but the Canadian forests are degrading rapidly (Kurz et al. 2008). The ability of forests to capture carbon is a reflection of their ability to provide other ecosystem services including the resources required for traditional use. Canada experienced the second largest loss of forest cover in the world (Hansen et al. 2010). It has been suggested that the conservation of Canadian boreal forests is running out of options because of changing land use (Schindler and Lee 2010).

In order to know whether conservation of Canadian boreal forests is in danger of reaching a point at which effective conservation action is no longer possible, the rate of forest cover loss must be determined so as to project when any given targets or thresholds for conservation may be reached or surpassed.

We note that the draft LARP proposes that 22% of LAR be set aside as conservation areas. Whether or not this is sufficient for the protection of ecosystem processes or whether this amount of protected areas will be endangered by the expanding development is a question that needs adequate ecological analyses.

2.2 Lack of Definition of Key Terms

Key Finding: LARP uses terms that sound good but no tangible definitions of these terms exist. These terms must be defined and used as foundations for frameworks that would help to “maintain ecosystem function and biodiversity” (p.40, 41). In particular, terms referring to traditional uses need to be explicit so as to maintain sufficient lands and resources for First Nations traditional resources and cultural needs.

Alberta's criteria for conservation areas include (p.18):

- *“little or no industrial activity,*
- *support of aboriginal traditional uses,*
- *representation of the biological diversity of the region, and*
- *areas of roughly 4,000-5,000 km² in size.”*

There are numerous problems with a lack of definitions of the above terms:

- Although areas with “*little activity*” may well be found in remote areas of northern Alberta, the question remains what “*little activity*” means and, as noted in this and other Mikisew Cree submissions, certain kinds of activities will be permitted in “conservation areas” which may conflict with the exercise of Treaty rights;
- No definitions of “*support of aboriginal traditional uses*” exist anywhere in LARP and its supporting documents. Even in discussions with GOA (meetings held April 15 and 27, 2011), no definition was provided (see also section 3.0 below). The Mikisew Cree (2010) has alerted GOA that additional information is required to determine what is needed to support the exercise of Treaty rights.
- *Biological diversity* in the region has not been evaluated in terms of:
 - what diversity means
 - where there are biodiversity hotspots (areas of high biological diversity)
 - what the natural range of variation is
 - how diversity and ecosystem health are linked
- Large areas are indeed desirable for the maintenance of “*ecological integrity*” (p.13) (see problems with definition below) but most areas designated for conservation under LARP already have some form of disturbance (we calculated that 12% of conservation areas are disturbed, see below). Moreover, large size alone is not a sufficient criterion for effective ecological conservation because areas need to be of adequate size to support a high biological diversity, a range of natural ecosystem processes, and because areas need to be interconnected. Perhaps, an interconnected network of intact forest landscapes the size of 500 km² as used by Potapov et al. (2008), may be a more realistic conservation target.

“*Conservation*” is used in Alberta’s plans to mean assurance of ecosystem integrity (p.19), but “*integrity*” of an ecosystem is not strictly defined, neither in LARP nor anywhere else. There are many challenges of using the complex notion of “*ecosystem integrity*” (Lackey 2001, DeLeo and Levin 1997, Wicklum and Davies 1995). Commonly used notions relate “*ecosystem integrity*” to the sound processes and healthy organisms composing an ecosystem which is unaffected by humans. However, all ecosystems in LAR are affected by humans. That is, perfect “*ecosystem integrity*” does not exist in LAR and must, therefore, be viewed on a scale from completely unaffected to fully affected by humans. LARP does not define the level of “*ecosystem integrity*” that would need to be maintained either within or outside of conservation areas. LARP does not elaborate how “*ecosystem integrity*” will be measured. How, then, will “*ecosystem integrity*” be assessed or maintained?

2.3 The Design of Conservation Areas

Key Finding: LARP is not based on ecological analyses that would support the design of conservation areas. Rather, LARP appears to be based on avoiding areas leased by industry.

While LARP promises to design conservation areas with the intent to use them as “*benchmark areas for assessing ecological integrity*” (p.19), and for protecting threatened wildlife species such as caribou (p.29), there is no indication that LARP used any ecological analyses in designing conservation areas.

A design of conservation areas and the interconnecting network of corridors should include an evaluation of species richness hotspots and the relationships between species and the area they need to maintain viability for a variety of taxa (Fleishman et al. 2000, Wolters et al. 2006, Koh et al. 2010). Without such an analysis it cannot be known how the conservation areas will protect the species in the region, how conservation areas will represent ecosystems in the region, and how the conservation areas might maintain “*ecological integrity*”, and ultimately how the conservation areas will provide for sufficient lands and resources for First Nations’ traditional uses and cultural needs.

For example, it is not clear how these conservation areas will protect endangered species such as woodland caribou because the design of LARP’s conservation areas does not appear to consider GOA’s caribou ranges (ASRD 2011); the caribou ranges were delineated to protect this threatened species from further decline but almost none of the ranges are within conservation areas (Figure 1). Similarly, the conservation areas do not protect areas that would contain aggregations of habitat for either wood bison or moose. Finally, the conservation areas do not protect important systems of bogs and fens and other wetlands. All such considerations (caribou habitat, habitat for other valued wildlife, different types of wetlands) contribute to regional biodiversity and need to be included in an evaluation of species-area relationships and species richness hotspots.

It appears that of the criteria for selection of conservation areas, the “*little or no industrial activity*” was given most weight in selecting the conservation areas. Figure 2 shows that the conservation areas largely avoid the presence of oil sands leases. There is no evidence that, in designing conservation areas, GOA considered the ecosystems, the processes, and the diversity of species that might exist in LARP’s conservation areas. The conservation areas simply try to minimize already substantial disturbance of land cover (Figures 3 and 4). In its plan, Alberta continues to disregard the requests for scientific analysis as a foundation for sound environmental planning decisions (RSC 2010, Oilsands Advisory Panel 2010).

2.4 “Economy Balanced with Society and Environment”

Key Finding: LARP has not provided ecological information to develop the rules necessary to protect wildlife species and vegetation outside of the conservation areas. While Alberta’s purpose in establishing KWBZ and ESAs was to protect ecological values, LARP is mute on the fate of KWBZ and ESAs outside of conservation areas and no information is provided on how KWBZ and ESAs and regional habitat restoration would fit into the balance.

The balancing act requires that rules for development be established not only within, but also outside of conservation areas. It has long been recognized that biodiversity cannot be maintained by merely setting aside protected areas; rather, conservation action must also occur in the matrix within which protected areas are located (Sinclair et al. 1995). In the case of the LARP, the “matrix” is the area comprised of the mixed use zone (“green area public land”) and “areas for recreation/tourism development.” The rules for conservation areas are set out in Schedule B of the draft LARP and permit a number of activities that disturb ecosystems, impact the sufficiency of lands and resources, and ultimately interfere with traditional use practices and cultural needs. However, the rules for lands outside of conservation areas are not described at all.

Although GOA staff provided assurance in meetings (April 15 and 27, 2011) that environmental protection measures would still be in place outside of the conservation areas, it is not clear how such measures will be put in place. It is also unclear what the measures might be, if they were put in place.

Under current conditions, the LARP boundary includes Key Wildlife and Biodiversity Zones (KWBZ) that encompass, according to our analyses, 9% of the LARP area. It also includes Ecologically Significant Areas (ESA) that encompass 28% of the LAR. Nearly all KWBZ (97%) and 80% of ESA areas are outside of conservation areas. According to GOA, these areas receive a special consideration when granting approvals for development but it is unclear how much and what quality of consideration. To our knowledge, the KWBZ and ESAs do not have protected area status which means development will be allowed within these areas.

An analysis is required to understand how, exactly, the conservation areas and the disturbance allowed will effectively protect ecosystems, biodiversity and traditional use. The effectiveness of conservation areas must be understood in terms of the balance that they provide in relation to the development, especially in consideration of the lack of protection provided outside of the conservation areas where development is “*expected to more than double within the decade*” (p. 15). Analyses to balance disturbance with habitat restoration must be done while there is still time for restoration of native ecosystems

outside of conservation areas. Trade-offs between habitat degradation and habitat restoration must be determined to protect biodiversity outside of conservation areas (Sinclair et al. 1995).

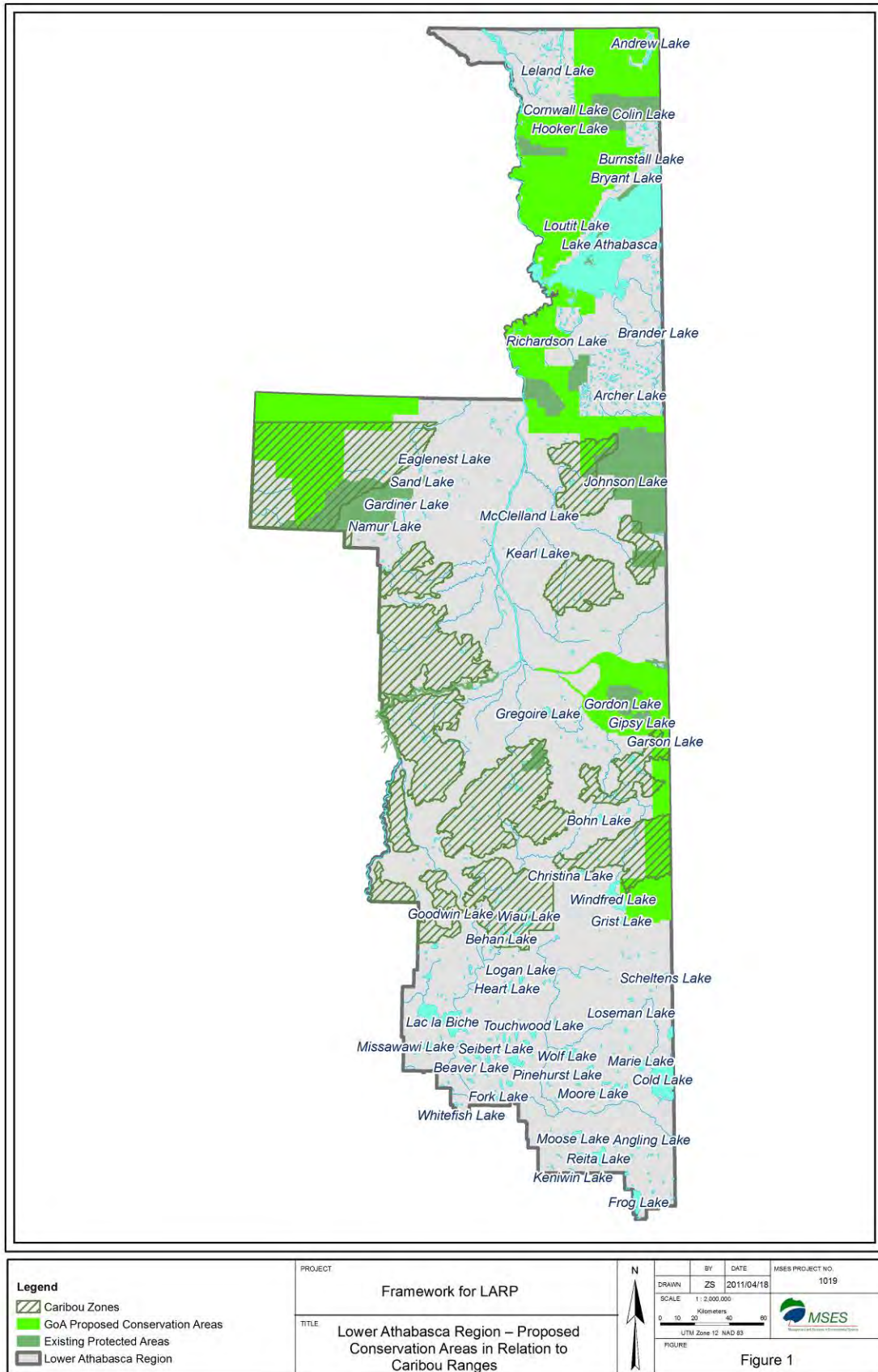


Figure 1: Lower Athabasca Region – Proposed Conservation Areas in Relation to Caribou Ranges

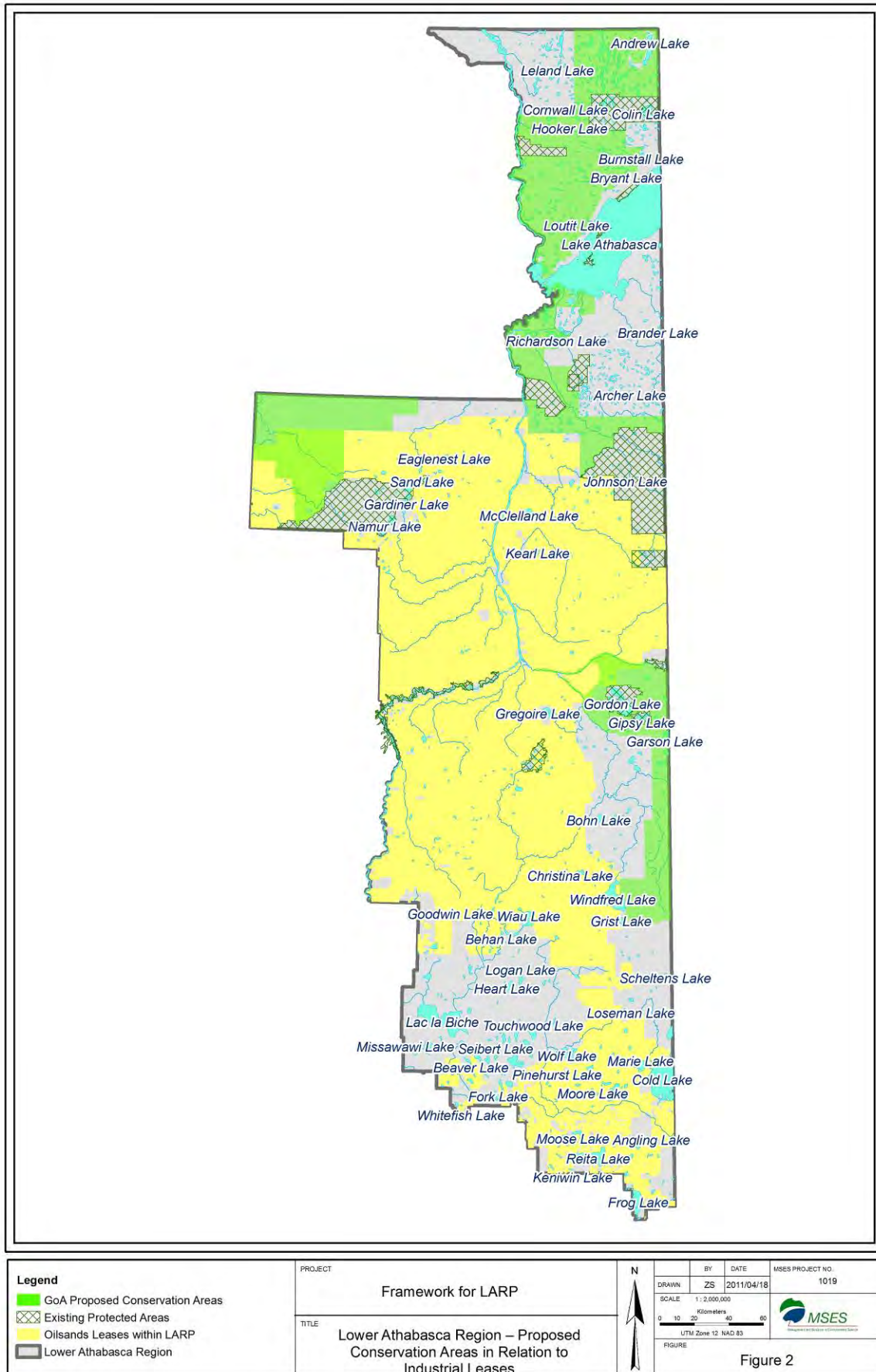


Figure 2: Lower Athabasca Region – Proposed Conservation Areas in Relation to Industrial Leases

2.5 Enforcement of Triggers and Limits

LARP relies on triggers and limits for environmental management. That is, Schedules B-E of the draft LARP show various environmental limits to development. LARP promises to keep the impacts of regional development within these limits. However, our review (August 2011, submitted to AENV) of the frameworks for air, surface water and ground water raised numerous issues regarding a lack of tangible measures and targets in the documents and a lack of management actions prescribed under the frameworks. Concrete action plans, setting the limits and triggers that need to be reflected in regulatory approvals, will be necessary to meet the goals set out in the frameworks. There is no evidence that LARP addressed the issues we raised in our review of the frameworks.

2.5.1. Tools to Control Regional Exceedences

Key Finding: LARP does not provide the tools needed to bring regional exceedences of triggers and limits under control.

When asked about how a regional limit will be enforced, GOA replied that it could alter regulatory approvals or limit new approvals from being issued until a given regional limit is managed and brought under control (communications with GOA April 15 and 27, 2011). However, past experience with enforcement of approvals does not lend support to this assurance, as the following examples demonstrate:

- Approvals typically ask for ecosystems (namely vegetation, wildlife diversity, wildlife habitat and habitat use) to be re-established to a level “*similar to what existed prior to disturbance*” (e.g. Approval No 20809-01-00 for the Muskeg River (Lease 13, 30 and 90) Oil Sands Processing Plant and Mine). However, when asked about how the compliance with such approval clauses would be assessed, we were told that such clauses were never tested (personal communication, Carrie Nugent, ASRD, June 2, 2010). Indeed, we are unaware of any monitoring program anywhere in the oil sands region that would measure the compliance with such clauses. How, then, would GOA be able to evaluate whether or not a limit has been reached? Even if GOA somehow did gather the information and it showed that the regional limit of a population or vegetation community would be reached, how would GOA re-set approval clauses which are already in force for any given project?
- When reviewing annual reports by Albian Sands we commented (Review of Albian Sands Energy Inc. Muskeg River Mine Project 2008 Annual Environment Report, prepared for MCFN, December 2009):

- “The report includes a list of the number of continuous monitoring events that were reportable, but does not provide a summary of the high concentrations nor an explanation for those high values. The report contains no information on stack monitoring results. Therefore, this clause is not satisfied.” or
- “Another example includes phenols, which consistently exceeded guidelines, yet no discussion was provided. The statement “the values do not appear to be significantly different from historical data” (page 55) is not an explanation of the results.”

These are only two of many examples where approval clauses have not been satisfied, yet, no action has followed, not even an explanation has been provided by GOA. If exceedences of guidelines are shrugged off for each and every project, how will GOA be able to manage the accumulation of these exceedances in the region?

As far as air quality monitoring is concerned, a great deal of uncertainty exists given the inconsistent data acquisitions that require coordination among the air and water monitoring programs. Acid deposition and regional acidification are an increasing challenge (RSC 2010, Oilsands Advisory Panel 2010). As it stands, baselines still need to be developed that would allow GOA to even start defining triggers and limits, let alone enforce them. The solid baselines (showing the natural or “pre-disturbance” levels of any given parameter including its range of variation) are required to set the benchmarks against which current and future disturbance will be measured. How long will it take to develop scientifically rigorous and credible data that can inform GOA about how much current measurements deviate from baselines? When and if it is developed, will there be a process in place that would allow for the amendments of existing approvals?

2.5.1. Lack of Ability to Keep Degradation within the Limits for Indicators

Key Finding: LARP does not provide the analyses necessary to measure the success of keeping industrial degradation within the limits for the indicators in the region. Nor does it provide the rates of degradation that are needed to understand how fast actions must be implemented to keep degradation of the indicators within the limits.

Page 30 of LARP lists indicators for use in evaluating the effectiveness of meeting *Outcome 3: Landscapes are managed to maintain ecosystem function and biodiversity*. For the indicators listed, current information shows that all of them are progressing in the wrong direction. For example:

- The “**status of Alberta species**”, particularly species at risk, is clearly deteriorating. Not only are populations dwindling (evidence for woodland caribou and moose is now strong and in GOA’s own records (ASRD 2011)); our analyses show the deterioration of remoteness, ecosystem processes, and wildlife species such as bison, caribou, moose, beaver, and waterfowl

(Effects on Traditional Resources of the Mikisew Cree First Nation: The Joslyn Creek Project Specific and Cumulative Effects in the Oil Sands Region prepared for the MCFN August 2010), the habitats are steadily eroding. Moreover, as habitat is changing, deer and other invasive species compete with native wildlife and vegetation species (Latham and Boutin 2008, Latham et al. 2011).

- The “**area of land disturbance**” is rapidly increasing. Our analysis of land cover disturbance shows this clearly (Figures 3 and 4). Even the conservation areas, having been designed to avoid industrial disturbance to the extent possible, have experienced by 2008 a disturbance of 12% of their land cover. In addition to the disturbance foot print (Figure 4: note the disturbances recorded in the green areas), a great deal of fragmentation of the conservation areas is evident. When will LAR run out of options for the implementation of tangible and effective conservation action, within, and outside of conservation areas? The possibility that LAR has already run out of options to protect “*ecosystem integrity*” may be a real one.
- The “**status of biodiversity indicators**” is related to both the parameters noted above, namely species composition and abundance and landscape scale disturbance. Biodiversity is changing from a natural system to a man made one.
- As per our analyses, it is evident that the “**area of land retained in native vegetation**” is diminishing. Aside of the clearing of vegetation, land cover disturbance allows for the invasion of non-native species, which according to GOA’s own records is a major threat (ASRD 2004).
- The “**area of oil sands reclamation**” is not keeping pace with the rate of disturbance. As can be seen in our analysis of land disturbance, more and more land is disturbed without being returned to pre-disturbance conditions (see also section 2.6 below).
- The “**volume of fluid tailings**” is also increasing, as can be seen on any air photo or satellite image. With an increase in fluid tailings many issues of concern arise, including the increase in hazard for waterfowl (and other wildlife) deaths, water quality concerns, and reclamation challenges.
- Air quality indicators, particularly **nitrogen dioxide**, are also on the increase in certain areas. Regional acidifications as well as increasing green house gas emissions are of concern (RSC 2010, Oilsands Advisory Panel 2010).

Given the continuing degradation of parameters that are used in LARP as indicators for ecosystem function, it is impossible to set targets for balancing “economic, environmental, and social implications” because any desired balance is a moving target for which the rate of change is not understood. Furthermore, the Mikisew Cree and other First Nations have made numerous submissions to GOA for the need to include information on what is needed to exercise their Treaty rights in order to identify indicators and setting targets (Mikisew Cree 2010, ACFN 2010). The rate of change in these indicators is also not understood. The ability of the land disturbance plan (p.29) to set limits and triggers

appropriate from an ecological standpoint is constrained because it must recognize that land disturbance will “*increase substantially*”.

The implementation plan for healthy ecosystems and environment, (p.40, Table 2) calls for the design of conservation areas by 2011 and for the development of a biodiversity management framework by 2013. Given that limited or no ecological or traditional land and resource needs analysis appear to have been used to date for the designation of conservation areas, and that many ecological parameters are poorly understood today, a great deal of research and analysis is still required before an understanding can be reached about how the limits can be set, where in the region they can be set, and how they can be managed.

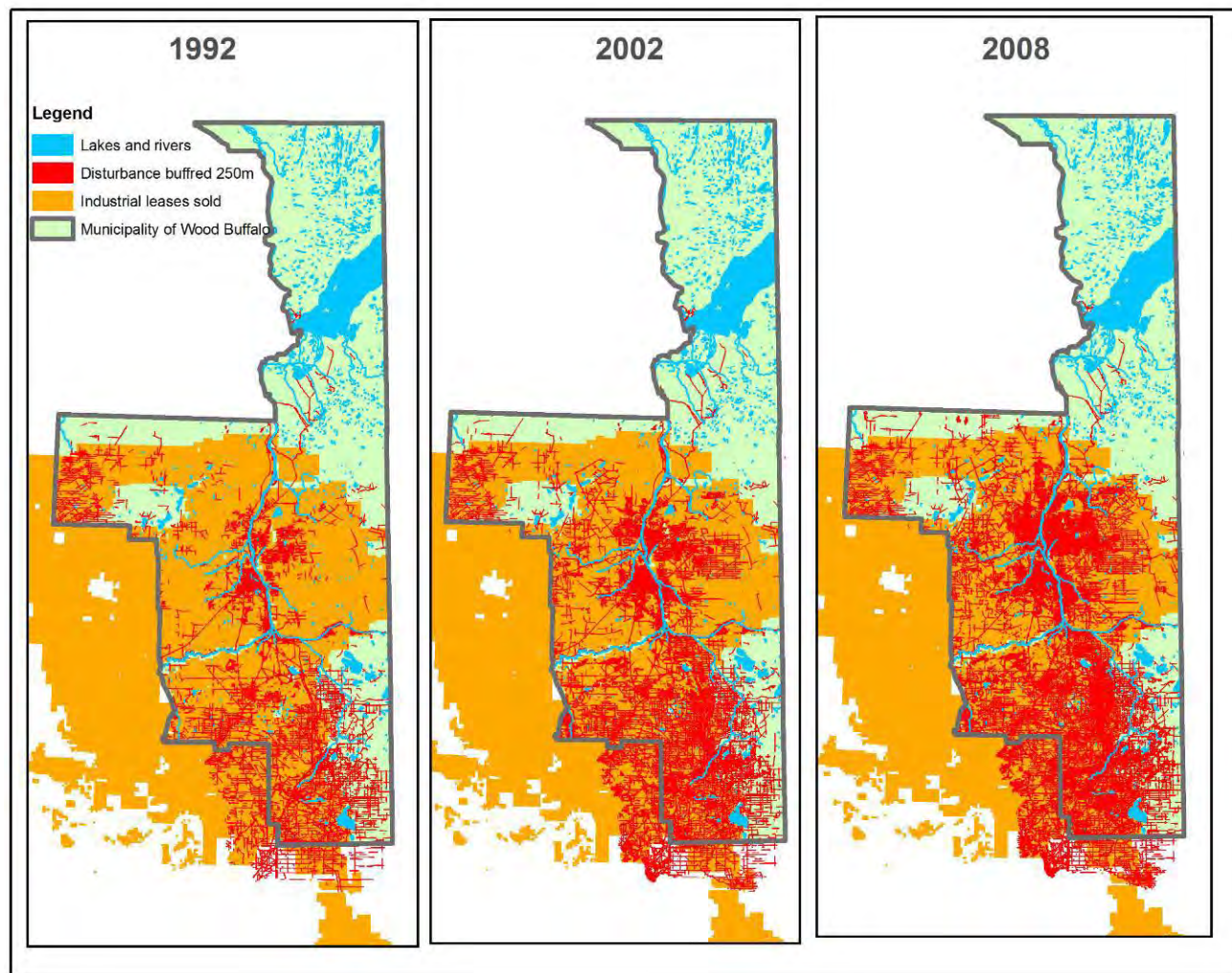


Figure 3: Increasing Disturbance of Natural Surfaces in Relation to Oil Sands Tenure (Leases) in the Regional Municipality of Wood Buffalo (RMWB).

The disturbance shown here includes 250 m zones of influence around all industrial features and is based on satellite image analysis.

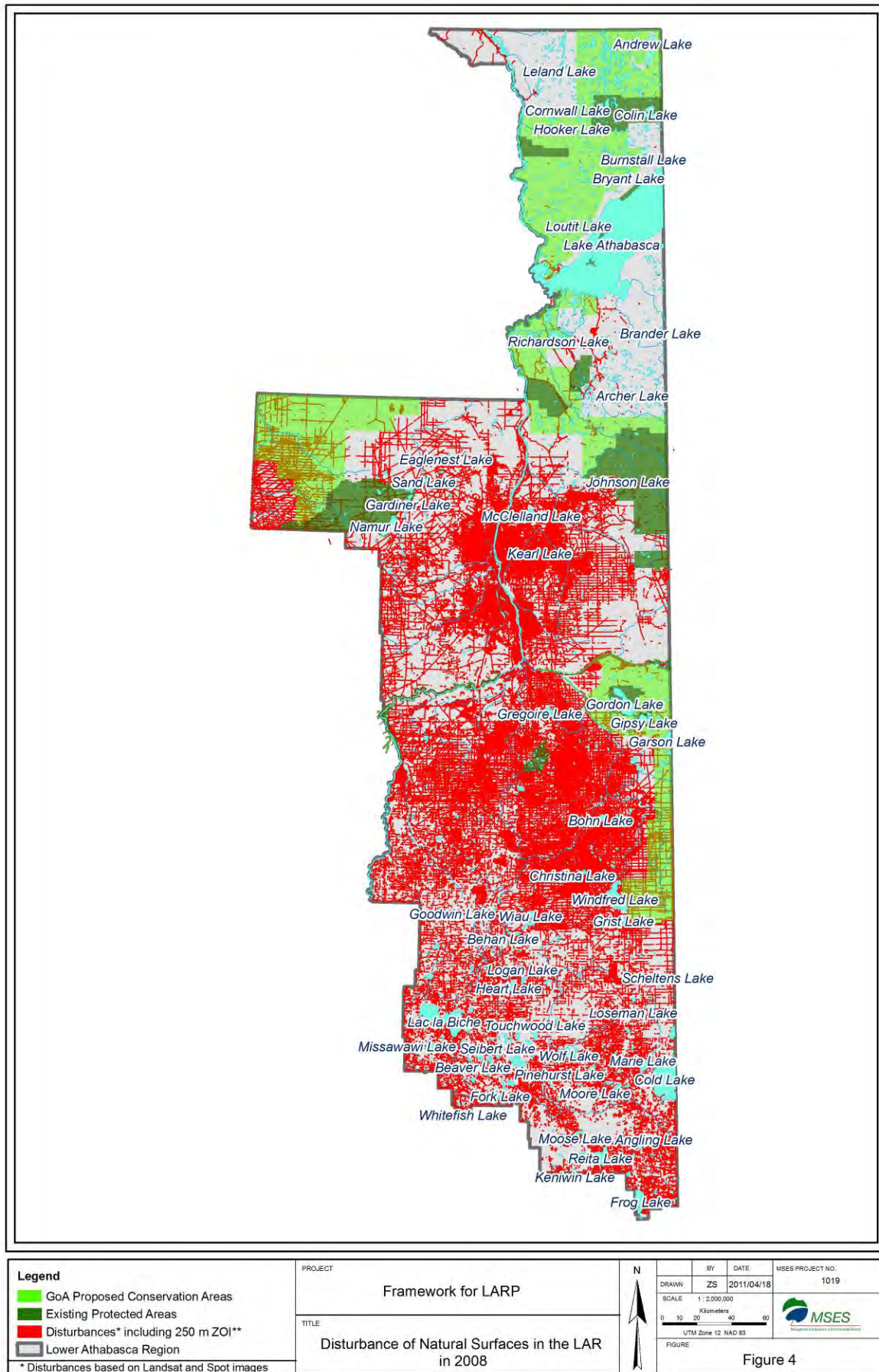


Figure 4: Disturbance of Natural Surfaces in the LAR in 2008. The analysis shown here includes SPOT satellite image analysis which is more a more detailed imagery than Landsat used to produce Figure 3.

2.6 Enhancing the Rate of Reclamation

Key Finding: LARP does not indicate how the continuing erosion of healthy ecosystems in the region can be halted, let alone how a net-gain in healthy ecosystems in the region can be achieved.

According to LARP (p.28), enhancing the rate of reclamation is one of the main objectives. In the Decision regarding the Joslyn North Mine Project by TOTAL, the Joint Review Panel stated (ERCB Decision Report p.128):

“The Panel believes that reclamation is a central mitigation strategy to address regional environmental sustainability issues that require adaptive management strategies.”

The Panel recommends that AENV establish measurable targets for increased indigenous vegetative biodiversity in the reclaimed landscape and the post-closure landscape (ERCB Decision Report p.129). The Panel’s recommendation echoes the comments from advisory panels reviewing the environmental management process in the Oil Sands (RSC 2010, Oilsands Advisory Panel 2010). It also reflects the repeated requests from First Nations to establish scientifically testable reclamation targets and procedures that would measure the success of re-establishing pre-disturbance vegetation communities. In the past, Alberta rebutted the First Nations requests, notably by stating that the First Nation requests would require a change in policy (Chris Powter, AENV, personal communications, spring 2008). As a result, the advisory panels noted that “reclamation is not keeping pace with the rate of land disturbance” (RSC 2010, p.1).

In support of the finding by RSC (2010), we found that in the central and southern portions of LARP, about 3% of disturbance is added each year to already existing disturbances (see also Figures 3 and 4). The reason for seeing the ever-increasing amount of disturbance is that past disturbances, including seismic lines and well pads, are left to recover naturally. The evidence for the lack of ecosystem re-establishment from natural encroachment of vegetation species into disturbed areas is overwhelming. The First Nations have noted this lack of ecosystem re-establishment repeatedly and they are now supported by the reviews of RSC (2010) and the Oilsands Advisory Panel (2010). Both reviews request that a central publically accessible data warehouse be established to facilitate the resolution of regional environmental sustainability issues. Measurable benchmarks and targets must be set. The success of reaching them must be tested with scientifically rigorous methods. It is not clear how GOA intends to satisfy this request.

Moreover, the Mikisew Cree stated that “today there is no proof that reclamation efforts will succeed in re-establishing conditions suitable for their traditional practices“(Mikisew Cree 2010, p.3). In other words, even if pre-disturbance conditions were established at some point in the future, and even if reclamation would successfully restore pre-disturbance conditions (which to our knowledge has not yet been achieved in the Oil Sands), the ability of using the resources of the reclaimed area may be lost.

2.7 Lack of Tools to Manage Greenhouse Gas Emissions

Key Finding: LARP has not provided the tools to manage the balance of Green House Gas emissions.

Further to the need for reclamation, we add to the concern about greenhouse gas emissions raised by RSC (2010) that the challenge is not only in reducing the emissions per se, but also in protecting the carbon storage capacity of the ecosystem. This is because vegetation communities, particularly old growth forests, are Canada’s major carbon sink (Luyssaert et al. 2008, Kurz et al. 2008). In other words, not only are emissions increasing, but the capacity of ecosystems to clean the air is decreasing. The ability of the boreal forest to serve as a carbon sink is eroding in light of industrial disturbance (see also Figures 3 and 4). The carbon sequestration of boreal forests has received much attention in recent studies and in reviews of environmental management in the Oil Sands region (as cited above) because of the regional, national, and global implications of declining carbon sequestration. Moreover, because carbon sequestration requires large intact forests, it is also a reflection of the potential for viability of wildlife and vegetation populations. We recommend that Alberta and Canada develop clear and concrete targets for vegetation removal and restoration as part of a regional vegetation no-net-loss plan or, more appropriately, a net-gain plan. This plan would serve a multitude of functions, from the re-establishment of wildlife habitat for species at risk, to protecting traditional resource use, to improving the sink-to-source balance of greenhouse gas emissions.

3.0 Comparison of LARP to Mikisew Cree Recommended Protected Areas

Key Findings:

LARP only protects 40% of the land that the Mikisew Cree requested for the protection of their culture and their rights. Yet, even for the lands selected for protection, there is no explanation provided in LARP to clarify whether this or any other amount and configuration of lands purportedly protected under LARP will actually accommodate the need for sufficient lands, flora and fauna to guarantee a meaningful right to exercise traditional pursuits and livelihood.

LARP does not provide any rules or criteria on how the LARP conservation areas reflect the request by First Nations to protect their rights. LARP does not protect traditional land use activities specifically, it only makes overarching statements about conservation “areas that support aboriginal traditional uses” (p.18).

LARP does not provide any rules or criteria on how the rights of First Nations would be protected within or outside of conservation areas. Furthermore, within conservation areas, it allows for activities that are incompatible with the exercise of rights.

GOA does not provide any information, whether in LARP or in personal communications, on how the input from the Mikisew Cree was used in the drafting process for LARP.

MSES conducted spatial analyses comparing the amount of recommended areas protected (RAP) by the Mikisew Cree, which would allow their members to sustain their traditional livelihood, versus the amount of proposed conservation areas (PCA) outlined in the LARP document.

Currently, there are only 5,896 km² (6% of the LARP area) considered protected within the LAR area as wildland or provincial parks. Under the LARP, GOA is proposing to designate an additional 15,081 km² (16% of the LARP area) for a conservation area total of approximately 20,977 km² (22% of LARP area). MSES evaluated these proposed conservation areas in light of current disturbances within those areas. Although GOA is proposing to designate 16% of LAR as new conservation areas, 12% of the new conservation areas are already disturbed. Moreover, as per Schedule B, a number of activities (e.g., recreational use, industrial development, forestry, grazing) are permitted within conservation areas that are incompatible with traditional land uses.

The Mikisew Cree has recommended that GOA protect 40% of the LARP area for their community members to sustain their traditional and cultural activities (Mikisew Cree 2010). This recommendation is based on analyses of traditional land use submitted to the Landuse Secretariat. Under current conditions in the RMWB, only 11% of that area is protected and PCAs outlined in LARP will only include an additional 29% of the area that the Mikisew Cree has requested to be protected. In other words, only 40% of the land that the Mikisew Cree require for the sustenance of their culture will have a “protected” status (Figure 5). There is no mentioning in LARP about how lands outside of the protected areas proposed under LARP would be managed for traditional land use, as was requested by the Mikisew Cree (2010).

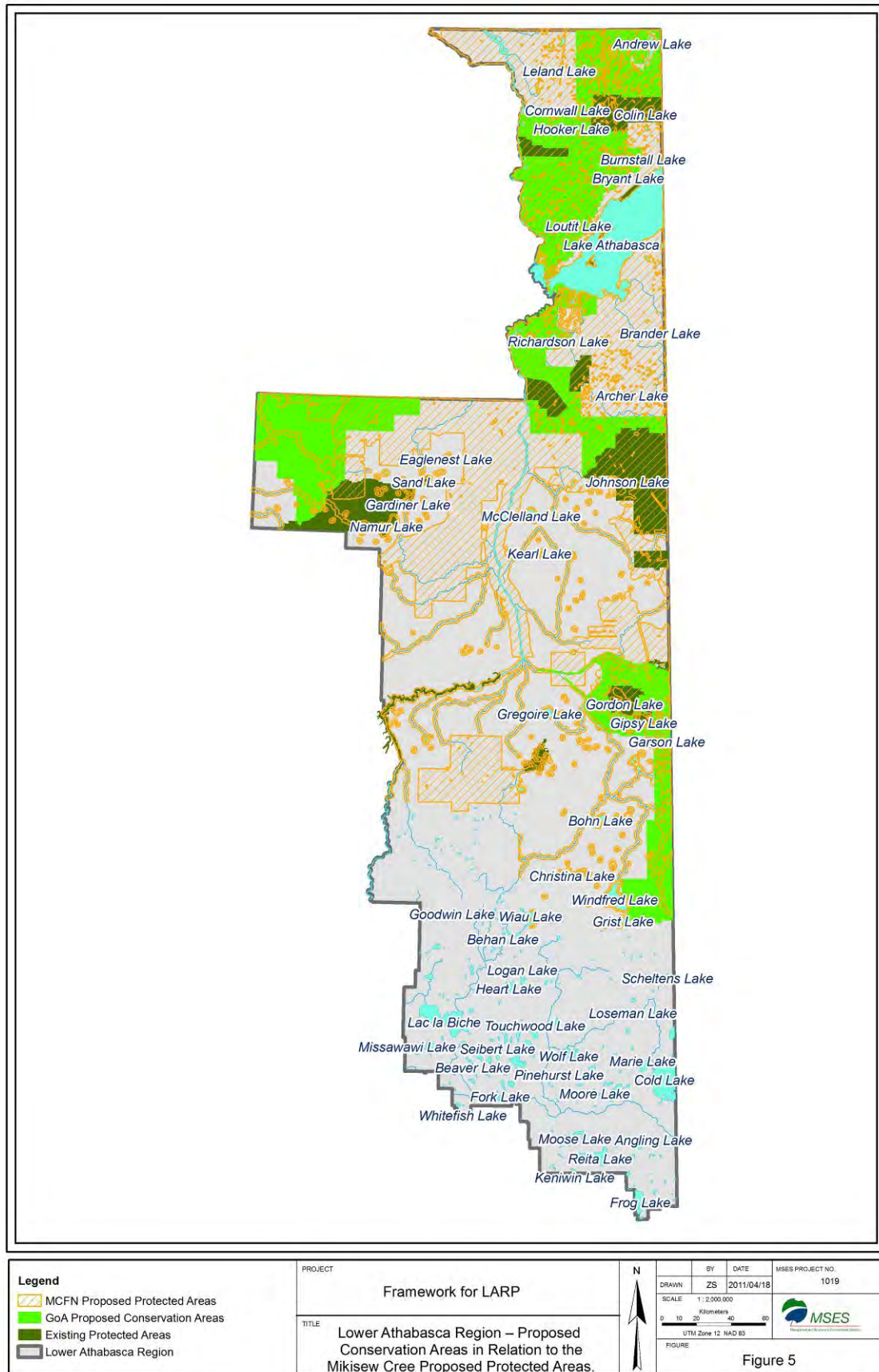


Figure 5: Lower Athabasca Region – Proposed LARP Conservation Areas in Relation to the Mikisew Cree Proposed Protected Areas.

The Mikisew Cree request for protected areas is based on numerous traditional knowledge and traditional land use studies and analyses of land criteria that are of importance to the Mikisew Cree, including but not limited to: intact forests; healthy, navigable water systems; and areas that support ungulate populations. The results of these studies have been submitted to GOA for input in the development of protected areas (Mikisew Cree 2010). Based on these studies, the Mikisew Cree has over 6,600 Traditional Land Use points falling within the LARP area but only about 29% of these points fall within the LARP proposed conservation areas. Furthermore, LARP does not take into account the importance of protecting water bodies and navigable water systems such as the Athabasca River although numerous Mikisew Cree submissions have emphasized the importance of these water systems in order to sustain the Mikisew Cree's rights and livelihood. Because of the importance of these water systems, the Mikisew Cree have requested that protective buffers around water bodies be established. No matter how we look at the results and the requests of the Mikisew Cree, we conclude that only a fraction of the land that the Mikisew Cree require to practice their rights is designated for protection under LARP. The draft LARP is mute on how the input of First Nations was used in the design of protected areas. Likewise, communications during meetings with GOA (April 15 and 27, 2011) did not shed any light on how LARP was designed to protect the rights of First Nations. The only consistent criterion for the designation of conservation areas under LARP appears to be the avoidance of oil sands and mineral leases.

Aside of the amount of Mikisew Cree lands designated for protection under LARP, the problem lies in the designation itself. That is, conservation areas are not designed specifically for the protection of traditional land uses. Rather, conservation areas are designed as multi-use areas that will allow for recreational, forestry, grazing and some industrial activity, none of which are compatible with traditional land use practices. Furthermore, protecting areas for their ecological value is not equivalent to protecting an area for its cultural importance. GOA is failing to assess how LARP specifically will assure that Treaty Rights are sustained and protected now and in the future. The Mikisew Cree explained this concern in their submission and yet it seems not to have been taken into account in the LARP conservation areas (Mikisew Cree 2010).

Because 51% of LAR is considered for oil sand development and much of this area is used by Mikisew Cree community members for traditional use, the Mikisew Cree have recommended that 29% (or 13,815 km²) of the oil sands lease area be protected. However, the proposed conservation areas avoid almost all (96%) of the leases, designating only an insignificant amount (4% or 2,043 km²) of the oil sands lease area to be protected. Essentially, GOA does not seem to be prepared to designate for protection almost any land that has been leased.

4.0 Closure

MSES evaluated the LARP with the overall objective to facilitate continued dialogue surrounding the consequences for traditional resources of the proposed development scenarios in the LAR. We hope that this constructive critique and associated questions and comments will enable all parties to meaningfully contribute to current and future development plans. This review has focused on the value of LARP for maintaining ecological services and biodiversity, especially with respect to traditional use and cultural needs. This review is by no means a comprehensive overview of all of the concerns of the Mikisew Cree with respect to LARP. As outlined in our review above, there remain many outstanding issues for the Mikisew Cree and other First Nations to be discussed through their continued communications with both the Government of Alberta and industry.

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REVIEW OF THE DRAFT LOWER ATHABASCA REGIONAL PLAN

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EXECUTIVE SUMMARY

This report reviews the draft Lower Athabasca Regional Plan (LARP) by addressing the following topics and answering the following questions.

Definitions and Brief History of Regional Planning

The draft LARP lacks a clear definition of regional planning. It should have drawn from almost thirty years experience with similar large-area regional land use plans in the territorial north.

Background Information

Did the plan compile the best available scientific data and traditional knowledge (especially geo-spatial information and maps) regarding past, present, and future social, economic, and environmental conditions in the plan area?

Based on a review of the publicly available information at the Alberta Land-Use Framework web-site, there is no map data available to justify the zoning decisions in the draft LARP.

Was this background information made available to the public?

A “background report” with nine (9) small scale and low resolution maps was made available to the public.

Data Analysis and Plan Development

Were the plan components (land use zoning, policies, goals, objectives, strategies, triggers/thresholds etc.) developed using transparent methodologies using the best available scientific data and traditional knowledge about the plan area?

The draft LARP does not fulfill the Terms of Reference provided by the Government of Alberta (GoA) to examine oil sands production scenarios and does not explain how it made zoning decisions based on the criteria provided by the GoA. When all other existing land interests are subtracted from the plan area, the remaining “unencumbered” provincial lands are about same area as the GoA’s 20% target for conservation zones.

Were these methodologies and their results made available to the public?

There is no evidence that any systematic methodologies were used.

Public Consultation

Were the results of all public consultations made available in an accessible public registry?

The public consultation methods used to develop the draft LARP did not allow citizens and stakeholders to know one another's statements or submissions.

Were the submissions made by MCFN and ACFN incorporated into the plan?

As noted in the technical analysis by MSES,¹ the draft LARP establishes conservation zones covering 40% of the lands identified as essential for aboriginal land use by MCFN and 19% of the lands identified as essential for aboriginal land use by ACFN. However, there are no written explanations about how the submissions from MCFN and ACFN were incorporated into the plan.

Were explanations and reasons provided about whether or not public comments were incorporated into the plan?

The GoA and the Regional Advisory Committee did not provide any written explanations or reasons to citizens and stakeholders about its decisions.

Plan Contents

Are the plan components (land use zoning, policies, goals, objectives, strategies, triggers/thresholds etc.) "SMART" (Specific, Measurable, Attainable, Relevant, Time-Bound)?

The plan contents are not well defined and do not fulfill established strategic planning criteria.

Is there a mechanism for legal implementation and enforcement of the plan and its components?

There is legislation to implement the draft LARP. A recent amendment may have undermined the legislation by establishing excessive rights to compensation for private property owners, establishing plan variances, and allowing a plan to create exclusions, exemptions, and time-limits. Enforcement of cumulative effects assessment are discussed in greater detail in the draft

¹ Management and Solutions in Environmental Science [MSES]. 2011. Review of the Draft Lower Athabasca Integrated Regional Plan. Prepared for Athabasca Chipewyan First Nation, May 2011. And Management and Solutions in Environmental Science [MSES]. 2011. Review of the Draft Lower Athabasca Integrated Regional Plan. Prepared for Athabasca Chipewyan First Nation, May 2011.

LARP review reports by MSES.² An analysis of the legal issues with the draft LARP in relation to Treaty and Aboriginal Rights has been provided in a separate report to MCFN and ACFN.³

Does the plan establish a systematic process and clear criteria for amendment and revision/update?

Yes, but the indicators need to be refined to establish direction (e.g. increasing, decreasing, stable) and perhaps numeric targets.

Overall, is the plan likely to achieve its stated vision, goals, and objectives?

Read closely, the plan vision, “Regional Outcomes”, and objectives cannot all be achieved as some are mutually exclusive.

Best Practices for First Nations Participation in Regional Land Use Planning

Four recent “best practice” regional land use plans across northern Canada were reviewed. The common threads include: partnerships between First Nations and governments; commitment to cutting-edge science and traditional knowledge; establishment of large protected areas between 30% to 50% of each *total* plan area based on intensity of aboriginal land use; and use of Special Management Zones that allow for controlled development. The draft LARP does not have any of these characteristics.

² Ibid.

³ Janes Freedman Kyle Law Corporation. 2011. Legal Review of the Draft Lower Athabasca Regional Plan. Prepared for the Athabasca Chipewyan First Nation and the Mikisew Cree First Nation.

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REVIEW OF DRAFT LOWER ATHABASCA REGIONAL PLAN

Introduction

Mikisew Cree First Nation (MCFN) and Athabasca Chipewyan First Nation (ACFN) of Fort Chipewyan Alberta contracted Cizek Environmental Services to review the draft Lower Athabasca Regional Plan (hereafter the “draft LARP”) using the following criteria and questions:

Background Information

Did the plan compile the best available scientific data and traditional knowledge (especially geo-spatial information and maps) regarding past, present, and future social, economic, and environmental conditions in the plan area?

Was this background information made available to the public?

Data Analysis and Plan Development

Were the plan components (land use zoning, policies, goals, objectives, strategies, triggers/thresholds etc.) developed using transparent methodologies using the best available scientific data and traditional knowledge about the plan area?

Were these methodologies and their results made available to the public?

Public Consultation

Were the results of all public consultations made available in an accessible public registry?

Were the submissions made by MCFN and ACFN incorporated into the plan?

Were explanations and reasons provided about whether or not public comments were incorporated into the plan?

Plan Contents

Are the plan components (land use zoning, policies, goals, objectives, strategies, triggers/thresholds etc.) “SMART” (Specific, Measurable, Attainable, Relevant, Time-Bound)?

Is there a mechanism for legal implementation and enforcement of the plan and its components?

Does the plan establish a systematic process and clear criteria for amendment and revision/update?

Overall, is the plan likely to achieve its stated vision, goals, and objectives?

MCFN and ACFN further requested Cizek Environmental Services to compare the draft LARP to other regional land use plans to identify if there are “best practices” for involvement/engagement of First Nations in land use planning that should/could be applied in

LARP. The level of detail in this report is limited by the fact that it was completed within a one month period in five (5) working days.

Definitions and Brief History of Regional Planning

Before proceeding to answer the specific questions about the draft LARP, it may be helpful to review the varied definitions and to provide brief history of regional planning, specifically in the Canadian context.

The Government of Alberta (GoA) has **not** defined what it means by “regional plan” or “regional planning” anywhere in its written material, including its website,⁴ the Alberta Land Use Framework (hereafter the “Framework”),⁵ the *Alberta Land Stewardship Act*,⁶ and the draft LARP.⁷ Therefore, there is uncertainty about what is meant by “regional planning” and how it should be undertaken.

The Canadian Encyclopaedia defines “Urban and Regional Planning” as:⁸

In broadest terms, urban and regional planning is the process by which communities attempt to control and/or design change and development in their physical environments. It has been practised under many names: town planning, city planning, community planning, land use planning, and physical environment planning. The object of planning is the "physical environment," which is taken to mean land and all its uses, along with everything that has tangible existence on or beneath the land surface.

The Canadian Encyclopaedia does not specifically define “Regional Planning”, but it has an entry for “Regional Development Planning”:⁹

Regional Development Planning is undertaken by governments with the aim of improving the well-being of people in areas where there is concern about present and future living conditions. Economic conditions normally receive the greatest attention, but economic problems (such as high rates of unemployment, low income levels or lack of investment opportunities) are closely associated with a broad range of physical and social problems. These include substandard health and housing conditions, inadequacies in physical infrastructure (eg, water supplies, waste disposal, transport facilities), environmental pollution, and deficiencies in educational, recreational and social services. A planned program of regional development normally attempts to treat these problems comprehensively.

The other type of “regional planning” focuses on metropolitan urban areas, such as the original definition from the 14th Edition of the Encyclopaedia Britannica in 1929:¹⁰

⁴ <http://www.landuse.alberta.ca/>

⁵ <http://www.landuse.alberta.ca/AboutLanduseFramework/Default.aspx>

⁶ <http://www.landuse.alberta.ca/AlbertaLandStewardshipAct/Default.aspx>

⁷ <http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/Default.aspx>

⁸ <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0008273>

⁹ <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=A1ARTA0006746>

¹⁰ B. MacKaye. 1940. Regional Planning and Ecology. Ecological Monographs. Vol. 10, No. 3. pp 349-353.

Regional Planning, a term used by community planners, engineers, and geographers to describe a comprehensive ordering of the natural resources of a community, its material equipment and its population for the purposes of laying a sound physical basis for the “good life”...Regional planning involves the development of cities and countrysides, of industries and natural resources, as part of the regional whole.

A more recent definition of regional planning is more generic:¹¹

Regional planning is concerned with the ordering of human activities in supra-urban space.

These two types of regional planning (“regional *economic* development planning” and “regional *metropolitan* planning”) are usually the only kinds of regional planning taught in the curricula of Canadian planning schools and discussed in standard survey textbooks.¹²

Benton MacKaye¹³ and Lewis Mumford,¹⁴ the two originators of regional planning in North America during the 1920’s, focused most of their attention on the sprawling industrial cities of the American north-east. Managing metropolitan urban sprawl remains the most common subject matter of regional planning to this day.¹⁵

The Framework mentions that metropolitan planning for Edmonton and Calgary is already underway. The Framework contrasts metropolitan planning with the planning regions established for “provincial interest planning on a broad landscape basis”¹⁶ but does not elaborate on this definition. The Framework states that: “Once completed, the regional plans will provide guidance to future updates of the metropolitan plans”.¹⁷ However, the Framework does not clearly state whether or not the “regional plans” include urban areas or should specifically address urban planning issues outside the Edmonton and Calgary metropolitan areas.

Further, regional planning is often confused with “Integrated Resource and Environmental Management” (IREM), which is defined as:¹⁸

A coordinated management process and philosophy, which takes into account the many resources of an area, its linkages to other systems (i.e. communities, politics, environment) and the consideration of long-term sustainable use. IREM is an approach that attempts to integrate both biophysical and cultural elements in the landscape, and thereby increases management objectives beyond single or multiple uses. Ideally, IREM embraces a more holistic approach that combines our greater understanding of ecosystems with a wider range of stakeholders participation.

¹¹ J. Friedmann. 1963. Regional Planning as a Field of Study. Journal of the American Planning Association. Vol. 29, No 3. pp. 168-175.

¹² G. Hodge and D. Gordon. 2008. Planning Canadian Communities 5th Edition. Toronto: Nelson.

¹³ B. MacKaye. 1990 (orig. 1928). The New Exploration: A Philosophy of Regional Planning. Urbana-Champaign: The University of Illinois Press.

¹⁴ M. Lucarelli. 1995. Lewis Mumford and the Ecological Region: The Politics of Planning. New York: Guilford Press.

¹⁵ P. Calthorpe and W. Fulton. 2001. The Regional City: Planning for the End of Sprawl. Washington D.C.: Island Press.

¹⁶ <http://www.landuse.alberta.ca/AboutLanduseFramework/LUFProgress/documents/LanduseFramework-FINAL-Dec3-2008.pdf> p. 47

¹⁷ *Ibid.* p. 44.

¹⁸ D. Ewert, D.C. Baker, G.C. Bissix. (eds.) 2004. Integrated Resource and Environmental Management: The Human Dimension. Cambridge, MA: CABI Publishing. p. 6.

Indeed, the GoA has produced numerous “Integrated Resource Plans” dating back to the 1970’s, which are defined as:¹⁹

Integrated Resource Plans outline the land and resource management intent for a planning area based on a landscape assessment. These assessments:

- Include the resource, physical and biological characteristics and social values within a planning area.
- Identify objectives for long-term management of the area to promote responsible use of the land in the future.
- Describe the type of activities that are compatible with this land and resource management direction. For example, public land may be designated for recreation, grazing, oil and gas, forestry or other uses.

These plans include the “Fort McMurray-Athabasca Oil Sands Sub-Regional Integrated Resource Plan” from 2002.²⁰ This plan was to be updated and amended through the “Mineable Oil Sands Strategy”,²¹ but it appears that this initiative was never completed.

The *Alberta Land Stewardship Act* makes no reference to these existing “Integrated Resource Plans.” While the draft LARP shows “Natural Resource Management Planning” as a subordinate level of regional planning in a bubble diagram,²² it does not acknowledge the existence of the three (3) existing “Sub-Regional Integrated Resource Plans” or the five (5) “Local Integrated Resource Management Plans” that fall within the Lower Athabasca “land-use region”:²³

Sub-Regional Integrated Resource Plan	Area (Sq Km)	Year Approved
Fort McMurray-Athabasca Oil Sands	6,979	2002
Lakeland	3,487	1985
Cold Lake	6,302	1996
Local Integrated Resource Plans		
Winefred Lake and Grist Lake Regional Integrated Decision	217	2000
East Frenchman Lake Local Plan	164	1984
Christina Lake Management Plan	114	1991
Avenir Regional Integrated Decision	111	1994
South Beaver Lake Local Plan	16	1985

¹⁹ <http://www.srd.alberta.ca/ManagingPrograms/Lands/Planning/IntegratedResourcePlans.aspx>

²⁰ http://www.srd.alberta.ca/MapsFormsPublications/Publications/documents/2002_Amended_IRP.pdf

²¹ <http://www.srd.alberta.ca/MapsFormsPublications/Publications/FtMcMurrayMineableOilSandsIRP.aspx>

²²

http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/DLARP%20Regional%20Plan_FINAL_March%2029%202011_1%2044%20pm.pdf p. 3

²³ <http://www.srd.alberta.ca/ManagingPrograms/Lands/Planning/IntegratedResourcePlans.aspx>

The “Sub-Regional Integrated Resource Plans” and “Local Integrated Resource Plans” that fall within the Lower Athabasca “land-use region” were identified by examining boundary shapefiles in ArcGIS from:

http://www.altalis.com/prod_base_bound.html

The Framework only briefly mentions “Integrated Resource Plans”, but does not state how they specifically relate to the current regional planning initiatives:²⁴

A more recent example is the *Policy for Resource Management of the Eastern Slopes*, introduced by Premier Lougheed in 1977, during the last period of rapid growth in the province. The Eastern Slopes Policy identified watershed integrity as the highest priority use for this region of the province, followed by public recreation and tourism. It stated that the management of renewable resources would be the priority, but that non-renewable resource development - primarily oil and gas - would be encouraged in areas where it was compatible. The policy also mandated detailed subregional and local integrated resource management plans (IRPs) for its subregions. These IRPs included multiple objectives – timber, minerals and agriculture in addition to watershed, wildlife, fisheries, and recreation – but noted that “not all objectives will necessarily be achieved in all areas.”

The Land-use Framework thus represents continuity with past policy, not a break. There are precedents in which far-sighted leaders responded to our growing population and economy with new land-use guidelines.

Adding further to the confusion, the actual title of the draft LARP is “Draft Lower Athabasca ***Integrated*** Regional Plan 2011-2021” [emphasis added]²⁵ while the *Alberta Land Stewardship Act* refers to “***integrated*** planning regions” [emphasis added] in its definitions section:²⁶

2 (s) “planning region” means an integrated planning region established under section 3 or by a regional plan, as amended from time to time;

The GoA also has an “Integrated Land Management” program, which is defined as:²⁷

Integrated land management (ILM) is an approach to informed land management planning, decision-making, actions and evaluation that applies to the life-cycle of activities on the landscape.

ILM is aimed at managing the footprint of human uses on public land and associated natural resources. Managing the footprint means managing the impact of human use of land and resources on landscape values. Values can be:

- Economic - industrial commercial
- Social - recreational, aesthetic
- Environmental - water, wildlife

ILM is not a plan or a process. ILM is a way of doing business and a way of thinking, by sharing the land and working together land users can reduce their impact on the land.

²⁴ <http://www.landuse.alberta.ca/AboutLanduseFramework/LUFProgress/documents/LanduseFramework-FINAL-Dec3-2008.pdf> p. 6-7

²⁵

http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/DLARP%20Regional%20Plan_FINAL_March%2029%202011_1%2044%20pm.pdf

²⁶ http://www.qp.alberta.ca/574.cfm?page=A26P8.cfm&leg_type=Acts&isbncln=9780779742271 p. 7

²⁷ <http://www.srd.alberta.ca/ManagingPrograms/IntegratedLandManagement/default.aspx>

The Integrated Land Management web page is the only place where the GoA provides a partial definition of a “regional plan” and an explanation of the relationship between “Integrated Land Management” and the new “Regional Plans”.²⁸

The Land-Use Framework is a strategic, high-level plan to make land-use decisions in Alberta. The regional plans will identify what land use goes where. ILM is the on-the-ground way to influence land-user behaviour, improve stewardship and reduce the relative footprint.

This definition captures the implied intention of the Alberta “regional plans” in the phrases “will identify what land use goes where” and “strategic, high-level plan”. The definition of “land use planning” derived from the United Nations Food and Agriculture Organization,²⁹ seems best suited to the Alberta regional plans:

Land use planning is the term used for a branch of public policy encompassing various disciplines which seek to order and regulate land use in an efficient and ethical way, thus preventing land use conflicts. Governments use land use planning to manage the development of land within their jurisdictions. In doing so, the governmental unit can plan for the needs of the community while safeguarding natural resources. To this end, it is the systematic assessment of land and water potential, alternatives for land use, and economic and social conditions in order to select and adopt the best land-use options.

There are several aspects of this definition that are worth highlighting:

- 1) The phrase “systematic assessment” means that land use plans should use rational and scientific methods to understand “land and water potential, alternatives for land use, and economic and social conditions.” The Alberta Land Use Framework claims to support this approach by stating in its “Guiding Principles” that land-use decisions will be “Knowledge-Based – Government decision-making and choices will be informed by science, evidence and experience, including traditional knowledge of aboriginal peoples.”³⁰
- 2) The phrase “land and water potential” means that a land use plan should describe current conditions and also assess how natural resources could be used in the future. For example, this is the difference between a description of bedrock geology compared to a economic assessment of the mineral potential of an area.
- 3) The phrase “alternatives for land use” means that there are many possible future options to choose from and that a land use planning process should present several alternatives for review and comment by the public.

This review evaluates the extent to which any of these aspects are met in the draft LARP.

²⁸ <http://www.srd.alberta.ca/ManagingPrograms/IntegratedLandManagement/default.aspx>

²⁹ <http://www.fao.org/docrep/T0715E/t0715e02.htm>

³⁰ <http://www.landuse.alberta.ca/AboutLanduseFramework/LUFProgress/documents/LanduseFramework-FINAL-Dec3-2008.pdf> p. 16

The final significant aspect of the Alberta “regional plans” is the vast geographic area covered by the “land-use regions.” However, the Framework does not provide any information about the actual geographic area of each “land-use region.” To better understand this aspect, the area of each “land-use region” was calculated in ArcGIS software with “land-use region” shapefile³¹ projected in Alberta 10TM, as listed below in descending order:

Land-Use Region	Area (Sq Km)
Lower Peace	192,176
Lower Athabasca	93,258
North Saskatchewan	85,787
South Saskatchewan	83,764
Upper Athabasca	82,981
Upper Peace	74,270
Red Deer	50,345
Average Area	96,654

For comparison, the average area of the “land-use regions” or the area of the Lower Athabasca “land-use region” is slightly bigger than the areas of the province of New Brunswick,³² or the state of Maine, or the country of Portugal.³³ For further comparison, the average geographic area covered by the Alberta “Integrated Resource Plans” is 1,982 square kilometres³⁴ and size of the Edmonton Capital Region Board is 12,196 square kilometres.³⁵

The Yukon, Northwest Territories and Nunavut are the only other places in Canada where regional planning has already been carried out for such extremely large geographic areas where most of the land is publicly owned.³⁶ In the territorial north, the beginnings of “regional planning” or “regional land use planning” can be traced as far back as 1973, when the first federal policy paper to mention land use planning outlined a seven-phase process.³⁷

³¹ http://www.altalis.com/prod_base_bound.html

³² http://en.wikipedia.org/wiki/List_of_Canadian_provinces_and_territories_by_area

³³ http://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_area

³⁴ Calculated in ArcGIS using the shapefiles from http://www.altalis.com/prod_base_bound.html projected in Alberta 10TM.

³⁵ None of the documents prepared by the Capital Region Board state the geographic area covered by the map area at http://www.capitalregionboard.ab.ca/images/Maps/capital_region_board_map.pdf. This area was calculated using in ArcGIS using the municipal census boundaries from

<http://geogratis.gc.ca/geogratis/en/option/select.do?id=E7771C97-5203-451F-8EC3-B11DAE2E9783>

³⁶ Completed in 1997, the exceptionally large Fort Nelson Land and Resource Management Plan in far northern British Columbia also covered 98,000 square kilometres.

http://archive.ilmb.gov.bc.ca/slrp/lrmp/fortstjohn/fort_nelson/index.html. In the 1970’s and 1980’s, the Ontario government also developed “Strategic Land Use Plans” for all of north-eastern and north-western Ontario, but these were policy frameworks that created “District Land Use Guidelines”. See: J. Dunster. 1988. Land Use Planning in Canada: An overview of the forestry aspects. Land Use Policy. Volume 5, Issue 1. pp. 83-93.

³⁷ J.K. Naysmith. 1973. North of 60: Toward a Northern Balance. Ottawa: Information Canada. p. 21.

1. An inventory of the natural values of the land-base such as wildlife habitat, recreation, forestry, agriculture, known minerals and hydrocarbon deposit.
2. The identification and analysis of the social, cultural, and technological uses of the land.
3. The determination of the physical properties of the terrain and its performance when subjected to various kinds of man-induced alteration.
4. The systematic presentation or classification of the land, based on the composite value determined in phases 1, 2, and 3.
5. The determination of management criteria and management structures to meet those criteria.
6. The formation and operation of a mechanism for regional participation.
7. Political decisions reflected in legislation.

Following advocacy for land use planning by citizen's groups such as the Canadian Arctic Resources Committee,³⁸ Justice Thomas Berger made land use planning a centerpiece of his recommendations in the Report of the Mackenzie Valley Pipeline Inquiry in 1977: "The [pipeline] corridor should be developed only on the basis of a sensible and comprehensive plan that accounts for and resolves the many land use conflicts that are apparent in the region even today."³⁹

After several false starts in policy development, it took until the late 1980's for land use planning in the territorial north to get fully underway.⁴⁰ Since then, the following northern land use plans have been fully approved or are nearing completion:

Land Use Plan	Area (Square Km)	Status
Lancaster Sound Regional Land Use Plan (North Baffin) ⁴¹ - Nunavut	1,500,000	Approved 1991; Revised and Approved 2000
Keewatin Regional Land Use Plan ⁴² - Nunavut	445,000	Approved 1995; Revised and Approved 2000
Gwich'in Land Use Plan ⁴³ - NWT	57,000	Approved 2003
North Yukon Land Use Plan ⁴⁴ - Yukon	55,548	Approved 2009
Sahtu Land Use Plan ⁴⁵ - NWT	283,588	Third draft under review
Dehcho Interim Land Use Plan ⁴⁶ - NWT	215,615	Final draft being revised and negotiated
Peel River Watershed Plan ⁴⁷ - Yukon	67,000	Final recommended plan being revised

³⁸ K.P. Beauchamp. 1976. Land Management in the Canadian North. Ottawa: Canadian Arctic Resources Committee.

³⁹ Justice T.R. Berger. 1977. Northern Frontier, Northern Homeland: Report of the Mackenzie Valley Pipeline Inquiry. Volume 1. Ottawa: Supply and Services Canada. p. viii.

⁴⁰ T. Fenge and W. Rees (eds.). 1987. Hinterland or Homeland? Land-Use Planning in Northern Canada. Ottawa: Canadian Arctic Resources Committee.

⁴¹ <http://www.nunavut.ca/en/about-commission/important-information/approved-plans>

⁴² Ibid.

⁴³ <http://www.gwichinplanning.nt.ca/landUsePlan.html>

⁴⁴ <http://nypc.planyukon.ca/>

⁴⁵ <http://www.sahtulanduseplan.ca/>

⁴⁶ <http://www.dehcholands.org/>

⁴⁷ <http://www.peel.planyukon.ca/>

The large-area regional land use planning experience in the territorial north provides almost thirty years of experience upon which the Alberta regional planning program should have drawn.

Background Information

Did the plan compile the best available scientific data and traditional knowledge (especially geo-spatial information and maps) regarding past, present, and future social, economic, and environmental conditions in the plan area?

Was this background information made available to the public?

The exhortation “Survey Before Plan!” by Sir Patrick Geddes, the Scottish godfather of scientific urban and regional planning, was ground-breaking at the end of the 19th century.⁴⁸ This exhortation is still worth repeating to this day, as a great deal of data and analysis is required to inform rational land use planning. In the 1960’s, landscape architect and regional planner Ian McHarg laid the foundations for comprehensive landscape inventories, which also anticipated the imminent invention of computerized Geographic Information Systems that would revolutionize the cartographic techniques required to compile such inventories.⁴⁹ McHarg’s “layer-cake” model can be applied at any geographic scale ranging from the individual site to a very large region:⁵⁰

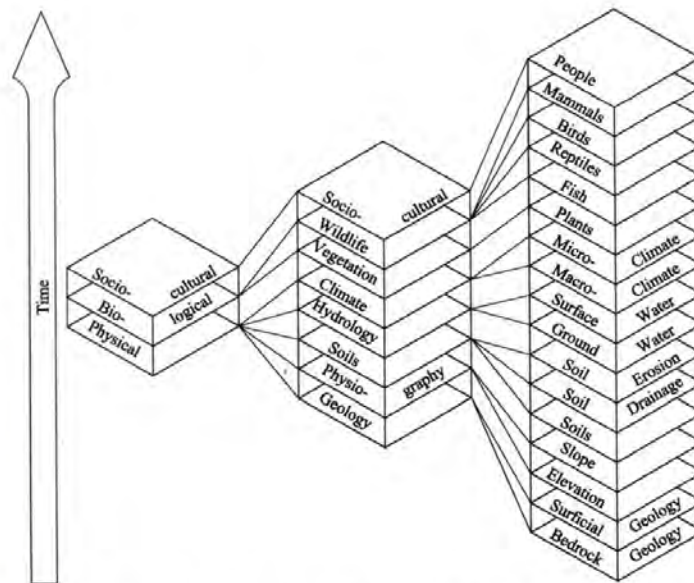


Fig. 1.3. The layer-cake model illuminates the relationships among abiotic, biotic, and cultural elements across the landscape (Wallace, McHarg, Roberts, and Todd, 1971–74). Redrawn by M. Rapelje, 2000.

⁴⁸ <http://www.casa.ucl.ac.uk/news/newsstory.asp?id=153>

⁴⁹ I.L. McHarg. 1969. *Design with Nature*. Garden City, NY: Doubleday.

⁵⁰ F. Ndubisi. 2002. *Ecological Planning: A Historical and Comparative Synthesis*. Baltimore: John Hopkins University Press. p. 30.

As noted earlier, this rational and scientific approach is reflected in the “Guiding Principles” of the Alberta Land-Use Framework where the GoA states that land-use decisions will be: “Knowledge-Based – Government decision-making and choices will be informed by science, evidence and experience, including traditional knowledge of aboriginal peoples.”⁵¹ Further, the Terms of Reference provided to the Lower Athabasca Regional Advisory Committee (hereafter the “Terms of Reference”) state:⁵²

The development of a regional plan is a complex task, involving a significant amount of data, policy input and decision-making....

....As the RAC is informed by data, modelling projections, and provincial policies about the region, it will refine its advice in more focused and specific terms.

To assess the quality of background information supporting the draft LARP, the “Profile of the Lower Athabasca Region”⁵³ (hereafter the “Profile”) is the only background document available for public review. The GoA has not posted any other documents or maps specifically as background information to the draft LARP anywhere on the Alberta Land-use Framework website.⁵⁴ In the Acrobat document, there are nine (9) maps at a very small scale of about 1 to 3 million, which are at such a low resolution that it is impossible to see any detail when zooming into the Acrobat document:

- 1) Lower Athabasca Planning Region Overview Map
- 2) Transportation Infrastructure
- 3) Oil Sands Projects
- 4) Surface Mineable Area
- 5) Oil Sands, Wells, and Associated Activities
- 6) Forest Management Agreement
- 7) Non-Energy Industrial Minerals
- 8) Natural Regions and Sub-Regions
- 9) Watersheds

⁵¹ <http://www.landuse.alberta.ca/AboutLanduseFramework/LUFProgress/documents/LanduseFramework-FINAL-Dec3-2008.pdf> p. 16

⁵²

<http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/TermsOfRefDevLowerAthabascaRegionIPlan-Jul2009.pdf>

⁵³ <http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/ProfileOfTheLowerAthabascaRegion-Jul2009.pdf>

⁵⁴ <http://www.landuse.alberta.ca/Default.aspx>

The following table uses the structure of McHarg’s “layer cake” model to assess the adequacy and accuracy of the background information provided within the Profile. Note that the italicized headings in the table are not from McHarg’s “layer-cake” model but from the Profile itself.

Information and Maps in the Profile		
Socio-Cultural	People	<i>Community and Social Development</i>
		<i>Population and Settlement</i>
		<i>Transportation Infrastructure</i>
		<i>Parks, Recreation, and Trails</i>
		<i>Culture and Cultural Heritage</i>
		<i>Community Health</i>

⁵⁵ Profile. Supra. p. 4

Socio-Cultural	People	<i>Economic Development and Prosperity</i>	<p><i>Oil Sands</i></p> <ul style="list-style-type: none"> • Narrative summary with some numeric information • “Oil sands projects” map shows open pit mines as points; at this scale they should be shown as polygons (areas) showing the past, present, and future land disturbance.⁵⁶ • Three (3) proposed open pit mines are missing entirely from this map: Shell Pierre River, Shell Jackpine Phase 2, and Suncor Voyageur South; TOTAL Joslyn is shown as a numbered point on the map but is missing from the list in the table • Many in-situ projects are missing entirely from this map, for example Nexen Longlake South (proposed), JACOS Hangingstone (existing), Connacher Great Divide and Algar (existing). • The total number of in-situ projects that are missing cannot be counted accurately as there are many numbered points that appear on the map, which are missing from the list in the table. • Numeric table compares portions of oil sands areas in the Lower Athabasca region and states that the “Total area disturbed by oil sands mining” is 530 km² or less than 1% of the Lower Athabasca Region; Canadian Association of Petroleum Producers⁵⁷ states that the “active mining footprint” is 662 km²; the table does not forecast the future mining footprint if all existing, approved, and proposed mining projects are developed,⁵⁸ which is approximately 1,585 km² • The “Surface Mineable Area” map implies that all open pit mines will be confined within this area; parts of several open pit mining projects actually extend outside this area, including Suncor Millenium and Steepbank (existing), Syncrude Mildred Lake (existing), Imperial Oil Kearl (approved), Suncor Voyageur South (proposed), Shell Pierre River (proposed), and TOTAL Sinopec Northern Lights (proposed). • The text states: “Forecasts indicate that bitumen production could more than double in the future.”⁵⁹ The Terms of Reference require the Regional Advisory Committee to consider three bitumen production scenarios ranging from 1.5 to 6.0 million barrels per day,⁶⁰ which involves more than quadrupling the present production of 1.3 million barrels per day. • No map or information is provided about the geographic area covered by oil sands leases.
			<p><i>Natural Gas</i></p> <ul style="list-style-type: none"> • Narrative summary with some numeric information • The map “Oil Sands, Gas Wells, and Associated Facilities” combines in-situ bitumen wells and natural gas wells/pipelines in one category • In-situ wells and bitumen pipelines should be shown separately in the previous section about oil sands • No quantitative future forecast about natural gas production in the plan area is provided. • No map or information is provided about the geographic area covered by natural gas or conventional petroleum leases.
			<p><i>Forestry</i></p> <ul style="list-style-type: none"> • Narrative summary with some numeric information • The map “Forest Management Agreement” only shows the boundaries of the Alpac FMA. • The table “Allocation Volumes in Forest Management Units lying partially or entirely within the Lower Athabasca” should be shown in map format. • The geographic location of planned future timber harvest blocks should be shown in map format. • No numeric information is provided about the anticipated future reduction in annual allowable cut due to salvage from non-renewable resource development .

⁵⁶ As shown at: <http://oilsandstruth.org/>

⁵⁷ <http://www.capp.ca/UpstreamDialogue/OilSands/Pages/default.aspx#X4EK26sikRC8>

⁵⁸ <http://oilsandstruth.org/mineable-oil-sands-existing-approved-and-proposed-projects>

⁵⁹ <http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/ProfileOfTheLowerAthabascaRegion-Jul2009.pdf> p. 31.

⁶⁰

<http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/TermsOfRefDevLowerAthabascaRegionaIPlan-Jul2009.pdf> p. 12

Socio-Cultural	People	<p><i>Agriculture</i></p> <ul style="list-style-type: none"> • Five (5) numeric tables showing past to present (1996, 2001, 2006) agricultural statistics; no quantitative future forecasts provided • No maps provided showing geographic distribution of farms or soil capability for agriculture. <p><i>Tourism</i></p> <ul style="list-style-type: none"> • Narrative summary with some numeric information. • No maps provided showing geographic distribution of existing tourism facilities outside urban areas (campgrounds, lodges, trails etc.) or scenic natural features <p><i>Other Industry</i></p> <ul style="list-style-type: none"> • Narrative summary with some numeric information about electricity, industrial minerals, and aggregate mining. • “Non-Energy Industrial Minerals” map shows point data industrial minerals; not clear whether these are showings or active quarries • No maps provided showing the geographic area covered by non-metallic and metallic mineral permits, licenses, or leases. <p><i>Major Missing Component: Human Disturbance of Natural Surfaces</i></p> <ul style="list-style-type: none"> • The Profile does not provide a map or calculation describing the combined past, present, and future human industrial footprint on the landscape, which includes human settlements, open pit mines, in-situ projects, conventional oil and gas, logging, quarrying, transportation corridors, pipelines, trails, well-sites, seismic cut-lines. <p><i>Major Missing Component: Aboriginal Hunting, Fishing, Trapping, and Gathering</i></p> <ul style="list-style-type: none"> • There is no mention of the economic value of aboriginal hunting, fishing, trapping, and gathering, which may be outside formal monetary exchange but still provides significant “in-kind” or “replacement” value. • There is no reference to mapping these land uses so that they may be protected from industrial development. 	
	Historical Resources	<ul style="list-style-type: none"> • Narrative summary with some numeric information about the Historical Resources Act, Designated Historical Resources, and Archaeological Sites • No maps showing the geographic location of historical resources or archaeological sites; the exact location of archaeological sites can be generalized on small scale maps for security and confidentiality • No maps showing aboriginal cultural sites and historical occupancy 	
Biological	Wildlife	Mammals	<p><i>Biodiversity Section in Profile</i></p> <ul style="list-style-type: none"> • One paragraph narrative summary • List of thirteen (13) “major” mammals in the Lower Athabasca; no complete species list of all mammals occurring in the Lower Athabasca • No range or habitat maps and how this has changed over time • Very brief statement that these species are important to aboriginal peoples
		Birds	<p><i>Biodiversity Section in Profile</i></p> <ul style="list-style-type: none"> • One paragraph narrative summary • List of eight (8) “major” game bird species; no complete species list of all game birds or birds occurring in the Lower Athabasca • No range or habitat maps and how this has changed over time • Very brief statement that these species are important to aboriginal peoples
		Reptiles	<ul style="list-style-type: none"> • No maps or information provided

Biological	Wildlife	Fish	<p><i>Biodiversity Section in Profile</i></p> <ul style="list-style-type: none"> • One paragraph narrative summary • Three (3) fish species listed out of twenty-eight (28) species occurring; no complete list of all fish species occurring in the Lower Athabasca • No range or habitat maps and how this has changed over time • No description of how these species are important to aboriginal peoples
		Species at Risk	<p><i>Biodiversity Section in Profile</i></p> <ul style="list-style-type: none"> • Narrative summary. • Species list of eight (8) federally designated species at risk and seven (7) provincially designated species at risk that occur in the Lower Athabasca • Seventeen (17) provincially designated “sensitive” species that occur in the Lower Athabasca mentioned but not listed • No range or habitat maps and how this has changed over time • No mention of predictive models of future status if resource extraction continues
	Vegetation	Plants	<p><i>Biodiversity Section in Profile</i></p> <ul style="list-style-type: none"> • Two paragraph narrative states there are more than 500 species of vascular plants in Lower Athabasca area; mentions examples of shrub species; no complete species list of plants • No maps about plants, vegetation cover, forest fires, or insect infestations provided <p><i>Ecosystems Section in Profile</i></p> <ul style="list-style-type: none"> • Brief narrative summary of the “Boreal Forest Natural Region” and the “Canadian Shield Natural Region” • “Natural Regions and Subregions” map; no additional narrative information about the “sub-regions”
Physical	Climate	Micro	<p><i>Air and Emissions in Profile</i></p> <ul style="list-style-type: none"> • Summary narrative with some numeric information about air quality, hydrogen sulphide, ozone, greenhouse gas emissions, climate change strategy • No maps or numeric tables describing point sources of emissions, regional airsheds, or air quality and how this has changed over time
		Macro	<ul style="list-style-type: none"> • No mapped or numeric description of past and present regional climatic profiles • Effects of climate change on water and biodiversity mentioned only in passing • No mapped or numeric description of future climate change, especially changes in forest fire frequency, insect infestations, and surface water flows and how this has changed over time
	Hydrology	Surface & Ground	<p><i>Water Section in Profile</i></p> <ul style="list-style-type: none"> • Lengthy narrative with numeric information about watersheds, water management, water quality, pressures on water, water policies; includes both surface and groundwater • States that “oil sands activities have had no measurable impact on water quality”;⁶¹ does not mention that traditional knowledge and some peer-reviewed scientific literature states the opposite⁶² • “Provincial Watersheds” map shows Beaver River, Athabasca River, Peace River, Lake Athabasca, Slave River, and Great Slave Lake Basin watersheds; no sub-watersheds shown.
	Soils	Erosion	<ul style="list-style-type: none"> • Soil erosion mentioned only in passing. • No maps or information provides about river bank stability or presence/melting of discontinuous permafrost.

⁶¹ <http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/ProfileOfTheLowerAthabascaRegion-Jul2009.pdf> p. 52

⁶² E.N. Kelly et al. 2010. Oil sands development contributes elements toxic at low concentrations to the Athabasca River and its tributaries. Proceedings of the National Academy of Sciences. Vol 107, No 37. pp 16178-16183.

Physical	Soils	Drainage	<ul style="list-style-type: none"> No maps or information about agricultural land capability, wetlands, peatlands
	Physiography	Elevation & Slope	<ul style="list-style-type: none"> No maps or information showing topography, elevation, slope; related to drainage and erosion above
	Geology	Surficial	<ul style="list-style-type: none"> No maps or information about surficial geology, especially location of known or potential gravel deposits.
	Geology	Bedrock	<ul style="list-style-type: none"> No maps or information about bedrock geology, especially location of known or potential mineral and petroleum deposits.

There are major data gaps in the Profile, especially in terms of mapped information. The most glaring data gaps are:

- 1) Past, present, and future human disturbance of natural surfaces
- 2) Past and present vegetation, habitat and range maps of birds, mammals, fish, and species at risk
- 3) Aboriginal land use and traditional knowledge

One of the key seven strategies of the Framework is: “Inclusion of Aboriginal peoples in land use planning.”⁶³ The Terms of Reference⁶⁴ refer to aboriginal land use in several areas:

First Nations and Métis have expressed serious concerns about the state of their traditional areas. Some seek creation of “preserved” areas to ensure the future of treaty rights. First Nations believe they should be consulted on regional plans beyond the land-use region in which their reserve lands lie because of the broad expanse of traditional territory. (p. 9)

Land use must be managed to include Aboriginal traditional use activities (p. 11)

Key criteria for establishing conservation areas include the following:

- areas with little or no industrial activity;
- areas that support Aboriginal traditional uses; (p. 14)

⁶³ <http://www.landuse.alberta.ca/AboutLanduseFramework/LUFProgress/documents/LanduseFramework-FINAL-Dec3-2008.pdf> p. 4

⁶⁴

<http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/TermsOfRefDevLowerAthabascaRegionalPlan-Jul2009.pdf>

Traditional use lands encompass much of the Lower Athabasca. There are 17 First Nations reserve lands, two Métis Settlements, and several communities with high Métis populations in the region. It will be important that continued opportunities exist for Aboriginal traditional uses to be in close proximity to First Nations and Métis communities. (pp. 17-18)

Yet the Profile is written as if aboriginal peoples never venture beyond their Indian Reserves or Métis Settlements, except perhaps to go work in the petroleum or logging industries. There is no reference at all to the aboriginal land use and traditional knowledge research projects that have already been conducted in the region where some data had already been shared with the GoA.⁶⁵

Ian McHarg's "layer-cake" model represents an ideal comprehensive landscape inventory but the information provided in the Profile does not even meet bare minimum information requirements. Given the total absence of any information about human disturbance of natural surfaces and the total absence of vegetation, wildlife habitat and range data in Profile, it could not have been possible to prepare any kind of rational and scientific regional plan. It is not known if the GoA or RAC made use of any other information that was withheld from the public, but there is no evidence anywhere that the regional planning in the Lower Athabasca fulfills the "Knowledge-Based" Guiding Principle of the Framework.

Data Analysis and Plan Development

Were the plan components (land use zoning, policies, goals, objectives, strategies, triggers/thresholds etc.) developed using transparent methodologies using the best available scientific data and traditional knowledge about the plan area?

Were these methodologies and their results made available to the public?

The central direction provided to the Regional Advisory Committee (RAC) in the Terms of Reference is to assess trade-offs:⁶⁶

Trade-offs

The RACs will provide advice on how competing land uses in the region should be reconciled and how trade-offs could be addressed.

⁶⁵ According to ACFN and MCFN, both First Nations made submissions to the Government of Alberta on the Land Use Framework, in various regulatory proceedings, and ACFN also had a publicly available traditional use study that Government of Alberta prior to the Profile being completed. There is no publicly-available evidence that this information was considered.

⁶⁶

<http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/TermsOfRefDevLowerAthabascaRegionalPlan-Jul2009.pdf> p. 7

The Terms of Reference then require the RAC to:⁶⁷

The RAC will consider three development scenarios, as follows:

Current State Scenario

Energy prices remain moderate. Existing production levels continue, with some new investments made. Current environmental management systems and technology continue to be employed. Production levels are approximately 1.5 to 2.0 mbd.

Mid-range Scenario

Increased average energy prices. Production levels grow with new investments. Technological advancements and innovations are employed, aimed at achieving environmental objectives. Production grows to meet a mid-range level of demand, and to a point of cost constraints. Production levels are approximately 4.0 to 4.5 mbd.

High-end Scenario

Robust and sustained energy prices. Production levels increase in response to increased energy demand. Technological advancements and innovations are employed, aimed at achieving environmental objectives. Project and compliance costs remain moderate, with limited cost constraints. Production levels are 6.0 mbd or more.

The Terms of Reference also require the RAC to identify 20% of the plan area for conservation lands based on the following criteria:⁶⁸

Key criteria for establishing conservation areas include the following:

- areas with little or no industrial activity;
- areas that support Aboriginal traditional uses;
- areas that are representative of the biological diversity of the area (e.g., landforms, species, vegetation); and
- areas of sufficient size (i.e., roughly 4,000-5,000 square kilometres).

There is no evidence in the RAC’s “Advice to the Government of Alberta Regarding a Vision for the Lower Athabasca Region”⁶⁹ (hereafter “Advice”) or in the draft LARP⁷⁰ about how these three key tasks were undertaken and whether any systematic methods were used.

In order to carry out the first task of evaluating the implication of the three bitumen production scenarios, the RAC would have to model how much land disturbance occurs in each scenario. As noted above in reviewing the data available in the Profile, it appears that the RAC did not even have access to past and present maps of the land disturbance in the plan area, unless this information was withheld from the public.

At the bare minimum, the RAC would need to use following map data in order to carry out the second task of identifying 20% of the plan area for conservation:

⁶⁷ Ibid. p. 12

⁶⁸ Ibid. p. 14

⁶⁹ <http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/LARP-VisionForLowerAthabascaRegion-Aug2010.pdf>

⁷⁰

http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/DLARP%20Regional%20Plan_FINAL_March%2029%202011_1%2044%20pm.pdf

- 1) Maps of past, present, and future human disturbance of the natural surface to identify the “areas with little or no industrial activity”
- 2) Maps of aboriginal land uses
- 3) Maps of biodiversity such as landforms, species (habitat and range maps), and vegetation.

Again, based on the above review of the data provided in the Profile, it appears that the RAC did not use any of these maps, unless these maps and the subsequent analyses were withheld from the public. The RAC Advice to the GoA was completed August 2010 so it could not have used the MCFN and ACFN reports that were submitted in November 2010. The Conservation Areas are somewhat changed in the draft LARP released in April 2011. However, there is no rationale explaining why they were modified and how or if the reports prepared by MCFN and ACFN were taken into account.

If there *were* sufficient map data available, it is useful to outline briefly what kind of a transparent and systematic methodology could have been used to identify the 20% target for Conservation Areas using the listed criteria. First of all, it is necessary to define spatial *criterion* in contrast to spatial *constraint* in the specific context of land use planning:⁷¹

Criterion: the standard of judgment or rules on the basis of which alternative decisions are ranked according to their desirability.

Constraint: a restriction that rules out certain combinations of decision variables as feasible solutions.

There are different mathematical techniques in GIS-based Multi-Criteria Decision Analysis, which involve weighting the different criteria to create a combined suitability map that shows where the trade-offs are located. Alternately, specialized conservation planning software such as Marxan calculates millions of options for the best location of protected areas and identifies the most frequently selected “optimal” option.⁷² There is no publicly-available evidence that the GoA used any of these commonly-applied techniques.

Instead, it is possible that the GoA may have used a “Constraint” approach instead of a “Multi-Criteria” approach to identify the “Conservation Areas.” It is also possible that the GoA’s 20% target figure for conservation areas may have been determined using a similar constraint approach. As shown in the following table and in the maps in the Map Appendix, the following land “interests” were identified and subtracted from the total LARP area:⁷³

⁷¹ J. Malczewski. 1999. GIS and Multicriteria Decision Analysis. Toronto: John Wiley. p. 343.

⁷² <http://www.uq.edu.au/marxan/>

⁷³ Mapping and calculations prepared by Zoran Stanojevic, GIS Analyst, Management Solutions in Environmental Sciences. www.mses.ca

Type	Area (Sq km)	Percent of LARP
LARP Plan Area ⁷⁴	93,216	100%
Urban Areas, Indian Reserves, Métis Settlements, Cold Lake Air Weapons Range, White Zone	14,720	15.8%
Mineral Permits and Leases	17,589	18.9%
Oil Sands Leases	47,947	51.4%
Conventional Oil and Gas Leases	24,437	26.2%
<i>Total Lands with Other Interests (accounting for overlaps)</i>	<i>69,823</i>	<i>74.9%</i>
Waterbodies	6,374	6.8%
<i>Total</i>	<i>76,197</i>	<i>81.7%</i>
Remaining “Unencumbered” Provincial Land	17,019	18.3%

It is quite coincidental that the remaining “unencumbered” provincial land in the LARP plan area is just under 20% of the total land base, excluding waterbodies. It would be rather disingenuous if the GoA had privately carried out a similar constraint mapping exercise to establish their arbitrary 20% target for the “Conservation Areas”.

Nevertheless, the fact that the GoA has already allocated so much land to other interests makes the establishment of much larger “Conservation Areas” problematic due to the need to compensate oil sands, oil and gas, and mining permit and lease holders if all their intended land use were prohibited. A possible solution to this dilemma would be to establish “Special Management Zones” on sensitive lands where resource extraction is permitted, but only under specific terms and conditions that protect aboriginal land use, habitat, and other valued environmental features.

This is the approach that was recommended as part of the “TRIAD Approach” in research sponsored by the Cumulative Effects Management Association.⁷⁵ Special Management Zones are also commonly used in regional land use plans throughout the territorial north and in British Columbia.⁷⁶ This is also related to the option of developing different land disturbance thresholds for different zones. However, the land disturbance plan will not be completed for the LARP until 2013.⁷⁷ Overall, the draft LARP cannot be considered a complete land use plan due to the absence of a land use management system, whether through Special Management Zoning or land disturbance thresholds, for those zones where industrial development and resource extraction is permitted.

⁷⁴ The draft LARP states that the total plan area is “approximately 93,260 square km.” The difference of less than 1% in the area is likely caused by the use of different map projections in the calculation.

⁷⁵ http://cemaonline.ca/component/docman/doc_download/1334-the-triad-approach-a-strategy-for-sustainability-in-the-rmwb.html
http://cemaonline.ca/component/docman/doc_download/1335-the-triad-approach-principles-and-recommendations-a-discussion-paper-in-support-of-the-sewg-model.html

⁷⁶ <http://archive.ilmb.gov.bc.ca/slrp/index.html>

⁷⁷

http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/DLARP%20Regional%20Plan_FINAL_March%2029%202011_1%2044%20pm.pdf p. 29.

Public Consultation

Were the results of all public consultations made available in an accessible public registry?

Were the submissions made by MCFN and ACFN incorporated into the plan?

Were explanations and reasons provided about whether or not public comments were incorporated into the plan?

The information in this section is limited to public consultation and does not review the adequacy of First Nations consultation. The public consultation aspect of the LARP is evaluated using Sherry Arnstein’s “A Ladder of Citizen Participation,”⁷⁸ which is a standard framework in land use planning theory. Arnstein proposes an eight rung ladder of participation with the greatest levels of public participation at the top of the “ladder” and the lowest degrees of public participation at the bottom of the “ladder”. Arnstein further divides the eight rungs into three categories: “Degrees of Citizen Power”, “Degrees of Tokenism”, and “Nonparticipation.”:

Citizen Control	Degrees of Citizen Power
Delegated Power	
Partnership	
Placation	Degrees of Tokenism
Consultation	
Informing	
Therapy	Non-Participation
Manipulation	

⁷⁸ S.R. Arnstein. 1969. A Ladder of Citizen Participation. Journal of the American Planning Association. Volume 34, Number 4, pp. 216-224.

Public consultation in the LARP took the following forms:

- 1) Open houses held in the evenings in major communities
- 2) Stakeholder Workshops
- 3) Questionnaire “Workbooks”

The results of the public consultation are listed in the following four reports:⁷⁹

- 1) Lower Athabasca Regional Plan Phase 2 Public Consultation Summary – Dec 2010 (22 pages)
- 2) Lower Athabasca Regional Plan Phase 2 Stakeholder Consultation Summary – Dec 2010 (28 pages)
- 3) Lower Athabasca Regional Plan Phase 2 Public Consultation Summary – Dec 2010 (66 pages)
- 4) Summary of the 2009 Phase I Consultation – Aug 2010 (10 pages)

The reports provide the following information about the public consultations:

- Locations and dates of open houses
- Total number of participants who attended open houses, workshops, who completed questionnaires
- Total number of written submissions and number of “stakeholder” groups by category
- Narrative summary of questions and issues raised by participants
- Statistical summary of the results of the questionnaire “workbooks”

The following information is **not** provided in the four consultation reports or anywhere else:

- Number of participants attending open houses in each community
- Locations and dates for workshops with stakeholder groups
- Names and affiliations of the stakeholder groups who provided written submissions
- Copies of the written submissions from the stakeholder groups
- Responses from GoA and RAC to public consultation, including explanations and reasons for decisions

Using only the open house format without also holding a public meeting means that the public does not know what other participants are saying to the GoA or the RAC. It also means that the GoA or the RAC are not required to publicly respond to citizen’s comments. Not posting the written stakeholder submissions in an electronic registry means that the public cannot know about views of the varied stakeholder groups. Further, the GoA and the RAC did not reply to written submissions with explanations and reasons for their decisions on the public record.

⁷⁹ <http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/Default.aspx>

The public consultation techniques used in the LARP have created a closed circuit of communication where only the GoA and RAC have access to and control of virtually all information. The type of public participation practiced in the LARP is located within the overall category of “Degrees of Tokenism” and falls into Arnstein’s rungs of “Informing” and “Consultation”, which she defined as:⁸⁰

Informing: Informing citizens of their rights, responsibilities, and options can be the most important first step toward legitimate citizen participation. However, too frequently the emphasis is placed on a one-way flow of information -from officials to citizens-with no channel provided for feedback and no power for negotiation.

Consultation: Inviting citizens’ opinions, like informing them, can be a legitimate step toward their full participation. But if consulting them is not combined with other modes of participation, this rung of the ladder is still a sham since it offers no assurance that citizen concerns and ideas will be taken into account. The most frequent methods used for consulting people are attitude surveys, neighborhood meetings, and public hearings.

It should be noted the participation techniques practiced in the LARP barely meet Arnstein’s definition of “consultation” since no public meetings or hearings were held.

Much higher standards of public participation are regularly practiced in environmental assessments and in other regional planning processes. For example, the recent TOTAL Joslyn Mine environmental assessment includes an electronic public registry with all written submissions and transcripts of public hearings. The Joint Review Panel for the TOTAL Joslyn Mine also responded to submissions by providing reasons and explanations in its decision.⁸¹ The Dehcho Land Use Planning Committee has an electronic registry with all written submissions, responses to all verbal and written comments, and transcripts of all public hearings.⁸²

An in-depth review of the contents of the written submissions made to the LARP by MCFN and the ACFN is beyond the scope of this report. Generally, the MCFN and ACFN stressed the need for LARP to protect sufficient lands and resources so that the First Nations aboriginal rights for harvesting, cultural, and spiritual land use would be maintained in perpetuity. As noted in the technical analysis by MSES, the draft LARP establishes conservation zones on 40% of the lands identified as essential by MCFN and on 19% of the lands identified as essential by ACFN. But most importantly, the GoA and the RAC do not provide any reasons or explanations about their decisions so it cannot be determined how they took the MCFN and ACFN submissions into account.

⁸⁰ S. Arnstein. *Supra.* p. 219.

⁸¹ <http://www.ceaa.gc.ca/050/details-eng.cfm?evaluation=37519>

⁸² http://www.dehcholands.org/public_comments.htm

Plan Contents

Are the plan components (land use zoning, policies, goals, objectives, strategies, triggers/thresholds etc.) “SMART” (Specific, Measurable, Attainable, Relevant, Time-Bound)?

Is there a mechanism for legal implementation and enforcement of the plan and its components?

Does the plan establish a systematic process and clear criteria for amendment and revision/update?

Overall, is the plan likely to achieve its stated vision, goals, and objectives?

The draft LARP is designed as a “Strategic Plan” and is structured according to the following nested hierarchy:

- 1) Vision for the Region
- 2) Regional Outcomes
- 3) Objectives
- 4) Strategies
- 5) Indicators

The “SMART” criteria are a common way to assess the effectiveness of strategic planning components by asking the following questions:⁸³

Specific	Measurable	Achievable	Realistic	Time-Bound
Do the objectives etc. specify what they need to achieve?	Can you measure whether you are meeting the objective etc. or not?	Are the objectives etc. you set, achievable and attainable?	Can you realistically achieve the objectives etc. with the resources that you have?	When do you want to achieve the set of objectives etc.?

It is beyond the scope of this report to assess each component within the draft LARP in detail using the SMART criteria. Only the most significant components are assessed in detail and general comments are provided for the remainder of the draft LARP.

The “Government of Alberta’s Vision for the Lower Athabasca Region”⁸⁴ is quite “Specific” in stating “people, industry, and government partner to support development” and “economic opportunities abound.” However, it does not make any sense to say “air, water, land, and biodiversity support healthy ecosystems” since the air, water, and land are parts of the ecosystems themselves. Also, there is no mention of the need to protect sufficient habitat that supports aboriginal land use and that prevents the extirpation of species at risk.

⁸³ http://en.wikipedia.org/wiki/SMART_criteria

⁸⁴

http://www.landuse.alberta.ca/RegionalPlans/LowerAthabasca/documents/DLARP%20Regional%20Plan_FINAL_March%2029%202011_1%2044%20pm.pdf p. 12

The first “Regional Outcome” states that “The economic potential of the oil sands resource is optimized.” The definition of “optimize” has several different definitions:⁸⁵

1. (tr) to take the full advantage of
2. (Business / Commerce) (tr) to plan or carry out (an economic activity) with maximum efficiency
3. (intr) to be optimistic
4. (Electronics & Computer Science / Computer Science) (tr) to write or modify (a computer program) to achieve maximum efficiency in storage capacity, time, cost, etc.
5. (tr) to find the best compromise among several often conflicting requirements, as in engineering design

Does the draft LARP mean “to take full advantage of” or does it mean “to find the best compromise among several often conflicting requirements”? If it means the latter, then some form of restraint on oil sands development is required. If it means the former, then it should use the word “maximize” to be clear in its intent.⁸⁶

Similarly, the draft LARP uses the word “optimize” in the Tourism objective: “Tourism potential of the region is optimized.”⁸⁷ However, it is logical that unrestrained oil sands development will reduce wilderness tourism opportunities. Both sectors cannot be “optimized” unless trade-offs and a balance between the two are found. However, as shown in more detail in the report by MSES, the zoning established by the draft LARP gives priority to oil sands development.⁸⁸

The second “Regional Outcome” states “The region’s economy is diversified.” Again, it is logical that unrestrained oil sands development will reduce the long-term timber supply, will preclude wilderness tourism opportunities, and will fragment farmland through in-situ development in the south. It is not “Realistic” to think that the region’s economy will be further diversified unless trade-offs and a balance are found between all economic sectors. If oil sands development is really to be “maximized”, then the draft LARP should honestly state that all it can do is attempt to “mitigate” the complete domination of regional economy by the oil sands sector.

The third “Regional Outcome” states “Landscapes are managed to maintain ecosystem function and biodiversity.” Close reading of this “Regional Outcome” does not commit the GoA to maintaining *all* biodiversity, which would require preventing the regional extirpation of *any* species at risk. Similarly, the strategies under this “Regional Outcome” only commit to “regional biodiversity indicators” and “strategies *to address* [emphasis added] caribou habitat needs.” The strategies do not commit to ensuring that sufficient caribou habitat is protected to ensure the survival of all caribou herds within the region, do not commit to preventing the extirpation of any species and do not commit to maintaining all species within a range of natural variability.

⁸⁵ <http://www.thefreedictionary.com/optimize>

⁸⁶ It is also important to point out that in maximizing economic potential, other values or goals, such as aboriginal use of the land are affected. In essence, there is a “trade-off” of other land uses / values for economic outcomes. However, LARP is not clear on what these trade-offs are, or if they have been considered or evaluated in any rational way.

⁸⁷ draft LARP. Supra. p. 27

⁸⁸ Management Solutions in Environmental Sciences. 2011. Supra.

The seventh “Regional Outcome” is the last to be assessed in detail. It states: “Inclusion of aboriginal peoples in land-use planning.” This “Regional Outcome” is not a complete sentence since it does not have a verb. This implies inaction as the verb is the “action”. Perhaps what the GoA means is: “Aboriginal peoples are included in land-use planning.” The objective in this section states “To encourage aboriginal peoples’ participation in land-use planning and decision-making...” The GoA does not commit to protecting any lands required for aboriginal land use. The strategies only commit to inviting First Nations to become involved in the Richardson Backcountry sub-regional initiative and for the GoA to continue consulting with aboriginal peoples. It is not “Realistic” to expect that aboriginal peoples will continue to participate in land use planning if it does not produce concrete results such as the protection of lands critical for aboriginal land use.

Overall, the only “strategies” that are “Time-bound” and that have an actual target date established are the development of the “biodiversity management framework” and the “land disturbance plan” by 2013. As noted above, the delay in completing “land disturbance plan” means that the draft LARP cannot be considered a complete land use plan.

In terms of the “Measurable” criterion, all the Objectives in the draft Plan have “indicators” but the none have been assigned a direction (e.g. increasing, decreasing, or stable). The “indicators” could also be assigned an actual numeric target.

The *Alberta Land Stewardship Act* provides an adequate legal basis for the implementation of a regional plan. The issue of enforcing the triggers and thresholds in the cumulative effects management frameworks is addressed in greater detail in the report by MSES.⁸⁹ The *Alberta Land Stewardship Act* also provides a clear process for amendment and revision of a regional plan based on clear criteria. To provide a stronger basis for evaluation, the indicators in the draft LARP should be assigned directions and numerical targets, as mentioned above.

However, the recently passed *Alberta Land Stewardship Amendment Act*⁹⁰ (hereafter the “Amendment Act”) introduces other factors, which may weaken a regional plan. Some comments from a land use planning perspective are provided below, but the legal implications for First Nations rights are not addressed in this review.

The Amendment Act introduces an extreme form of property rights protection, which requires compensation not just for the “expropriation” but for the “diminution” of a property right, title, or interest:

19.1(1)(a) “compensable taking” means the diminution or abrogation of a property right, title or interest giving rise to compensation in law or equity;

This contradicts the established principle in planning law that government may *regulate* land use without paying compensation. Compensation is payable only if an *existing* land use is

⁸⁹ Management Solutions in Environmental Sciences. 2011. Supra.

⁹⁰ <http://www.landuse.alberta.ca/AlbertaLandStewardshipAct/Default.aspx>

prohibited or *all* future land uses are prohibited.⁹¹ However, it appears that these amendments only apply to fee simple and freehold mineral owners. Owners of oil sands, oil and gas, and mineral permits and leases do not seem to be covered by these additional compensation provisions.

The Amendment Act also allows for a “title holder” to apply for a “variance” to a plan:

15.1(1) A title holder may apply to the Stewardship Minister for a variance in respect of any restriction, limitation or requirement regarding a land area or subsisting land use, or both, under a regional plan as it affects the title holder.

Unlike municipal planning which uses the term “minor variance”, there are no limitations on the scope of this “variance,” which should more accurately be called an “exception.” This amendment gives complete discretion to the Stewardship Minister to alter a plan through a variance. Again, it appears that this amendment only applies to fee simple and freehold mineral owners.

The Amendment Act also creates additional loopholes allowing a regional plan to exclude, exempt, or time-limit any activities and sub-regions:

8(2) A regional plan may:...

- (h) make different provision for
 - (i) different parts of a planning region, or for different objectives, policies, activities or effects in a planning region;
 - (ii) different classes of effect arising from an activity in a planning region;
- (i) manage an activity, effect, cause of an effect or person outside a planning region until a regional plan comes into force with respect to the matter or person;
- (j) specify that it applies for a stated or described period of time;
- (k) provide for an exclusion from, exception to or exemption from its legal effect;
- (l) specify whether, in whole or in part, it is specific or general in its application;
- (m) delegate and authorize subdelegation of any authority under the regional plan, except authority
 - (i) to make a regional plan or amend a regional plan, or to make or adopt rules under a regional plan, or
 - (ii) to approve, adopt or incorporate a subregional plan or issue-specific plan as part of a regional plan, or to adopt or incorporate a plan, agreement or arrangement as part of a regional plan, or to amend any of them.

The draft LARP does not presently exclude any sub-regions or activities from its legal application, but this amendment could be used to enable a change in the final LARP plan or it could be used to enable a change in an amended LARP plan.

⁹¹ B. Barton. 1998. Reforming the Mining Law of the Northwest Territories: A Comparison of Options. Ottawa: Canadian Arctic Resources Committee.

The draft LARP could achieve its vision, “Regional Outcomes”, and objectives if the terms “optimize” and “diversify” were loosely interpreted. The draft LARP could continue to allow for unrestrained resource extraction since its vision, “Regional Outcomes”, and strategies technically do not prohibit or prevent the regional extirpation of some plant and animal species. On close reading of the vision, “Regional Outcomes”, and objectives related to “optimizing” oil sands development while “diversifying” the economy are mutually exclusive and cannot be achieved simultaneously. It is also not likely that the “Regional Outcome” for “Inclusion of aboriginal peoples in land-use planning” could be achieved as it is difficult to imagine that aboriginal peoples would continue to participate in land use planning if their repeated requests to protect a sufficient amount of land for aboriginal land use continue to be ignored.

Best Practices for First Nations Participation in Regional Land Use Planning

As mentioned above, there are many precedents for First Nations participation in regional land use planning, especially in northern Canada. The following four (4) regional land use plans are selected to illustrate some recent best practices that could be applied in the LARP:

Plan Name	Location	Plan Area (Sq Km)	Status	Zoning	Unique Features
Great Bear Rainforest (North and Central Coast) ⁹²	Coastal British Columbia	64,000	Approved by British Columbia and 25 First Nations 2006	28% Protected Areas 5% Mining/Tourism 67% Ecosystem-Based Management Forestry Ecosystem-Based Management continues to be developed and implemented ⁹³	<ul style="list-style-type: none"> • “Government to Government” relationship between British Columbia and 25 First Nations • Independent “Coast Information Team” brought together science, traditional, and local knowledge in support of ecosystem-based management⁹⁴ • Coast Sustainability Trust provides \$5 million economic adaptation fund.⁹⁵ • Joint Solutions Project focused on interests not positions⁹⁶

⁹² http://www2.news.gov.bc.ca/news_releases_2005-2009/2006AL0002-000066.htm

⁹³ http://www.ilmb.gov.bc.ca/slrp/lrmp/nanaimo/central_north_coast/index.html

⁹⁴ <http://www.citbc.org/index.html>

⁹⁵ <http://www.coastsustainabilitytrust.com/>

⁹⁶ http://www.coastforestconservationinitiative.com/about_us/joint_solutions.html

Plan Name	Location	Plan Area (Sq Km)	Status	Zoning	Unique Features
Whitefeather Forest Initiative, ⁹⁷ Pikangikum Land Use Plan	North-western Ontario	12,217	Approved by Ontario and Pikangikum First Nation 2006	36% Protected Areas 35% Enhanced Management Areas 29% General Use Area	<ul style="list-style-type: none"> Partnership between Pikangikum First Nation and Ontario Ministry of Natural Resources Extensive research and mapping with Elders and Harvesters of traditional ecological knowledge
North Yukon (Old Crow) ⁹⁸	Northern Yukon	55,548	Approved by Vuntut Gwitchin Government and Yukon 2009	36% Protected Areas 50% Integrated Management Area 12% North Yukon Land Withdrawal 2% Fishing Branch Habitat Protection Area	<ul style="list-style-type: none"> Yukon Land Use Planning Council established through the Yukon Umbrella Final Agreement comprehensive land claim as a co-management institution between First Nations and Yukon⁹⁹ Uses a four zone cumulative effects management system for the Integrated Management Area allowing varying degrees of development in each zone.
Dehcho ¹⁰⁰	South-western NWT	215,615	2006 Final Draft Plan being revised through negotiations between 12 Dehcho First Nations, Canada, and Government of the NWT	43% Protected Areas 4% Special Management 33% Special Development 21% General Use	<ul style="list-style-type: none"> Established as a partnership between Dehcho First Nations, Canada, and Government of the NWT through an Interim Measures Agreement in 2001¹⁰¹ About 50% of the plan area protected through interim land withdrawals in 2003 Dehcho First Nations carried out detailed land use and occupancy mapping 1996-2003¹⁰² Extensive natural resource inventory and traditional ecological knowledge mapping

⁹⁷ <http://www.whitefeatherforest.com/>

⁹⁸ <http://www.emr.gov.yk.ca/lands/nyrlup.html>

⁹⁹ <http://www.planyukon.ca/>

¹⁰⁰ <http://www.dehcholands.org/>

¹⁰¹ <http://www.ainc-inac.gc.ca/al/lcd/ccl/agr/dci/dci-eng.asp>

¹⁰² http://www.iapad.org/publications/ppgis/04_03_22_land_use_paper_norwegian_and_cizek.pdf

The common threads that run through these “best-practice” regional land use plans are:

- A partnership between one or more First Nations and government is established through a variety of means that range from ad hoc agreements, interim measures, to comprehensive land claims.
- There is a commitment to using cutting-edge environmental science combined with well-documented aboriginal land use data and traditional ecological knowledge.
- Protected areas of significant size ranging from 30% to almost 50% of the *total* plan areas are established and are designed to geographically cover the most heavily used areas for aboriginal land use.¹⁰³
- The specific protected areas legislation recognizes and supports aboriginal land use and harvesting rights. No industrial development or resource extraction is usually permitted although conditional uses such as transportation corridors (roads, pipelines, hydro-electric corridors) may be allowed in protected areas if they cannot be located elsewhere.
- Special Management Zones are used to control development using a variety of enhanced terms and conditions in about one-third of the plan areas.

The draft LARP does not have any of these characteristics.

Conclusions

This report reviewed the draft LARP based on the following topic areas:

Definitions and Brief History of Regional Planning

The draft LARP lacks a clear definition of regional planning. It should have drawn from almost thirty years experience with similar large-area regional land use plans in the territorial north.

Background Information

Based on a review of the publicly available information, no map information could have been used to make any rational or scientific zoning decisions in the draft LARP.

Data Analysis and Plan Development

The draft LARP does not fulfill the Terms of Reference provided by the GoA to examine oil sands production scenarios. It does not explain how it made zoning decisions based on the

¹⁰³ This review does not suggest that a specific percentage or size of protected areas is required. It is the specific location and design of protected areas along with the other features of a land use plan such as Special Management Zones or cumulative effects thresholds, which will determine the success of any particular land use plan.

criteria provided by the GoA. When all other existing land interests are subtracted from the plan area, the remaining “unencumbered” provincial lands are about same area as the GoA’s 20% target for conservation zones.

Public Consultation

The public consultation methods used to develop the draft LARP did not allow citizens and stakeholders to know one another’s statements or submissions. The GoA and the RAC did not provide any written explanations or reasons to citizens and stakeholders about its decisions.

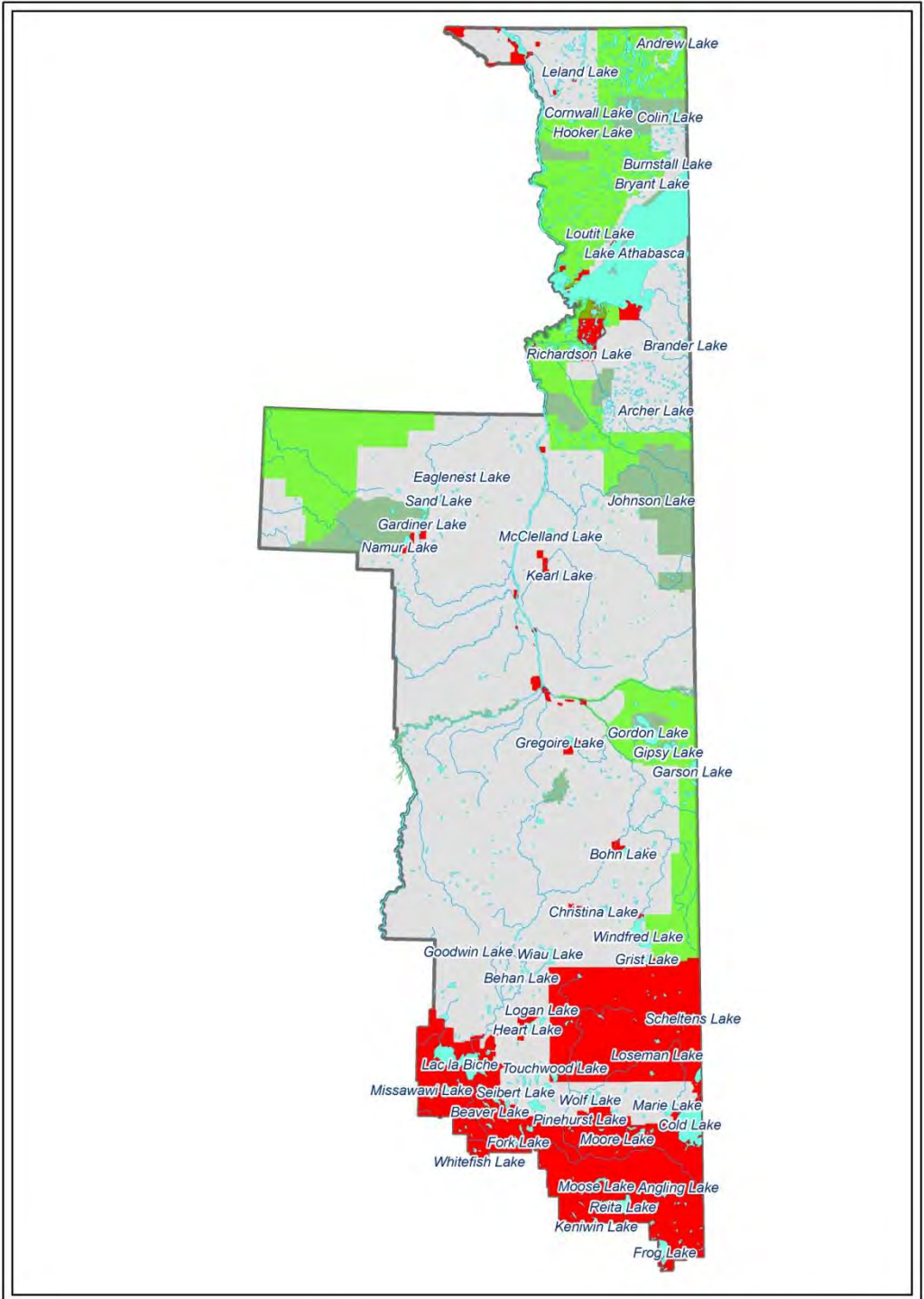
Plan Contents

The plan contents are not well defined and do not fulfill established strategic planning criteria. There is adequate legislation to implement the draft LARP. A recent amendment may have undermined the legislation by establishing excessive rights to compensation for private property owners, establishing plan variances, and allowing a plan to create exclusions, exemptions, and time-limits. Read closely, the plan vision, “Regional Outcomes”, and objectives cannot all be achieved as some are mutually exclusive.

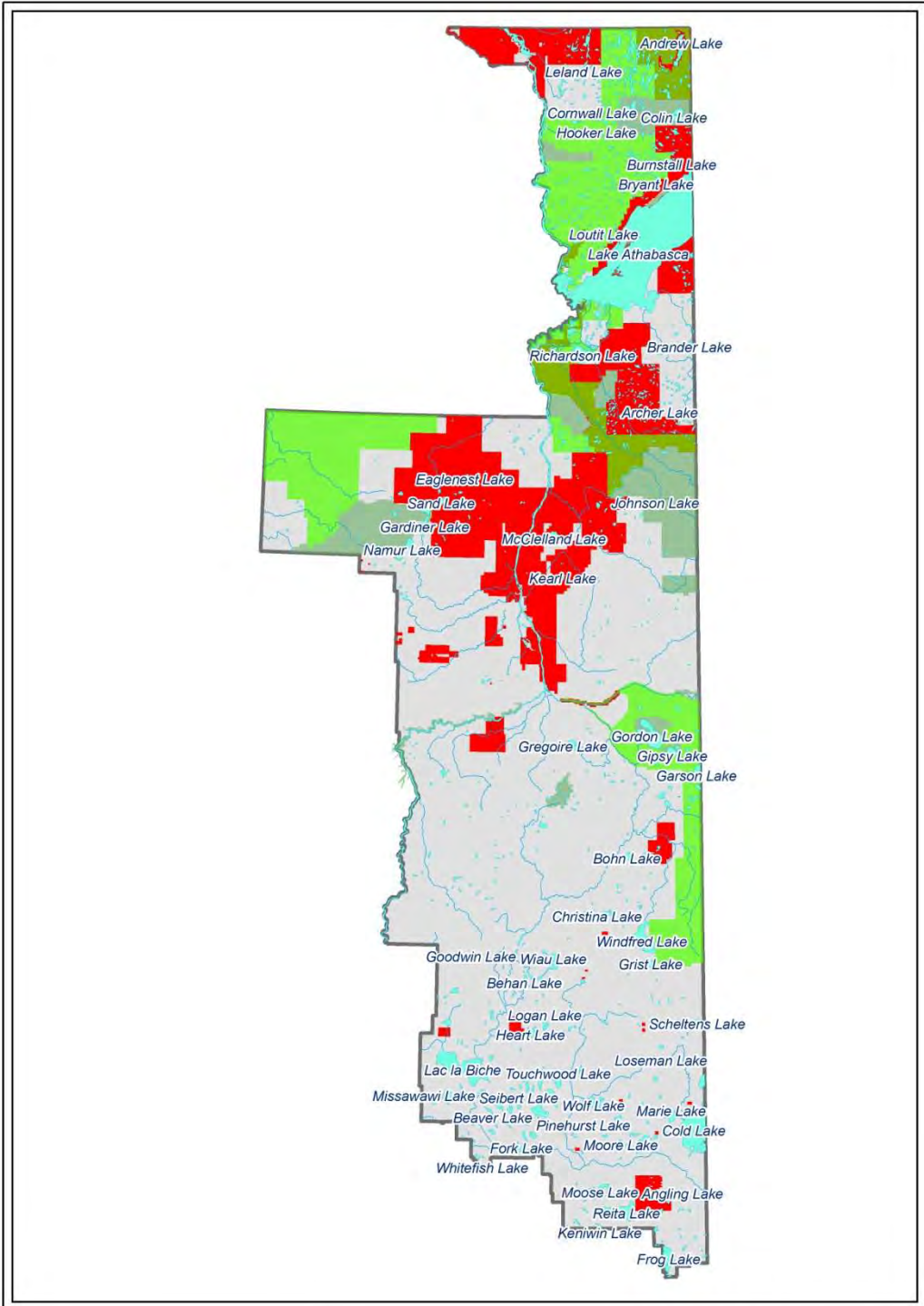
Best Practices for First Nations Participation in Regional Land Use Planning

Four recent “best practice” regional land use plans across northern Canada were reviewed. The common threads include: partnerships between First Nations and governments; commitment to cutting-edge science and traditional knowledge; establishment of large protected areas between 30% to 50% of the *total* plan area based on intensity of aboriginal land use; and use of Special Management Zones that allow for controlled development. The draft LARP does not have any of these characteristics.

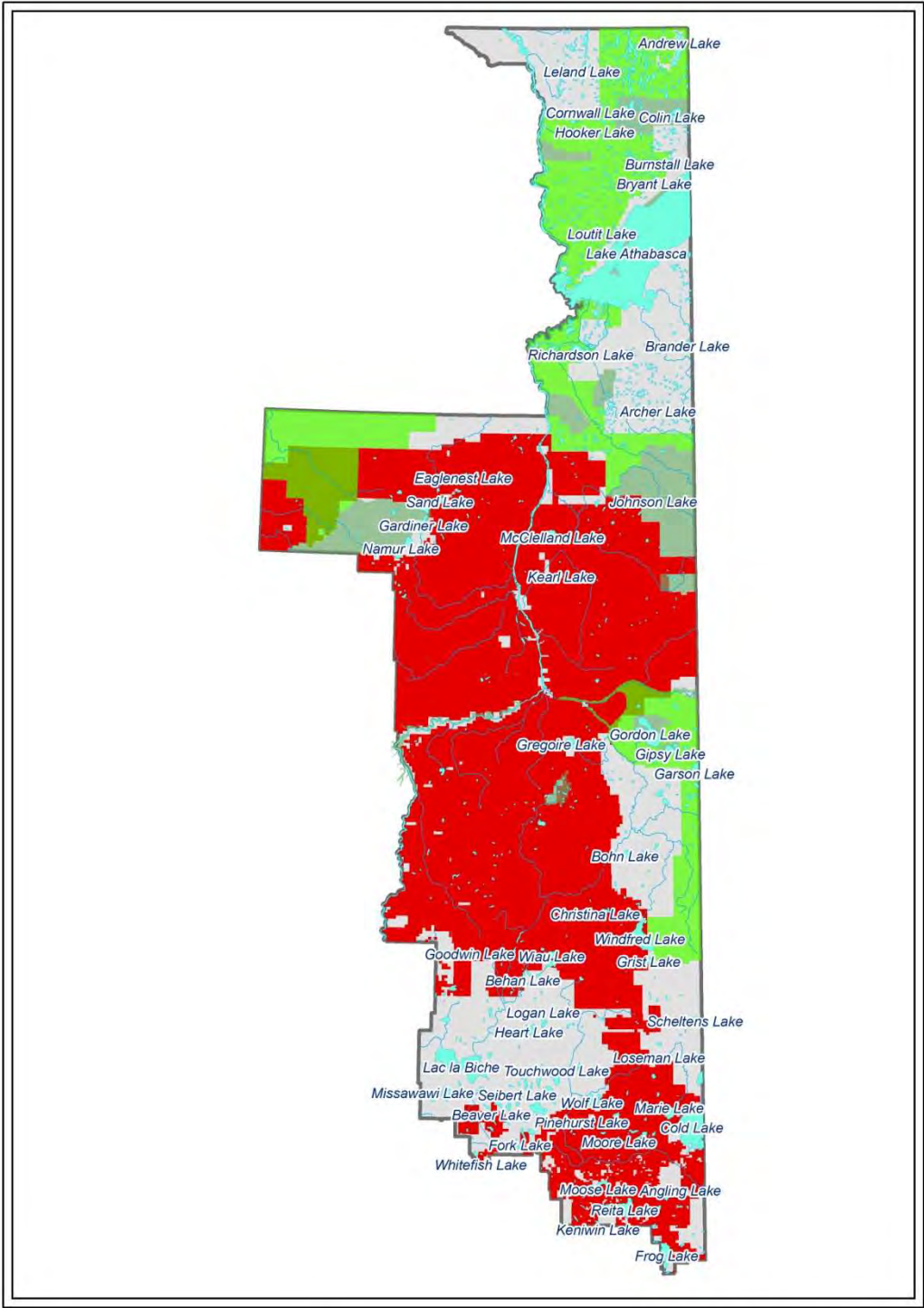
MAP APPENDIX



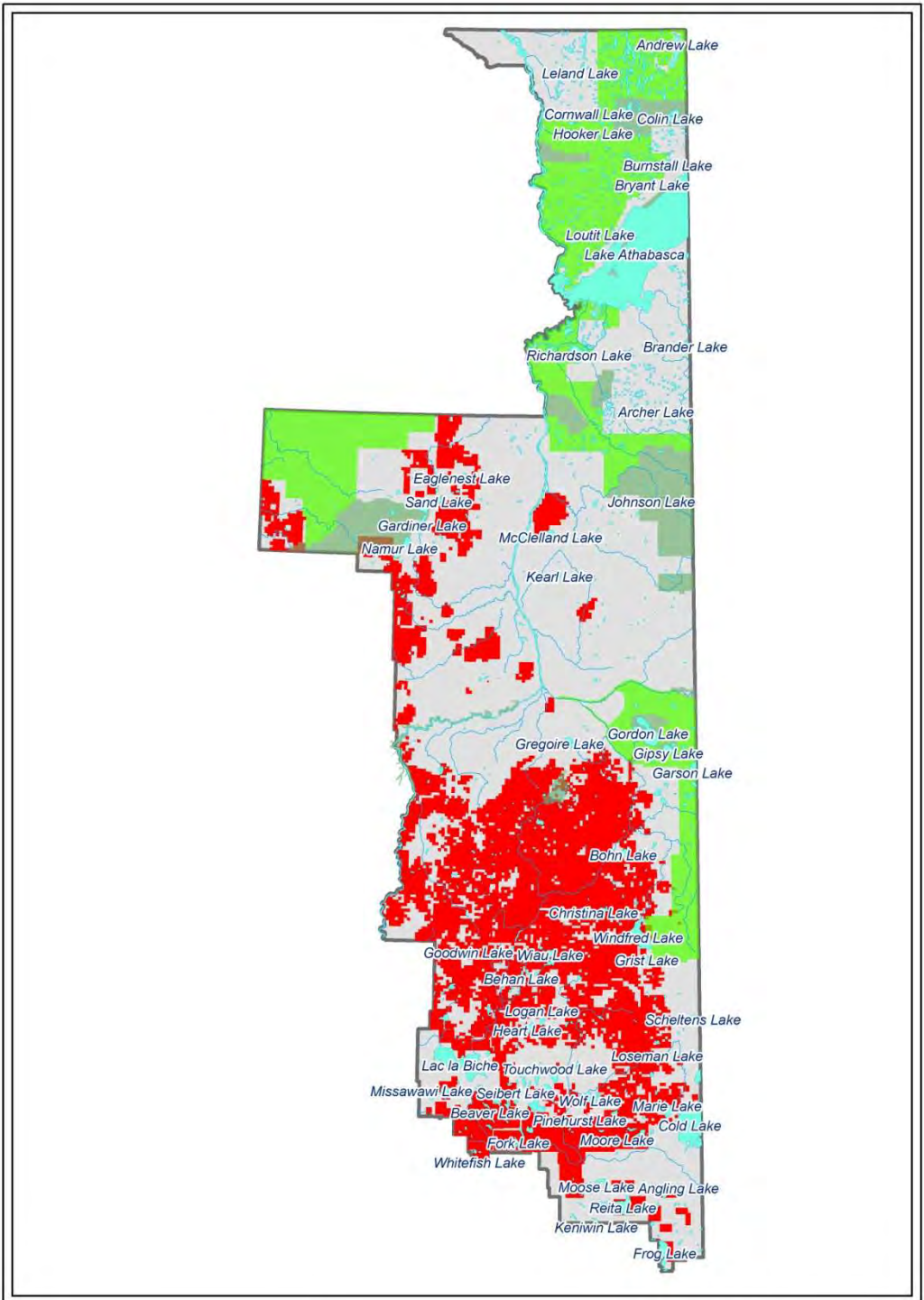
Legend GoA Proposed Conservation Areas Existing Protected Areas Urban, Aboriginal, Agricultural and Military Lands Lower Athabasca Region <small>* Including Indian Reserves, Metis Settlements, Cold Lake Air Weapon Range and White Zone</small>	PROJECT <p style="text-align: center;">Framework for LARP</p>	BY DATE MSES PROJECT NO. ZS 2011/05/12 1019 SCALE 1:2,000,000 Kilometers 0 10 20 40 60 UTM Zone 12 NAD 83
	TITLE Urban Areas, Indian Reserves, Metis Settlements, Cold Lake Air Weapons Range, White Zone within Lower Athabasca Region	



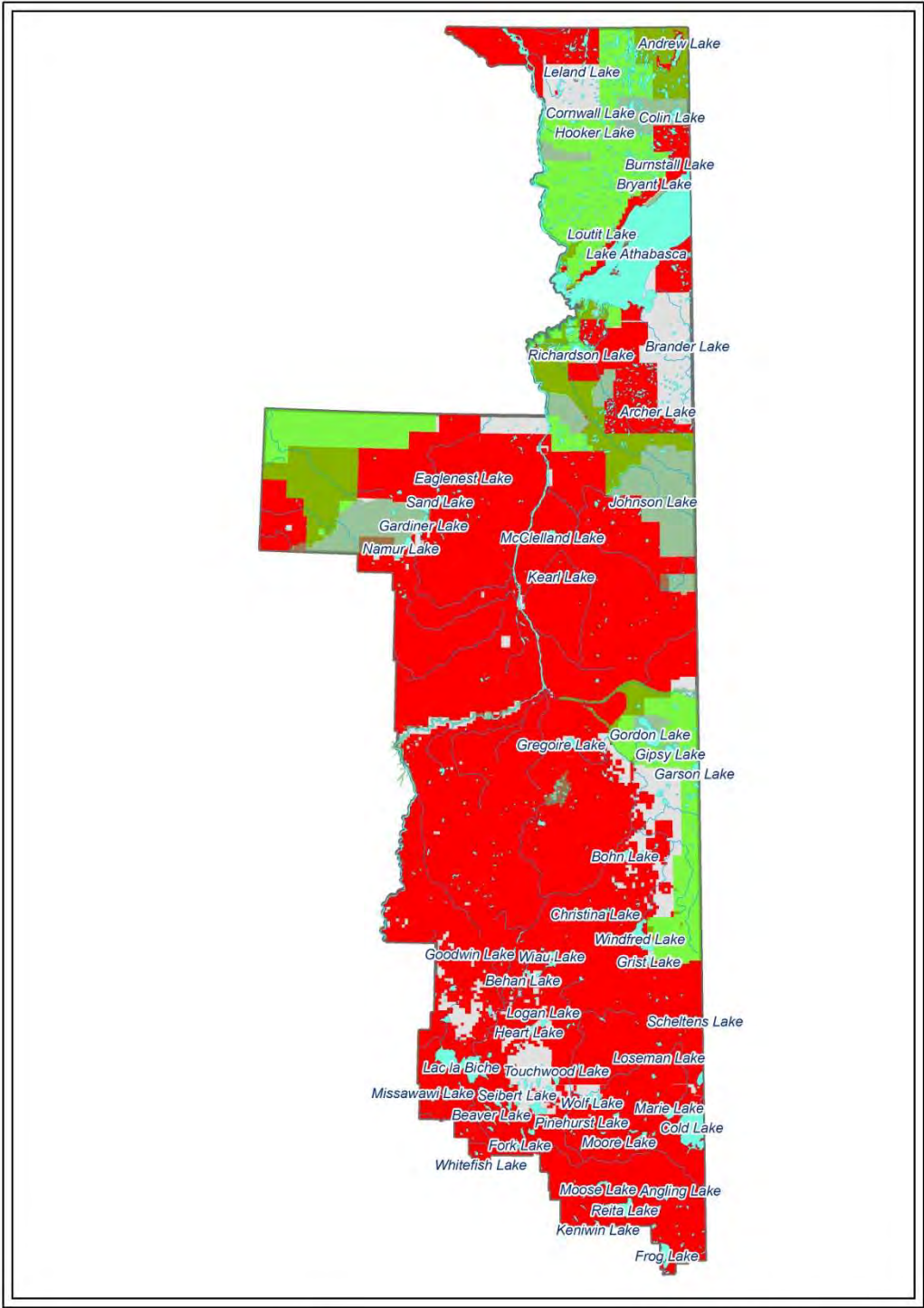
Legend GoA Proposed Conservation Areas Existing Protected Areas Mineral Permits and Leases Lower Athabasca Region	PROJECT <p style="text-align: center;">Framework for LARP</p>	BY DATE MSES PROJECT NO. DRAWN ZS 2011/05/12 1019 SCALE 1:2,000,000 UTM Zone 12 NAD 83 	 MSES Mineral Services Environmental Services
	TITLE <p style="text-align: center;">Mineral Permits and Leases</p>		



Legend GoA Proposed Conservation Areas Existing Protected Areas Oil Sand Leases Lower Athabasca Region	PROJECT <p style="text-align: center;">Framework for LARP</p>	BY DATE MSES PROJECT NO. ZS 2011/05/12 1019 SCALE 1 : 2,000,000 0 10 20 40 60 Kilometers UTM Zone 12 NAD 83
	TITLE <p style="text-align: center;">Oil Sands Leases within Lower Athabasca Region</p>	



Legend GoA Proposed Conservation Areas Existing Protected Areas Conventional Oil and Gas Leases Lower Athabasca Region	PROJECT <p style="text-align: center;">Framework for LARP</p>	 BY: ZS DATE: 2011/05/12 MSES PROJECT NO: 1019 SCALE: 1:2,000,000 UTM Zone 12 NAD 83
	TITLE <p style="text-align: center;">Conventional Oil and Gas Leases within Lower Athabasca Region</p>	



Legend GoA Proposed Conservation Areas Existing Protected Areas Combined Lands with Other Interests Lower Athabasca Region	PROJECT Framework for LARP	N BY: ZS DATE: 2011/05/12 MSES PROJECT NO: 1019 SCALE: 1 : 2,000,000 Kilometers 0 5 10 30 UTM Zone 12 NAD 83 MSES Alberta Environmental Services
	TITLE Combined Lands with Other Interests Hindering Establishment of Conservation Areas	