

# Duncan's First Nation: Protecting the Land and Their Way of Life

By Gillian Steward



**F**irst Nations households in the Peace River region often share the moose meat they harvest with extended family members and neighbours. Hunting is a long-held tradition and moose meat is an important source of protein. But the moose population is in decline. First, it was the bison, then the caribou, both important food staples and cultural touchstones; now moose are becoming harder to find.

There is no one culprit to blame for the decline of moose in this corner of northwestern Alberta. It's death by a thousand cuts to habitat that was home ground for moose and other wildlife for centuries. Each forestry operation, oil or gas installation, agricultural activity, or any other industrial venture is approved by provincial regulators on an individual basis. Together, the multiplying impacts of all those projects can leave a scarred landscape that is inhospitable to nearby communities and wildlife.

Many First Nations in sparsely populated areas of Alberta know all about this. Some of them have mounted court cases — and won — in an effort to stop the widespread destruction of the land in their territories.

It's still early days, but it's possible that cases such as these will lead to significant changes in environmental protection and remediation policies, laws and regulations that will benefit Indigenous peoples, wild habitat, wildlife, and all Albertans.

These cases also alert project developers to the risks of half-hearted consultation processes with Indigenous

people. The Truth and Reconciliation Commission spells out what a more thorough consultation process might look like. It calls on the corporate sector to “commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.”

The Peace River region in west central Alberta is home to Duncan's First Nation, a signatory of Treaty 8 (1899). The reserve and its surrounding territory lie in the middle of extensive farmland, forestry operations, and oil and gas infrastructure. Rough roads have been carved out for logging trucks, seismic exploration, and pipeline construction. Those roads also provide easy access for sports hunters keen to bag a moose.

“There used to be a huge population of moose in the nearby Saddle Hills. Now we have to travel one and a half to two hours to hunt moose,” Irvin Knott Jr. told University of Alberta law students and faculty during a March 2023 webinar. Knott is a former band councillor for Duncan's First Nation, a community of 300 Woodland Cree — half living on reserve and half off-reserve — about a half-hour drive from the town of Peace River.

In-situ oil sands operations also mark the Peace River region and have created another kind of disturbance. In March 2023, geophysicists at Stanford University concluded that a 5.6 magnitude earthquake in the Peace River region in November 2022, one of the largest ever recorded in

Alberta, was most likely caused by in-situ oil sands wastewater injected underground. Upon being informed of the results of the research which it had commissioned, the Alberta Energy Regulator issued an Environmental Protection Order for Obsidian Energy which requires the company to take action to reduce the likelihood of such events. Obsidian disputes the findings of the research.

According to former band councillor Irvin Knott Jr., where once the people of Duncan's First Nation could hunt, trap and fish close to home, the land has become so diminished that they had to buy a new trap line instead of relying on older trap lines which were handed down for generations but are now seemingly inhospitable to the wildlife once found there.

## Duncan's First Nation challenges the Alberta government in court

In the summer of 2022, the band's frustration came to a head. Facing what seemed like uncontrolled industrial development in the territory surrounding their reserve where they believed they could continue a way of life that included hunting and trapping as promised in Treaty 8, Duncan's First Nation filed a lawsuit against the Alberta government. It asserts that the cumulative impact of all that development has infringed on the rights granted to them by the treaty.

“The case is about ensuring that as the original inhabitants and stewards of their land, Duncan's First Nation has control over what happens on it. They

should be in the driver's seat — right now they aren't even in the car," said Aria Laskin of JFK Law in Vancouver in an interview. The lawsuit takes aim at the process by which each industrial project in the area is granted approval by provincial authorities without considering that together all those projects create a dead zone where wild habitat and wild animals can no longer thrive.

"Those cumulative impacts need to be appropriately considered and managed," added Laskin. "Right now,

if you walk in Duncan's territory, in many places it's so disrupted that you just wouldn't want to be in it, let alone have any success exercising rights, of practicing your way of life."

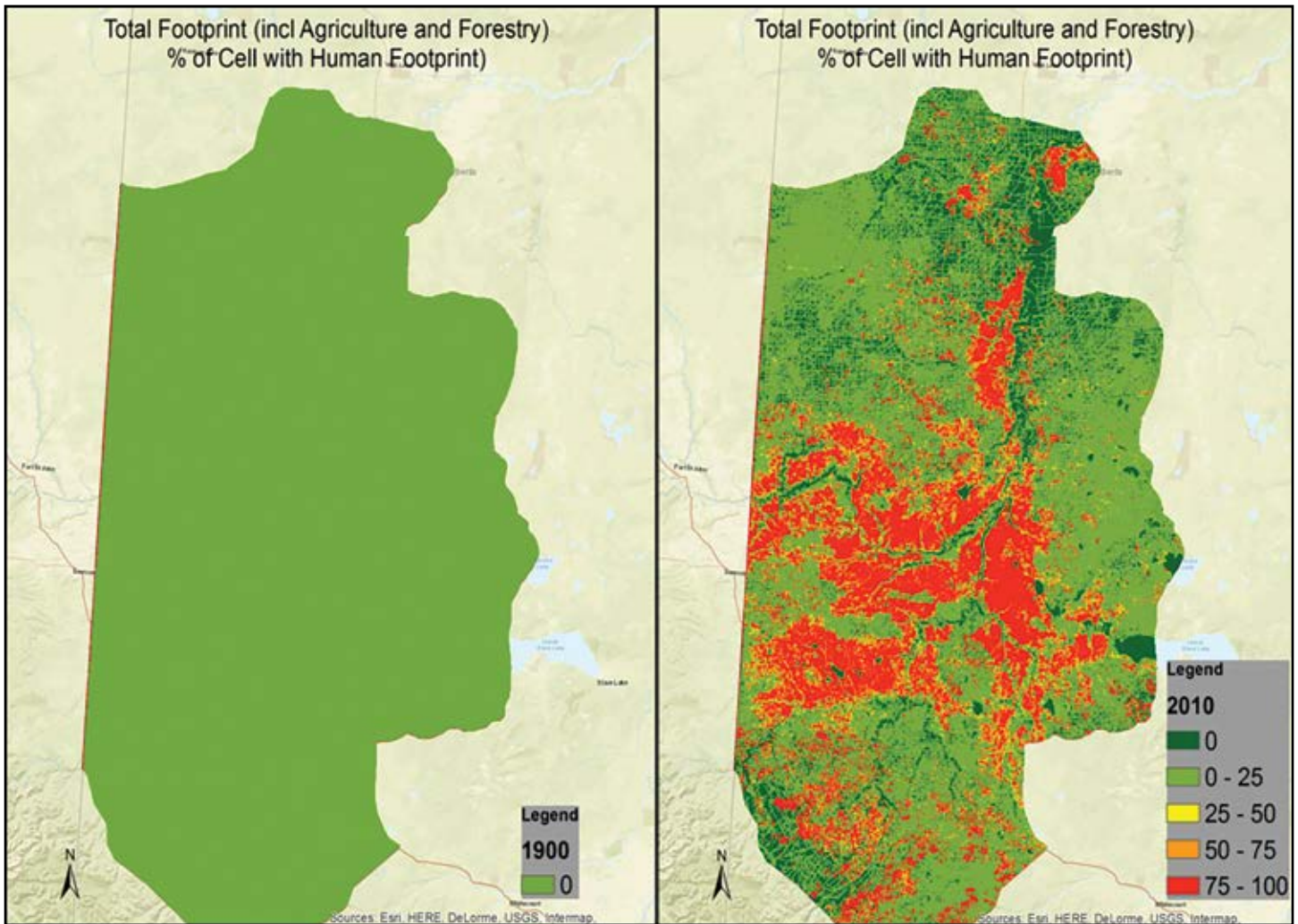
Cumulative impacts to the land and Indigenous culture were the basis of a successful claim against the B.C. government by Blueberry River First Nations (Yahey) in the Treaty 8 region of northeastern B.C. That claim and the judicial decision that followed eventually led to a negotiated agreement in January 2023 between the

provincial government, Blueberry River First Nations and several other B.C. Treaty 8 nations, designed to preserve or remediate specified areas and limit future cumulative impacts on the environment. Most importantly, it gives the First Nations a seat at the table when land-use decisions are being made.

Since Duncan's First Nation is also part of Treaty 8 which extends from northeastern B.C., across northern Alberta, and into the Northwest Territories, these claims are getting



Access road to an Alberta oilsands/heavy oil production area in Duncan First Nation's traditional territory. The Nation's hunting grounds have been transformed by significant levels of oil and gas development. Photo: © M. General, courtesy of Duncan's First Nation.



Human footprint in 2010 compared to 1900 in the Alberta portion of Duncan's First Nation traditional territory. Their 2022 lawsuit asserts that the cumulative impacts of these disturbances have infringed upon their rights ensured under Treaty 8. Map courtesy of Duncan's First Nation. Photo: © M. General, courtesy of Duncan's First Nation.

a lot of attention from other First Nations who find themselves in similar situations.

### Alberta's stance

When it comes to the environmental impacts of resource development, taking on the government of Alberta is no easy task. "Often the government will invoke regional land-use planning as a way to deal with the disputes. But the land-use plans never materialize ... there certainly isn't one that includes Duncan's First Nation," Laskin said. In fact, only two of Alberta's seven regions have approved land-use plans. And they don't manage or limit cumulative land disturbance.

Matthew General works with Laskin as JFK's manager of Indigenous consultation and advisory services.

He believes land-use planning will not solve all the problems First Nations are having with the cumulative effects of industrial development.

"It's just not just a matter of all of a sudden Alberta saying, 'Hey, we're gonna do land-use planning to make this all go away'. It has to deal with the rights, it has to deal with the culture, the carrying capacity of the land, and what lands and what quality of lands are there to sustain the exercise of rights by not only Duncan's but other Indigenous nations as well," General said.

In its response to the Duncan's First Nation claim it's clear that the Alberta government is not looking to any of the precedents set by the Blueberry River case, even though a court ruling in the First Nation's favour was delivered in the summer of 2021 and the B.C

government and the First Nation reached an agreement ten days before Alberta filed its response.

Instead, Alberta outright denies any breaches of treaty rights and refutes the boundaries of Duncan's First Nation traditional territory as described by the band in its claim. It's "too late" to issue a claim, the statement of defence asserts, because the allegations of damage occurred decades ago. Alberta also maintains that Duncan's First Nation had the opportunity to register its opposition during consultation efforts and could also have used legal channels such as judicial reviews of planned projects.

Alberta's response doesn't explain how a community of only 300 people was supposed to raise the money for the technical expertise and legal advice needed to mount a challenge; one of the

reasons that makes it almost impossible for First Nations to challenge each project especially when there are so many in their territory, Laskin said.

That wasn't the case for the Fort McKay First Nation which has benefitted financially from its participation in oil sands projects and services. Just north of Fort McMurray, Fort McKay First Nation wanted to prevent an oil sands project from blocking access to and polluting its Moose Lake reserves, an important hunting and ceremonial area for band members about 65 kilometres from the Fort McKay reserve. It was eventually successful in securing that access.

"The Moose Lake Access Management Plan was a precedent-setting approach for Alberta in regards to cumulative effects," said Brenda Heelan Powell of the Edmonton-based Environmental Law Centre. "There was already strongly established industrial footprints in the area. But according to the plan negotiated between the First Nation and the provincial government there needs to be restoration of that footprint before various industries in the area can move on to new developments."

Another Indigenous community in Alberta, Beaver Lake Cree First Nation (BLCFN) situated 105 kilometres northeast of Edmonton in the Cold Lake area, first sued the federal and provincial governments in 2008 claiming cumulative impacts from industrial developments such as oil sand operations had made it impossible for members to maintain their way of life as well as hunting and trapping. That case has been winding through various levels of the judicial system since then and has so far cost the Beaver Lake Cree \$3 million, yet the substance of the case has still not been addressed.

However, BLCFN chalked up a victory in March 2022 when the Supreme Court ruled that it is entitled to make an application to the Alberta Court of King's Bench for advance costs of its legal challenge.

"I really don't think you can overstate how important the capacity funding piece is, and I think a lot of people don't

really get that," said Laskin, the lawyer with Vancouver-based JFK Law, which also acts for BLCFN. Laskin pointed out that a lot of cases involving treaty rights and environmental issues can be extremely complicated. Government regulators, petroleum and forestry companies have in-house experts or the resources to hire them when they need to get their projects approved. Most First Nations don't have that capacity. And they don't receive any federal funding to mount court challenges.

Although Indigenous rights are recognized in the Constitution, said Laskin, those rights are only theoretical if they cannot be exercised due to a lack of resources to uphold them.

She wonders what is going to happen when carbon sequestration projects come up for approval. "How can First Nations easily respond to such complex industrial infrastructure?" she asked. "Someone comes to you and says, oh, we're gonna pump carbon under your traditional land. You're like, 'well, I don't really know what that is, it doesn't sound good'. But who knows what that's actually going to do?"

O'Chiese First Nation, a Saulteaux community west of Rocky Mountain House, is also concerned about cumulative industrial impacts on its traditional territory. Its submission to Alberta's Coal Policy Review Committee in 2021 states: "The Government of Alberta's approach to coal regulation and its deficient understanding of Inherent and Treaty rights demonstrates a notable bias towards development at the expense of the environment and O'Chiese First Nation's Inherent and Treaty rights ... these collective damages and violations from all human activity are not considered in the regulatory processes."

Jason Veness has worked with the Alberta Energy Regulator and as Resource Director for Aseniwuche Winewak Nation which sits amidst forestry, oil and gas, and coal mining operations near Grande Cache in west central Alberta. He points out that the Blueberry River case put other jurisdictions on notice that they could be at "massive" financial risk if treaty

rights are not recognized.

"There is also a sense of urgency among First Nations about the impact of industry on their lands. In this area alone, for example, caribou are at huge risk and are already functionally extirpated," Veness said. Instead of recognizing their responsibility to uphold treaty rights, the Alberta government always positions industrial projects within an economic frame of reference; that's the first priority, he said. "Regulatory processes are predatory in nature," Veness added. "They are designed to remove people from the land."

It will likely take several years for the Duncan's First Nation claim to wend its way through the justice system. In the meantime, industrial development will continue in their territory and the Peace River region using the same regulatory processes that caused what the band experiences as devastating cumulative impacts to the land, waters, wilderness, and wildlife that they depend on.

That's certainly the situation the Beaver Lake Cree Nation is facing. It filed its claim 15 years ago and since then oil sands production in the Cold Lake area has increased significantly. And now there is the prospect of a multi-billion-dollar carbon sequestration project that will entail a trunk line stretching from Fort McMurray to an underground hub near Cold Lake where the carbon will be stored.

Each delay, whether it be because of government inaction or lengthy court cases means logging, oil and gas developments, and other industrial projects continue unabated. And that means every year there is less wild habitat for moose, caribou, and other wildlife. Time is quickly running out for them and for the First Nations that want to preserve and exercise their treaty rights. 🐾