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Saturday, August 31, 2013

File: 4733

By Courier and *E-mail: jodie.hierlmeier@gov.ab.ca*

Alberta Justice
8th Floor, Oxbridge Place
9820 - 106th Street
Edmonton, Alberta, Canada
T5K 2J6

Attention: Jodie Heirlmeier, Alberta Justice

Dear Ms. Hierlmeier

Re: Request for Review of the Lower Athabasca Regional Plan ("LARP") pursuant to section 19.2(1) of the Alberta Land Stewardship Act, the Alberta Land Stewardship Regulation, and Form LUS-01

Please find below a supplemental submission to ACFN's Request for Review of LARP. This supplemental submission should be read together with ACFN's Request. I understand by way of your email to me dated August 30, 2013 that I am to provide ACFN's submissions directly to you rather than to the Land Use Secretariat and the Minister.

Overview

Athabasca Chipewyan First Nation's ("ACFN") August 19 request for review (the "Request") provided an overview of ACFN's rights, property and interests within the Lower Athabasca Planning Region. The overview assumed that based on the voluminous submissions ACFN made in LARP, and in the Jackpine Mine Expansion Joint Panel Review, Alberta had a good working knowledge of the interconnectedness of ACFN's Treaty 8 and Aboriginal Rights, traditional land use and culture to ACFN's property, quiet enjoyment of property, right to income and the health of its members. This supplement is provided out of an abundance of caution, in the event that Alberta is still unclear on the interconnections between property, quiet enjoyment of property, health, right to income and Treaty and Aboriginal Rights, traditional land uses and culture of

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ACFN. The intention of this supplement is to explain ACFN's Treaty and Aboriginal Rights within the framework of "direct and adverse effect" in relation to of the *Alberta Land Stewardship Act*, SA 2009, c A-26.8 (the "*ALSA*") including sections 1(1) and 1(2)(b) of the *ALSA* and sections 5(1)(c) and section 7(1) of the *Alberta Land Stewardship Regulation*, Alta Reg 179/2011 (the "*Regulation*"); to ensure that Alberta is aware of the interconnections and overlaps between ACFN's section 35 Rights, traditional land use and culture to its property, quiet enjoyment of property,¹ right to income, and the health of its members; and to clarify the interconnectedness of and overlap between the adverse effects listed in the Request with the more than minimal direct and adverse impacts on ACFN's property, quiet enjoyment of property, income, and health.

ACFN's Property, Health and Income are Intertwined with ACFN's Treaty 8 and Aboriginal Rights, Traditional Land Uses, and culture.

First, *ALSA* itself supports the connection between property, quiet enjoyment of property, health, income and section 35 rights, traditional land uses and culture. For example, through sections 1(1), 1(2)(b) and sections 2(h)(i)(ii) *ALSA* demonstrates clear legislative intent that direct and adverse harms and impacts of the nature raised in ACFN's Request in relation to its Treaty and Aboriginal Rights, traditional land use and culture, fall within the ambit of section 5(1)(c) of the *Regulation*. *ALSA* defines effect as follows:

- (h) "effect" includes
 - (i) any effect on the economy, the environment, a community, human health or safety, a species or an objective in a regional plan, regardless of the scale, nature, intensity, duration, frequency, probability or potential of the effect, and
 - (ii) a cumulative effect that arises over time or in combination with other effects;

LARP is subservient to *ALSA*, and must further the purposes of the Act. The purposes of *ALSA* as set out in s. 1(2) includes providing "a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples". *ALSA* also specifies that "in carrying out the purposes of this Act. . . the Government must respect the property and other rights of individuals and must not infringe on those rights except with due process of law and to the extent necessary for the overall greater public interest." Therefore the nature of effects to ACFN's health, property, income or quiet enjoyment of property include environmental, community, cultural, and

¹ Please note that references to peaceful use and occupation in the Request should be understood to include quiet enjoyment.

cumulative effects as well as effects on the reasonably foreseeable needs of current and future generations of ACFN members.

As you are likely aware, the Supreme Court of Canada has been very clear that considerations of the public interest necessarily includes a consideration of section 35 rights:

It is obvious that the Board must exercise its decision-making function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act, 1982*. Therefore, it must first be determined whether this particular decision of the Board, made pursuant to s. 119.08(1) of the *National Energy Board Act*, could have the effect of interfering with the existing aboriginal rights of the appellants so as to amount to a *prima facie* infringement of s. 35(1).²

ACFN notes that while the purpose of the LARP is to manage land use to meet the reasonably foreseeable needs of current and future generations of Albertans, including aboriginal peoples, and create policy that enables sustainable development while taking into account and responding to cumulative effects, the LARP in its current form does not do so. There are no objectives, strategic plans or implementation plans that are reflective of the need to plan for the reasonably foreseeable needs of ACFN, and the need not to infringe upon ACFN's rights except to the extent necessary for the overall greater public interest.

The LARP Terms of Reference support an interpretation of section 5(1)(c) of the Regulation that is inclusive of ACFN's section 35 Rights, traditional land use and culture. For example at page 17-18 the Terms of Reference state "It will be important that continued opportunities exist for continued Aboriginal uses to be in close proximity to First Nations and Metis communities". No such opportunities are incorporated in LARP with respect to ACFN.

The Terms of Reference for LARP further directed that LARP consider how lands under federal jurisdiction, such as First Nation lands, will be impacted and the long-term needs of those lands. Potential impacts to Reserve lands are not addressed by LARP.

We note that a interpretation of s. 5(1)(c) that includes direct and adverse impacts and harms to ACFN's section 35 rights is consistent with international law, including the Declaration on the Rights of Indigenous Peoples. As recently stated by James Anaya, UN Special Rapporteur on the Rights of Indigenous People, indigenous rights must be considered by states when undertaking strategic planning.

49. States typically regard mineral, oil and gas, and other natural resources to be strategic assets and, accordingly, in regulating the industries many engage in long- and short-term planning for the development of the resources, including resources within or near indigenous territories. Such strategic State planning influences the definition of laws, shapes regulatory controls, and

² *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159 . See also *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, [2003] 2 SCR 585 ; *Rio Tinto Alcan v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650

determines the policies pertinent to resource extraction. It also establishes the basis for the decisions about the development and implementation of resource extraction projects. With these characteristics, strategic planning for resource development can have profound, even if not so immediate, effects on indigenous peoples and the enjoyment of their rights. The Special Rapporteur is concerned that, of the many cases of State resource development planning he has studied, he has found but a few notable instances in which indigenous peoples have been included and their specific rights addressed in the planning process.

50. Instead, by and large, the Special Rapporteur has found patterns of State planning for resource extraction that can be seen, in a number of ways, to set in motion decisions that prejudice indigenous peoples' ability to set their own priorities for the development of their lands and territories. Some planning regimes adhere to competitive bidding or other permitting schemes that allow for the distribution of licenses for resource exploration or other extractive activities in advance of any consultations with affected indigenous peoples. Furthermore, State planning typically reinforces existing industry practices in a way that is not conducive to alternative models, advocated in the present report, under which indigenous peoples have the opportunity to exercise greater control over resource extraction activities within their territories.

51. Patterns of State planning that marginalize indigenous peoples and their rights must be reversed, so that indigenous peoples may participate in strategic planning processes through appropriate representative arrangements, as has been done at least to some extent by a number of States or their political subdivisions. Indigenous participation in strategic planning for resource extraction will undoubtedly lend itself to greater possibilities of agreement with indigenous peoples on specific projects.

Second, historical context and facts reveal the overlapping and interconnected nature of property, quiet enjoyment of property, health, income to section 35 rights, traditional land uses and culture.

ACFN's beneficial ownership of its reserve lands arose specifically out of Treaty 8, and were intended to support ACFN's way of life, including income, livelihood, health and culture, by serving as a base for the exercise of section 35 rights over broad areas of surrounding lands. Reserves were promised to Indian Bands in relation to livelihood, which was a mixed economy in which hunting, fishing, trapping and gathering were important aspects. The Reserves were never expected to provide all the land that the Indians required.³ ACFN's right to earn livelihood and to obtain sustenance from harvesting activities is analogous to and indivisible from the right to earn an income. In fact, it has always been explicitly understood by the signatories to the Treaty to be so.⁴ It was specifically contemplated that the normal enjoyment of Reserve lands included the ability to hunt, fish, trap, and gather in surrounding lands and waters.

³ See Dr. McCormack testimony at Dover in its entirety, and specifically at page 412.

⁴ See the excerpt of Dr. McCormack's Ethnohistory appended, as well as the excerpt of Dr. McCormack's testimony at the Dover hearing, also appended, for a review of how the ability to meaningfully exercise Treaty Rights is and has always been understood to be part of the income and livelihood for signatory First Nations.

The World Health Organization has defined health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” This definition has been adopted by Health Canada. As noted in its *Handbook of Health Impact Assessment* (2004): The influences of political, social, cultural and economic elements are all crucial determinants of human health (at page 7). According to Health Canada, the negative health impacts development and how it is planned and managed can be directly “related to physical health, such as mortality and morbidity from disease and injury” and “social and community health may also be affected negatively where individuals face a loss of cultural identity and quality of life, social disruption and violence, and a breakdown of community and family support networks. Furthermore, socio-cultural well-being can be affected by increasing stress, anxiety, and feelings of alienation”.

Clearly, culture is a determinant of health. Loss or devaluation of language and culture adversely affects health.

Third, it is critical that the Minister, when considering the Request take into account the aboriginal perspective of the definition of “directly and adversely” found in the Regulation. Aboriginal concepts of property and use of property require an expansive interpretation of section 5(1) of the Regulation.

Since *R. v. Sparrow*, courts have repeatedly confirmed that when dealing with an issue related to aboriginal rights, the aboriginal perspective must be taken into account. In *Sparrow*, it was held that it was crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake (p. 1112). That underlying principle must also apply in this context, where the aboriginal perspective of the right to quiet enjoyment of property, and of the right to income includes ACFN’s Treaty and Aboriginal Rights, traditional land uses and culture. This is essential in order to uphold the honour of the Crown, which is at stake whenever the Crown is dealing with First Nations.⁵ This it is also consistent with the principles set out in *R. v. Van der Peet*,⁶ where the court described why it was important to attempt to reconcile the aboriginal perspective of rights with the Canadian legal and constitutional structure. The Court said at para. 49:

....As has already been noted, one of the fundamental purposes of [s. 35\(1\)](#) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada. To quote again Walters, at p. 413: "a morally and politically defensible conception of aboriginal rights will incorporate both [aboriginal and non-aboriginal] legal perspectives". The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.

ACFN’s right to use its traditional lands for rights-based and cultural activities is analogous to the right to quiet enjoyment of property. ACFN’s right to earn livelihood and to obtain

⁵ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 16.

⁶ [1996] 2 S.C.R. 507.

sustenance from harvesting activities is analogous to and indivisible from the right to earn an income. In fact, it has always been explicitly understood by the signatories to the Treaty to be so.⁷ Courts have been clear that section 35 Rights include the rights to access Crown lands for the purpose of exercising those rights and maintaining ACFN's way of life. A central component of ACFN's section 35 rights is to have the Crown take positive steps to ensure the continued ability of ACFN members to exercise their rights and culture in perpetuity, taking into account preferred conditions, locations, and manner of exercising those rights. *The Constitution Act, 1982*, as well as the case law that interprets it, demands that the rights described in the Regulation, section 5(1)(c) must include ACFN's perspective on the meaning and scope of the rights described. In particular we note that when considering if a provision or section of LARP has direct and adverse impacts on ACFN :

1. Alberta must be guided by a generous purposive approach because actions affecting unproven Aboriginal title or rights or treaty rights can have irreversible effects that are not in keeping with the honour of the Crown;⁸
2. Alberta must approach the issue in a manner which maintains the integrity of the Crown because the honour of the Crown is always at stake in its dealing with Aboriginal peoples;⁹
3. Impacts must be construed broadly;¹⁰
4. The historical context of developments also affecting the exercise of those rights must be considered;¹¹
5. Any injurious affection that a provision or priority-scheme may have on other areas or rights must be considered as well;¹²
6. Potential derivative impacts and potential injurious effects must also be considered;¹³ and
7. Alberta must take into account that the impacts of ACFN may not only be physical in nature.¹⁴

Form LUS-01 Part 1: Details of Request for Review

A. Clearly identify the specific provision of the Regional Plan that you believe is directly and adversely affecting you, or will directly and adversely affect you.

Per the above, ACFN's property, its peaceful use and occupation - or quiet enjoyment of its property – health and livelihood are intimately connected to its Treaty and Aboriginal Rights, traditional land uses, and culture. Those specific provisions identified in the Request as

⁷ See the excerpt of Dr. McCormack's Ethnohistory appended, as well as the excerpt of Dr. McCormack's testimony at the Dover hearing, also appended, for a review of how the ability to meaningfully exercise Treaty Rights is and has always been understood to be part of the income and livelihood for signatory First Nations.

⁸ Rio Tinto Alcan, *infra*, at para. 43.

⁹ *R. v. Badger*, [1996] 1 SCR 771 at para. 41.

¹⁰ *Dene Tha' First Nation v. MoE et al* 2006 FC 1354, at para. 34.

¹¹ *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)* 2011 BCCA 247 at paras. 83, 117.

¹² *Mikisew Cree First Nation v. Canada* 2005 SCC 69 at paras. 15, 44, 47.

¹³ *Taku River Tlingit First Nation v. British Columbia* 2004 SCC 74 at para. 32

¹⁴ *Haida Nation v. British Columbia* 2004 SCC 73 at paras. 72-73.

directly and adversely affecting ACFN, or that will directly and adversely impact ACFN, by virtue of direct and adverse impacts to Treaty and Aboriginal Rights, traditional land uses, and culture also directly and adversely impact ACFN's property, quiet enjoyment of its property, health and livelihood.

B. Explain how the provision (section in the Regional Plan you identified in A (above) is directly and adversely you, or will directly and adversely affect you.

C. Explain the adverse effects that you are suffering or expect to suffer as a result of the specific provision (section) you identified in A (above)

Please note that this list of direct and adverse effects upon ACFN is supplemental to that provided in the Request, is not exhaustive, and is provided to assist Alberta's understanding regarding the need for a review of LARP.

The Terms of Reference for LARP directed that LARP consider how lands under federal jurisdiction, such as First Nation lands, will be impacted and the long-term needs of those lands. ACFN is not able to identify any provision of LARP that ensures the sustainability of its lands for ACFN's long-term cultural, social or economic needs. Specifically, how terrestrial and aquatic resources on its Reserves will support traditional land use, how water quality and quantity on its lands will support its needs, or how air quality will protect members' health. Potential impacts to Reserve lands are not addressed at all by LARP.

The serious decline in the availability of traditional resources such as wildlife, migratory birds, fish, and water; as well as serious declines in the availability of suitability of those traditional resources that remain due to contamination concerns, have and continue to directly and adversely impact the value of ACFN's Reserve lands, and member's ability to quietly enjoy those lands for the purposes for which they were set aside.¹⁵

For example, ACFN IR. 201D was specifically set aside as a fishing reserve, but many ACFN members no longer fish there due to contamination concerns.¹⁶

Poplar Point is located in proximity to the range of the Ronald Lake Bison herd and is regularly used as a base camp for those ACFN members wishing to hunt bison. The prioritization of oil sands development, and lack of a traditional use management framework means that the lands that are currently used by bison are likely to be taken up, bison will be driven out, and ACFN's ability to quietly enjoy Poplar Point to support this subsistence hunting activity will be lost.¹⁷

¹⁵ See Effects on Traditional Resources of ACFN (MSES), Candler Technical Memorandum, Larcombe Encroachment report.

¹⁶ McCormack Ethnohistory at pages 29-31. See also Larcombe Encroachment Report at pages 5-16 to 5-19.

¹⁷ i.e. see ACFN witness testimony at Teck Winter Drilling hearing held August 19-23 2013.

Migratory birds are no longer found in the same quantities as historically around ACFN reserve lands in the delta.¹⁸ Again, this impedes ACFN's ability to quiet enjoyment of its reserve lands for normal purposes.

The normal quiet enjoyment of ACFN's Reserve lands also depends upon access to said lands. ACFN's preferred and traditional access to its lands is by boat. ACFN can no longer dependably access its reserve lands by boat. The LARP water quantity framework is not yet complete, there is no mechanism to protect ACFN navigation under LARP, nor its riparian rights that accompany its beneficial ownership of reserve lands. ACFN members are also experiencing increasing difficulties accessing Reserve lands by land.

Increasing use by non-Aboriginal people in the area has resulted in increases to trespass on ACFN's reserve lands. LARP as it now stands will only increase such direct and adverse interferences with ACFN's possession of its reserve lands, and contains no strategies or objectives that would minimize or avoid such direct and adverse impacts.

ACFN's Poplar Point Reserve is completely surrounded by oil sands leases. As the Dover decision reveals, LARP as it now stands has led decision makers to believe they cannot protect Reserve lands from oil sands development coming right up to their boundaries. Noise, odour, light could well render the Reserve uninhabitable. The risk of injury to people and property will increase. Trespass is already increasing, and will be exacerbated by development near Poplar Point and Point Brule. The ecology of the reserve lands will be changed. They will no longer be fit for the purpose of supporting cultural land use and section 35 rights. LARP does not contain the necessary tools to manage the cumulative effects of this development.

LARP's frameworks do not contain measures that address the health impacts of air pollution, water pollution, odour, and noise on ACFN members using their Reserve lands.

ACFN's Reserve lands are all within the range identified by Environment Canada scientists in November 2012 as receiving deposition of substances from the oil sands. This represents a direct physical interference with ACFN's quiet enjoyment of its Reserve lands, particularly with reference to the ability to safely drink water and harvest plants on Reserve and in the surrounding lands.

All of ACFN's reserve lands are downstream of the oil sands, and the water quality framework under LARP does not address safe drinking water or other health concerns related to water quality for ACFN's Reserves, nor for ACFN members who live downstream in Fort Chipewyan.

Overall household income can be significantly directly and adversely affected when food must be purchased instead of harvested, as well as when members must travel farther in order to harvest successfully.¹⁹

¹⁸ Candler Technical memorandum.

¹⁹ Larcombe Encroachment Report at pages 6-7 to 6-11.

The designation of traditionally used areas as “Public Land Use Areas” will directly and adversely affect ACFN’s livelihood, health, and ability to exercise Treaty Rights. Designation as Public Land Use Zones under PLAR will result in restrictions on the uses of conveyances including on and off highway vehicles or snow vehicles and motorized boats, which many ACFN members rely upon for accessing their traditional lands for rights based activities (see s. 185 PLAR); restrictions on camping and fires in certain circumstances within public recreation areas within public land use zones; and restrictions on the use of firearms in public land recreation areas or public recreation trails (see s. 188 PLAR) which are created pursuant to Schedule “F” of LARP.

The reduction in opportunities to exercise section 35 rights have direct physical health consequences for ACFN members including:

1. impacts related to diet and nutrition stemming from loss of access to nutrient dense lower fat foods with high quality proteins, minerals and vitamins.
2. Loss of exercise – exercise of rights generally involves significant physical exertion.
3. Less access to country foods and limited disposable income often have to purchase cheaper and less healthy food alternatives. This increases the incidence of diabetes, obesity, heart disease, and other chronic diseases.²⁰

The reduction in opportunities to exercise section 35 rights have direct psychological health consequences for ACFN members including:

1. Distress and depression associated with decreased food security;
2. Psychological harm connected to disturbance of lands, waters and natural resources that ACFN members are culturally connected to.²¹

As discussed above, culture is a determinant of health, and loss or devaluation of language and culture adversely affects health. ACFN’s culture has already experienced significant adverse, and potentially irreversible impacts.²² The Joint Review Panel for the Jackpine Mine Expansion made the following finding:

*Based on the evidence provided by Shell and ACFN, the Panel believes that oil sands activity and other development and activities within the RMWB have already contributed to significant socioeconomic and cultural change for ACFN. . . . The Panel finds that the cumulative effects on some elements of ACFN’s culture are already adverse, long-term, likely irreversible and significant and that these effects are likely to increase in the future if the projects identified in the application case and PDC proceed as planned.*²³

We note that there is nothing in LARP that would stop any project identified in Shell’s application and planned development cases from proceeding as planned, given LARPs prioritization of development of the oil sands above all else, and the subjugation of ACFN’s

²⁰ Larcombe Encroachment Report at page 6-20.

²¹ Larcombe Encroachment Report at pages 6-20-6-24.

²² Larcombe Encroachment Report at pages 6-12 to 6-19.

²³ 2013 ABAER 011 at 1491.

rights to oil sands development, recreation and tourism interests, and other industrial activities addressed by LARP.

LARP's failure to address ACFN's section 35 Rights, traditional land use and culture will result in continued and ever increasing direct and adverse impacts upon ACFN's culture, and therefore upon its health.

Form LUS-01 Part 2: Requested Relief

As advised in the Request.

Form LUS-01 Part 3: Other Applicable Information

ACFN has enclosed the following applicable information for your consideration, in addition to that information provided on August 19. This list is without prejudice to ACFN's ability to lead further evidence during the Minister's review of LARP.

Appendix	Description
1	July 1, 2013 Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples.
2	April 24, 2013, Testimony of Dr. Patricia McCormack, Re Dover, Vol. 2 at pages 408-412
3	September 2, 2012 An Ethnohistory of the Athabasca Chipewyan First Nation, excerpt
4	CV of Dr. Patricia McCormack
5	September 2012, Migratory Birds and Aquatic Fur: Technical Memorandum, Firelight Group.

Form LUS-01 Part 4: Applicant Information

As advised in August 19 2013 Request.

Yours truly,
WOODWARD & COMPANY



Jenny Biem

/eh
c.c. ACFN Chief and Council
Lisa King
Doreen Somers