

December 1, 2014

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

VIA EMAIL: LUF@gov.ab.ca

Dear LARP Review Panel:

**Re: Review of Lower Athabasca Regional Panel
Information Request #4 Directed to the Crown**

We write on behalf of Fort McKay First Nation in reply to the Crown's response to Information Request No. 4 ("IR #4). In this reply, "Crown Response" refers to Ms. Semenchuk's letter of November 14, 2014 and "Annual Report" refers to the *Land Use Framework Regional Plans Progress Report: A Review of our Progress in 2013*.

Both the Crown's Response and Annual Report confirm that LARP as it exists is incapable of balancing Fort McKay's constitutionally protected rights with the regional outcome of promoting oil sands development. Both also confirm much of the information Fort McKay provided in its October 17, 2014 correspondence to the Panel, notably that Alberta has not engaged with Fort McKay on many of the strategies set out in LARP and is at its very preliminary stages of developing tools and mechanisms contemplated by LARP to ensure the constitutionally protected rights of Fort McKay.

For the Panel's convenience and to avoid repetition, this response is organized by the substantive issues and topics raised by Information Request #4 rather than providing specific responses to the each information request.

1. Delayed LARP Timelines

The Crown Response and Annual Report at the Progress Summary section confirm that while LARP's intended outcome of continuing oil sands development is on-track (including the tourism products and services Alberta considers necessary to attract oil sands labour to the region, see p. 32 of LARP), the tools and mechanisms contemplated to address aboriginal constitutionally protected rights such as the Biodiversity Management Framework ("BMF") and Landscape Management Plan (LMP) have been delayed far passed

the timelines set out in LARP. Response at pages 2-3 confirm the Annual Report's revised timelines for the BMF and LMP will not be met either. This means that while the adverse impacts of oil sands development on Fort McKay's treaty and aboriginal rights and traditional uses continue to accumulate, no substantive protection is provided to these rights by LARP. And there is no indication that the BMF and LMP will, in fact, implement or respect Fort McKay's constitutional rights.

2. Provincial Outcome of Healthy Ecosystems and Environment

At page 9 of the Annual Report, Alberta relies on the creation LARP Conservation Areas, the creation of AEMERA and its "extensive work" towards the completion of the framework and strategies in LARP to demonstrate that in 2013 Alberta is achieving the outcome of healthy ecosystems and environment.

With respect to Conservation Areas, the Annual Report confirms that Alberta had not yet formally designated LARP conservation areas as of 2013. Fort McKay understands currently none of these Conservation Areas have been designated. The Annual Report also confirms that Alberta is not yet in compliance with Part 2 of the Regulatory Details Plan that mandates a program to evaluate the effectiveness of the conservation area in meeting relevant conservation objectives (Annual Report at p.1), and which according to LARP, are intended to support traditional land use (LARP at p.30).

With respect to AEMERA, we attach the Report of the Auditor General of Alberta – October 2014 at pp. 23-32 (Attachment 1), which found, among other things, that AEMERA's ability to monitor cumulative effects of oil sands development may be jeopardy if Alberta does not take further action to fully carry out its responsibilities regarding Joint Canada-Alberta Implementation Plan for Oil Sands Monitoring (JOSM). In any event, monitoring does not in itself, provide protection. If established thresholds are exceeded by operating projects, an unspecified management response may be required. However, this requires the existence of thresholds relevant to the exercise of treaty and aboriginal rights, and the integration of such thresholds and existing monitoring data into land use planning and project approvals. Once projects are developed and monitored, the management options will be limited. To date, AEMERA's monitoring program is not integrated into the project assessment and approval process.

With respect to Alberta's "extensive efforts" to implement the frameworks and strategies of LARP in 2013, these efforts have not included completion of the BMF, LMP or a traditional land use management framework (as recommended by the Joint Review Panel in its 2013 decision on the Shell Jackpine Mine Expansion, 2013 ABAER2013 at para. 36) to address the lack of planning and measures to protect treaty and aboriginal rights and traditional use. This is demonstrated by the Annual Report which confirms delays in completing the BMF and LMP until 2014 and the Crown Response that indicates that it was not until September 2014 that Alberta began developing the BMF and that the development of LMP has yet to begin (Crown Response at p.2).

This is consistent with Fort McKay's previous submissions to the Panel on August 25, 2014 indicating that the workshop session in March 2014 provided a high level introduction to the BMF and was at a conceptual level of development and Fort McKay's correspondence of October 17, 2014 advising that as of October 2014, Fort McKay had not yet seen a draft of the BMF had yet to be approached regarding consultation on the LMP. Fort McKay has since October 2014 reviewed a draft of the BMF since provided by Alberta, which Fort McKay considers very much incomplete in many respects. This includes the absence of any objectives into the BMF specific to aboriginal and treaty rights, including protection of terrestrial resources on Reserve lands.

It does not appear that the "extensive work" in 2013 referred to in the Annual Report included the Surface Water Quantity Framework, which has been delayed from 2012 to 2015, and the draft was only provided to aboriginal communities in late 2014 for comment. Given the content of the Annual Report and the Crown's Response failure to discuss the Groundwater Management Framework, it can be inferred that this "extensive work" also did not involve developing final triggers and limits in that framework either.

3. Biodiversity Management Framework

Neither the Annual Report or Crown Response substantively address how Alberta has worked with First Nations to consider their constitutional rights in close proximity to their communities, although this is a requirement of the Terms of Reference for Developing LARP. Fort McKay is skeptical that the BMF will meet this commitment in LARP. As previously provided to the Panel in our correspondence of October 17, 2014, Fort McKay met with Environment and Sustainable Resource Development on September 19, 2014, and was advised that the staff leading the development of the framework do not have a mandate to incorporate traditional land use objectives or requirements into the framework. For example, by, inter alia, setting thresholds for population levels of cultural keystone species that will support a harvestable supply for Fort McKay or any First Nation or establishing locations where traditional land use may occur in reasonable proximity to aboriginal communities. The draft BMF that Fort McKay has reviewed since October 2014 confirms that its objectives and indicators are insufficient to protect Fort McKay's exercise of constitutional rights, and there is no plan for protecting opportunities for the exercise of these rights on or in proximity to Reserve lands.

4. Landscape Management Plan

While at page 11 of the Annual Report it states the LMP is being developed in conjunction with the BMF, Fort McKay understands that this is currently not the case and that the BMF is being developed separately. This understanding is supported by the Crown Response at page 3 which does not identify any connection between the development of the two.

As Fort McKay advised in its correspondence of October 17, 2014, as of October 2014 no consultation with Fort McKay had begun on the LMP and Fort McKay only recently has been approached in regards to the LMP. Fort McKay notes the comments made at page 3 of the Crown Response about further consultation on the modules of LMP, including the Birch

River Conservation area and the Moose Lake Access Management Plan. Fort McKay is not aware of the “module” of the Birch River Conservation Area, and seeks more information on this given the location in proximity to Fort McKay’s culturally important Moose Lake Reserves, 174a and 174b.

With respect to the LMP “module” of the Moose Lake Access Management Plan, Fort McKay now understands that Alberta would like to somehow incorporate this Plan into LARP. However, this Plan predates and is separate of LARP and has been subject of the negotiations with Alberta since 2002. A renewed commitment from Alberta was made in 2012 in connection with litigation against Alberta. Completion of the plan has since been delayed by Alberta despite a letter of commitment from the Minister of ESRD in 2012 as an immediate goal, to be completed in October 2012. Since March of 2014 Fort McKay has been awaiting a response from Alberta to proposed interim measures pending completion of the Plan. Therefore, Fort McKay is very concerned with and strongly objects to Alberta’s suggestions that this Plan is now at the beginning stages of LMP’s development, including First Nation consultation.

5. Tailings Management Framework

The Annual Report at page 11 confirms Alberta’s position set out in ESRD’s letter of June 18, 2014 in Attachment 2 that Alberta has yet to decide on whether it intends to consult Fort McKay on the framework and confirms Fort McKay’s understanding that it is at its early stages of development indicating it may not be complete by the revised completion date of early 2015. This delay is a considerable concern for Fort McKay given the recent Environment Canada study supporting Fort McKay’s ongoing view that tailings ponds are causing healthy impacts on the community due to air quality impacts (See Attachment 3).

6. Groundwater Management Framework

The Annual Report at page 11 and 12 confirms Fort McKay’s understanding that the Groundwater Management Framework still provides for interim triggers and final limits have yet to be developed. Fort McKay has not been contacted by Alberta in developing the final limits. Fort McKay is unclear as to what the “Regional Groundwater Monitoring and Reporting” group and whether it has been invited to participate despite its interest in the involvement of the development of the framework.

7. Surface Water Quantity Framework

The Annual Report at p. 12 confirms the delay in completing Surface Water Quantity Framework passed the timeline required by LARP. The draft reviewed by Fort McKay in late 2014 indicates a substantial gap in the management of cumulative effects and the protection of Fort McKay’s constitutional rights as the focus remains on the Athabasca River and excludes culturally important tributaries and lakes, and fails to consider groundwater-surface water interactions, and the relationship between land disturbance and water quantity. Therefore, Fort McKay is skeptical that this framework will not be protective of its treaty rights and constitutional uses.

8. Traditional Land Use Locations of Culture and Spiritual Significance

At page 2 of the Crown's Response it states that Alberta continues to work with First Nations to protect traditional use sites of a historic resource nature and currently has 124 traditional land use sites listed for aboriginal peoples in LARP. This appears inconsistent with the Annual Report that states as of 2013, LARP contained only 13 sites. Fort McKay seeks further information on the collaboration Alberta undertook to designate these over 100 new traditional land use sites, including any collaboration with Fort McKay. In any event, Fort McKay is not aware of any of its traditional land use sites being designated as historical resources and requests such information from Alberta.

9. Engagement with aboriginal communities with air, water, land and biodiversity strategies

With respect to land and biodiversity strategies, Fort McKay relies on its response at 3 and 4 above. With respect to air and water strategies, Fort McKay repeats its comments in its correspondence of October 17, 2014 in that much of Fort McKay's input into development of the air and surface water quality was disregarded. The Crown's Response attaches the Annual Report for the Air and Surface Water Quality Management Frameworks that indicated exceedances of triggers. Fort McKay has not been advised or approached regarding any management responses taken by Alberta despite Fort McKay's interest in participating in the implementation of the frameworks.

10. Sustaining Woodland Caribou Populations

Fort McKay's position is the Woodland Caribou Policy for Alberta has been ineffective in achieving naturally sustaining woodland caribou populations as oil sands disturbance is consistently approved despite clear indications that woodland caribou populations are declining rapidly and caribou habitat disturbance exceeds the 65% of undisturbed habitat recommended by the federal governments *Recovery Strategy for the Woodland Caribou, Boreal Population, in Canada*. For example, in Attachment 11 of Fort McKay's Application for a Request of a Review of LARP (Gould Environmental Wildlife Report), it states that as of 2012, 69% of the critical habitat has been disturbed in the West Side Athabasca Range and 62% of critical habitat in the Red Earth range has been disturbed (pdf 10), and despite the proponent of the Dover Commercial Project identifying the project site as refuge for caribou given observed high cow: calf ratio (Fort McKay Application - Attachment 11 at pdf 30), the Alberta Energy Regulator approved the Project.

While the Crown Response implies that Alberta's commitment to achieving natural sustaining woodland caribou populations will be addressed in the BMF, Fort McKay's position is that BMF does not adequately address stressors on caribou for it fails to manage the stressors on caribou such as industry habitat disturbance and reclamation. Rather, the intent is to manage exceedances of limits on indicators such caribou, which are already exceeded. Alberta's policy and initiatives are silent on how existing exceedances will be managed, including the projected extirpation of moose and caribou in 2/3rds of Fort

McKay's Traditional Territory, including on its Moose Lake Reserves and within large portions of the Birch Mountain Conservation Area.

11. Regional Parks Plan and Regional Trail System Plan

Despite its commitments in LARP to consult with aboriginal communities on these initiatives (LARP at pp. 34 & 63) and despite the Annual Report's claims that Alberta Parks continues to engage with aboriginal peoples with respect to parks and tourism initiatives that potentially adversely impact treaty rights and traditional uses (Annual Report at p. 17), the Crown's Response at # 5, confirms that these initiatives will largely be developed without any aboriginal consultation. This confirms that LARP's commitment to ongoing consultation with aboriginal peoples on government decisions that could have adverse impacts on aboriginal people (p.63-64; Crown's Reply to Fort McKay's Application of June 25, 2014 at para. 28) is inadequate or not done at all.

12. Traditional Knowledge

The Crown Response at #8 confirms LARP's commitment to consider traditional environmental knowledge to inform land and natural resource planning in the region is not being implemented. For example, the Crown Response at #4 indicates it did not consult with aboriginal peoples to obtain traditional ecological knowledge in developing the Regional Park Plan even though it makes such commitment on the face of LARP (page 34) and Alberta has yet to incorporate, or make a plan for incorporation of traditional knowledge into the BMF. Therefore, Fort McKay is skeptical that Alberta will do anything to substantively incorporate traditional knowledge to inform its decision making in developing and implementing the managements and frameworks under LARP as stated in the Crown Response at 8.

13. Implementing Key Recommendations in *Connecting the Dots*

Enhancing opportunities for aboriginal peoples in the labour force is a laudable objective, but Fort McKay has not seen evidence of implementation of this policy.

14. Outcome 7 Inclusion of Aboriginal Peoples in Land Use Planning Strategies

- a. Fort McKay reiterates its comments from its previous submissions that Alberta currently does not engage in meaningful consultation with Fort McKay. In the existing regulatory system, Alberta relies on project proponents to undertake procedural and "site-specific" consultation, and Alberta then relies on the mere existence of LARP to disregard Fort McKay's concerns that Alberta considers not "site" or "project" specific such as impacts to declining wildlife populations and air quality that impacts traditional land use. To Fort McKay's knowledge, there is no strategy specifically aimed at securing a harvestable supply of fish and game, reasonable opportunities for the exercise of rights, protecting important cultural

landscapes and resources or consulting with Fort McKay to create such strategies. Consultation that does not translate into any action or substantive response to the consultation is not useful.

- b. Lower Athabasca Regional Trail System: the Crown Response at page 4 confirms Fort McKay's correspondence of October 17, 2014 that it has not been approached by Alberta on this matter.
- c. Surface Water Management Framework: Fort McKay has provided its comments on the draft of the Framework but is skeptical that its comments will be incorporated given Alberta's failure to substantively incorporate its feedback in developing the existing frameworks (or any land use policy).
- d. Tourism Development: The Crown Response at 7, 10 and 11 confirm Fort McKay's previous comments in its October 17, 2014 correspondence that Alberta has not approached Fort McKay on these matters.
- e. First Nations Richardson Backcountry Stewardship Initiative: The Crown Response at #6 confirms Fort McKay's previous comments in its October 17, 2014 that Fort McKay has recently been approached on this initiative, which appears to be at its early stage of development.
- f. BMF and LMP: as discussed above, these initiatives are at their early stages of development, but based on the information available, Fort McKay is skeptical that they will ensure the protection of its constitutionally protected rights.

15. Note 6 regarding Hunting, Fishing and Trapping (including aboriginal peoples)

The Crown Response at 16 states it is unclear as to what the Panel is seeking in requesting a status update on the hunting, fishing and trapping of aboriginal people as a land use in the designated land use areas under LARP. Fort McKay supports any clarification the Crown requires in responding to the information request.

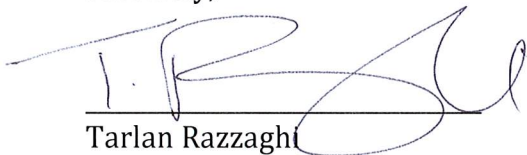
We can advise that Alberta has not yet resolved the land use conflict between oil sands development and traditional land use, both of which are permitted uses in the 'mixed-use' lands of LARP. Fort McKay can also advise that projects continue to be approved in the mixed-use area despite their incompatibility with the exercise of rights and the continuing decline of wildlife and despite the absence of management frameworks or plans for preserving reasonable opportunities to exercise Fort McKay's rights. The existence of LARP, even in its incomplete state, is used as a justification for approving projects because oil sands development is a permitted use under LARP (See AER Decision on Dover Commercial Project, 2013 ABAER 014 at para.46). Traditional land

use is also permitted under LARP, but this use is not being operationalized in planning or project approvals.

The Crown Response at #16 confirms that Fort McKay's hunting, fishing, and trapping in Conservation areas may continue in accordance with existing provincial laws. However, these existing laws just mean that such activities are legal. The legality of these activities is irrelevant to whether these activities are possible and can practicably be exercised in the absence of traditional use species or in the absence of culturally relevant and accessible locations. And as confirmed by the Annual Report at p.1, Alberta has not yet established a program to evaluate the effectiveness of the conservation areas in supporting traditional use as required by Part 2 of the Regulatory Details Plan.

In conclusion the Crown's response to the Information Request #4 confirms that there is significant delay in developing and implementing the tools and mechanisms contemplated in LARP, modest as they may be, intended to balance Fort McKay's constitutional rights with oil sands development. In the meantime, oil sands developments proceeds unabated; all of which supports Fort McKay's request that the effective date of LARP be amended until the essential components of LARP that address constitutional rights are developed.

Sincerely,



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Barrister and Solicitor

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