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COUNSEL

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The Honourable Donald J. Johnston, P.C., Q.C. (1974-1996)

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June 26, 2003

Applications Branch
Alberta Energy and Utilities Board
640 - Avenue S.W.
Calgary, Alberta
T2P 3G4

Attention: Terry Abel, P.Eng.

Dear Sirs:

Re: Proposed Conservation Policy Affecting Gas Production in Athabasca Wabiskaw-McMurray Oil Sands Areas; Alberta Energy and Utilities Board (“Board”) General Bulletin GB 2003-16; AltaGas Services Inc. June 26, 2003 Submission

I have been retained to act for AltaGas Services Inc. (“AltaGas”) in the above referenced matter. I am enclosing two (2) copies of the Submission of AltaGas in response to the Board’s GB 2003-16. A copy of this letter and the enclosed Submission have also been sent to you by e-mail.

Yours truly,

HEENAN BLAIKIE LLP

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**IN THE MATTER OF
ALBERTA ENERGY AND UTILITIES BOARD
GENERAL BULLETIN 2003-16
GAS PRODUCTION IN OIL SANDS AREAS
ALBERTA ENERGY AND UTILITIES BOARD
REQUEST FOR SUBMISSIONS**

SUBMISSION OF ALTAGAS SERVICES INC.

JUNE 26, 2003

ALTAGAS SERVICES INC. SUBMISSION ON GB 2003-16

INTRODUCTION

1. By way of General Bulletin GB 2003-16, the Alberta Energy and Utilities Board (“Board”) announced “further steps” to be taken by the Board to “review and revise [the Board’s] conservation policy respecting gas production from the Wabiskaw-McMurray in the Athabasca Oil Sands Area.”
2. The Board has advised parties through GB 2003-16 of the immediate implementation of a reduced Wabiskaw and McMurray gas production application area. The Board has also stated that “[e]ffective August 1, 2003, all Wabiskaw-McMurray gas production from wells within the new reduced application area and within overlapping Pool Orders must be shut in.” The only exceptions to the Wabiskaw-McMurray wells to be shut in are wells approved for production or wells exempted in Decision 2003-023.
3. The Board stated it was prepared to receive further submissions on or before 4:00 pm June 26, 2003 from interested parties on the Board’s further steps.
4. The present submission is being made by AltaGas Services Inc. (“AltaGas”) in response to the Board’s invitation.

STATEMENT OF INTEREST

5. AltaGas is an interested party in the process established by the Board pursuant to GB 2003-16. AltaGas is an independent natural gas midstream company that provides gathering and processing services to the natural gas producing community. AltaGas gathers producers’ gas from the wellhead on AltaGas owned gathering systems and processes this gas at AltaGas owned processing facilities to remove certain hydrocarbon components and impurities and to compress the gas to meet downstream pipeline operating specifications for transportation to end-use markets.
6. AltaGas’ primary business of gathering and processing natural gas is supported by a significant network of facilities. A portion of these facilities (AltaGas’ gathering and processing facilities in the Thornbury and Winefred areas of Alberta) is located within and serves producers within the new application area established by GB 2003-16.¹ AltaGas will accordingly be directly negatively impacted as a result of the shut in of natural gas wells within the new application area for which AltaGas provides gathering and processing services.
7. Due to the Board’s very compressed timeline, AltaGas has not had adequate time to determine the extent of the economic impact of GB 2003-16 on AltaGas’ Thornbury and Winefred operations. However, to the extent the Board implements its stated conservation policy, thereby sterilizing natural gas

¹ See Attachment 1 to this Submission.

production in the new application area of the Athabasca (Wabiskaw-McMurray) Oil Sands Area, AltaGas will suffer both present and future financial harm.

8. AltaGas intends to participate in the “consultation meeting” scheduled by the Board for July 3 and 4, 2003, and to speak to its submissions herein and to respond to the submissions of other parties.

ALTAGAS SUBMISSIONS

9. AltaGas submits that the Board’s stated intention in GB 2003-16 to shut in all Wabiskaw-McMurray gas production from wells within the new reduced application area and within overlapping Pool Orders, with stated exceptions, effective August 1, 2003, is unfair and unreasonable. It is unfair and unreasonable as the Board clearly intends to shut in the subject wells without providing any or any adequate opportunity to affected parties to be heard. It is unfair and unreasonable as it is contrary to the legitimate expectations of producers and processors based on present Board policies and directives. It is also unfair and unreasonable as it is overly broad, severe and unnecessary.
10. AltaGas submits that the Board can and should proceed to a hearing in accordance with the Board’s normal hearing process to consider the need for and scope of any shut-in order(s) applicable to the new application area.

Affected parties have not had an opportunity to be heard

11. AltaGas is concerned by the lack of adequate stakeholder consultation and the lack of due process associated with the Board’s issuance of GB 2003-16, the short timeframe provided for parties to make submissions, and the total absence of effective opportunity to present evidence in support of such stakeholder interests. AltaGas submits that the issuance of GB 2003-16 in the absence of prior stakeholder consultation with all potentially affected parties, including oil sands leaseholders, production producers, midstream service providers and companies owning transportation facilities has resulted in a denial of justice to those parties who were acting in good faith reliance upon the existing regulatory framework.
12. The Board has advised that its determination to shut in all wells in the new application area is “[b]ased on the evidence and conclusions derived from lengthy proceedings before the Board and on [the Board’s] continuing technical review....” This advice is unhelpful. It provides parties no information as to what evidence in the prior lengthy proceedings the Board considered compelling and what evidence and/or what information arising from the Board’s continuing technical review mandates such extraordinary future steps by the Board. The Board’s advice accordingly does not afford parties adversely affected by the Boards’ decision an effective opportunity to provide evidence in reply. In short, parties adversely affected by the Board’s shut-in order have not had an opportunity to be heard, and, under the Board’s proposed consultation process, will not be afforded the opportunity to be heard before the wells are shut in.

13. The Board states “the current lengthy application and hearing process will not address grandfathered wells in time to achieve the Board’s overall conservation objective.” AltaGas agrees the Board has the responsibility to conserve and prevent waste of Alberta’s oil and gas and oil sands resources. However, the Board also has common law and statutory duties of fairness as fundamental as its statutory duties to conserve and prevent waste:²

Administrative action is subject to judicial review on the ground of procedural impropriety. In particular, many public decision-makers are under a legal duty to afford to interested persons a fair opportunity to participate in the decision-making process before any action is taken that is detrimental to their interests. These participatory rights may be found under different legal labels. At common law, the notions of “the rules of natural justice” and, more recently, “the duty of fairness,” are frequently used to denote the several rules and principles that provide those participatory rights.

14. There is no question that the Board must comply with the principles of natural justice and procedural fairness. Any question is removed by, among other decisions, the *Giant Grosmont*³ decision of the Alberta Court of Appeal, and the provisions of the *Energy Resources Conservation Act*⁴ and the *Administrative Procedures Act*.⁵ The Alberta Court of Appeal stated in the *Giant Grosmont* decision:⁶

The regulations permit wells that are completed and producing prior to July 1, 1998 to continue production without obtaining Board approval. Production in effect on July 1, 1998 will continue unabated subject only to an application to shut-in brought by bitumen leaseholders or by the Board on its own initiative. Even then, shut-in is not automatic; **the interested parties must be dealt with in accordance with equitable principles and the principles of natural justice and procedural fairness appropriate to all administrative proceedings.**

15. If the Board’s processes do not afford the Board the ability to achieve the Board’s conservation objectives, a proposition that AltaGas does not accept, the answer is not for the Board to ride roughshod over fundamental fairness objectives. Interested parties must be dealt with in accordance with the principles of natural justice and procedural fairness.

² Judicial Review of Administrative Action in Canada, Brown and Evans (loose-leaf edition) Volume 2 page 7-1.

³ *Giant Grosmont v. Gulf Canada Resources*, (2001) 93 Alta L.R. (3d) 242; [2001] A.J. No. 864.

⁴ Energy Resources Conservation Act, R.S.A. 2000 c. E-10.

⁵ Administrative Procedures Act, R.S.A. 2000 c. A-3.

⁶ *Giant Grosmont*, *supra* [2001] A.J. No. 864 at paragraph 36 (Bolding added).

16. The right to be heard extends beyond the right to make written and/or oral submissions, such as the Board has allowed in the present case. Section 26(2) of the *Energy Resources Conservation Act* provides among other things for each party who may be adversely affected by an application to learn of the facts bearing on the application and to have “a reasonable opportunity to furnish evidence relevant to the application or in contradiction or explanation of the facts or allegations in the application.”⁷
17. Section 4 of the *Administrative Procedures Act* specifies that before an authority, including the Board, in exercising a statutory power, makes a decision or order adversely affecting the rights of a party, the authority “shall give the party a reasonable opportunity of furnishing relevant evidence to the authority” and “shall inform the party of the facts in its possession or the allegations made to it contrary to the interest of the party in sufficient detail (i) to permit the party to understand the facts or allegations, and (ii) to afford the party a reasonable opportunity to furnish relevant evidence to contradict or explain the facts or allegations....”
18. AltaGas simply does not know what facts the Board now has in its possession which have caused the Board to take what appears to AltaGas to be a radically different course from that articulated in the Board’s Gas/Bitumen Inquiry Report (March 1998), ID-99-1 and Decisions 2000-22 and 2003-023.
19. The Alberta Court of Appeal also stated:⁸

The Appellants in this case have argued that the impugned regulations have the grievous effect of ordering the immediate shut-in of all gas wells in Oil Sands Areas. Fortunately, this is not the case. Wells completed before July 1, 1998 may continue producing without any obligation to seek permission from the Board. Gas producers may have to address complaints made by crude bitumen producers but will have the opportunity to be heard before the Board makes a decision concerning shut-in or other action. Wells completed in Oil Sands Areas or with completion contemplated after July 1, 1998 must seek permission from the Board. This process, however, does not mean that a permit will be denied in every case. The Board will hear submissions from interested parties in each case and determine the matter accordingly.

20. Significantly, the Board has now proposed to do precisely what the appellants in the *Giant Grosmont* appeal accused it of doing. The Board has now ordered

⁷ It is true that the Board speaks in GB 2003-16 as if its shut-in directive is interim in nature. It is also true that interim decisions by their nature are based on a more limited evidentiary record than final decisions (see *Bell Canada v. Canada (CRTC)*, (1989) 38 Admin. L.R. 1 at page 32 and Decision 2001-63). But the point here is that parties have no evidentiary record. Nor has the Board provided any advice as to the process and the timing of the process it intends to pursue after August 1, 2003.

⁸ *Giant Grosmont*, *supra* at paragraph 44.

virtually an immediate shut in of all wells in the Board's newly delineated application area. As of August 1, 2003 wells completed prior to July 1, 1998 may no longer produce without any obligation to seek permission from the Board. Indeed, they too will be shut in until further direction from the Board. Gas producers and other affected parties will not have an effective opportunity to be heard before the effective date of the shut-in order. And rather than hearing submissions and considering each case on its merits, the Board has now issued a blanket shut-in order, effective until further order as the Board itself notes in GB 2003-16, to shut in even non-associated gas wells until further review.

21. AltaGas submits that the Board's decision to shut in all wells in the Wabiskaw-McMurray area (save those exempted) is manifestly unfair and unreasonable and therefore contrary to the Board's common law and statutory duties of fairness.

GB 2003-16 is contrary to the legitimate expectations of affected parties

22. AltaGas and other affected parties have invested significant sums of money in oil and gas development, exploitation and infrastructure in Alberta and have done so in good faith reliance on the existing regulatory framework. The Board should not in fairness reverse its past practices and renege on its past assurances concerning its treatment of wells, including "grandfathered" wells in the oil sands areas of the province.
23. The production of gas from producing formations within the Athabasca (Wabiskaw-McMurray) Gas Production Application oil sands area is currently governed by ID-99-1, as amended. The Board has, as recently as Decision 2003-023 in March 2003 confirmed that ID-99-1 was to govern the production of gas from producing oil sand formations within the (Athabasca Oil Sands Application Area). AltaGas has continued to operate and invest in the Athabasca oil sands area on the basis of the rules set out in ID-99-1. The arbitrary issuance of GB 2003-16 will cause present and future economic harm to AltaGas as volumes shut in immediately cease to flow to AltaGas' Thornbury and Winefred area facilities and as parties react to the uncertainties created by GB 2003-16 by potentially freezing further investment in northern Alberta because the regulatory risk involved is now simply too high.
24. The doctrine of legitimate expectations has been recognized as a "discrete category of interest protected by the duty of fairness."⁹ It arises from past conduct of the relevant decision-maker and has as its principal rationale, the entitlement of persons "to expect that governmental bodies will honour the undertakings they have given, either expressly or by implication, particularly where there has been detrimental reliance on them."¹⁰
25. The Board recognized in its Gas/Bitumen Inquiry Report dated March 1998 that it had to consider two distinct cases, first, currently producing gas wells and

⁹ Judicial Review of Administrative Action in Canada, *ibid.* Volume 2 page 7-40.

¹⁰ *Ibid.*, at page 7-43.

facilities developed in advance of the Board's report, and, second, investments made subsequent to the report. The Board noted:¹¹

In the first instance, gas operators drilled wells and installed facilities in good faith with the reasonable expectation that gas production would be permitted; the risk that gas production would be shut in because of a bitumen-related conservation issue was not contemplated by the P&NG leaseholders in the oil sands areas. Therefore, although there may be some impact on future bitumen recovery, the Board will generally allow associated gas production to continue from investments made up to July 1, 1998, unless the Board receives a complaint from an oil sands leaseholder and the subsequent investigation shows continued production from existing gas wells would not be in the long term public interest. Suitable recognition would have to be given at that time to the cost/benefit of shutting in existing associated gas production. In some instances the Board may also initiate such a review.

26. It is true that the Board could potentially order a grandfathered well to be shut in if a complaint from an oil sands leaseholder was received by the Board or the Board initiated a review on its own motion. However, ID-99-1 is clear that grandfathered wells would be **“allowed to continue to produce, subject to the resolution of any concerns** that may be raised by oil sands leaseholders or by the Board on its own initiative.”¹² Contrary to ID-99-1 the Board has now stated that it will shut in grandfathered wells prior to the resolution of the Board's concerns.
27. GB 2003-16 places those who drilled wells and installed facilities before July 1, 1998 “in good faith with the reasonable expectation that gas production would be permitted”¹³ at a disadvantage relative to wells drilled after July 1, 1998, as those drilling subsequent to ID-99-1 were aware of the requirements of ID-99-1 before they drilled and could factor ID-99-1 into their plans and compliance timelines. Parties impacted by the application of GB 2003-16 to grandfathered wells have no such ability.
28. The Court noted in *Giant Grosmont* that the Board must balance competing interests and that “[e]quity considerations have sometimes prevailed over conservation considerations.”¹⁴ The Court took particular note of the acknowledgement by the Board of the interests of those gas producers who initiated their activities with the expectation that gas production would be allowed.

¹¹ Gas/Bitumen Inquiry Report March 1998 at pages 52 to 53.

¹² ID-99-1 page 1 (Bolding added).

¹³ AltaGas has invested in the Thornbury and Winefred areas both before and after ID-99-1. As a party investing prior to ID-99-1 AltaGas believes its investments should be considered in the same way as the good faith investments of well owners prior to ID-99-1.

¹⁴ *Giant Grosmont*, *supra* at paragraph 32.

29. It is submitted that it is simply inappropriate for the Board to reverse its practices as articulated in ID-99-1 and to shut in all wells in the Board new application area and to shut in the subject wells before parties know of the basis for the Board's concerns and have an opportunity to respond to the Board's concerns. It is further submitted that it would be particularly unbecoming for the Board to shut in grandfathered wells at least prior to a case specific determination being made that continued production from the challenged grandfathered gas well would not be in the long term public interest.

GB 2003-16 is overly broad, severe and unnecessary

30. A blanket shut-in order is simply unfair and unreasonable. The Board has noted in GB 2003-16 that it will be necessary following the shut in of all wells within the new application area to "complete a detailed review of shut-in gas production within the new application area ... to allow production of nonassociated gas." Clearly, therefore, the Board is unable yet to determine, on the basis of the evidence and conclusions derived from prior hearings and the Board's own continuing technical review, whether the wells which will be shut in effective August 1, 2003, are producing associated gas and therefore whether the wells are producing associated gas from areas where the underlying oil sands are commercially recoverable. It is therefore clear that the Board is unable to say which of the wells it has directed be shut in on August 1 are creating a risk of bitumen sterilization and which wells are not.
31. AltaGas submits that, given the significant financial harm that will result to producers and processors from the shut-in of commercial gas wells in the new application area, it is incumbent on the Board not to shut in any well until the Board has determined that production from the well will create a risk of bitumen sterilization.
32. GB 2003-16 is also unnecessary. There is simply no basis for concluding, as the Board has done in GB 2003-16 that the Board's hearing is inadequate to enable the Board to carry out its conservation mandate. The Board has been considering the question of the concurrent production of gas and oil sands for a number of years. It would appear that the Board concluded in the Gas/Bitumen Inquiry that the question of the conservation of oil sands resources could be dealt with through the Board's regulatory process in an adequate fashion. The Board said that it would "exercise jurisdiction over concurrent production involving oil sands pursuant to its general authority and seek legislative authority should the general authority be considered inadequate."¹⁵ As no legislative initiative has been initiated one assumes the regulatory process remains adequate to respond to concerns regarding conservation and waste in a timely fashion. AltaGas notes as well that the Court of Appeal in *Giant Grosmont* appeared to believe the Board's empowering statutes "provide the Board with the ability to address these issues promptly as they arise."¹⁶

¹⁵ Inquiry Report at page 53.

¹⁶ *Giant Grosmont, supra* at paragraph 30.

33. No evidence has been presented to show that an immediate blanket shut-in order is necessary to preserve the bitumen resources in the application area.

CONCLUSION

34. AltaGas submits that the Board's decision to shut in all wells in the Wabiskaw-McMurray area is manifestly unfair and unreasonable and therefore contrary to the Board's duties of fairness. Moreover, it is contrary to the legitimate expectations of parties and is overly broad and unnecessary. As such, the Board's actions violate the fundamental purposes of the *Oil and Gas Conservation Act*,¹⁷ including "provid[ing] for the economic, orderly and efficient development in the public interest of the oil and gas resources in Alberta."
35. AltaGas submits that the Board can and should proceed to a hearing in accordance with the Board's normal hearing process to consider the need for and scope of any shut-in order(s) applicable to the application area.
36. The Board's GB 2003-16 does not address the issue of compensation to parties negatively impacted by the Board's directive to shut in wells in the new application area. AltaGas wishes to alert the Board that should AltaGas' Thornbury and Winefred operations be impacted by reason of GB 2003-16 and any Board order shutting in production normally served at AltaGas' facilities, AltaGas will seek compensation for its losses.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 26TH DAY OF JUNE 2003.

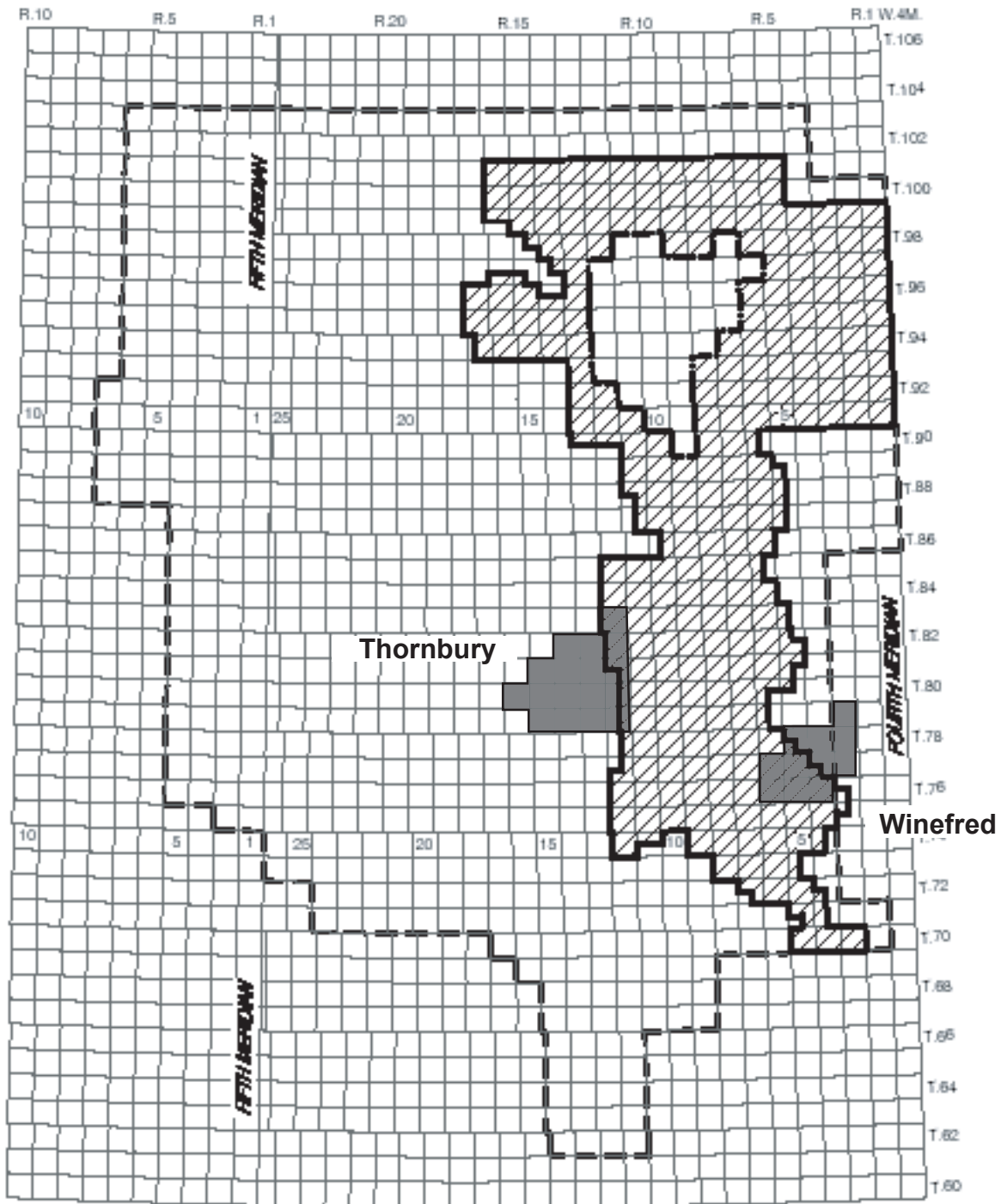
HEENAN BLAIKIE LLP

(original signed by M. S. Forster)

Per: MONTE S. FORSTER
Counsel for AltaGas Services Inc.

¹⁷ Oil and Gas Conservation Act, R.S.A. 2000 c. O-6.

Attachment 1 to AltaGas Services Inc.'s June 26, 2003 Submission to AEUB GB 2003-16



Legend

-  Athabasca Oil Sands Area
-  Wabiskaw-McMurray Production Application Area
-  Excluded mineable oil sands area