

**SUBJECT: DEPARTMENTAL CONSULTATION  
WITH FIRST NATION COMMUNITIES**

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## 1. Policy

### Departmental Consultation with First Nation Communities

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#### 1.1 Policy Statement

- 1.1.1 The Department of Natural Resources is obliged to consult with New Brunswick First Nation communities whenever there is a reasonable likelihood that a contemplated policy or action may result in the infringement of a proven or asserted aboriginal or treaty right, including title.
- 1 1.2 Consultation will be undertaken in a meaningful and respectful manner, with a willingness to accommodate the right or mitigate the infringement.

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#### 1.2 Background

In the Haida Nation and Taku River cases, the Supreme Court of Canada directed the Federal and Provincial Crowns to consult with First Nation communities on action or activities that may infringe on a proven or asserted aboriginal or treaty right, including title.

The Honour of the Crown requires that the duty to consult include the obligation to accommodate the right in an effort to reconcile aboriginal and treaty rights with societal interests.

Aboriginal Affairs Secretariat is undertaking the development of an overarching aboriginal consultation policy which will address with the entire spectrum of consultation and accommodation, including a tripartite process, with the Federal Government and First Nations, aimed at modern day treaties.

Consultation and accommodation from a Departmental perspective should concentrate on minimizing infringement by providing appropriate access to resources rather than trying to fully define the right.

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#### 1.3 Policy Objectives

- 1.3.1 To meet, through meaningful consultation, the Crown's duty to accommodate and reconcile New Brunswick First Nations' interests while continuing to manage the province's natural resources in the best interest of the citizens of New Brunswick.

- 1.3.2 To provide increased formalized opportunities for New Brunswick First Nations to provide input, in a timely manner, on policies and actions/activities that may infringe on a right as well as to provide input on any accommodation that may be required to be made and/or the means, if any, that may have to be used to mitigate any infringement.
- 1.3.3 To improve the Department's relationship with New Brunswick First Nation communities through increased communications and contact between staff and the New Brunswick First Nation communities.
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#### **1.4 Definitions**

“Aboriginal Right” - activities that have an element of a practice, tradition or custom integral to the distinct culture of that aboriginal group, which existed prior to contact with Europeans.

“Aboriginal title” - type of aboriginal right. It is the collective right of an aboriginal group that is traceable to the group's historical exclusive use and occupation of the land.”

“Accommodation” - the Crown's duty to make adjustments to proposed policies and action/activities so that the impact on First Nation interests are minimized or eliminated. May mean abandonment of policy or action/activity or some form of financial compensation.

“Duty to Consult” – obligation on the Crown to take into consideration the impact that policies/decisions will have on the exercise of proven or asserted aboriginal or treaty rights. The Crown must interact with the First Nations to understand potential impacts and First Nation interests.

“Honour of the Crown” - obligation of the Crown to ensure that the interests of First Nations people are taken into consideration and protected.

“Infringement” – hindrance of the preferred method of the exercise of a right as a result of a policy or action/activity.

“Maliseet Nation” – consists of six communities whose traditional territory is the Saint John River Watershed. The six communities are; Madawaska, Tobique, Woodstock, Kingsclear, St. Mary's and Oromocto

“MAWIW Council of First Nations” - policy/service organization whose executive is made up of representatives from the Burnt Church, Elsipogtog and Tobique First Nations.

“Mi’kmaq” – consist of nine communities whose traditional territory is the Restigouche Watershed, the Miramichi Water shed and the eastern coastal regions of New Brunswick. The nine communities are: Eel River Bar, Papineau, Red Bank, Eel Ground, Burnt Church, Indian Island, Bouctouche, Elsipogtog, and Fort Folly.

New Brunswick Aboriginal Peoples Council – organization that provides program and policy services to off-reserve status and non-status Indians.

“Reconciliation” - the Crown must seek to reconcile its activities with the interests of the First Nation people.

“Union of New Brunswick Indians” - a policy/service organization whose executive consists of the Chiefs of Bouctouche, Eel Ground, Eel River Bar, Fort Folly, Indian Island, Kingsclear, Madawaska, Oromocto, Papineau, Red Bank, St. Mary’s and Woodstock First Nations.

“Treaty Right” rights recognized in both historic and modern treaties.

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## **2. Scope and Application**

Scope and Application

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### **2.1 Application**

This policy applies to all Departmental policies and programs. If parts of this policy are to be found in conflict with a Provincial policy on Consultation with First Nation’s the provisions of the Provincial Policy will prevail.

### **3. Implementation**    Implementation

#### **3.1 Roles and Responsibilities**

##### 3.1.1 Departmental Employees:

- a) Identify and bring forward to Policy and Planning Branch any policies or actions/activities that may have the potential to infringe on the exercise of a proven or asserted aboriginal or treaty right.
- b) Assist in assessing interest and determining who should be consulted.
- c) Assist in consultation and negotiations, if necessary.
- d) Participate in cultural awareness training and “Rights” workshops.

##### 3.1.2 Policy and Planning Branch

- a) Develop guidelines that will assist Departmental staff in identifying infringement of rights.
- b) Keep Departmental employees apprised of legal decisions or legislation that may impact on rights and Crown’s obligations.
- c) Take the lead in assessments of policies and action/activities for potential infringements.
- d) Decide on the nature and scope of consultation.
- e) Lead consultation efforts and negotiations on accommodations.
- f) Determine if “duty to consult” has been met.
- g) Co-ordinate cultural awareness training and “Rights” workshops.
- h) Maintain records of consultation efforts.

**3.2 Triggers** 3.2.1 The following general triggers should alert staff to assess whether a proposed policy and/or activity has the potential to infringe a right.

a) Is the policy or activity related to hunting, fishing or gathering of resources (trees, plants, shrubs, peat, gravel, etc.)?

b) Does the proposed policy/activity tend to deplete resources or restrict the harvesting of resources, including alienation of land?

c) Does the proposed activity occur near existing reserves or former reserves or specific ceremonial or traditional lands?

**3.3 Procedures** 3.3.1 Departmental employee assesses if policy or action/activity has potential to infringe a “Right”

3.3.2 Staff to contact Policy and Planning Branch to determine the likelihood of the infringement of a Right.

3.3.3 Policy and Planning Branch may ask for the assistance of the Aboriginal Affairs Secretariat and Justice in the assessment of the likelihood of infringement.

3.3.4 If infringement is likely and a right has been identified, Policy and Planning Branch will take the lead, prepare all necessary correspondence and identify a course of consultation with New Brunswick First Nation Communities based on the following:

a) Minor – Low impact on a proven or asserted right. - Letter to Chief and Band Council, copied to First Nation organizations, informing of proposed policy or action/activity and asking for concerns and comments within a defined time line. Response will be reviewed by Policy and Planning Branch with Departmental employee to determine if further action is required.

b) Moderate – Medium impact on a proven or asserted right – Letter to Chief and Band Council, copied to First Nation organizations, advising of activity and offering to meet to share information with Chief and Band Council or their representatives. Policy and Planning Branch t invite Aboriginal Affairs Secretariat to the meetings and to inform Department of Justice of the progress.

c) Strong – Letter Chief and Band Council, copied to First Nation organizations, advising of policy and offering to meet and begin consultation and negotiations on accommodation. Policy and Planning Branch to invite Aboriginal Affairs Secretariat and Justice to all meetings.

3.3.5 Policy and Planning Branch to lead all negotiations on mitigation of infringement and accommodation.

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#### **4. Evaluations**

Activity under this Policy will be reviewed yearly to determine if consultation is sufficiently occurring to meet the Crown's obligation to consult. Measures to be considered are, number of consultations commenced, number completed, outcomes, i.e., were policies or action/activities able to continue after modifications.

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#### **5. Contact**

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