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Date: December 14, 2010
File No: 1004-016

FAX COVER SHEET

ATTENTION: Ms. Anne-Marie Erickson, Secretary of the Board, NEB
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Number of pages including this cover page 49

Re: Kearl Pipeline Project – and Duty to Consult
NEB File: OF-Fac-Gas-N081-2010-06 01

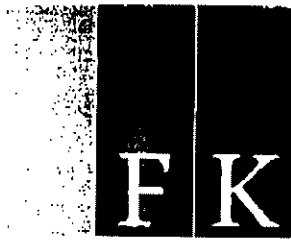
Please see attached correspondence from Jaela Shockey, sent on behalf of Athabasca Chipewyan First Nation.

The original, including color maps, will be sent by courier to your office.

Thank you,

Monique Cotton (mcotton@jfkclaw.ca Tel: 250-405-3469)
Legal Assistant

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SALE

NEB/016

December 14, 2010

Jaela Shockey
 E-mail: jshockey@jfkclaw.ca

DELIVERED BY FAX

National Energy Board
 444 Seventh Avenue S.W.
 Calgary, Alberta
 T2P 0X8

File No. 1004-016

Attention: Ms. Anne-Marie Erickson, Secretary of the Board

Dear Madame:

Re: Kearn Pipeline Project – and Duty to Consult
NEB File: OF-Fac-Gas-N081-2010-06 01 (the “proposed Project”)

Thank you for your letter of December 10, 2010, wherein you address the position of the National Energy Board in relation to the procedural and substantive concerns raised by the Athabasca Chipewyan First Nation [ACFN] with respect to the above noted matter and proposed Project. As the NEB knows, the proposed Project is within the traditional lands of ACFN, approximately 9km east of Kearn Lake, Alberta and consists of approximately 25km of pipeline with cleared right of way running generally north-south and crossing the upper Muskeg River and its tributaries. Moreover, ALIB has section 35 Treaty and Aboriginal rights which will be adversely impacted by the proposed Project proceeding, particularly in light of the NEB's approach to the articulation of ACFN's outstanding concerns. The project therefore requires meaningful consultation and accommodation in order to prevent harm and promote the goal of section 35 of the *Constitution Act, 1982* – reconciliation.

We note that in your recent letter, the NEB indicated that it issued an Order to approve the proposed Project, and to proceed with a screening level Environmental Assessment. ACFN is greatly concerned about the Board's decision to proceed with the proposed Project at this level, at this time, particularly considering the NEB's statement that it has considered the concerns of ACFN and “is of the view that NGTL's mitigation measures and its commitment to continue consultations with potentially affected

Aboriginal groups will address MCFN and ACFN's concerns about this Project", specifically referencing NGTL's November 3, 2010 correspondence which outlines what the NEB deems "the company's commitment to continuing consultations".

Inadequacy of NGTL's Approach to Consultation

The Board's decision fails to address ACFN's primary outstanding concern – with respect to the exclusion of NGTL from addressing the potential adverse impacts of the Project on its Treaty and Aboriginal section 35 rights. What is most concerning is that within NGTL's November 3, 2010 correspondence, which the NEB proposes to rely upon in order to address consultation with ACFN on its constitutional rights, NGTL refused to consider the potential impacts of the Project on ACFN's Treaty and Aboriginal section 35 rights. In NGTL's letter of response to ACFN, NGTL indicated that, despite the concerns raised by ACFN:

"NGTL is of the view that the effects on Aboriginal and Treaty rights are beyond the scope of this particular Project." **[Emphasis added]**

NGTL further stated that, therefore:

"In NGTL's view, there are no outstanding relevant concerns raised in the ACFN submissions, including the MSBS Report, which NGTL has not addressed in this response." **[Emphasis added]**

Thus, in dismissing ACFN's concern that it is necessary to identify the impact of the proposed Project on ACFN's section 35 rights, the Board has validated NGTL's approach, which effectively precludes any form of Aboriginal consultation (consistent with the case law) from taking place. Therefore, ACFN does not understand how the NEB proposes to rely upon this approach by NGTL which avoids considering the impact of the Project on ACFN's Treaty and Aboriginal rights, as the proper approach to consultation and to fulfill the NEB's duty to ensuring and/or assessing the adequacy of such consultation.

In effect, what the NEB is doing by adopting NGTL's flawed approach, is affirming NGTL's unconstitutional response, which has been to minimize the significance of the impacts of the Project on ACFN, by directly avoiding a discussion of the impacts on ACFN's constitutionally protected Aboriginal rights. ACFN submits that by the NEB validating the approach of NGTL to consultation, which is one that directly refuses to assess the potential impacts of the Project on ACFN's rights, the NEB has not addressed ACFN's procedural and substantive concerns respecting consultation on its section 35 rights. Moreover, the NEB is, in effect, validating an approach that allows the Proponent to simply dismiss ACFN's outstanding concern – that the Proponent has proposed to conduct its consultation process without including in that process an assessment of the impact on ACFN's Treaty and Aboriginal, section 35 rights.

Moreover, as we indicated in our letter of December 1, 2010, ACFN has a number of concerns with the Environmental Assessment process, in terms of the gaps and inadequacies of the regulatory process to consider and assess the impacts to Treaty and Aboriginal section 35 rights within assessments. This is

why ACFN attached, as Appendix "A" to our letter of December 1, 2010, a document which describes the role of a "Traditional Resource Use Plan" in assessing the baseline amounts of lands and resources that ACFN requires in order to continue to exercise its constitutionally protected section 35 rights.

It is, thus, worthwhile to note that the NEB's Order XC-NO81-17-2010, which provides in section 5 that NGTL shall file with the Board, a "summary of the ongoing consultation with the Aboriginal groups relating to the EPP and the specific measures taken in response to issues raised by Aboriginal groups" does not have the ability to address ACFN's outstanding procedural AND substantive concerns (both of which must be considered in consultation, per *Mikisew Cree*) particularly given that the NEB has already permitted NGTL to continue with its approach of directly dismissing the consideration of ACFN's Treaty and Aboriginal rights in its consultation. Furthermore, the report on NGTL's consultation to be filed within 60 days after construction, also does not have the potential or ability to address ACFN's concerns for the same reasons.

To expand, ACFN is concerned with the NEB's dismissal of ACFN's procedural concerns related to consultation raised in our December 1, 2010 letter. In *Mikisew Cree*, the SCC held that Aboriginal rights include both procedural and substantive rights, and the Crown, therefore, has both procedural and substantive consultation obligations. Indeed, the SCC stated that there are both:

"procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well." (para. 57).

Therefore, ACFN is concerned that none of its procedural concerns with respect to consultation, as raised in our December 1, 2010 letter, have been addressed, and that the NEB has made a decision that such procedural concerns are not outstanding concerns which need to be substantively addressed.

Adverse Impacts to ACFN's section 35 Rights

Over the past ten years, the Kearl Lake area, the Muskeg River watershed, and ACFN practice of Aboriginal and Treaty section 35 rights in the region, have been heavily impacted by oil sands developments. The potential indirect, direct and cumulative impacts of the proposed Project must be understood in this context, particularly given that the current areas available for the exercise of Treaty and Aboriginal section 35 rights are already constrained; thus making the additional impact of the Project on the sustainability of ACFN's rights even more vital to comprehensively understand.

The proposed Project is located within the Fort McKay Proximate Zone, which is an *ACFN Cultural Protection Area*, as identified in formal ACFN submissions on the *Lower Athabasca Regional Plan*, attached as Appendix

"A".¹ The Fort McKay Proximate Zone is identified as an area of lands and waters historically and currently relied upon, particularly by ACFN members living in and around the Fort McKay and Fort McMurray. Many of the ACFN members and families actively practicing their rights in this area are affiliated with Point Brule (IR Chipewyan 201F), Poplar Point (IR Chipewyan 201G), and *k'es hochela nene* (Poplar Point Homeland), located immediately north, and within 5km, of the proposed Project.

While subsistence (hunting and gathering), commercial (trapping), cultural/ spiritual use, and maintenance of cabins and camps in this zone by some ACFN members remains strong, impacts since the late 1990's, including restricted and gated access to areas controlled by oil sands companies, traffic, disturbance, taking up of lands, and high perceived levels of pollution (particularly air and water), have caused many ACFN members to begin avoiding large portions of this proximate zone for the practice of rights, including subsistence rights. Avoidance of areas for the practice and exercise of section 35 rights constitutes an adverse impact which must be taken into consideration when assessing the potential for the Project to adversely affect the long-term sustainability of ACFN's rights which stand to be affected by the Project.

Indeed, several ACFN members who have relied upon the Fort McKay proximate zone until recent years, report not being able to practice their rights as in previous years, and/or not being able to exercise their rights in their preferred manner, due to the elimination of opportunities formerly relied upon. Some rights-holders also report that they have to travel further (e.g. north of the Firebag river, or south to the Fort McMurray proximate zone) in order to actually exercise their section 35 rights.

In addition, there are a number of adverse impacts to ACFN's section 35 rights from existing oil sands development in the vicinity of the proposed Project which has already reached, or exceeded a threshold of safety (inadequate quality of lands and resources) or reliability (inadequate quantity of lands and resources). As a result of impacts to the quantity and quality of lands and resources that are needed to support the exercise of their Treaty and Aboriginal section 35 rights, many ACFN members no longer feel they can harvest or use the resources within the *Fort McKay Proximate Zone*, including water, fish, moose, and medicinal plants in order to support the continued practice of their rights.

In identifying a number of concerns about the potential for the Project to adversely impact ACFN's Treaty and Aboriginal section 35 rights, a 250km buffer was generated along the Project right of way, by the Firelight group, a consultant hired by ACFN, in order to represent an estimated physical disturbance footprint within which the impacts on rights could be preliminarily assessed.

Hence, the proposed Project will have a number of adverse impacts to the exercise of ACFN's Treaty and Aboriginal section 35 rights, both within and beyond the estimated physical footprint of the project. To begin to understand the nature and scope of the potential adverse impacts of the Project on ACFN's rights, ACFN has identified some of the Project impacts (within a 5km radius of the Project, and along the 250 km along the Project right-of-way) on ACFN's Treaty and Aboriginal section 35 rights (this is a non-exhaustive and preliminary list of impacts, which requires further assessment and study). As such, ACFN estimates that there will be at least the following impacts to ACFN's section Treaty and Aboriginal 35 rights:

¹ Please see page 9 for identification of Proximate Zones.

- **within the Treaty 8 area, and within lands historically and currently relied upon by ACFN members for the practice of rights under Treaty 8, including hunting, trapping, gathering, fishing, and associated cultural and livelihood practices;**
- **within 5km of three reported and recently or currently occupied cabins or permanent camps built by, and relied upon by ACFN members, all near the Project's northern terminus;**
- **within the Fort McKay Proximate Zone, an ACFN Cultural Protection Area identified in ACFN submissions to the Lower Athabasca Regional Plan;**
- **within, and transecting, a reported critical habitat area for woodland caribou, still actively used, and identified through ACFN traditional knowledge, and an area where ACFN members have historically hunted woodland caribou for subsistence use and to exercise their Treaty and section 35 right to hunt;**
- **within a registered trap line currently held by an ACFN member (Marvin L'Hommecourt, TL# 1714) that is used as a base for practice of rights under Treaty 8;**
- **within important habitat relied upon by ACFN members for hunting and subsistence use.** Seven reported instances of subsistence use are within 5km of the Project including five points and two areas where moose, bear, rabbit, grouse, ducks, geese, and other species have been hunted;
- **within areas reported to be currently avoided by some ACFN members due to existing impacts from industrial change, and concerns regarding safety and pollution.** One reported instance of specific avoidance due to quality (perceived industrial contamination of wild meat) is located within 5km of the Project; and
- **within the Muskeg River watershed, which is reported to be already subject to loss of use due to water quality issues and low flow.** The Muskeg River is a waterway used for navigation by ACFN members to access wider territories that is reported to be subject to low water levels resulting in loss of use. Multiple specific incidents of further loss of use due to quality related to fishing and moose hunting (including abandonment of abnormal fish and moose meat) have been reported by multiple ACFN members near the confluence of the Muskeg and Athabasca Rivers.

Please see the attached Map in Appendix "B", which identifies a number of locations of potential impacts to rights within a 2km and 5km buffer of the Project area, and along the 250km Project right of way. These identified potential adverse impact locations need to be integrated into a comprehensive Traditional Resources Use Plan ("TRUP"), in order to ensure that ACFN has sufficient lands and resources for the long-term sustainability of their section 35 Treaty and Aboriginal rights.

Despite the existing impacts from oil sands operations, resulting in loss of use by some ACFN members, the area is still used by ACFN for hunting, subsistence, cultural/spiritual, and other section 35 rights-based practices. Furthermore, until recent oil sands developments in the area (since approximately 2005), the area around TL #1714, and within 5km of the proposed Project, was relied upon heavily for the exercise of ACFN's Treaty and Aboriginal section 35 rights. The area that will be adversely impacted by the proposed Project is and has been an area which is thus important to the exercise of ACFN's rights, due, in part, to the following:

- Until recent years, the Project area was one of very few areas accessible by road and river, and in close proximity to ACFN members living in Fort McMurray and Fort McKay, but relatively untouched by oil sands development;
- The area has unique cultural and historic associations, particularly for some ACFN families, including the

holder of TL# 1714;

- The association of the area with TL# 1714 made it (until recent years) a 'safe' area for ACFN members to practice relatively free of disturbance;
- Through the 1990's, prior to current industrial disturbance, the area was a particularly productive and diverse area for harvesting moose and other subsistence resources; and
- The area includes important woodland caribou populations and habitat.

There is a need to fully and comprehensively address the potential adverse impacts of the Project on ACFN's Treaty and Aboriginal section 35 rights identified herein, by conducting a comprehensive Environmental Impact Assessment and a Traditional Resource Use Plan that assesses what baseline amounts of lands and resources are available to ACFN, and required by ACFN, in order to maintain the exercise of their constitutionally protected rights, now and into the future. Without first understanding how the proposed Project has the potential to add to the existing state of development which is already adversely impacting ACFN's exercise of both Treaty and Aboriginal rights, it will not be possible to substantively address ACFN's concerns and find meaningful accommodation, where necessary.

We look forward to your response, and trust that the inadequacies of the proposed approach to consultation on ACFN's Treaty and Aboriginal section 35 rights will be remedied, by developing a consultation process with the potentially affected First Nations, including ACFN, that specifically addresses the standards by which the adequacy and sufficiency of consultation with First Nations will be assessed. Finally, we trust that the Board will reconsider its decision to validate a proposed consultation process led by the proponent, NGTL, which effectively marginalizes and excludes any consideration of potential adverse impacts of the Project on ACFN's Treaty and Aboriginal, section 35 rights.

Yours truly,

Janes Freedman Kyle Law Corporation

Per:

Jaela Shockey

cc.

Chief and Council of ACFN

ACFN IRC, Attention: Lisa King, Director

Joel Forrest, TCPL (Fax: 403-920-2347)

Leslie Confransisco, NGTL (Fax: 403-920-2200)

Adrianne Menzies, NGTL (Fax: 403-920-2347)

Elaine Feldman, President, Canadian Environmental Assessment Agency, (Fax: 613-948-2208)

APPENDIX "A"



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Athabasca Chipewyan First Nation Advice to the Government of Alberta Regarding the Lower Athabasca Regional Plan

**Provided to the Land Use Secretariat
November 22, 2010**

Disclaimer

This information is being provided to the Government of Alberta for the purpose of informing development of, and consultation on, the Lower Athabasca Regional Plan. Nothing in this submission should be construed as to waive, reduce, or otherwise constrain the Treaty and Aboriginal rights of the ACFN. Consultation and accommodation regarding ACFN rights will be expected in accord with the fullest extent of the honour of the Crown throughout the ACFN consultation areas and cultural protection zones presented in this document.

ACFN Advice to Alberta Regarding LARP**November 22, 2010****Introduction**

On behalf of the Athabasca Chipewyan First Nation ("ACFN"), the ACFN IRC, with the assistance of The Firelight Group, has analyzed the Lower Athabasca Regional Advisory Council's Advice to the Government of Alberta ("GoA") Regarding a Vision for the Lower Athabasca Region ("RAC vision document") to identify areas of opportunity and weakness. Information contained herein is provided to Alberta for the purposes of development of the Lower Athabasca Regional Plan (LARP).

The ACFN submission includes six components, plus appendices:

- Section 1 contains a Declaration provided by ACFN Elders on ACFN Rights to Land Use
- Section 2 provides context on ACFN Mode of Life and Livelihood
- Section 3 sets out an ACFN Vision for the Lower Athabasca Regional Plan (LARP) that has Treaty 8 as a foundational document for land management in the Lower Athabasca Region;
- Section 4 includes a map and definition of ACFN Cultural Protection Areas, including homeland zones, proximate zones and critical waterway zones;
- Section 5 makes general comments on how the LARP Draft Vision conflicts with the ACFN vision for co-management; and,
- Section 6 provides additional technical comments on the LARP Draft Vision.

These comments are in addition to the joint submission of ACFN, CPFN and MCFN on the RAC vision document dated October 29, 2010 (see appendix 1).

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.

ACFN Advice to Alberta Regarding LARP**November 22, 2010**

Information provided herein is the most current available to ACFN, but is not complete due to lack of resources. Nothing in this submission should be construed as to waive, reduce, or otherwise constrain ACFN rights within, or outside designated cultural protection areas. ACFN reserves the right to amend, refine, or add to this document, and to its understanding of associated needs, at any time.

A Traditional Land and Resource Use Management Plan (TRUP, see appendix 2), or similar land and resource use analysis and planning process, is critical to filling information gaps on the criteria, thresholds and indicators necessary to sustain Treaty 8 rights into the future. This information is required in order for any planning process to adequately assess and accommodate ACFN Treaty 8 rights. To date, the ACFN has not received a response from GoA regarding provision of resources for an identification of resources and requirements necessary for the practice of rights by ACFN members, although a few meetings have taken place.

Section 1:

ACFN Elders' Declaration on Rights to Land Use

This is our Dené suliné territory, our Traditional Lands. We have occupied these lands for the last 10,000 years and maybe longer. Our traditions go on and we have the right to continue our traditional way of life. We agreed only to share our lands and we still consider these lands ours. Clearly we have been here longer than anybody. The Government must recognize that we still have the right to use these lands.

Our Rights to use the lands and water on Traditional Lands have never been extinguished. The Traditional Lands, and our rights to use of the lands, are central to our Dené culture, identity and well-being. They are essential to the well-being of our future generations and their ability to sustain our culture in a changing world.

The meaningful practice of our treaty rights depends on having sufficient lands and resources to exercise those rights. Sufficient refers to not only quantity but quality, including what is required to fulfill our cultural and spiritual needs.

Our parents and grandparents have told us that Treaty 8, signed by our Chief Lavolette in 1899, is an Intergovernmental agreement that, in return for sharing our Traditional Lands, upholds our inherent Dené rights to land use and livelihood. In our experience, Alberta is not upholding their end of the Treaty and is sacrificing our rights to industrial development. We have never been properly consulted and the Federal and Provincial Governments have never accommodated our rights or compensated us for infringements.

ACFN has had enough with having our land destroyed, no one is dealing with it; neither the Federal nor the Provincial Crown. Yet you come to us for approval of new projects. It is time for the Government to stop cheating us of our rights to land use and livelihood, culture and identity without proper consultation, mitigation and compensation.

As the Elders of our community, we demand that our ability to practice our constitutionally protected treaty rights and traditional uses is sustained within our Traditional Lands for future generations. We demand that our rights are protected in the LARP and any other initiatives proposed by the governments.

The lands from Firebag north, including Birch Mountain on the west side of river, must be protected. Richardson Backcountry is not to be given away – not to any government.

Everything we do here, we do to protect our rights to land use, livelihood and culture.

- ***Declared by the Athabasca Chipewyan First Nation Elders Council,
July 8, 2010, Fort Chipewyan, Alberta***

Section 2: ACFN 'Mode of Life' and Livelihood

Livelihood, in the Dené understanding, is about supporting the total way of making ones way in the world as a Dené individual. It is about "the way of life on the land" and how that relates to maintaining culture in the face of change. This includes the relationship between the physical acts of making a living and the spiritual and moral obligations of Dené individuals to themselves, to their community, and to the Earth and all of the creatures thereon. It requires that physical and spiritual needs are met in order to sustain oneself and one's community. As such, livelihood is central to individual and community well-being and to cultural continuity.

In the view of the ACFN Elders, the promises of the Treaty, including protection of 'mode of life' referred to in section three of this submission, have not been upheld. "When they signed the Treaty, the Government made a lot of promises to the Native people but nothing has been done. A lot has been broken ... It should not have happened like that."¹ ACFN Elders continue to express concern over the violation of their Treaty Rights:

"Anytime the Government... allows Industry to come develop something on the land like that and the industry puts out regulation that you're not allowed to go on that site... and if you know there's fur bearing animals there, you need to feed your family, you know you could kill moose or caribou in that area and they don't allow you, what are they doing to you? They're violating your Treaty Rights. When you look at things like that, what was really ours, it seems like we're not allowed to do anything on those lands and that's not right. It shouldn't be that way. I think that Treaty 8, whatever was said at the signing of Treaty 8, it tells a lot of different stories from what you see happening today. So, Treaty Rights is the right that we have to remember, it's not just First Nations people that asked for what's in the Treaty Rights, that was promised to them by the Crown, by Canada."²

Dené livelihood ties people with place and culture with the land. These connections have implications for individual and community health and well-being and for maintaining the resilience of culture in the face of change. In the traditional Dené cosmology, the land is alive. The Creator imbued the land, the waters and all creatures that dwell upon or therein, with spirits and ACFN Elders remember the spirits that helped their ancestors to survive:

"[L]ong time ago, Native people had their own spirit which told them how to do things and how to make things... Before there were guns, they used to use a bow

¹ Bruno, R. 2010. Oral History regarding Treaty 8 as told to N. Nicholls, and interpreted by A. Bernaille, on February 8, 2010. Fort Chipewyan, Alberta. Recording and transcript in possession of the ACFN IRC, Fort McMurray, Alberta

² Focus Group PA-1. 2009. ACFN Land Use Plan - Preservation Areas Study Focus Group PA-1, Fort Chipewyan, Alberta, October 15 and October 19, 2009. Transcript in possession of the ACFN IRC, Fort McMurray, Alberta.

ACFN Advice to Alberta Regarding LARP**November 22, 2010**

and arrow. Their spirit told them how to make and use these things. Before the white man hit this country, Native people were here already and they survived because their spirit told them how to do things.”³

The spirit of the people is linked inextricably with the spirit of the land.

Large-scale modification of the landscape can disrupt the balance of power in the relationship between people and their environment and can be “negative” to a person and destroy the spirit of the land:

“All that development will disrupt the natural law of the land, the natural ecosystem, the ecological system of the land. Everything will become unnatural.”⁴

“If industry digs a big hole in the ground, they’ll destroy the spirit of the land. If you go out and see beer cans, people that don’t respect the way of the land, it’s depressing. They destroy the spirit of the land, and then I won’t want to go there. But I have to go there anyway, because it’s part of me, part of my heritage.”⁵

³ Focus Group PA-1. 2009. ACFN Land Use Plan - Preservation Areas Study Focus Group PA-1, Fort Chipewyan, Alberta, October 15 and October 19, 2009. Transcript in possession of the ACFN IRC, Fort McMurray, Alberta.

⁴ Focus Group PA-10. 2009. ACFN Land Use Plan - Preservation Areas Study Focus Group PA-9, Fort McMurray, Alberta, October 21, 2009. Transcript in possession of the ACFN IRC, Fort McMurray, Alberta.

⁵ L’Hommecourt, M. 2009. In the Court of Queen’s Bench of Alberta Judicial District of Edmonton between Athabasca Chipewyan First Nation and Minister of Energy, Canadian Coastal Resources Ltd., Standard Land Company Inc., and Shell Canada Ltd., Affidavit # of Marvin L’Hommecourt, sworn January 30th, 2009, Action No. 0803 17419, Edmonton Registry.

Section 3:

Athabasca Chipewyan First Nation Vision for the Lower Athabasca Regional Plan

This section is the third component of the *ACFN Advice to Alberta on the LARP* and consists of ACFN's Vision for the LARP.

Treaty No. 8 is the foundation of the ACFN Vision for the Lower Athabasca Region. Consistent with the spirit and intent of Treaty No. 8, the reconciliation of Crown and First Nation Interests must be a primary goal of the Lower Athabasca Regional Plan.

Treaty No. 8 forms the foundation on which all land use in the region depends, including Crown and industrial use, and the reasonable taking up of lands. The spirit and intent of Treaty No. 8, among other promises and guarantees, involves ACFN's agreement to *share* lands and resources with the Crown. In exchange, as a priority over all other uses, the Crown confirmed protection for ACFN's way of life, throughout the extent of Treaty 8.

Shortly after signing, the Crown's own negotiators wrote:

"We had to solemnly assure them [First Nations] that ... they would be as free to hunt and fish after the treaty as they would be if they never entered into it. We assured them that the treaty would not lead to any forced interference with their mode of life..." (Laird, Ross and McKenna, Report of Commissioners for Treaty No. 8, 1899, emphasis added).

ACFN's vision for LARP includes the following:

- 1) All ACFN members have a right, now and in the future, to practice their Treaty 8 rights in their preferred manner and locations with confidence, to sustain the health and well-being of themselves and their families, and to pass their culture on to their children. Their ability to do so requires priority access to sufficient quality and quantity of the tangible and intangible resources (e.g., water, game, fish, berries, spiritual sites, cultural landscapes and homelands, traditional knowledge, and others) that underlie meaningful practice of rights.
- 2) Definition and Implementation of LARP designations must proceed in step with negotiation and implementation of meaningful and reliable consultation and accommodation frameworks, including co-management mechanisms with First Nations in areas critical for the past, present and future practice of their rights. This would include:
 - a. Establishing co-management boards, or other cooperative land and resource management arrangements, guided by the principles of shared decision-making

ACFN Advice to Alberta Regarding LARP

November 22, 2010

and joint stewardship for lands and resources of critical importance to the continued practice of rights.

- b. That a reasonable share of wealth generated from traditional lands and associated resources should flow to those First Nations who suffer, or have suffered, direct, indirect, or cumulative adverse effects from developments that harm, or take up, air, land and water to the point that their rights under Treaty No. 8 have been or will be infringed.

3.1 Co-management is a Critical Part of Deep Consultation and Accommodation

The critical issue for ACFN is to ensure that their rights are sustained for future generations. Reconciliation must start with providing a much greater say for ACFN in decision-making where decisions have the potential to adversely affect and/or infringe ACFN's Treaty No. 8 rights. This goes beyond GoA's current approach to the "right to be consulted", which has not resulted in the slowing down of the taking up of lands and adverse impacts to rights. At minimum, deep consultation and accommodation is required; at the higher end, full participation in resource management and decision-making, along the lines of resource co-management boards in NWT, Yukon and Nunavut, is required. This can be implemented as a spectrum from more to less involvement in the LARP area.

Co-management "broadly refers to the sharing of power and responsibility between government and local resource users"⁶. Although co-management can encompass a spectrum of arrangements based on the level of power-sharing, the type of arrangement that ACFN is referring to in this proposal is joint decision-making authority. This may not be the same as the 'cooperative management' mentioned in RAC vision documents. ACFN has been recommending and pursuing co-management of critical lands for some time, and raised the need for co-management during consultation on the Land Use Framework (appendix 3).

3.2 Operationalizing the ACFN LARP Vision

In Section 4, we have provided a draft map and definition of ACFN Cultural Protection Areas. These include three ACFN 'homeland zones', three 'proximate zones', and a network of critical waterway zones. These zones are set within the larger extent of ACFN practice and rights indicated by critical and standard consultation zones.

LARP is, in essence, a Crown plan to take up land under Treaty No. 8 for five categories of land use. ACFN expects the Crown to engage in meaningful and detailed consultation concerning ACFN's input into LARP. This must include establishing an appropriate framework for collaborating on how best to manage each of the land categories to give confidence that the Treaty, the honour of the Crown, and ultimately the public interest, will be respected. However, such consultation can only be meaningful with the presence of adequate information and studies.

⁶ Notzke, C. 1995. A new perspective in aboriginal natural resource management: co-management. *Geoforum* 26(2): 187-209.

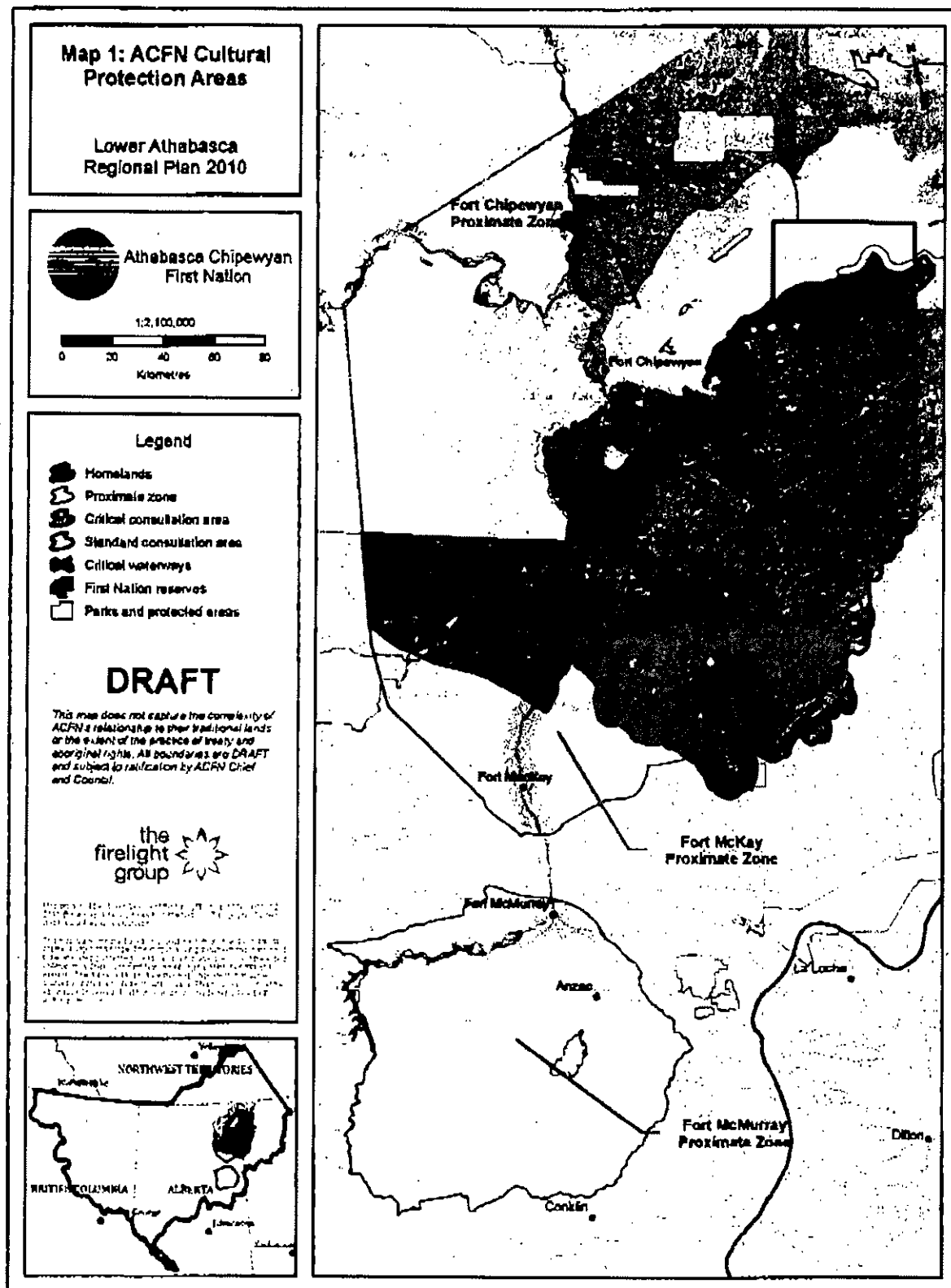
ACFN Advice to Alberta Regarding LARP**November 22, 2010**

ACFN strongly recommends that the Crown provide adequate resources and time for a measured, realistic, and reliable consideration of resources needed to exercise Treaty No. 8 rights. It should be noted that ACFN has raised with GoA the concept of a TRUP as early as October 2008. A more detailed submission, at the request of GoA, was made on September 28, 2010 (see appendix 2). Unfortunately, GoA has still not responded to this request. The ACFN considers TRUP to be a critical tool for identifying thresholds and criteria to be implemented in land, air, and water management, monitoring and decision-making. ACFN expects a detailed response on the TRUP concept from GoA. A legalistic response to the effect that "you should have used your LARP funding to do this work" will not suffice, particularly when ACFN has made it clear to GoA through detailed budgets and work plans and subsequent correspondence that the LARP funding was inadequate for ACFN to carry out LARP-related tasks such as respond to the RAC Vision Document and to produce these submissions.⁷ As the TRUP proposal makes clear, funding for and the carrying out of such a study is a complex, time-consuming and expensive prospect.

⁷ For example, see: (1) ACFN's July 2009 submission of a scope of work for consultation on LARP that included developing an ACFN-specific land use plan; (2) The August 29, 2009 joint letter of ACFN and MCFN regarding the First Nation Consultation Plan for LARP; (3) ACFN's January 30, 2010 scope of work for the LARP funding provided by Alberta; and, (4) ACFN's November 22, 2010 letter to Dave Bartesko summarizing concerns expressed in the spring and summer of 2010 about the LARP funding agreement.

ACFN Advice to Alberta Regarding LARP

November 22, 2010



ACFN Advice to Alberta Regarding LARP

November 22, 2010

3. Critical Waterway Zones

These areas recognize the integral importance of water quality and quantity to the ACFN membership and their practice of rights. These interconnected zones extend 5km on either side of waterways that are critical for the practice of ACFN rights. There is a need to establish cumulative effects frameworks and co-management frameworks that properly consider the requirements to sustain treaty rights and share decision-making with respect to the Critical Waterway Zones.

Due to the limitations of existing ACFN information and studies, further research and dialogue with the ACFN community and ACFN Chief and Council is required to confirm the extent of these three zones. Additional sub-regional planning is required for all designations.

4.2 Reasons for Designation

4.2.1 *Impacts and Encroachments on ACFN Rights and Land Use*

The pace and scale of industrial land-use activities, most importantly oilsands exploration and development, is threatening the long-term sustainability of ACFN rights and culture. Impacts to the land, air and water resources are occurring, and the magnitude and scale of these impacts will accelerate in the coming decades, if oilsands activity increases as planned (appendix 4). Industrial growth also increases the population of the Lower Athabasca Region. The numbers of recreational land users are increasing in ACFN cultural protection areas, leading to increased competition and conflict. Key issues for the meaningful practice of rights occur when the environmental (including the ecological, economic and social environments) effects of competing land uses (and associated policies and regulations that support competing land uses) impact the tangible and intangible resources that underlie the meaningful practice of ACFN rights.

While many specific management issues exist, the nine issues of greatest concern to ACFN at this time are:

1. Landscape and ecosystem alteration and degradation;
2. Contamination of traditional foods and resources;
3. Declines in water quality and quantity;
4. Competition for traditional resources;
5. Impacts of increased numbers of recreational land users (e.g., vandalism; desecration of the spirit of the land; and, direct conflict);
6. Restrictions on access to traditional lands;
7. Lack of involvement in land and resource decision-making, monitoring and enforcement;
8. Cumulative infringements on ACFN's treaty and aboriginal rights;
9. Methodology for considering and accommodating ACFN treaty and aboriginal rights in land use planning and regulatory decision-making.

ACFN Advice to Alberta Regarding LARP**November 22, 2010**

These issues are directly contributing to the loss of ACFN culture and traditional land-use practices. These issues have direct, indirect and cumulative impacts on ACFN's ability to exercise their constitutionally protected Treaty No. 8 rights.

As further discussed in this section and in section 5, ACFN membership has already experienced extensive erosion of its lands and rights, including within Cultural Protection Areas. Some of these impacts include, but are not limited to: contamination of waters and fish resulting in avoidance of traditional foods; reduced water levels in the Athabasca River and Delta resulting in restricted access to critical harvesting and cultural areas including reserve lands; destruction of hunting and trapping areas as a result of oil sands mining. These changes are of particular concern given that the population of ACFN and other First Nations in the region is growing, and that future resource requirements for the practice of rights will be greater in the future, not less. These few examples convey the urgent need for a better method of considering ACFN rights in planning and sharing of decisions regarding development that may affect ACFN traditional lands. ACFN is offering an opportunity to develop this method collaboratively with GoA, building on the cultural protection areas and management recommendations described here.

4.2.2 Information Sources

Rationale for designating three cultural protection areas zones and the spatial boundaries of each zone, are based on:

- The knowledge, recommendations and advice of the ACFN Elder's Council obtained through close collaboration with them;
- Community engagement (planning survey, visioning sessions, update meetings) with ACFN membership in Fort Chipewyan and Fort McMurray;
- Analysis of ACFN's database of mapped land use values including close to 5000 points, lines, and areas associated with the practice of rights by its members;
- Dené family-based homeland affiliations within the ACFN community;
- Ecological information related to critical wildlife habitat and water flow;
- An understanding of ACFN land use as a complex adaptive system; and,
- Ongoing ACFN research.

Cultural protection area boundaries are subject to adjustment by ACFN Chief and Council, based on further input from the ACFN Community.

4.2.3 Critical Values Supported

The primary objective of the ACFN cultural protection areas is to protect and sustain the rights of ACFN members. This requires protection of sufficient quantity and quality

ACFN Advice to Alberta Regarding LARP**November 22, 2010**

of lands, animals and other resources in areas where ACFN members choose to exercise their rights. Preferred harvesting areas are often those that are accessible to ACFN members within certain limits of time and cost, and therefore often occur in proximity to where ACFN members live. Sustaining the meaningful exercise of rights, and ultimately the health and culture of ACFN families, in these areas requires sufficient quality and quantity of resources, including: tangible resources such as water, minerals⁸, timber, plants, fish, fur, small and large game animals, locations of cultural importance; and intangible resources such as cultural landscapes, and resources of traditional knowledge and learning.

With the exception of recently developed ACFN preliminary thresholds for water flows on the Athabasca River (see appendix 5), studies to determine levels or thresholds of quality and quantity for resources required to protect Treaty and aboriginal rights are not yet available due to a current lack of technical and financial resources on the part of ACFN. Again, we note the lack of response from the GoA regarding fund the TRUP (see Appendix 2). While co-management, through shared planning and decision making, offers an opportunity to manage resources with consideration to treaty implications, it is only with more complete information on what is needed to sustain the exercise of ACFN's rights that land use planning will truly be effective.

4.3 Homeland Zones

The three ACFN Homeland Zones cover a total of approximately 2,723,200 hectares. These are the places where ACFN history, culture, and livelihood are most firmly rooted. They are places that are a living part of ACFN identity. As the population of the ACFN continues to rapidly grow, the resources needed to sustain the practice of rights will also increase. The Homeland Zones are the places that ACFN members are most likely to rely upon, and require priority access to, in the future. They include approximately 44% of the ACFN critical consultation area, and approximately 3.5% of the standard consultation area defined by Treaty No. 8.

"Homeland" is a profound concept to First Nations peoples, which "encompasses their personal and cultural identities, their histories, and their religions" (McCormack 1998: 27)⁹. There is not only a cultural connection, but also a familial and spiritual connection with place that is integral to one's identity as ACFN and Dene sùline. ACFN members consider the homelands sacred as they are necessary to the rights, identity, and ultimately, the cultural survival of ACFN. ACFN members, above all else, wish to protect these lands as sanctuaries for their current use and that of future generations.

⁸ Use of specific rocks and minerals, including bitumen, has always been an integral component of the ACFN economy. Archival accounts of collection, refinement, and use of oil sands bitumen by First Nations for transportation and construction (as waterproofing for canoes and other items), as well as trade in bitumen involving First Nations through the fur trade period, pre-date both Treaty No. 8, and the establishment of Canadian jurisdiction in the region.

⁹ McCormack, P. 1998. Native Homelands as Cultural Landscapes. In, Oakes, J., R. Riewe, K. Kinew, and E. Maloney [Eds.], *Sacred Lands: Aboriginal World Views, Claims and Conflicts*. Occasional Paper No. 43. Edmonton, Alberta: Canadian Circumpolar Institute, University of Alberta, pp. 25-31.

ACFN Advice to Alberta Regarding LARP

November 22, 2010

Each homeland area differs from the other in terms of the ecological and landscape patterns and processes, including abundance of various resources, that characterize it. It is important to note that while different ACFN families are associated with (i.e. occupy) particular homeland areas, individual members may use the characteristic resources of the other homeland areas as part of their overall patterns of land use. Thus, no one homeland zone can "replace" another in terms of utility for sustaining ACFN use. All are required as part of a connected system.

Large, contiguous areas, such as the homeland zones, are essential to past, present, and future ACFN practice of rights because of the wide ranging and dispersed nature of wildlife resources in the boreal, especially large ungulates such as moose, bison, and caribou, upon which much of ACFN's cultural practice and traditional economy depends. The importance of large areas within which livelihood can be practiced is likely to increase as a result of perceived contamination of waters by oil sands activities along the Athabasca drainage, which has largely eliminated ACFN opportunities for subsistence fishing, and which is resulting in ACFN members travelling further afield in search of 'clean' areas where game animals can be harvested with confidence.

While the homeland zones do not reflect the full extent of ACFN rights, and while mapped land use locations do not convey the depth and importance of cultural ties to these areas, the majority of ACFN's mapped land use values (72%, or more than 3500 separate mapped locations) are within the Homeland Zones. Thirty-nine percent of mapped land use values are located within *dz'ow'łze nene* (Jackfish Lake Homeland), 17% within *t'βnu nene* (Old Fort Point Homeland) and 15% within *k'es hochela nene* (Poplar Point Homeland). Detailed base data is maintained by the ACFN IRC and may be made available on an as needed basis in direct consultation with Crown and proponents.

4.3.1 *k'es hochela nene* (Poplar Point Homeland):

This homeland includes approximately 1,292,290 hectares of lands and waters critical to ACFN members, and particularly those families affiliated with the Poplar Point (IR Chipewyan 201G) and Point Brule (IR Chipewyan 201F) areas. It is an area that is critical to historic, current, and future ACFN practice of rights. It includes areas west of the Athabasca River to the Birch Mountains and east of the Athabasca River into Saskatchewan. East of the Athabasca River, the southern boundary of *k'es hochela nene* is defined by the Firebag River corridor (5km on either side of the Firebag River). The Firebag River is a critical use corridor, and demarcates what many ACFN members see as the boundary between where they are still able to practice their rights safely, and where industrial contamination and disturbance now makes it unsafe to subsist on the land. The importance of the Firebag area as a critical corridor of rights practice is highlighted by the density of ACFN land use values recorded (to date) along the river. One hundred thirty-five ACFN land use values, including critical hunting areas, camps, cultural/spiritual areas, trails, ACFN trap lines, and key wildlife and endangered Boreal Caribou habitat have been recorded within 5 km of the Firebag River. Seven hundred forty-seven land use values have been mapped within the *k'es hochela nene* homeland as a whole. West of the Athabasca River, the southern and western boundaries of this homeland are defined by core wood bison range extending south and west from the

area of Ronald Lakes, extending into the Birch Mountains. Bison from this area are relied upon heavily by ACFN members, and are especially critical to those families affiliated with the Poplar Point and Point Brule areas. Impacts to this area are being experienced as a result of recreational use of the area. As an area where ACFN rights can still be meaningfully practiced, the importance of the *k'es hochela nene* homeland is likely to increase as industrial effects continue to accumulate upstream along the Athabasca.

4.3.2 *dzô tuwßze nene (Jackfish Lake Homeland)*

This homeland includes approximately 463,435 hectares of lands and waters critical to ACFN members, and particularly those families affiliated with the Peace-Athabasca Delta (IR Chipewyan 201), Big Point (IR Chipewyan 201B), Jackfish Lake (Richardson Lake) and Jackfish Village areas (IR Chipewyan 201E). It includes the Athabasca River delta and Richardson Lake. To the south, along the Richardson River, it borders *k'es hochela nene*, and to the north along the Old Fort River, *t'ßnu nene*. It is an area that is critical to the historic, current, and future ACFN practice of rights. While this homeland is the smallest of the three, with more than 1900 mapped use sites it also has the highest concentration of documented ACFN use. Land use values mapped here include villages, cabins, and camp locations; cultural/spiritual areas; trapping areas; critical moose hunting, fishing, and other resource procurement sites; and land and water based transportation corridors. The density of recorded use is in part due to the ecological richness of the delta area, which supported particularly high levels of commercially important aquatic fur (beaver and muskrat) prior to impacts from damming of the Peace River (which dramatically reduced water levels in the delta and irreversibly impacted its ecology) and from oil sands (which ACFN members understand to contribute to low water levels, as well as pollution of the delta). The density of recorded sites is also due to the emphasis placed on the delta and nearby reserve areas during early ACFN mapping research. As this homeland is dominated by the delta, *dzô tuwßze nene* is especially sensitive to low water levels on the Athabasca River, and potential contamination from oil sands development. Large portions of the Athabasca delta, including Jackfish Lake itself, are now made inaccessible by low flows. As an area where ACFN rights can still be meaningfully practiced, the importance of this homeland is likely to increase as industrial effects continue to accumulate upstream along the Athabasca.

4.3.3 *t'ßnu nene (Old Fort Point Homeland)*

This homeland includes approximately 967,477 hectares of lands and waters critical to ACFN members, particularly those families affiliated with the Old Fort settlement (IR Chipewyan 201A), and the N22 trapping block area of Saskatchewan. *t'ßnu nene* includes areas north to Lake Athabasca, and south to the Old Fort River drainage. To the east, the boundary of this homeland is defined by the legal bounds of the N22 trapping block, an area used extensively by ACFN families for trapping and other subsistence practices. With 860 mapped ACFN use values, this homeland includes villages, cabins, important trail networks, cultural/spiritual areas, fishing and resource procurement

ACFN Advice to Alberta Regarding LARP

November 22, 2010

areas, and critical habitat for woodland caribou, moose, and fur bearing animals. As an area where ACFN rights can still be meaningfully practiced, the importance of this homeland, like the others, is likely to increase as industrial effects continue to accumulate upstream along the Athabasca.

4.4 Proximate Zones

The three ACFN Proximate Zones cover a total of approximately 2,236,800 hectares of land and water that are particularly important for ACFN members who cannot easily access the homeland zones. While not necessarily "prime" lands in terms of quantity and quality of resources, proximate zones are critical for providing ACFN members living away from the homelands, with accessible areas for harvesting resources and reconnecting with the land. For those members, the Proximate Zones are important not only based on where they live, but because financial, time and other constraints may prevent them from exercising their rights in the Homeland Zone on a regular basis.

Because they are more readily accessible (in terms of distance from settlement and because specialized equipment, for example, boats and snowmobiles are not required to access much of them), and may not necessarily be the most productive lands, competition for available resources in the proximate zones is high. As proximate zones become increasingly polluted and impacted by oil sands development, ACFN use may shift to other areas where constraints of travel time and expense allow, however, with each removal of lands or reduction in tangible resources, competition increases, costs increase, opportunities for transmission of knowledge are lost, and the number of ACFN members who no longer feeling able to practice their rights as frequently as they would like, or at all, increases.

4.4.1 Fort Chipewyan Proximate Zone

This proximate zone includes approximately 423,525 hectares of lands and waters historically and currently relied upon by the majority of ACFN members who live in and around the Fort Chipewyan settlement. It includes much of Lake Athabasca, its islands, and its northern shore extending approximately 20km inland and east beyond the border with Saskatchewan. In addition to areas accessible by road from Fort Chipewyan, this proximate zone includes large areas of the 'North Shore' accessible only by boat, and is defined by ACFN trap lines, camps, cabins, trails, hunting, fishing and resource procurement areas, habitat areas used historically by barren ground caribou, as well as other species, and cultural/spiritual areas. The northern and eastern bounds of this proximate zone should be reconsidered as additional information becomes available.

4.4.2 Fort McKay Proximate Zone

This proximate zone includes approximately 476,880 hectares of lands and waters historically and currently relied upon by ACFN members living in and around the Fort McKay settlement, or in Fort McMurray. Strong family connections with the Fort McKay First Nation have resulted in a number of ACFN members, many of them members of families affiliated with Point Brule, Poplar Point, and *k'es hochela nene* (Poplar Point Homeland), living and practicing within this zone. This proximate zone includes areas

east and west of the Athabasca River, extending in the west to the area of Gardiner Lakes, and east to the Firebag River and is generally accessible by road from Fort McKay or Fort McMurray.

Because of impacts including restricted and gated access to areas controlled by oil sands companies, traffic, disturbance, and perceived pollution, since the late 1990's, many ACFN members have begun avoiding large portions of this proximate zone for the practice of rights, including subsistence rights. The area includes important ACFN trap lines, camps, cabins, trails, hunting, fishing and resource procurement areas, habitat areas used historically by bison and woodland caribou, as well as other species, and cultural/spiritual areas. Despite such adverse impacts, practice of ACFN rights in this zone by some members remains strong. However, available evidence suggests that adverse effects from oil sands has already reached a threshold where many ACFN members feel that harvesting of resources such as fish, moose, or medicinal plants is no longer safe throughout much of this zone. As a result, several ACFN members who relied upon the Fort McKay proximate zone up to recent years now must travel further (north of the Firebag river, or south to the Fort McMurray proximate zone) in order to practice their rights, or alternately, are not able to practice their rights due to the elimination of opportunities formerly relied upon. It is likely that, if not for impacts from oil sands, the Fort McKay proximate zone, and the Fort McMurray proximate zone, would be contiguous.

4.4.3 Fort McMurray Proximate Zone:

This proximate zone includes approximately 1,336,400 hectares of lands and waters currently and increasingly relied upon by ACFN members living in and around Fort McMurray. Connections between ACFN families and those of other Fort McMurray area First Nations are strong and economic factors have resulted in an increasing percentage of ACFN membership living in the Fort McMurray area permanently or seasonally. Because of down-stream oil sands impacts north of Ft. McMurray, ACFN rights-based activities have in recent years extend upstream (south) generally following existing road networks accessed by highways 63, 69, and 881, including the Anzac area, to Conklin in the south, and extending to the west along the Athabasca River and west of Fort McMurray. This proximate zone, while outside the generally identified historical extent of ACFN traditional lands, is increasingly being accessed by ACFN members for subsistence resource procurement (hunting, berry picking, and related activities) and is increasingly preferred over road accessible areas north of Fort McMurray (including the Fort McKay proximate zone) because of greater perceived pollution and other impacts around the existing oil sands operations north of Fort McMurray. For ACFN members who access these areas, they do so because (in comparison to other areas affected by industrial development), there may still be places where exercise of those rights is possible. This should not be understood, however, as any overall comment or analysis by ACFN on the state of the environment or practice of rights in those southern areas. Often, where there is industrial development in various places, a choice to exercise

ACFN Advice to Alberta Regarding LARP

November 22, 2010

rights or attempts to do so in one place over another represents a choice between the "lesser of two evils" in terms of existing impacts.

4.5 Critical Waterway Zones

Critical waterway zones are identified within 5km of major streams and waterways that are important hunting, transportation and access zones and/or drinking water sources. These critical waterways include the Athabasca, Firebag, Maybelle, Old Fort, Richardson, and Clearwater rivers. The zones are intended to recognize the critical ecological role of rivers and associated riparian areas (see appendix 5), and to provide a buffer along major water ways where additional management procedures would be applied. ACFN recommends that within these zones, water quality and quantity should be carefully monitored and managed to maintain opportunities for the use of rivers in the practice of ACFN rights.

4.6 ACFN Recommendations for Management of Cultural Protection Zones

ACFN strongly recommends that GoA implement processes for deep consultation and accommodation, including co-management of lands and resources that are critical to the current and future practice of ACFN rights. Co-management, consisting of full participation and shared authorities in resource planning, management and decision-making, can be implemented as a spectrum from more to less involvement throughout LARP. The highest level of involvement must be in the ACFN Homelands.

Consistent with past proposals made by ACFN to the Crown regarding co-management of the Richardson Backcountry, ACFN wishes to work collaboratively with the Crown to establish a framework for co-management of its homelands so that appropriate and full consideration of ACFN rights can take place in planning and making decisions regarding resources and lands critical ACFN rights and culture. ACFN recommends that LARP should do the following in order to achieve the goals and principles of consideration of ACFN rights:

1. Homelands as Cultural Units for Co-management

Recognize the three ACFN homelands as cultural units for appropriate land, water, and air co-management and shared decision making within the Lower Athabasca Region.

2. Watershed Planning and Management for Critical Waterways

Establish and implement co-management arrangements with ACFN for shared watershed planning and cumulative effects management for the ACFN Critical Waterways.

3. Rights-based Cumulative Effects Management Framework

Establish and implement cumulative effects frameworks that include criteria, thresholds and measures for the current and future exercise of ACFN rights.

4. Sub-regional Planning Process

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).

5. Traditional Land and Resource Use Management Plan

Establish and adequately fund information collection activities to inform these processes, including development of a Traditional Lands and Resource Use Management Plan (TRUP) (see appendix 2).

6. Co-management Frameworks

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 of;

7. Protection of ACFN Rights that Depend on the Athabasca River

Recognize and implement the ACFN's recommendations regarding the Athabasca River Phase 2 Water Management Framework. These recommendations include establishing a Phase 2 Consultation and Accommodation Framework, and implementing ecosystem base flow (EBF), Aboriginal Base Flow (ABF), and Aboriginal Extreme Flow (EXF) thresholds for the Athabasca River (see appendix 5).

8. Community-based Monitoring

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 (including homelands, proximate zones, and critical waterway zones).
- b) May affect wide ranging species relied upon for cultural use.

9. ACFN Conservation Areas and No-Net Loss

Within 1 year of completing the final TRUMP:

- a) Establish ACFN Conservation Areas¹⁰ totalling at least 40% of the total area (including waters) of each of the three ACFN homeland zones. Conservation Areas would be intended to provide firm protection of lands and waters, in perpetuity, for the practice of ACFN rights. This may require buying-back leased

¹⁰ It is important to note that the conservation areas proposed in the Regional Advisory Council Vision document are not sufficient to fulfill this goal, as discussed below in Section 6.

ACFN Advice to Alberta Regarding LARP

November 22, 2010

- lands, and mechanisms that ensure the areas are not alterable except through ACFN prior informed consent;
- b) For lands outside of an ACFN Conservation Area, but within an ACFN homeland, 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. "Restoration" must include establishing sufficient quantity and quality of the tangible and intangible resources upon which the meaningful practice of rights depends; and,
 - c) For lands outside of an ACFN Conservation Areas, but within an ACFN homeland, establish a 'no-net increase' policy in relation to roads and linear developments (including seismic work) within each ACFN homeland.

10. LARP Review Process

Agree to a joint crown-ACFN process for funding, reviewing and adjusting LARP every five years or as otherwise agreed.

Section 5:

General ACFN comments on the RAC Vision Document

The following comments include general comments on the RAC Vision document by the ACFN. These comments are in addition to the Joint submission of ACFN, CPFN and MCFN detailing legal comments on the RAC vision document (the "Joint Submission") dated October 29, 2010 (see appendix 1).

5.1. Reconciliation Mandated by Section 35 of the *Constitution Act, 1982*

Within the RAC Vision, the economic imperative of oil sands development is clearly identified as the central and primary goal for the region. This characterization of the economy of the Lower Athabasca Region completely misses the fact that there is a valid and important *subsistence economy* in this region. The subsistence economy is fundamental to the well-being, health, diet and culture of aboriginal peoples in the region. The economic and cultural reality of the subsistence economy should be recognized and validated.

It is imperative that ACFN rights be considered and accommodated in any regional plan. As discussed in the Joint Submission, the RAC Vision document does not provide assurance that this can be achieved in LARP. ACFN wishes to emphasize this point, and has the following concerns with the RAC Vision document:

- No concrete means are provided for how the rights and livelihoods of Aboriginal peoples will be ensured into the future.
- The focus is on monitoring impacts on treaty rights and possibly compensating for rights infringements. Monitoring and compensation is not necessarily a reasonable approach when avoidance of infringement is possible.
- No analysis of possible impacts to Treaty rights that would result from implementation of RAC vision recommendations is provided. Nor is there an explanation of how impacts to Treaty rights have been assessed and considered in making the RAC recommendations.
- 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
- The existing baseline proposed in the LARP assumes a starting point of 2010. 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. Given the existing impacts, a 2010 baseline is not a sufficient baseline for understanding impacts to rights.
- The RAC document severely discounts and understates the relevance of Treaty rights. A good example is p. 3 where "aboriginal communities" are mentioned as one of several factors. The constitutional protection of treaty rights must be front and centre in this document.

6.2. Proper Consideration of Treaty Rights Requires Better Knowledge

Planning for the meaningful practice of rights in the Lower Athabasca Region requires that criteria, thresholds and indicators for the tangible and intangible resources that underlie the meaningful practice of rights are developed and incorporated into planning methods. A robust data set regarding ACFN cultural needs must be developed, including identification of a pre-Industrial baseline and future needs. ACFN has proposed a series of research plans for adequate information and studies to establish thresholds for maintaining underlying conditions necessary to the practice of rights in the region¹¹. Reference to the need for this research, or mechanisms to accomplish such research and incorporate it into planning, does not appear in the RAC Vision document.

While there is some support for community based monitoring within the RAC vision, the areas of study are largely limited to ecological parameters rather than the specific relationship to practice of constitutionally protected Treaty Rights. Further, the purpose and intent of data collection is not clear. This could result in research findings not being applied through follow-up actions and mitigations.

There needs to be a basis for this planning in thresholds, criteria and measures to assess impacts on First Nation rights. Despite written submissions by ACFN to RAC and Land Use Secretariat, the RAC Vision does not clearly contemplate the need to develop and consider rights-based thresholds for consideration in planning.

ACFN has recently completed a landmark study that demonstrates how rights-based thresholds can be identified and provides recommendations on how it can be applied in a cumulative effects management context. The Athabasca River is central to ACFN identity, culture and practice of rights. The ACFN study on knowledge and use of the Athabasca River (see appendix 5) illustrates how water quality and quantity has changed over time, and suggests rights-based thresholds. Other data sets and thresholds relevant to other aspects of ACFN's way of life need to be developed and considered in planning. LARP must include mechanisms to integrate rights-based thresholds, as they become available, into cumulative effects management, monitoring and regulatory processes. LARP must also explicitly state the need to develop these thresholds within a specified timeframe.

¹¹ In October 2008, ACFN submitted a Proposal for Co-management of Richardson Backcountry (see appendix 3), as a submission on the Land Use Framework. This proposal included a description of the research requirements needed to consider ACFN rights in planning. In April 2009, ACFN's initial submission on the LARP included the need to develop thresholds for the meaningful practice of rights and referenced the need for a traditional land and resource use plan. In July 2009, ACFN submitted a consultation proposal for the LARP that included a work plan for an ACFN-specific land use plan, which would develop information necessary for appropriate planning. In September 2010, ACFN submitted a detailed proposal for a Traditional Land and Resource Use Management Plan (see appendix 2).

5.3. A Moratorium on Future Approvals Until Knowledge Is Improved

A moratorium on all future oil sands projects should be considered until better knowledge (and resulting thresholds) regarding resources required to maintain the meaningful practice of rights is in place. Where this is not possible, a moratorium on development in 'homeland' areas, at least, should be implemented until adequate knowledge, and co-management frameworks, are in place (see appendices 6 and 7).

5.4. RAC Vision Must Give Confidence that Rights will be Sustained

The five land-use classifications that have been proposed in the RAC Vision document do not give any confidence that Treaty rights will be maintained or respected, even within conservation areas. In order to provide confidence that ACFN rights will be sustained, LARP should establish firm and precautionary caps on the pace and scale of development. Currently, there is no mention of pace and scale of development within LARP, other than the cap that suggests oil sands extraction cannot disturb more than 15% of the mixed-use areas. We recommend that this figure is simply too high, given that:

- It represents a tripling of what is currently being disturbed in these regions. ACFN is already experiencing significant impacts to the ability of members to practice treaty rights. Development in some areas is already reaching, or breaching, a threshold beyond which members cannot practice rights. Tripling development will only make this worse.
- This figure only includes oil sands development. The land disturbance threshold should account for cumulative impacts of all industry.
- There should be consideration given to sequencing the pace of development over time.
- The mixed use area represents a massive area. It is possible to imagine that 15% of the extraction could be localized in the homeland of one family, wiping out their collective land base, culture and collective memory. We have been consistently requesting constraints on development in parts of our Traditional Lands¹², and continue to do so. As such, ACFN recommends that the application of any land development thresholds occur at a sub-regional level in the LARP, rather than at the scale of the LARP planning area itself.
- Thresholds for treaty rights should be considered in developing additional caps based on air, water, and other resources.
- There seems to be an assumption that the exercise of Treaty Rights is compatible with some of the land uses designated in the classifications. This is not necessarily the case. As discussed earlier the meaningful practice of rights depends on sufficient quantity and quality of a number of tangible and intangible

¹² ACFN Submission to Alberta Sustainable Resource Development Regarding Consultation on the *Lower Athabasca Regional Plan*, April 16, 2009.

ACFN Advice to Alberta Regarding LARP

November 22, 2010

resources. These can be adversely impacted by a variety of land use activities including industrial use, recreational use, and even conservation.

- i. In the case of mixed use areas, many of these resources will be impacted by industrial development activities and cannot be restored through reclamation. Further analysis and application of requirements for sustaining or accommodating for Treaty rights in a "working" landscape is required.
- ii. In the case of recreation/tourism areas, ACFN rights have been adversely impacted by recreational uses. Impacts occur, for example, through vandalism, competition for traditional resources, direct conflict and threats on safety, and adverse effects to the spiritual and aesthetic experience of place that are important to identity and feelings of security. Further, restrictions that may be implemented to manage recreational use (e.g., recently proposed changes to Public Lands Act Regulations) may impact the ability of ACFN members to practice their rights. Therefore, recreational use is not necessarily compatible with ACFN use. Involvement of ACFN in planning and managing recreational use is absolutely necessary to ensure that such use can occur in a way that minimizes land use conflict and optimizes the possibilities for compatibility.
- iii. Conservation areas, as described in the RAC Vision document, are also not necessarily compatible with the exercise of Treaty rights. Any restrictions placed on ACFN hunting and use of conservation areas would be an infringement of rights. Through experiences with Wood Buffalo National Park and other conservation measures implemented unilaterally by the Crown in the past (e.g., hunting and trapping regulations), ACFN is very familiar that the creation of conservation measures by the Crown frequently results in alienation or elimination of livelihood rights.

5.5. Consultation on the RAC Document and on LARP has been Inadequate

LARP designations must proceed in step with negotiation and implementation of appropriate consultation and accommodation mechanisms with First Nations throughout their traditional lands, and across all LARP designations. In respect of lands and resources critical to sustaining the future practice of treaty rights, negotiated co-management frameworks may provide a formal basis for deep consultation and accommodation.

It is the view of ACFN that, to date, consultation on LARP development has not been meaningful. From the outset, ACFN has raised serious concerns with the LARP process, including the lack of meaningful consultation, and the structure and function of the RAC. Despite concerns, ACFN representatives met with RAC Chair on several occasions in 2009, as well as submitted letters directly to the RAC so that issues of concern to ACFN could be considered in the RAC process. The RAC Vision document does not demonstrate how the issues of ACFN concern were considered in the process. This may stem from the fact that no consultation was required at key points in the RAC process, especially at the terms of reference (or "scoping") stage and on Cabinet's guidance to RAC. We wish to reiterate the point that GoA

confirmed on several occasions that Roy Vermillion, a Treaty 8 RAC representative, was not on RAC to represent individual First Nations or to carry out consultation on LARP on behalf of ACFN or any other First Nation. This is also made clear by the fact that on numerous occasions ACFN was denied access to critical RAC documents and discussions on the basis that such discussions and materials were "confidential."

The First Nations of the Lower Athabasca Region are more than stakeholders – they have unique constitutionally protected rights that must be considered and accommodated in planning and decision-making by the Crown. Our primary objective is to ensure that we have meaningful input into the development of the LARP, including input into the kinds of information that we feel are necessary to develop a credible land-use plan.

According to the LARP Terms of Reference, Cabinet was to provide guidance to RAC including such things as:

- General directions on priorities for the region;
- Specific policies that should be considered by the RAC;
- Qualitative and quantitative assumptions that the RAC should follow;
- Possible land-use conflicts that must be reconciled; and
- Key land-use questions on which Cabinet would like the RAC's advice.

ACFN was not consulted on this guidance, in particular on regional priorities, on assumptions, on land-use conflicts and on key land use questions. Consultation on strategic (guidance) aspects of the LARP is critical to developing a land use plan that considers First Nations issues, concerns and rights in a credible and meaningful way.

Because of a lack of resources sufficient to develop the necessary regional studies and thresholds, a lack of consideration of adverse impacts on treaty rights, and lack of dialogue on key issues of concern, it will be important to ensure that the approach to consultation on the LARP shift now to a more collaborative, mutually agreeable process. It will also be important that the LARP itself provide, at minimum, for the following:

- Co-management of lands and resources essential to the meaningful practice of rights;
- Mutually agreeable and reliable processes for consultation and accommodations;
- Rights-based cumulative effects thresholds for the tangible and intangible factors that underlie the exercise of treaty rights;
- A regulatory decision-making system that requires the analysis of rights-based impacts and has information and tools to do so.

ACFN Advice to Alberta Regarding LARP

November 22, 2010

ACFN has already communicated these expectations to GoA in other submissions.¹³

5.6. Reclamation Does Not Restore Rights

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. Where disturbance involves removal of landforms and where areas relied on for teaching are fundamentally altered or made inaccessible, then the cultural landscape is fundamentally and irrevocably changed through development. In these circumstances, permanent impacts to the cultural landscape cannot be mitigated through even the best and most sensitive reclamation techniques. Compensation and funding of cultural documentation and language retention programs, while important activities, are only partial mitigations for the loss of use of lands.

5.7. Without Concrete Mechanisms for the Incorporation and Use of Aboriginal Knowledge, there is No Basis for Trust, Transparency and Use of Data

Throughout the document, references are made to involving aboriginal peoples and their knowledge. It may be helpful in this document to refer to the *authorities* that represent aboriginal people. While municipalities are mentioned, aboriginal governance structures are rarely discussed. Each First Nation in the Lower Athabasca region has a Chief and Council that makes decisions on traditional lands, but there is often an institution within each administration for lands analysis, policy and traditional use. These institutions are deeply connected and accountable to their communities. The people in each of these organizations are a huge resource to the province in planning, and are critical to the successful implementation of this LARP vision. Reference to the appropriate structures of governance should be made.

As an example of this, on page 6, reference is made to "utilization of aboriginal knowledge, and involvement of aboriginal knowledge holders early on in the process." This example could lead LARP staff down the path of selectively involving people who they believe hold "aboriginal knowledge". This would potentially serve to exclude fundamentally the voices of youth, women, and other elders less well known to GoA. These vulnerable populations must be consulted, because it is they who are often most impacted by industrial development. Further, these populations may have quite different things to say. It is for this reason that we suggest that more specific language be used, potentially replacing the above noted statement with "the involvement of administrations representative of aboriginal peoples in Alberta, and

¹³ For example, see: ACFN October 2008 submission to Alberta Sustainable Resources Development regarding co-management of Richardson Backcountry; ACFN April 2009 submission to the Land Use Secretariat regarding consultation on LARP; ACFN, CPFN and MCFN October 2010 joint submission to the Regulatory Enhancement Task Force.

Involvement of the aboriginal knowledge of men, women, elders and youth, early in the process."

The process of sharing traditional knowledge follows strict protocols. It should be noted that the ACFN, along with many other First Nations, has a formal process to collect and use this knowledge and requires a TEK sharing agreement. The RAC Vision document provides no guidance on how aboriginal knowledge is to be incorporated into management plans, or how it is to be used together with scientific and socio-economic data. As stated earlier, without concrete means specified for implementing this information, research results may not be utilized in land use management, monitoring and decision-making. We recommend that the LARP define how data regarding the state of knowledge of fish and wildlife resources and the effective management of these resources is to be used to create a real commitment to respect treaty rights.

5.6. The Intent and Use of Conservation Zones is of Utmost Concern

The specific uses and intent of conservation zones is of specific concern to the ACFN. GoA continues to present the conservation areas network as the primary means by which to incorporate First Nations input and as spaces in which to meaningfully practice section 35 rights. As presented in the RAC document, the conservation areas might include multiple uses (tourism, recreation, and industry) that are not necessarily compatible with ACFN use. Further, the conservation areas represent a trade-off of rights that will be impacted outside of the conservation zone. There are no thresholds data on the minimum standards for practice of rights in which to base these assumptions that these uses can all co-exist. Nor do these trade-offs compensate for the loss of traditional territories to industrial development outside of the conservation areas.

ACFN recommends:

- Conservation Area implementation should only be legislated after mutually acceptable agreements have been reached on the co-management of all land use designations, including conservation areas, within ACFN Homeland Zones (these include Richardson Backcountry, see appendix 3), and Critical Waterway Zones.
- Protecting in the range of 40 percent of the Lower Athabasca region, as suggested by the Canadian Boreal Leadership Council.¹⁴
- Supporting the connectivity that has been proposed in the LARP which may enhance conservation effectiveness.
- That no development whatsoever can occur in conservation areas. This means that "Existing commitments" should be honoured only through Government buying back leases.
- Management of conservation areas must not be privatised.

¹⁴ See letter and recommendations on the Lower Athabasca Land Use Planning Region and Alberta's Boreal Region, submitted to Minister Mel Knight, May 6, 2010.

Section 6:

ACFN Technical Comments on Specific Sections of the LARP Draft Vision

In addition to the general comments made in section 5, above, the following comments are technical comments on specific sections and subsections of the RAC Vision document. These comments are in addition to those contained in the joint submission of ACFN, CPFN and MCFN on the RAC vision document dated October 29, 2010 (appendix 1). Numbering reflects that of the original RAC vision document.

1.2.1 Regional Planning Process

The RAC Vision document makes no reference to the need for consultation during the regional planning process. While there is a vague reference to the importance of "the integration of aboriginal traditional knowledge" into a "comprehensive planning process" (p. 3), there is no explanation provided on how this has been accomplished.

1.2.2 Key Components for Phase One of the Lower Athabasca Regional Plan

1.2.2.2. Land-use Classifications

The RAC Document designates five land-use classifications for the Lower Athabasca Region: agriculture, conservation, mixed-use resource, population centres, and recreation and tourism. There seems to be an assumption that First Nations use of the land for livelihood purposes can be accommodated within these five land-use classifications. There is no assurance provided that there will be adequate measures to protect and sustain First Nations use of the land within these land-use classifications.

On page 5 the RAC document mentions that management frameworks offer a "system for understanding priority values and how these values are affected by land use decisions". We agree that management frameworks are important; however, to make this credible for First Nations, the management frameworks must mention that constitutionally protected rights are a priority value to be considered and planned for in the LARP. Will GoA consider incorporating into LARP a management framework for protecting Section 35 rights? ACFN and MCFN have submitted a proposal to the Land Use Secretariat, Alberta Environment and Canada for developing such a management framework: the Traditional Land and Resource Use and Management Plan (appendix 2).

On page 6, reference is made for the need to utilize aboriginal knowledge, for appropriate consultation, for defining thresholds and precautionary triggers, etc. The ACFN has consistently proposed study of the thresholds that should be used for planning in order to adequately consider the fundamental rights to pursue aboriginal livelihoods. The need for thresholds for livelihood rights should be explicitly acknowledged here. Precautionary triggers are an excellent idea, and we recommend they be collectively developed based on aboriginal and western science. ACFN has requested that AENV engage in a collaborative, and adequately funded,

Thresholds and triggers should be developed for the human environment, as well as for air, water and biodiversity. While developing sociocultural and wellness indicators can be challenging, the people of this region are vulnerable, and human development should be as carefully monitored and tracked. So for example, language retention, housing indicators, and other fundamental issues that relate to wellness and identity should be monitored as triggers to action. These thresholds and triggers must be developed in collaboration and consultation with First Nations.

Review, monitoring and reporting are necessary for a credible land use planning and management process; however, there needs to be reference again to the triggers that might generate action if something is going wrong. Monitoring without action is meaningless. This means that conversations in Alberta have to occur about what will happen when a threshold is surpassed. In this case, will mitigation funds be triggered? What actions will be taken?

Outcome 1: The economy of the region grows and diversifies

Objective 1.6: Increased participation of aboriginal peoples in the regional economy

We question why Strategy "f" is included under a section pertaining to increasing participation of aboriginal peoples in the regional economy. Strategy "f" would be more fitting under increasing participation of aboriginal peoples in land and resource use management and monitoring. As well, Strategy "f" should refer to *co-management* rather than *cooperative management*. Models of co-management in Canada are well established in several jurisdictions (NWT, Nunavut, and Quebec) and should be adapted to the Alberta context.

ACFN Advice to Alberta Regarding LARP

November 22, 2010

Outcome 2: Infrastructure and community development needs are anticipated, planned and provided effectively and efficiently

While there is mention of a new process to assess infrastructure, social and economic implications of major projects, assessments of cultural impacts and impacts to constitutionally protected rights must also be included. Further, meaningful involvement of aboriginal peoples in scoping, terms of reference and throughout the process must be at the core of this process.

This section also calls for stewardship plans. How can these plans and this involvement be secured in Alberta if industrial development of traditional lands overrides the objections of local communities? There should be stronger roles for the voices of the stewards, specifically the voices of First Nations who have traditional rights of stewardship responsibility to the land, including the option to co-manage the terms of development.

Outcome 3: Economy growth is achieved through integrity and respect for management systems

This section should include an objective pertaining to respect for constitutionally-protected livelihood rights. For example, in Objective 3.4 the Traditional Land and Resource Use requirements of First Nations are understood, assessed and monitored. Strategies to achieve such an objective could include:

- Conduct comprehensive cultural and social impact assessments for aboriginal peoples in the region;
- Conduct a comprehensive cumulative impact assessment of livelihood rights for aboriginal peoples in the region;
- Work with aboriginal peoples to develop traditional land and resource use and management plans;
- Develop an assessment process that supports locally controlled social, cultural and aboriginal rights and use impact assessment;
- In collaboration with aboriginal peoples, develop co-management systems to control the pace and scale of development;
- Include aboriginal representation on regulatory decision-making boards;
- Include an assessment of the adequacy of consultation in the public interest assessment of regulatory decision-making;

The importance of proper social and cultural impact assessments for evaluating impacts to livelihood rights and aboriginal community wellness cannot be overstated. These core areas of research have been undervalued and, to our knowledge, there has never been an adequate social, cultural or cumulative impact assessment done for aboriginal peoples in this region.

Objective 3.1: The environment's natural processes and natural resources are understood, respected and cared for

Strategy "a" must include reference to cumulative impacts.

Regarding strategy "f", (Promote the actions taken by industry and business to minimize environmental impacts) we do not understand what is meant by this strategy or how it contributes to understanding, respecting and caring for the environment's natural processes and natural resources? Stewardship at all levels of society should be promoted.

Objective 3.2: Land, air, water and biodiversity are monitored and reported.

This section needs to include data from traditional use and rights studies, so that thresholds for rights practice can be established. In addition, once these thresholds are established, measures for if these thresholds are surpassed must be proactively identified.

In respect of strategy "e", please replace "assess the effectiveness" with "support the effectiveness of a community based monitoring program."

Objective 3.3 Multi-stakeholder groups contribute meaningfully to the overall responsible development of the region.

Strategy "a" is an example of the focus on multi-stakeholder groups and associations and the vague category of "aboriginal peoples". Again, we reiterate, that aboriginal peoples are not just another type of stakeholder group. The constitutionally protected rights of aboriginal peoples require priority consideration in planning and decision-making.

Instead of including this vague category, please add another strategy as follows: "Strengthen the involvement of regional and local levels of aboriginal governance."

Objective 4.1 Landscapes are managed to maintain and enhance ecological integrity and human health.

Strategy "c" requires a reduction of the 15%, as we have described earlier in our overall discussion. The figure needs to be reduced, as the current pace and scale of development is already causing severe impacts to ACFN member's ability to live off of the land. Development limits must ensure that no one aboriginal traditional territory will suffer an unjust burden of the 15%. Application of land development thresholds at a sub-regional level, rather than at the scale of the LARP planning area, should be considered. Further, all development zones should be included in this, and there should be limits on all kinds of development that is inclusive of cumulative impacts, not just oil sands extraction.

Strategy "i" should include develop and "implement" appropriate mitigation/mitigation strategies. In addition, while the recommendation to include aboriginal knowledge is generally a good idea, it will only work if there are regulatory changes to require incorporation of knowledge at an early point in project development, as well as funds and capacity. There needs to be moratoriums on development in areas where this knowledge is not already apparent or archived, or where knowledge is not sufficient or judged to be valid.

ACFN Advice to Alberta Regarding LARP

November 22, 2010

Objective 4.2: Disturbed land is reclaimed in a timely, progressive and aggressive manner.

ACFN believes that the reclamation section of the RAC vision document is fundamentally flawed. There must be intensive and meaningful co-management of reclamation, such that aboriginal people are stewards of this process. Indigenous science is central to recovery of disturbed ecosystems, and large scale research must be proactively conducted on how reclamation can be done consistent with inclusion of Indigenous science.

Objective 4.3: Regional biodiversity and ecosystem function is conserved and enhanced.

There needs to be more specificity in how aboriginal people will be involved in conservation and enhancement of biodiversity needs. How and when would this be achieved under LARP?

Outcome 5: The integrity of air and water are managed through responsible stewardship

There should be penalties associated with any breaches of thresholds that are agreed upon for air quality, water quality and quantity. Mutually agreeable mechanisms must be established so that First Nations who suffer impacts as a result of breaches to thresholds are compensated.

Objective 5.2: Water quality and quantity is managed to enhance and maintain ecological integrity and human health

Strategies should reference the thresholds for maintenance of livelihood rights, in particular the Athabasca River study recently completed by the ACFN and MCFN (see appendix 5). For example:

- Immediately implement Aboriginal Baseline Flow and Aboriginal Extreme Flow thresholds for the Athabasca River;
- Working collaboratively with aboriginal peoples to further understand and address water quality issues and concerns, including psychosocial factors, and resulting adverse effects on treaty and aboriginal rights, along the Athabasca river, delta, and adjoining tributaries; and,
- In consultation and collaboration with aboriginal peoples, establish a water use co-management board for Critical Waterway Zones.

Objective 6.3: Cultural diversity is valued.

This objective should include a strategy to: "support education in aboriginal languages and identity at the earliest levels."

Strategy "F" should include indigenous control over the place name records.

ACFN Advice to Alberta Regarding LARP

November 22, 2010

Objective 6.4: Significant historical resources are protected and historical themes are identified and developed.

The focus on "historical" resources and themes suggests that culture is something that is held in the past. This objective should be refocused on "culturally valued resources", which can include archaeological, historic, and ceremonial sites. Strategies to achieve this objective should include the management tools and guidelines for culturally valued resources.¹⁵

Strategy "b" should refocus on "culturally valued resources, including historic and ceremonial sites" rather than being limited to only historic and ceremonial sites.

Strategies should include developing legislative mechanisms and consultation processes to protect significant culturally valued areas and resources.

Outcome 7. Aboriginal people's rights, traditional uses and values are respected and reflected in planning

While many of the recommendations in this section are strong, they largely lack implementation mechanisms that will ensure that on-the-ground practice results in meaningful consideration of rights, uses and values. In current practice, economic priorities override all other priorities and are at the expense of the livelihood rights of aboriginal peoples in this region. How will implementation measures provide "teeth" and mechanisms to these strategies so that objectives are achieved?

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

As stated above, while the strategies have merit, without proper consideration of implementation, how will these strategies result in measurable changes in actual practice? For example First Nations are already working to improve the quality of information considered in planning process, for example, by providing information on planning, infrastructure and services in project specific TORs. In current practice, the recommendations and concerns of First Nation are largely ignored.

One way to address the implementation gap is to build formal roles for aboriginal peoples and demonstrate a strong commitment to consultation in the regulatory system.

Strategy "d" under objective 7.1 has merit only if there is some means of integrating information from First Nations land use plans in land and resource use assessment and decision-making. What opportunity will there be for the results of First Nations-specific land use plans to be considered and incorporated in LARP itself?

¹⁵ NWT Cultural Places Program. 2007. Living with the Land: A manual for documenting cultural landscapes in the Northwest Territories. Yellowknife, NT: Government of the Northwest Territories.

ACFN Advice to Alberta Regarding LARP

November 22, 2010

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

In order to assess and understand how to "balance" rights, adequate and credible information is required on what is needed to sustain the rights, and what the consequences of impacts to rights will be. ACFN and MCFN have proposed to develop such information through a Traditional Land and Resource Use Management Plan (TLRUMP). Almost all strategies identified under Objective 7.2 require the kind of detailed information that would be developed under a TLRUMP. Issues with inadequate consultation and engagement could be obviated by slowing down development and placing moratoriums on new applications until planning and research is done in critical areas.

Strategy "a" should not be limited to planning, assessment and monitoring but should also include "land and resource use decision-making".

Strategy "c" should acknowledge the thresholds that the TLRUMP will develop.

In Strategy "d" the wording "joint planning" should be replaced by "co-management."

In strategy "e", "Support" should be replaced by "sustain".

An additional strategy should be added based on Objective 4.1.1. in the Oil Sands Secretariat's policy document Responsible Action: "Work with First Nations to understand potential cumulative environmental impacts on rights and traditional uses in order to inform regional planning and consultation approaches."¹⁶

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

Strategy "a" should include "ensure" rather than "support".

In respect of strategy "b", it should be noted that commercial guide outfitting, recreational hunting and fishing, are not ordinarily traditional uses. Aboriginal traditional use has constitutional priority over those uses.

Outcome 8: Variety of recreation opportunities are available

These purposes should not conflict with the rights of aboriginal peoples to sustain themselves on the land. Currently, recreational use impacts tangible and intangible resources (e.g., safety, solitude, cultural sites) that are necessary to the meaningful practice of livelihood rights. ACFN members consistently express significant concerns about recreational land users and conflicts with ACFN use of lands and resources.

¹⁶ Oil Sands Secretariat. 2008. A Plan for Alberta's Oil Sands. .
http://www.treasuryboard.alberta.ca/docs/GOA_ResponsibleActions_web.pdf

ACFN Advice to Alberta Regarding LARP

November 22, 2010

Objective 8.1: Recreational opportunities meet the preferences of residents and tourists

Strategy "a" should say "Establish recreation and tourism areas to increase regional recreation and tourism opportunities that do not conflict with aboriginal rights."

Objective 8.2: Recreation areas are safe, sustainable and enjoyable

This should include a strategy for aboriginal co-management of planning, management and monitoring of recreational areas.

Land Use Classification System

The five land use classifications provided do not ensure that First Nations livelihood uses can be sustained or will be compatible with the classified land uses. The province should consider establishing a priority "Aboriginal livelihoods" classification.

Agriculture

While agriculture may be a primary use in the southern LAR area, the northern region does not have agriculture as a long term priority use. The long term use of this region has been for practice of aboriginal livelihoods and this should remain the priority use of this region. We suggest that this land use classification be established only for a southern sub-region under LARP coinciding with the current agricultural areas.

Conservation

The heart of this vision lies in promoting economic interests, not in balancing conservation or aboriginal rights to pursue a livelihood based in the land. There are very few tools identified for conservation, such as expropriation, easements, directives or stewardship units. These sorts of tools, and appropriate tools for the protection of aboriginal rights and engagement of aboriginal people and Indigenous science, must be made central to this plan and articulated at the outset.

The priorities for use are undermined by the fact that there is no mechanism to reduce oil and gas production, or other mineral development, in conservation areas. Instead the document suggests that "existing commitments will be honoured", suggesting that anything that is already leased to be developed, will be, and then turned into a conservation area once mined. These potential uses seem incompatible, particularly when it is remembered that First Nation use seems to be buried under conservation values within the RAC vision.

In some cases, conservation on its own may be incompatible with First Nation use. If conservation areas are expected to 'double' as primary areas for use by First Nations, then we can anticipate that there will be greater use pressures on them. This is likely to result in either a lack of sustainability in the practice of Treaty rights, or the regulation of First Nations use of these areas, resulting in unjustifiable limits on rights.

ACFN Advice to Alberta Regarding LARP

November 22, 2010

This raises the issue of whether or not proposed conservation areas contain sufficient lands to sustain aboriginal traditional use for all of the aboriginal groups in the LARP area. It is highly notable that no conservation areas are proposed in the mineable oil sands area. All conservation areas are at the "fringes" of the LARP area. Some First Nations traditional lands do not have any conservation areas specified at all. There may be increased hunting and use pressures on conservation areas that are more easily accessible, for example, those in Richardson Backcountry. These all pose significant challenges to the ability to maintain and exercise traditional Aboriginal rights.

The optimization of conservation areas selection cannot be done until a full consideration of the tangible and intangible resources that underlie the meaningful practice of rights is completed. Conservation areas that are devised without assessing the nature and structure of the treaty and aboriginal rights, or are governed in a manner inconsistent with cultural use, will not assure the continued ability to meaningfully practice Treaty and Aboriginal rights. For example, the "aboriginal use" referred to in Alberta's planning criteria cannot be properly assessed without considering the sociocultural, ecological and economic factors that are integral to the *practice* of the "aboriginal use." There is no guarantee that a conservation area, developed in absence of culturally appropriate information, will provide adequate opportunities for the land and resource uses of the multiple First Nations (and other Aboriginal peoples) in this region. Furthermore, the conservation areas network that may result from such a planning exercise does not accommodate for existing and future infringements to Treaty and Aboriginal rights and loss of land available for use elsewhere in the Lower Athabasca region. The conservation areas network itself is a compromise and a "trade off" of rights; however the LARP process does not incorporate measures or criteria to evaluate such trade-offs.

Recreation and tourism

ACFN concerns about recreation and tourism continue to be raised.¹⁷ Recreational use in the Richardson Backcountry and Poplar Point areas is already conflicting with ACFN members' traditional use. More consultation on these issues needs to be held.

Multi-use corridor overlay

Long-term infrastructure planning is an issue of special concern. These corridors will have long term consequences for ACFN current and future interests.

¹⁷ Regional Advisory Council Letter from ACFN, July 7, 2009 regarding meeting objectives and ACFN request for suspension.

APPENDIX "B"

ACFN Study Results from past research projects within the vicinity of the TransCanada Kearl Pipeline extension project



Athabasca Chipewyan
First Nation

1:300,000

0 2 4 6 8
Kilometres

Legend

- ◆ Cultural / Spiritual
- Environmental
- Habitation
- Subsistence
- Transportation
- Environmental
- Transportation
- Cultural / Spiritual
- Environmental
- Habitation
- Subsistence
- Transportation
- ACFN Core Preservation Area
- ACFN Proximate Zones

CONFIDENTIAL

the
firelight
group

This map is preliminary, based on available information and consultation of fire, budget and scope. This map is a living document and is intended to be updated and refined over time. It is not an expression of the views of Athabasca Chipewyan First Nation Aboriginal or Treaty rights and interests. The data used to produce this map originates from multiple sources and the presented without prejudice. This map is property of the Athabasca Chipewyan First Nation and may only be reproduced with written permission.

