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July 10, 2013

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Attn: Director, Northern Region

Re: Coal Valley Resources Inc., Robb Trend Project
Alberta Energy Regulator (“AER”) Application No. 1725257
Environmental Protection and Enhancement Act (“EPEA”) Application 028-11066, and other related *Water Act* and *EPEA* Applications
Yellowhead Tower – Pit 29 Haul Road Realignment Project
AER Application No. 1750173
EPEA Application No. 031-11066, and other related *EPEA* and *Water Act* Applications
(Collectively, the “Applications”)

Whitefish (Goodfish) Lake First Nation #128
Statement of Concern

Our File: 41205-48

We act for the Whitefish Lake First Nation #128 (“WLFN”)¹ on Coal Valley Resources Inc.’s (“CVRI”) Applications for its Robb Trend Project and for its Yellowhead Tower – Pit 29 Haul Road Realignment Project.

¹ WLFN Contact Information as per s. 6(1)(c) of the *AER Rules of Practice*

This Statement of Concern is for the CVRI applications related to the Robb Trend Project, including AER Application No. 1725257, EPEA Application 028-11066, and all other applications under the *Water Act* and *EPEA* that relate to the Robb Trend Project. It is also WLFN's Statement of Concern for the Yellowhead Tower – Pit 29 Haul Road Realignment Project ("Haul Road Project"), AER Application No. 1750173, EPEA Application No. 031-11066, and other *EPEA* and *Water Act* applications that relate to the Haul Road Project.

We note the AER Notices of Application for the two Projects do not list the Application numbers for all the *EPEA* and *Water Act* Applications contemplated in the Application material filed by CVRI with the AER.

WLFN objects to the approval of the Applications.

1. OVERVIEW

The Robb Trend and Haul Road Projects are located in the Eastern Slopes, a significant Aboriginal Traditional Use area.

CVRI seeks approval for an 'expansion' to a permit for an open-pit surface coal mine known as the Coal Valley Mine. The 'expansion' will be known as the Robb Trend Project and the new permit area will cover over 10,000 hectares.

The Road Haul Project would amend the Yellowhead Tower Mine approval to realign a haul road. This will disturb an additional 60 hectares of land in the area, require a water-crossing, a surface water management system including infrastructure to manage mine waste-waters, and the construction of a wetland.

As described in more detail below, these projects would be located in WLFN's Traditional Territory, in the heart of an area used intensively by WLFN's harvesters for hunting, fishing, gathering, and trapping. The Eastern Slopes is one of the last remaining areas suitable for traditional use in the Treaty 6 area. The projects would have significant and permanent adverse impacts on WLFN's ability to exercise its traditional activities in and around the projects.

Aside from the terrestrial surface impacts directly associated with open-pit coal mining, the proponent seeks to employ the use of settling ponds that would eventually release water unto external watersheds, divert and re-align numerous streams, install sump pumps and construct various watercourse crossings. This will permanently reduce the suitability of this area for traditional use activities.

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Note: please send all notices and documents in this matter to the undersigned as solicitors for WLFN.

WLFN has constitutionally and legally recognized interests that will be directly and adversely affected by the Application.

WLFN was not included in CVRI’s report on Traditional Ecological Knowledge and Land Use submitted with its Robb Trend Application, nor was it consulted about the Haul Road Project. To date, neither CVRI nor the Crown, to the best of our knowledge, have bothered to measure the impacts of the proposed projects on WLFN.

WLFN acknowledges that CVRI has, in the last month or so, engaged in preliminary discussions with the Nation with regard to the Robb Trend Project.

WLFN’s has concerns about the Applications which remain unaddressed.

It is therefore entitled to participate in the Applications’ approval process with full intervener status, including full participation at any AER oral hearings.

WLFN relies on 17 affidavits in support of its standing to participate. The affiants are collectively known as the “WLFN Harvesters”, and these materials are collectively referred to as the “WLFN Affidavits”. Attached to each of the WLFN Affidavits are maps showing the Robb Trend Project with the harvesting locations for the individual affiant marked, and maps showing geographical scope of the WLFN’s traditional territory. **Of the 17 WLFN Harvesters interviewed:**

- **13 identify traditional use areas that directly overlap with the Robb Trend Project boundary, and the remaining 4 identify traditional use areas within 2 kms of the Robb Trend Project boundary;**
- **11 identify traditional use areas that directly overlap the Haul Road Project area, with 4 more identifying traditional use areas within 10kms of the Haul Road Project site.²**

To be clear, these WLFN Harvesters represent only a fraction of WLFN’s members who have cultural and historic ties to the lands directly and indirectly impacted by the proposed projects. The lands within and surrounding the project boundaries are culturally significant to WLFN as a collective, and the exercise of Aboriginal and Treaty rights in the area is not isolated to the WLFN Harvesters.

² The WLFN Affidavits were sworn specifically in relation to the Robb Trend Project. WLFN has consented to use of the 17 WLFN Affidavits for the additional purpose of submitting a Statement of Concern for the Haul Road Project. The map exhibits to the affidavits do not specifically show the Haul Road Project site. However, based on Figure 1.1-1 to CVRI’s Haul Road Application, the overlap of TLU and the project site can be extrapolated.

We attach CVRI’s Figure 1.1-1 from the Haul Road Application for ease of reference.

WLFN intends to make an application under the AER *Rules of Practice* and *EPEA* requesting the affidavits and their exhibits be kept confidential and, subject to the advice of the AER, will provide the WLFN Affidavits and their exhibits following a determination on this confidentiality application.

2. OBJECTION TO STRUCTURING OF REGULATORY APPLICATIONS

WLFN objects to CVRI's characterization of its proposed Robb Trend Project as the expansion of an 'existing' permit and "not a new mine".³ Further, CVRI says it will separately submit applications to the ERCB (now the AER) and AESRD for approvals to develop, operate and reclaim the Project.⁴ CVRI says it is only at this later stage that it will provide "specific details on how the Project will be developed operated and reclaimed". Nevertheless, it expects to begin production in late 2014. This leaves very little time for CVRI to conduct Aboriginal and public consultation in relation to the "specific details" of its development.

WLFN submits that this characterization of CVRI's Robb Trend Project is not in the public interest and appears to have been done to minimize regulatory oversight, specifically to avoid having to submit a meaningful reclamation plan under s.12 of the *Coal Conservation Act*.

Its Haul Road Project Application material is similarly devoid of important detail required to assess impacts and relies on an EIA from 2008 which doesn't cover the entirety of the Road Haul Project site.⁵

The specific details of CVRI's reclamation, development and operational plans are key to WLFN's understanding the extent and duration of the impacts of CVRI's activities on the Nation.

3. WLFN ABORIGINAL AND TREATY RIGHTS

WLFN enjoys constitutionally protected Aboriginal and Treaty rights within and directly adjacent to the new permit and Road Project areas. These rights include, but are not limited to:

- the right to hunt, fish, gather and trap;
- the right to transmit traditional knowledge to subsequent generations; and
- those practices reasonably incidental to the above.⁶

³ Robb Trend Application, Section A-1

⁴ Robb Trend Application, Section A 4.

⁵ See Haul Road Application, section 4-4 – "Once it is known more detail will be provided on the design, construction and operation of the Project".

⁶ *R. v. Sundown*, [1999] 1 SCR 393 [*Sundown*].

These Aboriginal and Treaty rights are entrenched and protected pursuant to section 35 of the *Constitution Act, 1982*.

Prior to signing Treaty 6 and predating the creation of Canada and Alberta, the ancestors of the current WLFN membership had Aboriginal title and rights over and within its traditional territory. Some or all of these Aboriginal rights remain unextinguished and persist to the present day.

In addition to its unextinguished Aboriginal rights, WLFN has established Treaty rights. In 1876, WLFN signed Treaty 6 which confirmed that WLFN members “shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered”.⁷

As explained by the Supreme Court of Canada in *R v. Sundown*:

Treaty No. 6 is one of 11 numbered treaties concluded between the federal government and various First Nations between 1871 and 1923. They were negotiated with the aim of facilitating European settlement of western Canada. Treaty No. 6, also known as the Treaties at Forts Carlton and Pitt, was signed in 1876 and covered an expanse of 120,000 square miles. The area ceded covered much of central Alberta and Saskatchewan. In exchange for the land, the federal government provided or made a commitment to provide the bands with reserves, schools, annuities, farm equipment, ammunition, and assistance in times of famine or pestilence. Hunting, fishing and trapping rights were also secured to the Indians. Indeed, it is clear from the record of the negotiations that the guarantee of these rights was essential for the First Nations in their acceptance of the treaty.⁸ [emphasis added]

The *NRTA*⁹ expanded the scope of Treaty 6 rights to include trapping in addition to hunting and fishing. The *NRTA* also enlarged the right to hunt, fish, gather and trap from the boundaries of Treaty 6 to all unoccupied Crown lands or lands to which Indians may have a right of access within the province of Alberta. **Importantly, this includes the unoccupied lands to be taken-up by the projects.** Further, practices, such as occupying hunting cabins or using traditional trails, which are reasonably incidental to the Treaty right to hunt, fish, and trap are also protected by the Treaty.¹⁰

The WLFN reserve lands are approximately 350 kms from the permit area. However, WLFN’s members are not limited to practicing their traditional harvesting activities on reserve. As set out above they may hunt, trap, fish and gather over any unoccupied Crown lands in the province. Accordingly, the geographic proximity of WLFN’s reserve lands to the project boundaries are not determinative of impact.

⁷ Treaty No. 6 (1876) [*Treaty 6*].

⁸ *Sundown* at para. 5.

⁹ *Constitution Act, 1930*, Schedule 2 (Alberta) at para. 12 [*NRTA*].

¹⁰ *Sundown*.

The notion that a project may adversely impact WLFN's Treaty and Aboriginal Rights, notwithstanding that WLFN's reserve lands do not overlap the project boundary, has been accepted by regulators in this province. In its decision dated September 13, 2011, in respect of the MEG Energy Corporation Christina Lake Phase 3 Project (Application No. 1571384), the Energy Resources Conservation Board (the "ERCB", as it then was) underscored the need to demonstrate a degree of location and connection between the project area and the areas in which a First Nation exercises its Treaty and Aboriginal Rights, as opposed to the location of the First Nation's reserve lands.

Likewise, the Alberta Utilities Commission ("AUC") confirmed in its decision dated August 12, 2011, with respect to the Eastern Alberta Transmission Line (Application No. 1607153) that the test for standing could be satisfied by demonstrating a potential for direct and adverse impact by a project located within a First Nation's traditional territory.

In both cases, the ERCB and the AUC granted standing to the First Nation participants, and in doing so, the regulators accepted that projects located within a First Nation's territory, separate and apart from a First Nation's reserve land, could adversely impact a First Nation's Treaty and Aboriginal Rights.

In this instance, the projects will be situated within WLFN's traditional territory. The affidavits sworn by WLFN's members show the overlap of the proposed new project areas and the areas where WLFN's Harvesters exercise their Treaty and Aboriginal rights.

The rights of WLFN's members over their traditional territory constitutes a *sui generis* interest in the lands which can only be infringed in accordance with the principles enunciated by the courts.¹¹

The WLFN Affidavits and conclusions in the Environmental Impact Assessment for the Robb Trend Project ("EIA") clearly demonstrate a degree of location or connection between the activities proposed in the Applications and the WLFN's Aboriginal rights and Treaty rights (as expanded by the *NRTA*).

The geographic scope of these rights include the areas within the Robb Trend permit area and haul road footprint.

WFLN understands the AER has no jurisdiction to determine the adequacy of Aboriginal consultation and accommodation. However, the approval of the Applications, including those under the jurisdiction of the AESRD and the AER, do require the duty be met.

The duty to consult and accommodate "has both a legal obligation and a constitutional character,"¹² is "grounded in the honor of the Crown,"¹³ and "seeks to provide protection to Aboriginal and treaty rights while furthering the goals of reconciliation between Aboriginal

¹¹ *R. v. Sparrow*, [1990] 1 SCR 1075.

¹² *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43 [*Rio Tinto*] at para. 34.

¹³ *Rio Tinto* at para. 34.

peoples and the Crown.”¹⁴ The duty to consult is triggered when “the Crown has real or constructive knowledge of a claim to the resources or land to which it attaches.”¹⁵ The Crown’s duty to consult and accommodate WLFN’s Aboriginal and Treaty rights has clearly been triggered by the projects, and the Crown has not adequately discharged its duty.

4. WLFN TRADITIONAL ACTIVITIES

Wildlife, fish and vegetation are part of the ecosystem which forms the basis of the WLFN’s way of life. This way of life was guaranteed by Treaty 6 and protected by s.35 of the *Constitution Act*. Consequently, adverse impacts on the ecosystems that support this way of life, amount to a *prima facie* infringement of the WLFN’s constitutionally protected Treaty rights.

Wildlife is an important part of the WLFN’s culture and traditional economy. In particular, the WLFN Harvesters have deposed that they hunt various species including caribou,¹⁶ grizzly bear,¹⁷ wolves,¹⁸ moose,¹⁹ elk,²⁰ deer,²¹ rabbits,²² black bear,²³ coyotes,²⁴ bighorn sheep,²⁵ and various bird species in or near to the proposed permit . Birds hunted include, but are not limited to grouse,²⁶ ducks,²⁷ geese,²⁸ and wild chickens.²⁹ The WLFN Harvesters have further deposed that they trap numerous species including rabbits,³⁰ muskrat, fox, beaver, coyote, otters and gophers.³¹ In addition to the foregoing, the WLFN Harvesters harvest other species opportunistically when they are hunting moose, elk and deer. Wildlife and vegetation cumulatively form the basis of the WLFN’s way of life and any disturbance or disruption constitutes and interference with the WLFN’s traditional activities and a potential adverse impact on its Constitutionally protected Treaty rights

The WLFN Harvesters have deposed that they gather various berries including blueberries,³² cranberries,³³ raspberries,³⁴ saskatoon berries,³⁵ strawberries,³⁶ gooseberries,³⁷ huckleberries,³⁸

¹⁴ *Ibid.*

¹⁵ *Rio Tinto* at para. 40.

¹⁶ Affidavit of #15.

¹⁷ Affidavits of #15 and #17.

¹⁸ Affidavits of #10, #11, #13, #15, #16 and #17.

¹⁹ Affidavits of #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, #11, #12, #13, #14, #15, #16 and #17.

²⁰ Affidavits of #1, #2, #3, #4, #5, #6, #7, #8, #9, #10, #11, #12, #13, #14, #15, #16 and #17.

²¹ Affidavits of #3, #4, #5, #6, #7, #8, #9, #10, #11, #12, #13, #14, #15, #16 and #17.

²² Affidavits of #3, #4, #8, #9, #10, #11, #12, #13, #14, #15, #16 and #17.

²³ Affidavits of #6, #7, #9, #10, #12, #13, #15, #16 and #17.

²⁴ Affidavits of #10, #12, #15, #16 and #17.

²⁵ Affidavits of #13 and #14.

²⁶ Affidavits of #3, #4, #5, #6, #8, #9, #10, #11, #12, #13, #14, #15, #16 and #17.

²⁷ Affidavits of #10, #12, #14, #15, #16 and #17.

²⁸ Affidavits of #5, #6, #10, #12, #13, #14, #15, #16 and #17.

²⁹ Affidavits of #16 and #17.

³⁰ Affidavits of #9, #11, #12, #13 and #14.

³¹ Affidavit of #12.

³² Affidavits of #4, #5, #6, #8, #9, #10, #12, #14, #15, #16 and #17.

³³ Affidavits of #4, #6, #8, #10, #12, #14, #15, #16 and #17.

³⁴ Affidavits of #4, #5, #6, #8, #9, #10, #12, #13, #14, #15, #16 and #17.

and chokecherries³⁹ in or near to the proposed permit. The WLFN Harvesters have deposed that they gather traditional medicines including roots,⁴⁰ bark,⁴¹ muskeg tea/labrador tea,⁴² sage,⁴³ diamond willow fungus,⁴⁴ balsam tree sap,⁴⁵ sweet grass,⁴⁶ muskeg,⁴⁷ mountain ash,⁴⁸ lodgepole pine fungus/flowers,⁴⁹ seneca root and rat root.⁵⁰ The WLFN Harvesters have deposed that they fish in the areas deposed to for species including grayling,⁵¹ trout,⁵² whitefish,⁵³ walleye/pickereel,⁵⁴ jackfish/northern pike,⁵⁵ yellow perch,⁵⁶ tulibee,⁵⁷ suckers,⁵⁸ burbot (freshwater/ling cod) and goldeye.⁵⁹

The WLFN Affidavits and the attached Traditional Use Maps, show the WLFN traditional territory and current harvesting areas include the Robb Trend permit area and the Haul Road Project area.

The WLFN Harvesters further depose that the CVRIs proposed activities will impact wildlife populations beyond existing impacts, and will further restrict rights of access to lands previously available to them to practice their constitutionally protected rights to hunt, fish, gather and trap.

The WLFN Harvesters report that the frequency of the exercise of their harvesting rights is already impacted by existing development. Most lands in the Treaty 6 area have already been taken-up. The Eastern Slopes remains one of the few area left within Treaty 6 territory suitable for the exercise of its Treaty rights. Additional development such as the proposed projects in the WLFN’s traditional territory, particularly in the Eastern Slopes, will further negatively impact the exercise of these traditional activities, and further erode WLFN’s constitutionally entrenched and protected Aboriginal and Treaty rights. As such, even in cases where the impact of the

³⁵ Affidavits of #5, #6, #9, #10, #12, #14, #15, #16 and #17.
³⁶ Affidavits of #6, #9, #10, #11, #12, #14, #15, #16 and #17.
³⁷ Affidavits of #4, #6, #8, #11, #14, #15, #16 and #17.
³⁸ Affidavits of #4, #6, #8, #11, #13, #14, #15 and #16.
³⁹ Affidavits of #5, #6, #9, #10, #12, #14, #15, #16 and #17.
⁴⁰ Affidavits of #4, #6, #8, #10, #11, #14, #15, #16 and #17.
⁴¹ Affidavits of #4, #6, #8, #9, #10, #11, #14, #15, #16 and #17.
⁴² Affidavits of #5, #12 and #14.
⁴³ Affidavits of #5, #12, #14 and #17.
⁴⁴ Affidavits of #9, #12, #16 and #17.
⁴⁵ Affidavit of #9.
⁴⁶ Affidavits of #12, #14, #16 and #17.
⁴⁷ Affidavit of #14.
⁴⁸ Affidavit of #14.
⁴⁹ Affidavits of #16 and #17.
⁵⁰ Affidavits of #16 and #17.
⁵¹ Affidavits of #7, #9, #13 and #15.
⁵² Affidavits of #5, #7, #9, #11, #12, #13, #14, #15, #16 and #17.
⁵³ Affidavits of #5, #7, #11, #12, #13, #14, #15, #16 and #17.
⁵⁴ Affidavits of #5, #9, #12, #14, #15, #16 and #17.
⁵⁵ Affidavits of #5, #9, #12, #14, #15, #16 and #17.
⁵⁶ Affidavits of #9, #12, #14, #15, #16 and #17.
⁵⁷ Affidavits of #12 and #15.
⁵⁸ Affidavits of #15, #16 and #17.
⁵⁹ Affidavits of #16 and #17.

proposed activities on fish, plant, berry species and wildlife may on its face seem negligible, the cumulative, regional diminution of WLFN’s harvesting activities magnifies each of these potential impacts.

5. IMPACTS

The Applications contemplate taking up more than 10,000 hectares of land. These lands would be removed from the lands available to WLFN to exercise treaty rights for decades. For example, CVRI does not anticipate reclamation will be complete on the Haul Road Project area until 2058.⁶⁰

In addition to removing the lands for use by WLFN Harvesters, this taking-up will impact the WLFN Harvesters’ ability to transmit traditional knowledge about the area to younger generations. In short, the Applications, if approved, will have lasting adverse impacts on WLFN’s culture.

As traditional land and resource users, the WLFN is concerned that its members, including the WLFN Harvesters, will no longer be able to use certain culturally important species and sites due to industrial development.

The EIA for the Robb Trend Project identifies several potential impacts that could affect species that are culturally important to WLFN members, such as wolves, grizzly bears, arctic grayling, trout and plant/berry/medicine species. As well, the EIA identifies potential human health impacts which could affect the WLFN Harvesters themselves. Further, WLFN submits there are impacts that were not adequately addressed in the EIA.

Save for a few exceptions, the direction of impact according to the EIA is universally negative for all impacts,⁶¹ and these impacts explained in the EIA itself demonstrate how the Project will further directly and adversely affect the WLFN’s Aboriginal and Treaty rights.

a. Wildlife

Marten, fisher, lynx, wolf and grizzly bear were all indicated in the EIA as valued environmental components (“VEC”) that will be impacted by the Robb Trend Project. Impacts on these culturally important species will result from Project activities due to: (1) habitat alteration, (2) sensory disturbance and effective habitat loss, (3) habitat fragmentation, and (4) direct mortality, and (5) barriers to movement.⁶²

⁶⁰ Haul Road Application, section 6.2.3 and Table 6.2-3, which says reclamation isn’t anticipated until 20 years following the end of the Robb Trend project in 2038.

⁶¹ Robb Trend Application, CR#7 Mammalian Carnivores, Table 31.

⁶² Robb Trend Application, CR#7 Mammalian Carnivores, Page 55.

Habitat alteration and habitat fragmentation is expected to fall in a range of low, moderate and high impacts for marten, fisher, lynx, wolf and grizzly bear during the life of the Project.⁶³ To WLFN's alarm, the magnitude of impacts for habitat alteration for WLFN's culturally important species wolf and grizzly bear are expected to be high in the application case.⁶⁴

WLFN Harvesters have deposed that they conduct traditional harvesting activities and exercise associated rights within the area covered by the Project and surrounding area. Since WLFN Harvesters carry out harvesting activities within the permit area and surrounding area, the direct habitat alteration and loss, and barriers to movement, will directly and adversely affect these traditional practices. The EIA says there will be a negative impact within the Project Boundary in the form of habitat loss and migration barriers for culturally important wildlife species wolf and grizzly bear. This impact would directly and adversely affect the ability of WLFN's members to exercise their traditional harvesting rights in the Project Boundary and surrounding areas.

i. species of concern

The EIA identified seven species of concern that are present or assumed to exist in the regional study area surrounding the Robb Trend Project.⁶⁵ Listed species include the grizzly bear, bobcat, lynx, fisher, long-tailed weasel, wolverine and badger.⁶⁶

The EIA fails to address any specific impacts on woodland caribou, which are listed federally as "threatened" (Species at Risk Public Registry 2011) and provincially as "at risk" (ASRD 2011), and is also included on Schedule 1 of the Species at Risk Public Registry. The Proponent's lack of a specific plan to address the impact to woodland caribou is unacceptable, particularly in light of the affidavit evidence which demonstrates WLFN Harvesters have hunted caribou in the area. Further, the Applications, on their own and when considered in the larger context may contribute to the continued decline of the caribou species. Caribou are of considerable importance to WLFN Harvesters and to the WLFN's culture generally. The potential impacts of the projects on caribou are unacceptable to the WLFN, as is the lack of a caribou protection plan.

Another culturally important species to the WLFN is the grizzly bear, which is listed as *Special Concern* by the Committee on the Status of Endangered Wildlife in Canada (May 2012), as *At Risk* under the 2010 *General Status* evaluation, and as *Threatened* under the *Wildlife Act* (AFWD 2010). The EIA provides that there were 33 grizzly bears recorded in the RSA from 1999 to 2006.⁶⁷ This animal has previously been harvested by a WLFN Harvester within the RSA⁶⁸ and is at risk for direct mortality. WLFN Harvesters have traditionally harvested grizzly bears but have ceased to hunt this animal to enable the population of the species to recover to a healthy, sustainable level. The projects will adversely impact grizzly bear movement and habitat. WLFN

⁶³ Robb Trend Application, CR#7 Mammalian Carnivores, Table 31.

⁶⁴ Robb Trend Application, CR#7 Mammalian Carnivores, Table 31.

⁶⁵ Robb Trend Application, CR#7 Mammalian Carnivores, Page 8.

⁶⁶ Robb Trend Application, CR#7 Mammalian Carnivores, Page 8.

⁶⁷ Robb Trend Application, CR#7 Mammalian Carnivores, Page 50.

⁶⁸ Affidavit of #15.

has a direct interest in the protection of this culturally important species and the associated exercise of WLFN Harvester’s rights which may be adversely affected by the projects. The grizzly bear is an extremely sacred animal to the WLFN. It is at risk for direct mortality due to increased public access that will result from the projects.

ii. moose

Moose are a culturally important species to WLFN. As the prevalence of new roads increase, so too will the likelihood of vehicle-wildlife collisions, including collisions with moose. WLFN is concerned that the 70 kph speed limit will not have the desired effect of reducing the rate of vehicle-wildlife collisions.⁶⁹ Accordingly, WLFN has a direct interest in the protection of this culturally important species and the associated exercise of WLFN Harvester’s rights which may be adversely affected by the projects.

iii. elk

Elk are also a culturally important species to the WLFN. It was acknowledged in the EIA that elk trails were recorded in 18 of 31 land cover types.⁷⁰ The Robb Trend Project will likely impact elk, and WLFN has a direct interest in the protection of this culturally important species and the associated exercise of WLFN Harvester’s rights.

b. Aquatic Resources

WLFN has concerns about impacts from CVRI activities proposed in the Applications that would result in (1) direct physical habitat disturbance, (2) changes in flow regimes, (3) changes in water quality, and (4) changes in fish resource access and utilization⁷¹, which can in turn lead to the following impacts on fish:

1. reduced fish abundance;
2. change in fish distribution;
3. change in fish biodiversity; and
4. decrease in fish health.⁷²

The projects will also affect surface water as a result of activities during construction, operation and abandonment.⁷³ The measures proposed in the *Water Act* application for the Haul Road Project are of particular concern to WLFN in this regard.⁷⁴

i. aquatic ecology

⁶⁹ Robb Trend Application, CR#7 Mammalian Carnivores, Pages 57, 61-79.

⁷⁰ Robb Trend Application, CR#7 Mammalian Carnivores, Page 25.

⁷¹ Robb Trend Application, CR#2 Aquatics, Page 51.

⁷² Robb Trend Application, CR#2 Aquatics, Table 5.2.

⁷³ Robb Trend Application, CR#6 Hydrology, Table 7.

⁷⁴ Haul Road Project Application, Part 8.

The EIA identifies several culturally important fish species that are harvested by WLFN members at Table 3.3, including arctic grayling, burbot, mountain whitefish, northern pike, suckers, perch and trout.⁷⁵ As well, the EIA identifies the following culturally important species as key aquatic indicator species: arctic grayling, bull trout and rainbow trout.⁷⁶

Changes in water quality have the potential to affect fish health. WLFN submits that any spills or releases by the proponent, either planned or unplanned, as well as the disturbance of natural water courses will impact the environment and will be unacceptable. And if any such spills or releases occur then the effects on WLFN Harvesters' Treaty rights will be adverse given the potential impact on aquatic ecology, wildlife and plant and berry species.

Any effects on fish abundance, fish distribution, fish biodiversity and fish health will also have a corresponding negative effect on WLFN members' rights to fish pursuant to Treaty. For example, the arctic grayling is a culturally important species of fish harvested by WLFN members and they are classified as *Sensitive* and is considered a *Species of Special Concern* under the *Alberta Species at Risk Program*.⁷⁷ WLFN has a direct interest in the protection of this culturally important species and the associated exercise of WLFN's rights which may be adversely affected by adverse impacts on this fish.

ii. hydrogeology

The Robb Trend Project will also affect surface water as a result of the following activities as follows:⁷⁸

| Construction | Operations | Abandonment |
|--|--|--|
| <ul style="list-style-type: none"> • tree clearing, constructing access roads, diversions, and settling ponds • area disturbances for borrow pits and waste and soil piles | <ul style="list-style-type: none"> • groundwater drawdown / mine dewatering, settling ponds and diversion operation and maintenance • diversion shifting, flushing/cleaning pits • haul road grading, runoff control, culvert and berm maintenance • O&M of cleanouts/retention areas. | <ul style="list-style-type: none"> • area reclamation, creek restoration / stabilization. • in-pit pond developments and filling • eventual settling pond removal |

The WLFN is extremely concerned about any surface water impacts from any lakes or watercourses in and around the permit area due to the numerous stream diversions that will be

⁷⁵ Robb Trend Application, CR#2 Aquatics, Table 3.3, Pages 9-10.
⁷⁶ Robb Trend Application, CR#2 Aquatics, Table 3.4, Pages 12-14.
⁷⁷ Robb Trend Application, CR#2 Aquatics, Table 3.4, Pages 12-13.
⁷⁸ Robb Trend Application, CR#6 Hydrology, Table 7.

required for the Robb Trend Project ,⁷⁹ including any impacts from construction activities, use of Nitrogen-based explosives, impoundment operations, and use of end-pit lakes.⁸⁰

c. Air Quality

The Robb Trend Application , if approved, would result in atmospheric emissions from fossil fuel combustion sources, fugitive emissions from mine equipment, coal processing plant, soil handling, coal movement and wheel entrainment.⁸¹ The total equivalent CO₂ emissions for the project alone are estimated to be 357 kt/yr.⁸²

The direction of impact for air quality is universally negative for all impacts outlined in Table 6.5-1,⁸³ which list the following potential impacts/effects:

1. human health effects;
2. vegetation effects;
3. visibility impairment;
4. nuisance;
5. odour;
6. ecological health effects; and
7. ecological effects.

The WLFN Harvesters would be subject to the foregoing impacts that arise from the Robb Trend Project's effect on air quality. This could adversely impact WLFN harvester health, especially during spring and fall hunts and harvesting activities by WLFN members, and related fishing and plant/berry gathering activities during all seasons.

Regarding odors emanating from the Project, the EIA provides that exceedance of the average odor threshold was predicted to occur infrequently on the mine permit boundary.⁸⁴ Odors may affect human health comfort and enjoyment and deter future harvesting from the area by WLFN Harvesters. Further, WLFN is concerned the effect that the odors will have on wildlife such as caribou, moose, deer, etc.

d. Noise

The construction and operation of the projects will lead to increased noise in this area. Like odor, WLFN Harvesters understand that noise has an effect on the wildlife that they harvest, and are concerned that animals will avoid the project areas altogether due to such noise. WLFN is concerned that this in turn may affect the success of its members' harvesting activity within the area.

⁷⁹ Robb Trend Application, CR#6 Hydrology, Page 33.

⁸⁰ Robb Trend Application, CR#2 Aquatics, Page 72.

⁸¹ Robb Trend Application, CR#1 Air Quality Assessment, Page 3.

⁸² Robb Trend Application, CR#1 Air Quality Assessment, Page 40.

⁸³ Robb Trend Application, CR#1 Air Quality Assessment, Table 6.5-1, Pages 91-92.

⁸⁴ Robb Trend Application, CR#1 Air Quality Assessment, Page 78.

e. Human Health Risk

WFLN is seriously concerned about human health risks associated with exposure to various chemicals that are released from the Robb Trend Project and the acute effects on those in the community who travel to the Project area in order to harvest resources, and to those who consume such harvested resources.⁸⁵ The threat of exposure to various chemicals, in particular selenium, arising from the Robb Trend Project will significantly diminish the value and attractiveness of the area in the vicinity of the Project for traditional pursuits by WFLN Harvesters.

f. Habitat Fragmentation

Alteration of terrain will result in the removal of all natural vegetation and wetlands within the Robb Trend project footprint (predicted to be a loss of 5,728 ha) and the Road Project footprint.⁸⁶ This also means that the fish, wildlife and plant and berry resources will also be affected by the projects. This habitat fragmentation will adversely impact the WFLN Harvesters' Treaty rights.

g. Reclamation

As stated above, WFLN is concerned about the lack of meaningful reclamation and mitigation plans. The Robb Trend reclamation plan is described as "conceptual", and the reclamation section of the Haul Road Application appears to be copied directly from other 'conceptual reclamation plans' and contains largely generic statements about mine reclamation, not access road or water crossing reclamation.

6. CONCLUSION

WFLN possesses and exercises legal and constitutional rights in the Robb Trend permit area, Haul Road Project boundary and the lands surrounding these areas pursuant to, *inter alia*, Treaty. In this case, neither the Crown nor CVRI have offered any concrete mitigation, avoidance or accommodation measures that would justify the potential adverse impacts these projects would have on these rights.

The WFLN submits that the Applications ought to be denied.

The basis for the denial is that the projects would remove lands suitable for the exercise of Treaty harvesting rights from the diminishing available inventory of lands within the Treaty 6 area.

Second, the proposed activities will disturb traditional plants, fish and wildlife populations, including identified species of concern that are in decline and species that are culturally important to the WFLN's continued exercise of its constitutionally protected harvesting rights.

⁸⁵ Application, CR#5 Human Health, Pages 10-16.

⁸⁶ Application, CR#13 Vegetation, Page 83.

Third, the Applications ought to be denied because the Federal and Provincial Crown have not consulted, or adequately consulted, the WLFN, much less accommodated the adverse impacts of the proposed projects on WLFN's Aboriginal and Treaty rights. While the AER may not have jurisdiction to determine if the duty to consult has been adequately discharged, the fact remains, it is a constitutional duty and it must be met in advance of final project approvals.⁸⁷

The WLFN further submits that, at a minimum, an oral hearing is necessary for the AER to:

- a. fully consider and appreciate how the projects may directly and adversely affect the WLFN's constitutionally protected Aboriginal and Treaty rights;
- b. determine if the projects are in the public interest;
- c. impose conditions, should the projects ultimately be approved; and
- d. consider whether CVRI's consultation with WLFN was sufficient to meet the regulatory requirements imposed by the AER.

At an oral hearing, WLFN would present further written and oral evidence from experts and community members with respect to the nature and extent of the traditional activities that it carries out in in the project areas, as well as in the LSA and RSA WLFN panel members will describe for the AER the social and cultural impacts associated with the loss and degradation of lands which support its traditional activities. WLFN would also tender its own expert evidence with respect to environmental and traditional use issues. WLFN, through its counsel, would conduct cross examination of the CVRI panel on a variety of issues related to the projects, including their size, scope, and the consequent impacts.

In the absence of such evidence, the AER cannot be assured that its decision on the Application would be in the public interest, as is mandated by Section 4(c) of the *Coal Conservation Act (Alberta)*.⁸⁸

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⁸⁷ *Rio Tinto* at para. 63

⁸⁸ *Coal Conservation Act*, R.S.A. 2000, c. C-17, at s. 4(c).