

The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013

Introduction

The Government of Alberta ("Alberta") is committed to strengthening relationships with First Nations through the continued recognition of the Treaty relationship between First Nations and the Crown. Alberta's legal duty to consult and accommodate is grounded in the honour of the Crown. Under this Policy, Alberta will seek to reconcile First Nations' constitutionally protected rights with other societal interests with a view to substantially address adverse impacts on Treaty rights and traditional uses through a meaningful consultation process. Additionally, the provincial government strives to ensure First Nations have the chance to benefit from economic development opportunities and to enjoy Alberta's prosperity.

Alberta's management and development of provincial Crown lands and natural resources is subject to its legal and constitutional duty to consult First Nations and, where appropriate, accommodate their interests when Crown decisions may adversely impact their continued exercise of constitutionally protected Treaty rights. In this document, "decisions relating to land and natural resource management" refers to provincial Crown decisions that directly involve the management of land, water, air, forestry, or fish and wildlife.

Treaty Rights Context

Alberta respects that First Nations' Treaty rights are protected by section 35 of the *Constitution Act, 1982*, and understands the important role these rights have in maintaining First Nations' cultures and traditions. Alberta recognizes that impacting Treaty rights to hunt, fish, and trap for food may trigger a duty to consult. These rights may be practised on unoccupied Crown lands and other lands to which First Nations members have a right of access for such purposes.

Traditional Uses

Alberta recognizes that First Nations may engage in customs or practices on the land that are not existing section 35 Treaty rights but are nonetheless important to First Nations ("traditional uses"). Traditional uses of land include burial grounds, gathering sites, and historical or ceremonial locations and do not refer to proprietary interests in the land. First Nations' traditional use information can help greater inform Crown consultation and serve to avoid or mitigate adverse impacts. Alberta will consult with First Nations when traditional uses have the potential to be adversely impacted by land and natural resource management decisions.

Duty to Consult

Consultation is a process intended to understand and consider the potential adverse impacts of anticipated Crown decisions on First Nations' Treaty rights, with a view to substantially address them. Alberta recognizes that a duty to consult exists when the following three factors are all present:

1. Alberta has real or constructive knowledge of a right;
2. Alberta's decision relating to land and natural resource management is contemplated; and
3. Alberta's decision has the potential to adversely impact the continued exercise of a Treaty right.

Accommodation

Consultation may reveal a Crown duty to accommodate First Nations. The primary goal of accommodation will be to avoid, minimize, or mitigate adverse impacts of a Crown decision on Treaty rights or traditional uses.

Accommodation, where appropriate, will be reflected in the Crown's decision.

Policy Response

Through *The Government of Alberta's First Nations Consultation Policy on Land and Natural Resource Management, 2013* ("Policy"), Alberta will seek to reconcile First Nations' Treaty rights and First Nations' traditional uses with Alberta's mandate to manage provincial Crown lands and resources.

Alberta will consult with First Nations when Crown land and natural resource management decisions may adversely impact Treaty rights protected under the *Constitution Act, 1982*, as well as traditional uses.

In conjunction with the changes to the regulatory regime represented by the Integrated Resource Management System and Regulatory Enhancement Project, Alberta intends to increase its emphasis on strategic consultation. Strategic consultation will be defined in the operational guidelines.

Policy Application

Provincial Crown Lands

This *Policy* applies to strategic and project-specific Crown decisions that may adversely impact the continued exercise of Treaty rights and traditional uses. Specifically, the *Policy* applies to Crown decisions in relation to land and natural resource management with the potential to adversely impact

- Treaty rights on provincial Crown lands, as described above; or
- Traditional uses on provincial Crown lands, as described above.

Alberta may enter into specific consultation process agreements with individual First Nations to further clarify the consultation process. A formal process to outline the creation of consultation process agreements will be developed after the implementation of this *Policy*. Consultation process agreements will be consistent with this *Policy*.

Matters Subject to this Policy

Crown decisions that Alberta will assess for potential consultation will include:

- Provincial regulations, policies, and plans that may adversely impact First Nations Treaty rights and traditional uses; and
- Decisions on projects relating to oil and gas, forestry, and other forms of natural resource development that may adversely impact First Nations Treaty rights and traditional uses.

Matters Not Subject to this Policy

Crown decisions that Alberta will *not* assess for potential consultation will include those relating to:

- Leasing and licensing of rights to Crown minerals;
- Accessing private lands to which First Nations do not have a right of access for exercising their Treaty rights and traditional uses;
- Crown decisions on policy matters that are unrelated to land and natural resource management; and
- Emergency situations that may impact public safety and security.

The *Policy* does not preclude other Crown processes that may engage First Nations and lead to government-to-government agreements or resolutions. That engagement may occur between First Nations and Crown officials and elected leadership.

Federal Crown Lands

In some cases, the *Policy* may also apply to provincial Crown decisions relating to or impacting lands other than provincial Crown lands. Alberta recognizes that First Nations members may also be exercising Treaty rights and traditional uses on federal Crown lands (including Indian reserves). Therefore, consultation with First Nations may be required for provincial Crown decisions with the potential to adversely impact the exercise of Treaty rights and traditional uses on federal Crown lands.

Guiding Principles

In November 2005, the Supreme Court of Canada released its decision in *Mikisew Cree First Nation v. Canada*, addressing the Crown's duty to consult First Nations in Treaty areas. From this decision and others, a number of principles have been derived to help guide consultations in a respectful and meaningful manner. Alberta believes that the following principles will result in meaningful consultation.

- Alberta will consult with honour, respect, and good faith, with a view to reconciling First Nations' Treaty rights and traditional uses within its mandate to manage provincial Crown lands and resources for the benefit of all Albertans.
- Consultation requires all parties to demonstrate good faith, reasonableness, openness, and responsiveness.

- Consultation should be carried out before Crown decisions on land and natural resource management are made. Where appropriate, consultation will be done in stages.
- Alberta and project proponents will disclose clear and relevant information regarding the proposed development, decision, or project to First Nations and allow reasonable time for review.
- The level of consultation depends on the nature, scope, magnitude, and duration of the potential adverse impacts on the Treaty rights and traditional uses of the affected First Nation.
- Alberta will inform First Nations and project proponents of known potential adverse impacts and the degree of consultation to be undertaken.
- Alberta will solicit, listen carefully to, and seriously consider First Nations' concerns with a view to substantially address potential adverse impacts on Treaty rights and traditional uses.
- Proponents must act within applicable statutory and regulatory timelines and in accordance with *The Government of Alberta's Corporate Guidelines for First Nations Consultation Activities*.
- First Nations have a reciprocal onus to respond with any concerns specific to the anticipated Crown decision in a timely and reasonable manner and to work with Alberta and project proponents on resolving issues as they arise during consultation.
- The Crown's duty to consult does not give First Nations or project proponents a veto over Crown decisions, nor is the consent of First Nations or project proponents required as part of Alberta's consultation process.
- Accommodation will be assessed on a case-by-case basis and applied when appropriate. The Crown is ultimately responsible for accommodation, but project proponents may have a role in accommodating First Nations.

Elements of Consultation

Content of the Duty

The content of the duty to consult and the appropriate level of consultation to be conducted are based on specific factors. Because the degree of consultation required varies with specific circumstances, Alberta's approach to meeting the duty to consult requires flexibility and responsiveness.

Alberta has developed draft *Government of Alberta's Corporate Guidelines for First Nations Consultation Activities* ("Corporate Guidelines"), which include a draft consultation matrix that classifies activities according to their relative potential impact on Treaty rights and traditional uses. Operational matrices will be created to identify when (i.e., in what cases) and how much (i.e., the degree of) consultation is required. The matrices will also identify timelines within the consultation process.

Scope of Consultation

The scope of consultation will be defined by the project or initiative being proposed and its potential adverse impacts on the continued exercise of Treaty rights and traditional uses. For projects or initiatives to which the operational matrices would apply, Alberta will use the operational matrices to make its initial determination of the scope of consultation.

Depth of Consultation

Alberta recognizes that more consultation may be required where the potential adverse impact on Treaty rights and traditional uses is greater. Factors that could influence the depth of consultation include:

- The geographic extent of the anticipated Crown decision's impact on the land or resources; and
- The degree to which First Nations have used the affected lands and resources for the exercise of Treaty rights and traditional uses and continue to do so today.

Consultation Office

Alberta will also establish a consultation office that reports to the Minister of Aboriginal Relations. In satisfying Alberta's duty to consult, this office will manage all aspects of consultation, including:

- Policy development and implementation;
- Pre-consultation assessment;
- Management and execution of the consultation process;
- Assessment of consultation adequacy;
- Consultation capacity-building initiatives with First Nations; and
- Measures to protect the transparency and integrity of the consultation process.

The consultation office will carry out these activities in a manner described in this *Policy* and the draft *Corporate Guidelines*.

Direct Consultation by the Crown

Alberta will consult directly in the following situations:

- When Alberta undertakes strategic initiatives with the potential to adversely impact Treaty rights and traditional uses;
- When Alberta acts as a project proponent; and
- When a project requires Level 3 consultation as set out in the draft *Corporate Guidelines*.

Direct Crown consultation will ordinarily be carried out by the consultation office with support from appropriate provincial departments. Consultation for certain strategic initiatives may be led by provincial departments with support from the consultation office. For Level 3 consultation, proponents may be required to participate in and lead various aspects of direct consultation.

Delegation

Within this *Policy*, a proponent is defined as “an entity or person who is either applying for or seeking a Crown decision related to land and natural resource management.” Alberta recognizes that the legal duty to consult rests with the Crown. However, when consultation relates to specific projects, the law allows the Crown to delegate procedural aspects of consultation to project proponents.

Generally, the consultation office will delegate procedural aspects of consultation for projects where the preliminary assessment indicates that the scope of consultation is limited (refer to the operational matrices within the draft *Corporate Guidelines*). When delegating aspects of consultation, the consultation office will assess consultation adequacy. The level of consultation that the consultation office requires of proponents depends on the extent of the potential adverse impacts on the Treaty rights and traditional uses and the scope and depth of the proponents’ anticipated activities.

When it delegates procedural aspects of consultation, the consultation office will remain engaged in the consultation process. In general, procedures that may be delegated to project proponents include:

- Providing First Nations with plain language information on project scope and location;
- Identifying potential short- and long-term adverse project impacts;
- Meeting with First Nations to discuss their concerns;
- Developing potential mitigation strategies to minimize or avoid adverse impacts;
- Implementing mitigation measures, as directed; and
- Summarizing, for both Alberta and First Nations, consultation efforts including an explanation, when required, of how specific First Nations’ concerns regarding adverse impacts have been addressed.

Despite the above, the consultation office will direct and manage all aspects of consultation for those projects requiring Level 3 consultation with First Nations as set out in the draft *Corporate Guidelines*. In cases involving proponents, the consultation office will guide the proponents in how to support the consultation.

Proponents will summarize, for both Alberta and the appropriate First Nations, their consultation efforts in a way that clearly demonstrates how mitigation strategies will address impacts to the Treaty rights and traditional uses. Using this information, the consultation office will assess the adequacy of consultation and provide direction to proponents regarding mitigation.

Alberta acknowledges that some First Nations have developed their own consultation protocols. Alberta encourages proponents to be aware of these protocols, but does not require proponents to comply with them while consulting with First Nations. In cases of conflict between a First Nation's consultation protocol and this *Policy* or the *Corporate Guidelines*, the *Policy* and *Corporate Guidelines* will prevail.

As stated above, the consultation office will manage delegated aspects of consultation. Forthcoming operational guidelines will set out minimum standards for delegated consultation activities, specific timelines, and a range of Crown-management activities. This clarification of the Crown's role will help ensure delegated consultation activities are meaningful and consistent with the *Policy*.

Roles and Responsibilities in Delegated Consultation

Government of Alberta

Conducting a Pre-Consultation Assessment

Pre-consultation assessments will guide the consultation office in determining if consultation is needed in the circumstances and, if so, the scope and extent of the consultation required. The consultation office will complete this initial assessment as early as possible in the planning phase of an anticipated Crown decision.

Determining Notification Requirements

The consultation office is responsible for determining which projects require consultation and which First Nations need to be notified and for directing proponents to provide reasonable time for First Nations to respond with their specific concerns about the potential adverse impacts.

Considering the Response and Determining Adequacy

The consultation office will determine whether delegated activities were performed adequately by considering what efforts were made to mitigate or substantially address potential adverse impacts on Treaty rights and traditional uses. This assessment of adequacy will be made after consultation is completed and before the Crown decision is made. If the consultation office finds performance to be inadequate, the consultation office may direct the proponent to take further steps to achieve adequacy.

Accommodating First Nations

While accommodation is the responsibility of the Crown, proponents will have a role in identifying and implementing potential mitigation measures, where appropriate.

Reporting the Decision and Following Up

In a manner consistent with the draft *Corporate Guidelines*, Alberta may report its decision in writing to the affected First Nations. When procedural aspects of consultation are delegated, it

is expected that proponents will identify adverse impacts on Treaty rights and traditional uses to Alberta, and how they plan to mitigate those impacts.

First Nations

Timely Information Sharing and Communication

First Nations have a reciprocal obligation to be timely in responding to the Crown's efforts to consult and in providing Alberta or proponents with specific information on how the project or initiative may adversely impact the exercise of their Treaty rights and traditional uses. The obligation also requires First Nations to report consultation concerns to Alberta as soon as possible. First Nations are invited to work with Alberta to identify the geographic areas on which they have historically exercised their Treaty rights and traditional uses and continue to do so.

Providing a Single Point of Contact

Consultation will occur on a government-to-government basis. Alberta recognizes that consultation will require the participation of different levels of officials, employees, or agents of Alberta and First Nations, depending on the nature of the anticipated Crown decision and the organizational structure of the particular government. For clarity and efficiency, Alberta requires First Nations to identify a single point of contact to serve as the First Nation's authorized consultation representative that Alberta or the proponent should contact. A First Nation's Chief and Council, ordinarily recognized by Canada, may serve as this representative.

Project Proponents

Carrying Out Delegated Activities

Project proponents that have procedural aspects delegated to them by Alberta's consultation office may include industry, municipal governments, or any other organization requiring Crown approval of a project. The consultation office will assess the adequacy of the consultation. As directed by Alberta, proponents will notify potentially affected First Nations early in project planning to allow reasonable time for First Nations' concerns to be considered. Proponents will discuss project-specific issues that arise with First Nations as well as strategies to address those concerns.

Consultation Timelines

The assessment of consultation adequacy will generally occur within applicable statutory and regulatory timelines and in accordance with the *Corporate Guidelines*.

Coordinating Consultation

Consultation may involve coordination across jurisdictions, departments, agencies, and processes. Alberta will continue to work on enhancing cross-government working relationships, in order to

strengthen this coordination. Alberta will also develop coordination processes with other provincial and territorial governments, Canada, or agencies of government, with a view to increasing information-sharing and cross-jurisdictional collaboration.

Alberta Energy Regulator

Alberta has established the Alberta Energy Regulator (“the Regulator”). This Regulator has no jurisdiction with respect to assessing the adequacy of Crown consultation-associated First Nations’ Treaty rights as recognized and affirmed under Part II of the *Constitution Act, 1982*. The consultation office will work closely with the Regulator to ensure that any needed consultation occurs for decisions on energy project applications within the Regulator’s mandate.

Consultation Capacity

Alberta will develop a program to increase capacity funding to First Nations and to fund that program through a levy on industry. The consultation office will be responsible for managing and distributing this funding to First Nations. Alberta will solely fund government-led consultation for Crown projects.

Transparency of Process

The integrity of the consultation process depends on all parties knowing clearly at each step of a consultation what the costs of that consultation will be.

The levy and its resulting funding contribute to this transparency by increasing consultation capacity of First Nations. Alberta supports general community economic development initiatives which proceed outside this *Policy*, including current discussions with First Nations on an Economic Opportunities Initiative. The option of entering into agreements about project impact benefit agreements is open for exploration between First Nations and proponents.

Measures to maintain integrity of the consultation process will be contained in guidelines developed to support this *Policy*.

Corporate and Operational Guidelines

To provide all parties to the consultation process with increased clarity and direction, and to ensure that consultation is meaningful, Alberta will adopt *Corporate Guidelines* and operational guidelines that will:

- Develop a range of Crown-monitoring activities for delegated consultation;
- Clarify specific information required from First Nations on projects and initiatives;
- Coordinate consultation by working with Canada and provincial governments;
- Reflect the needs of proponents and First Nations as well as specific ministry mandates and regulatory processes; and

- Guide the development of consultation matrices to identify triggers, project scope, and depth of consultation, and address the range of projects and initiatives and their potential to impact Treaty rights and traditional uses.

Review

It is important for all parties to continue to identify, discuss, and resolve issues related to First Nations consultation. Alberta will review this *Policy*, and all associated documentation, in separate engagement forums with First Nations, industry, and other stakeholders annually as mutually decided upon by the affected parties. The purpose of these forums will be to assess the performance, standards, and best practices of the consultation process. This will ensure that the *Policy* reflects developments in First Nations consultations and responds to the future needs of First Nations, industry and other stakeholders. Alberta reserves the right to amend this *Policy* as appropriate.

Conclusion

This *Policy* replaces *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* (adopted May 16, 2005) and comes into force upon a date to be specified.

Alberta's previous *First Nations Consultation Guidelines on Land Management and Resource Development* (updated November 14, 2007) outlined procedures to help the Crown implement its duty to consult. The *Policy* and *Corporate Guidelines* support these existing guidelines, which will remain in effect, with necessary changes, until forthcoming operational guidelines under the *Policy* come into effect. Many of the matters outlined in the *Policy*, including the consultation office, operational matrices, the consultation levy and consultation process agreements, will require further engagement and discussion with First Nations, industry, and other stakeholders.

In the event of a discrepancy between the *Policy* and the existing guidelines, the *Policy* will prevail. Where consultation on a project or initiative has commenced prior to this *Policy* coming into effect, consultation will be completed under the previous policy and guidelines.