

## Golden Opportunity to Address Cumulative Effects on Indigenous Rights in Alberta

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The 10-year review of the Lower Athabasca Regional Plan (**LARP**) must be commenced by September of 2022, or it will expire on its own terms.<sup>1</sup> The review of the LARP presents a significant opportunity to address critical issues that have arisen since the implementation of LARP in 2012 including the protection of biodiversity and species-at-risk, and the cumulative effects on the aboriginal and treaty rights of Indigenous communities. By addressing these issues, the landscape could be proactively managed to ensure healthy ecosystems, respect Indigenous rights and interests, and create the certainty needed to move forward with responsible development in the area.

### Biodiversity and Species-At-Risk

In 2008, the Government of Alberta announced a new land-use framework in a concerted effort to move away from piecemeal, project-by-project planning to a more comprehensive, regional-level approach. The land-use framework divides Alberta into seven regional areas based on the seven major watersheds in the province and aimed to manage the cumulative effects<sup>2</sup> on air, land, water, and biodiversity for each region using a scientific approach.<sup>3</sup>

Alberta's first regional plan - LARP - was released in 2012.<sup>4</sup> LARP called for several management frameworks to be put in place to manage the long-term cumulative effects of development on the environment in the region. Each management framework was to include scientifically-based ecological limits and triggers for key indicators,<sup>5</sup> an approach to monitoring, evaluating, and reporting results and an action plan to achieve the desired regional objectives.

To date, five environmental management frameworks have been developed for the Lower Athabasca Region: air quality, surface water quality, surface water quantity, groundwater and tailings. However,

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<sup>1</sup> Section 6 of the *Alberta Land Stewardship Act (ALSA)* requires the Secretariat to review each regional plan at least once every 10 years for its ongoing relevancy and effectiveness. If the review is not performed, the regional plan expires. It is not clear how or when the Land Use Secretariat intends to proceed with the review. As of June 15, 2022, there has been no announcement and there is no indication on the LARP webpage. This is surprising given the extensive time and effort that went into the development of LARP.

<sup>2</sup> Cumulative effects are defined in LARP as "[T]he combined effects of past, present and reasonably foreseeable land-use activities, over time, on the environment."

<sup>3</sup> The passing of the ALSA the following year provided the legislative framework and tools to implement the land-use framework. ALSA requires that all regulatory decisions in Alberta comply with its requirements and those of the regional land use plans created pursuant to it.

<sup>4</sup> The Lower Athabasca Region comprises a large section of northeastern Alberta covering approximately 9 million hectares. Forestry and energy development in the Athabasca and Cold Lake Oil Sands areas are the two dominant land-use activities.

<sup>5</sup> Limits established within the frameworks represent levels at which the risk of adverse effects on environmental quality is becoming unacceptable. These are clear boundaries in the system not to be exceeded. Triggers are set in advance of limits as early warning signals and support proactive management.

the Biodiversity Management Framework (**BMF**) has not yet been developed. The BMF was to identify key indicators and objectives and to describe monitoring and reporting requirements (including both species and habitats in terrestrial and aquatic ecosystems) that are affected by land-use in the Lower Athabasca Region.<sup>6</sup>

The failure to develop the BMF is a huge oversight given the alarming rate that animal and plant species that are disappearing worldwide.<sup>7</sup> The 10-year review of the LARP is an opportunity to address this oversight as well as to evaluate what management steps are needed to further protect biodiversity and the species-at-risk in the region. The woodland caribou, in particular, continue to decline despite concerted efforts to monitor and implement recovery strategies.<sup>8</sup>

The Alberta Biodiversity Monitoring Institute (**ABMI**) is in place and tracks changes in Alberta's biodiversity, land-cover and human footprint and provides ongoing and scientifically credible information for Alberta's land-use decision makers.<sup>9</sup> The ABMI's biodiversity information could be used to evaluate the status of the biodiversity in the region in relation to ecological triggers and limits established in LARP as well as to inform sustainable resource management.

### **Traditional Land Use Management Framework**

The LARP also recognized the importance of managing cumulative effects on air, water, land, and biodiversity is essential to meet the needs of Indigenous communities that hold constitutionally protected rights in the lower Athabasca area. However, to date, a Traditional Land Use (**TLU**) Management Framework to protect treaty rights and traditional land use has not yet been developed.

Indigenous communities in the area have long been trying to achieve better protection of their rights in the context of regional land-use planning. In 2013, LARP was criticized by several First Nations in the context of the Jackpine Mine Expansion project because it failed to include or protect aboriginal and treaty rights, traditional land use, culture, or the possibility of establishing areas that could be set aside for TLU and the exercise of aboriginal and treaty rights.<sup>10</sup>

In 2015, six First Nations in the Lower Athabasca Region requested a review of LARP under section 10 of ALSA arguing that their interests were not incorporated in the LARP in any meaningful way. The review panel found the First Nations to be directly and affected by the proposed implementation of the LARP and further that a TLU Management Framework was needed to recognize and honour the constitutionally protected rights of the Indigenous communities residing in the Lower Athabasca Region. Some progress was made in 2018 when the Government of Alberta announced five new or expanded wildlife provincial parks in northeast Alberta.<sup>11</sup> The new parks expanded the protection of the boreal forest and included important habitat for species-at-risk such as woodland caribou and wood bison, both

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<sup>6</sup> See Lower Athabasca Region Plan Strategies dated February 13, 2014 at <https://open.alberta.ca/dataset/0926637f-e18b-4878-931d-8c18249a27d3/resource/14f004b9-0e88-4d8c-8acf-5337549e0a91/download/2014-larp-factsheet-strategies-feb13-2014.pdf>

<sup>7</sup> Approximately 1 million animal and plant species are threatened with extinction – many within decades – according to the 2019 *Global Assessment Report on Biodiversity and Ecosystem Service*. See [https://ipbes.net/sites/default/files/2020/ipbes\\_global\\_assessment\\_report\\_summary\\_for\\_policymakers\\_en.pdf](https://ipbes.net/sites/default/files/2020/ipbes_global_assessment_report_summary_for_policymakers_en.pdf)

<sup>8</sup> See Caribou Monitoring Unit webpage at <https://cmu.abmi.ca/about/about-the-cmu/>

<sup>9</sup> ABMI has divided the province into 1,656 evenly spaced monitoring sites. Visiting approximately 330 sites each year, the entire province is surveyed once every five years.

<sup>10</sup> *Re Shell Canada Energy Jackpine Mine Expansion Project* (9 July 2013), [2013 ABAER 011](#).

<sup>11</sup> <https://www.albertaparks.ca/media/6494617/parks-larp-new-wpps-map.pdf>

of which are important species to Indigenous communities in the region. Co-management strategies with three First Nations in the area were also anticipated to better protect traditional land uses, cultural practices and treaty rights.<sup>12</sup>

In 2020, the Fort McKay First Nation (**FMFN**) launched an appeal of the decision of the Alberta Energy Regulator (**AER**) to approve the Rigel oil sands project, which would be located within 5 kilometres of the FMFN's Moose Lake Reserves.<sup>13</sup> The FMFN had been in negotiations with the Government of Alberta since 2003 to develop a Moose Lake Access Management Plan (**MLAMP**) to address the cumulative effects of oil sands development on the FMFN's Treaty 8 rights. The Alberta Court of Appeal found that the honour of the Crown necessitated the AER taking into account the effect of a project on Indigenous communities, which include the state of negotiations between the FMFN and the Crown. The MLAMP was published as a LARP subregional plan on February 8, 2021.

The 10-year review of LARP is an opportunity to move towards proactively protecting aboriginal and treaty rights and aligning with the United Nations Declaration of the Rights of Indigenous Peoples (**UNDRIP**) by acknowledging and respecting their traditional lands and by creating protected areas and buffer zones. Further, land-use management tools such as off-sets and restoration could be utilized to recover some of the damage already done.

### **Litigation regarding Cumulative Effects on Indigenous Treaty Rights**

The cumulative effects on aboriginal and treaty rights is an urgent and pressing concern arising all over Canada. In the 2021 decision *Yahey v British Columbia*,<sup>14</sup> the Blueberry River First Nation (**BRFN**) was successful in establishing that its Treaty 8 rights had been infringed by the intensive resource and industrial development in its traditional territory in northeast British Columbia. The court was clear that the government of British Columbia must manage cumulative impacts to ensure the meaningful exercise of treaty rights. The parties are now working together to ensure future authorizations, manage cumulative effects on land and wildlife, and their impact on the BRFN's treaty rights.

In Alberta, the Beaver Lake Cree Nation (**BLCN**) filed a similar lawsuit against the governments of Alberta and Canada in 2008 alleging that the cumulative effects from oil, gas, forestry, and mining activities violated the BLCN's Treaty 6 rights to hunt and fish. The litigation has been slow to advance partially due to BLCN's inability to cover its legal fees. In September 2019, Alberta's Court of Queen's Bench awarded a rare "advanced costs order", directing Alberta and Canada to each pay \$300,000 per year toward BLCN's legal fees until the case was concluded at trial. The Alberta Court of Appeal overturned this decision however BLCN has recently won its appeal to the Supreme Court of Canada where the Court clarified the legal test for advanced costs for a First Nation government.<sup>15</sup> The trial is currently scheduled for January 2024.

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<sup>12</sup> <https://www.fortmckay.com/news/northeast-alberta-first-nations-and-province-say-parks-announcement-heralds-new-era/>

<sup>13</sup> *Fort McKay First Nation v Prosper Petroleum Ltd*, [2020 ABCA 163 \(CanLII\)](#)

<sup>14</sup> [2021 BCSC 1287 \(CanLII\)](#).

<sup>15</sup> See *Anderson v Alberta*, [2022 SCC 6 \(CanLii\)](#). The Court has ordered a new hearing on advanced costs where the First Nation's finances will be assessed in relation to the legal requirement to establish impecuniosity. The BLCN may be able to meet this test if it can demonstrate that it requires its own resources to meet its pressing needs as understood by BLCN.

## **Why We All Lose if the Promise of Land-Use Planning Remains Unfulfilled**

There is no question that ALSA and the concept of regional land-use planning was a needed and welcome advancement to address cumulative effects on the landscape as well as to recognize aboriginal and treaty rights.

The problem is that without scientifically based ecological thresholds and clear protective areas built into the LARP, the promise of proactively managing the landscape to ensure healthy ecosystems and respect the constitutionally-protected rights of Indigenous communities remains largely unfulfilled. In turn, Indigenous communities are forced to resort to litigation to have their interests met and project proponents are held up by the requirement for piece-meal mitigation measures and delayed regulatory processes. Without clearly articulated rules of engagement, it is becoming increasingly difficult to move forward with responsible development in the region (particularly in light of recent net-zero and sustainability goals, and UNDRIP).

The 10-year review of LARP represents an opportunity to right these wrongs and to build a solid foundation on which to manage the cumulative impacts of energy and resource development in the Lower Athabasca Region for Indigenous communities and for present and future generations.