



FORT MCKAY

FIRST NATION

April 10, 2018

Deborah Schulte
House of Commons
Ottawa, Ontario K1A 0A6
Canada

Sent via e-mail: deb.schulte@parl.gc.ca; envi@parl.gc.ca

Re: Fort McKay First Nation Submission to the Standing Committee on Environment and Sustainable Development, Study of Bill C-69

Dear Madam Chair:

Thank you for allowing Fort McKay First Nation to present as a witness to the Standing Committee on April 17, 2018. We look forward to providing the Committee with our expertise, views and opinions on the Government of Canada's proposed legislation Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*.

We include with this letter a written brief to contribute to the Standing Committee's study. It is intended that this submission be considered in concert with Fort McKay's appearance as a witness.

Fort McKay is the most directly and adversely affected First Nation community surrounded by the oil sands industry. There are more than 20 large-scale industrial projects currently operating in Fort McKay's Traditional Territory. This includes nine oil sands mines, three upgraders, eight *in situ* oil sands projects, plus multiple roads, pipelines, transmission lines, quarries, and other land disturbances. Only one-third of those developments required an environmental assessment under the federal assessment process.¹

We believe there are real and fundamental changes that are necessary to achieve reconciliation with First Nations people in Canada. We anticipate that our submission will have a substantive and positive influence towards the creation of a robust impact assessment process.

We acknowledge the immense task the Standing Committee has before it to receive and review the testimony and submissions it will receive, and we commend you for your dedication to ensuring the

¹ Response to Environmental and Regulatory Reviews Discussion Paper, FMFN August 28, 2017.

development of an impact assessment process that works to improve the well-being of current and future generations.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Alvaro Pinto', with a long horizontal stroke extending to the right.

Alvaro Pinto, PhD.
Executive Director, Sustainability Department
Fort McKay First Nation

cc: George Arcand Jr., CEO, Fort McKay First Nation
Honourable Ed Fast, Vice Chair, Standing Committee on Environment and Sustainable Development
Linda Duncan, Vice Chair, Standing Committee on Environment and Sustainable Development
Thomas Bigelow, Procedural Clerk, Standing Committee on Environment and Sustainable Development
Mike Evans, Sr. Manager, Government Relations, Fort McKay First Nation
Bori Arrobo, Sr. Manager, Environment and Regulatory, Fort McKay First Nation



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**Brief to the Standing Committee of Environment and
Sustainable Development
Study of Bill C-69**

*An Act to enact the *Impact Assessment Act* and the
Canadian Energy Regulator Act, to amend the
Navigation Protection Act and to make consequential
amendments to other Acts*

April 10, 2018

Submitted via email to: envi@parl.gc.ca

1 Fort McKay First Nation

Fort McKay First Nation (Fort McKay) is a First Nation¹ community located in northeast Alberta. Fort McKay is an adherent to Treaty 8 and has nearly 830 members of Cree and Dene descent. The community's main residential settlement is at the epicenter of oil sands development, approximately 60km north of Fort McMurray.

Fort McKay's Traditional Territory comprises over 3.5 million hectares of land, including its Reserves 174, 174A, 174B, 174C and 174D, legal title for which is held by the federal government. Reserve lands account for 26,000 hectares and all five are hemmed in by oil sands leases. Fort McKay's Traditional Territory and Reserve lands are shown in the Appendix, Figure 1. Fort McKay members have used these lands for millennia; lands that are rich in the cultural heritage of the Fort McKay people.

Through Treaty 8, the Crown promised Fort McKay the *continuity* of its traditional patterns of activity and occupation, its "way of life", far into the future, including the use and enjoyment of its Reserve lands. These constitutional promises have been significantly undermined by intensive oil sands development throughout its Traditional Territory.

Oil sands development in the region has expanded rapidly since the 1960s; over 75 percent of Fort McKay's Traditional Territory has been leased by the Government of Alberta to the oil sands industry; 98 percent of traplines held by community members are within those leased areas and many have been irrevocably lost to oil sands development. Fort McKay's residential Reserves, 174 and 174D, are entirely surrounded by mining activity, and there are more than 20 large-scale industrial projects currently operating in its Traditional Territory. This includes nine oil sands mines, three upgraders, eight *in situ* oil sands projects, plus multiple roads, pipelines, transmission lines, quarries, and other land disturbances. The Alberta Energy Regulator has itself noted "[e]ight open-pit mines and three *in situ* oil sands mining operations are located within a 30 km radius of the center of the Fort McKay community, and more are being planned."² The maps in Figure 2, Figure 3, and Figure 4 in the Appendix show the dramatic expansion of oil sands development in Fort McKay's Traditional Territory.

While oil sands development has provided Fort McKay with important opportunities for economic self-sufficiency, it has also come at significant cost to lands to which members are deeply connected and that they believe must be protected to sustain their collective identity as a First Nation community.

Yes, the oil sands industry is important to both the national and provincial economies and Fort McKay has collaborated with both Alberta and project proponents to pursue sustainability. However, Fort McKay finds Canada is an absent party from efforts to advance reconciliation in the face of expanding oil sands development.

As the other signatory to Treaty 8, the federal Crown must actively meet its responsibilities to Indigenous people and their lands to advance reconciliation, ensure duties within exclusive federal jurisdiction – such as the protection of Reserve lands – are fulfilled, and guarantee that provincial or "local" interests are properly balanced with the need to protect s.35 Rights. Fort McKay submits its brief to the Standing Committee in this context, with the expectation that federal laws and commitments will prevail where necessary.

As Alberta's large-scale take up of lands in Fort McKay's Traditional Territory continues, Fort McKay values the commitment Canada has made to reconciliation and the protection of Treaty Rights and Reserve lands. Fort McKay shares Canada's desire to "protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations."³

¹Prior to the signing of Treaty 8 in 1899, Fort McKay First Nation was a sovereign nation; First Nations that signed Treaties have unique rights enshrined in the Constitution.

² <http://www.aer.ca/about-aer/spotlight-on/fort-mckay>.

³ Definition of Sustainability: <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/first-reading>.

2 Fort McKay First Nation's Participation to Develop Bill C-69

Fort McKay has participated extensively in all aspects of Canada's review of environmental legislation and regulations. It has written detailed submissions, made oral presentations and attending various First Nations engagement sessions. A summary of Fort McKay's participation can be found in Table 1 of the Appendix. Some federal funding was provided for this work, which marshalled considerable resources to provide meaningful input. Fort McKay was very optimistic after reviewing the report of the Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground, A New Vision for Impact Assessment in Canada* (April 2017). The Expert Panel made substantive and positive recommendations to improve the federal impact assessment process for all Canadians and to advance reconciliation with Indigenous people. The Expert Panel's review marked one of the very few occasions where Fort McKay felt heard and that its concerns were substantively addressed. Fort McKay was disappointed that many of the Expert Panel's recommendations were not incorporated into Bill C-69.

3 Summary of Concerns with Bill C-69

Fort McKay appreciates Canada's efforts to repeal and replace the *Canadian Environmental Assessment Act 2012* (CEAA 2012) with the *Impact Assessment Act*. Its pronouncements preceding the release of the draft Bill C-69 suggested Canada would give greater weight to First Nations engagement than it did in CEAA 2012. However, the federal government *has neglected* many of the Expert Panel's recommendations, made with significant First Nations input. Recommendations that would have ensured a robust Impact Assessment (IA) process are absent and leave much uncertainty regarding Canada's commitment to both adopt UNDRIP⁴ principles and its constitutional duties to First Nations people and their lands. Fort McKay contacted Environment and Climate Change Canada on several occasions to ask that the Expert Panel's recommendations be adopted, and for an explanation when its recommendations were declined, but nothing has been forthcoming to date.

3.1 Lack of Transparency in Response to the Expert Panel's Report

The Expert Panel's Report represented a marked change for Fort McKay in existing First Nations engagement on government decisions. Fort McKay felt heard, acknowledged and respected by a "decision-maker."

The Expert Panel identified *four fundamental principles* to govern IAs. The assessment process must be: i) transparent, ii) inclusive, iii) informative, and iv) meaningful.⁵ The Panel noted stakeholders were concerned about an environmental assessment process that took place "behind closed doors," in which decisions were often made without sufficient explanation and stakeholder concerns appeared to vanish. A lack of transparency has led to distrust in the IA process, and that distrust persists with the draft Bill C-69. Transparency is essential to the review of this proposed legislation. Canada must explain why it has rejected many of the Expert Panel's recommendations, particularly considering the extensive engagement efforts through which the recommendations were developed.

The Expert Panel's Terms of Reference⁶ identified two key goals: i) reflect the principles of UNDRIP "especially with respect to the way environmental assessment processes can be used to address potential impacts to potential or established Aboriginal and treaty rights"; and ii) "find ways to enhance Indigenous participation and consultation."⁷ These goals were specified in Minister McKenna's mandate letter. Fort McKay had hoped to see a greater emphasis on these matters in Bill C-69.

⁴ United Nations Declaration on the Rights of Indigenous Peoples, 2007
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

⁵ *Building Common Ground, A New Vision for Impact Assessment in Canada. (2017) Expert Panel Review of Environmental Assessment Processes*, pp.13-14

⁶ <http://eareview-examenee.ca/panels-terms-of-reference/> (Accessed April 3, 2018).

⁷ *Building Common Ground*, p.3

While reference is made to s.35 Rights and Indigenous governing bodies, lacking from CEEA 2012, Bill C-69 does not include the substantive recommendations of the Expert Panel with respect to First Nations people. The Expert Panel recognized that current practice does not sufficiently engage First Nations people and that the relationship of First Nations peoples to their traditional lands and waters is essential to achieve reconciliation and comply with UNDRIP principles. The Panel's report exemplified an inclusive and meaningful engagement that acknowledged and substantively addressed Indigenous peoples'. That progress is not reflected in Bill C-69. It is disappointing that the Panel's recommendations have faded away.

3.2 Substantive Concerns with Bill C-69

3.2.1 First Nations Government Participation in Decision-Making

Expert Panel's Recommendation: Indigenous Peoples be included in decision-making at all stages of IA, in accordance with their own laws and customs.⁸

Fort McKay applauds Bill C-69's acknowledgment of Indigenous jurisdictions in the IA process at s. 21 of the IAA. However, Bill C-69 puts historical Treaty First Nations at an express disadvantage with respect to exercising their inherent rights to self-government compared to those with modern treaties or title claims.

Section 2 limits jurisdiction to Indigenous government bodies or co-management bodies established under a land claim agreement or a law or regulation of the federal or provincial governments.⁹ Historical Treaty First Nations are not recognized to have broad jurisdiction over their own Reserve lands, let alone any 'jurisdiction' over Crown lands, the exploitation of which can significantly impact Reserve lands. Section 114(e) does not adequately address this, which depends on further regulation despite the Expert Panel's recommendation that:

Where Indigenous governments have assessment responsibilities, tri-partite arrangements should be negotiated for the conduct of regional or project assessment within their traditional territory, treaty settlement lands and/or Aboriginal title lands. Should Indigenous Groups without modern treaties wish to undertake their own IA processes, *they should be able to do so*, and co-operation arrangements with these Groups should be negotiated. Federal IA governance structures and processes *should support Indigenous jurisdiction* [emphasis added].¹⁰

Section 22 sets out the factors to be considered in an IA, including an assessment of "effects" conducted by or on behalf of an Indigenous governing body; however, there is no provision in the Bill for Canada to help First Nations build capacity to carry out such assessment. This is a significant omission and was explicitly addressed by the Expert Panel.¹¹ Further, impact assessment undertaken by or on behalf of an Indigenous governing body as 'one of many factors' is a far cry from cooperation.

Fort McKay's Experience

Development pressures surrounding Fort McKay's Reserves demonstrate the need for better legislated structures to enable cooperation with the Indigenous governing bodies of First Nation signatories to historical Treaties.

Fort McKay's residential Reserves are surrounded by nine oil sands mines and associated tailings ponds, which are enormous. Noise, light, industrial traffic and odours are sources of daily and significant stressors on the social, health, and mental well-being of the community. The breach of a single tailings pond would have devastating health and environmental impacts.¹² Initial federal approval of these mines occurred

⁸ *Building Common Ground*, p. 30.

⁹ <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/first-reading>.

¹⁰ *Building Common Ground*, p.25.

¹¹ *Ibid*, pp. 31-33.

¹² In 2017, the Pembina Institute estimated the aggregate volume of mature fine tailings at 1.3 trillion litres, enough to fill 400,000 Olympic-sized swimming pools. See <http://www.pembina.org/blog/tailings-ponds-worst-yet-come>.

without any express certainty whether technology could ever reclaim tailings¹³; at present, the pollutants they contain will persist for centuries and pose significant risk to water quality. In addition, closure and reclamation plans for tailings ponds alter the end landscape significantly from its original state and are not considered on a regional scale. Air emissions from these mines are known to frequently cause harmful air quality exceedances at Fort McKay's Reserves. It was not until 2016 that the Government of Alberta even acknowledged the air quality concerns of the community. Fort McKay's residential Reserves (174 and 174D) and culturally designated Reserves (174A and 174B) are shown in Figure 1 in the Appendix.

Fort McKay requested a federal environmental assessment of the recently proposed expansion of Syncrude's Mildred Lake mine, which would come within 7.5km of Fort McKay's residential Reserves. The request was declined. Several other mine expansions close to Fort McKay's Reserves are also planned and, unless expansion triggers are exceeded, no federal assessment will occur. Clearly, some jurisdiction regarding Traditional Territories being exploited for natural resources is required to protect Fort McKay's Reserves, and the principle will apply elsewhere in Canada.

Reserves 174A and 174B, collectively referred to by the community as the "Moose Lake Reserves," comprise the last remaining, relatively pristine Reserves lands in Fort McKay's Traditional Territory. In 2004, Canada and Fort McKay settled Fort McKay's 1987 Treaty Land Entitlement claim and the Moose Lake Reserves were expanded to promote cultural preservation. Cultural preservation and the transmission of traditional knowledge includes but is not limited to hunting, fishing, trapping and gathering on those Reserves and the surrounding lands.¹⁴

There are now 11 leaseholders for *in situ* developments within 10km of Fort McKay's Moose Lake Reserves (see Figure 6, Appendix). As *in situ* projects, these developments will escape federal review and Fort McKay has no mechanism to address their impacts other than to seek accommodation from the provincial government. Unfortunately, the Province says the federal government is responsible to protect Reserve lands impacted by development on provincial Crown lands. In the most recent example, Prosper Petroleum's own review of its *in situ* project planned to extend within 2km of the Moose Lake Reserves says it will reduce water levels at Namur Lake, the domestic water supply for the Moose Lake Reserves. Prosper also plans to withdraw water from the Ells River, which supplies Fort McKay's drinking water at its residential Reserves. None of water impacts have engaged federal environmental assessment despite Fort McKay's request to federal ministers to intervene. The federal government appears poised to exempt all *in situ* projects from federal IA. Indigenous jurisdiction, at least regarding *in situ* developments that border the sacred Moose Lake Reserves, is required to protect those lands and associated Treaty Rights.

Fort McKay Recommends:

- The *Impact Assessment Act* should be amended to require cooperation with -First Nations governing bodies regarding projects that could cause adverse effects to their Reserve lands.
- Section 14 of the *Impact Assessment Act* should be amended to establish a further process for Indigenous governing bodies with historical treaties to negotiate agreements with the federal government to assess activities on Crown lands that may impact Reserve lands or that may infringe on the Treaty Right to maintain the continuity of a way of life.
- The *Impact Assessment Act* should be amended to establish a program to provide long-term and ongoing capacity-building for Indigenous governing bodies to carry out IAs.

3.2.2 The Duty to Consult and Accommodate in the Impact Assessment Process

Expert Panel's Recommendation: any IA authority be designated an agent of the Crown and, through a collaborative process, thus be accountable for the duty to consult and accommodate, the conduct of consultation, and the adequacy of

¹³ Currently none of the mines within Fort McKay's Traditional Territory can meet AER Directive 085, *Fluid Tailings Management for Oil Sands Mining Projects*.

¹⁴ McCormack, Patricia. (2013). Research Report, The Treaty Rights of Fort McKay First Nation with Special Reference to the Moose Lake Area. Prepared for ERCB, Dover Commercial Project.

consultation. The fulfilment of this duty must occur under a collaborative framework developed in partnership with impacted Indigenous Groups.¹⁵

Section 12¹⁶ states the IAA must “offer” to consult with an Indigenous jurisdiction or group that may be affected by a proposed project. The IAA becomes responsible only to coordinate consultation, as outlined in s.155(b), and to engage with First Nations on policy development as per s.155(i); it does not empower the Agency to act as an agent of the Crown responsible for substantive consultation and accommodation as the Expert Panel recommended. This coordinating function is not consistent with Canada’s commitments to reconciliation or its Treaty obligations. Sections 14 and 15 shift the duty to consult to the proponent because, according to the draft legislation, the IAA must list the project-related issues related for the proponent’s response, but no process is indicated for the federal Crown to consult or accommodate affected Indigenous communities. Further, no process is established for the IAA to determine if an Indigenous community consents to a proposed project, which the Expert Panel recommended as the ideal goal of consultation.¹⁷

Section 22 identifies factors that must be accounted for in an IA, including impacts on Rights as identified in s.35 of the *Constitution Act 1982*. However, there is no reference to any requirement to determine whether the duty to consult and accommodation have been met or whether Indigenous groups have consented. There is no mechanism for the Crown to address issues the proponent is unable to mitigate or accommodate.

Project approval appears to remain a “political decision.” Indeed, s. 63 of Bill C-69 identifies factors to help determine the public interest, including adverse effects to Indigenous groups and their Rights. However, an approval does not appear to weigh heavily enough whether efforts to mitigate or accommodate impacts are reasonable or adequate.

Fort McKay Experience

The federal government has yet to accommodate Fort McKay despite the significant impacts to its Rights in the national economic interest. In October 2012, Fort McKay participated in the Shell Jackpine Mine expansion hearing and expressed its concern about the ever-increasing cumulative environmental, socio-economic and cultural impacts within its Traditional Territory and the lack of attention being paid by either senior government to impacts on Aboriginal and Treaty Rights.

The Joint Review Panel (JRP) found that Shell’s project, combined with other projects, is “likely to result in significant adverse cumulative effects on Aboriginal Traditional Land Use (TLU), rights and culture.”¹⁸ The Panel recommended that prior to issuing their approvals, both governments needed to evaluate if consultation was adequate or if further consultation was necessary. The Panel also found “the oil sands industry has contributed to the socioeconomic and cultural changes experienced by Fort McKay by affecting its land use, contributing to the avoidance and loss of use of traditional lands, and increasing its reliance on the wage economy.”¹⁹ It further recommended Fort McKay be more involved in “regional planning and the stewardship of the traditional resources” because “cultural changes can be mitigated when people have control over the changes experienced in their daily life.”²⁰

Fort McKay asked the hearing panel to recommend to Canada and Alberta that they work with Fort McKay to identify measurable mitigation and accommodation measures. The accommodation measures recommended were intended to ensure Fort McKay’s continued ability to use and enjoy land within its Traditional Territory and to address industry impacts on traditional uses, Rights and culture.

Fort McKay wrote to CEAA in August 2013 asking how Canada would address the impacts identified by the JRP and how CEAA viewed its responsibility to consult with Fort McKay to ensure mitigation and

¹⁵ *Building Common Ground*, p.3

¹⁶ <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/first-reading>.

¹⁷ *Building Common Ground*, p 68.

¹⁸ Report of the Joint Review Panel, Shell Canada Energy Jackpine Mine Expansion Project, Application to Amend Approval 9756 Fort McMurray Area, July 9, 2013, p. 295.

¹⁹ *Ibid*, p. 297.

²⁰ *Ibid*.

accommodation occurred.²¹ Fort McKay noted no representative of Canada with the authority or ability to promote impact mitigation or accommodation had met with Fort McKay. This is still true nearly five years later.

Canada responded to Fort McKay in October 2013, advising the Minister is required to take the JRP's report into consideration when determining in the likelihood of significant adverse environmental effects. The JRP concluded Shell's project would add to the regional effects of oil sands development and cause significant adverse effects on Fort McKay's TLU, Aboriginal and Treaty Rights, and culture; CEAA said it was "mindful" of the panel's findings that project-specific effects would not "fundamentally alter" the ability of Indigenous groups to pursue TLU or exercise of Rights. Instead, project effects, in *combination* with other existing projects, were the likely source of significant adverse cumulative effects. CEAA said it was not responsible to manage cumulative effects, saying Alberta would have to play the "central role in the mitigation and/or accommodation of impacts to Fort McKay's Rights, culture and traditional use."²² Alberta has frustrated Fort McKay on this precise subject for years. Canada's reliance on Alberta is an abdication of its duties to Indigenous people. The status quo forces Fort McKay to conclude that when negative impacts are incremental, *no one* is responsible, even when the cumulative impacts have dramatic consequences to the environment, culture, social structure, health, traditional economies and Rights of Indigenous peoples. It is hard to see how abdication fulfils the federal government's commitment to reconciliation.

We wait for Canada to demonstrate it will ensure impacts to First Nations peoples are assessed through the environmental, cultural, social, health, and economic criteria it has identified. Equally, we expect the federal government and its agencies to commit they will not delegate the fiduciary responsibility to mitigate or accommodate direct and indirect impacts on Reserve lands to either the provinces or project proponents, without diligent follow up to ensure these are identified before the project is approved. An express reference to cumulative effects in Bill-C-69 without a corresponding requirement for the Crown to identify accommodation before projects are approved will not ameliorate our concerns.

Fort McKay Recommends:

- The new IAA should be empowered to act as an Agent of the Crown responsible to First Nations people for the duty to consult and be accountable for substantive accommodation before projects are approved.
- The *Impact Assessment Act* should clearly indicate how development impacts will be addressed and acknowledge that mitigation and accommodation measures are not synonymous.
- Accommodation measures should be clear *prior* to any project approval and the absence of First Nations consent, considering concerns about adequate accommodation, should result in the delay or denial of the approval.
- Indigenous groups should be able to respond to consultation adequacy decisions by granting their consent. Fort McKay agrees with the Expert Panel that "the absence of appropriate accommodation measures should be deemed an acceptable reason for withholding of consent."²³

3.2.3 Projects that Should Require a Federal Impact Assessment

Expert Panel's Recommendation: The likelihood of consequential impacts on matters of federal interest should determine whether an IA would be required.²⁴

CEAA is currently consulting on a new project list that will identify projects designated by regulation – and, by omission, exempt projects. Canada's proposed regulations designate only projects that cause residual moderate or high impacts on federal *environmental* matters, which are defined not to include Indigenous peoples or Rights. Section 16 of Bill C-69 further gives the IAA discretion to decide if designated projects

²¹ Letter addressed to Carolyn Dunn, August 14, 2013 from Karla Buffalo, Fort McKay.

²² Letter addressed to Margaret Luker, October 23, 2013 Consultation for the Proposed Shell Jackpine Mine Expansion Project.

²³ *Building Common Ground*, p.64.

²⁴ *Ibid*, p. 21.

must undergo an IA. This is contrary to the Expert Panel's recommendation that *all* designated projects must undergo an IA.

Section 9(1) authorizes the Minister to designate an otherwise exempt project to complete an IA if "public concerns related to [its] effects warrant the designation." Section 9(2) says the Minister "must take into account any adverse impact that a physical activity may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act* 1982." Bill C-69 makes the requirement to complete an IA a political Ministerial decision rather than a decision of the IAA as recommended by the Expert Panel.

The Expert Panel highlighted that IA processes rooted in sustainability must focus on activities with potential impacts on matters of federal interest that are consequential to present and future generations.²⁵ Federal interests were considered broadly by the Expert Panel to include Indigenous people and associated lands. The Panel further defined consequential impacts as those that "affect *multiple matters of federal interest*, are of duration that will be *multi-generational*, and/or *extend beyond a project site in geographic extent* [emphasis added]."²⁶

Fort McKay Experience

Fort McKay commissioned a Cultural Impact Assessment (CIA) in 2015 to respond to concerns regarding changes to the environment and its way of life resulting from expanding industrial development in its Traditional Territory.²⁷ The study assessed cumulative impacts in the region, as well as project-specific impacts from the Teck Oil Sands Mine project. Fort McKay members said culture includes physical cultural sites, cultural practices, cultural landscapes, cultural values and well-being. Study results demonstrate that core cultural elements have been and will continue to be negatively impacted by industrial development. Members believe cultural impacts will lead to unacceptable change in the community.

Studies have concluded that oil sands development is the leading cause for the rapidly declining population of traditional wildlife resources, including moose and caribou. The boreal forest, on which members rely to meaningfully transmit traditional knowledge to the next generation, is highly fragmented and inaccessible due to oil sands development; worse, there is no technology proven to reclaim boreal muskeg or peatlands.

Fort McKay maintains its grave concern about projects that are implicitly exempt from IA under the current project list, particularly *in situ* projects. *In situ* projects elevate risks to the community. Ministerial discretion to designate projects will not resolve our concern. Fort McKay has asked on two occasions for *in situ* developments to be designated under CEAA 2012. One is located within two kilometres of the Moose Lake Reserves and proposes to use the drinking water source for Fort McKay's residential Reserve; the other proposes to use continuous commercial-scale solvent injection, the effects of which on groundwater sources are unknown. The Minister under both the current and previous governments has denied our requests.

Fort McKay Recommends:

- The Expert Panel's definition of "consequential impact" should be adopted, and a new project list created that would include *all* projects that are likely to adversely impact matters of "federal interest" with consequences for present and future generations.
- Remove Ministerial discretion for listed projects.
- "Federal interest" should at minimum include species-at-risk, fish, migratory birds, Indigenous peoples and lands, and watershed or airshed effects crossing Reserve boundaries.
- Refined IA triggers should include projects outside federal lands that affect the use and enjoyment of Reserve lands.
- Oil sands projects should not be exempted from the requirement to complete an IA until a federal regional assessment is completed in cooperation with Indigenous communities.

²⁵ *Building Common Ground*, p.3

²⁶ *Ibid*, p.21

²⁷ Integral Ecology Group Ltd. Fort McKay First Nation Cultural Impact Assessment Teck Frontier Oil Sands Project (2016). Project No. FMBTCI-15.

3.2.4 Federal versus Proponent- Driven Project Impact Assessment Process

Expert Panel: “[A]ll phases of project IA [should be] be conducted through a multi-party, in-person engagement process”; and “the outcome of the Planning Phase would be a conduct of assessment agreement.”²⁸

“Based on a prepared project design, the conduct of assessment agreement would finalize the factors for assessment, set out the sustainability framework, identify studies that need to be conducted, address the constitutional duty to consult, outline how the process will integrate procedural and legislative requirements of other jurisdictions, and provide details on IA timing and cost”; and “the studies outlined in the conduct of assessment agreement [should] be completed in the Study Phase. The IA authority would lead an assessment team accountable for preparing the Impact Statement, informed by these studies.”²⁹

Section 10 introduces moderate changes to the planning processes in CEAA 2012. The aim is still to determine the potential concerns with a project and how proponents will address those concerns when the IAA “screens” a project to determine if an IA is required. Fort McKay feels the planning phase remains a paper exercise. Defensible screening should require face-to-face interaction to inform the design of an IA, and/or identify accommodation measures early in the process, including the denial or relocation of a project entirely.

Section 18 allows the IAA to determine what studies are required to conduct the IA. Section 19 further makes the proponent responsible to provide information guiding which studies will be needed to complete the IA. This approach will continue to create skepticism about the independence of investigations undertaken to fulfill IA requirements. Nowhere in Bill-C-69 is accommodation required to be addressed at the IA stage.

The Expert Panel recommended substantive change to the way project-specific IAs were to be completed. Instead of the IAA determining what is “relevant” under s.14 – notwithstanding the requirement to include “issues that are raised by the public or by any jurisdiction or Indigenous group” – the IAA should coordinate parties and or specially-struck bodies that develop an Assessment Agreement together.

The Panel said legislative and regulatory changes are necessary to: ensure an open and inclusive process; create clarity of roles and responsibilities; eliminate lengthy information request processes; ensure a transparent consensus-based approach that seeks Indigenous consent.³⁰ Bill C-69 has not incorporated any of these recommendations.

Fort McKay Experience

Fort McKay’s experience with environmental assessment prompts concern about what studies are required to complete a impact assessment, and how proponents carry out those studies. These concerns are often raised at the beginning and carried throughout the consultation process without being addressed, thereby preventing opportunities for dialogue on meaningful mitigation or accommodation measures. Bill C-69 has not addressed these persistent concerns, whereas the Expert Panel identified ideal solutions to address them.

Fort McKay Recommends:

- The planning phase should be more robust to ensure sufficient studies are undertaken to ensure the sustainability of a project.
- The IAA should create project and government expert committees as outlined in the Expert Panel Report to identify potential impacts and assess those against sustainability criteria.
- IA should be led by a team of consultants and experts that operate independently and its members chosen through a collaborative process involving the two committees.
- The planning and study phases should include discussion of accommodation measures appropriate to the identified impacts on Aboriginal and Treaty Rights.

²⁸ *Building Common Ground*, p. 68

²⁹ *Ibid*, p. 5.

³⁰ *Building Common Ground*, p. 67

3.2.5 Post-Impact Assessment Process, Follow-Up Based on Outcome Conditions

Expert Report: “[D]ecision statements use outcome-based conditions that set clear and specific standards of performance” and “IA legislation contain a formal process to amend conditions.”³¹

Bill C-69 has not incorporated the Expert Panel's recommendations to adopt outcome-based conditions or formal review processes despite s.64 and the requirement to impose conditions to address effects and implement mitigation measures – which is already current practice. Section 64 does not mention accommodation.

Nor does s.64 require a project approval to include a “follow-up program” expected to “[verify] the accuracy of the impact assessment of a designated project and [determine] the effectiveness of any mitigated measure.” Sections 105(e) and 112(b) allude to designing and making public the details of follow-up programs associated with designated projects. Section 6(n) says follow-up programs are intended to encourage ongoing improvements to IAs. Finally, follow-up programs are assigned to IAA in s.75 to IAA. However, there is little detail in the legislation to explain the process to develop and implement a follow-up program or how to meet required mitigation and accommodation measures. Equally important, no formal process is established to amend approval conditions as may be determined necessary through a follow-up program. Outcome-based practices that are not adaptive are empty.

Fort McKay Experience

Except for the legacy companies, oil sands mines in Alberta were approved by Canada through CEEA's participation in provincially-convened hearings and contingent upon on-going research to prove tailings management and reclamation. Canada no longer regulates the operation and reclamation of these toxic impoundments, despite the significant and permanent impact of tailings on Fort McKay's Reserve lands.

There are nine mines around Fort McKay's residential Reserve. CNRL, Imperial and Syncrude, especially, all have tailings dams that pose significant risk to Fort McKay. Imperial admitted significant adverse effects to Fort McKay in the event of a breach at the Kearl tailings dam. Imperial's risk assessment model demonstrated risks that ranged from extreme water contamination to complete flooding and destruction of the community. Though Fort McKay presumes they exist, CNRL and Syncrude have never presented their tailings dam breach studies to Fort McKay. We have requested assistance from Alberta and specific companies to build capacity for emergency response, but not enough has been done to ensure Fort McKay is protected or adequately prepared for such emergencies. The federal government has been particularly absent in the protection Fort McKay and its lands from this ongoing significant risk. Fort McKay has borne a profound risk on behalf of all Canadians, presumably to advance the national interest. Clearly, Canada needs an ongoing, active role in the oil sands, and the Expert Panel's recommendations to improve the formal approval review process provide concrete solutions.

Fort McKay Recommends:

- Bill C-69 should establish a formal follow-up program to review changes in baseline environmental conditions and/or require outcome-based project plans with clear performance standards to ensure a project remains sustainable.
- Follow-up processes should be transparent and require strict measures that are monitored jointly through cooperative agreements between the federal government and Indigenous governing bodies.
- Follow-up should establish an accurate understanding of the effectiveness of the mitigation and accommodation measures adopted.
- Follow-up processes must support adaptive management and amendments to project approvals if monitoring results indicate change is necessary.
- A formal review process should be established to amend project approvals if necessary, including suspension of approvals if significant threat to Indigenous people and lands persist.

³¹ *Ibid*, p. 68.

3.2.6 Regional Assessments

Expert Panel: IA legislation require the use of strategic and regional IAs to guide project IA.³²

Section 93 of Bill C-69 grants unstructured discretionary powers to the Minister to conduct regional assessments in a region composed “in part of federal lands, or in a region entirely outside federal lands.” This discretion does not obligate the Minister to act on requests for a regional assessment. Fort McKay has limited faith in discretionary powers to prompt a regional assessment if such assessments did not occur under CEAA 2012, which set out similar discretion. By the definition of jurisdiction provided in s.93(a), Fort McKay, and other First Nations, is further constrained from entering into agreement with the Minister to conduct an assessment.

Section 157 requires the IAA to create expert committees to advise on “issues related to impact assessments, including scientific, environmental, health, social or economic issue.” The IAA does not specify similar support for the completion of regional assessments.

The Expert Panel recommended regional assessments are necessary to establish and assess baseline conditions incorporating cumulative impacts on matters of federal interest, including impacts to First Nations communities and their ability to exercise their constitutionally-protected Aboriginal and Treaty Rights.³³ The panel recommended that regional assessments be required on “federal lands or marine areas with the potential for cumulative impacts, and outside federal lands and marine areas where there is the potential for, or existing, cumulative impacts on many federal interests.”³⁴ As above, no one appears to be responsible under the current regulatory regime for existing cumulative impacts, let alone potential impacts.

Without a formal process or mandatory provisions that require a federal regional assessment, the baseline scientific measures they are expected to generate cannot inform project IAs, including cumulative impacts to Indigenous people and their lands.

Fort McKay Experience

The cumulative effects in the oil sands region are likely reaching, or may have exceeded, *environmental* and *cultural* thresholds; and there are no federal or provincial *regulatory* thresholds. Caribou are rapidly declining in the region, and Alberta's Biodiversity Monitoring Index indicates a deleterious shift in the predator-prey-predator relationship and a wide-scale ecosystem shift.

The Expert Panel suggests the Lower Athabasca Regional Plan (LARP) is a regional assessment. Fort McKay disagrees. LARP does not acknowledge the impact of industrial development on Aboriginal and Treaty Rights. It is incomplete and was not developed with reference to any baseline assessments. At best, it is a regional *land use* plan. Despite this, the federal government has relied on its erroneous interpretation of LARP to refuse Fort McKay's requests for federal assessment of specific projects.

The LARP *Review Panel Report 2015* identified Fort McKay as “the most severely affected of all the First Nations by oil sands development in the region ... which has in turn impacted their Traditional and Aboriginal rights.”³⁵ LARP was developed without meaningful consultation. LARP was *intended* to manage industrial development effects but projects continue to be approved without systems to acknowledge, understand, or manage cumulative effects arising from these approvals.

Fort McKay sees, instead, that LARP maximizes bitumen production and does not safeguard protected areas identified in the plan that are also in Fort McKay's Traditional Territory. Further, there is no evidence to support that the protected areas identified in LARP are sufficient to support wildlife populations. Figure 5 in

³² *Ibid*, p.22.

³³ *Ibid*, p. 76.

³⁴ *Ibid*, p. 79.

³⁵ LARP Review Panel Report, 2015.

<https://www.landuse.alberta.ca/LandUse%20Documents/Lower%20Athabasca%20Regional%20Plan%20Review%20Panel%20Recommendations%20-%202016-06.pdf>.

the Appendix is a map overlaying current Caribou Ranges on Fort McKay's Traditional Territory. Significant habitat fragmentation has occurred both within and between these ranges. Unfortunately, because projects are reviewed individually and limited to site-specific impacts, Alberta has been unable to protect important species such as caribou. None of the provincial populations are considered to be self-sustaining, and all have been in decline since 2001.³⁶ This inability to foresee major impacts to wildlife and wildlife habitat not only affects the biodiversity of the region but infringes upon Fort McKay's Aboriginal and Treaty Rights because members are no longer ensured a harvestable supply of traditional foods. This complacency challenges the Constitution. The federal government is absent while Alberta prioritizes industrial development over maintaining biodiversity and the protection of Aboriginal Rights.

Fort McKay Recommends:

- Bill C-69 should require the IAA to take active steps as a priority to conduct regional assessments where cumulative impacts on matters of federal interests occur, including -First Nations people and species-at-risk.

4 Summary

Fort McKay's cultural heritage and identity are inextricably connected to the natural resources and lands surrounding and connecting its Reserves. Traditional land uses have been integral to its identity through generations, but opportunities to practice Aboriginal and Treaty Rights are adversely impacted every day.

The provincial and federal governments are both obligated to protect Aboriginal Rights and act in accordance with the Honour of the Crown. The federal government must protect federal Reserve lands from provincial decision-making. Bill C-69 suggests improvements to CEAA 2012; however, there is still much room to advance reconciliation by respecting and protecting s. 35 Rights in the context of natural resource development.

The Expert Panel report made several recommendations to strengthen the IA process to foster reconciliation. Fort McKay maintains reconciliation requires Canada to resume a more active role in the oil sands region. Canada is an important party to the Treaties. Canada's practice of evidence-based IA is more rigorous than Alberta's and it has the resources to intervene to improve Alberta's relationship with Fort McKay, specifically, and other First Nations generally, to protect Treaty Rights.

³⁶ Environment Canada. *2012 Recovery Strategy for the Woodland Caribou (Rangifer tarandus caribou)*, Boreal population, in Canada. Species-at-risk Act Recovery Strategy Series. Environment Canada, Ottawa. Xi+ 138pp,

5 Appendix

Figure 1 Map of Fort McKay Traditional Territory and Reserve Lands

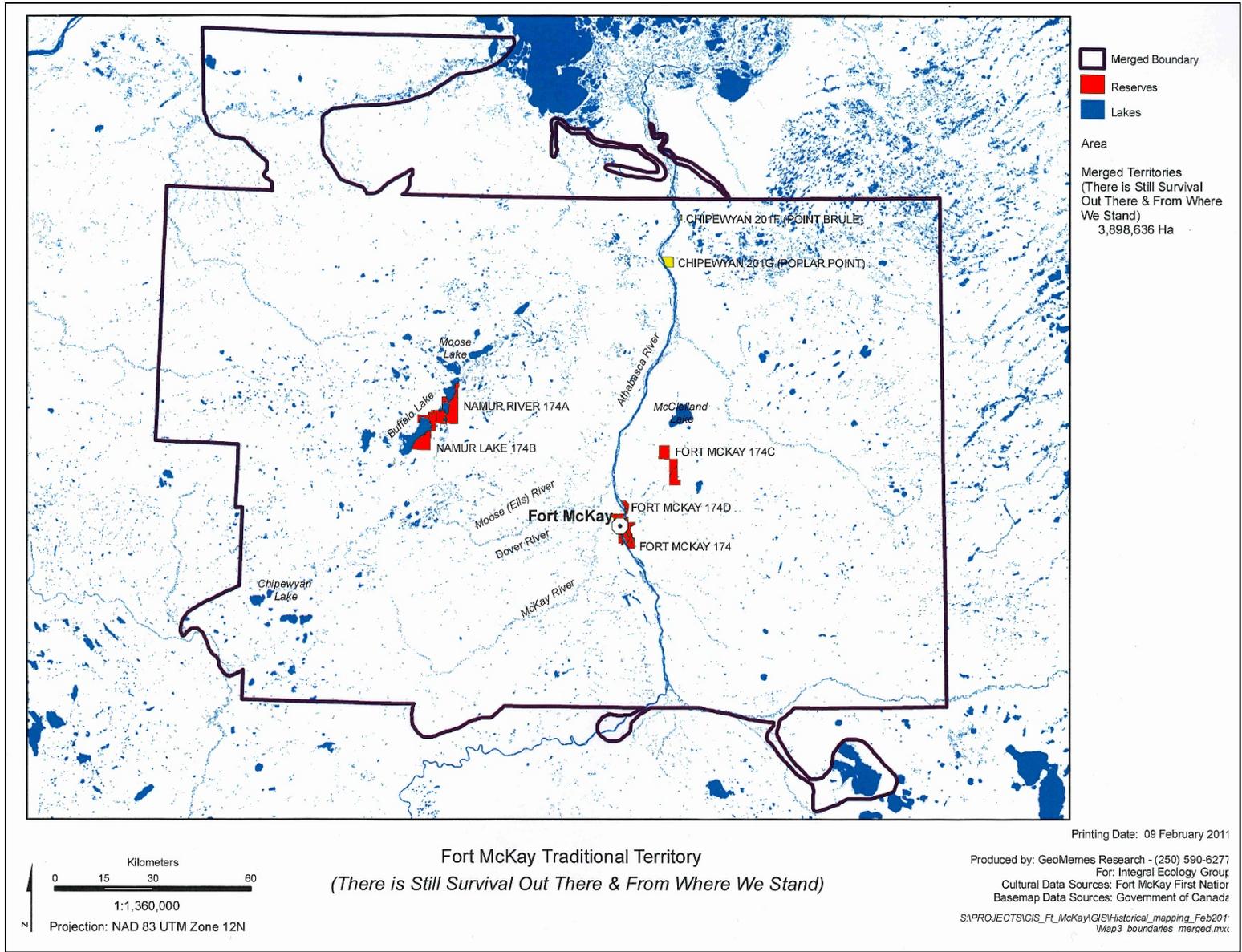


Figure 2 Rapid Expansion of Oil Sands Development in Fort McKay's Traditional Territory

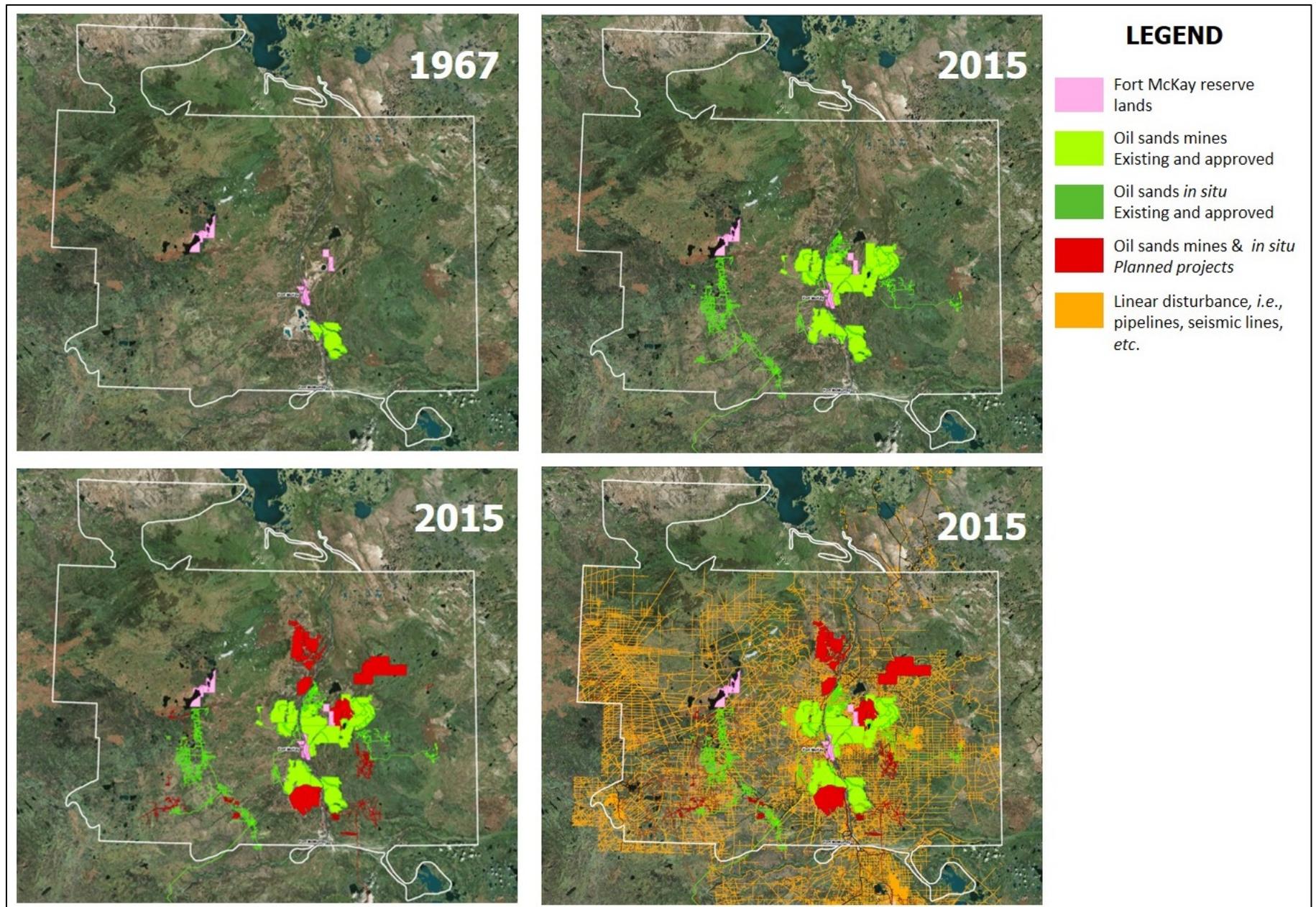


Figure 3 Existing and Approved Oil Sands Projects in FMFN Traditional Territory

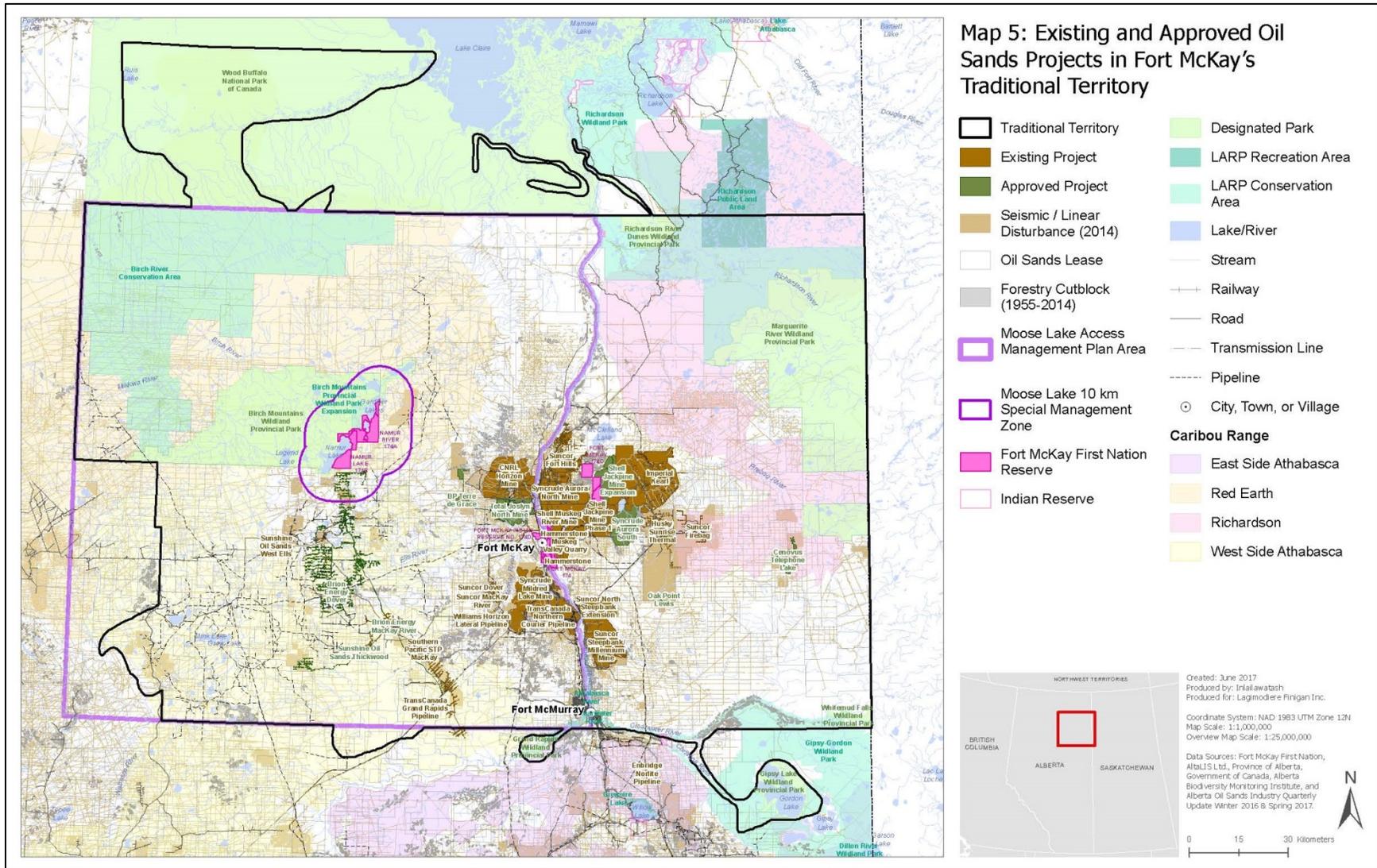


Figure 5 Caribou Ranges laid over Fort McKay's Traditional Territory and Oil Sands Leases

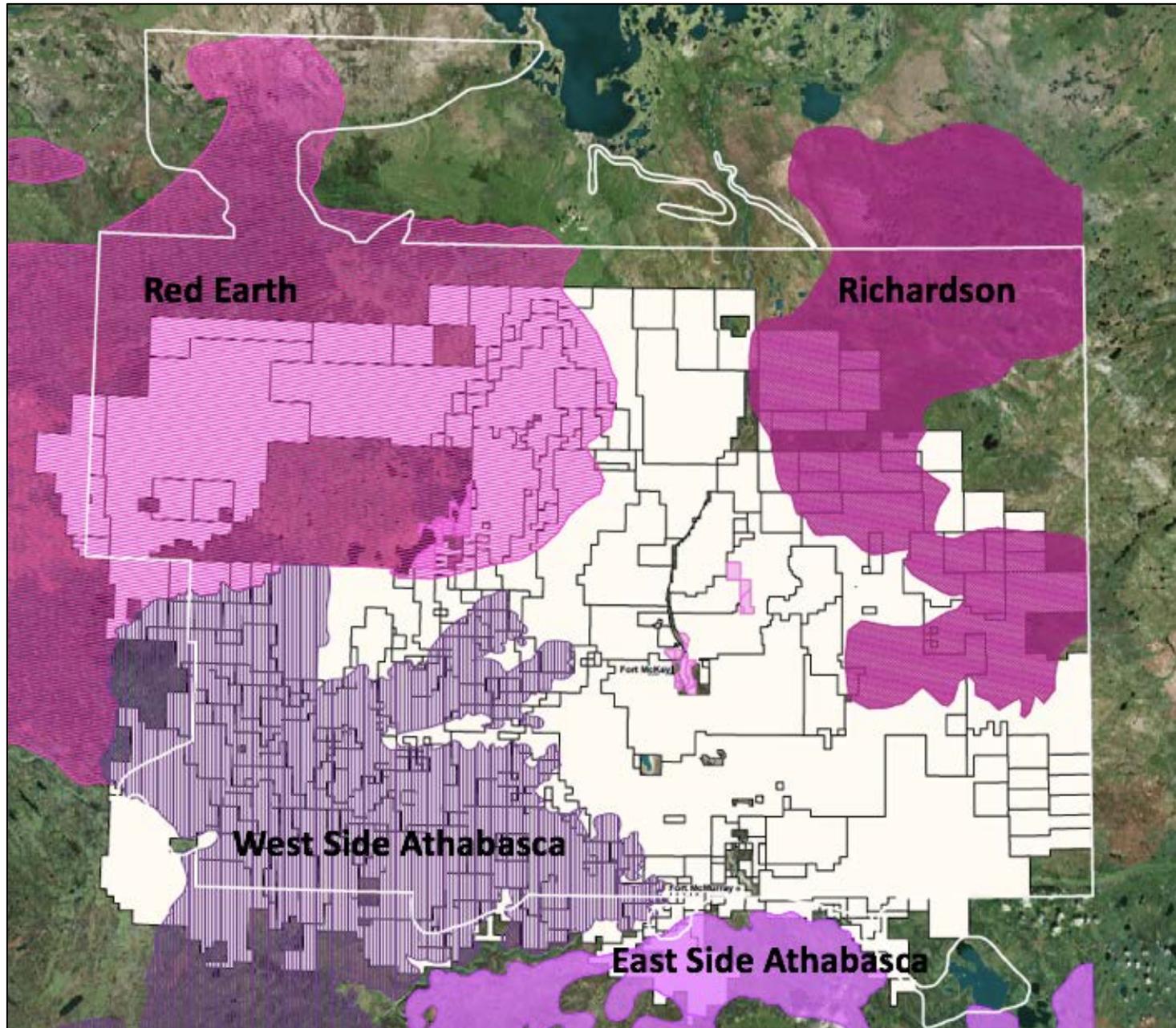


Figure 6 Oil Sands Leases in Proximity to Fort McKay's Moose Lake Reserves, 174A and 174B

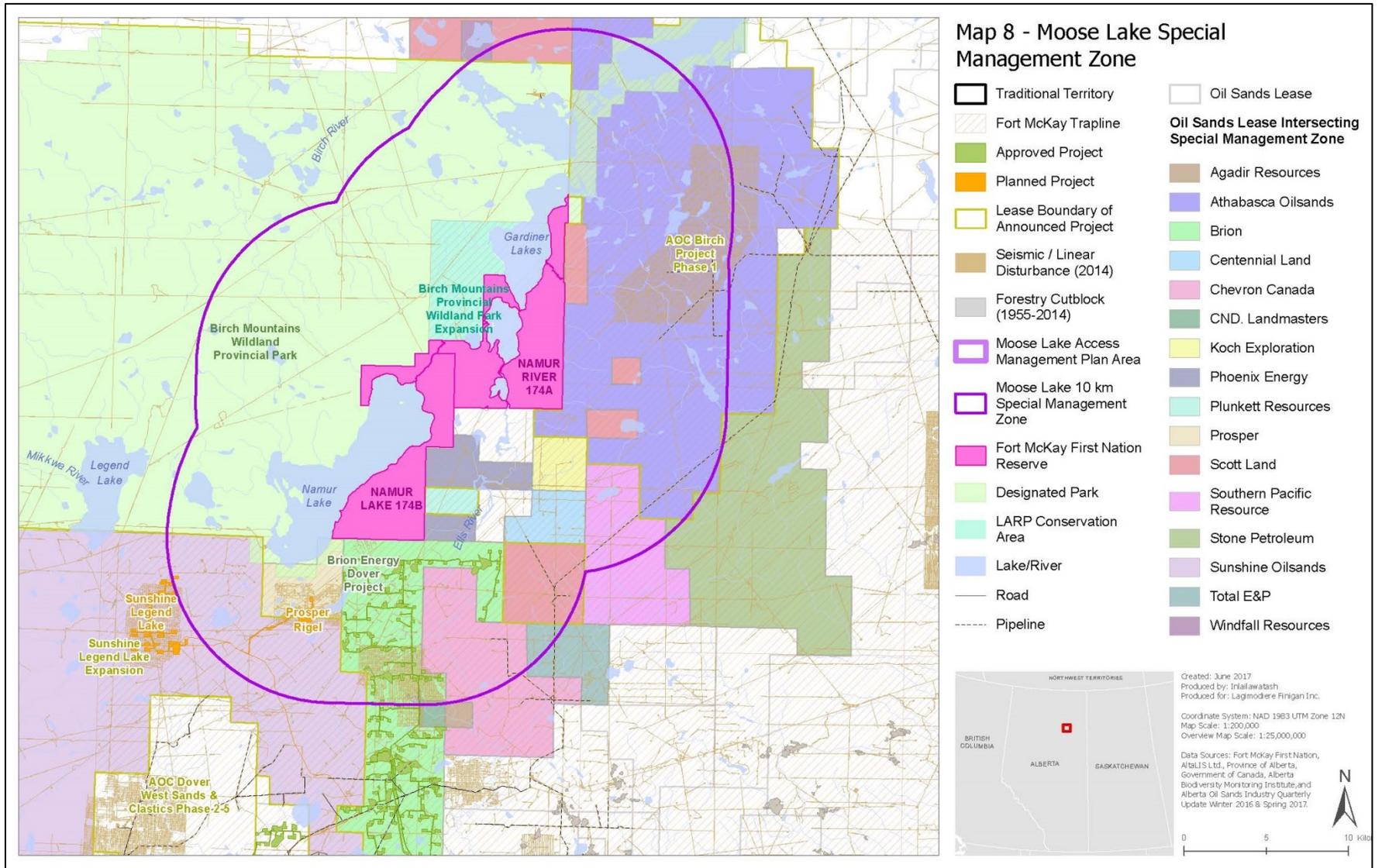


Table 1 Timeline of Fort McKay Submissions to the Government of Canada- Environmental and Regulator Reviews

November 24, 2016	Presentation to Expert Panel, Review of Environmental Process- Fort McMurray
November 30, 2016	Submission to Minister and Standing Committee on Fisheries and Oceans
November 30, 2016	Submission to Minister and Standing Committee on Transport, Infrastructure and Communities
December 16, 2016	Submission to Expert Panel Review of Environmental Assessment Process
March 30, 2017	Submission to Expert Panel, National Energy Board Modernization
May 1, 2017	Submission to the Honourable Marc Garneau, Minister of Transport Re: A Study of the Navigation Protections Act, Report of the Standing Committee on Transport, Infrastructure and Communities
May 5, 2017	Submission to the Honourable Catherine McKenna, Minister of Environment and Climate Change Canada Re: Expert Panel's Report- <i>Building Common Ground: A New Vision for Impact Assessment in Canada</i>
May 25, 2017	Fort McKay attended event hosted by Minister McKenna with Indigenous leaders regarding the Expert Panel Report.
June 12, 2017	Submission to the Honourable James Carr, Minister of Natural Resources Re: Report of the Expert Panel on the Modernization of the National Energy Board: <i>Forward, Together Enabling Canada's Clean, Safe, and Secure Energy Future</i>
August 15, 2017	Submission to the Honourable Dominic LeBlanc, Minister of Fisheries, Oceans and Canadian Coast Guard Re: Report of the Standing Committee on Fisheries and Oceans Review of Changes Made in 2012 to the Fisheries Act: <i>Enhancing the Protection of Fish and Fish Habitat and the Management of Canadian Fisheries</i>
August 28, 2017	Letter to Minister McKenna Re: Discussion Paper- Environmental and Regulator Reviews

*Fort McKay First Nation worked collectively with Fort McKay Metis (Local 63), Fort Chipewyan Metis (Local 125), Fort McMurray Metis (Local 1935) and Conklin Metis (Local 193) to provide input on the effects from 2012 changes to legislation.