

## A FRAMEWORK FOR CONSULTATION GUIDELINES

### Introduction

The land and resources in Alberta provide all Albertans with opportunities to benefit through careful management and development practices. The development of resources also brings the responsibility to assess and manage the associated potential impacts. This requires, among other things, ongoing consultation with First Nations. The *Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* ("Policy") was approved on May 16, 2005. (Appendix C) The Policy recognizes and values the special relationship between First Nations and Alberta and reiterates that nothing in the Policy abrogates or derogates from the treaties. The Policy provides clarity and direction for Government of Alberta ministries on how to proceed with consultation with First Nations in Alberta about land management and resource development. The Policy provides for the development of Consultation Guidelines ("Guidelines") to address specific questions about how consultation for land management and resource development should occur in relation to specific activities. The Guidelines are to be consistent with, and provide for, implementation of the Policy.

The purpose of this Framework for Consultation Guidelines ("Framework") is to establish the principles with which all Guidelines are required to be consistent. The principles are instructions to Alberta ministries preparing guidelines pursuant to the Policy. Another objective for this Framework is to identify how the Policy should be successfully implemented in order to facilitate an ongoing evaluation and to improve the implementation of the Policy. A glossary of frequently used terms is included as Appendix A.

### Principles

Consultation Guidelines created by Alberta ministries will be consistent with the Policy and particularly with the Guiding Principles set out in the Policy which are as follows:

#### *Guiding Principles excerpted from the Policy:*

- 1. Consultation must be conducted in good faith.*
- 2. Alberta is responsible for managing the consultation process.*
- 3. Consultation will occur before decisions are made, where Land Management and Resource Development may infringe First Nations Rights and Traditional Uses.<sup>1</sup>*
- 4. While each has very different roles, the consultation process requires the participation of First Nations, the Project Proponent and Alberta.*
- 5. Alberta's consultation practices will be coordinated across departments.*

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<sup>1</sup> Rights and Traditional Uses includes uses of public lands such as burial grounds, gathering sites, and historic or ceremonial locations, and existing constitutionally protected rights to hunt, trap and fish and does not refer to proprietary interests in the land.

6. *Parties are expected to provide relevant information, allowing adequate time for the other parties to review it.*
7. *The nature of the consultation will depend on such factors as the extent of potential infringement, the communities affected, and the nature of the activities involved.*
8. *Consultation should be conducted with the objective of avoiding infringement of First Nations Rights and Traditional Uses. Where avoidance is not possible, consultation will be conducted with the goal of mitigating such infringement.*
9. *Consultation will occur within applicable legislative and regulatory timelines.*

***Consultation Guidelines Principles:***

In addition, Guidelines created by Alberta ministries will be consistent with the following principles:

1. Guidelines will need to evolve as experience in Alberta grows and as the law related to consultation evolves. As such, Guidelines should incorporate a transparent monitoring and evaluation process and adopt an incremental approach in the development of Guidelines that allows the monitoring and evaluation process to assist and guide adjustments as necessary.
2. Guidelines are intended as a means to support a process of consultation and an overarching objective of reconciliation rather than confrontation.
3. Alberta will proceed with important initiatives such as traditional use studies and the meaningful involvement of First Nations in land and resource planning as a tool to identify and avoid or mitigate potential impacts on First Nation Rights and Traditional Uses or to accommodate those rights and traditional uses in Alberta's decision making. Guidelines for project-specific consultation processes will ensure that those processes are informed by and integrate the understandings gained through Alberta's general consultation activities such as Traditional Use Studies and land and resource management planning.
4. Guidelines will support project-specific consultation processes that are as efficient as possible utilizing the understandings and knowledge gained through Alberta's general consultation activities to focus those processes where the attention of First Nations, proponents and government is required. This approach means seeking alternatives to consulting each time Alberta issues a disposition while still ensuring that First Nations are informed about land management and resource development activities that have the potential of adversely impacting their Rights and Traditional Uses.

5. Guidelines for project-specific consultation related to resource development will reflect the differing needs of different industries.
6. Guidelines will attempt to identify minimum requirements for project-specific consultation. Alberta will also encourage the development of best practices.
7. Guidelines will identify and utilize opportunities for project-specific consultation within the existing regulatory processes. Where required, regulatory amendment will be effected to ensure meaningful consultation can proceed.
8. Guidelines will establish a mechanism for Alberta to assess the need for project-specific consultation and indicate when project-specific consultation is not required.
9. Guidelines will require project-specific consultation where either Alberta or the project proponent is aware of the potential for adverse impact on sites or areas that are important to the exercise of First Nation Rights and Traditional Uses.
10. Where the Guidelines require project-specific consultation, the guidelines:
  - a. will require the proponent to engage with affected First Nations to ensure the precise impacts and practical avoidance, mitigation, or accommodation strategies are identified.
  - b. will identify what information is to be provided to First Nations, when that information should be provided, that the information be as clear and practical as possible, and the time for First Nations to review and respond. First Nations will be asked to identify any potential for impact on sites or areas that are important to the exercise of First Nation Rights and Traditional Uses and make suggestions on how these might be avoided, mitigated or accommodated.
  - c. may provide for access to the relevant Alberta statutory decision maker for advice on the adequacy of consultations planned or undertaken and of proposed avoidance, mitigation or accommodation strategies.
  - d. will provide a mechanism for the relevant Alberta statutory decision maker to advise both First Nations and the proponent of their decision and the reasons for the decision.
11. For development projects which receive approval to proceed through a legislated public consultative process, such as an Environmental Impact Assessment, the Guidelines will set out a distinct process to the existing processes for project-specific First Nations consultation.

## **Roles in the Consultation Process**

Guidelines developed by ministries will reflect the following roles and process for those situations where project-specific consultations are required.

### **1. Alberta's Role**

- a. **General Consultation:** The Policy states that Alberta will conduct “general consultation.” Alberta sees general consultation involving a wide range of activities which will vary to suit the circumstances of different First Nations and as experience grows. As Alberta moves forward to implement, refine or develop new activities in the general consultation toolkit, it can check these activities for consistency with this Framework for Consultation Guidelines. Although Alberta expects industry and First Nations to participate in some activities, general consultation is the primary responsibility of Alberta.
- b. **Project-Specific Consultation:**
  - i. For the purposes of the Policy, Alberta defines “major projects” as those for which an environmental impact assessment is required and which require a multiplicity of approvals from boards or statutory decision-makers. Alberta’s role is defined within those processes and there is an established well understood process with mandated decision-makers. During the development of Guidelines, a distinct process for First Nations consultation will also be established within the approval processes.
  - ii. In cases where Alberta is the project proponent, such as when making regulatory change or as the proponent of a new development, Alberta will consult with First Nations about the potential adverse impacts of the related decisions on First Nation Rights and Traditional Uses.
  - iii. Alberta will assess projects, including major projects, for the potential to adversely impact First Nations Rights and Traditional Uses and advise both the potentially affected First Nations and the project proponent of the outcome of the assessment. These assessments will be conducted in a context which incorporates the discussion which has occurred at regional tables or in land and resource management planning processes with the objective of identifying those projects which require First Nation specific consultation. Where there is potential for adverse impact, Alberta may require the proponent to engage the affected First Nations in project-specific consultation. The objective of this discussion is to provide the necessary details about the project to the First Nations so as to confirm whether there is an adverse impact and, if so, to

develop practical strategies to avoid or mitigate the impact, such as changing the site of the project. If there are no adverse impacts, then no further activity is required. In either case, the proponent will be required to file a report with Alberta and forward a copy to the First Nations. Alberta will then determine whether to approve the project.

## 2. Industry's Role

- a. **General Consultation:** Industry will be expected to participate in some aspects of general consultation by, for example, providing data or information during land or resource planning processes or by participating in the regional tables, where appropriate.
- b. **Project-Specific Consultation:** When Alberta's assessment of a project indicates there is potential for adverse impact on First Nation Rights and Traditional Uses, the proponent may be required to engage the affected First Nations in project-specific consultation. The objective of this discussion is to provide the necessary details about the project to the First Nations so as to confirm whether there is an adverse impact and, if so, to develop practical strategies to avoid or mitigate the impact, such as changing the site of the project. If there are no adverse impacts, then no further activity is required. In either case, the proponent will be required to file a report with Alberta and forward a copy to the First Nations.

## 3. First Nations' Role

- a. **General Consultation:** Successful implementation of general consultation activities will require Alberta to work closely with First Nations. All of the tools that are available to the consultation process have been or will have to be developed in dialogue with First Nations. First Nations have expressed a strong interest in being involved and Alberta expects their continued involvement. As our collective experience grows, the process can be refined and improved. Alberta will seek to work closely with First Nations to build this process and to define how First Nations will participate.
- b. **Project-Specific Consultation:** First Nations will be expected to participate in project-specific consultation by indicating whether they wish to be consulted on a project. If so, First Nations will be expected to review the project assessment conducted by Alberta as to the potential for adverse impact on First Nations Rights and Traditional Uses. If the First Nation has concerns with the assessment, it should communicate those concerns to Alberta. Lastly, when Alberta's assessment of a project indicates there is potential for adverse impact on First Nation Rights and Traditional Uses, the affected First Nations should participate in dialogue with the project proponent to confirm whether there is an adverse impact and, if so, to develop practical strategies to avoid or mitigate the impact

such as changing the site of the project. If there are no adverse impacts then no further activity is required. In either case, the proponent will be required to file a report with Alberta and forward a copy to the First Nations. The First Nation should review the report filed by the proponent.

#### *Indicators of Success*

Successfully implementing the Policy in accordance with this Framework will bring about certain identifiable results. The following are results that Alberta will strive for and seek to measure as indicators of successful implementation of the Policy:

1. Engagement of all parties in the process as indicated in the Policy and the relevant Guidelines.
2. Reduced number of unintentional impacts on First Nations rights and traditional uses and an increased number of sites or areas, important to the exercise of First Nation Rights or traditional uses that receive protection.
3. Timely review of required project-specific consultations and project plans and the improved ability of Alberta to make decisions having satisfied its duty to consult.
4. Meaningful engagement of Alberta and First Nations in processes, such as land and resource planning, which efficiently seek methods to avoid or mitigate the impacts of land and resource management decisions made by Alberta and to accommodate First Nation Rights and Traditional Uses where avoidance or mitigation is not possible.
5. Focused attention, for project specific consultation, on decisions or actions that have the potential for adversely impacting First Nations Rights and Traditional Uses and processes that resolve practical issues relating to surface land use conflicts.
6. An increased number of completed traditional land use studies and data management agreements, between First Nations and Alberta, producing data which can be utilized to assist consultation.
7. Timely provision of information to First Nations in an understandable format or with appropriate access to advice to assist First Nations in understanding the information.
8. Timely provision of a response from First Nations identifying potential impacts and possible methods to avoid or mitigate the impact.
9. The ability of First Nations and Alberta to identify potential impacts through the use of tools such as traditional use studies and to communicate those impacts to the decision maker or project proponent in a timely manner.
10. Impacts on First Nations Rights and Traditional Uses are avoided, mitigated or, where appropriate, accommodated.

#### *Evaluating Guidelines*

In order to facilitate this work Alberta will track information on whether these outcomes have been achieved on an annual basis and report these outcomes to both First Nations and industry. As a guide in the incremental development of the approach, Alberta has attached a “Guidelines Implementation and Review” chart as Appendix B. Alberta will engage both parties in dialogue about whether the Policy has been successfully

implemented or whether it needs to be varied to reflect things such as: new legal or policy developments; emerging best practices; measures that contributed to or detracted from successful implementation; and to identify potential improvements. Alberta may also facilitate a tripartite dialogue to contribute to evaluation or identify other outcomes.

## APPENDIX A

### **GLOSSARY**

When used in this Framework or Guidelines, these terms have the following meaning.

#### Avoidance

Avoidance involves government or a project proponent amending their decision or project plan in order that First Nations Rights and Traditional Uses will not be impacted by the project or decision.

#### Mitigation

Mitigation involves government or a project proponent amending their decision or project plan in order that identified impacts on First Nations Rights and Traditional Uses are reduced, but not eliminated or avoided.

#### Accommodation

Accommodation is the creation of a reasonable balance between the potential impact of a particular decision on a First Nation with the competing societal concerns. In determining adequate accommodation, compromise is inherent to the reconciliation process.

#### First Nation Rights And Traditional Uses

*Rights and Traditional Uses* includes uses of public lands such as burial grounds, gathering sites, and historic or ceremonial locations, and existing constitutionally protected rights to hunt, trap and fish and does not refer to proprietary interests in the land.

**APPENDIX B**

**GUIDELINES IMPLEMENTATION AND REVIEW**



**APPENDIX C**

**The Government of Alberta's First Nations Consultation Policy on  
Land Management and Resource Development**

**May 16, 2005**

**The Government of Alberta's  
First Nations Consultation Policy  
on Land Management and  
Resource Development**

**MAY 16, 2005**



In September 2000, the Government of Alberta ("Alberta") released *Strengthening Relationships: The Government of Alberta's Aboriginal Policy Framework* ("APF"). The APF sets out the basic structure for Alberta policies to address Aboriginal issues in the province. Within the APF, Alberta committed to consult with Aboriginal people when *Land Management and Resource Development*<sup>1</sup> decisions may infringe their existing treaty or other constitutional rights.

The Government of Alberta recognizes and respects the treaties and the lands set aside under the treaties as First Nation reserve lands. Nothing in this document will abrogate or derogate from the treaties. Under Section 35 of the *Constitution Act, 1982*, existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are recognized and affirmed. Alberta recognizes that some activities on provincial Crown lands affect existing treaty rights and other interests of First Nations in Alberta ("*Rights and Traditional Uses*"<sup>2</sup>).

Alberta has the constitutional mandate to manage public lands and the development of natural resources in the province for the benefit of all Albertans.

Alberta desires a practical consultation process that avoids or minimizes impacts on First Nations *Rights and Traditional Uses* and creates greater certainty. Alberta's objective is to build a "made-in-Alberta" policy approach that seeks to improve working relationships throughout the province.

Alberta's consultation process is intended to produce better communication, stronger relationships and easier resolution of issues between government and First Nations. The consultation process also seeks to encourage strong relationships, communication and easier resolution of issues between industry and First Nations. It will provide more effective procedures for addressing First Nations *Rights and Traditional Uses*. Alberta will seek to ensure that this consultation policy is coordinated with related measures that may be undertaken by the federal government.

#### **Policy Statement**

Alberta will consult with First Nations where Land Management and Resource Development on provincial Crown land may infringe First Nations *Rights and Traditional Uses*.

#### **Purpose of this Policy**

Alberta's *First Nations Consultation Policy on Land Management and Resource Development* (the "Policy") addresses the manner in which Alberta will consult with First Nations and defines the roles and responsibilities of all parties. This Policy is designed to create an approach to consultation that benefits all Albertans.

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<sup>1</sup>*Land Management and Resource Development* means activities arising from dispositions or decisions involving forestry, energy, and water, fish and wildlife management.

<sup>2</sup>*Rights and Traditional Uses* includes uses of public lands such as burial grounds, gathering sites, and historic or ceremonial locations, and existing constitutionally protected rights to hunt, trap and fish and does not refer to proprietary interests in the land.

The purpose of this Policy is to identify a consistent approach to consultation that will be applied by Alberta Government departments involved in *Land Management and Resource Development* decisions. This Policy is intended to define Alberta's role in the consultation process and to set out Alberta's expectations of First Nations and industry.

#### **Alberta's Consultation Model**

Alberta held a series of meetings and workshops across the province with First Nations and industry to receive feedback for development of this Policy. Development of this Policy is Alberta's first step. Where appropriate, Alberta will also create Consultation Guidelines to address specific questions about how consultation for *Land Management and Resource Development* should occur in relation to specific activities such as exploration, resource extraction, and management of forests, fish and wildlife. The Consultation Guidelines will be consistent with, and will provide for, implementation of this Policy.

Alberta will review this Policy four years after implementation to assess its approach and consider changes. During those first four years, Alberta will work with First Nations and industry to identify best practices and other strategies to improve Alberta's approach. Where appropriate, changes will be incorporated to allow Alberta's policy and approach to evolve.

Alberta recognizes that many First Nations and *Project Proponents*<sup>3</sup> have longstanding and established relationships that are mutually satisfactory. It is Alberta's intention to foster these existing relationships.

#### **Guiding Principles**

Alberta believes that the following principles will result in meaningful consultation by bringing the appropriate parties together in a timely way. With this Policy, Alberta intends to provide a meaningful process in which First Nations, industry and government listen openly to each other before resource development and land management decisions are made.

1. Consultation must be conducted in good faith.
2. Alberta is responsible for managing the consultation process.
3. Consultation will occur before decisions are made, where *Land Management and Resource Development* may infringe First Nations *Rights and Traditional Uses*.
4. While each has very different roles, the consultation process requires the participation of First Nations, the *Project Proponent* and Alberta.
5. Alberta's consultation practices will be coordinated across departments.

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<sup>3</sup>*Project Proponent* refers to Industry parties who propose natural resource developments. Alberta recognizes that in some circumstances the *Project Proponent* may be government.

6. Parties are expected to provide relevant information, allowing adequate time for the other parties to review it.
7. The nature of the consultation will depend on such factors as the extent of potential infringement, the communities affected, and the nature of the activities involved.
8. Consultation should be conducted with the objective of avoiding infringement of First Nations *Rights and Traditional Uses*. Where avoidance is not possible, consultation will be conducted with the goal of mitigating such infringement.
9. Consultation will occur within applicable legislative and regulatory timelines.

#### **Alberta's Responsibilities**

Alberta acknowledges it has a duty to consult with First Nations where legislation, regulations or other actions infringe treaty rights. Alberta will manage the consultation process and, where necessary, consult directly with First Nations where *Land Management and Resource Development* on provincial Crown land may infringe First Nations *Rights and Traditional Uses*. Consultation about *Land Management and Resource Development* will occur in two ways: through general consultation and relationship building, and through project-specific consultation.

#### **General Consultation and Relationship Building**

Alberta will pursue a broad range of practices that are not related to any specific development proposal but are intended to build relationships, to increase the flow of information between First Nations, industry and Alberta, and to avoid or mitigate impacts on First Nations *Rights and Traditional Uses*. These activities could change over time, depending on the circumstances of the communities or regions involved. These activities will introduce multi-party discussions into everyday work and lead to more effective working relationships and partnerships. For example, Alberta will:

1. Initiate sessions to share information with First Nations about roles and responsibilities of Alberta, on regulatory processes involved in approving resource development projects, and about trends of industrial development around their communities. Alberta will welcome the opportunity to attend information-sharing sessions initiated by First Nations to learn from their experiences related to resource development.
2. Work with First Nations to identify traditional uses of land that may be affected by *Land Management and Resource Development*, support relevant traditional use studies, and ensure that the information collected is used in project planning. Traditional use information will be used in accordance with agreements between the First Nation and Alberta.
3. Work with First Nations to identify practical arrangements on how to implement this Policy and subsequent Consultation Guidelines.

### Project-Specific Consultation

Alberta expects the *Project Proponent* to consult with First Nations on proposed projects in accordance with this Policy and Consultation Guidelines and resolve issues where possible. A compliance-monitoring program will ensure that the consultation meets the intent of this Policy and Consultation Guidelines.

Alberta may consult directly with First Nations where major projects are proposed or Alberta's assessment indicates Alberta should engage in project-specific consultation. Assessments will be based on available information about the proposed activity and the First Nations in the relevant geographic area. The nature of the consultations will depend on factors such as the nature of the *Rights and Traditional Uses* identified by the First Nation as being affected by the project, the extent of the potential impact, the communities affected, and the nature of the industry involved.

Alberta will not engage directly in a consultation process for every proposed resource development activity. In most cases Alberta will require *Project Proponents* to conduct procedural aspects of project-specific consultation, but Alberta will retain responsibility to determine whether consultation has been adequate in the circumstances. However, when a specific activity is proposed for which Alberta will consult directly, a lead Ministry will:

1. Engage in meaningful consultation, keeping in mind applicable industry and regulatory timelines and the need for informed understanding among the parties. The consultation process will include gathering and assessing the necessary information from the *Project Proponent* and First Nations, assessing the potential for infringement of the First Nations *Rights and Traditional Uses*, and facilitating discussions between the *Project Proponent* and the First Nation.
2. Maintain a record of the consultation process, including how the First Nations concerns have been considered.
3. Statutory decision-makers will review all information provided during the consultation process, and fully consider the views of industry and the First Nation. In particular, methods to avoid, mitigate or otherwise address potential infringements of First Nations *Rights and Traditional Uses* will be considered and documented.
4. Where the decision is to be made by an independent decision-maker, such as the Alberta Energy and Utilities Board or the Natural Resources Conservation Board, Alberta may report on consultation to the relevant decision-maker.
5. Advise the First Nation and industry in writing of the outcome of the consultation.

### Alberta's Expectations of Industry

Alberta expects industry to engage in consultation based on respect, open communication and co-operation. Those who propose natural resource developments are expected to consult with and consider the views of First Nations who could be affected by their developments. Industry should incorporate traditional use data when planning their operations. Alberta expects the

*Project Proponent* to avoid or mitigate infringement of First Nations *Rights and Traditional Uses*. Alberta's expectations of the *Project Proponent* are as follows:

1. Provide early notification to Alberta and to First Nations before development is authorized to proceed, to ensure they are reasonably informed about the *Project Proponent's* proposed activities. Information should include short-term and long-range plans in the area.
2. Discuss with First Nations when their proposed activities may infringe First Nations *Rights and Traditional Uses*.
3. Record and address issues or concerns identified by the First Nations and identify how infringements were avoided or mitigated.
4. Upon request, make available to Alberta its documentation and other information related to consultation.
5. Consider the circumstances of the project and avoid infringement of First Nations *Rights and Traditional Uses*. Where avoidance is not possible, the *Project Proponent* is expected to make reasonable efforts to mitigate the infringement.
6. Enter into dialogue with the First Nations regarding opportunities specific to an individual project toward achievement of a positive, sustainable outcome.

**Alberta's Expectations of First Nations**

Alberta expects First Nations to indicate clearly whether they wish to be consulted on a project. If so, they are expected to communicate openly and to work with industry and Alberta in good faith to identify *Rights and Traditional Uses* and work co-operatively toward resolution. Alberta's expectations of First Nations are as follows:

1. Work with Alberta to identify practical arrangements on how to implement this Policy and subsequent Consultation Guidelines.
2. Clearly identify which *Rights and Traditional Uses* may be infringed by *Land Management and Resource Development* activities.
3. When raising concerns to the *Project Proponent* or government about proposed developments, provide alternate solutions or approaches for resolving particular issues.
4. Initiate sessions for Alberta and the *Project Proponent* to increase awareness of that First Nation's *Rights and Traditional Uses*.
5. Upon request, make available to Alberta that First Nation's documentation and other information related to consultation.

6. Share traditional use information with Alberta and the *Project Proponent* to inform the *Land Management and Resource Development* review and decision-making process.