



February 26, 2021

Laura Friend
Manager, Board Reviews
Natural Resources Conservation Board
Email: laura.friend@nrcb.ca

Dear Ms. Friend,

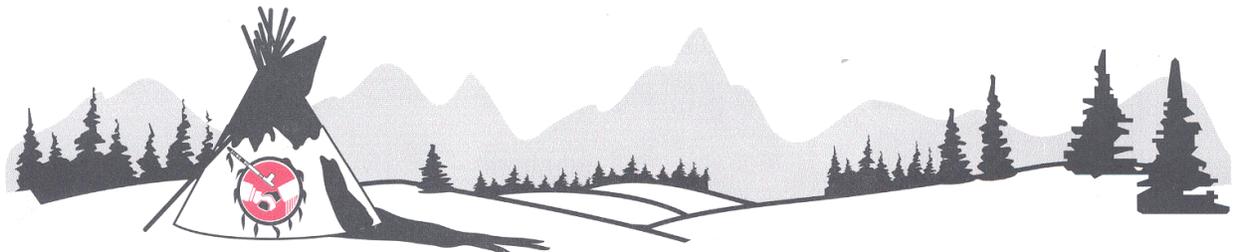
Re: **Review of the Springbank Off-Stream Reservoir Project Draft Environmental Assessment Report and Potential Conditions under the *Canadian Environmental Assessment Act, 2012***

The Stoney Tribal Administration represents the three distinct Stoney Nakoda Nations (“SNN”): Wesley First Nation, Bears paw First Nation and Chiniki First Nation. The Chiefs and Councils of the SNN have the authority to protect the collective rights and interests of the SNN as recognized by Treaty 7 and the *Natural Resources Transfer Act, 1930* (“NRTA”) and protected by Section 35 of the *Constitution Act, 1982* (collectively known as “Section 35 Rights”). SNN’s Section 35 Rights include hunting as laid out in Treaty 7, and the right to hunt, trap and fish as detailed in the NRTA. As well as rights not including land, water and resource rights, the right to self-govern, the right to practice SNN culture, the right to speak SNN language, and any right flowing from these aspects (e.g., passing on knowledge to the next generation).

As stated within the Natural Resources Conservation Board (“NRCB”) documentation, the NRCB is a quasi-judicial board designated to conduct the public interest review of the Springbank Off-stream Reservoir Project. It is legislated by the *Natural Resources Conservation Board Act* which provides for “...an impartial process to review projects that will or may affect the natural resources of Alberta in order to determine whether, in the Board’s opinion, the projects are in the public interest, having regard to the social and economic effects of the projects and the effect of the projects on the environment.”¹

In order to assist the NRCB in their determination of whether the Project is within the public interest SNN undertook a review of the draft Environmental Assessment (“EA”) report and associated linked sections of the Environmental Impact Statement (“EIS”). Further, SNN undertook a review of the potential conditions under the *Canadian Environmental Assessment Act, 2012* (“CEAA, 2012”) which are contemplated in relation to the Project. The Impact Assessment Agency of Canada and Alberta Environment and Parks coordinated the federal and provincial EA processes through acceptance of a single EIS by the Proponent to satisfy both the provincial and federal requirements and information sharing during the technical review

¹ Natural Resources Conservation Board Act



STONEY TRIBAL ADMINISTRATION

of the EIS. Therefore, SNN's review of the EA report, EIS and potential conditions can be considered relevant evidence to the application. A summary of that review is outlined below.

SNN's review of the above noted documentation was focused on whether the Project is likely to cause potential impacts on SNN established Section 35 Rights as well as impacts to SNN as affected landowners.

Narrow Legislative View of Rights

As per the EA report, the *Impact Assessment Act* ("IAA") came into force August 2019 and *CEAA, 2012* was repealed. In accordance with the transitional provisions of the IAA, the environmental assessment for the Project continued under *CEAA, 2012*.

While SNN understands the legislative framework under which this Project operates, the transitional provision cannot be licence to proceed in breach of common law principles of Indigenous consultation. These common law principles were highlighted in *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069 which noted that "[t]he consultative inquiry is not properly into environmental effects *per se*. Rather, it inquires into the impact on the right itself." A principle which is highlighted within the IAA through the direction provided within the Act itself, as well as through the practitioner's guide, and must be applied in practice to *CEAA, 2012* approvals to ensure the honor of the Crown is upheld and the duty to consult discharged. For example, the SNN Section 35 Right to hunt includes much more than just the activity of hunting. Nation members indicate that hunting is a central part of SNN culture²; it is grounded in respect for the land and animals and it is essential to be out on the land to access traditional sites for both the exercise of the right to hunt as well as passing down this knowledge to the younger generation³. In order to accurately assess impacts of the project on Aboriginal and Treaty rights⁴, as stated, there must be both a consideration of the exercise of the right (e.g., hunting, trapping, fishing, gathering) as well as consideration of impacts to the cultural, social and ceremonial components of those rights.

This means looking at potential impacts to SNN rights which may not be only tied to biophysical components and instead exploring conditions necessary for the exercise of rights and the preference of SNN members in the exercise of those rights. It also means interweaving information on SNN's systems for self-governance and self-determination with respect to the management of those traditional lands and resources to ensure consideration of SNN law, customs and structures is appropriately contemplated.

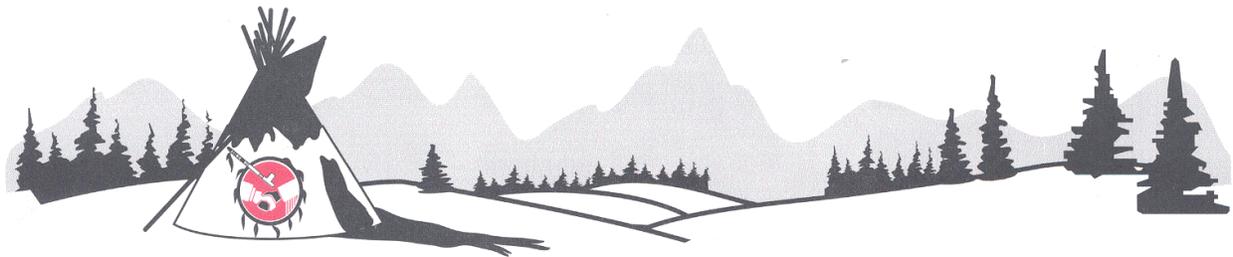
Significance Determination

Residual environmental effects from the Project in relation to Section 5 of *CEAA, 2012* to current use of lands and resources for traditional purposes by Indigenous people (including from loss or alteration of access for Indigenous use; effects on the health of Indigenous peoples due to exposure to air and water

² MNP, Stoney Nakoda Nations – Bearspaw First Nation, Chiniki First Nation and Wesley First Nation, Section 35 Rights Assessment Report for the 2021 NGTL System Expansion Project, 2019 Bearspaw Report, Filing A98976: <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3768830>; NGTL 2021 Chiniki Report, Filing A98968: <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3768542>; NGTL 2021 Wesley Report, Filing A98962: <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3768725>.

³ *Ibid.*

⁴ Terminology used within EA report



STONEY TRIBAL ADMINISTRATION

contaminants, noise, and country foods and reduced ability to harvest subsistence and economic resources; and, effects to sites or things of historical, archaeological, or paleontological significance to Indigenous people) were categorized as part of the assessment process.

However, the Agency concludes that, taking into account the implementation of the key mitigation and follow-up program measures, the Project is not likely to cause significant adverse environmental effects as defined under *CEAA, 2012*. It is unclear from this determination how the proponent's own determination within the EIS has informed the IAAC's determination of significance; particularly as SNN has issues with the proponent's determination, detailed below.

First, the rationale used to identify a lack of significance does not correlate to the exercise of rights specifically. The EIS determined that "the effects of the Project on TLRU will not result in the long-term loss of availability of traditional use resources or access to lands currently relied on for traditional use practices or the permanent loss of traditional use sites and areas in the RAA"⁵. This ignores the importance of specific sites in the exercise of harvesting rights as well as the current levels of damage and development⁶ which exist within the regional assessment area. This assertion is made without a quantitative calculation of unoccupied Crown land or private land to which SNN has a right of access and instead relies on the assumption that because of the availability of traditional use resources within the regional assessment areas, this would not constitute a long-term loss; however availability of resources does not correlate with the ability to exercise a right as there are numerous other factors including:

- availability of land, and
- preference⁷ of land users which can inform potential avoidance behaviors.

Therefore, the significance determination must include consideration of how SNN Section 35 Rights may be more vulnerable to the effects of the Project when they are added to or interact with the existing displacement within baseline conditions.

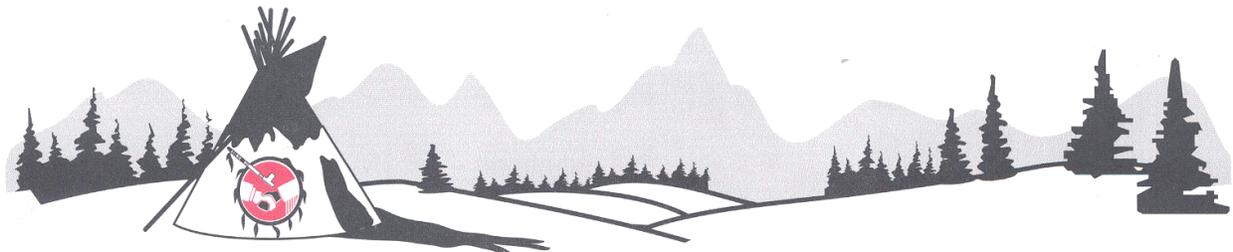
Previous SNN experience, and previous work on projects north and south of the project development area, has shown that unoccupied Crown land and private land to which SNN has a right of access is limited; resulting in SNN harvesters and land users already being displaced. Even the minimal loss presented by the Project is a meaningful change which must be quantified, considered, mitigated and discussed as part of the EA report and potential conditions.

Additionally, the EIS determination of significance does not account for the location sensitivity of cultural activities. In previously completed work, it was noted by participants that ceremonial, cultural or sacred

⁵ Springbank Off-Stream Reservoir Project, Environmental Impact Assessment, Volume 3A: Effects Assessment (Construction and Dry Operations), pp. 14.84

⁶ MNP, Stoney Nakoda Nations – Bears paw First Nation, Chiniki First Nation and Wesley First Nation, Section 35 Rights Assessment Report for the NOVA Gas Transmission Ltd. Edson Mainline Expansion Project, 2020

⁷ Preference is a parameter used to identify infringement of a right: (1) is the limitation unreasonable, (2) does the regulation impose undue hardship, (3) does the regulation deny to the holders of the right their preferred means of exercising that right, as per *R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075



STONEY TRIBAL ADMINISTRATION

places are immovable⁸; once the site is disturbed or destroyed it is culturally lost⁹. This does not appear to have been considered for the significance determination by the Proponent and must be incorporated into the significance determination by the IAAC within the EA Report.

The process of identifying significance should be iterative and include input from SNN. As SNN was not involved in the assessment of potential impacts to their Section 35 Rights, nor in the development of mitigation, the process for determination of significance currently includes substantial data gaps. The below aspects of SNN Section 35 Rights should have been considered as part of the assessment and link back to criteria which can help define the severity of impact, including:

- Discussion of how the Project may impact SNN's ability to continue customs, traditions and practices that are integral to SNN's distinct culture;
- Discussion of how existing exercise of Section 35 Rights may be more vulnerable to the effects of the Project when the effects are added to, and interacting with, the baseline conditions; and
- Discussion of how the Project may impact SNN's systems for self-governance and self-determination with respect to the management of traditional lands and resources, taking into consideration SNN laws, customs and structures of the community¹⁰.

SNN Land Use

Building upon the concepts for determining significance, SNN identified gaps in the understanding of impacts to SNN Section 35 Rights. The exercise of SNN Section 35 Rights can be illustrated through previously collected traditional knowledge, including traditional knowledge collected specifically for this Project.

The previously collected land and resource use information identifies general hunting, fishing, and berry, plants and medicine gathering overlapping with the Project Development Area ("PDA"). In addition, the PDA intersects ceremonial areas, camping areas, sacred sites, a family camp and burial ground (western tip of the bottom of the PDA).

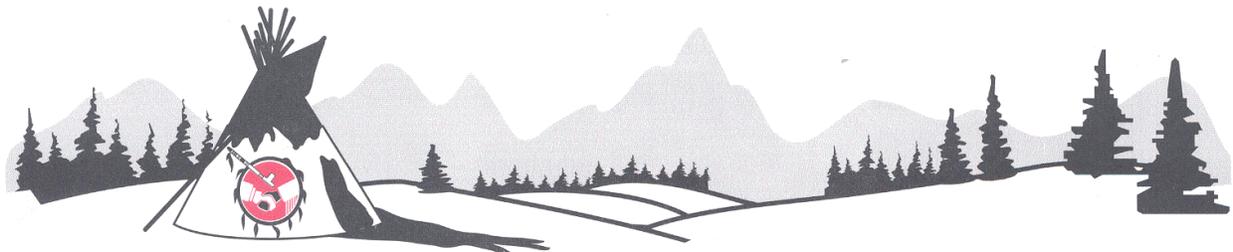
Additionally, specific traditional knowledge collected for this Project identifies marked SNN place names; an ongoing spiritual and cultural connection with harvesting resources; vegetation and wildlife, water, fish and fish habitat; as well as 30 SNN specific use sites within the SR 1 Project Development Area.

This exercise of Section 35 Rights takes place in and around the PDA. The PDA represents approximately 1,438 ha, of which, a portion of unoccupied Crown land and private land to which SNN has a right of access will be removed (either through legal mechanisms such as dispositions, through safety related restrictions or through preference-based avoidance behaviors). In order to understand this amount of land effectively lost to SNN, the Proponent, the Government of Alberta and IAAC must calculate the amount of land that will be inaccessible (either through legal mechanism, safety restrictions or preference-based avoidance

⁸ The PDA intersects ceremonial areas, camping areas, sacred sites, a family camp and burial ground (western tip of the bottom of the PDA). See Appendix A for maps illustrating this information.

⁹ MNP, Stoney Nakoda Nations – Bearspaw First Nation, Chiniki First Nation and Wesley First Nation, Section 35 Rights Assessment Report for the NOVA Gas Transmission Ltd. Edson Mainline Expansion Project, 2020

¹⁰ Impact Assessment Agency of Canada, Practitioner's Guide to the Impact Assessment Act, Guidance: Assessment of Potential Impacts on the Rights of Indigenous Peoples



STONEY TRIBAL ADMINISTRATION

behaviors) to SNN and does not intersect with the Land Use Area. This will allow SNN to quantify the portion of SNN's traditional territory (fyârhe Nakoda Makochi¹¹) which can no longer be accessed in the exercise of their Section 35 Rights. Partial mitigation for this impact could take the form of a Crown Land Offset plan.

Perceptions and Avoidance

Many of the biophysical sections of the EIS, including the atmospheric environment, hydrology and surface water quality, terrestrial landscape, fish and fish habitat, migratory birds, as well as consideration of current use of lands and resources for traditional purposes did not consider a key aspect of potential impacts to SNN Section 35 Rights, perception of SNN members and how this can result in increased avoidance behaviors.

Perceptive effects can extend beyond the identified extent of the direct effect and increase the avoidance of SNN harvesters from Project proximity, thereby increasing the amount of land lost (either through legal mechanisms such as dispositions, through safety related restrictions, or through preference-based avoidance behaviors) by SNN harvesters and land users. Additionally, the effects duration for perception may vary from those identified for the direct effect as perceptions may persist beyond the construction activities or flood events. These were not considered within the EA report or the EIS.

Mitigation

SNN issues with mitigation are two-fold:

1. As potential impacts to SNN Section 35 Rights were not assessed fully as part of the Environmental Impact Statement, no mitigation has been developed in partnership with SNN to address these specific impacts; and
2. Some proposed mitigations for other Project related impacts may result in specific impacts to SNN and this was, also, not considered.

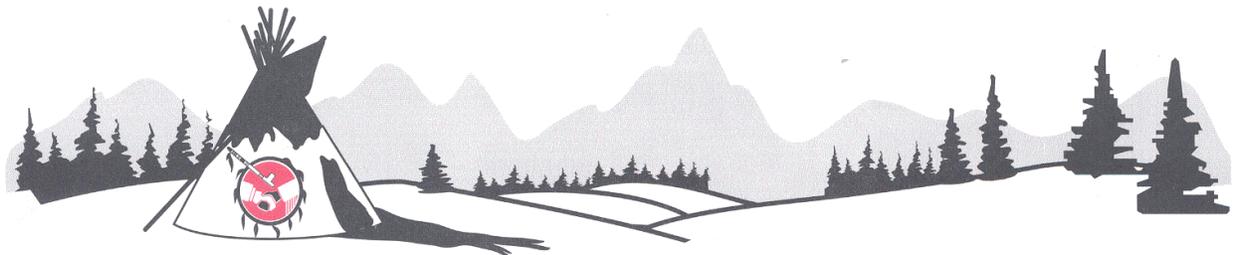
As impacts to SNN Section 35 Rights were not considered in relation to:

- perception-based impacts which could result in avoidance behaviors,
- a quantification of Crown land or private land to which SNN has a right of access removed (either through legal mechanisms such as dispositions, through safety related restrictions, or through preference-based avoidance behaviors) by the Project.

Mitigation for these impacts was not considered. For example, the Project conditions do not contemplate a Crown land offset plan which could address the portion of SNN's fyârhe Nakoda Makochi which can no longer be accessed for the exercise of Section 35 Rights. This impact should have been assessed, quantified, considered for mitigation, and discussed as part of the potential conditions.

Another issue with mitigation, as stated above, was that some proposed mitigations for Project related impacts could result in specific impacts to SNN. For example, within atmospheric conditions one such

¹¹ Rev., Dr., Chief Snow described SNN fyârhe Nakoda Makochi as extending from beyond the Brazeau River area in the north, south into Montana, east beyond the Cypress Hills of Saskatchewan, and west well into the British Columbia Interior (2005)



STONEY TRIBAL ADMINISTRATION

mitigation identified is the re-establishment of the vegetation cover on the deposited sediment post construction. The interruption time between existing vegetation and re-establishment should have been considered in terms of interruption in the exercise of rights. This interruption could result in displacement of SNN harvesters and land users from this locale, which they may or may not return to. For example, the temporary displacement will require the harvester/land use 'go elsewhere' in the exercise of their Section 35 Rights. Once established at this new locale, assuming a new locale is available, there may be reluctance to re-establish at the original place. This would result in a permanent loss. The possibility that traditionally harvested plants may not re-establish must also be considered which would also constitute a permanent loss.

Another mitigation proposed which may have unintended impacts on SNN Section 35 Rights is the usage of chemical dust suppressants which would be applied to haul roads as an alternative option to watering and applied on an as-needed basis during high wind conditions. This can result in a negative perception of SNN harvesters and land users which can result in avoidance of the area.

Additionally, a further mitigation of herbicide/weed control being used to promote successful revegetation of traditional plants is incongruent with SNN Section 35 Rights. Perception of contamination will render the successfully revegetated traditional plants unusable for traditional purposes as contaminated or re-planted species (real or perceived) cannot be used¹².

Conditions of Approval

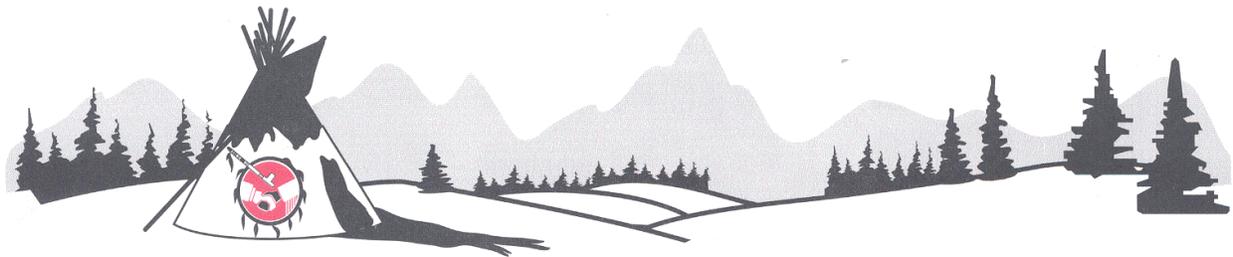
Tied to the above noted issues related to mitigation are SNN concerns with the potential conditions. The concerns with the potential conditions can be categorized as:

1. Since the assessment of potential impacts to SNN Section 35 Rights and development of mitigation was incomplete, there is also an incomplete consideration of potential conditions to address these impacts; and
2. Reasonable capacity must be included as a condition of approval to ensure SNN participation in all the identified opportunities for involvement.

SNN has many rights in addition to land and water rights including the right to control SNN membership, SNN self-government and self-determination, the SNN right to language, SNN rights to laws and justice, SNN rights to control wealth distribution, SNN rights to healthcare, and SNN rights to education. Further, the EIS and EA report include a narrow interpretation of water and the rights that SNN holds in relation to water. There are spiritual and cultural values of water – and the EIS and EA report do not account for the water rights held by SNN which allow for ongoing navigation and management of this resource. SNN water rights are being asserted in Alberta Court of Queen's Bench Action No. 0301-19586. Governance rights are also described in the EA report and EIS as governance over resources only, but this right is expressed as a right to self-determination and self-governance.

This should be highlighted through conditions of approval which allow SNN a meaningful voice in the construction and operation of the Project. One example of a condition resulting from an assessment of

¹² NOVA Gas Transmission Ltd. 2021 System Expansion Project, Hearing Transcript, SNN Intervenor Testimony, Filing A99488, <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3779119>



STONEY TRIBAL ADMINISTRATION

potential impacts to SNN Section 35 Rights could be a calculation of lands impacted (through legal mechanism, safety restrictions or preference-based avoidance behaviors) by the Project and the application of an appropriate condition of approval to offset the loss of land.

In relation to the reasonable capacity, the mitigation measures outline many opportunities for SNN involvement, however, a condition of approval must be applied that requires capacity funding for these additional opportunities or it is rendered meaningless as SNN does not have internal capacity to support this level of post-approval involvement.

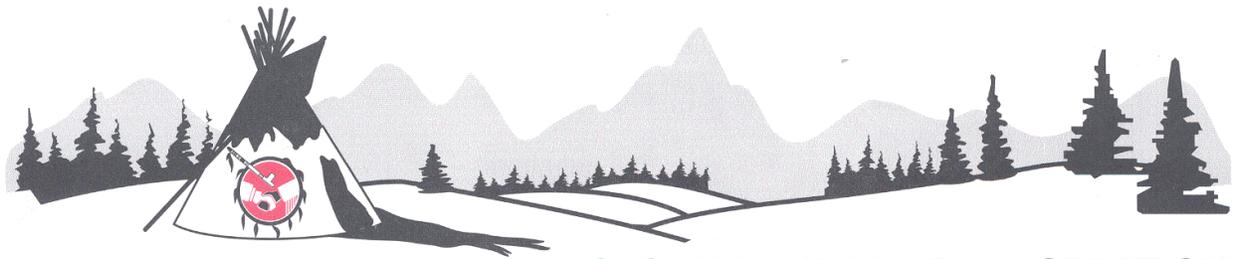
Conclusion

Based on the above identified themes, we expect the NRCB to consider this information in the determination of whether the Project is within the public interest. Through the above noted issues SNN finds that, without additional consideration of potential impacts to SNN Section 35 Rights, and without additional mitigation or conditions of approval, including capacity, the Project is contrary to the interests of our Nations. As reconciliation should be a key driver of the regulatory framework in Canada, what is in SNN interest should too be in Canada's interest and the NRCB, IAAC and SNN should work together to ensure the Project adequately assesses, mitigates and accommodates SSN Section 35 rights, should it proceed.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dean Cherkas", is written in a cursive style.

Dean Cherkas
Director, Consultation
Stoney Tribal Administration



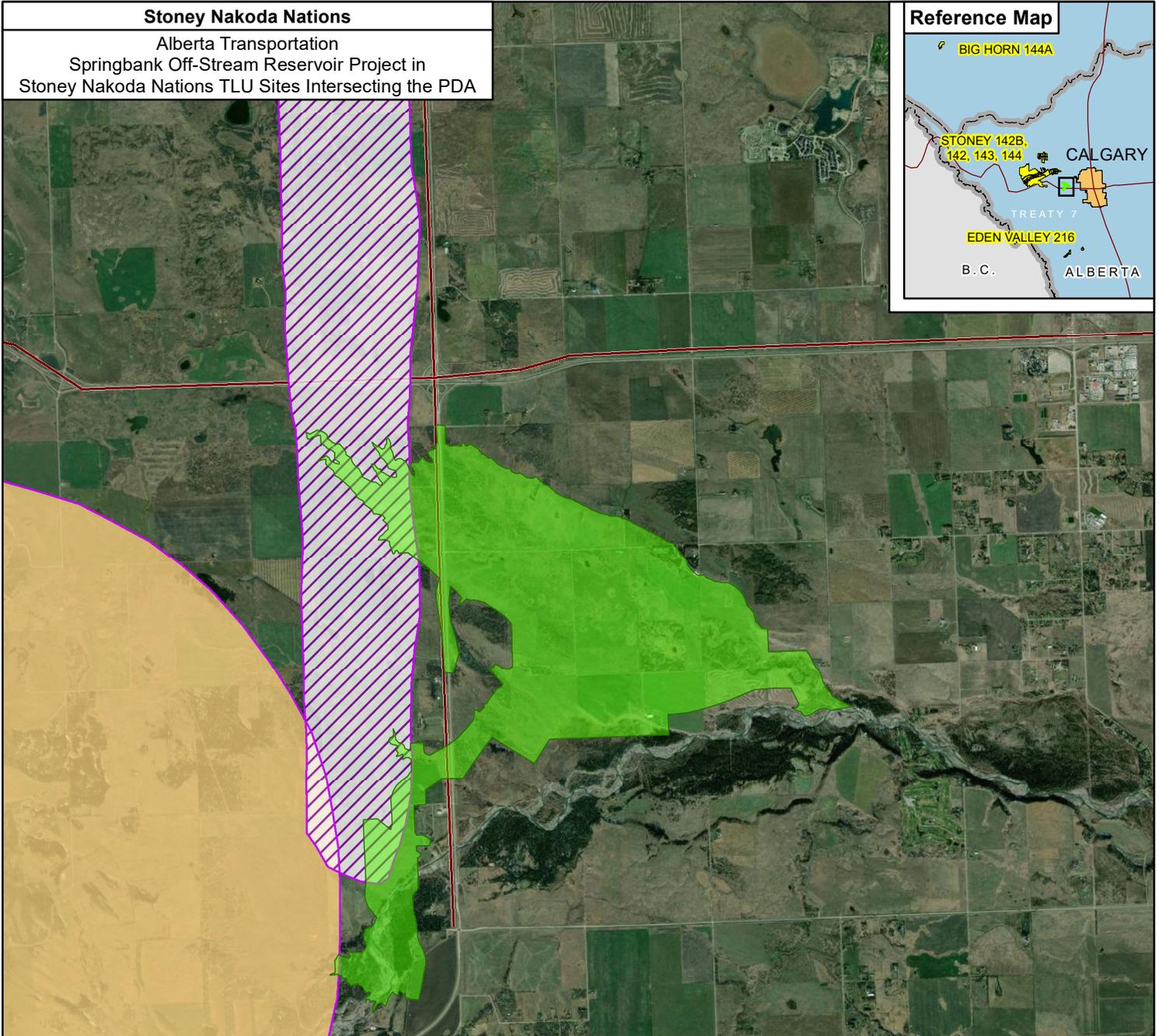
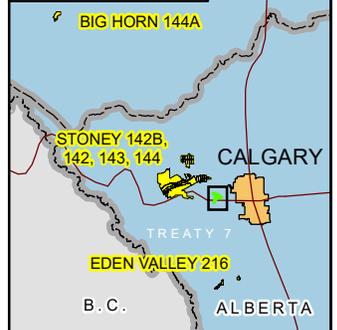
STONEY TRIBAL ADMINISTRATION

Appendix A - Maps

Stoney Nakoda Nations

Alberta Transportation
Springbank Off-Stream Reservoir Project in
Stoney Nakoda Nations TLU Sites Intersecting the PDA

Reference Map



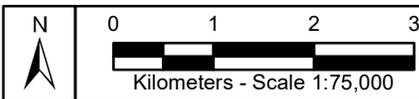
Legend

SNN TLU - West Path

-  Burial Grounds
-  Medicine Gathering Site
-  Stoney Nakoda Nations Reserve (See Inset Map)
-  Springbank Off-Stream Reservoir Project Development Area
-  Primary Highway
-  Treaty Boundary (See Inset Map)

SOURCES: ESRI, HERE, GARMIN, INTERMAP, INCREMENT P CORP., GEBCO, USGS, FAO, NPS, NRCAN, GEOBASE, IGN, KADASTER NL, ORDNANCE SURVEY, ESRI JAPAN, METI, ESRI CHINA (HONG KONG), SWISS TOPO, GIS USER COMMUNITY, GOVERNMENT OF CANADA, GOVERNMENT OF ALBERTA, ALBERTA TRANSPORTATION

DISCLAIMER: THIS MAP SHOULD NOT BE CONSIDERED A SUBSTITUTE FOR CONSULTATION WITH STONEY NAKODA NATIONS. THIS MAP IS THE EXCLUSIVE PROPERTY OF STONEY NAKODA NATIONS. ANY REPRODUCTION OR DISTRIBUTION WITHOUT WRITTEN APPROVAL IS STRICTLY PROHIBITED. PROJECT DATA LOCATIONS ARE APPROXIMATE.



Date: Feb 23, 2021
Coordinate System:
NAD83 11N

Prepared For:
Stoney Nakoda Nations 

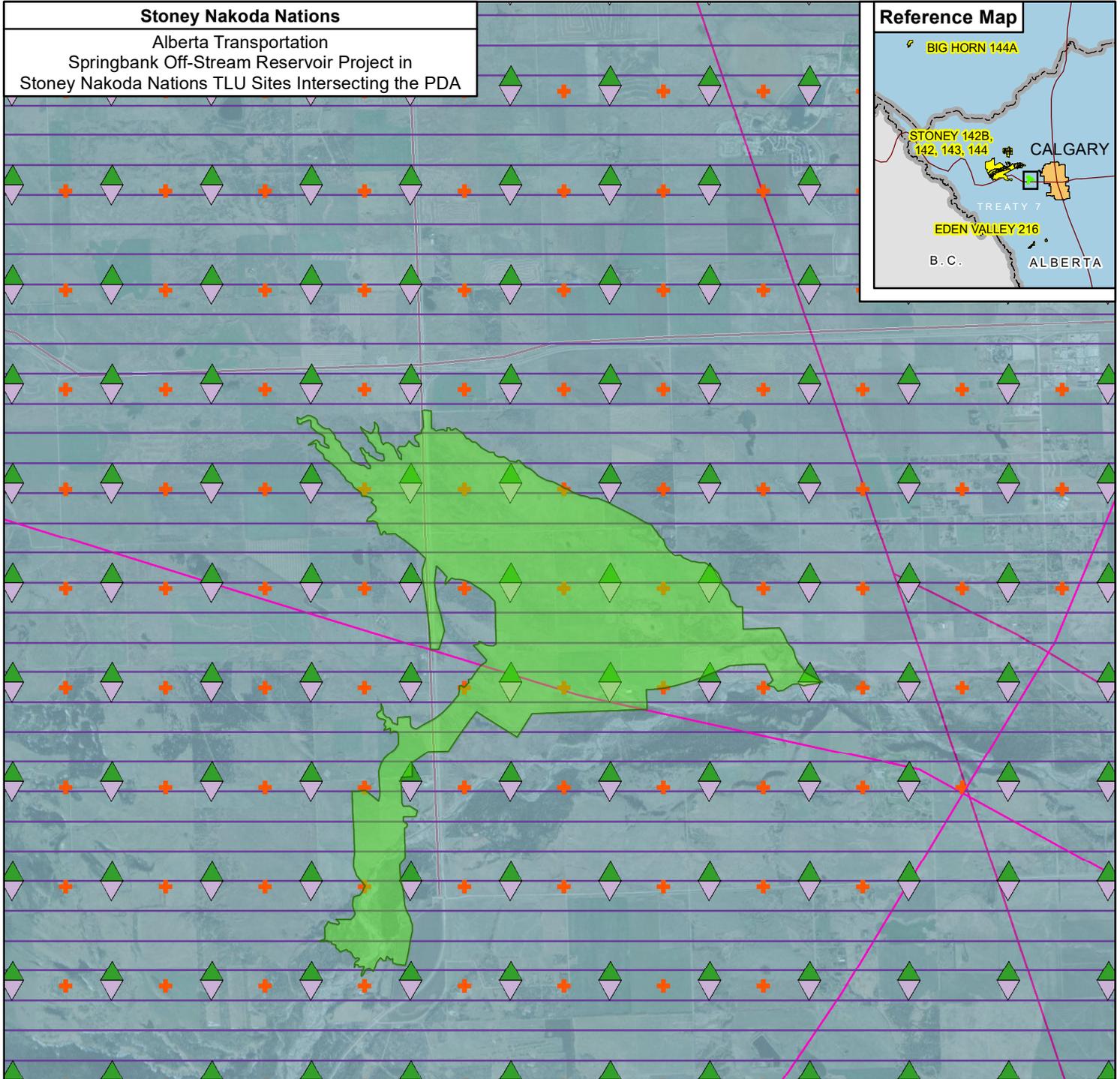
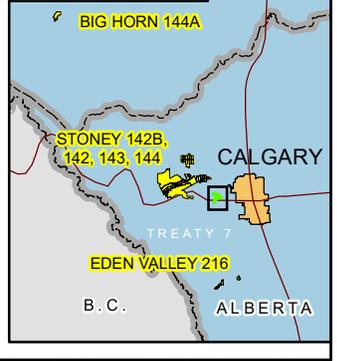
Prepared By:
MNP LLP 

Figure:
1-1

Stoney Nakoda Nations

Alberta Transportation
Springbank Off-Stream Reservoir Project in
Stoney Nakoda Nations TLU Sites Intersecting the PDA

Reference Map



Legend

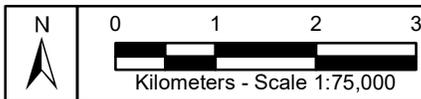
SNN TLU - NGTL 2021

- Hunting Site
- Fishing Site
- Plant Gathering Site
- Berry Gathering Site
- Medicine Gathering Site

- Stoney Nakoda Nations Reserve (See Inset Map)
- Springbank Off-Stream Reservoir Project Development Area
- Primary Highway
- Treaty Boundary (See Inset Map)

SOURCES: ESRI, HERE, GARMIN, INTERMAP, INCREMENT P CORP., GEBCO, USGS, FAO, NPS, NRCAN, GEOBASE, IGN, KADASTER NL, ORDANCE SURVEY, ESRI JAPAN, METI, ESRI CHINA (HONG KONG), SWISS TOPO, GIS USER COMMUNITY, GOVERNMENT OF CANADA, GOVERNMENT OF ALBERTA, ALBERTA TRANSPORTATION

DISCLAIMER: THIS MAP SHOULD NOT BE CONSIDERED A SUBSTITUTE FOR CONSULTATION WITH STONEY NAKODA NATIONS. THIS MAP IS THE EXCLUSIVE PROPERTY OF STONEY NAKODA NATIONS. ANY REPRODUCTION OR DISTRIBUTION WITHOUT WRITTEN APPROVAL IS STRICTLY PROHIBITED. PROJECT DATA LOCATIONS ARE APPROXIMATE.



Date: Feb 23, 2021
Coordinate System:
NAD83 11N

Prepared For:
Stoney Nakoda Nations

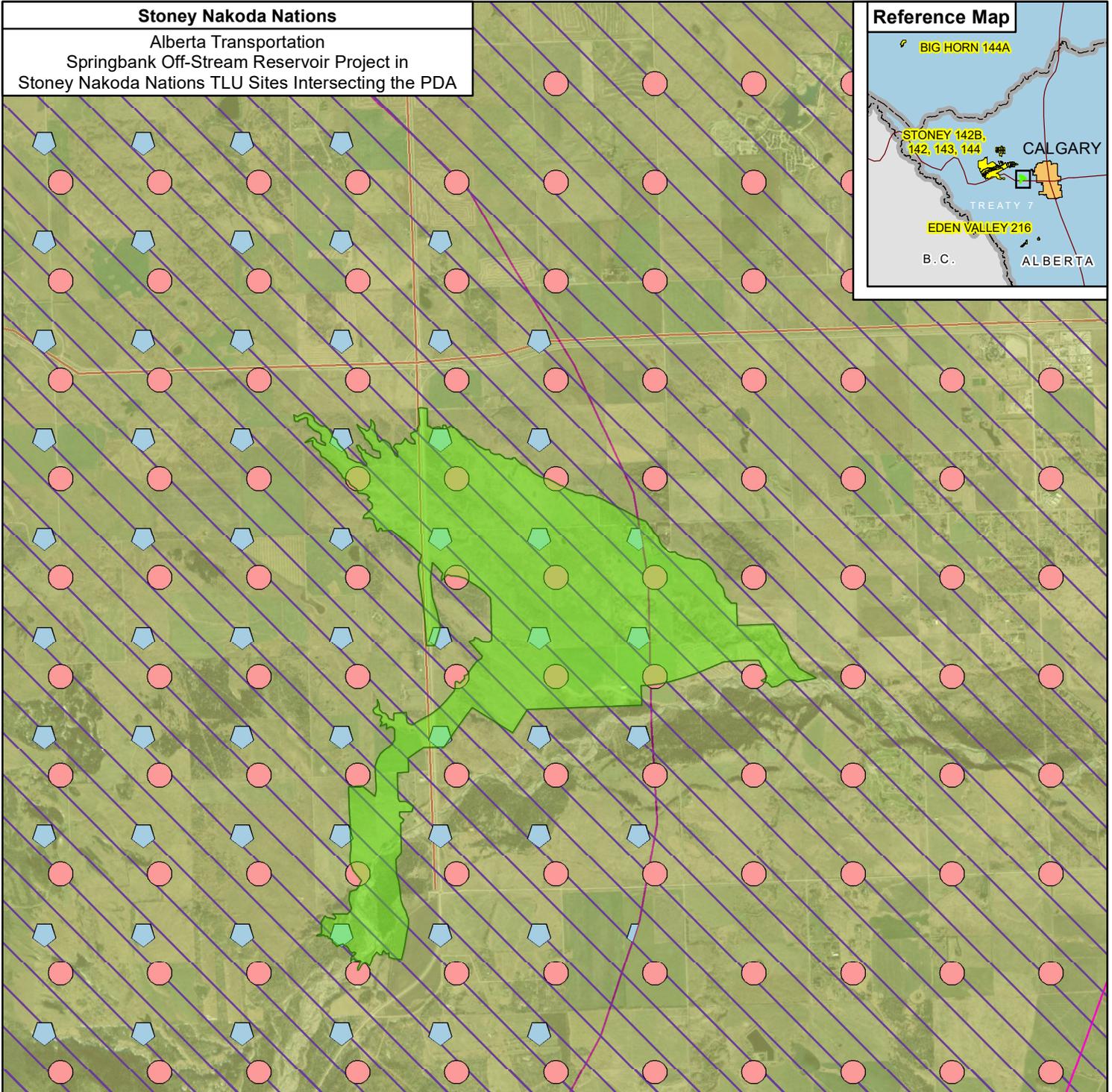
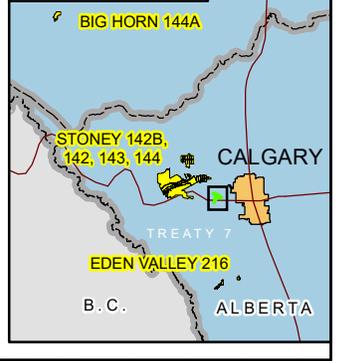
Prepared By:
MNP LLP

Figure:
1-2

Stoney Nakoda Nations

Alberta Transportation
Springbank Off-Stream Reservoir Project in
Stoney Nakoda Nations TLU Sites Intersecting the PDA

Reference Map



Legend

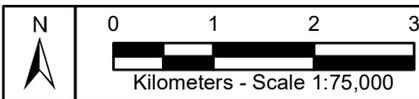
SNN TLU - NGTL 2021

- Camping Site
- Family Camp Territory
- Ceremonial Site
- Sacred Site

- Stoney Nakoda Nations Reserve (See Inset Map)
- Springbank Off-Stream Reservoir Project Development Area
- Primary Highway
- Treaty Boundary (See Inset Map)

SOURCES: ESRI, HERE, GARMIN, INTERMAP, INCREMENT P CORP., GEBCO, USGS, FAO, NPS, NRCAN, GEOBASE, IGN, KADASTER NL, ORDNANCE SURVEY, ESRI JAPAN, METI, ESRI CHINA (HONG KONG), SWISS TOPO, GIS USER COMMUNITY, GOVERNMENT OF CANADA, GOVERNMENT OF ALBERTA, ALBERTA TRANSPORTATION

DISCLAIMER: THIS MAP SHOULD NOT BE CONSIDERED A SUBSTITUTE FOR CONSULTATION WITH STONEY NAKODA NATIONS. THIS MAP IS THE EXCLUSIVE PROPERTY OF STONEY NAKODA NATIONS. ANY REPRODUCTION OR DISTRIBUTION WITHOUT WRITTEN APPROVAL IS STRICTLY PROHIBITED. PROJECT DATA LOCATIONS ARE APPROXIMATE.



Date: Feb 23, 2021
Coordinate System:
NAD83 11N

Prepared For:
Stoney Nakoda Nations

Prepared By:
MNP LLP

Figure:
1-3