

ERMINESKIN CREE NATION

COMMENTS ON THE SUMMARY OF THE INITIAL PROJECT DESCRIPTION

BEACON AI CENTERS HEARTLAND PROJECT (REF NO. 90123)

1.0 EXECUTIVE SUMMARY

1. Ermineskin Cree Nation (“**Ermineskin**”) is submitting comments on an Initial Project Description (“**IPD**”) submitted by Beacon AI Centers (the “**Proponent**”) regarding its Heartland Project (the “**Project**”).
2. The Project will have adverse impacts on the practice of Ermineskin’s Aboriginal and Treaty rights in the area because of adverse environmental impacts on the local and regional ecosystem/ environment, including water quantity reduction, air contamination, and noise pollution. This area remains an important area for Ermineskin culture and connection to our ancestors – it is utilized by individuals to practice Aboriginal and Treaty rights. Actions taken to further degrade this landscape will further degrade Ermineskin culture and way of life.
3. In addition to impacts to Aboriginal and Treaty rights, the Project impacts multiple areas of federal jurisdiction thus necessitating a comprehensive federal impact assessment under the *Impact Assessment Act* (“**IAA**”).
4. Ermineskin is concerned about the scope of the Project as identified in the IPD. The “Project” – as currently scoped in the IDP – is limited to the power generation facility. However, the incidental activities proposed go far beyond this facility and include a power generation station, multiple data centers, a natural gas pipeline, and transmission lines. The IPD should describe all components as a single project, not just the power generation station. This will allow for a more accurate description of the “Project” and its impacts and avoid the negative consequences of project splitting. As it stands, the IPD inappropriately splits the project into individual parts frustrating a proper assessment of its impact and should be revised.
5. Concerningly, Alberta’s regulatory process evaluates the project components separately, failing to provide any decision maker with the complete and necessary information regarding the potential impacts, and refusing consultation with First Nations. In Ermineskin’s experience, Alberta’s approach often disregards cumulative effects and impacts on Aboriginal and Treaty rights.
6. In this case, Alberta has deemed consultation unnecessary – exacerbating concerns that there is no place for Ermineskin’s concerns to be considered.
7. A federal assessment is crucial to ensure thorough evaluation, a comprehensive assessment of areas of federal jurisdiction, and fulfilment of the Crown’s obligations, duties, and honour.

2.0 INTRODUCTION

Ermineskin Cree Nation

8. Ermineskin is a Cree First Nation with inherent authority pursuant to the Ermineskin Cree Nation Constitution and Tribal Laws under the Cree legal traditions. Ermineskin is also a “band” within the meaning of the *Indian Act*, RSC 1985, c I-5, as amended, and an Aboriginal people within the meaning of s. 35 of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11.
9. Ermineskin’s reserves are in what is now central Alberta, approximately 70 km south of Edmonton and halfway between the towns of Ponoka and Wetaskiwin. The majority of Ermineskin’s citizens resides on Ermineskin Indian Reserves No. 138 and 138A (the “**Reserves**”). Ermineskin’s Reserves and much of its traditional territories lie within the tract of land subject to Treaty 6.
10. Ermineskin is the successor to Chief Bobtail’s band, which adhered to Treaty 6 at Blackfoot Crossing in 1877, induced by the Crown’s assurances that the band and descendants could continue to hunt, fish, trap, gather, and harvest free from interference in its traditional territory– as Ermineskin have always done.
11. Long before the Crown’s assertion of sovereignty in what is now Alberta, Ermineskin used the lands and waters throughout its traditional territory to hunt, fish, trap, gather, and support Cree ways of life, ways of being, and cultural practices and activities. Ermineskin’s dependance on and relationship with these lands and waters has shaped its unique identity and way of life as Indigenous peoples, including language, economy, culture, and spirituality.
12. In many ways, these commitments and assurances have not been upheld and Ermineskin has witnessed its lands developed, carved up, and sold off in ways that are incompatible with that original Treaty promise and have created little benefit for Ermineskin and its members.

Project Overview

13. The Project is proposed approximately 7 km east of Gibbons, Alberta. The Project is a power generation facility with a capacity of 920 Mwe, providing 800 MWe of continuous, dispatchable electricity to the four on-site data centers. The IPD describes the four on-site data centers as “co-located” with the Project, along with related infrastructure including a natural gas pipeline, new transmission lines, and a transmission and connection to an existing transmission line. These four components are all interdependent, but the IPD only includes the power generation station. Ermineskin is very concerned that this limited review artificially scopes out the total impacts of the four components together. The lack of assessment of the four components together is leaving a large regulatory gap where impacts will go unexamined and unaddressed.

14. The Project will directly impact lands used by Ermineskin harvesters, exacerbate major cumulative effects concerns, and increase potential risk to the lands and waterways on which Ermineskin harvesters rely for the practice of Aboriginal and Treaty rights and for drinking water to Ermineskin's primary reserve lands. In particular, the IPD flags a major potential concern: substantial use of water for data centers while many impacted First Nations struggle to get access to clean, reliable, and safe drinking water.
15. The IPD describes a project with little comparison in Canada in terms of scale. Data center projects are new and understudied. New projects with new and novel impacts require rigour and scrutiny from all levels of government, including First Nations. We must be cautious in how we assess these projects and evaluate how they may impact different jurisdictions. Indigenous groups, including Ermineskin, must play a substantial role in project regulation and development to realize the positive impacts of the Project and reduce the negative impacts and potential risks.
16. The Project must proceed with the highest level of environmental protection, diligence, and scrutiny. It must involve First Nations at every step of the way. To meet this standard requires a federal process to ensure all regulatory gaps are filled.

Engagement/Consultation to Date Insufficient

17. Ermineskin has been notified of the Project and had one introductory meeting with the Proponent. The Proponent has not offered any capacity funding.
18. Concerningly, the IPD states that the Alberta Aboriginal Consultation Office ("**ACO**") has confirmed no consultation with Indigenous Nations is required due to the Project's location on private land and absence of identified traditional use. As will be explained below, this reflects an impoverished understanding of what the Project's impacts will be and is not in line with the jurisprudence on the duty to consult.

The *United Nations Declaration on the Rights of Indigenous Peoples* Applies

19. Federal assessment is required for Canada to uphold its UNDRIP commitments.
20. Canada has affirmed the *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**"), and it has been adopted into Canadian law. There are numerous UNDRIP articles applicable to this Project, including but not limited to:

- Article 18 -- Indigenous peoples have the right to participate in decision-making in matters which would affect their rights.
 - Article 26 -- Indigenous peoples have the right to their traditional territories, including the protection of such lands.
 - Article 29 -- Indigenous peoples have the right to the protection of their lands.
 - Article 32 -- Indigenous peoples have the right to free, prior and informed consent with regards to projects on their lands.
21. Given Treaty infringement concerns, impacted First Nations, the Proponent, and the various federal and provincial agencies must co-develop a process to obtain the free, prior, and informed consent of First Nations on whose lands the Project will operate.

3.0 ERMINESKIN CONCERNS

22. Please note the below are preliminary concerns only. Ermineskin has not had sufficient time or resources to do an in-depth review of concerns related to the Project but expects there are many other rights, interests, and concerns that will need to be raised on the Project. More work is required to identify such concerns. We look forward to engaging in the federal assessment to do this work.

Project is Inaccurately Scoped

23. The power generation station, four data centers, a natural gas pipeline, new transmission lines, and connection to an existing transmission line (together, the “**Consolidated Project**”) are inextricably linked. This is a single project made up of four components that should be considered together as part of a single assessment. When projects that are interconnected and inextricably linked are split, impacts are not properly assessed, and the potential impacts of the individual components are downplayed. This could lead to project approval without the full scope of impacts on the environment and Treaty rights ever being presented to decision-makers. For example, the Project’s overall water use must be calculated based on the consumption of the power generation station, four data centers, a natural gas pipeline, new transmission lines, and connection to an existing transmission line – without doing so, we are not looking at the full picture.
24. Under the IAA, a designated project includes one or more physical activities that are listed in the *Physical Activities Regulations*, as well as any physical activity incidental to those listed physical activities. In determining what is “incidental”, as directed by the *Guide to Preparing an Initial Project Description and a Detailed Project Description* (the “Guide”), the following are considered:
- the nature of the proposed activities and whether they are subordinate or complementary to the designated project.
 - whether the activity is within the care and control of the proponent.

- if the activity is to be undertaken by a third party, the nature of the relationship between the proponent and the third party and whether the proponent has the ability to “direct or influence” the carrying out of the activity.
 - whether the activity is solely for the benefit of the proponent or is available for other proponents as well; and
 - the federal and/or provincial regulatory requirements for the activity.¹
25. Further, “incidental” has been defined in the case law as “occurring or liable to occur in fortuitous or subordinate conjunction with something else”. Incidental requires “a certain level of proximity as well as possibly a causal connection between the activities and the designated project.”²
26. There is an immediate proximity and a clear causal connection between the power generation station, four data centers, natural gas pipeline, new transmission lines, and connection to an existing transmission line. Additionally, it is our view that each of the Guide’s criteria and the common definition of “incidental” are met in this case when assessing the proponent’s full project – to develop a power generation station, four data centers, a natural gas pipeline, new transmission lines, and connection to an existing transmission line together. This is particularly true of the power generation station and the four data centers. For example, the power generation station and data centers are all taking place on the same “data center campus”, as described by the Proponent. The data centers will be controlled by the Proponent and are for the benefit of the Proponent. The components are not only complementary of each other – they are wholly interdependent: the data centers could not operate without the power generation station and there is no reason for the power generation station without the data centers.
27. It is inaccurate to suggest these components are not causally connected and that they represent different projects. The Consolidated Project is therefore a designated project and requires impact assessment under the IAA.
28. Without a federal assessment, there will be no forum where the impacts of the Consolidated Project or even the Project on its own will be assessed properly.

Alberta Regulatory Regime Insufficient

29. The Alberta regulatory process addresses the components of the Consolidated Project individually and does not look at them as a single project. For example, there will be an Alberta Utilities Commission proceeding that excludes analysis of the data centers. There will be other applications under provincial legislation, but no decision maker will

¹ Guide to Preparing an Initial Project Description and a Detailed Project Description ([link](#)).

² *Canada (Canadian Environmental Assessment Agency) v Taseko Mines Limited*, 2018 BCSC 1034.

consider all four components together. Without looking at the components together, no decision maker can properly assess or respond to the impacts.

30. Compounding Ermineskin’s concern is the fact that Alberta is not even equipped to address the impacts of the power generation station alone. For example, Alberta has not ordered consultation with First Nations and impacted Indigenous groups in relation to the power generation station, which shows that a full and proper assessment of impact on Indigenous peoples will not occur unless done so through the federal process. Allowing an impoverished assessment of impacts to Indigenous peoples, cumulative impacts, and areas of federal jurisdiction is not keeping with the honour of the Crown and the federal government’s constitutional obligations.
31. For example, the Consolidated Project proposes to use substantial volumes of water. The IPD highlights that the Proponent has obtained a permit for use of potable drinking water distributor to alleviate concerns about excessive water use. Respectfully, this is not a solution that addresses the concern. Ermineskin needs detailed information about where the municipality gets its water, the extent of the water use, long term impacts of such use, and how this aligns with water scarcity management throughout Alberta. Additional information on the water quality and quantity in the Sturgeon County watershed over the next several decades must be provided.

Impacts to Federal Jurisdiction Require Federal Assessment

32. Alberta’s piecemeal approach facilitates project splitting and will leave several areas of concern understudied and unaddressed. A federal assessment is required to ensure assessment of the following impacts:

Greenhouse Gas Emissions

The IPD states the Project will generate roughly 4.4 megatons (“Mt”) of GHG emissions per year. Large oil sands projects in Alberta often range 4–6 Mt CO₂e/year, meaning this Project is in the same class as one of Canada’s largest single industrial GHG sources. The Project could have significant effects on cumulative effects of climate change and air quality in the region. Canada’s key GHG commitments include reducing emissions by 40-45% by 2030 and achieving net-zero by 2050. This Project represents several steps backward on the path to meeting these targets and rather treats them as suggestions. For example, the IPD does not provide a plan for how the Project will achieve net zero emissions by 2050, beyond vague references to carbon capture or offsets. The volume of GHG warrants federal review of the Consolidated Project.

Air Quality

Such a significant source of emissions also raises concern about air quality. Recent reports about flaring issues at LNG Canada facilities in British Columbia have highlighted concerns

about unintended air and noise pollution that could impact human health and increase greenhouse gas emissions from production facilities.

Water

Ermineskin is particularly concerned about potential adverse effects on water quantity and quality on First Nation lands. Any alteration in flows, quality, or reliability has direct implications for the health, rights, and interests of Indigenous people and for the integrity of Indigenous lands. Ermineskin requires detailed information on water use, including: (a) identification of all municipal water sources proposed to supply the Project; (b) the projected volumes, timing, and variability of water use over the life of the Project; (c) assessment of long-term impacts on regional water availability, aquatic ecosystems, and downstream users; and (d) analysis of consistency with Alberta's water scarcity management frameworks and allocation priorities. In addition, Ermineskin requires forward-looking information on water quality and quantity trends within the Sturgeon County watershed over the coming decades, including climate-resilience assumptions, hydrological modelling inputs, and contingency measures for drought and low-flow conditions.

Noise

The Consolidated Project will create significant noise, and sound often travels farther on the prairies. This will have indirect impacts on birds and wildlife, as well as human avoidance.

Aquatic Environments

The Project site includes several wetlands and small waterbodies within its footprint and the terrestrial assessment area, which is defined as a 100-metre buffer around the proposed project footprint. The Project will directly impact wetlands within the project area, resulting in the loss of wetland area. Wetlands are critical aquatic ecosystems.

Migratory Birds

The Project is expected to have some effects on migratory birds, mainly through habitat loss and disturbance during construction. A full and proper assessment requires more information about how the light and noise from the Consolidated Project will impact migratory birds.

Potential Effects on Indigenous Health, Social, and Economic Conditions

The Proponent acknowledges that impacts on air quality, noise, and human health may extend beyond the Project area, though they are not expected to exceed regulatory standards once appropriate mitigation measures are applied. The Proponent's expectations must be examined more closely. Impacts are cumulative and must be considered in the context the impacts will be added to. Additionally, the Proponent states that socio-economic effects will extend beyond the Project area but are expected to be positive due to the Project's economic benefits. However, just because a project may have economic benefits does not mean that those benefits will be felt by Ermineskin or other First Nations. We need

to see evidence that benefits will accrue to Ermineskin and its members before we accept the assurances made by the Proponent.

Provincial Consultation Out of Date and Insufficient

33. As mentioned above, the ACO has determined that because the land for the Project site is privately owned and hosts no traditional land use activities, the province's duty to consult is not triggered and no consultation is required. This narrow understanding of consultation – as understood by the provincial government – will almost ensure that the Crown's duty to consult is not met.
34. As a result of the inadequate provincial consultation regime, there is no clear mechanism for the regulators to understand and assess the potential adverse impacts of the Project on Ermineskin Aboriginal and Treaty rights. We anticipate that the Project will: (1) have impacts on lands that will cause incompatibility with Aboriginal and Treaty rights, such as creating constant noise and affecting air quality; (2) cause Ermineskin members to avoid the area around the Project as the Project will undermine confidence in the quality of country foods and alter land use patterns; (3) impact wetlands and potential fish bearing waters; and (4) impact wildlife and wildlife habitat and causing wildlife avoidance behaviours for the area. Taken together, these impacts have the potential to dramatically impact the use of the surrounding area for Aboriginal and Treaty rights practice, namely harvesting plants and wildlife.
35. In addition, this Project has the potential to impact reserve land and related rights. Without assessment of the Project's total water use (including all four components), there is potential risk to the drinking water to our primary reserve lands.
36. Alberta's regulatory process is inadequate for identifying and assessing the risks of the Project as those risks relate to matters within federal jurisdiction, particularly impacts to reserve lands, Indigenous peoples, and Aboriginal and Treaty rights.

Canada Cannot Rely on Alberta to Assess Cumulative Impacts

37. The Project is being proposed in an area that has borne the brunt of industrial development and has seen substantial adverse impacts on Aboriginal and Treaty rights. Ermineskin faces substantial impacts to its Treaty rights throughout Treaty 6 but most prominently in the Heartland area. The promises made under Treaty 6 are foundational to the relationship between Ermineskin and the Crown. However, the Crown continues to break Treaty promises by continuously approving projects that cumulatively hinder Ermineskin members' access to lands and resources essential for our cultural practices. The Crown has not made meaningful efforts to preserve the waters, natural resources, and ecosystems necessary for Ermineskin to exercise our Treaty rights and traditional way of life. Alberta is facilitating the death by a thousand cuts to Ermineskin's Aboriginal and Treaty rights.
38. The cumulative impacts from developments are already significantly curtailing Ermineskin members' ability to exercise rights that are protected under section 35 of the

Constitution Act, 1982, and Treaty 6. Any further development will only exacerbate these cumulative impacts, which will risk breaching Treaty 6 promises and infringing upon Ermineskin rights. As development has increased around Ermineskin's reserve lands, members have traveled farther west, including to the Project area. This adds additional barriers and costs to the practice of our rights.

39. The ACO considers cumulative effects outside scope of consultation under its Policy and Guidelines. The ACO only considers "site-specific" impacts, and because the Project site is privately owned, and no traditional land use occurs on the site, has determined that no consultation is necessary.
40. However, impacts from a project of this size and type will not be limited to the Project site. The Project is occurring in an area of high existing cumulative effects and will exacerbate such effects further. Therefore, the Crown's duty to consult is engaged. Since Alberta refuses to engage, the federal government cannot rely on the province's process.
41. In addition, all four components of the Consolidated Project must be assessed in determining the cumulative effects. In *Chippewas of the Thames First Nation v Enbridge Pipelines*, 2017 SCC 41, the Supreme Court of Canada stated that it may be impossible to understand the severity of a particular project's impact on Aboriginal rights without considering the cumulative impact of the project and other developments. A project must be considered in a historical and cumulative context to account for impacts that have already affected the First Nation.³ This includes projects that are reasonably foreseeable.
42. Any project that increases the cumulative risk to the viability of our Aboriginal and Treaty rights practice, and our traditional economy, must be properly mitigated to ensure no net decrease in viable land occurs and, where possible, there is a net gain in available land.
43. As it currently stands, cumulative effects (existing and projected from the Project) will go unexamined and unaddressed without federal involvement. Only a federal impact assessment can address the gaps in Alberta's regulatory system.

Increased Funding Required

44. Ermineskin will apply for and accept the funding offered by IAAC for the planning phase. However, we accept this funding with the disclaimer that the funding offered to date is inadequate for the full and complete participation of Ermineskin in this process and an increase in funding at each stage of the regulatory process is necessary.
45. Any acceptance of funding offered is without prejudice to Ermineskin's ability to raise concerns about funding levels at a future date.

³ *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 at para 83 and 117, leave to appeal denied 2012 CanLII 8361 (SCC);

4.0 CLOSING

46. The IPD raises many concerns that will go unaddressed by Alberta's regulatory processes. Most notably, there is no forum where the four elements of the Consolidated Project can be assessed together. In addition, without an IAAC assessment, there will be no comprehensive review of (1) impacts to First Nations' Aboriginal and Treaty rights; (2) impacts to other concerns under federal jurisdiction, such as GHG emissions and water use; and (3) cumulative impacts to Aboriginal and Treaty rights.
47. As noted, Alberta's regulatory and consultation system is not equipped to review this Project and is leaving many concerns unaddressed. The federal Crown cannot rely on provincial processes to carry out the duty to consult or address other concerns within federal jurisdiction. A federal impact assessment is required.