January 20, 2015

By Email

Brett Maracle, Panel Manager
Canadian Environmental Assessment Agency
160 Elgin Street, 22nd Floor, Ottawa ON K1A 0H3
RobbTrend@ceaa-acee.gc.ca

Dear Mr Maracle,

RE: **Robb Trend Coal Mine Expansion Project – O'Chiese First Nation Comments on Agreement to Establish a Joint Review Panel for the Robb Trend Coal Mine Expansion Project Between the Minister of the Environment, Canada -and- the Alberta Energy Regulator, Alberta (Draft Agreement)**

Michel First Nation was enfranchised as a group in 1958, two years prior to the general enfranchisement of Indians in Canada in 1960. This enfranchisement did not annul the Treaty relationship between the Crown and Michel First Nation, and individual members of Michel First Nation continue to receive Treaty payment and exercise their constitutionally protected Treaty rights. More background information about Michel First Nation can be found in the attached letter to Premier Prentice of Alberta.

Michel First Nation is participating in the Environmental Assessment for the Robb Trend Coal Mine Project to ensure that its rights and interests in the project area are protected. Please accept the following comments on the Draft Agreement for the Robb Trend Coal Mine Expansion Project.

Draft Agreement

1. The fourth Whereas clause states that:

   WHEREAS the proposed Robb Trend Coal Mine Expansion Project (the Project) requires a public hearing and approvals from the AER pursuant to REDA and the Coal Conservation Act, may include approvals from the AER pursuant to the

Environmental Protection and Enhancement Act (EPEA) and the Water Act, and is subject to an assessment under CEAA 2012; and

This clause does not make it clear whether or not approvals pursuant to the Environmental *Protection and Enhancement Act* (EPEA) and the *Water Act* will be required. Michel First Nation suggests that the Draft Agreement clearly describe what approvals are required. If approvals under EPEA and the *Water Act* are not required, reference to them should be removed from the clause.

2. The nineth whereas clause states:

   WHEREAS the AER and the Federal Minister of the Environment have determined that a joint review of the Project should be conducted in a manner consistent with the provisions of Appendix 2 of the Canada-Alberta Agreement on Environmental Assessment Cooperation (2005) to the extent reasonable; and

It is not clear what is meant by "to the extent reasonable". Michel First Nation suggests that either specific provisions of the Appendix 2 of the Canada-Alberta Agreement on Environmental Assessment Cooperation (2005) should be referenced, with any necessary changes or that this clause should be removed from the Draft Agreement because it does not provide meaningful guidance to the Joint Review Panel.

3. The definitions include:
   a. "interested party" means any person who the Joint Review Panel determines, with respect to the Project, may be directly affected by the carrying out of the Project or has relevant information or expertise;

The test used by the AER to determine whether a party "may be directly and adversely affected" is overly restrictive and will prevent parties with existing treaty rights, like Michel First Nation, in the project area from participating in the public hearing without providing evidence of the exercise of those rights in the project area. It should be made clear that any Aboriginal group with existing rights in the project area is an "interested party" for the purposes of this environmental assessment.

   b. "mitigation" means, in respect of the Project, the elimination, reduction or control of the adverse environmental effects of the Project, and includes restitution for any damage to the environment caused by such effects through replacement, restoration, compensation or any other means;

Mitigation should include accommodation. Further, restitution should not be limited to damage caused to the environment, but should be broadened to include restitution and accommodation for the environmental effects of damage caused to the environment as defined in CEAA 2012.

c. "report" means the document produced by the Joint Review Panel, which contains decisions pursuant to REDA and the Coal Conservation Act (and may include decisions pursuant to EPEA and the Water Act), and the Joint Review Panel's rationale, conclusions and recommendations relating to the environmental effects of the Project including any mitigation measures and follow-up program pursuant to CEAA 2012 and a summary of comments received from the public, including Aboriginal persons and groups.

The terms of reference should clearly describe the work to be completed by the Joint Review Panel. The definition of report should reference the particular sections of the acts referenced under which decisions may be made.

4. The wording in section 5.2 is unclear. The section states:

   The public registry will include relevant documents included during the environmental assessment and documents on the AER's public record prior to the referral to a review panel.

It is not clear what is meant by "relevant documents". Who will determine what a "relevant document" is? How will what a "relevant document" is be determined? Does "included during the environmental assessment" mean filed during the Environmental Assessment under EPEA or under CEAA 2012?

5. Section 5.4 reference to "follow-up program" should be "follow-up programs" because there are two different types of follow-up programs in the definitions section, and because there could be many different follow-up programs depending on the recommended mitigation measures.

Appendix 1 Terms of reference (Terms of Reference)

6. Page A1 states that:

   The Joint Review Panel shall conduct an assessment of the environmental effects of the Project referred to in the Scope of the Project (Part 1) in a manner consistent with the requirements of CEAA 2012, REDA, the Coal Conservation Act, EPEA if applicable, and these Terms of Reference.

It is not clear what situations EPEA might be applicable, and the *Water Act* is not mentioned despite the mention of the *Water Act* in the fourth whereas clause on page 1 of the draft agreement. It should be made clear whether or not EPEA is applicable not only to guide the work of the Review Panel, but also to assist those individuals and groups participating in the Environmental Assessment.

7. Public hearing participation

The requirement in the Terms of Reference in clause 14 of Part V that public hearing participants meet the test in subsection 34(3) of REDA will prevent participation of Aboriginal groups who have existing rights in the project area from participating without providing evidence of the exercise of those rights. Requiring evidence of the exercise of an Aboriginal or Treaty right prior to determining impacts on those rights is generally contrary to the relationship between the Crown and Aboriginal groups, and specifically contrary to the Aboriginal Consultation Direction provided in Energy Ministerial Order 105/2014 which states that the AER shall:

> require the proponent of the energy application to include information about the potential adverse impacts, if any, of the proposed energy resource activity on existing rights of aboriginal peoples

The direction given to the AER in Energy Ministerial Order 105/2014 means that the AER must require the proponent to determine the adverse impacts of the proposed activity on existing rights . For further clarity, the impacts on existing rights may differ from impacts on the exercise of existing rights. The rights of Aboriginal groups like Michel First Nation are not frozen in time, and the exercise of Aboriginal and Treaty rights may change in response to many factors. Impacts on existing rights must therefore be seen to encompass all rights, whether exercised or not.

Requiring Aboriginal groups to submit evidence on the exercise of rights prior to permitting them to participate in a public hearing in support of an Environmental Assessment is analogous to requiring a landowner to demonstrate that they use a part of their land before allowing the land owner to participate, even though the land itself, which the landowner has rights to, will be affected by the project. The requirement that public hearing participants meet the test in subsection 34(3) of REDA should be removed from the Terms of Reference.

Conclusion

Michel First Nation looks forward to receiving feedback on how its comments and advice have been considered by the Canadian Environmental Assessment Agency, in accordance with the Aboriginal consultation plan for the above mentioned project.

Thank you,

<original signed by>

for
Gil Goerz
Chief, Michel First Nation

Enclosure: Letter to Premier Prentice of Alberta, dated December 2, 2014

December 2nd, 2014

Sent Via Email – Premier@gov.ab.ca

The Honourable Jim Prentice
Premier of Alberta and Minister of Aboriginal Relations
307 Legislature Building
10800 - 97 Avenue
Edmonton, AB T5K 2B6

Dear Premier Prentice:

Re: Recognition of the Michel First Nation (MFN)

Firstly, let me congratulate you on your recent electoral victory. We are encouraged that you have, for a very long time, recognized how important it is for government, First Nations and industry to all come to a place where they can find common ground, identify opportunities and concerns, and proceed with development that is balanced and respectful of all of the parties' views. As you wear both hats, as the Premier and the Minister of Aboriginal Relationships, you are sending a clear and strong message of your government's desire for meaningful and deeper engagement with First Nations.

Secondly, the Chief and Council of the Michel First Nation ("MFN") require your personal assistance in addressing a long-standing historical grievance that you are already quite familiar with. You may recall MFN from an Indian Claims Commission hearing you co-chaired in 1998. MFN is in a unique position among First Nations in Canada, having been enfranchised as a group in 1958. The simplistic and legally flawed position taken by Canada was with no Indian reserve, you could not be an Indian Band, and hence were not a collective, and accordingly, you have no treaty rights.

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To borrow the words of the ICC decision in which you took part in 1998, failure to recognize the MFN results in "manifest unfairness". Now, as the Premier and the Minister, you have the opportunity, and we would even say obligation, to correct this historical wrong and injustice.

The 1958 vote took place prior to Indians receiving the federal vote in 1960 and the provincial vote in Alberta in 1965. Subsequently, through bills such as Bill C-31 and Bill C-3, members of MFN have regained Indian status under the *Indian Act.* As our forbearers signed an adhesion to Treaty #6 in 1878, members of Michel First Nation have existing treaty rights protected by section 35 of the *Constitution Act, 1982*.

The Government of Canada maintains that the dissolution of the entity known as the Michel Indian Band under the *Indian Act* correspondingly dissolved their Treaty 6 rights. MFN respectively disagrees with Canada's legal position. There is currently outstanding litigation with the Federal Crown on this very issue. We note that the Government of Canada continues to recognize and pay treaty annuity payments to MFN members since 1993. All members of MFN have Indian Status.

We are setting out our legal concerns in some detail, so that you can fully appreciate and understand that we are asking you to intervene, not only from a sense of correcting a historical grievance, but also that there is an ongoing legal breach of our constitutionally protected section 35 treaty rights.

The unilateral decision by the federal Government to deny us our constitutionally-protected Section 35 Charter Rights is clearly in breach of the Honour of the Crown. The federal Crown has taken the position, as set out in its Statement of Defense at paragraph 31 that:

> *Upon its members being enfranchised and the Michel Band's assets being distributed to its members and to Michel Investments Ltd. in accordance with the 1958 Enfranchisement Plan, the Michel Band ceased to exist as a separate entity, by operation of law, and the former Band members ceased to be Indians as defined by the Indian Act. Treaty rights are by definition collective in nature and accrue only to the band which is the modern manifestation of the Treaty signatory band. Once the Michel Band ceased to exist, any rights conferred upon the former Michel Band by Treaty No. 6 ceased to apply to them.*

This position is legally flawed and clearly wrong.

The Michel Indian Band had signed the adhesion to the Treaty on September 18, 1878. However, when they had signed Treaty 6 they were not a statutorily-created Band. The Treaty rights were granted to the Michel Indian Band and there was a time gap, as it were, before the

Band was clearly recognized under the *Indian Act*. Thus the treaty rights of the Michel Indian Band under the Treaty 6 existed independently of it being a statutorily-created Indian Band.

By signing Treaty 6 the Michel First Nation agreed to transfer, surrender or relinquish all their traditional lands in turn for a number of benefits under Treaty 6, one of which was the creation of a reserve. However, the Treaty 6 rights that were granted included hunting and fishing rights, the right to farm implements, the right to guns and ammunition, the right to a Treaty annuity, and a number of other rights. When looking at the actual text of Treaty 6, it also contemplated that the reserve that would be created for the Band could be sold with the consent of the Band, but this would not terminate the treaty.

The termination of the Band's status under the *Indian Act* does not inherently extinguish the Band's treaty protected rights. A treaty is an exchange of solemn promises between the parties, whose nature is sacred: *R. v. Simon*, [1986] 1 C.N.L.R. 153 ("*Simon"*); *R. v. Badger*, [1993] 5 W.W.R. 7 (Alta.C.A.) ("*Badger*").

When entering into Treaty 6, the Michel First Nation agreed to transfer, surrender and relinquish all their right, title and interest whatsoever in certain described lands, in return, were to receive all the benefits provided in Treaty No. 6. In *Simon*, the Supreme Court of Canada explained that, "given the serious and far-reaching consequences of a finding that a Treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises" [p. 403].

The federal government could only extinguish Treaty or aboriginal rights before 1982 by legislative act evincing "a clear and plain intention" to extinguish the right in question: *Calder v. B.C. (A.G.),* [1973] S.C.R. 313 and adopted by the unanimous Court in *R.* v. *Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 S.C.R. 1075. In the case of the Michel First Nation, the instruments use to enfranchise Band members did not evince a clear and plain intention to also exterminate the Michel First Nation's Treaty rights. This intent was neither explicit nor implicit.

In summary, terminating of the Band's status under the *Indian Act* does not inherently extinguish the Band's Treaty protected rights. Canada has not proven "a clear and plain intention" to extinguish the right in question. In our respectful view, Canada is relying on the wrong test when it states that "once the Michel Band ceased to exist, any rights conferred upon the former Michel Band by Treaty No. 6 ceased to apply to them."

In our respectful view, none of that proof exists and there has never been a clear and plain intention to extinguish all of Michel First Nation's Treaty rights. The Court in *Badger*, at page 92, held that the onus of proving extinguishment is on the Crown. In our respectful view, the

Crown did not meet this burden, and has wrongfully denied the Michel First Nation its Treaty rights.

It remains our position that the Michel Band still exists as a collective group of Aboriginal People. In *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193 (CanLII), 2012 BCCA 193, the Court of Appeal found that rights could be held on a collective basis that was not based on band membership:

> *[77] … [T]he chambers judge designated the class members as "Aboriginal collectives" because of his recognition of the fact that Band membership does not necessarily establish the requisite ancestral connection to assert an Aboriginal right. I agree with the chambers judge in this regard. This is so because in some cases, an Aboriginal collective may self-identify along traditional lines independent of Indian Act designation as a Band. A Band is not necessarily the proper entity to assert an Aboriginal right (emphasis added).*

The Court of Appeal in *William v. British Columbia*, 2012 BCCA 285 upheld this decision stating that the Tsilhqot'in people were a collective and as a Nation, the proper rights holders:

> *[149] In my view, the position taken by British Columbia does not take adequate account of the Aboriginal perspective with respect to this matter. I agree with the trial judge's conclusion that the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself. In that regard, at para. 471, the judge cited with approval a passage from Professor Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 745:*
>
> *What role, then, does native custom play in this scheme? The answer lies in the fact that, while the doctrine of aboriginal land rights governs the title of a native group considered as a collective unit, it does not regulate the rights of group members among themselves. Subject, always, to valid legislation, the latter are governed by rules peculiar to the group, as laid down by custom or internal governmental organs.*
>
> *Thus, the doctrine of aboriginal land rights attributes to native groups a collective title with certain general features. The character of this collective title is not governed by traditional notions or practices, and so does not vary from group to group. However, the rights of individuals and other entities within the group are determined inter se, not by the doctrine of aboriginal*

> *title, but by internal rules founded on custom. These rules dictate the extent to which any individual, family, lineage, or other sub-group has rights to possess and use lands and resources vested in the entire group. The rules have a customary base, but they are not for that reason necessarily static. Except to the extent they may be otherwise regulated by statute, they are open to both formal and informal change, in accordance with shifting group attitudes, needs, and practices.*
>
> *[Footnotes omitted; see also Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can. Bar Rev. 255.]*
>
> *[150] In the case before us, the evidence clearly established that the holders of Aboriginal rights within the Claim Area have traditionally defined themselves as being the collective of all Tsilhqot'in people. The Tsilhqot'in Nation, therefore, is the proper rights holder.*

MFN seeks recognition as an Aboriginal group to whom Alberta owes a duty to consult and accommodate when decisions are made by the Government of Alberta that could negatively affect Treaty 6 rights. Recognition of MFN by the Government of Alberta is an excellent opportunity for Alberta to demonstrate renewed commitment to its relationship with all First Nations.

We would also note that Alberta ESRD field officers recognize MFN members as holding treaty rights to hunt when encounters between Fish and Wildlife officers and MFN members occur. Despite the existence of our treaty rights, Alberta does not currently recognize MFN as a group to which it owes a duty to consult. This position is unfounded, because the treaty rights of MFN have never been extinguished. While it may have been the Government of Canada's intention to assimilate MFN through enfranchisement, the act of enfranchisement alone did nothing to extinguish our constitutionally protected treaty rights. Members of MFN continue to exercise their treaty rights throughout MFN's traditional territory.

It is for this reason that the letter sent on behalf of the Land Use Secretariat of Alberta (attached) refusing to consult with MFN regarding the North Saskatchewan Regional Plan must be seen as a failure on the part of Alberta to consult with MFN.

As Minister of Aboriginal Relations for Alberta, you are now in a position to correct part of the unfairness you recognized 16 years ago as co-chair of the Indian Claims Commission. Your decision in the Friends of Michel Society Inquiry is set out below:

> *The Commission, of course, makes no findings on the merits of these other claims. We do, however, have serious reservations about the fairness of Canada's position that the Michel Society does not have standing to bring a claim under the Policy. Such a decision may, in effect, immunize Canada from the legitimate claims of a group of Indians who contend that they still stand in a fiduciary relationship with the Crown. Furthermore, it is our view that this result, although correct from a technical legal perspective, is unfair because it might allow Canada to benefit from the effect of enfranchisement provisions that were repealed in their entirety in 1985. Viewed in this light, we think it would be inappropriate for Canada to stand on its technical legal advantage in this case. That advantage is derived from the fact that the Band was enfranchised in combination with the strictures of the Specific Claims Policy and what may be a gap in the Bill C-31 amendments.*
>
> *In our view, Canada should consider the specific claims of the Michel Society on their merits. Such an approach is not only consistent with the thrust of the Specific Claims Policy and the Crown's fiduciary relationship with aboriginal peoples, but it is also consonant with the spirit of the Bill C-31 amendments, which sought to eradicate the concept of enfranchisement and to remedy its discriminatory effects.*

After the proclamation of the Aboriginal Consultation Levy Act you will be able to recognize MFN as an Aboriginal group for the purposes of section 2 of the Aboriginal Consultation Levy Act. We urge you to take this remedial step. In the meantime, MFN requests that you indicate your intention to recognize MFN as an Aboriginal group under the Aboriginal Consultation Levy Act, and requests that you direct the Land Use Secretariat, and all other aspects of the Alberta Crown, to recognize Alberta's obligations to MFN. Michel First Nation played an important role in the history of Canada and Alberta, and that should not continue to be denied by Alberta.

Please contact me so that we can arrange for a meeting to address this very import wrong and to make sure that the Government of Alberta, under your leadership, will put itself on the right side of history and maintain the Honour of the Crown.

Sincerely,

<original signed by>

Gil Goerz
Chief, Michel First Nation

Encl. – Email from Land Use Secretariat

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