

**Prosper Petroleum Ltd.  
Regulatory Appeal of 24 Well  
Licences and a Letter of Authority  
Undefined Field**

November 5, 2014

**Alberta Energy Regulator**

Decision 2014 ABAER 013: Prosper Petroleum Ltd., Regulatory Appeal of 24 Well Licences  
and a Letter of Authority, Undefined Field

November 5, 2014

Published by

**Alberta Energy Regulator**

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## **2014 ABAER 013**

### **Prosper Petroleum Ltd.**

### **Regulatory Appeal of 24 Well Licences and a Letter of Authority**

### **Undefined Field**

### **Proceedings No. 1779665 and 1795000**

## **Decision**

[1] Having carefully considered all of the evidence, the Alberta Energy Regulator (AER) confirms the decisions to issue Licences No. 0454959, 0454960, 0454961, 0454962, 0454963, 0454964, 0454965, 0454966, 0454967, 0454968, 0454969, 0454780, 0454781, 0454782, 0454783, 0454784, 0454785, 0454786, 0454787, 0454788, 0454789, 0454790, 0454791, and 0456119, and the decision to extend the letter of authority for oil sands exploration program OSE 120084.

## **Introduction**

### **Background**

[2] On February 7, 2013, Prosper Petroleum Ltd. (Prosper) was issued a letter of authority (LOA) under the *Public Lands Act (PLA)* for oil sands exploration program OSE 120084. The LOA authorizes Prosper to enter and occupy specific portions of land for the purpose of conducting an oil sands exploration (OSE) program, subject to the consent of all occupants and other conditions attached to the LOA.

[3] In February and March of 2013, Prosper applied for 24 oil sands evaluation well licences. It submitted the applications to the AER on a routine basis, and the licences were issued within a few days with one-year expiry dates. The licences were issued in three groups—on February 11, February 13, and March 26, 2013.

[4] The LOA and the wells relate to Prosper's oil sands mineral lease area within Sections 19, 20, 21, 28, 29, 30, and 33 of Township 96, Range 17, West of the 4th Meridian (figure 1). A list of the well locations is in appendix 1.

[5] In the winter of 2013, Prosper drilled eight wells and abandoned seven. One well (at 16-20-096-17W4M) was drilled but not abandoned. On August 2, 2013, Fort McKay First Nation and the Fort McKay Métis Community Association (Fort McKay) requested a regulatory appeal, under division 3 of the *Responsible Energy Development Act (REDA)* and part 3 of the *AER Rules of Practice*, of the decisions to grant the well licences. Once the regulatory appeal of the wells was filed, Prosper voluntarily

stopped work in the project area and did not drill any of the other 16 licensed wells. On November 14, 2013, the AER granted Fort McKay's request for a regulatory appeal (Proceeding No. 1779665).

[6] After Prosper stopped construction of its remaining wells during the regulatory appeal process, it applied to the AER to extend the expiry date of the licences, extend the abandonment requirement for the 16-20-096-17W4M well, and extend the expiry date of the LOA. Due to the ongoing regulatory appeal process, the AER extended the expiry dates of the undrilled well licences, extended the abandonment due date, and in February 2014 granted the LOA extension.

[7] The activities that remain in Prosper's OSE program are the clearing, construction, drilling, and reclamation of temporary leases and access areas for the additional 16 wells over the winter of 2014/2015. Prosper proposed preparing the lease sites and associated access roads when the ground is frozen, and indicated that core-hole drilling would be done under frozen-ground conditions using snow and ice fill to limit soil disturbance. Prosper submitted that these additional activities will disturb about 16.5 hectares (ha) of its lease.

[8] Fort McKay, in requesting an appeal of the decision to grant the well licences, argued that the AER should not authorize these activities. It submitted that Prosper's OSE program will prejudice its work with the Government of Alberta (GoA) developing and implementing the Moose Lake Protection Plan, which is intended to guide development in the area of Fort McKay Reserves 174a and 174b (the Moose Lake reserves). It contended that these reserves, and the surrounding area that supports them, are critical to the preservation of Fort McKay's culture and the continuity of traditional practices. They provide opportunities for ongoing cultural activities, and serve as an anchor for harvesting activities in the surrounding area. It argued that the long-lasting effects of Prosper's OSE program would limit options for the implementation of the Moose Lake Protection Plan and impair the plan's ability to protect the intended ecological and cultural functions of the Moose Lake reserves. It submitted that the Moose Lake reserves are increasingly significant due to the impacts of oil sands development elsewhere in Fort McKay's traditional territory. In support of this view, Fort McKay raised concerns about the effects of the OSE program on the lease area, as well as regional cumulative effects on vegetation, wildlife, and fish.

[9] Fort McKay also raised concerns about the adequacy of the Lower Athabasca Regional Plan (LARP) for protecting treaty and aboriginal rights. It asserted that plans for managing cumulative effects, such as biodiversity and landscape management frameworks, are not yet developed, and as a result, the AER does not have the information it needs to adequately assess the impacts of the OSE program. Fort McKay also contended that Prosper failed to meet the requirements of Ministerial Order 141/2013 (MO). It submitted that the MO confirms the AER's obligations to consider the potential adverse effects of energy applications on Fort McKay's treaty and aboriginal rights and to ensure that its decisions are consistent with Alberta's constitutional obligations to aboriginal people.

[10] On March 31, 2014, Fort McKay requested a further regulatory appeal, under section 38(1) of *REDA* and section 121 of the *PLA*, of the decision to grant the extension of the LOA to conduct an oil sands exploration program. The AER granted this request on April 23, 2014 (Proceeding No. 1795000). The two regulatory appeals are being considered together in this proceeding.

## Hearing

[11] On January 20, 2014, the AER issued a notice of hearing for Proceeding No. 1779665 that outlined due dates for interested parties wishing to file a request to participate in the regulatory appeal hearing. The AER did not receive requests to participate from any other interested parties. Both Prosper and Fort McKay requested a written proceeding, and on May 5, 2014, the AER issued a revised notice of hearing that set out a process for a written hearing of Proceedings No. 1779665 and 1795000.

[12] The notice of hearing included a provision for the filing of notices of questions of constitutional law. However, Fort McKay informed the AER that it would not be filing a question of constitutional law in this proceeding.

[13] The AER held a written hearing that started on May 30, 2014, with the first submission due date. The hearing closed on August 19, 2014, with a letter to the participants. The hearing commissioners on the panel are B. T. McManus, Q.C., (presiding); R. C. McManus, M.E.Des.; and C. Macken. Appendix 2 lists the participants in this proceeding.

[14] In accordance with section 41(2) of *REDA*, the only matter before the panel is whether to confirm, vary, suspend, or revoke the AER decisions to issue the well licences and extend the LOA. Although the panel is aware that Prosper has applied for the Rigel project, a commercial in situ oil sands scheme, this application is not before the panel and was not considered in its decision-making process.

## The AER's Legal Mandate

[15] The AER is governed by its enabling statute, *REDA* and *REDA*'s regulation, the *Responsible Energy Development Act General Regulation (REDA General Regulation)*.

[16] *REDA* sets out the AER's mandate:

2(1) The mandate of the Regulator is

- (a) to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta through the Regulator's regulatory activities, and
- (b) in respect of energy resource activities, to regulate
  - (i) the disposition and management of public lands,
  - (ii) the protection of the environment, and
  - (iii) the conservation and management of water, including the wise allocation and use of water,

in accordance with energy resource enactments and, pursuant to this Act and the regulations, in accordance with the specified enactments.

[17] Under section 15 of *REDA*, when the AER is considering a regulatory appeal of a decision made under the AER's energy statutes, such as the *Oil and Gas Conservation Act (OGCA)*, it must, in addition to any other factor it considers in the appeal, consider any factor prescribed by the regulations, including the interests of landowners. Section 3 of the *REDA General Regulation* sets out the factors that the AER must consider: (a) the social and economic effects of the energy resource activity; (b) the effects of the activity on the environment; and (c) the impacts on a landowner as a result of the use of the land on which the activity is located.

[18] Prosper's 24 OSE wells were approved under the *OGCA*. The purposes of the *OGCA* can be found in section 4. They include the following:

- (a) to effect the conservation of, and to prevent the waste of, the oil and gas resources of Alberta;
- (b) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, constructing, completing, reworking, testing, operating, maintenance, repair, suspension and abandonment of wells and facilities and in operations for the production of oil and gas or the storage or disposal of substances;
- (c) to provide for the economic, orderly and efficient development in the public interest of the oil and gas resources of Alberta...
- (e) to provide for the recording and the timely and useful dissemination of information regarding the oil and gas resources of Alberta.

[19] The panel is satisfied that throughout the proceeding and in its decision it has considered the purposes and factors identified in the noted sections.

[20] Section 20(1) of the *PLA* prohibits any person from entering onto and occupying public land for any purpose without receiving authorization to do so. Under section 20(7), the AER may impose any conditions it considers necessary on an authorization.

[21] The extension of OSE program LOA 120084 was issued to Prosper in February 2014 under section 20(1) of the *PLA*. The panel notes that the *PLA* does not contain a "public interest mandate" similar to that found in the *OGCA*, and that the factors in section 3 of the *REDA General Regulation* do not apply to specified enactments under *REDA*, such as the *PLA*.

[22] While the *REDA General Regulation* does not apply to the *PLA*, the panel considers that the AER is always guided by the principle that it must act in the best interests of the people of Alberta as a whole even where, as here, the provisions of the relevant legislation do not specifically refer to "public interest."



[23] Fort McKay submitted that its members have statutory and common law rights, and in addition to their rights as Canadians, as first peoples of Canada they have communal and individual rights that are guaranteed by the Constitution of Canada. Fort McKay further asserted that the nature of its rights and those of its members is such that a special public interest applies to it. Prosper submitted that while the regulator must consider Fort McKay's interests before deciding on the application, there is no basis for suggesting that the AER's public interest mandate requires the AER to give priority to Fort McKay over any other party.

[24] The panel recognizes that the AER must consider Fort McKay's interests and rights and how the application could affect them, and it must ensure that Fort McKay is treated fairly in the AER's process. Ultimately, the AER must weigh the factors relevant to each application and make decisions in the best interests of the people of Alberta as a whole. In doing that, the AER does not prioritize the rights of any Albertans ahead of others.

## **Constitutional Issues**

[25] Fort McKay submitted a letter to the AER on April 4, 2014, stating that Fort McKay would not be filing a Question of Constitutional Law in this proceeding. Nonetheless, it raised some matters in its evidence and argument that were constitutional in nature. Fort McKay mentioned a number of concepts and cited several cases related to aboriginal law that address constitutional issues. However, Fort McKay did not say how these concepts and assertions were related to the issues before the panel.

[26] Fort McKay has not asked the panel to decide on any issues relating to the above-noted submissions, and the panel does not consider it necessary to do so to fulfill its obligation to properly consider and decide on the regulatory appeals. The panel also does not see any basis for commenting on those submissions because they are not determining factors in the issues to be decided.

[27] The panel further notes that Fort McKay raised several issues related to the Crown's consultation with Fort McKay on the OSE program and the LOA. Section 21 of *REDA* makes it clear that the AER "has no jurisdiction with respect to assessing the adequacy of Crown consultation associated with the rights of aboriginal peoples," and therefore the panel cannot consider or address the matters raised by Fort McKay on this topic.

## **Issues**

[28] The panel considers the issues of the regulatory appeals to be

- the applicability of Ministerial Order 141/2013,
- the need for the project,
- land use planning

- environmental effects,
- cumulative effects, and
- traditional land use.

[29] In reaching its decisions, the panel has considered all relevant materials constituting the record of this proceeding, including the evidence and argument provided by each party. Accordingly, references in this decision to specific parts of the record are intended to help the reader understand the panel's reasoning on a particular matter and do not mean that the panel did not consider all relevant portions of the record with respect to that matter.

[30] Fort McKay submitted that the panel does not have the information it needs to meet its mandate in considering the OSE program in these proceedings. However, the panel is satisfied that through the hearing process, it has received the information necessary to allow it to fulfill its mandate and make decisions on the regulatory appeals.

[31] Prosper has asked the panel to have regard for two AER decisions, *2013 ABAER 017* (Teck Resources Limited) and *2013 ABAER 014* (Dover Operating Corp.). While the panel may consider those decisions, to the extent that they provide guidance on issues of policy and law, the panel must decide these appeals on the facts and evidence presented by the parties in this proceeding.

## **Applicability of Ministerial Order 141/2013**

[32] On November 26, 2013, the minister of energy issued Ministerial Order 141/2013 (MO), the Aboriginal Consultation Direction (the Direction). This Direction was made under section 67 of *REDA*, and its purpose is stated as follows:

The purpose of this Direction is to ensure that the AER considers and makes decisions in respect of energy applications in a manner that is consistent with the work of the Government of Alberta

- (a) in meeting its consultation obligations associated with the existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*; and
- (b) in undertaking its consultation obligations pursuant to *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development (2005)* as amended or replaced from time to time and any associated Consultation Guidelines.

[33] The Direction sets out the process the AER is to follow to require information from proponents and to provide information to the GoA, through its Aboriginal Consultation Office (ACO), about energy applications that may adversely affect the exercise of existing rights of aboriginal peoples as recognized and affirmed under part II of the *Constitution Act, 1982*. Before deciding on an energy application, the AER is required to ask the ACO whether the GoA has found consultation to have been adequate, adequate

pending the outcome of the AER's process, or not required. The Direction recognizes that Alberta is responsible for assessing the adequacy of Crown consultation related to energy applications.

[34] Fort McKay submitted that the MO confirms the AER's obligations to consider the potential adverse effects of energy applications on Fort McKay's treaty and aboriginal rights and to ensure that its decisions are consistent with Alberta's constitutional obligations to aboriginal people. Fort McKay further submitted that, because of the Direction, "the AER requires project proponents provide a detailed assessment of potential impacts of energy resource activities on aboriginal communities so that the AER can meet its obligations." Fort McKay said that Prosper failed to meet the requirements of the MO and has not provided the information the AER needs to meet its legal mandate in this proceeding. Fort McKay asked the AER to revoke the subject decisions and order Prosper to meet the requirements of the MO and consult with Fort McKay.

[35] Fort McKay submitted that the MO applies to both the *OGCA* and the *PLA* decisions made by the AER. Prosper submitted that the MO is clear that it applies to applications to the AER for approvals under "specified enactments" as defined in *REDA*. Prosper said that the MO does not apply to applications under "energy resource enactments," such as the well licence applications.

[36] Fort McKay suggested that a purposive reading of the MO, to consider the OSE program's impacts on Fort McKay's constitutionally protected rights, prevents a narrow interpretation that the MO only applies to the *PLA* decision.

[37] In considering the applicability of the MO to this proceeding, the panel notes that the MO states that the Direction applies to "energy applications," which are defined as "applications" to the AER for "energy resource activity approvals" under the "specified enactments." *REDA* distinguishes between what legislation is considered to be a "specified enactment" and what is considered an "energy resource enactment." As outlined in section 1.1(s) of *REDA*, a "specified enactment" includes the *Environmental Protection and Enhancement Act (EPEA)*, the *PLA*, and the *Water Act*, but does not include the *OGCA*, the *Oil Sands Conservation Act*, or the *Pipeline Act*, which fall under the meaning of an "energy resource enactment." Therefore, the MO does not apply to well applications filed under the *OGCA*, but does apply to applications filed under the *PLA*.

[38] In response to Fort McKay's submission that Prosper failed to meet the requirements of the MO, Prosper argued that Fort McKay misinterpreted the meaning and scope of the MO and that the MO did not create a deficiency in Prosper's applications. It submitted that the MO applies to all prospective applications and that nothing in the MO suggests that it applies retroactively to invalidate well licences that were granted by the AER before November 2013, including the well licences that are subject to this regulatory appeal.

[39] In this proceeding, the panel is conducting a regulatory appeal of the extension to the LOA issued to Prosper under the *PLA*. As noted above, the Direction cannot apply to the well licences approved by the AER since the Direction does not apply to applications under the *OGCA*. Before the original decision by Environment and Sustainable Resource Development (ESRD) to issue the LOA was made, the GoA had provided its decision that First Nation consultation was adequate. On judicial review, the GoA's adequacy decision was confirmed by the Court of Queen's Bench.

[40] Prosper did not complete its OSE program within the time originally contemplated and so it applied to the AER for an extension on the LOA approval. Nothing in the extension request changed what Prosper proposed to do under the LOA approval so as to affect or displace the consultation adequacy decision: it continued to apply to the LOA approval. Fort McKay argued that the extension application necessitated a restarting of the Crown's consultation process. In the panel's opinion, no useful purpose would be served by restarting the Crown's consultation process, particularly since the consultation adequacy decision for the LOA approval was reviewed and confirmed by the Court.

[41] In summary, the purpose of the MO is to ensure that AER decisions on energy applications under the specified enactments are consistent with the programs, policies, and work of the GoA on aboriginal consultation. Paragraph 6 of the MO requires the AER to request the GoA's advice before granting an approval of an energy application where the GoA has found consultation to be adequate. The GoA's advice, confirmed by the Court of Queen's Bench, is that First Nation consultation for the LOA approval is adequate. Accordingly, there was no need or requirement to re-initiate the First Nation consultation process in relation to the LOA approval given the GoA's decision on consultation adequacy. As a result of this, the panel finds that no useful purpose would be served by granting Fort McKay's request that the AER revoke the decisions and require Prosper to provide further information.

[42] Whether the Direction did or did not apply to Prosper's extension request is not a question that the panel needs to consider because the GoA had already made its advice known that Crown consultation for the LOA approval was adequate.

## **Need for the Project**

[43] Prosper submitted that in October 2012 it acquired its oil sands leases from Koch Oil Sands Operating ULC (Koch). Prosper stated that it is required to conduct the OSE program to delineate its oil sands leases. The OSE program will provide detailed subsurface information and allow Prosper to make an informed business decision about the viability of its leases before making further investments.

[44] Prosper explained that its intent is to delineate and ultimately develop the entire lease area. Although only 1.5 sections have been delineated to date, Prosper intends to delineate and develop another 4.5 of the remaining 5.5 sections as part of its Rigel project if favorable reserves are identified.

[45] Prosper submitted that under section 13 of the *Oil Sands Tenure Regulation* it is obligated to conduct a minimum level of evaluation to continue the leases. Prosper confirmed that it has not yet fulfilled this requirement on the remaining leases and that it is required to delineate these leases before they expire. Furthermore, once the leases are delineated and continued, Prosper will be liable to pay escalating rents to the GoA if the leases are not producing. Prosper also advised that it needs to continue the OSE program to get scheme approval for production before the leases expire.

[46] Prosper explained that it is required to delineate the potential resource underlying the leases in order to develop the information required under section 2.3 of *Directive 023: Guidelines Respecting an Application for a Commercial Crude Bitumen Recovery and Upgrading Project*. Prosper advised that its oil sands leases include the right to gather geological information to effectively manage the resource, which is consistent with the AER's mandate under the *OGCA* to allow the conservation of, and to prevent the waste of, the oil and gas resources of Alberta and to provide for the economic, orderly, and efficient development in the public interest of the oil and gas resources in Alberta.

[47] Fort McKay argued that because Prosper had already applied for a commercial oil sands scheme approval, drilling requirements had been satisfied and the remainder of the OSE program was not needed and was not in the public interest.

[48] The panel notes that *Directive 023* states that a proponent must acquire enough drilling information to delineate the resource and determine the economic viability of the project. *Directive 023* sets out the information required in an application for approval of a scheme to recover oil sands or crude bitumen or for approval of an oil sands processing plant. These requirements include resource evaluation and information about the geology in the OSE program area.

[49] The panel finds that the regulatory requirements for the delineation of the oil sands leases establish the need for the 24 core-hole evaluation wells and the extension of the LOA. The panel therefore finds that Prosper's OSE program is needed.

## Land Use Planning

[50] Fort McKay raised concerns that regional land use planning initiatives are not yet complete for the lands surrounding its Moose Lake reserves and that Prosper's OSE program should be delayed until these are established. These initiatives include biodiversity and land use management frameworks contemplated under the Lower Athabasca Regional Plan (LARP) and the Moose Lake Protection Plan. Fort McKay requested that because these frameworks are not in place the OSE program be delayed until the Moose Lake Protection Plan is complete, which is anticipated in 2016.

## Lower Athabasca Regional Plan

[51] Fort McKay submitted that the LARP Implementation Plan does not contain specific measures to protect opportunities for the exercise of Fort McKay's constitutional rights. Fort McKay said that the implementation plan has yet to settle the land use conflict between the exercise of treaty and aboriginal rights and the development of oil sands on 65 per cent of the LARP area, and that it includes no plans to support the exercise of treaty and aboriginal rights close to aboriginal communities. Fort McKay submitted that it provided extensive input and written submissions to the Alberta Land Use Secretariat regarding the development of LARP. In Fort McKay's view, the GoA disregarded almost all of Fort McKay's input when it implemented LARP.

[52] Fort McKay noted that it filed a review request in August of 2013 under the *Alberta Land Stewardship Act* to address its concerns about the incomplete nature of LARP and about the lack of measures to protect Fort McKay's ability to exercise its constitutional rights. Its review request asks for the following: a) amend LARP to change its effective date to December 2015 or upon completion of the management frameworks and tools that have not yet been completed; b) develop a traditional land use management framework; c) establish designated buffer areas in which resource development is not permitted around the hamlet of Fort McKay and adjacent lands owned by Fort McKay and surrounding Reserves 174a and 174b; and d) develop a management framework for the protection of water levels and quality in all rivers and in Buffalo (Namur) Lake and Gardiner Lake. As of the date of its submissions in this proceeding, Fort McKay had not received notice that a review panel had been established to consider its request.

[53] Prosper submitted that LARP was developed through several years of extensive consultation with all stakeholders in the region, including Fort McKay, and that it prescribed the land use priorities for each part of the Lower Athabasca Region. It said that its project is located in an area that had been designated to allow for oil sands exploration and development.

[54] Prosper argued that, in this proceeding, Fort McKay is seeking to indirectly challenge the GoA's decision to not include the OSE program area as a protected area within LARP. It said that the GoA balanced the interests of all stakeholders and determined that its OSE program was in an area where oil sands development should be allowed. Prosper submitted that the AER is bound by this determination and cannot now reverse LARP, rewrite government policy, and designate new areas where development is prohibited.

[55] The AER is required under section 20 of *REDA* to act in accordance with regional plans under the *Alberta Land Stewardship Act*. The Prosper OSE program is within an area that is subject to LARP.

[56] The panel accepts that broad-scale land use decisions are directed by LARP. Fort McKay advised that it has submitted a LARP review request under the *Alberta Land Stewardship Act*. The review is a forum in which Fort McKay can bring forward its concerns about land use management in the region. The

panel recognizes that LARP is a work in progress and understands that various subregional plans and frameworks are currently being developed. When finalized and implemented, these plans and frameworks will help the AER in its decision-making. However, until they are implemented by the GoA, the AER cannot speculate on what these plans and frameworks will contain.

[57] In addition to considering social, economic, and environmental factors and the public interest in making its determination on the regulatory appeals, the AER must also act in accordance with LARP as it exists today. The panel does not believe that it is necessary or would be appropriate to defer its decisions on the regulatory appeals until the various LARP subregional plans and frameworks have been developed and implemented.

[58] The panel notes that section 7(3) of the Regulatory Details Plan in LARP states that

a decision-maker or local government body must not adjourn, defer, deny, refuse, or reject any application, proceeding or decision-making process before it by reason only of

- a) the Crown's non-compliance with a provision of either the LARP Strategic Plan or LARP Implementation Plan, or
- b) the incompleteness by the Crown or anybody of any direction or commitment made in a provision of either the LARP Strategic Plan or LARP Implementation Plan.

[59] The panel finds that the OSE program is not in, and does not overlap, any of the conservation or designated provincial recreation/tourism areas established under LARP, and that development of oil sands resources is permitted in the project area. The panel finds that the 24 evaluation well licences and the LOA are in compliance and satisfy the current requirements of LARP.

### Moose Lake Protection Plan

[60] Fort McKay argued that the OSE program will negatively affect the Moose Lake reserves due to proximity. Fort McKay raised concerns about Prosper drilling wells within 2.5 kilometres (km) of the Moose Lake reserves and less than 1 km from Buffalo (Namur) Lake. Fort McKay said that the effects from the drilling of the wells will hinder the ability of the Moose Lake reserves to support the exercise of treaty rights.

[61] Prosper said that it had no plans to expand the OSE program to the northeastern-most section of its mineral lease that encompasses some of Buffalo (Namur) Lake (section 33).

[62] Fort McKay submitted that it has been working with the GoA to develop a Moose Lake Protection Plan to guide development in the area. The plan would also protect the Moose Lake reserves and surrounding area for the exercise of its constitutional rights, which maintain the community's links with historical resources and traditions within its cultural landscape. The plan will include intensive management tools, such as coordinated road planning and linear disturbance thresholds. Fort McKay

submitted that Alberta has committed to implementing the Moose Lake Protection Plan within two years and that the ministers of ESRD, Energy, and Aboriginal Affairs have recently reaffirmed the GoA's commitment.

[63] Fort McKay submitted a regional study it conducted called *Protected Area Needs for Maintaining Ecological Integrity in the Moose Lake Region* on the effects of development in its traditional territory. The study concluded that large parcels of protected lands are needed to support wildlife populations, and that the Moose Lake reserves together with Birch Mountains Wildland Provincial Park are not sufficient. The report also concludes that there is a need for undisturbed lands beside the reserves to maintain the ecological integrity required for the exercise of traditional activities.

[64] Fort McKay explained that work on the Moose Lake Protection plan is progressing and that terms of reference, a work plan, and a schedule have been developed. When asked for a copy of these documents, Fort McKay explained that the documents are internal and have not been officially signed by Fort McKay and the GoA, and that the GoA considers them to be confidential.

[65] Fort McKay submitted that it is necessary for the GoA to respond to Fort McKay's suggested options for implementing the Moose Lake Protection Plan before Fort McKay finalizes the terms of reference and work plan. Fort McKay was expecting a response in mid-June 2014 from the GoA on these potential options for the plan's implementation. To Fort McKay's knowledge, the GoA has not yet decided on the potential options for implementing the Moose Lake Protection Plan.

[66] Fort McKay is of the view that Prosper's OSE program threatens the purpose and functionality of the Moose Lake Protection Plan because it will cause disturbance within the plan area and will lead directly to more commercial development. Fort McKay submitted that for the resulting Moose Lake Protection Plan to be effective, the status quo around the reserves needs to be maintained in order to preserve options for protecting the reserves.

[67] Fort McKay asked the AER to acknowledge its extensive efforts to protect its constitutional rights by providing the GoA and Fort McKay with a fair opportunity to complete the Moose Lake Protection Plan before further effects occur around the reserves. It requested that the AER defer consideration of the OSE program until the Moose Lake Protection Plan is complete; otherwise, the AER's decision could prejudice the ongoing work of the GoA and Fort McKay.

[68] In response, Prosper argued that Fort McKay provided no information about the Moose Lake Protection Plan and that Fort McKay was essentially asking the AER to refuse to consider applications within what it called Fort McKay's "buffer" area around its reserves until 2016, when a management plan from Alberta may or may not be finalized. Prosper explained that if the GoA believed that authorizing new exploration in the area before 2016 would prejudice the Moose Lake Protection Plan, it has the ability to impose a moratorium on new energy development applications in the Moose Lake area. Until it



does so, the AER is bound to comply with LARP and cannot entertain requests for development moratoriums without all potentially affected stakeholders present in the discussion.

[69] Prosper pointed out that in *Decision 2013 ABAER 014* (Dover Operating Corp.), the AER concluded that while regional management frameworks are subject to constant revision, they do not preclude further industrial development in the region pending finalization of each revision.

[70] Fort McKay responded that the Moose Lake Protection Plan is not a no-development buffer; the plan instead seeks to coordinate development and limit disturbance in the area described under the plan. This area would include the OSE program because of its location on the border of the Moose Lake reserves.

[71] The panel notes that the OSE program well that will be drilled closest to the Moose Lake reserves will be about 2.5 km away. The panel notes that Prosper said it has no plans to drill in its mineral lease area in section 33. The panel also notes that portions of the lease fall within a provincial park, where surface access is limited.

[72] The panel is of the view that the AER cannot consider a plan that has yet to be developed and adopted as policy by the GoA. As such, the panel will not defer its decision on the regulatory appeals as requested by Fort McKay. In making its decision, the panel will consider the evidence that has been filed on the record of this proceeding.

[73] The panel notes that subregional management plans to be developed under LARP, presumably including the Moose Lake Protection Plan, will also provide guidance for the regulator in future decisions. In this regard, the panel encourages Fort McKay and the GoA to continue discussions toward addressing their specific concerns and for the GoA to continue to develop tools under LARP, such as subregional plans and a biodiversity management framework.

## **Environmental effects**

[74] Fort McKay identified several concerns about the environmental effects of the OSE program that it submitted would affect its members' traditional uses of the land. These effects included clearing of land for leases and winter road access, creating permanent roads and access to the area, and effects on wildlife caused by such things as noise and increased human activity. It also questioned Prosper's proposed reclamation practices for disturbed lands. Fort McKay submitted that when Prosper purchased the oil sands lease from Koch, the lease had 9.59 ha of existing disturbance remaining from Koch's activities during the 2011/12 drilling season. Fort McKay said that Prosper acknowledged that it further disturbed 7.57 ha of land during the 2012/13 drilling season.

[75] Prosper had received approval to prepare access roads and leases to drill 24 core-hole evaluation wells, 8 of which were completed in the 2012/13 winter drilling season. Prosper submitted that the OSE

program for 2014/15 would involve completing the remaining 16 core holes, with an expected disturbance of about 16.5 ha for new well sites, access roads, log decks, and a sump. It indicated that core-hole wells are expected to take about 48 hours to complete and that all of the OSE activities are expected to be completed within a few months. Prosper proposed conducting these activities during the winter on frozen ground to avoid disturbing soils and root zones where possible and said it expects to apply for reclamation certificates within three growing seasons in accordance with LOA requirements.

[76] As noted, Prosper estimated that the remaining OSE program activities will result in about 16.5 ha of new clearing. These estimates are based on a maximum lease size of 80 metres (m) x 80 m and a maximum access road width of 8 m. Fort McKay submitted that lease sizes for the OSE program should be limited to 50 m x 50 m and access roads limited to 6 m in width. Prosper submitted that it applied for well lease sites of 80 m x 80 m to be able to accommodate any size of drilling rig. For the same reason, Prosper applied for access road widths of 8 m to accommodate the movement of the larger rigs. Fort McKay questioned the need for this size of clearing and argued that Prosper could use 50 m x 50 m leases and 6 m access roads as other companies have done. Prosper explained that it often cannot secure a smaller rig due to circumstances such as timing and finances.

[77] The panel accepts Prosper's submission that it might not be able to secure smaller rigs for the upcoming drilling season on short notice. For this reason, the panel will not require that leases be no larger than 50 m x 50 m. However, the panel expects Prosper to fully explore the availability of smaller rigs in order to minimize both lease size clearing and access road width clearing, and to make all reasonable efforts to limit the footprint of the OSE program on the lease area.

[78] Fort McKay maintained that the OSE program activities will reduce or eliminate wildlife on the Moose Lake reserves and contribute to a change in the area's ecological integrity. It cited findings of the Dover commercial project's environmental impact assessment (EIA), which Fort McKay said predicts that both caribou and moose will be extirpated from the region within 30 years, including from Prosper's lease area, if no management intervention occurs. Based on aerial wildlife surveys, the moose population has declined in Wildlife Management Unit (WMU) 531 significantly since 1993. WMU 531 overlaps Prosper's lease entirely. The reasons for this decline are not clear and may be related to human harvest and industrial development. The Dover EIA suggests that changes in the predator-prey systems as a result of industrial deforestation have led to increasing numbers of predators, such as wolves, and more predator mobility as a result of packed snow on roads and trails that, in combination, result in increased predation on caribou and moose.

[79] The range of the Red Earth caribou herd overlaps the Prosper lease area and the Moose Lake reserves, but it does not encompass the OSE program area. Prosper confirmed that its closest well is about 24 m from the Red Earth range boundary. Fort McKay said that the population of the Red Earth caribou herd declined 84 per cent from 1994 to 2012, which has affected caribou hunting in Fort McKay's traditional land use areas. Linear disturbance from industrial development is considered to be the primary

cause of this decline because it increases predator access to the herd ranges. Fort McKay argued that even though the Red Earth herd's range does not overlap Prosper's activities, caribou habitat will be indirectly affected because increases in linear disturbances will detrimentally affect moose and caribou beyond Prosper's leases.

[80] Prosper submitted that the potential effects on wildlife will primarily be related to wildlife habitat loss and fragmentation. It said that the effects on wildlife will be negligible because it only expects to clear about 16.5 ha of land. Prosper also noted that it does not have any activity planned in the portion of its leases that are within the Red Earth caribou range.

[81] The panel recognizes that, although the closest well is very near to the caribou range boundary, Prosper's activities are not actually within a caribou range, and as a result Prosper is not required to prepare a caribou protection plan.

[82] Fort McKay requested that Prosper prepare a coarse woody debris management plan to mitigate the effects of new linear disturbance on wildlife. Coarse woody debris could be used to block linear disturbances, making them less attractive for human and predator use. On narrow disturbances, predator mobility would not be expected to appreciably increase except where these disturbances are used by humans. The packed snow improves mobility for both prey and predators and increases encounter rates.

[83] Prosper responded that although it does not have a formal coarse woody debris management plan, coarse woody debris would be placed across access routes to reduce vehicle and wildlife use. It said that this had been done upon completion of the 2012/13 season. The panel notes that Prosper indicated specifically that it had used coarse woody debris to block access to Licence of Occupation (LOC) road 112910. Prosper also described how it uses coarse woody debris to control erosion and to create microsites to help with revegetation. This approach appears inconsistent with the woody debris management approach described in Prosper's Activities Plan, which states that debris will be spread over the entire lease and will be 5 centimetres or less in depth, and that excess debris will be mulched or burned. This is also inconsistent with condition 22 of the LOA, which states that all woody debris and leaning trees must be slashed, limbed, and bucked flat to the ground unless otherwise approved by an AER departmental officer. The panel expects Prosper to use coarse woody debris to block linear disturbances for access control as it has committed to do. Its plan for using woody debris for access control must be developed in consultation with the appropriate AER land use officer, as stated in condition 22 of the LOA.

[84] Fort McKay submitted that the effects of Prosper's OSE program will include displacement of wildlife through disturbance.

[85] Prosper submitted that although wildlife may be temporarily displaced from the immediate area during active drilling, the project's effect on wildlife would be negligible beyond the OSE program area.

Prosper concluded that, based on monitoring from another similar OSE program, sensory disturbance will be localized, short-term, and reversible.

[86] Fort McKay submitted regional studies that included Prosper's lease area. These studies related to wildlife effects from other development in the region. Fort McKay asked the AER to consider the effects of this program combined with the effects of other development in the region.

[87] The panel agrees that industrial activity, such as drilling a well, will likely disturb wildlife in the immediate area at the time of drilling and may result in animals avoiding the area due to increases in noise, light, and human activity. The panel notes that the timeframe for the activities to be carried out under the OSE program is short term. Most activity will occur over a three-month period, with individual wells drilled over a 48-hour period. Since the activities are of a limited duration, the panel finds that the effects of sensory disturbance on wildlife will also be of limited duration and therefore will not linger or have long-term effects on wildlife use of the OSE program area.

[88] The panel finds that the limited aerial extent and temporary nature of OSE program activities will have negligible effects on wildlife habitat in the immediate area and are not expected to have long-term effects on wildlife populations on a local or regional scale.

[89] Fort McKay submitted that vegetation disturbance effects of the OSE program, particularly loss of old-growth forest, will be long lasting or permanent, meaning that the social, cultural, and economic effects will be felt long after Prosper has completed its program. Fort McKay indicated that the effects will last until mature forest is re-established on the cleared sites, which means that the land would not support traditional activities for several generations.

[90] To accelerate the reclamation process, Fort McKay asked that vegetation be planted on all cleared sites. Fort McKay indicated that the replanting should include native species, including native trees, to achieve a mature canopy structure similar in composition to adjacent undisturbed areas at the end of the 2014/15 drilling season.

[91] Prosper submitted that using minimal disturbance construction methods results in faster revegetation because the rooting layer is not disturbed. It noted that natural regeneration is the method preferred by ESRD. It also submitted that active replanting would be in conflict with condition 25 of its LOA, which states that initial reclamation efforts must use natural regeneration processes. Prosper acknowledged that a more active approach might be needed if natural regeneration is not successful at re-establishing appropriate vegetation.

[92] The panel understands that the goal of reclamation is to achieve equivalent land capability, and that Prosper is required to apply for a reclamation certificate within three growing seasons. Receipt of a reclamation certificate would indicate that the lands have demonstrated equivalent capability and that the forest cover is expected to re-establish with time. It is clear to the panel that natural regeneration of some

species will be slow, but the evidence provided did not persuade the panel that planting woody species would lead to better reclamation outcomes or would accelerate timelines.

[93] The panel recognizes that cleared areas disturb the local environment and that disturbed areas take more than three years to return to the vegetation structure that existed before being cleared. The panel accepts that the magnitude and extent of the disturbance footprint is a very small proportion of the lease area. It is on this basis that the panel concludes that the effects of land disturbance from the OSE program are not extensive.

[94] The panel notes that Fort McKay presented only general assertions and limited evidence of traditional land uses that depend on old growth forest on Prosper's leases and of how the clearing of old growth forest from those leases would affect future generations. The panel understands that traditional activities depend on access to boreal forest ecosystems that include mature or old growth forest. Because of the limited project-specific evidence, the panel is unable to make a finding in response to Fort McKay's assertion that the effects on traditional practices of clearing old growth will be long lasting, permanent, or multigenerational.

[95] The panel finds that existing LOA conditions requiring natural regeneration processes are appropriate, and it expects Prosper to work toward obtaining the required reclamation certificate, using active planting methods if that becomes necessary.

[96] Fort McKay submitted that increased access to the OSE program area via roads and other linear disturbances will affect wildlife through increased recreational hunting and fishing, habitat fragmentation, human and animal predation, and increased mortality, each of which affects the ability of Fort McKay's members to use the land for traditional activities. It expressed concern that new linear access into the area will result in more hunting by nonaboriginal hunters and increased wildlife mortality from predators that use the access routes.

[97] Prosper indicated that access to the OSE program area will be via the Dover permanent access road. Through a director's order issued by ESRD, Alberta has restricted the use of the Dover road to industrial and regulatory access only, and it is controlled by Athabasca Oil Sands Corporation. The order indicates the closure of roads LOC 111600, 111712, and 111599 to the public. The purpose of the closure is to enable ESRD to establish a subregional access plan as contemplated under LARP, although the order does not identify the boundaries of the planning area.

[98] Prosper submitted that, in addition to all-season access on existing permanent LOC roads, access within the OSE program area is by 16 km of winter-only roads. Prosper explained that access for drilling equipment and personnel will be by winter ice roads, which require plowing and the construction of ice bridges. Prosper indicated that the amount of machinery and traffic will depend on the number of

employees and contractors that will be on site. Prosper also said that workers will live in an area campsite rather than commute every day from Fort McMurray.

[99] The panel notes that ESRD is trying to establish a subregional access plan, although details about the plan and its intent are not clear. Nonetheless, the panel is satisfied that by using existing LOC roads with controlled access instead of building new access roads, Prosper is not opening up the area to more recreational use. The panel also notes that Prosper will not be building any new all-season roads within the OSE program area. The panel understands that Fort McKay is concerned that increased access will negatively affect its members' ability to conduct traditional activities, as well as introduce negative pressures such as lights, more potential for trespassing, more predators on the reserve (raising safety concerns), more competition for resources, risk of damage to traps, and loss of harvesting opportunities because of legal restrictions. However, the panel is satisfied that the existing controlled access of the permanent LOC access roads will continue to provide the necessary restrictions on access to the OSE program area and will mitigate the negative pressures that Fort McKay anticipates.

[100] Fort McKay said that one of its concerns is that an increase in the number of vehicles will directly lead to an increase in mortality from wildlife-vehicle collisions.

[101] Prosper submitted that it does not expect wildlife mortality to increase because the temporary ice roads are not conducive to high vehicle speeds and its workers and contractors would be subject to speed limits on the permanent access roads.

[102] As there is no expected increase in wildlife mortality associated with the OSE program's traffic, the panel concludes there will be no population level effects on wildlife.

[103] Prosper said that it will need to withdraw water from four lakes in order to build ice roads and freeze the lease sites level for drilling. To withdraw the water, it will need to apply to the AER for temporary diversion licences (TDLs). It also said that since an EIA is not required for TDL applications, it did not do any studies to determine the effects on fish or fish habitats. However, a limited amount of fish data was available for the lakes. Prosper indicated that it had considered this information when it developed its proposed mitigation measures to minimize the effects of its activities on surface waters and fish. Prosper noted a potential risk to overwintering grayling, a risk that it would mitigate by avoiding or reducing water withdrawals from fish-bearing waters.

[104] Fort McKay said that its members engage in traditional harvesting in at least two of the lakes (Long Lake and Little Whitefish Lake). In addition to potential environmental effects, such as contamination and damage to the banks and littoral zone, Fort McKay was concerned that activities near the lakes would cause its members to lose confidence in the quality of the water. Fort McKay proposed a series of actions, mitigation, and monitoring for Prosper to conduct to protect the quality of the water resources.

[105] Fort McKay requested that Prosper

- conduct a traditional use study of the four lakes and assess resource use and traditional harvesting potential;
- propose potential mitigation or offset measures for impacts on traditional activities;
- conduct a fisheries and aquatic baseline study;
- not allow water withdrawals unless a fisheries biologist establishes ecologically acceptable withdrawal limits where there is the potential for fish overwintering;
- consult with Fort MacKay on mitigation and monitoring;
- screen intake hoses;
- monitor dissolved oxygen and water levels during withdrawals;
- prevent impacts on the littoral zone;
- avoid situations where there is a spill hazard; and
- have a plan in place to respond to spills and leaks.

[106] Prosper objected to Fort McKay's requested actions, mitigation, and monitoring conditions because they are beyond regulatory requirements and are not standard OSE program approval conditions.

[107] The panel recognizes that an EIA is not required for OSE and TDL applications, which means there is limited information on the presence of fish or on the effects of water withdrawal from these lakes. The panel also notes that Fort McKay has identified Long Lake and Little Whitefish Lake as fish bearing. The panel notes that during TDL licensing, the AER will assess the adequacy of mitigation measures for fish and fish habitat and will establish appropriate requirements.

[108] Prosper's winter access will also cross several watercourses, which will require either ice bridge construction or snow fill. Prosper confirmed that the crossings will be built to Alberta Transportation guidelines and will adhere to the Department of Fisheries and Oceans' operational statements. In its response to the AER's hearing questions (exhibit 37.04), Prosper included the following commitments to keep watercourse crossings free of contaminants in order to protect water quality:

- All drilling activity will be a minimum of 100 m from any water bodies.
- Avoid fish bearing lakes where possible for water withdrawals.
- Minimize withdrawals from fish bearing lakes.
- Water crossings will be created using snow fill and will be removed at the end of the program.
- Watercourse crossings are kept clean of sediment, dirt, and any other potential deleterious materials.

- All operations will be conducted in compliance with the *Water Act* (administered by ESRD) and the *Fisheries Act* (administered by the Department of Fisheries and Oceans).
- All operations are conducted under frozen ground conditions and operations cease when ground conditions are unfavourable to snow-fill watercourse crossings.
- Drilling mud will be disposed of to sumps.
- Any water being used for operations will first pass through a screen on the pump intake with openings no larger than 2.54 mm.
- No fishing or access to Namur Lake [Buffalo Lake] will be allowed for Prosper staff and contractors.

[109] The panel agrees that Prosper's commitments will help maintain the water quality of those watercourses crossed by ice and snow bridges. The panel recognizes that poor water quality may have a detrimental effect on the traditional activities in the area. The panel also understands that even if water quality is maintained, Fort McKay's members may have the perception that surface waters have been contaminated. The panel expects Prosper to uphold the commitments to water quality that it made in its submission and to communicate with Fort McKay about the success of its actions.

[110] The panel accepts that the OSE program has the potential to affect the local environment through clearing of vegetation, effects on wildlife habitat, and impact on fish-bearing waters. The panel also acknowledges that these effects can be minimized or eliminated through planning and mitigation measures. The panel finds that Prosper's plans meet AER regulatory requirements and are consistent with industry practices and that the proposed construction, access, and reclamation management plans will mitigate the risk of any long-term effects on vegetation, fish, and wildlife in the immediate area of Prosper's lease and the Moose Lake reserves. The panel finds that the program will have some short-term, sensory disturbance effects on wildlife in the immediate area of Prosper's lease; however, the panel finds these effects to be acceptable.

## Cumulative Effects

[111] Fort McKay argued that the exercise of its traditional rights is dependent on the presence of wildlife and other natural resources that are affected by large-scale industrial processes, so the OSE program cannot be considered in isolation from other effects in its traditional territory. Fort McKay argued that considering the effects of the OSE program separately from regional effects or the effects of all disturbances within the Prosper leases would not provide a true picture of the effects of oil sands development and of this OSE program.

[112] Prosper submitted that OSE program effects should only be considered within the confines of its lease area. Prosper indicated that it considered existing on-lease disturbances when it assessed the OSE program's effects on wildlife populations in the lease area and found the cumulative effects to be negligible. It concluded that the effects of OSE program activities on the ecology of reserve lands and on



regional moose and caribou populations would be negligible. Cumulative effects on other environmental receptors outside the OSE program area were not assessed.

[113] Prosper submitted that Alberta's current regulatory framework requires the AER to consider the specific effects of the OSE program together with the OSE program's likely contribution to cumulative effects. Prosper submitted that the effects will be temporary, short-term, and reversible, and that therefore the contributions to cumulative effects will be negligible.

[114] Fort McKay disagreed with Prosper's site-specific approach for assessing the effects of the OSE program on its traditional territory and its traditional land use activities. Fort McKay argued that the effects of any one project on Fort McKay are inseparable from the existing effects of oil sands development in its traditional territory. Fort McKay submitted that the assessment of OSE program effects along with existing effects of oil sands development in its traditional territory is within the scope of this proceeding.

[115] As noted earlier, Fort McKay had undertaken its own studies to identify the regional impacts of development. These included collaborating with Shell Canada, ESRD, and the Canadian Environmental Assessment Agency to prepare the Fort McKay Specific Assessment (2010) for Shell's applications for regulatory approval of the Pierre River Mine and Jackpine Mine Expansion projects, and preparing several other cumulative effects studies within Fort McKay's traditional territory that were originally prepared to support Fort McKay's participation in the hearing for the Dover commercial project. Fort McKay undertook these studies to understand how environmental, cultural, and traditional resources of concern to Fort McKay are affected by cumulative effects and how regional development has affected Fort McKay's cultural integrity. Fort McKay also submitted the wildlife assessment from the Dover commercial project's EIA.

[116] Citing these studies, Fort McKay argued that traditional harvesting had already declined in its traditional lands due to existing regional effects. These studies evaluated the effects of development on key environmental indicators, including the availability of moose, fisher, fish, and edible berries. Fort McKay concluded that habitat change and human activity were having significant adverse effects on these indicators. Fort McKay also asserted that populations of wildlife, including moose, caribou, and fisher, in its traditional territory are below sustainable harvestable supplies.

[117] Fort McKay asked that the AER consider the combined effects of Prosper's OSE program, commercial oil sands development, and seismic activities within its traditional territory. Together, such consideration would allow for the evaluation and mitigation of regional effects on Fort McKay's reserve lands and aboriginal rights.

[118] Fort McKay expressed concerns about the clearing of vegetation and the effects that removing wildlife habitat will have on its members' ability to practice traditional activities in the project area. In

support of this position, it submitted a cumulative effects study (2013), based on results from the ALCES<sup>®</sup> cumulative effects model that contains an evaluation of the effects of industrial development in Fort McKay's traditional territory. Fort McKay said that although this study is regional in scope, it includes the entire Prosper lease area.

[119] Prosper argued that the evaluation of cumulative effects should be limited to the contribution of the OSE program to overall effects in the context of existing disturbance on its leases. It submitted that Fort McKay's concerns should be addressed through regional planning initiatives, such as LARP and associated subregional plans and management frameworks, rather than through project-specific applications.

[120] The panel notes that Fort McKay's submissions on cumulative regional impacts were of limited assistance in its deliberations on the potential effects of the OSE program. Within the scope of the AER decision-making process on applications such as these, submissions that would be most helpful to the panel would address the specific impacts expected within the immediate area of the program or lease. The panel also notes that Prosper's leases are a small part of the study areas used to identify cumulative effects in these studies.

[121] The panel recognizes the potential for cumulative effects from resource development in Fort McKay's traditional use area. As noted previously, the panel believes that regional planning under LARP is the appropriate mechanism for addressing regional cumulative effects of resource development, including the contribution of oil sands development. As discussed, some key deliverables from LARP are still outstanding. The biodiversity management framework and the landscape management plan are expected to provide guidance to the AER when it is assessing energy development applications. However, those plans have not yet been announced or implemented. In the absence of the framework and any associated thresholds or disturbance limits, the panel does not have a basis on which to assess the significance of the OSE program's contribution to cumulative effects.

[122] In any event, the panel finds that since Prosper will use minimal disturbance techniques and seasonal access, the project-specific effects are negligible. Therefore, it follows that any potential contribution of the OSE program to regional cumulative effects would also be negligible.

## **Traditional Land Use**

[123] Fort McKay submitted that the OSE program's environmental effects will affect its members' ability to continue to exercise traditional land use practices, which preserve and perpetuate Fort McKay's society and culture.

[124] Fort McKay said that it has about 700 members and that most of its members live in the hamlet of Fort McKay and Fort McKay's adjacent Indian Reserve 174D. It also submitted that many of its members occasionally occupy cabins on the Moose Lake reserves and on members' traplines. Many of the traplines

are between Fort McKay and the Moose Lake reserves and surround the reserves to the north, south, and east. About 25 cabins are on the Moose Lake reserves and another 9 are beside the lakes but within the borders of the reserves. Several new cabins are under construction by members. There are 4 cabins on the north end of Buffalo (Namur) Lake and a campsite on the south shore of the lake.

[125] Fort McKay submitted that the OSE program area is immediately adjacent to the Moose Lake reserves and within Fort McKay's traditional territory (figure 2, traditional use area information taken from pages 14 and 19 of exhibit 19.14), and that its members continue to use the area for traditional purposes. Fort McKay members said, through affidavit evidence, that they hunt, fish, harvest, and trap on their traditional territory on and around the Prosper lease. They also explained that the Moose Lake reserves are used more often in the winter when the ground is frozen and that Fort McKay has a program to fly in community members in the summer months.

[126] Fort McKay submitted maps showing areas that are important for certain traditional use values, such as subsistence, trapping and commercial activity, transportation, cultural and spiritual, and habitation. The maps were created using traditional land use data contained in Fort McKay's Community Knowledge Keeper database. The maps showed "buffered" areas to indicate the general location of the sites, but not their specific locations (figures 3 and 4). A 2 km buffer was applied to its site-specific traditional land use data in order to protect Fort McKay's confidentiality and traditional knowledge contained in the information.

[127] Fort McKay was concerned that trails and navigational landmarks are disappearing and that the landscape is becoming unrecognizable. Fort McKay submitted that Prosper's OSE program footprint is intersected by a traditional trail that its members use to travel from Spruce Lake to Buffalo (Namur) Lake and that access on the trail may be impeded.

[128] Prosper expressed its frustration that Fort McKay had not responded to its requests for information about traditional activity sites on the lands. Prosper indicated its willingness to mitigate the effects on any sites on which traditional activities take place, although it said that it needs more detailed information from Fort McKay in order to develop specific mitigation strategies.

[129] The panel understands that the buffered trail was the only traditional site identified in the submissions. The panel notes Prosper's commitment to develop appropriate mitigations associated with the information provided to it by Fort McKay regarding traditional trails. The panel reminds the parties that they need to work together to determine the best way to mitigate potential effects on the traditional trails. It encourages Fort McKay to be forthcoming to identify the location of any traditional land use and cultural sites that require protection or mitigation.

[130] The panel accepts Fort McKay's general submission that its traditional land use activities, as well as the culture and history of Fort McKay, are linked to the natural environment and attributes of the lands.

The panel also recognizes Fort McKay's submission that environmental effects of resource development are intertwined with the effects on traditional land use and acknowledges Fort McKay's submission that the ability to carry out traditional land use activities and participate in cultural traditions is essential for the continuation of Fort McKay's culture.

[131] As noted earlier in this decision, the panel finds that the environmental effects of the OSE program will be localized, temporary, and of relatively short duration. Furthermore, Fort McKay's evidence about activities on or near the OSE program area was broad in nature and provided little detail, such as site-specific locations of activities, other than reference to one trail and general references to hunting on and around Prosper's lease. The panel notes the lack of specific information demonstrating how Fort McKay's access may be impeded on the trail. It also notes that the buffered trail extends outside the OSE program area. For these reasons, the panel is unable to conclude that access on the traditional trail may be impeded by the OSE program.

[132] The panel notes that Fort McKay did not provide evidence about how its traditional and cultural activities were specifically affected by the 2012/13 OSE program. This information, if available, would have been useful for the panel in its consideration of the potential effects on Fort McKay's traditional land use and cultural activities.

[133] In light of the limited extent, duration, and character of environmental effects of the OSE project and the general nature of the evidence from Fort McKay on traditional use and cultural activities on or near the OSE program lease area, the panel is unable to conclude that the OSE program is likely to directly affect the practice by Fort McKay members of traditional land use and cultural activities.

## Summary of Findings

[134] The panel finds there is a need for the project because Prosper is required by regulation to delineate the potential resource underlying its leases in order to evaluate the viability of the leases and apply for a subsequent commercial oil sands scheme approval.

[135] In considering the applicability of the MO to this proceeding, the panel finds that the MO only applies to applications made under the *PLA* and not the *OGCA*, and therefore the MO does not apply to the well licences. The panel notes that the GoA has determined that consultation for Prosper's LOA was adequate and finds that the adequacy decision continues to apply to the AER's decision to extend the LOA. The panel finds that no useful purpose would be served by granting Fort McKay's request that the AER revoke the decisions and require Prosper to provide further information.

[136] The panel recognizes that many of the concerns raised by Fort McKay are related to regional effects of current and future resource development on lands defined by Fort McKay as its traditional land use area. These are important issues for Fort McKay and its members. The panel finds that management frameworks and thresholds to be established under LARP and efforts by Fort McKay to work with the

GoA toward developing the Moose Lake Protection Plan are the appropriate mechanisms for addressing concerns about regional development and the cumulative effects of resource development. The panel also finds that Prosper's OSE program is a designated use and is in compliance with LARP.

[137] The panel finds that the submissions in this proceeding indicate that the OSE program activities will be temporary and that environmental effects, if any, will be localized to the lease area and of relatively short duration. In its assessment of the OSE program, the panel has determined that the contribution to environmental effects both locally and regionally will be negligible.

[138] The panel notes that Fort McKay submitted a large amount of evidence related to other oil sands projects in areas adjacent to Prosper's leases. Much of the information was of a regional scale and was not project-specific data. The panel finds that these regional studies and reports were of little help in understanding the specific effects of Prosper's OSE program.

[139] Fort McKay's evidence regarding the exercise of traditional and cultural activities on and near the OSE program area was mostly general in nature and did not persuade the panel that the limited physical impacts of the OSE program will directly affect Fort McKay's cultural and traditional practices.

## **Conclusion**

[140] Having considered the economic, social, and environmental effects of Prosper's OSE program, the panel concludes that the well licences and the LOA meet all AER regulatory requirements and are in the public interest. Therefore, the panel hereby confirms the AER decisions to issue the well licences and extend the LOA.

Dated in Calgary, Alberta, on November 5, 2014.

## **Alberta Energy Regulator**

*<original signed by>*

B. T. McManus, Q.C.  
Presiding Hearing Commissioner

*<original signed by>*

R. C. McManus, M.E.Des.  
Hearing Commissioner

*<original signed by>*

C. Macken  
Hearing Commissioner

## Appendix 1 List of Wells

### Application No. 1754416

UWI Location	Licence No.	Issued	Status
06-20-096-17W4M	0454780	February 11, 2013	Drilled/abandoned
08-20-096-17W4M	0454781	February 11, 2013	Drilled/abandoned
02-20-096-17W4M	0454782	February 11, 2013	Drilled/abandoned
14-20-096-17W4M	0454783	February 11, 2013	Drilled/abandoned
16-20-096-17W4M	0454784	February 11, 2013	Drilled
01-21-096-17W4M	0454785	February 11, 2013	Licensed/undrilled
04-21-096-17W4M	0454786	February 11, 2013	Drilled/abandoned
10-21-096-17W4M	0454787	February 11, 2013	Licensed/undrilled
12-21-096-17W4M	0454788	February 11, 2013	Drilled/abandoned
14-21-096-17W4M	0454789	February 11, 2013	Drilled/abandoned
16-21-096-17W4M	0454790	February 11, 2013	Licensed/undrilled
09-19-096-17W4M	0454791	February 11, 2013	Licensed/undrilled

### Application No. 1754606

UWI Location	Licence No.	Issued	Status
04-19-096-17W4M	0454959	February 13, 2013	Licensed/undrilled
06-19-096-17W4M	0454960	February 13, 2013	Licensed/undrilled
07-19-096-17W4M	0454961	February 13, 2013	Licensed/undrilled
12-19-096-17W4M	0454962	February 13, 2013	Licensed/undrilled
14-19-096-17W4M	0454963	February 13, 2013	Licensed/undrilled
15-19-096-17W4M	0454964	February 13, 2013	Licensed/undrilled
02-28-096-17W4M	0454965	February 13, 2013	Licensed/undrilled
04-28-096-17W4M	0454966	February 13, 2013	Licensed/undrilled
03-29-096-17W4M	0454967	February 13, 2013	Licensed/undrilled
08-29-096-17W4M	0454968	February 13, 2013	Licensed/undrilled
08-30-096-17W4M	0454969	February 13, 2013	Licensed/undrilled

### Application No. 1758791

Location	Licence No.	Issued	Status
03-30-96-17W4M	0456119	March 26, 2013	Licensed/undrilled

## Appendix 2      Written Review Participants

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### Principals and Representatives

(Abbreviations used in report)

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Prosper Petroleum Ltd. (Prosper)

S. Duncanson

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Fort McKay First Nation and Fort McKay Métis Community Association (Fort McKay)

T. Razzaghi

K. Buss

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Alberta Energy Regulator staff

B. Kapel Holden, AER Counsel

M. LaCasse, AER Counsel

J. Koppe

R. Ruddell

A. Baru

B. Cole

S. Cook

B. Greenfield

P. Hunt

A. Panwar

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## Appendix 3      Summary of Commitments

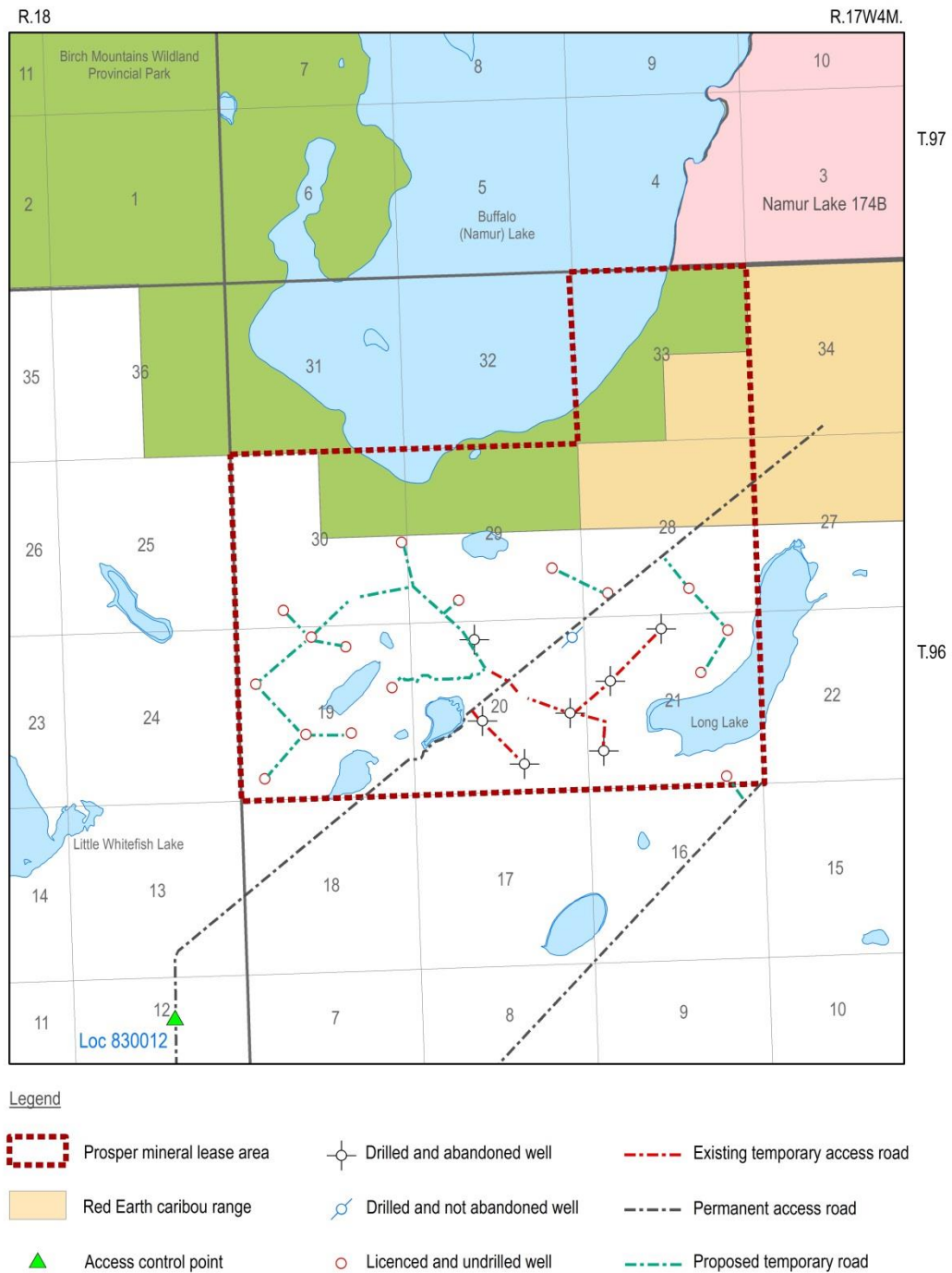
The AER notes that Prosper has made certain undertakings, promises, and commitments (collectively referred to as commitments) to parties involving activities or operations that are not strictly required under AER requirements. These commitments are separate arrangements between the parties and do not constitute conditions to the AER's confirmation of the licences and LOA. The commitments that have been given some weight by the AER are summarized below.

The AER expects the applicant to comply with commitments made to all parties. However, while the AER has considered these commitments in arriving at its decision, the AER cannot enforce them.

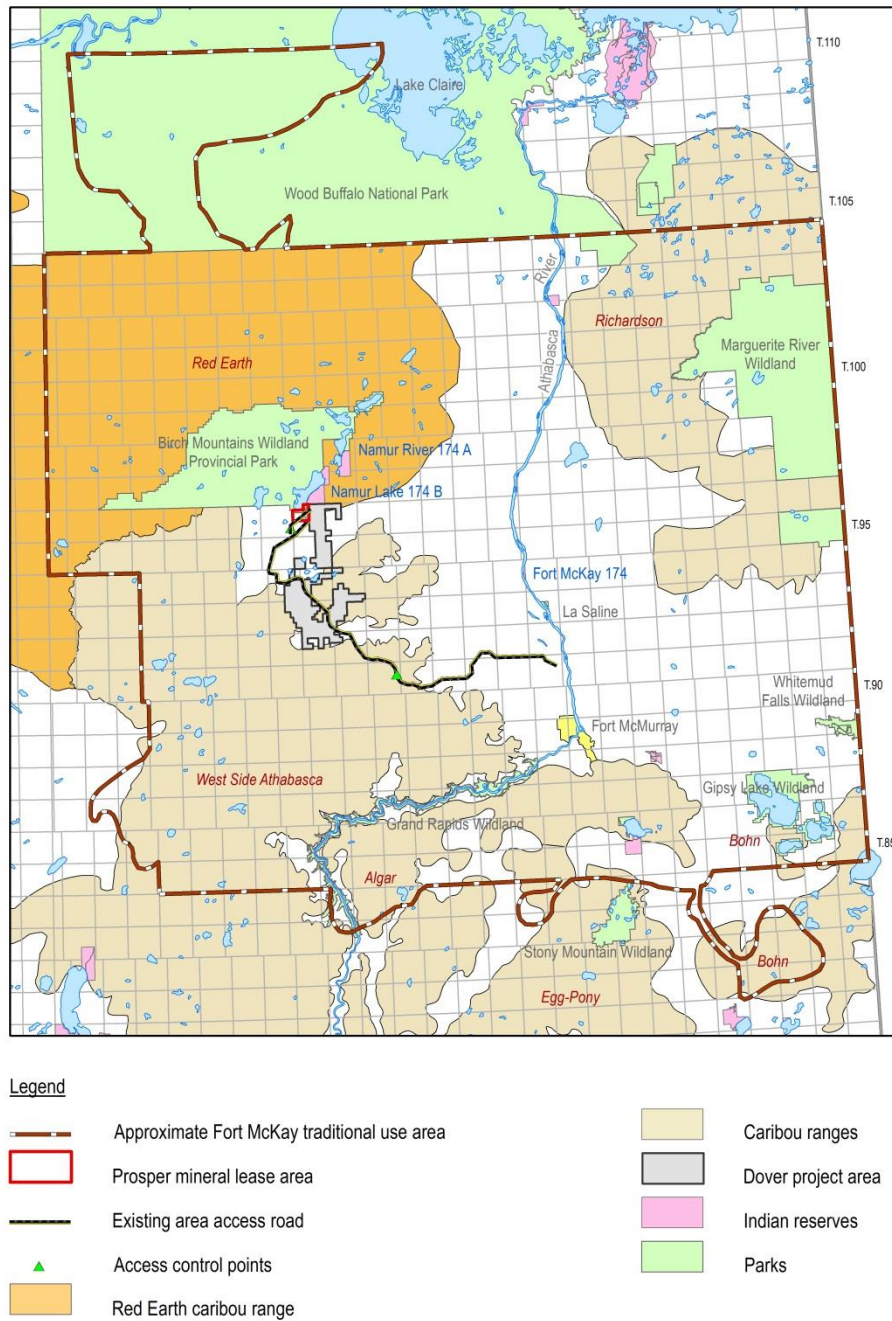
### Commitments by Prosper Petroleum Ltd.

- All drilling activity will be a minimum of 100 m from any water bodies with defined bed and shore
- Avoid fish bearing lakes where possible for water withdrawals
- Minimize withdrawals from fish bearing lakes
- No fishing or access to Namur Lake [Buffalo Lake] will be allowed for Prosper staff and contractors
- Prosper also committed to follow each of the mitigation measures that Koch Oil Sands Operating ULC (Koch), from which it acquired the lease, committed to Fort McKay:
  1. To fence all open sumps until reclamation to restrict wildlife access to these locations.
  2. To follow all regulatory requirements and setbacks when constructing and utilizing sumps.
  3. To arrange a field visit for community members to view a sump during winter operations.
  4. To provide First Nation with information on the amount of water applied for under TDL, the amount used, sources of the withdrawals and the uses of the water.
  5. Upon completion of program, logs and/or woody debris will be placed across access routes so as to block/restrict recreational users' access, except on access that is held under disposition and used by other companies.
  6. Workers will be living in the area campsite and will not be commuting to Fort McMurray on a daily basis.
  7. During shift change (on average of three weeks) workers will carpool in groups of five or six to and from Fort McMurray.
  8. To enter the OSE program from the south route only.





**Figure 1. OSE program area**



**Figure 2. Fort McKay Traditional Land Use Regional Area**

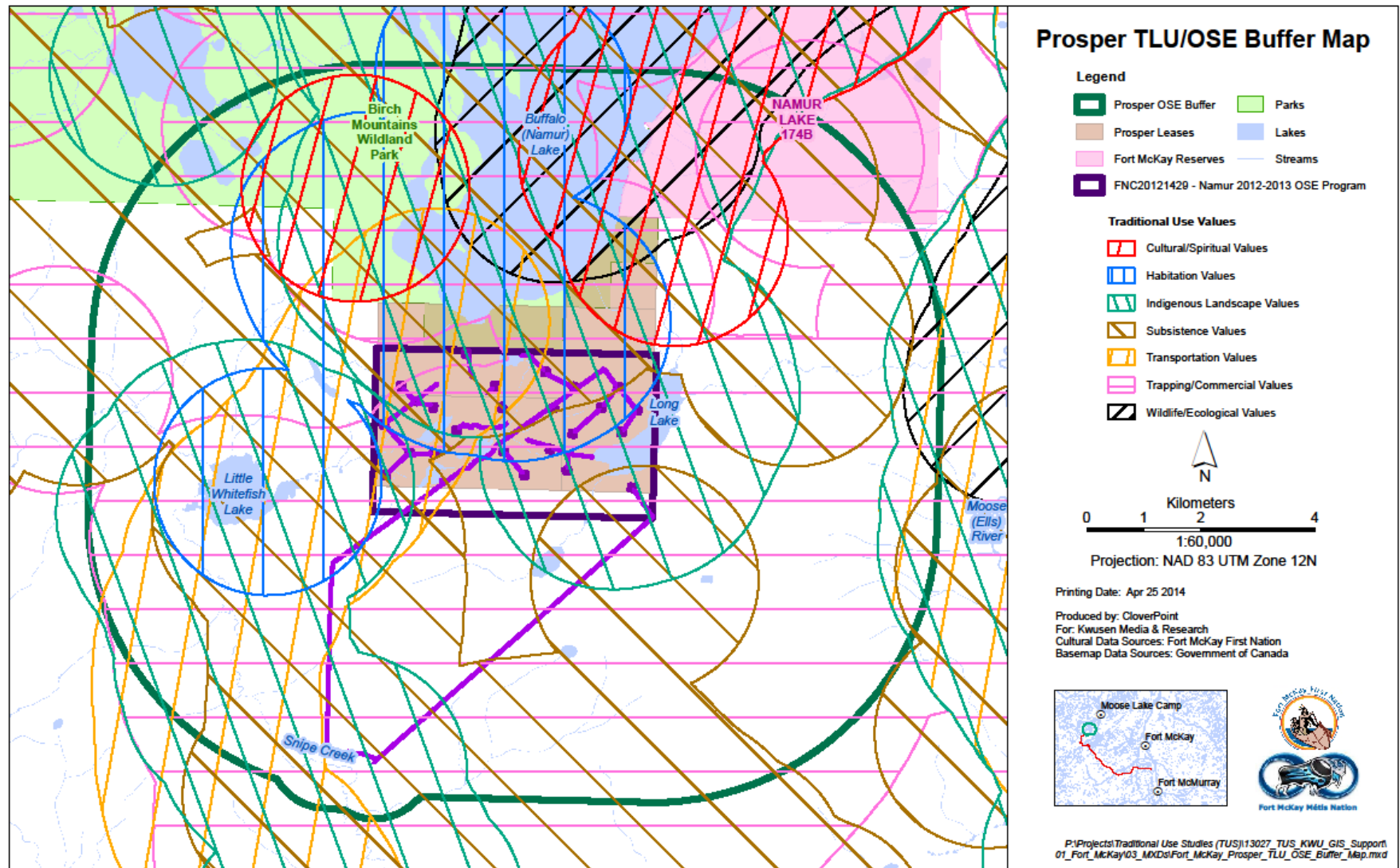


Figure 3. Buffered Traditional Use Values (Exhibit 19.04 Exhibit B to Affidavit of Daniel Stuckless)

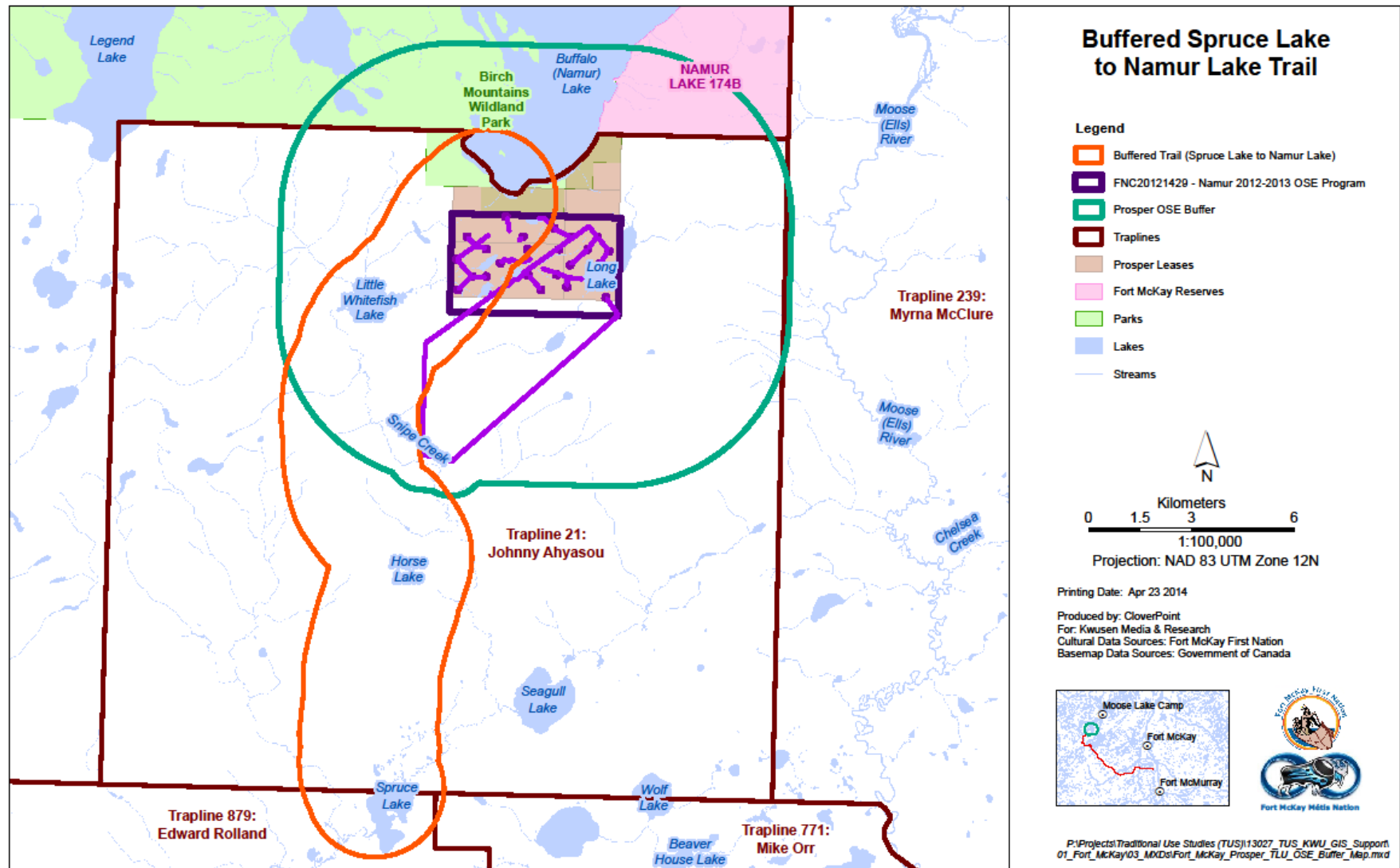


Figure 4. Buffered Spruce Lake to Buffalo (Namur) Lake Trail (Exhibit 19.06 Exhibit C to Affidavit of Daniel Stuckless)