

Attachment 15
Sunchild First Nation





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Authorizations Review & Coordination Team
Alberta Energy Regulator
Suite 1000, 250-5 Street SW
Calgary, Alberta T2P 0R4

Attention: Authorizations Review & Coordination
Team

Dear Mesdames/Sirs:

**Re: Alberta Energy Regulator Application No. 1725257 (the “Application”) and
Sunchild First Nation’s (“Sunchild”) Statement of Concern to Coal Valley
Resources Inc. (“CVRI”) Proposed Robb Trend Project (the “Project”)**

1. Introduction

This submission concerns CVRI’s Application and is in response to the Notice of Application from the Alberta Energy Regulator (“**AER**”) dated June 4, 2014. Based on the concerns outlined in this Statement of Concern, Sunchild requests that the AER set down CVRI’s Application for a hearing.

Sunchild is a Cree Nation and a signatory of Treaty No. 6, underlying the central portions of Alberta, including the Rocky Mountain Foothills Region (“**Sunchild Territory**”). Sunchild’s rights are inextricably connected to the land, waters and resources with Sunchild Territory from which its spirituality, identity, culture, heritage, language and traditions arose. Sunchild’s rights pre-exist Treaty No. 6 and exist in Canadian law not as a result of governmental recognition, but because they were not extinguished upon the Crown’s assertion of sovereignty. Since time immemorial, Sunchild’s members have and continue to extensively use and occupy Sunchild Territory. Sunchild’s Aboriginal and Treaty rights are protected by section 35 of the *Constitution Act, 1982*.

The technical and multifaceted mine permit amendment application for the Project was filed by CVRI in April, 2012 for review by Crown agencies. Despite the Project being this far advanced in the environmental assessment and regulatory approvals process, concerns related to Sunchild’s Aboriginal and Treaty rights have not been included or meaningfully considered by the Crown or CVRI. Sunchild has not completed its independent TLU study for the Project which it views as being critical to identify, address and mitigate specific impacts to Sunchild’s Aboriginal and Treaty rights. The completion of a TLU study is a fundamental prerequisite to CVRI’s Project Application being. Further, such information is required by the Crown in order for it to justify any infringements to Sunchild’s Aboriginal and Treaty rights, if the Project is approved. In absence of such information, any decision regarding the Project

will be vulnerable to judicial intervention. Sunchild thereby seeks the AER to set down the Project Application for a hearing in order to pre-emptively address its concerns regarding the Project and the Project Application's significant information gaps and deficiencies.

Sunchild believes that all beings are connected and made from the same building blocks. Based on this perspective, it is Sunchild's obligation and right to be the caretakers and stewards of all living beings within Sunchild Territory. Therefore, any development proposed to take place within Sunchild Territory must be carried out in a manner that protects and respects both the environment and Sunchild's Aboriginal and Treaty rights. As the Project is proposed to be developed in Sunchild Territory, Sunchild believes that a hearing is required in order to ensure that impacts to the environment and Aboriginal and Treaty rights are avoided, minimize or mitigated.

If the Project receives the necessary regulatory approvals, it will add new permitted lands to CVRI's existing significant disturbance area to allow for soil excavations, resource extraction, new pit shells and dump locations. The total area of new disturbance is 113 hectares of lands entirely on Crown lands. CVRI estimates that such activity will access 177.5 million of raw metric tonnes of coal. The life of the mine will exceed twenty-five years.

As the new disturbance area necessary to construct and operate the Project is within the heart of Sunchild Territory, the Project will directly and adversely affect its ecosystem, wildlife, wildlife habitat including bear dens, fish, fish habitat, plant harvesting areas, waterways and aquifers, ceremonial sites held along the Foothills and heritage property sites such as identified old tepee rings and cabin rings. The new disturbance will also hinder Sunchild's ability to exercise its rights in and around the Project area which is a preferred use area of Sunchild. Additionally, the newly contemplated activities must be analyzed in the present state of affairs, including cumulative impacts to Sunchild Aboriginal and Treaty rights. Additionally, past concerns such as impacts to identified burials sites were not and continue to be ignored by CVRI.

CVRI continues to construct, operate and propose further development activities in Sunchild Territory without meaningfully and adequately consulting Sunchild in order to mitigate and accommodate Sunchild's Aboriginal and Treaty rights. Consultation has not been initiated with Sunchild in respect of the Project by the Crown or CVRI notwithstanding our willingness. Sunchild acknowledges that past failures do not trigger the duty to consult. However, CVRI's Application must be considered in the context of the present material Application and CVRI has clearly not done so.

Thereby, the direct and adverse affects of the Project on Sunchild should be addressed during the AER's decision-making process including the cumulative impacts to Sunchild's Aboriginal and Treaty rights. Also, past use and the loss of future use and the right of Samson's intergenerational transfer must also be considered and assessed.

For the Project, all objective evidence (see section 2(c) below) supports the conclusion that *the Project will directly and adversely affect Sunchild and its members*. As such, any decision to increase the disturbance area of CVRI's Project must be carried out in a manner that mitigates and protects both the environment and Sunchild's Aboriginal and Treaty rights. Thereby, Sunchild seeks that the AER set down CVRI's Application for a hearing in order to ensure that the AER considers the direct and adverse affects to Sunchild and its members arising from the Project.

If the AER accepts Sunchild's request to set down CVRI's application for a hearing, Sunchild's participation in the AER regulatory processes will ensure and contribute to the reliability and credibility of the hearing. Sunchild's environmental expertise and traditional knowledge will provide the Regulator with valuable information and a better understanding of the anticipated direct and adverse affects arising from the Project. This information that Sunchild, as an intervenor, will provide at the hearing is necessary for the Regulator to be in a position to make an informed decision in respect to the Project.

2. The Requirements for a Hearing and Sunchild's Standing Are Satisfied

Paragraph 34(2)(b) of the of the *Responsible Energy Development Act* ("**REDA**") requires the AER to conduct a hearing on an application when it is required to do so under the *Alberta Energy Regulator Rules of Practice* (the "**Rules**"). Subsection 7(2) of the *Rules* provides that the AER may only make a decision on an application without a hearing under the following circumstances:

- (a) the person filing a statement of concern has not demonstrated that the person may be directly and adversely affected by the application,
- (b) the Regulator considers the statement of concern to be frivolous, vexatious or without merit, or
- (c) the Regulator determines the objection raised in the statement of concern has been addressed.

Subsection 34(3) of *REDA* provides that, if a hearing is required on an application, a person who may be directly and adversely affected by the application has a right to be heard at the hearing.

Therefore, the AER is required to hold a hearing when:

- (i) a statement of concern is filed;
- (ii) the statement of concern demonstrates that the filer may be directly and adversely affected by the decision on the application; and
- (iii) the objections raised in the statement of concern have not been addressed.

If those three elements are satisfied, the person who filed the statement of concern must be heard at a hearing concerning the application at issue. In this matter, each of the elements for a hearing and standing have been satisfied. As such, a hearing at which Sunchild has standing is required.

A. The "**Directly and Adversely Affected**" Threshold

The words "directly and adversely affect" were considered by the Alberta Court of Appeal in *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)* ("**Dene Tha'**").¹ That case

¹ 2005 ABCA 68.

concerned the test for standing under the old *Energy Resources Conservation Act*. Clearly, the test for what constitutes a direct and adverse affect under *REDA* and the *Rules* should be the test set out in *Dene Tha'*. In *Dene Tha'*, the direct and adverse affect test was stated to be the following:

The Board correctly stated here that that provision ... has two branches. First is a legal test, and second is a factual one. The legal test asks whether the claim right or interest being asserted by the person is one known to the law. The second branch asks whether the Board has information which shows that the application before the Board may directly and adversely affect those interests or rights. The second test is factual.²

The test only requires that there may be direct and adverse affects. We submit that the Statement of Concern establishes that Sunchild will be directly and adversely affected by the Project. Additionally, it is Sunchild's position that the objections raised have not been addressed in CVRI's Application.

Below, we provide the following submissions on how Sunchild will be directly and adversely affected by the Project, if approved by the AER. Alternatively, Sunchild unequivocally passes the low threshold of "may" be directly and adversely affected by the Project.

B. Sunchild's Rights

Sunchild has Aboriginal and Treaty rights. Those rights are constitutionally protected under subsection 35(1) of the *Constitution Act, 1982*, which provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". Sunchild's preliminary identification of specific rights at stake are discussed in detail directly below.

Sunchild is a signatory of Treaty No. 6, which provides Sunchild with the following rights:

Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may from time to time be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.³

² *Ibid* at para 10.

³ "Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions", online: Aboriginal Affairs and Northern Development Canada <<http://www.aadnc-aandc.gc.ca>> [emphasis added].

In *R v. Sundown* (“**Sundown**”),⁴ the Supreme Court of Canada (“**SCC**”) read the above text in its historical context. Justice Cory, writing for the Court, held that Treaty No. 6 preserved hunting, fishing and trapping rights. He also held that Treaty No. 6 was meant to preserve the signatory First Nation’s traditional way of life. Justice Cory stated the following:

Hunting, fishing and trapping rights were also secured to the Indians. Indeed, it is clear from the record of the negotiations that the guarantee of these rights was essential for the First Nations in their acceptance of the treaty. In *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (1991 (reprint)), Alexander Morris, the Lieutenant Governor in charge of the negotiations, recorded the following exchange. The Chiefs stated, “We want to be at liberty to hunt on any place as usual” (p. 215). Mr. Morris responded as follows (at p. 218):

You want to be at liberty to hunt as before. I told you we did not want to take that means of living from you, you have it the same as before, only this, if a man, whether Indian or Half-breed, had a good field of grain, you would not destroy it with your hunt.

It is clear from the history of the negotiations between Alexander Morris and the First Nations who signed Treaty No. 6 that the government intended to preserve the traditional Indian way of life. Hunting and fishing were of fundamental importance to that way of life.⁵

Treaty No. 6 protects Sunchild’s right to hunt, trap and fish throughout all of Sunchild’s Traditional Territory. Sunchild has occupied, used and have maintained a substantial connection to Sunchild Territory where members exercise their Treaty rights to fish, hunt, harvest and trap and further their culture and spiritual practices on the lands and waters within Sunchild Territory, including the area in and around the Rocky Mountain Foothills Region. In particular, Sunchild exercises the following rights:

- i. hunting and trapping various animals, including big game, birds and ducks;
- ii. carrying on Sunchild’s traditional way of life by maintaining its traditional seasonal round;
- iii. carrying out a variety of practices, traditions and customs within Sunchild Territory including specific spiritual, ceremonial and burial sites in and around the Project Area; and
- iv. fishing;

⁴ [1999] 1 SCR 393.

⁵ *Ibid* at 398 [emphasis in original].

- v. cultivating and harvesting traditional herbs, medicines and berries; and
- vi. habitation sites.

These practices, traditions and customs enumerated above were and remain central to the distinctive culture of Sunchild and Sunchild's traditional way of life in both its past and contemporary usage. In fact, yearly ceremonies, hunting and harvesting rights are utilized on a seasonal basis, as well as berry and medicinal plant harvesting. Sunchild continues to lay to rest with the Creator its members in this area for the reasons of being close to its ancestors when crossing over into the spirit world.

These practices, traditions and customs were carried out for a variety of purposes:

- i. consumption as food;
- ii. use as clothing;
- iii. use for medicine;
- iv. use for shelter;
- v. use in ceremonies;
- vi. use of the watersheds, airsheds and ecosystem;
- vii. use of Sunchild Territory;
- viii. use in trade within Sunchild Territory; and
- ix. use for trade outside the Sunchild Territory.

Sunchild's has Treaty No. 6 rights that extend beyond just its written terms. The SCC in *R v Sioui*, [1990] 1 SCR 1025 enunciated that the terms of the Treaty extend beyond the written text of the document and requires an understanding of: (i) the historical, cultural and political context; (ii) oral histories of the Indigenous signatories; and (iii) Indigenous laws. These interpretative requirements were confirmed again by the SCC in its decision of *R v Marshall*, [1999] 3 SCR 356, by stating that simply looking at the written text gives "excessive weight to the concerns and perspective of the British, who held the pen." Accordingly, Sunchild's perspective is required in order to conduct an assessment of "direct and adverse effects" of the Project on Sunchild's Treaty rights. An inquiry into Sunchild's Treaty rights and the Project has not been conducted by either the Crown or CVRI.

Sunchild's Treaty rights encompasses rights which are incidental to the rights granted by the Treaty, including environmental conservation required to ensure that Sunchild can continue to exercise its rights as formerly in Sunchild Territory.⁶ Sunchild believes that its concerns regarding potential impacts to Sunchild's ecosystem and environment are reasonable in light of CVRI's recent project integrity track record. Additionally, Sunchild Elders acknowledge the spiritual significance of the Rocky Mountain Foothills Region. Furthermore, historic and

⁶ *Simon v. The Queen*, [1985] 2 SCR 387.

contemporary burial sites, known and unknown, exist within the Project boundaries. Thereby, increasing the disturbance area necessarily threatens Sunchild's ability to maintain its culture and also may cause irreparable damages to cultural heritage sites.

Additionally, Sunchild's Territory is currently subject Treaty Land Entitlement ("TLE") proceedings. Therefore, the Project has the potential to adversely affect Sunchild's TLE lands.

C. *Direct and Adverse Effects on Sunchild's Rights Resulting from the Project*

The Project is within the core of Sunchild Territory and within the area that Treaty No. 6 expressly provides hunting, fishing, harvesting and trapping rights to Sunchild. To this day, Sunchild's members exercise those rights on a daily basis. The Project is in an area that includes many of Sunchild's traditional use, ceremonial and burial sites. These sites are evidenced by both the evidence which is provided in these submissions and further evidence which will be provided at a hearing on the application. Based on the significant scope of impacts including cumulative impacts of the Projects, its location within Sunchild's Territory, and the substantial evidence of direct and adverse impacts already provided herein makes it clear that Sunchild's Treaty No. 6 rights will be directly and adversely affected. Any determination to the contrary would be inconsistent with the clear submissions made to the AER.

The submissions below provide detailed information on how Sunchild's rights and interests will be directly and adversely affected. The submissions are based on the *Coal Valley Mine Extension Project: Robb Trend, Mercoal West and Yellowhead Tower Site Exploration Report* (the "2008 TLU Report"), the traditional knowledge of Sunchild and the oral evidence of Sunchild's Elders and knowledge holders. It should be noted that the 2008 TLU Report requires further support from the latter sources as the scope of its study was very narrow as a result of capacity constraints limiting Sunchild to prepare its adequate independent study and report regarding specific impacts.

The 2008 TLU Report and Sunchild's Elders have identified a number of traditional use sites within the Project location. This establishes Sunchild's extensive connection to the area where the Project is to be constructed and operated. It also establishes that Sunchild's currently exercises Aboriginal and Treaty rights in the area where the Project is to be constructed and operated. The sites identified include: hunting areas, fishing areas, plant harvesting sites, habitation sites, sacred sites, ceremonial sites, heritage property sites and seasonal round sites. Sunchild Elders are certain about the close and significant ties to the traditional land use sites and land bases of the traditional culture and way of life for Sunchild's people. The Project will directly and adversely affect Sunchild's use of these sites.

Below Sunchild identifies specific impacts to its Aboriginal and Treaty rights.

(i) *Hunting and Trapping*

Hunting is a key aspect of Sunchild's way of life. Sunchild members have hunted on throughout Sunchild Territory since time immemorial and continue to do so today. The 2008 TLU Report and Sunchild's Elders have identified a number of hunting blinds, mineral salt licks, kill sites and game trails within close proximity to the Project. The area the Project will be located is a prime hunting area for Sunchild members, specifically for hunting big game, birds and ducks and all other kinds of animals. Upon further study, it is highly likely that game

trails will be discovered in the area of the Project. Currently moose is the most commonly hunted game in the area surrounding the Project. Deer and elk are also harvested in the area.

The area surrounding the Project is an excellent wildlife habitat, evidenced by a moose, deer, and elk tracks; moose, elk and deer droppings; moose breeding grounds; salt licks; the number of game trails and water holes. The new disturbance of constructing and operating the Project will affect wildlife and wildlife habitat in the area which will have an impact on Sunchild members' ability to hunt. Specifically, Sunchild is concerned about water contamination arising from CVRI's activities. Additionally, the Project will disturb wildlife migratory patterns by creating a barrier and causing activity that will cause animals to avoid the area. Another contributing factor impacting wildlife and wildlife habitat is the increase of noise in the area that will arise from the Project.

Access to traditional food such as moose meat is extremely important to Sunchild for dietary, social, and cultural reasons. Wild game is far lower in fat and richer in nutrients than store bought options like pork and beef. Continued access to healthy traditional foods is extremely important to Sunchild members who, as a group, face increasing rates of heart disease, diabetes, and obesity. The ability to harvest traditional food is important socially as it provides youth an opportunity to learn how to hunt and the opportunity to learn associated stories and lessons that pass on Sunchild's ideals about respect for and reciprocity with animals and the land. Finally, traditional foods are vitally important to Sunchild's cultural well being as many traditional foods are essential for various ceremonies and feasts.

Construction and operation of the Project will be disruptive to wildlife habitats and will drive game elsewhere. This will have a devastating impact on Sunchild. Therefore, mitigation measures approved by Sunchild must be put in place to ensure that the construction and operation of the Project is done in a manner that preserves wildlife, wildlife habitat, and Sunchild's traditional use of both. The Application must be considered in its present state of affairs, including the presentation population of wildlife and location of wildlife habitats.

(ii) Traditional Seasonal Round

There are a number of traditional seasonal round routes located within the Project area. Seasonal round routes are particular preferred areas within Sunchild Territory important in linking traditional land use areas and are often bordered by other traditional land use sites, like hunting camps and grave sites. Traditional seasonal rounds often have considerable cultural and historic importance because they link current users to the paths of their ancestors. It has so far been confirmed that at least one traditional seasonal round in close proximity to the Project is used by Sunchild members to access hunting grounds. Evidence of this can be found along the seasonal round including habitation sites, ancestral burial grounds and other artifacts.

It is crucial that the location of the Project and all construction activities performed for the Project do not destroy or limit access to these seasonal round routes. Any interruption in these routes will severely hinder Sunchild's members from in engaging in traditional uses and traveling throughout Sunchild Territory as their ancestors did.

(iii) Sacred Sites and Cultural Heritage Sites

Sunchild members also report ceremonial sites within the Project area. The Project area has been used heavily by Aboriginal people for many generations. The heritage sites in the

Project area have significant importance to Sunchild. Of particular importance are the pre-contact sites and traditional use sites which are considered sacred by Sunchild. Sunchild members continue to practise ceremonies such as sweats and the Sundance in and around the Project area. This is further evidenced by the fact that the Project area lies within Sunchild's seasonal round area.

The Elders and the 2008 TLU Report have identified heritage property sites in and around the Project area, including burial sites. In fact, Sunchild has identified to CVRI a burial site merely within and estimated 15 kilometres away from the Sunchild's burial sites. Therefore, CVRI activities clearly will cause irreparable harm to Sunchild's burial sites through its mining activities. Notwithstanding, CVRI's Application fails to identify any measures to avoid and mitigate such irreparable harm. Clearly Sunchild will be directly and adversely affected by the Project.

The Elders and the 2008 TLU Report have identified ceremonial sites in and around the Project area. Sunchild conducts its "Law Lodge" ceremony annually in the Spring in and around the Project area. Additionally, Sunchild conducts "Sweats" annually in the Summer in and around the Project area. Increased disturbance area will clearly directly and adversely affect Sunchild in exercising these ceremonies.

Even more concerning, is that Sunchild continues to hold ceremonies in the Project area. As a matter of fact, just last week a funeral was held just across the road of the proposed Project area.

The Project will have significant impact on the sacred sites within the Project area, and such disturbance will cause irreparable harm. In the event the applications are approved, approval should be based on mitigation measures approved by Sunchild to minimize the impact of the Project on the historical sites and to ensure that all artefacts and sites found are given proper attention, treatment and consideration and handled according to traditional culture and customs.

(iii) Fishing

Fishing is an important aspect of Sunchild's way of life. Sunchild members have fished in the lakes, rivers, and streams throughout Sunchild Territory since time immemorial and continue to do so today. Treaty No. 6 gives Sunchild members the right to fish throughout their Traditional Territory. Elders evidence considered the locations of fish bearing water sources near the Project. The waterways which runs next to the Project area provides a good year-round habitat for a number of fish species. This demonstrates that the area of the Project will be located is an important fishing area for Sunchild members.

Sunchild is specifically concerned with impacts to: (i) Pembina River; Embarras River; and (iii) Lovett River.

Access to traditional food such as fish is extremely important to Sunchild for the reasons mentioned above. Construction and operation of the Project will harm fish and fish habitat. Sunchild is especially concerned about disruption of fish bearing streams and pollution of water sources. Any such event could have a devastating impact on Sunchild's ability to fish.

Sunchild has concerns regarding the sustainability of fish populations and development of aquatic flora and fauna. Sunchild's concerns have not been addressed by CVRI in its February 2014 report by Hatfield Consultants.

(v) Plant and Berry Harvesting

The Elders and the 2008 TLU Report have identified a number of plant and berry harvesting and cultivation sites within the close proximity of the Project. Sunchild members use plants found at these sites for a wide range of uses including medicinal, ceremonial, and dietary purposes. Medicinal, ceremonial and food plants found in the Project area and is considered a preferred area to carry out this practice as it is the "cleanest area" remaining in Sunchild Territory.

Traditional use vegetation has a very high potential to occur in the Project area. The construction of the Project will destroy these plant harvesting sites. One of the most important concerns among the Sunchild Elders was the impact to medicinal, ceremonial, and food plants in the Project area. Some of these plants were noted as "rare" or "rare elsewhere". Some were noted by Elders as being more abundant in this area and larger in size in some cases.

Sunchild members frequently gather plants by going in groups to an area, often setting up a camp, and then walk around the area gathering. Gathering, thus has a social component which is important to help band members bond and maintain Sunchild's culture and traditions.

(vi) Habitation Sites

The Elders have identified a number habitation sites within the Project area. The 2008 TLU reports identifies a number of habitation sites including location of old cabins in the Project area.

The people living in this area or using it for ceremonial purposes will be impacted by the Project. The noise from construction will adversely affect them by driving away wildlife and destroying the aesthetics of the area.

3. Sunchild's Concerns Have Not Been Addressed

Paragraph 7(2)(c) of the *Rules* provides that the AER may make a decision without a hearing if the AER determines objections made in a statement of concern have been addressed. The objections made by Sunchild in its Statement of Concern have not been addressed by CVRI. This is made clear by the fact that CVRI has not engaged Sunchild in respect to the Project. Additionally, CVRI's Application inappropriately relies on a "continued consultation" approach which attempts to apply previously gathered information through other stand-alone projects to its current Project.

In particular, this Statement of Concern raises several informational deficiencies that have not been addressed including impacts on Sunchild's Aboriginal and Treaty rights. The 2008 TLU Report, discussed above, do not provide Sunchild or CVRI with information on all of the Project's impacts. In the absence of a decision to not approve the Project without a hearing based on the compelling evidence of direct and adverse impacts already provided, this information is important to be heard by the AER.

We note the lack of information provided to Sunchild is inconsistent with the duty of consultation and accommodation because it prevents Sunchild from meaningfully identify and discuss impacts arising from the Project and mitigation measures. In *Mikisew*, the SCC held:

The duty [to consult] has both informational and response components... This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impacts on those interests.⁷

Similarly, the Court of Appeal for British Columbia in *R v. Sampson* and *R v. Jack* has held that there is an obligation on the Crown to provide full information to First Nations, and the Crown's duty is not fulfilled by simply waiting for First Nations to raise questions which the Crown will then attempt to answer.⁸

The Crown is relying, to the extent possible, upon CVRI and the AER process to discharge the duty of consultation and accommodation. To date, neither the federal or provincial Crown nor the AER has engaged in dialogue with Sunchild with the objective of substantially resolving Sunchild's concerns. Therefore, the obligation to provide Sunchild full information is by default delegated to CVRI. CVRI has not adequately discharged that obligation.

Despite its limited capacity and resources, Sunchild is still working to gather information on the direct and adverse affects of the Project. Sunchild would present such additional evidence at a hearing.

It should also be noted that there are likely a number of additional direct and adverse affects which have not yet been identified because Sunchild's limited capacity and resources prevent it from engaging in an adequate traditional land use study, Cumulative Impact Assessment study and Socio-Economic Impact Analysis study. These studies are required to realize the full extent of the Project's direct and adverse affects on Sunchild in the current state of affairs and will be provided at a hearing on the application and consider the Application. Nonetheless, the 2008 TLU Report allows Sunchild to meet the direct and adverse affects threshold required by the AER.

4. Conclusion

The information provided above demonstrates the extensive connection Sunchild has to the area surrounding the Project. Therefore, the granting of the application and the development and operation of the Project will clearly directly and adversely affect Sunchild's use of its Traditional Territory to exercise its Aboriginal and Treaty rights.

Just like their ancestors, Sunchild members continue use the area surrounding the Project frequently in order to exercise Aboriginal and Treaty rights. Today, the area is particularly used for hunting, fishing, ceremonial sites and plant harvesting. Hunting in the area surrounding the Project is part of everyday life for many Sunchild members, and it represents

⁷ *Mikisew*, supra note 6 at para 64.

⁸ *R v Sampson* (1995), 131 DLR (4th) 192 at paras 107-109 (BC CA); *R v Jack* (1995), 131 DLR (4th) 165 at para 77 (BC CA).

both a traditional activity and a source of subsistence. The Project will inevitably impact wildlife habitat, which will directly and adversely affect Sunchild hunters, as well as the Sunchild community at large which is reliant on hunting for nutrition, as well for social and cultural purposes. Sunchild is concerned about potential breaches that may arise from CVRI's activities resulting in the pollution of important waterways and therefore threatening the wildlife habitat and populations within the Project area.

Plant harvesting is a traditional activity exercised by current Sunchild members, particularly Elders and children whom the Elders take out on the land to teach about the different plants and their uses. The plants harvested are consumed as food and medicine and used in ceremonies. Sunchild will be directly and adversely affected physically (in terms of nutrition), socially, and culturally should plant harvesting areas be destroyed by the construction and operation of the Project.

Numerous habitation and sacred sites have been identified in the area surrounding the Project. These sites are a physical part of Sunchild's history and culture. Harm or destruction of these sites will directly and adversely effect Sunchild. Elders tell traditional stories and pass on Sunchild's history, culture, and knowledge at these habitation and sacred sites. The sites are integral parts of the stories and knowledge and are used as a medium through which the traditional stories are told and the traditional knowledge is communicated. It is imperative that these sites be preserved and protected so that the stories and knowledge can be past on to future generations of Sunchild members.

The construction of the Project will further destroy the surrounding area of traditional land use sites making a new and unfamiliar landscape. Destruction of trails and limiting access to Sunchild's seasonal round routes will make it difficult to access resource use areas. Furthermore, the loss of familiar game trails, salt licks and water holes will make locating game more difficult and may also force game out of the area surrounding the Project for an indefinite period of time. Traditionally used plants will be destroyed and likely replaced with different or even non-native species through reclamation. Sacred sites will be erased from the landscape or abandoned due to proximity to the Project.

As shown above, the effects of the Project will significantly impact Sunchild's ability to exercise its Aboriginal and Treaty rights within Sunchild Territory. Sunchild will be directly and adversely affected by the Project. Sunchild's objections to the Project have not been addressed by CVRI, the Crown, or any other party. CVRI has not offered to put in place appropriate mitigation and accommodation measures. In Sunchild's view, the inevitable direct and adverse affects it will suffer warrant greater discussion in respect to mitigation and accommodation measures than CVRI has been willing to engage in to date.

Consequently, Sunchild requests that applications not be approved. In the alternative, Sunchild requests that the AER hold a hearing at which Sunchild is granted intervenor status and the direct and adverse affects of the Project on Sunchild can be addressed. Any decision to approve the Project without a hearing would be both incorrect and unreasonable and thus reviewable at law.

Sunchild will make written submissions, provide evidence at the hearing, cross-examine CVRI's witnesses and make oral submissions regarding whether the applications should be approved. The evidence Sunchild will present at the hearing includes:

- an adequate traditional land use report;
- a Socio-Economic Impact Assessment study;
- a Cumulative Impact Assessments study;
- videotaped statements by Sunchild's Elders on the proposed Project's affect on vegetation and their traditional way of life;
- affidavit or oral testimony by Sunchild Elders on how the Project will impact the Sunchild's traditional way of life; and
- a cultural anthropologist report on Sunchild's heritage property sites and seasonal round routes.

The information submitted for the hearing will further substantiate Sunchild's position that the approval of the applications and the development and operation of the Project will directly and adversely affect Sunchild's use of its Territory to exercise its Aboriginal and Treaty rights.

5. Questions of Constitutional Law

Sunchild intends to raise questions of constitutional law including, but not limited to: (i) does the proposed Project infringe unjustifiably section 35, *Constitution Act, 1982* protected treaty rights; and (ii) has the Crown discharged its duty to act honourably in its dealings with Sunchild in respect to adverse impacts that may arise from the proposed Project upon the rights guaranteed to Sunchild pursuant to Treaty 6.

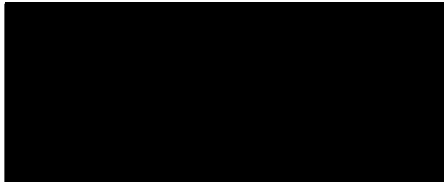
Sunchild intends to argue that if the Project approved, it will infringe the Aboriginal and Treaty rights of Sunchild and that infringement is unjustified. Sunchild intends to argue that the Crown has not acted honourably in its dealings with Sunchild in respect to Project and that the Crown's duty to consult must be fulfilled regardless of whether the statutory regime precludes the decision-maker from assessing the adequacy of Crown consultation.

Sunchild intends to further define its questions of constitutional in accordance with section 12 of the *Administrative Procedure and Jurisdiction Act* and Schedule 2 of the *Designation of Constitutional Decision Makers Regulation*.

Sunchild will submit evidence on its Treaty 6 rights, including both its written and oral terms of the document.

Contact information for Sunchild and Mr. Aryn Lalji, Sunchild's legal counsel, is provided below. If the AER has any questions regarding these submissions, please contact Mr. Lalji.

Chief Jonathan Frencheater
Sunchild First Nation



Aryn F. Lalji
Miller Thomson LLP
840 Howe Street, Suite 1000
Vancouver, BC V6Z 2M1
Phone: 604.643.1201
Email: alalji@millerthomson.com
Fax: 604.643.1200

Regards,

MILLER THOMSON LLP

Per:

<original signed by>

Aryn F. Lalji

AFL/lrg

July 10, 2014

Amyl Lalji
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Calgary Head Office
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www.aer.ca

Dear Mr. Lalji:

**STATEMENT OF CONCERN NO. 29118
COAL VALLEY RESOURCES INC.
MINING APPLICATION FOR PROPOSED ROBB TREND PROJECT
APPLICATION NO. 1725257
LOCATION: 08-049-21W5M**

The Alberta Energy Regulator (AER) acknowledges receipt of your letter, on behalf of Sunchild First Nation, dated July 9, 2014, indicating your statement of concern to the subject application. Please be advised that an application was submitted to the AER on April 17, 2014, and was assigned Application No. 1725257.

The application is currently under review and the concerns outlined in your letter will be taken into consideration by the AER in its review of the application. The AER expects parties to discuss outstanding concerns whenever possible. By way of copy of this letter to Coal Valley Resources Inc. (Coal Valley), we are requesting Coal Valley contact you to attempt to address your concerns, as provided under AER requirements.

Please note that the AER has no jurisdiction over matters of compensation for land usage. The Alberta Surface Rights Board is the regulatory agency that deals with these issues. Further the AER has no jurisdiction with respect to assessing the adequacy of Crown consultation with the rights of aboriginal peoples.

The AER offers and strongly recommends you make use of our Alternative Dispute Resolution (ADR) program which features either staff or third party mediation arranged through an AER mediator. Please contact Krista Waters at 403-755-1422 for more information on this process. Further information about this program is available through *EnerFAQs: All About Alternative Dispute Resolution* and *Manual 004: ADR Alternative Dispute Resolution Program and Guidelines for Energy Industry Disputes* on the AER web site, (<http://www.aer.ca>), under Applications & Notices, Alternative Dispute Resolution (ADR) Process.

Please note that Section 49 of the *Alberta Energy Regulator Rules of Practice* (Rules) requires that all documents filed with the AER be placed on the public record. However, any party may file a request for confidentiality of information under Section 49 prior to filing the information with the AER. Any request under Section 49 must be copied to the other parties to the proceeding. Section 49 of the Rules is available at the AER website at www.aer.ca.

Please direct questions regarding your statement of concern to Amanda Black at 780-743-7473 who will manage the application through to completion. If you have any questions regarding AER process please contact the undersigned through our Customer Contact Centre, toll free, at 1-855-297-8311, or collect at 403-297-5749.

inquiries 1-855-297-8311
24-hour
emergency 1-800-222-6514

Yours truly,



Jennifer Richards
Review & Coordination Team
Authorizations Branch

cc: Les Lafleur, Coal Valley Resources Inc., llafleur@westmoreland.com
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