

# FINAL ARGUMENT OF SMITH'S LANDING FIRST NATION TO THE JOINT REVIEW PANEL

ENVIRONMENTAL ASSESSMENT OF THE  
FRONTIER OIL SANDS MINE PROJECT

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First Nation  
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## A. INTRODUCTION

1. Smith's Landing First Nation (SLFN), the Tthebatthı Dënésułné, is a signatory of Treaty No. 8 and the descendants of the traditional Dënésułné of the Great Slave region. SLFN is a "band" within the meaning of the *Indian Act*.<sup>1</sup>
2. SLFN has used and occupied its traditional territory which expands from northern Alberta, including Wood Buffalo National Park (WBNP), northern Saskatchewan, northern Manitoba, the Northwest Territories (NWT) and southern Nunavut for generations. Present day members hold a strong connection to their traditional territory and continue to actively use the lands, waters, and resources in their "homeland" for cultural, traditional and spiritual purposes. Members of SLFN rely heavily on the Slave River which serves as the eastern border of WBNP.
3. Over the years, SLFN has experienced significant adverse downstream cumulative impacts on its Treaty rights from development activities and it has never been consulted by industry or the Crown on these impacts.
4. Teck Resources Limited (Teck) has filed an application with the Canadian Environmental Assessment Agency (Agency) and the Alberta Energy Regulator (AER) for approval of the Frontier Oil Sands Mine Project (Project) which includes the construction, operation and reclamation of an oil sands mine located approximately 110 kilometers north of Fort McMurray for the proposed lifetime of 41 years.
5. The proposed Project has the potential to cause devastating impacts on SLFN's ability to exercise its Treaty rights and interests, along with its ability to continue its cultural way of life and pass on traditional knowledge to future generations. SLFN's Treaty rights and interest have not been identified, considered and addressed by Teck's assessment of the Project. In fact, Teck has completely excluded SLFN from its environmental assessment.
6. SLFN presented oral evidence at the Joint Review Panel (JRP) hearing on October 3, 2018 in Fort McMurray on the potential impacts of the Project on SLFN which is summarized below. Despite the extensive evidence presented by SLFN, both Teck and the Alberta

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<sup>1</sup> *Indian Act*, RSC, 1985 c I-5.

Crown take the position that SLFN is not an Aboriginal group potentially affected by the Project and therefore, SLFN does not require consultation.

7. The purpose of this final argument is to ensure that the JRP understands the following:
  - a. SLFN has been impacted by past and present upstream oil sands development;
  - b. the Project has the potential to directly, indirectly, adversely and cumulatively impact SLFN's Treaty rights and interest; and
  - c. Teck has failed to assess impacts of the Project on SLFN.
  
8. SLFN's Project concerns are outlined below and SLFN takes the position that Teck's assessment is incomplete and lacks valuable traditional knowledge to accurately assess the impacts of the Project on potentially affected Aboriginal groups. Teck is not in a position to seek approval in the absence of information from SLFN and by extension, the JRP is not in a position to fulfill its mandate to consider the potential adverse effects that the Project may have on asserted or established Aboriginal or Treaty rights, and make recommendations to the federal Minister of Environment (Minister) regarding measures to mitigate any adverse effects of the Project on asserted or established Aboriginal or Treaty rights.

## **B. FACTORS TO BE CONSIDERED BY THE JOINT REVIEW PANEL**

9. The JRP is responsible for conducting an assessment of the environmental effects of Teck's proposed Project and prepare a report which will inform the Minister's decision on "whether the Project is likely to cause significant adverse environmental effects" and "whether those effects are justified in the circumstances."<sup>2</sup>
  
10. Teck is responsible for gathering sufficient information and analyze the information in a comprehensive manner to inform the JRP about the potential effects of the Project, including the potential effects on Aboriginal and Treaty rights. However, Teck failed to gather all necessary information on the potential impacts of the Project on SLFN's Treaty rights leaving glaring information gaps in its assessment.

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<sup>2</sup> *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19 [CEAA 2012], at s.52.

11. While it is not the responsibility of potentially effected Aboriginal groups to gather necessary information, SLFN requested consultation with Teck to ensure that Teck had sufficient information to assess the potential effects of the Project on SLFN's Treaty rights, including to invest in a SLFN-led Indigenous Knowledge Study to inform Teck's assessment. Teck declined to engage with SLFN.<sup>3</sup>

12. The assessment of the Project does not meet the requirements under the *Canadian Environmental Assessment Act, 2012*<sup>4</sup> (CEAA 2012), *Environmental Protection and Enhancement Act*<sup>5</sup> (EPEA) and the JRP Amended Agreement<sup>6</sup>. For ease of reference, the section below outlines the requirements under each respective legislation and guidelines that govern the assessment process.

### 1) Canadian Environmental Assessment Act, 2012 (CEAA)

13. The purpose of CEAA 2012 includes but is not limited to the following:

- a. to protect the environment from significant adverse environmental effects of a designated project;
- b. to ensure designated projects are considered in a careful and precautionary manner to avoid significant adverse environmental effects;
- c. to promote communication and cooperation with Aboriginal peoples with respect to environmental assessments;
- d. to ensure that opportunities are provided for meaningful public participation during an environmental assessment; and
- e. to encourage the study of cumulative effects of physical activities and consider those studies in environmental assessments.<sup>7</sup>

14. In accordance with section 19 of CEAA 2012, an environmental assessment must include a consideration of the following factors:

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<sup>3</sup> Hearing Transcript Volume 8: October 3, 2018, CEAA Doc No. 585 [Transcript Vol. 8], at 1606 to 1607, 1612 to 1613.

<sup>4</sup> CEAA 2012.

<sup>5</sup> *Environmental Protection and Enhancement Act*, RSA 2000, C E-13 [EPEA].

<sup>6</sup> *Amended Agreement to Establish a Joint Review Panel for the Frontier Oil Sands Mine Project between the Minister of Environment, Canada and the Alberta Energy Regulator, Alberta* (August 16, 2017) [JRP Amended Agreement].

<sup>7</sup> CEAA 2012, at s. 4(1).

- a. the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;
- b. the significance of the effects referred to in paragraph (a);
- c. community knowledge and Aboriginal traditional knowledge;
- d. mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of designated project;
- e. the requirements of the follow-up program in respect of the designated project;
- f. the purpose of the designated project;
- g. alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means; and
- h. any change to the designated project that may be caused by the environment.<sup>8</sup>

15. Section 5 of CEAA 2012 sets out the environmental effects that must be considered including any change to fish and fish habitat, aquatic species, migratory birds, along with the following:

(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on

(i) health and socio-economic conditions,

(ii) physical and cultural heritage,

(iii) the current use of lands and resources for traditional purposes, or

(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.<sup>9</sup>

16. The purpose, environmental effects and factors outlined above are recognized in the JRP Amended Agreement, Terms of Reference.<sup>10</sup>

17. The JRP has the authority under CEAA 2012 to request that the proponent collect additional information or conduct any necessary study in the event the JRP determines that it does not

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<sup>8</sup> CEAA 2012, at ss. 19 (1) and (2).

<sup>9</sup> CEAA 2012, at s. 5(1)(c).

<sup>10</sup> JRP Amended Agreement, Appendix 1: Terms of Reference, at A1-1 to A1-2 and A1-9.

have sufficient information to conduct the environmental assessment or prepare the final report.<sup>11</sup>

18. Following the completion of the assessment, the JRP is required to prepare, in accordance with its terms of reference, a report that sets out:

- a. the review panel's rationale, conclusions and recommendations, including any mitigation measures and follow-up program; and
- b. a summary of any comments received from the public, including interested parties.<sup>12</sup>

19. On receipt of the report, the Minister must determine whether a project will cause significant adverse environmental effects in accordance with s. 52 of CEEA 2012:

52 (1) For the purposes of sections 27, 36, 47 and 51, the decision maker referred to in those sections must decide if, taking into account the implementation of any mitigation measures that the decision maker considers appropriate, the designated project

(a) is likely to cause significant adverse environmental effects referred to in subsection 5(1); and

(b) is likely to cause significant adverse environmental effects referred to in subsection 5(2).

(2) If the decision maker decides that the designated project is likely to cause significant adverse environmental effects referred to in subsection 5(1) or (2), the decision maker must refer to the Governor in Council the matter of whether those effects are justified in the circumstances.

## **2) Environmental Protection and Enhancement Act (EPEA)**

20. The EPEA permits the establishment of co-operative proceeding between the AER and the Agency to conduct a joint review of the Project.<sup>13</sup>

21. The JRP Amended Agreement states that the Project will be subject to an environmental assessment under CEEA 2012.

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<sup>11</sup> CEEA 2012, at s. 44(2).

<sup>12</sup> CEEA 2012, at s. 43(1)(d).

<sup>13</sup> EPEA, at s. 18.

### 3) JRP Amended Agreement

22. The JRP Amended Agreement guides the environmental assessment process between the AER and the Agency and is required to conduct the assessment in accordance with its Terms of Reference.<sup>14</sup>
23. As mentioned above, the JRP Amended Agreement recognizes the requirements under ss. 5 (1) and 19(1) of CEAA 2012.<sup>15</sup>
24. The JRP Amended Agreement also sets out the scope of factors that the JRP must take into consideration which include:
- a. the potential effects of the Project on Aboriginal and Treaty rights;
  - b. the effects on the Outstanding Universal Value (OUV) of WBNP, World Heritage Site, including the Peace-Athabasca Delta (PAD);
  - c. cumulative effects of key valued components (including water quality and quantity, air quality and greenhouse gas emissions, Aboriginal or Treaty rights and interests, wildlife and wildlife habitat, and vegetation and wetlands);
  - d. accidents and malfunctions that may occur in connection with the Project; and
  - e. effects of changes cause by the Project.<sup>16</sup>
25. With respect to the potential effects of the Project on Treaty rights, the JRP will consider the following:
- a. any potential effects on current uses of land and resources by Aboriginal persons for traditional purposes;
  - b. any effects (including the effects related to increased access, fragmentation of habitat and displacement of the exercise of traditional activities) on hunting, fishing, trapping, cultural and other traditional uses of the land (e.g. collection of medicinal plants, use of sacred sites), as well as related effects on lifestyle, culture, health and quality of life of Aboriginal persons;

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<sup>14</sup> JRP Amended Agreement, Appendix 1: Terms of Reference, at A1-1 to A1-11.

<sup>15</sup> JRP Amended Agreement, Appendix 1: Terms of Reference, at A1-1 to A1-2 and A1-6.

<sup>16</sup> JRP Amended Agreement, Appendix 1: Terms of Reference, Part III-Scope of Factors, at A1-2 to A1-6.



- c. any effects of alterations to access into areas used by Aboriginal persons for traditional uses;
- d. any adverse effects of the project on the ability of future generations to pursue traditional activities or lifestyle;
- e. any effects of the project on heritage and archaeological resources in the project area that are of importance or concern to Aboriginal groups;
- f. proposed mitigation measures; and
- g. any effects in relation to the OUV of WBNP and the PAD.<sup>17</sup>

26. Regarding cumulative effects, the assessment must provide a justification and description of the special and temporal boundaries based on pre and post Project activities.<sup>18</sup>

27. In consideration of the above factors, the JRP in its report will reference information on how the Project may adversely affect Treaty rights and information regarding the strength of claim in respect to Treaty rights, as well as recommend mitigation measures.<sup>19</sup>

## **C. SLFN TREATY RIGHTS**

### **1) Overview of SLFN**

28. SLFN members are the descendants of the traditional Dēnesūliné who adhered to Treaty No. 8.

29. As mentioned above, SLFN's traditional and current territory spans northern Alberta, northern Saskatchewan, northern Manitoba, the NWT and southern Nunavut. SLFN has ten reserves, two of which are located in WBNP, including ?Ejere K'elni Kue 196I (Hay Camp) and Tsu Nedehe Tue 196H (Pine Lake).<sup>20</sup>

30. SLFN has a registered population of about 353 members. Approximately 120 members live in Alberta, 28 of which reside on reserve in Fort Fitzgerald and Thebacha Nare, and

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<sup>17</sup> JRP Amended Agreement, Appendix 1: Terms of Reference, Part III, Scope of Factors, at A1-2 to A1-3 and A1-4.

<sup>18</sup> JRP Amended Agreement, Appendix 1: Terms of Reference, Part III, Scope of Factors, at A1-5.

<sup>19</sup> JRP Amended Agreement, Appendix 1: Terms of Reference, Part III, Scope of Factors, at A1-3.

<sup>20</sup> From Smith's Landing First Nation to the Joint Review Panel re Undertaking 7, SLFN Reserve Map, CEEA Doc No. 648.

approximately 161 members live in the NWT. The remaining members reside outside Alberta and NWT.

## **2) The Relocation of SLFN**

31. The Chipewyan peoples have been known by a series of names over the years, including the Fitz/Smith Band which later formed part of the present day SLFN when the First Nation was legally established following the settlement of its Treaty Land Entitlement (TLE) Claim in 2000. The TLE Agreement fulfilled outstanding Treaty obligations of Canada, including providing reserve lands and benefits that SLFN never received under Treaty No. 8.
32. In the past, members of the Fitz/Smith Band resided at Fort Fitzgerald and Fort Smith. In the 1960's, the families belonging to the Fitz/Smith Band that had been living at Fort Fitzgerald were relocated by the federal government to Fort Smith.
33. This relocation was a result of a unilateral decision imposed on the Chipewyan people by the federal Crown to facilitate the centralization of the administration of the Department of Indian Affairs in Fort Smith and discontinue services to the community of Fort Fitzgerald. The community was relocated to Fort Smith into impoverished conditions within an area known as "Indian Village".
34. Indian Affairs told the Chipewyan people that they would benefit from the move by receiving better homes and services. However, the Crown's promises did not materialize and SLFN faced significant hardship and disconnection from their familial and community ties. SLFN members attested to this hardship before the JRP at the hearings.<sup>21</sup>
35. Following the settlement of the TLE Claim members of SLFN were able to return to their original settlement at Fort Fitzgerald.

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<sup>21</sup> Transcript Vol. 8, at 1684 to 1687.

### 3) Adhesion to Treaty No. 8

36. On July 17, 1899, Chief Pierre Squirrel, Headman Michel Mandeville and William Kesko executed an adhesion of Treaty No. 8. at Smith's Landing in present day Alberta. Smith's Landing was renamed Fort Fitzgerald in 1915.
37. The Aboriginal signatories of Treaty No. 8 placed great importance on the Crown's promises regarding harvesting rights and the ability of the Aboriginal peoples to use the land as their ancestors had done since time immemorial. Treaty No. 8 contains the following hunting, fishing and trapping provisions:

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.<sup>22</sup>

38. As an assurance to the Aboriginal signatories' concern that the Treaty would restrict their ability to access land and practice their ancestral way of life, the Treaty Commissioners, who represented the Crown in negotiations, did "solemnly assure" that the Indians "would be as free to hunt and fish after the Treaty as they would if they never entered into it". The promises of the Treaty Commissioners are confirmed in the Report of the Treaty Commissioners for Treaty No. 8:

Our chief difficulty was the apprehension that the hunting and fishing privileges were to be curtailed. The provision in the treaty under which ammunition and twine is to be furnished went far in the direction of quieting the fears of the Indians, for they admitted that it would be unreasonable to furnish the means of hunting and fishing if laws were to be enacted which would make hunting and fishing so restricted as to render it impossible to make a livelihood by such pursuits. But over and above the provision, we had to solemnly assure them that only such laws as to hunting and fishing as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made, and that they would be as free to hunt and fish after the treaty as they would be if they never entered into it.<sup>23</sup>

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<sup>22</sup> *Treaty No. 8*, June 21, 1899, Reprinted from the 1899 edition by Roger Duhamel, F.R.S.C. Queen's Printer and Controller of Stationery (Ottawa, 1966) Cat. No.:C1 72-0866, IAND Publication No. QS-0576-000-EE-A-16, at p.12 <<https://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853> > [Treaty No. 8].

<sup>23</sup> Canada, Indian Treaty Commissioners, *Report of the Commissioners for Treaty No.8*, by David Laird, J.H. Ross, and J.A.J. McKenna to the Honourable Clifford Sifton, Superintendent General of Indian Affairs, September 22, 1988, in Treaty No. 8 <<https://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853#chp2>>.

39. While the use of land would change after the Treaty, the Aboriginal signatories understood that their harvesting practices would be protected and not limited or interfered with in such a manner to render them meaningless. Treaty No. 8 guaranteed certain rights to SLFN, including but not limited to:

- a. the right to maintain a distinctive way of life in relation to the lands, waters and resources in its traditional territory;
- b. harvesting rights, including hunting, fishing and trapping; and
- c. ancillary and incidental rights, including the right to access Treaty No. 8 lands for the purpose of exercising Treaty rights.

40. These rights were granted constitutional protection with the enactment of section 35 of the *Constitution Act, 1982*.<sup>24</sup>

41. Treaty No. 8 also provides SLFN with the procedural right to consultation. Consultation is a constitutional obligation that engages the honour of the Crown. When the Crown has knowledge, actual or constructive, of an Aboriginal or Treaty right, and contemplates an action or decision that may adversely affect that right, it is constitutionally obligated to consult, and potentially accommodate, the Aboriginal group.<sup>25</sup>

42. The JRP must be mindful of the fact that administrative decision makers are bound to act in a manner that is consistent with the *Constitution Act, 1982*, regardless of whether the decision maker has the power to decide questions of constitutional law when formulating its recommendation to the Minister.<sup>26</sup>

#### **4) The Importance of Treaty to SLFN**

43. Elder Gerry Cheezie expressed the importance of Treaty No. 8 during his oral testimony to the JRP:

At the signing of Treaty 8, Commissioner Liard stated in the treaty report that he enticed our people by telling them that their mode of life will not change as long as grass grows and the river flows. Our people view that as a sacred oath.<sup>27</sup>

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<sup>24</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 35(1).

<sup>25</sup> *Athabasca Chipewyan First Nation v Alberta*, 2018 ABQB 262, at para 53 to 56.

<sup>26</sup> *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, at 1077-78.

<sup>27</sup> Transcript Vol. 8, at 1665.

44. For SLFN, Treaty rights are meant to protect their ability to use the land, water and resources provided by the creator, in order to continue their distinct way of life. SLFN members continue to sustain their way of life through hunting, fishing, trapping, gathering and cultural and spiritual practices which are intimately connected to their traditional territory.

45. The following are some of SLFN's requirements to meaningfully exercise their Treaty rights:

- a. a healthy, clean and sustainable environment (i.e. land, water and resources);<sup>28</sup>
- b. access to preferred harvesting areas;
- c. access to areas of cultural and spiritual significance<sup>29</sup>;
- d. the ability to harvest culturally important species;
- e. access to traditional transportation routes;
- f. the ability to share resources with community members;<sup>30</sup>
- g. access to safe transportation routes<sup>31</sup>; and
- h. the ability to pass on culture, knowledge and language to younger generations.<sup>32</sup>

46. As Treaty rights-holders, SLFN holds an integral stewardship role to protect the land, resources and northern waters that flow out of Alberta, through the NWT and into the Arctic Ocean to ensure the continuation of their Dene Ch'anie— "the path we walk"—the culture, beliefs and values of SLFN, which embodies a code of conduct according to natural laws. This duty to protect mother earth is interwoven into fabric of SLFN's being.<sup>33</sup>

47. Dene Ch'anié, is borne of the cultural and spiritual connection that SLFN has with its traditional territory. SLFN members knowledge is based on lived experiences - an intimate knowledge of, and direct and reciprocal relationship with, the environment which has been passed on since time immemorial and has ensured the survival and adaptation of generations of SLFN members. It is an understanding of the sacred interconnection between body, spirit, heart and

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<sup>28</sup> Transcript Vol. 8, at 1697, 1657, 1675.

<sup>29</sup> Transcript Vol. 8, at 1663 to 1664.

<sup>30</sup> Transcript Vol. 8, at 1658.

<sup>31</sup> Transcript Vol. 8, at 1997.

<sup>32</sup> Transcript Vol. 8, at 1658 to 1659.

<sup>33</sup> Transcript Vol. 8, at 1659.

mind, and correlates to SLFN's economy, beliefs and values, social system, and political system.<sup>34</sup>

48. As described below, SLFN's stewardship role and Dene Ch'anié have been significantly impacted by downstream cumulative impacts of development.<sup>35</sup>

## 5) The Importance of Wood Buffalo National Park and Slave River

49. SLFN has relied on and occupied their traditional territory for generations, hunting, trapping, fishing, gathering and for ceremonial and spiritual purposes. Current members wish to preserve their spiritual and traditional connection to the land, water and resources within their traditional territory so that future generations can walk in the footsteps of their ancestors.

50. Chief Tourangeau confirmed SLFN's strong connection to its traditional territory at the hearing:

We are active land users and our members continue to exert our treaty rights within the lands in our area such as the Parks, the Slave River, the Peace River and also the Athabasca River.

We hunt through those areas. We hunt north, south, east and west, which I will use 300 miles to the north, three to the south, three to the east, three to the west.<sup>36</sup>

51. SLFN members hold strong family connections to WBNP and Slave River area. At the hearing, Elder Lawrence Cheezie shared his family's history living in WBNP at Lake Claire and Birch River,<sup>37</sup> and Elder Magloire Paulette, Chief Tourangeau, and Councillor Thaidene Paulette explained that they were born and/or raised at Fort Fitzgerald.<sup>38</sup>

52. Elder Gerry Cheezie shared with the JRP his experience growing up at Fort Smith, Fort Fitzgerald, Fort Chipewyan and along the Slave River. He further expressed the importance of growing up on the land:

My earliest memories is living in the Slave and Peace River with my parents and my brothers. We lived a traditional life that sustained us.

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<sup>34</sup> Transcript Vol. 8, at 1677.

<sup>35</sup> Transcript Vol. 8, at 1608 to 1609 and 1636.

<sup>36</sup> Transcript Vol. 8, at 1597 to 1598.

<sup>37</sup> Transcript Vol. 8, at 1633.

<sup>38</sup> Transcript Vol. 8, at 1601, 1641 to 1643 and 1675.

We used the land to feed us. We used the land to give us medicines. And the land strengthened our spirituality.<sup>39</sup>

53. SLFN relies on the waterbodies within WBNP, PAD and the Slave River to exercise its Treaty rights. The Peace, Athabasca, and Slave Rivers form part of part of Canada's largest drainage basin, the Mackenzie River Basin, where the Athabasca River drains north into the Slave River which serves as the eastern border of WBNP, flowing north passed Fort Fitzgerald and empties in the Great Slave Lake, NWT.<sup>40</sup>
54. The Mackenzie River Basin Bilateral Water Management Agreement between Alberta and the NWT (Bilateral Water Agreement) recognizes the importance of managing the ecological integrity of these interconnected upstream and downstream waterbodies and recognizes that development activities in one jurisdiction may affect the ecological integrity of the aquatic ecosystem in another jurisdiction.<sup>41</sup>
55. SLFN traditionally relied on the Slave River and its tributaries as a transportation corridor to trade with other Nations and to follow the seasonal migration of various animals such as buffalo, caribou and moose. Members of SLFN testified that in the past they traveled by birch bark canoe in the summer.<sup>42</sup>
56. As such, SLFN members made a strategic decision in the past to settle at Fort Fitzgerald which is located above the first set of rapids on the Slave River, referred to as Tthebatthi whereas, Fort Smith, Thebacha, was established below the rapids.<sup>43</sup>
57. At the hearings, SLFN described the various traditional transportation routes used by its members to access harvesting areas which spanned from WBNP, up the Slave River passed Fort Fitzgerald and into the Dog River.<sup>44</sup>

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<sup>39</sup> Transcript Vol. 8, at 1663 and 1664.

<sup>40</sup> Northern River Basins Study: Report to the Ministers 1996, CEEA Doc No. 502 [NRBS], at adobe 23 and 24.

<sup>41</sup> Mackenzie River Basin Bilateral Water Management Agreement, Between the Government of Alberta and the Government of the Northwest Territories, Pursuant to the Mackenzie River Basin Transboundary Waters Master Agreement of 1997 [Bilateral Water Agreement], at s. 1.2.

<sup>42</sup> Transcript Vol. 8, at 1637.

<sup>43</sup> Transcript Vol. 8, at 1687 to 1688.

<sup>44</sup> Transcript Vol. 8, at 1599 to 1600 and 1687 to 1688.

58. In addition, SLFN regularly relied on the Slave River as a source of drinking water, especially when members were travelling on the Slave River to hunt.
59. SLFN members presented evidence of their harvesting activities in WBNP and along the Slave River. Some of the resources SLFN relied on include, but are not limited to:
- a. large game, including moose, buffalo and bear;<sup>45</sup>
  - b. terrestrial fur bearing animals, including wolves, wolverine, lynx, martin, fisher and lynx;<sup>46</sup>
  - c. migratory birds, including ducks, geese, swans and cranes;<sup>47</sup>
  - d. fish;<sup>48</sup>
  - e. aquatic fur bearing animals, including beaver and muskrat; and<sup>49</sup>
  - f. medicine, such as rat root and spruce gum.<sup>50</sup>
60. SLFN relied on these resources to provide for their families and share with community members, such as elders, who were not able to harvest themselves.<sup>51</sup>
61. Members of SLFN trapped aquatic and furbearing animals for personal use and consumption, as well as for trade. During the time of the fur trade, SLFN members relied on the trapping industry to make a living and provide for their families.<sup>52</sup>
62. On October 3, 2018, SLFN members presented evidence to the JRP regarding the abundance of healthy wildlife that they relied on for their survival and explained that in the past members were not concerned about consuming the fish and wildlife they harvested.<sup>53</sup>
63. In the 1950's and 60's, SLFN members also testified that there used to be millions of geese and ducks that would black out the sun when they flew across Lake Claire in WBNP.<sup>54</sup>

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<sup>45</sup> Transcript Vol. 8, at 1668, 1635 and 1638.

<sup>46</sup> Transcript Vol. 8, at 1652.

<sup>47</sup> Transcript Vol. 8, at 1668 and 1671.

<sup>48</sup> Transcript Vol. 8, at 1668.

<sup>49</sup> Transcript Vol. 8, at 1638.

<sup>50</sup> Transcript Vol. 8, at 1672.

<sup>51</sup> Transcript Vol. 8, at 1657, 1671 to 1672.

<sup>52</sup> Transcript Vol. 8, at 1652 and 1653.

<sup>53</sup> Transcript Vol. 8, at 1668 to 1669, 1643 and 1668 to 1669.

<sup>54</sup> Transcript Vol. 8, at 1634 and 1671.



64. Members of SLFN described the locations where they hunted, trapped, fished and gathered.

Some of the locations used by SLFN to harvest traditional resources include but are not limited to: Slave River, Athabasca River, Lake Claire, Birch River, Pine Lake, McNeil Lake, Fort Fitzgerald, Helen Lake, Leland Lake, Charles Lakes, Dog River, Murdoch Creek, La Butte and Hornaday Creek.

65. Sadele Paulette presented evidence to the JRP about the interconnection between the land and SLFN's culture:

My culture is land-based. My language is land-based. This means that in order to practice my language I must have access to the land. There are words in my language that I've been told cannot be translated in the English language that describes the land, the water, the animal. There's a connection; there is a relationship that is inherent and it is crucial to the survival of that language. It is necessary. It is integral. There are no compromises to this fact; it's a simple as that.<sup>55</sup>

#### **D. CURRENT AND ONGOING IMPACTS OF UPSTREAM DEVELOPMENT ON SLFN**

66. SLFN presented evidence to the JRP regarding the importance of WBNP and the Slave River to their ability to exercise their Treaty rights. In particular, SLFN explained how the Athabasca River and Slave River are directly connected and any changes to the Athabasca River consequently impact the Slave River.<sup>56</sup>

67. In recent decades, SLFN has experienced significant changes to WBNP and the Slave River due to the Bennett Dam and the ever-expanding footprint of oil sands development south of WBNP. These changes have adversely impacted SLFN's ability to continue its way of life. SLFN has never been consulted on these development activities leaving SLFN to feel like "second-class citizens within their own territory" as they have largely been ignored by the Alberta, NTW and federal governments.<sup>57</sup>

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<sup>55</sup> Transcript Vol. 8, at 1657.

<sup>56</sup> Transcript Vol. 8, at 1598.

<sup>57</sup> Transcript Vol. 8, at 1604.

68. Elder Lawrence Cheezie testified that “[d]evelopment has already prevented me from practicing my treaty rights, the right to trap and hunt and gather”.<sup>58</sup>

## 1) Water Quantity

69. Over the years, SLFN has experienced a noticeable decline in water levels in WBNP and the Slave River and its tributaries. Members of SLFN have linked these changes to upstream oil sands development because any change to the water levels on the Athabasca River directly impact the water levels on the Slave River.<sup>59</sup>

70. The water levels in WBNP and the Slave River have dropped, and some lakes have even dried up becoming overgrown with willows.<sup>60</sup> Elder Magloire Paulette described the low water levels on the Slave River at the hearing on October 3, 2018 stating:

The lakes are – it has dropped so much even the lakes out there, the inland lakes, maybe two feet, three feet they’ve dropped; same like the Slave River.<sup>61</sup>

71. SLFN members rely on water levels in WBNP and the Slave River area to access preferred harvesting areas. Since the introduction of upstream development, SLFN members have experienced difficulties navigating WBNP waterbodies and the Slave River and its tributaries as compared to the past. SLFN testified that there are some harvesting areas they can no longer access by boat because the water has dried up.<sup>62</sup>

72. Low water has adversely impacted SLFN’s ability exercise their Treaty rights and to continue living off the land. Elder Lawrence Cheezie provided oral testimony on how water levels have changed during his lifetime:

Yeah, prior to the oil sands coming on the scene we could travel almost anywhere, on the Slave River, on the Peace River, on the Athabasca River, but now even the creeks like Murdoch Creek, La Butte Creek, Hornaday Creek, Dog River, you can’t go in there it’s so -- the water is so low that you can’t even go in there with a canoe. And that plays a lot of impact on our way of life, because when we hunt we use a lot of these creeks, eh.<sup>63</sup>

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<sup>58</sup> Transcript Vol. 8, at 1636.

<sup>59</sup> Transcript Vol. 8, at 1598, 1631 and 1703.

<sup>60</sup> Transcript Vol. 8, at 1639.

<sup>61</sup> Transcript Vol. 8, at 1651.

<sup>62</sup> Transcript Vol. 8, at 1602.

<sup>63</sup> Transcript Vol. 8, at 1703.

73. Some members of SLFN have been forced to travel by plane in order to get into preferred harvesting areas that can no longer be accessed by boat. This is costly and creates further hardship for individuals that have limited resources to feed their family.<sup>64</sup>
74. SLFN also relies on the Slave River and its tributaries to access areas of cultural significance. For example, Chief Tourangeau testified that SLFN cannot access its reserve (Hokedhe Tue 169E) located near Myers Lake by boat because of low water on the Dog River.<sup>65</sup>
75. In addition, SLFN members have been faced with new navigational challenges as low water levels have exposed hazards such as sandbars, reefs and rocks making it difficult and dangerous to travel by boat on the Slave River and its tributaries. SLFN testified that its members must be cautious when travelling by boat on the Slave River and Dog River in order to avoid hitting these hazards.<sup>66</sup>
76. SLFN identified several areas as being difficult or impossible to travel or access as result of low water levels which include, but are not limited to: Slave River, La Butte Creek, Hornaday Creek, Dog River, Murdoch Creek, Scow Channel, Ryan Creek and Pine Lake.<sup>67</sup>
77. At the hearing, SLFN shared pictures with the JRP showing the changing water levels within its traditional territory.<sup>68</sup> These pictures show the drastic changes in water levels on the Slave River (and an associated drainage channel into the Slave River near the TransCanada Trail)<sup>69</sup> and how boat docks built along the Dog River and Slave River no longer reach the water's edge during low water events.<sup>70</sup>
78. SLFN participated in the Vulnerability Assessment (submitted to the JRP on August 31, 2018) where similar concerns were raised regarding low water and the difficulties navigating

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<sup>64</sup> Transcript Vol. 8, at 1638.

<sup>65</sup> Transcript Vol. 8, at 1603.

<sup>66</sup> Transcript Vol. 8, at 1654.

<sup>67</sup> Transcript Vol. 8, at 1601 to 1602, 1608, 1654 and 1703.

<sup>68</sup> Smith's Landing First Nation to the Joint Review Panel re: Presentation of Direct Evidence, October 3, 2018, Doc No. 584 [PowerPoint Presentation].

<sup>69</sup> PowerPoint Presentation, at adobe 14 and 15.

<sup>70</sup> PowerPoint Presentation, at adobe 18 and 21 to 23.

the Slave River. The following are some of the concerns raised in the Vulnerability Assessment:

- a. sediment build-up has blocked access to channels and lakes, and some smaller channels have vanished;
- b. the Slave River is becoming wider;
- c. decreased water flow has severely limited people's ability to access channels and lakes that used to be used for fishing and hunting;
- d. increased sediment bars which make it hazardous for boating; and
- e. large debris (e.g. logs) coming down the river get caught in sandbars and further restrict access.<sup>71</sup>

## 2) Water Quality

79. In addition to low water levels, SLFN members have experienced perceived and actual changes in the quality of water in WBNP and the Slave River.

80. SLFN members no longer drink water from the Slave River as they did in the past. Members testified that they carry drinking water with them when they are on the land because the water has been contaminated by oil sands activities.<sup>72</sup> SLFN has correlated high cancer rates in its traditional territory with contaminated water.<sup>73</sup>

81. The Vulnerability Assessment also outlines several concerns regarding water quality on the Slave River which includes, but not limited to:

- a. murky, brown-colored and tastes strange;
- b. oily film on the water's surface;
- c. high mercury levels due to development activity; and
- d. high cancer rates due to poor water quality.<sup>74</sup>

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<sup>71</sup> Smith's Landing First Nation: Hearing Submission Filing, Expert Report 1 – Vulnerability Assessment of the Slave River, Doc No. 502 [Vulnerability Assessment], at 34 and 35.

<sup>72</sup> Transcript Vol. 8, at 1654 and 1669.

<sup>73</sup> Transcript Vol. 8, at 1643.

<sup>74</sup> Vulnerability Assessment, at 10.

82. SLFN's concerns about the quality of water is supported by the findings in the Northern Basins River Study which states that individuals living in Fort Smith no longer trust the quality of surface water and have stopped drinking water from the Slave River and surrounding lakes primarily over a fear of disease and aesthetic concerns. The Northern Basins River Study indicates that "an oily sheen on the main rivers...leaves a scum" on tea cups.<sup>75</sup>

### 3) Air Pollution

83. SLFN has experienced airborne pollution as far north as Fort Fitzgerald and Fort Smith. Elder Magloire Paulette provided evidence regarding the changing quality of rain over the years:

...the air that we breathe, even when you know it rains and you go outside and look at your car, your car has got rain, it just dirty, boy, dirty brown-black colour – like the rain. We're breathing that in too, I guess, all the toxins from the -- the airborne toxins from the tar sands here, from pulp mills, too.<sup>76</sup>

### 4) Fish and Wildlife

84. Low water levels have resulted in a decline in habitat for fish and wildlife. Once abundant populations have been significantly reduced impacting SLFN's ability to exercise their Treaty rights and continue to live off the land. SLFN testified that fish and wildlife populations began to decline in the 1970's.<sup>77</sup>

85. SLFN presented evidence at the hearing regarding the decline in wildlife in WBNP and Slave River area, including but not limited to: moose, buffalo, woodland caribou, beaver, fox, muskrat, ducks, geese and swans.<sup>78</sup> Elder Lawrence Cheezie provided evidence on the decline of moose populations:

After the oil sands started up, you'll notice the decline up to today. In the past there was lots of moose that got taken for food, harvested for food. But today, we can hardly find a moose. The only moose we see most of the time is looking like this, on a sign on a road, a yellow sign. That's the only moose we see.<sup>79</sup>

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<sup>75</sup> NRBS, at adobe 52.

<sup>76</sup> Transcript Vol. 8, at 1649.

<sup>77</sup> Transcript Vol. 8, at 1669.

<sup>78</sup> Transcript Vol. 8, at 1608, 1634 and 1637 to 1638

<sup>79</sup> Transcript Vol. 8, at 1638.

86. SLFN has observed a decline in migratory bird populations in WBNP and along the Slave River. These observations are consistent with the Northern Rivers Basins Study:

Populations of migratory birds within the Slave River Delta also seem to have declined (Figure 3.4.7). In 1791, Peter Fidler noted that flocks of geese on the Slave River were so thick "they appeared at a little distance as if the river was quite choked up with floating driftwood." This abundance has not been observed in many years.<sup>80</sup>

87. Another resource that SLFN has relied on for generations that has been significantly impacted by low water levels on the Slave River is the beaver. At the hearing, SLFN described how beavers have been displaced from their habitat:

One time the river dropped so low you'd see the beavers walking around outside their lodge in February. It looks so pitiful, skinny, those beavers. Boy, I pity those beavers. I didn't bother them. Here, they're foraging around up in the bank there looking for something to eat.<sup>81</sup>

88. SLFN members are also being displaced from their traditional harvesting areas due to population declines. SLFN testified at the hearing that as wildlife populations become more scarce SLFN members are forced to travel further from their preferred harvesting areas to hunt causing additional financial pressure.<sup>82</sup>

89. It has become increasingly difficult to impossible for SLFN members to trap for a living following the decline in furbearing animal populations. SLFN members testified that they can no longer rely on the land to make a wage living.<sup>83</sup>

90. SLFN's survival both physically and culturally is depended on healthy and abundant resources. With the introduction of oil sands development, SLFN testified that they are concerned about eating fish and wildlife from WBNP and the Slave River due to pollutants being discharged from the oil sands into the Athabasca River. SLFN members also testified that they are "really leery about eating...birds as they land in tar sands ponds".<sup>84</sup>

91. SLFN provided evidence at the hearing that members inspect the fish that they catch from the Slave River before eating them to ensure the fish have no lesions or abnormal growths

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<sup>80</sup> NRBS, at adobe 53.

<sup>81</sup> Transcript Vol. 8, at 1645 to 1646.

<sup>82</sup> Transcript Vol. 8, at 1601 and 1669.

<sup>83</sup> Transcript Vol. 8, at 1652.

<sup>84</sup> Transcript Vol. 8, at 1671.

caused by oil sands contamination.<sup>85</sup> SLFN concerns about fish quality are consistent with those outlined in the Vulnerability Assessment which also identifies various other changes to fish, including a decrease in size and population (i.e. whitefish and chub).<sup>86</sup>

## 5) Cultural Continuity and Transmission of Knowledge

92. The ecology of WBNP and the Slave River and the ability of SLFN members to pass on traditional knowledge are inextricably linked. Members of SLFN still actively use accessible areas to exercise their Treaty rights and pass on traditional knowledge to future generations. However, this has become increasingly difficult with the downstream cumulative impacts of development within SLFN's traditional territory.

93. SLFN members ability to pass on the traditional knowledge and practices that they learned from their parents and grandparents has been adversely impacted as SLFN loses access to traditional harvesting areas, and fish and wildlife populations are diminished. Elder Magloire Paulette testified to this cultural disconnection:

My heart is sad when I think about all the old people I used to know and met. It was a great privilege to have known them, to have learned from them. They guided me into the future when I was a very young man. I learned from all of them. I'm a very traditional man, I'm a hunter, trapper, fisher, and I still do all those things the way I was taught, the old traditional way of life.

Today, that life just seems to be fading away, fading away with the language that I truly hold onto.<sup>87</sup>

## E. SLFN'S CONCERNS ABOUT PROJECT EFFECTS

94. SLFN is extremely concerned about the potential for the Project to adversely impact its Treaty rights and ability to continue its cultural way of life. Members of SLFN have experienced the incremental effects of development within their traditional territory and they are concerned that the introduction of another large-scale oil sands development will seal the fate of SLFN.<sup>88</sup>

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<sup>85</sup> Transcript Vol. 8, at 1632 and 1670.

<sup>86</sup> Vulnerability Assessment, at 11, 41 to 42.

<sup>87</sup> Transcript Vol. 8, at 1641.

<sup>88</sup> Transcript Vol. 8, at 1666.

95. At the hearing, SLFN expressed concerns about the current state of WBNP and the Slave River stating that they are at the tipping point. Members testified that “[t]his is just another project that will probably be the straw that breaks the camel’s back in relation to our ability of our community to live as [we have] always done”.<sup>89</sup>

96. SLFN explained that the younger generations are going to face extreme difficulties living off the land and continuing their cultural way of life in the face of the proposed Project. SLFN youth member, Sadele Paulette presented evidence on the importance of his ability to continue his cultural way of life:

But, as a young person I fear for [our] future; I fear for my future. I fear for my young nieces and nephews, for the children that I have -- that are yet to be born. I fear that I will not be able to share that knowledge that has been shared to me. I fear that the continuation of my culture, the land-based culture will cease to exist – the land-based side of my culture.<sup>90</sup>

97. Given the stressed state of WBNP and the Slave River, SLFN is concerned about cumulative and downstream impacts of the Project which include, but are not limited to:<sup>91</sup>

- a. the ability to use and access transportation routes and traditional lands and harvest areas;
- b. impacts to resources and further constraints on SLFN’s ability to harvest fish, wildlife, plants and medicines;
- c. the ability to share resources with community members;
- d. the ability to pass on traditional knowledge and language to future generations;
- e. the health of SLFN members as a result of water and air pollution;
- f. the ability to maintain cultural values;
- g. the ability to continue to act as stewards of SLFN’s traditional territory; and
- h. the ability to maintain a spiritual connection to its lands and a relationship to SLFN’s ancestors.

98. SLFN will continue to be directly and adversely impacted by the cumulative impacts of upstream development, including the Project. Chief Tourangeau explained that although SLFN is not located directly within the Project footprint it will still be affected by the Project:

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<sup>89</sup> Transcript Vol. 8, at 1666.

<sup>90</sup> Transcript Vol. 8, at 1658 to 1659.

<sup>91</sup> Transcript Vol. 8, at 1635, 1661, 1658, 1679, 1702 to 1703.



We might be in the far end on the Alberta border. That water does [run] down from Lake Athabasca -- Athabasca River does not have no borders. They run through my country.<sup>92</sup>

## **F. THE POTENTIAL EFFECTS OF THE PROJECT ON SLFN**

### **1) Teck's Failure to Assess Impacts to SLFN's Treaty Rights**

99. In the Environmental Impact Statement (EIS), Teck recognizes that the Project triggers consultation with potentially affected Aboriginal groups.<sup>93</sup> However, Teck's consultation efforts have been focused on Aboriginal group's in "close proximity" to the Project area and has excluded SLFN from its assessment.

100. The EIS does not consider or address potential impacts of the Project on SLFN's Treaty rights and interests. SLFN is one of the only Aboriginal groups located within the Municipality of Wood Buffalo that has not been consulted by Teck.

101. On September 25, 2018, Teck claimed that it engaged SLFN approximately ten years ago by sending letters and information packages to SLFN on the Project.<sup>94</sup> However, the purpose of the letters was to simply provide notice of the Project and to keep SLFN "informed of [Teck's] activities".<sup>95</sup>

102. Teck's intention to exclude SLFN from the environmental assessment at the outset is evident upon review of its Community Inclusion List.<sup>96</sup>

103. SLFN has expressed serious concern to Teck, the Agency and the AER on the potential impacts of the Project on SLFN. However, SLFN has largely been excluded from the assessment of the Project up until the JRP Amended Agreement was issued which required Teck to consider the effects of the Project on WBNP, including any effects to

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<sup>92</sup> Transcript Vol. 8, at 1705.

<sup>93</sup> Frontier Oil Sands Mine Project, Environmental Impact Statement, CEAA Doc. No. 5 [EIS].

<sup>94</sup> Hearing Transcript Volume 1: September 25, 2018, CEAA Doc No. 560 [Transcript Vol. 1], at 106, adobe 109.

<sup>95</sup> From Teck Resources Limited to the Joint Review Panel re: Reply Submission Filing, CEAA Doc No. 504 [Reply Submission], Attachment 26, at adobe 1043 to 1056.

<sup>96</sup> Reply Submission, Appendix II, Community Inclusion List, at adobe 672 to 675.

Aboriginal rights and interests. At this stage, the Agency was the only party that recognized SLFN as an Aboriginal group potentially affected by the Project.

104. Following the JRP Amended Agreement, SLFN requested consultation with Teck to discuss the Project and any potential impacts on SLFN's Treaty rights. SLFN testified that Teck only met with SLFN once on May 2, 2018 to provide a high-level overview of the Project and declined further consultation, and to invest resources in a SLFN-led Indigenous Knowledge Study to inform Teck's assessment of potential impacts on Treaty rights. Teck advised SLFN by letter dated June 20, 2018 that "the appropriate scope of our relationship continues to be one of notification" (see Appendix A).<sup>97</sup>
105. The hearing held on October 3, 2018 was the first opportunity for SLFN to express its concerns about the proposed Project.
106. Teck's position remains unchanged despite SLFN providing new and extensive evidence at the hearing regarding the potential impacts of the Project on SLFN members ability to exercise their Treaty rights within WBNP and along the Slave River. At the close of its presentation, SLFN expressed its frustration about Teck's failure to consult SLFN on the Project. Teck responded to SLFN by stating that it is only willing to meet with SLFN "to see if there's anything they want to know about the project".<sup>98</sup>
107. Prior to the hearing, the Aboriginal Consultation Office (ACO) took the position that Alberta is not required to consult SLFN on the Project but would provide a hearing report advising the AER whether consultation is required and whether it has been adequate.<sup>99</sup>
108. On November 26, 2018, the ACO issued its hearing report further advising the AER that consultation is not currently required with SLFN or if it was required, the consultation is adequate. The only basis provided by the ACO for its determination is that "SLFN did not

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<sup>97</sup> Transcript Vol. 8, at 1700 to 1702; Letter from Teck to SLFN dated June 20, 2018.

<sup>98</sup> Transcript Vol. 8, at 1713.

<sup>99</sup> Letter from Aboriginal Consultation Office to the Joint Review Panel re: Scope of Participation in the Hearing Panel, September 19, 2018, CEAA Doc No. 539.

identify any specific sites requiring mitigation and/or avoidance with reference to the Project".<sup>100</sup>

109. SLFN disagrees with the ACO's determination and its rationale. The hearing is not an exercise of pinpointing specific sites on a map but it is about presenting a holistic understanding of SLFN concerns about any likely Project effects to its Treaty rights, including but not limited to hunting, fishing, trapping and cultural and other traditional uses of the land. The evidence summarized above clearly shows that SLFN will be impacted by the Project.
110. Further, limiting consultation to site specific impacts does not constitute meaningful consultation.<sup>101</sup>
111. It is SLFN's position that the ACO treated the hearing as a forum for Aboriginal groups to "blow off steam" and did not meaningfully consider the potential impacts of the Project on SLFN's Treaty rights and interests. This is evidenced by the fact that the ACO representatives responsible for listening to SLFN evidence left the hearing room before SLFN completed its presentation. This does not constitute genuine consultation.<sup>102</sup>
112. To date, Teck and Alberta have not engaged with SLFN to meaningfully consult and accommodate its concerns and interests.
113. The environmental assessment does not meet the requirements under CEAA 2012 for assessing impacts to Aboriginal and Treaty rights. As such, the environmental assessment for the Project is incomplete as Teck failed to gather sufficient information regarding potential impacts of the Project on SLFN's Treaty rights. Consequently, Teck is not in a position to propose mitigation measures to reduce potential impacts on SLFN.
114. Although SLFN entered the assessment process late, it has spent a considerable amount of time, energy and funds to present evidence at the hearing and has a reasonable

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<sup>100</sup> From the Aboriginal Consultation Office to SLFN and the Alberta Energy Regulator re: SLFN Aboriginal Consultation Office Hearing Report, November 26, 2018, CEAA Doc No. 676.

<sup>101</sup> *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, at para 162.

<sup>102</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 46.

expectation that Teck will be held accountable for any deviations from the process requirements and environmental assessment standards.

115. Elder Lawrence Cheezie articulated the importance of SLFN being consulted on the proposed Project stating:

So, you've got to bargain in good faith and belief that we are talking from our hearts that we walk that path, we muddied our foots in those creeks and the boats when we land.

So, what I'm saying is, you believe us. If you don't, well, you're going to poison everyone downstream.

I'd like to see Teck Resources once the Project starts. I want to see them go down river, take a cup, I guess, in the water and drink it. I wonder if they could do that?<sup>103</sup>

116. SLFN would support Teck's use of the methodology and principles for assessing impacts on the exercise of Treaty rights proposed by Mikisew Cree First Nation and the Agency. However, SLFN recognizes that the methodology needs to be tailored to SLFN's history, culture and preferred conditions for the exercise of Treaty rights and other factors relating to SLFN's ability to continue its way of life.<sup>104</sup>

117. In summary, Teck's application was flawed from the outset regarding its understanding of the impacts of the Project on potentially affected Aboriginal groups through its exclusion of SLFN. The environmental assessment will continue to be flawed until Teck undertakes the appropriate steps to gather all necessary information and fully understand how SLFN will be impacted by the Project.

## **2) Teck's Failure to Consider the Downstream Cumulative Impacts of the Project**

118. Teck's assessment fails to consider the "farthest measurable" downstream cumulative impacts of the Project by not including the Slave River.

119. The EIS outlines the boundaries of the regional study area (RSA) to capture the "farthest measurable effects associated with the Frontier Project" for hydrology, surface water quality

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<sup>103</sup> Transcript Vol. 8, at 1704.

<sup>104</sup> From the Mikisew Cree First Nation and the Canadian Environmental Assessment Agency to the Joint Review Panel re: Methodology for Assessing Potential Impacts on the exercise of Aboriginal and Treaty Rights, May 25, 2018, CEAA Doc No. 394.

and fish and fish habitat. Teck described the following methodology for its downstream cumulative assessment:

The RSA encompasses the LSA and a study reach of the Athabasca River from Fort McMurray to Embarras Portage. The reach of the Athabasca River is included in the RSA to assess potential cumulative upstream and downstream effects of operating, approved and planned developments on the Athabasca River.<sup>105</sup>

120. Teck concludes that the “Project in combination with other development activities in the region are not expected to have any adverse effects on hydrologic regime and water quality of the Athabasca River, and the study area boundary is not extended past Embarras Portage.”<sup>106</sup>

121. The EIS fails to include a rationale for limiting the boundaries for cumulative downstream impacts to Embarras Portage and excluding the Slave River from its assessment. Teck’s assessment fails to recognize the unique transboundary aquatic ecosystem of the Athabasca River and Slave River which is protected by the Bilateral Water Agreement.

122. If Teck consulted SLFN on the Project it would have gained valuable knowledge of the unique interconnection between these transboundary waterbodies, and how changes to the Athabasca River have and will continue to directly effect the Slave River and consequently, SLFN’s ability to exercise their Treaty rights.

123. The boundaries used by Teck to assess downstream cumulative impacts of the Project are incorrect and SLFN reasonably expects the JRP to require that these boundaries to be adjusted to reflect the transboundary aquatic ecosystem of the Athabasca River and Slave River.

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<sup>105</sup> EIS, Volume 5, at 107, adobe 28.

<sup>106</sup> EIS, Volume 5, at 107, adobe 28.

### 3) Teck's Failure to Consider the Impacts of the Project on Aboriginal Groups within WBNP

124. In the Assessment of the Potential Effects of the Frontier Oil Sands Mine Project on the Outstanding Universal Value of Wood Buffalo National Park World Heritage Site<sup>107</sup> (OUV Assessment), Teck limits the scope of its assessment to natural properties within WBNP based on the following criteria:

- a. Criterion (vii): The great concentrations of migratory wildlife are of world importance and the rare and superlative natural phenomena include a large inland delta, salt plains and gypsum karst that are equally internationally significant.
- b. Criterion (ix): Wood Buffalo National Park is the most ecologically complete and largest example of the entire Great Plains-Boreal grassland ecosystem of North America, the only place where the predator-prey relationship between wolves and wood bison has continued, unbroken, over time.
- c. Criterion (x): Wood Buffalo National Park contains the only breeding habitat in the world for the whooping crane, an endangered species brought back from the brink of extinction through careful management of the small number of breeding pairs in the park. The park's size (4.5 million ha), complete ecosystems and protection are essential for in-situ conservation of the whooping crane.<sup>108</sup>

125. SLFN does not dispute that the above criteria are important for assessing the impacts of the Project on WBNP. However, the OUV Assessment fails to take into consideration how the Project may affect the ability of Aboriginal groups to exercise their Aboriginal and Treaty rights which is a requirement under the JRP Amended Agreement, Scope of Factors.<sup>109</sup> This would necessarily include any cultural values and indicators.

126. Other parties take a similar position regarding Teck's OUV Assessment. In the Final Strategic Environmental Assessment Report<sup>110</sup> (SEA Report), Parks Canada recognizes

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<sup>107</sup> Teck, Assessment of the Potential Effects of the Frontier Oil Sands Mine Project on the Outstanding Universal Value of Wood Buffalo National Park World Heritage Site, March 2018, CEAA Doc No. 364 [OUV Assessment].

<sup>108</sup> OUV Assessment, at 8, adobe 12.

<sup>109</sup> JRP Amended Agreement, Appendix 1: Terms of Reference, Part III- Scope of Factors, at A1-4.

<sup>110</sup> Volume 1: Milestone 3- Final SEA Report, Strategic Environmental Assessment of Wood Buffalo National Park World Heritage Park, CEAA Doc No. 401 [SEA Report],

the importance of considering impacts to Aboriginal groups who rely on WBNP to continue their cultural way of life:

The PAD, in particular, is a very complex ecosystem and as a result, there will always be unanswered questions. However, by applying the precautionary principle, a lack of information should not prevent action. Adaptive management solutions must be advanced with the involvement of Indigenous peoples and Indigenous Traditional Knowledge. Furthermore, collaborative approaches involving all parties will be necessary to develop the best possible mitigations and increase the likelihood of success. In particular, collaboration with Indigenous peoples will be important because it is Indigenous peoples who experience the impacts most directly given their intrinsic connection to the land.<sup>111</sup> [emphasis added]

127. In the SEA Report, Parks Canada further acknowledges that Aboriginal groups ability to pass on culture and traditional knowledge is intrinsically connected to their ability to access the land, water and resources in WBNP:

Permanent changes could put at risk the world heritage values of the PAD and its ecological integrity, and would be particularly undesirable for Indigenous people who transfer cultural knowledge and skills to the next generation on the land in the context of carrying out traditional activities. When this knowledge is not passed down, communities risk losing their culture and connections to the land. The more time with lack of access, or changes to the quantity and quality of resources, the higher the risk that this transfer of knowledge is interrupted or prevented.<sup>112</sup>

128. Teck's failure to assess impacts to Aboriginal groups within WBNP and consider cultural indicators is fatal to the environmental assessment process. Teck is not in a position to propose mitigation measures for potential Project effects of Aboriginal groups in WBNP, including SLFN who has been completely excluded from the assessment process.

## G. CONCLUSION

129. As described above, Teck has failed to assess cumulative downstream impacts on the Slave River and consider the potential impacts of the Project on SLFN. The JRP is faced with a significant information gap in the environmental assessment and is left in a position where it cannot properly consider the potential environmental effects of the Project or the potential effects to constitutionally-protected Aboriginal and Treaty rights.

130. Teck has failed to meet the requirements under ss. 5 and 19 of CEEA 2012. As a result, the potential environmental impacts of the Project in WBNP, PAD and the Slave River

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<sup>111</sup> SEA Report, at EX-4, adobe 27.

<sup>112</sup> SEA Report, at EX-5, adobe 28.

could have a devastating impact on the survival of SLFN's culture and identity which are intrinsically connected to the lands, waters and resources within its traditional territory.

131. If the Project proceeds based on present information before the JRP, SLFN ability to continue to exercise its Treaty rights and interests, including but not limited to hunting, fishing, trapping, gathering and the ability to pass on traditional knowledge and practices to future generations will reach a breaking point. As SLFN attested to at the hearing, “[o]ur people aren’t going nowhere, this is where we live, this is our homeland”<sup>113</sup> but the cumulative downstream impacts of oil sands development will make it extremely difficult for SLFN to continue to live in their homeland as their ancestors have done since time immemorial.

132. At this stage, Teck is not in a position to seek approval in the absence of information from SLFN and by extension, the JRP is not in a position to fulfill its mandate.

133. Given the high level of uncertainty surrounding the Project, SLFN asks that the JRP:

- a. order Teck to undertake an assessment and any necessary studies on the potential impacts of the Project on SLFN's Treaty rights and interest, including to identify mitigation measures in accordance with s. 44(2) of CEAA 2012;
- b. advise the Minister that the Project should not proceed in the circumstances as Teck's environmental assessment is incomplete and the JRP is not in a position consider the potential adverse effects that the Project may have on asserted or established Aboriginal or Treaty rights, and make recommendations on measures to mitigate any adverse effects of the Project on asserted or established Aboriginal or Treaty rights; and
- c. grant such further and other relief as SLFN may request or the JRP may consider appropriate.

RESPECTFULLY SUBMITTED ON THIS 5<sup>TH</sup> DAY OF DECEMBER, 2018.

Smith's Landing First Nation

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<sup>113</sup> Transcript Vol.8, at 1692.





June 20, 2018

Ms Becky Kostka  
Lands & Resources Manager' Smith's Landing First Nation  
<contact information removed>

Dear Ms. Kostka;

Thank you for your detailed letter regarding the funding request for an Indigenous Knowledge Study, a community coordinator, community meetings, consultation meetings and legal fees. Having received your detailed proposals, and having benefited from the opportunity to speak with you and other representatives of Smith's Land First Nation (SLFN) we have given careful thought and consideration to your proposal that our relationship be based on the highest end of the consultation spectrum.

Upon reflection, Teck continues to believe the appropriate scope of our relationship continues to be one of notification. We believe this scope will continue to support regular communication and information sharing, not the most significant consultation SLFN has suggested. We do wish to emphasize that we would anticipate there will be many opportunities after the Joint Review Panel Hearing for Teck and SLFN to continue discussing areas of shared interest, particularly with respect to Wood Buffalo National Park.

We enjoyed our discussion of May 2<sup>nd</sup> with Chief and Council and also meeting some of your administrative staff. We certainly do appreciate the hospitality shown and look forward to another visit at a later date.

Sincerely,

Yvonne Walsh  
Director Community & Indigenous Affairs