

MLT AIKINS

THE HAY-ZAMA WOOD BISON HUNT



LAND ACKNOWLEDGEMENT

MLT Aikins acknowledges that our offices are located on the territories of Indigenous peoples who have occupied these lands since time immemorial, including the First Nations of Treaty 1, The National Homeland of the Red River Metis (Winnipeg), Treaty 4 (Regina), Treaty 6 (Edmonton and Saskatoon), Treaty 7 (Calgary), the Coast Salish peoples (Vancouver), as well as other non-Treaty First Nations and Métis.

We recognize that we benefit from the lands. We are dedicated to ensuring that the spirit of reconciliation is honoured and respected.



AGENDA

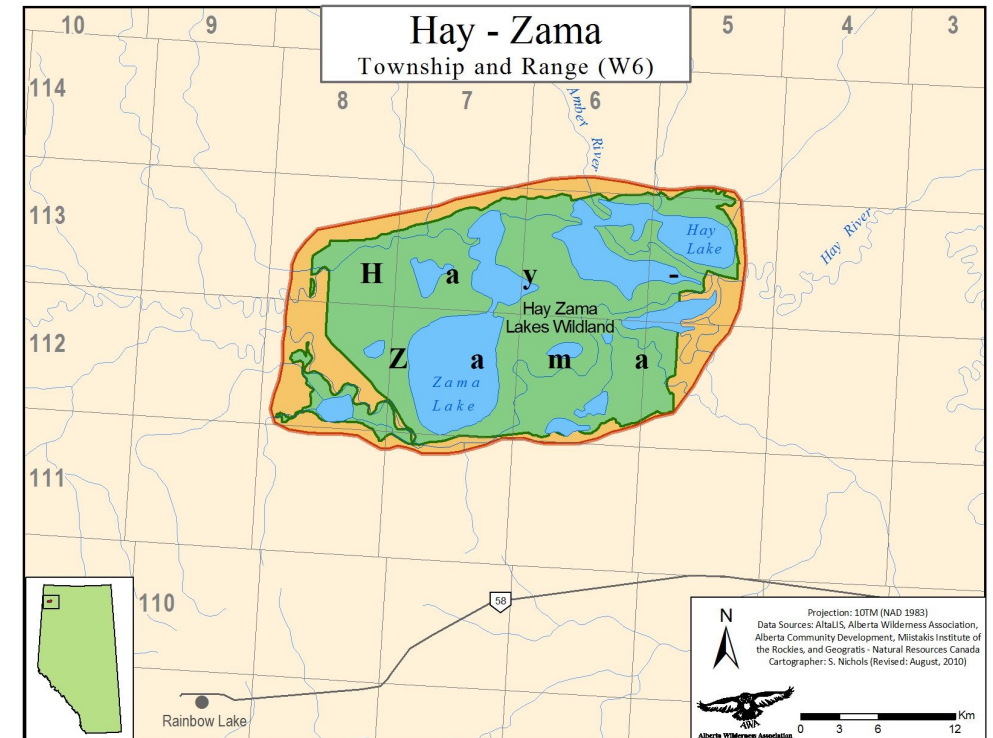
- I. Background of Hay-Zama Wood Bison Hunt
- II. Issues
- III. Alberta Wildlife Legislation
- IV. Treaty Hunting Rights
- V. Conclusion – What does this mean for First Nations?



I. BACKGROUND OF HAY- ZAMA WOOD BISON HUNT

BACKGROUND OF HAY-ZAMA WOOD BISON HUNT

- Hay-Zama – area in the far northwest corner of Alberta approx. 100 km northwest of High Level
 - Located in provincial park
- Hay-Zama Wood Bison reintroduction program began in 1983 – joint effort between Canadian Wildlife Service, Dene Tha' First Nation, and Alberta Environment and Parks
- Goal – to reestablish sustainable wood bison population in northwestern Alberta
- 1994 – 42 bison released into “Bison Protection Area”
 - Bison “endangered” in this area
- 2008 – Hay-Zama population 652
 - First hunting season initiated
 - Province’s goal is to maintain population between 400 to 600 bison



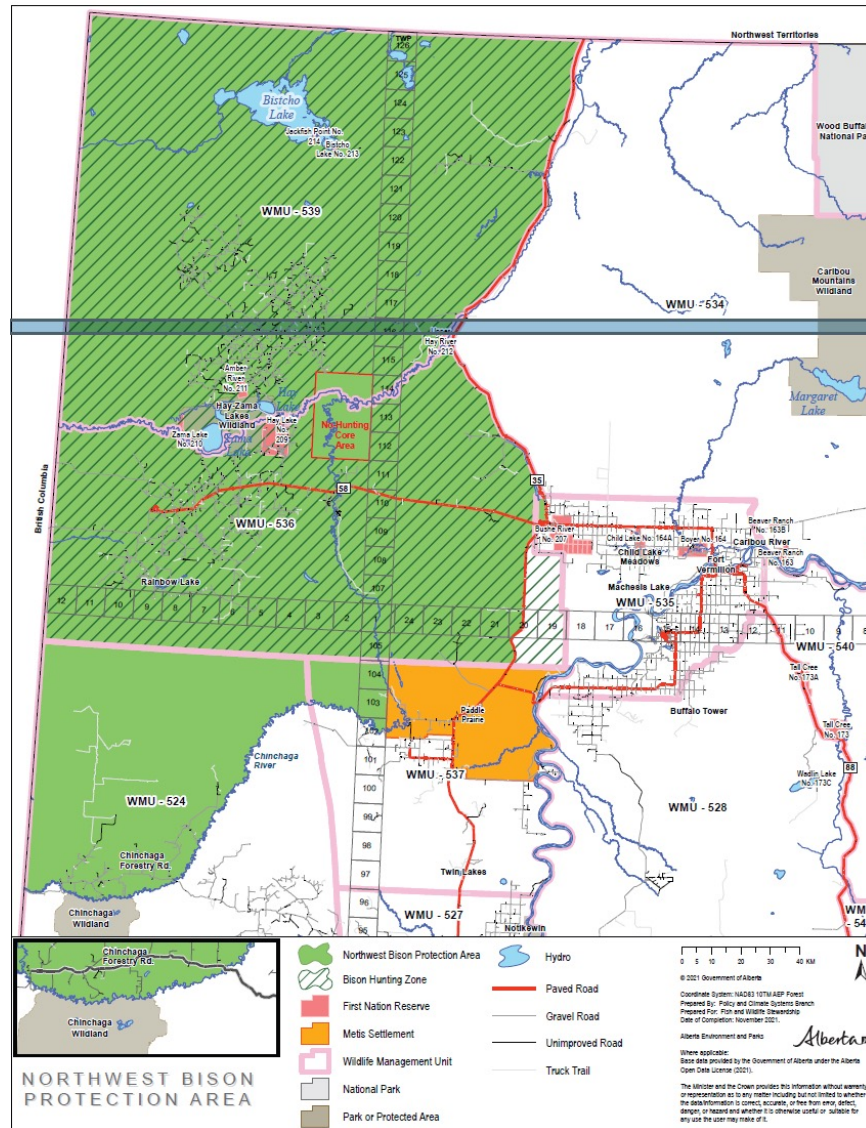
HUNTING SEASONS

- Hunting allowed from 2008 to 2013
- Hunt suspended in 2013-2014 season
- Suspended again in 2018 until 2023
- February 2023: 529 wood bison counted
- The hunt was resumed



HOW THE DRAW WORKS

- Resident Bison Special License 2023-24
- 80 Aboriginal
 - November 1, 2023 to March 31, 2024
 - Licenses are free of charge
- 40 non-Aboriginal
 - December 1, 2023 to February 29, 2024
 - Non-Aboriginal hunters pay \$59.95
- Harvesting of bulls encouraged
- “Bison hunting zone” only





II. ISSUES

II. ISSUES

1. Does the Government of Alberta have the authority to implement a lottery draw system for hunting bison in Alberta?

Likely yes.

2. Can the Government of Alberta require Treaty rights-holders to obtain a licence to hunt bison?

This could be an infringement of Treaty rights.



III. ALBERTA WILDLIFE LEGISLATION

ALBERTA WILDLIFE ACT AND REGULATIONS

- *Bison bison athabasca* (Wood Bison) listed as “endangered species”
 - This is the species that is permitted to be hunted in the Hay-Zama bison hunt
- Wildlife Act gives the Government of Alberta authority to make regulations for hunting of endangered species
- Government can issue licences to hunt wood bison in “bison hunting zones”

BISON SPECIAL LICENCES

- Bison special licence may permit hunting even if there is no open season for hunting bison
- Licence holder can hunt bison in the bison hunting zone during the period specified in the licence
- There is only one “bison hunting zone” located within the larger “Northwest Bison Protection Area” (a designated bison sanctuary)
- Treaty and Aboriginal rights holders are permitted to hunt bison that are not located in a bison sanctuary at any time

Alberta

FEDERAL LEGISLATION

- Wood Bison are also listed as a “threatened species” in the federal *Species at Risk Act*
 - “likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction”
- Federal laws that prohibit killing or harming of a threatened species do not apply on provincial lands unless there is an Order from the Governor in Council
- Currently no orders re: bison

SUMMARY OF THE LAW

- Government of Alberta likely has statutory authority to implement a lottery draw system for wood bison
- Although wood bison are listed as an endangered species, the *Wildlife Act* expressly provides that the Minister may carve out a permitted hunt for wood bison
- Bison Special Licences are only available for the bison hunting zone (including the Hay-Zama area)
- Federal law could allow for an Order prohibiting the killing of wood bison, but an Order could impact Treaty hunting rights





IV. TREATY HUNTING RIGHTS

TREATY HUNTING RIGHTS

- Treaty rights are protected under section 35(1) of the *Constitution Act, 1982*
- Harvesting clauses in the Treaties – right to hunt and fish throughout the tract surrendered
- *Natural Resources Transfer Agreement, 1930* (NRTA) – The courts say that the NRTA modified the Treaties
 - Treaty rights-holders may hunt for food on unoccupied Crown lands or on lands where there is a right of access for hunting
- This means that, under Canadian law, Treaty rights-holders have the right to hunt for food without a licence on unoccupied Crown lands or lands where there is a right of access for hunting

TREATY NO. 8

And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.



NATURAL RESOURCES TRANSFER AGREEMENT

12. In order to secure for the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indian within the boundaries thereof, provided, ***however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.***



ALBERTA REGULATION OF TREATY HUNTING FOR FOOD

1. Is Treaty hunting taking place on unoccupied Crown lands or lands to which there is a right of access for hunting?
2. If so, does the Treaty hunting conflict with conservation legislation?
3. If yes, does the conservation legislation infringe the Treaty right to hunt?
4. If yes, can the Government justify the infringement of that Treaty right?



ALBERTA REGULATION OF TREATY HUNTING FOR FOOD

Q: Is Treaty hunting taking place on unoccupied Crown lands or lands to which there is a right of access for hunting?

- If lands are “occupied,” the Government can regulate the hunting
 - The Province may “occupy” lands for the purposes of a game preserve
 - Need good faith conservation purpose
- If lands are put to a visible use which is incompatible with hunting, no right of access for hunting for a Treaty rights-holder
 - E.g., crops, fences, livestock, barns or outbuildings, posted signs, house nearby
 - For game preserves, if non-Indigenous hunters have a limited right of access, Treaty hunters have a continuous right of access

ALBERTA REGULATION OF TREATY HUNTING FOR FOOD

Q: Does the conservation legislation conflict with the Treaty right to hunt?

- Treaty rights-holders in Alberta have a constitutionally protected right to hunt for food on unoccupied Crown lands or lands to which there is a right of access for hunting
 - No hunting licence is required
- But, Alberta law designates the Northwest Bison Protection Area as a designated bison sanctuary
 - This means the Crown has “occupied” the area for conservation purposes
 - Was this occupation for a “good faith” conservation purpose?
 - Is the bison sanctuary “reasonably necessary” to conserve the bison?
- **Non-Indigenous hunters can get licence to hunt bison = continuous right of access for Treaty hunting**

ALBERTA REGULATION OF TREATY HUNTING FOR FOOD

Q: Is there an infringement of a Treaty right? If so, is the infringement justified?

- *R v Sparrow* test:
 - Has the right to hunt for food been infringed?
 - (a) Is the limitation unreasonable?
 - (b) Does the law impose undue hardship?
 - (c) Does the law deny the rights-holders their preferred means of exercising the right?
 - The Crown must prove the infringement is justified
 - (a) the duty to consult (and accommodate) was discharged;
 - (b) the Crown has a compelling and substantial objective;
 - (c) the government action is consistent with the Crown's fiduciary duty to the Aboriginal group



V. CONCLUSION – WHAT DOES THIS MEAN FOR FIRST NATIONS?

SUMMARY

- Government of Alberta likely does have the authority to implement a bison hunting draw in Alberta (for non-Indigenous hunters)
 - The Wildlife Act and the Wildlife Regulations permit the protection of endangered wood bison while also allowing limited hunting
- Government of Alberta may not be able to require Treaty hunters to obtain a licence to hunt bison, even if the licence is free of charge
 - When limiting the Treaty right to hunt, Government must show that it consulted with First Nations and that its actions are reasonably necessary for conservation – Government can't breach fiduciary duty
 - Limited right of hunting for non-Indigenous hunters means that Indigenous right of access must be unlimited

IN THE COURTS

- Treaty hunter charged with hunting bison without a licence (criminal court)
- A First Nation brings a claim for Treaty infringement (civil court)
- Establish that the Treaty infringement is “more than insignificant”
 - Evidence from community members would be necessary
- The Crown would then need to show that its infringement on the treaty right is justified
 - Adequate consultation
 - Adequate priority – is 80 Aboriginal bison tags enough to meet subsistence food needs?
 - Evidence from community about food needs re: bison
 - Scientific evidence about the bison population



QUESTIONS?



THANK YOU

K. Colleen Verville, K.C.

T: (780) 969-3505

F: (780) 969-3549

cverville@mltaikins.com

Drew Lafond

T: (306) 956-6980

F: (306) 975-7145

dlafond@mltaikins.com

“MLT Aikins” the MLT Aikins Designs and “Western Canada’s Law Firm” are trademarks of MLT Aikins LLP. Copyright © 2017 MLT Aikins LLP. All rights reserved.

Note: This presentation is of a general nature only and is not exhaustive of all possible legal rights or remedies. In addition, laws may change over time and should be interpreted only in the context of particular circumstances such that these materials are not intended to be relied upon or taken as legal advice or opinion. Readers/viewers should consult a legal professional for specific advice in any particular situation.