

Provincial policy on consultation with U.S. Tribes

Issuing authority: Deputy Minister, Ministry of Water, Land and Resource Stewardship (WLRS)

Administered by: Ministry of Water, Land and Resource Stewardship (WLRS)

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1) Purpose

This policy guides the Government of British Columbia's (B.C. government) approach to consultation with United States-based Indigenous groups (U.S. Tribes) when the Crown's duty to consult is triggered under Section 35 of the Constitution Act, 1982. It establishes principles, roles, and steps for consistent, meaningful, and proportionate consultation, consistent with the Crown's constitutional obligations.

2) Legal context

Section 35 of the Constitution Act, 1982 (s. 35) recognizes and affirms Aboriginal and treaty rights; the duty to consult arises where contemplated Crown conduct may adversely affect asserted or established rights.

R. v. Desautel, 2021 SCC 17 (Desautel) recognizes that U.S. Tribes can be "Aboriginal peoples of Canada" under s. 35, which are the modern successors of Aboriginal societies that occupied Canadian territory at the time of European contact, even if they are now outside Canada. Consultation is part of a process of fair dealing and reconciliation which arises from the Crown's assertion of sovereignty, and because groups outside Canada are not implicated in this process to the same degree, the scope of the Crown's duty to consult with them, and the manner in which it is given effect, may differ. Integrating groups outside Canada into consultations by the Crown with groups inside Canada may involve discussions within Aboriginal communities and with the Crown.

Lummi Nation v. Canada, 2025 FC 1986 confirmed that the duty to consult (with a U.S. Tribe) is triggered when the group has provided sufficient information to meet the Haida threshold for triggering the duty for all aspects of its claim—the claim that it is an Aboriginal people of Canada (the precondition for constitutional protection), and the claim that it holds specific Aboriginal rights or title protected under s. 35. The Court stated that the Supreme Court of Canada (SCC) in Desautel did not provide a roadmap or framework for Crown consultation with U.S. Tribes, nor guidance on what is required for reasonable consultation when U.S. Tribes are involved. The Court recognized that the circumstances involving U.S. Tribes are unique, and that cross border realities naturally shape the process of fair dealing and reconciliation that arises from the Crown's assertion of

sovereignty. The Court confirmed that a consultation process with a U.S. Tribe can differ from consultation with groups in Canada and still satisfy the duty to consult.

3) Scope

This policy applies to all B.C. government agencies and Crown decision-makers whose decisions about land or resource use may adversely affect asserted or established s. 35 rights of U.S. Tribes within B.C. This may include regulatory approvals, permits, licenses, land authorizations, or other operational decisions that trigger the duty to consult.

4) Key definitions

U.S. Tribe: An Aboriginal group located outside of Canada that has asserted or established s. 35 rights in B.C. as a modern successor to an Aboriginal group that occupied Canada at the time of European contact.

Duty to consult and accommodate: Crown obligation to consult and, where appropriate, accommodate when contemplated conduct may adversely affect potential or established s. 35 rights.

Consultation depth: The level of consultation (notification, normal, deep) which is proportionate to a preliminary assessment of the strength of claim and of the seriousness of potential impact(s).

Accommodation: Measures to avoid, minimize, compensate for or otherwise address potential adverse impacts.

5) Principles

The following principles will be applied to the interpretation and application of the policy:

Honour of the Crown: The B.C. government must act honourably in all its dealings with Aboriginal peoples.

Non-rights-determining: When considering asserted rights in the context of administrative decision-making, consultation by the provincial government does not finally determine whether a U.S. Tribe is an Aboriginal People of Canada nor determine the existence of any rights that may be held by the Indigenous group.

Evidence-based: Information is foundational for all aspects of the consultation process, and decisions will be grounded in credible historical and modern ethnohistoric evidence; this may include evidence provided by Indigenous groups in Canada. Information sharing will respect Indigenous knowledge and protect sensitive information.

Proportionality: Consultation processes are flexible and unique. Each situation will be calibrated based on an understanding of specific rights and potential impacts, while also considering strategic and policy drivers, supporting lawful decision-making while preserving flexibility within the provincial government's constitutional duties.

Distinctions-based: The B.C. government's relations and dealings with U.S. Tribes and other Indigenous Peoples will be conducted in a manner that acknowledges the specific rights, interests, priorities, and concerns of each, while respecting and acknowledging

these are distinct Peoples with unique cultures, histories, rights, laws, and governments. S. 35, recognizes and affirms the rights of Aboriginal Peoples of Canada, while all Indigenous Peoples have human rights that are expressed in the United Nations Declaration on the Rights of Indigenous Peoples. However, not all rights are uniform or the same among or between all Indigenous Peoples. As such, the B.C. government's relationship and engagement with U.S. Tribes may require different approaches and result in different outcomes than with First Nations in B.C. This distinctions-based approach is consistent with the SCC's recognition in *Desautel* that differences in circumstances, including where an Indigenous community is situated outside Canada, may reasonably result in different processes or outcomes in the application of Aboriginal rights.

Transparency with First Nations in B.C.: If requested by a First Nation in B.C., the B.C. government will aim to provide information to increase transparency where consultation with a U.S. Tribe is required.

Continuous improvement: Monitor performance, learn, adapt, and update policies and procedures as case law, legislation, and reconciliation implementation evolves.

6) Roles and responsibilities

Decision-making ministries and Statutory Decision-Makers (SDMs): Accountable for sufficiency of consultation prior to decision; lead and implement consultation processes in alignment with policy, including calibration of depth.

Ministry of Water, Land and Resource Stewardship (WLRS): Provide consultation policy and tools, supports analyses where appropriate, and management of digital consultation tools.

Ministry of Indigenous Relations and Reconciliation (IRR): Alignment of reconciliation commitments; leadership for government-to-government relationships and agreement negotiations.

Provincial regulatory agencies: Integrate policy guidance into decision-making processes; coordinate where deeper consultation is warranted.

Proponents: Provide timely, accurate information; implement mitigations and accommodations where assigned.

U.S. Tribes and First Nations in B.C.: Provide perspectives, information, and protocols; meaningfully engage in decision-making processes.

7) The policy

7.1 Triggering consultation

Consultation with a U.S. Tribe is initiated only where the Tribe provides sufficient information to demonstrate that it is:

- (a) an Aboriginal people of Canada; and
- (b) asserting specific Aboriginal rights protected under s. 35 of the Constitution Act, 1982.

Meeting this threshold for the purposes of consultation does not constitute recognition, affirmation, or validation of Aboriginal rights, title, or status, all of which remain subject to assessment, negotiation, and determination in accordance with applicable law.

To support the assessment of assertions of status as an Aboriginal people of Canada, the Tribe must provide credible evidence such as ethnographic records, use and occupancy information, oral histories, or documentation of kinship ties and shared identity with First Nations in B.C. that substantiate a historical and cultural connection to areas within what is now B.C.

To support the assessment of Aboriginal rights pursuant to s. 35, the Tribe must submit information describing the nature of the rights claimed and demonstrating their historical and contemporary continuity, including evidence of longstanding practice and cultural significance. It is the responsibility of the U.S. Tribe to provide sufficient, credible, and detailed information to substantiate a claim.

When the B.C. government receives an assertion of s. 35 rights by a U.S. Tribe, staff will consider whether the duty to consult is triggered and may seek legal advice as needed. If a duty to consult is triggered, staff will move forward with the consultation process.

7.2 Preparation

Once a consultation process is triggered, staff will undertake basic research and analysis to prepare relevant information, including identifying a project map, known land and resource interests, and contact details for the appropriate representative group.

7.3 Engagement

The nature and extent of consultation will vary with the circumstances. Consultation depth is a spectrum from notification through normal to deep and is calibrated by the strength of the information supporting the claimed rights, seriousness of potential impacts (for example magnitude, extent, duration, reversibility), cumulative effects, and other contextual factors (for example ongoing exercise of rights in Canada, dependence on exercise of these rights). Consideration of cross-border realities will inform the assessment of the appropriate level of consultation.

The B.C. government will assess each consultation process on a case-by-case basis. In most cases, initiating consultation at the lower end of the spectrum (notification) will likely be appropriate.

7.3.1 Communications

When the duty to consult is triggered, the B.C. government will notify the U.S. Tribe of the proposed project and invite their input. Staff may request further information related to any specific rights being asserted in relation to the project area or activity type. Staff may also ask U.S. Tribes for information about their engagements with First Nations in B.C. regarding their asserted or established rights in Canada.

The B.C. government will aim to increase transparency and information sharing with First Nations in B.C. when consultation with a U.S. Tribe is required.

The B.C. government will advise the proponent when a duty to consult a U.S. Tribe is triggered in relation to the proponent's application. The B.C. government may assign the procedural aspects of consultation with a U.S. Tribe to a proponent. If a proponent has indicated willingness to undertake the procedural aspects of consultation, the B.C. government may rely on those efforts (for example meetings, information sharing, discussing mitigations); however, the B.C. government is responsible for ensuring consultation, and accommodation where appropriate, is adequate. Staff may also provide advice to proponents on how to focus their engagement efforts.

Regarding confidentiality, the B.C. government will aim to be as transparent as possible, while respecting confidentiality considerations if they arise.

The B.C. government will maintain a complete administrative record; this may include providing written reasons for decisions at normal to deep levels, including how concerns were considered and addressed.

7.4) Accommodation

In accordance with *Haida Nation v. British Columbia (Minister of Forests)*, the scope and nature of accommodation are determined by a proportionality assessment that considers both the strength of the asserted or established Aboriginal claim and the seriousness of the potential adverse effects on Aboriginal rights or interests. Accommodation may include a range of practical measures, such as avoidance or mitigation of impacts; modification of proposed activities; commitments to undertake additional actions; a range of land or resource protection measures; and monitoring of impacts.

In the case of U.S. Tribes, consideration of cross-border realities will inform the assessment of the appropriate level of accommodation. Mitigation measures will be implemented in accordance with applicable legal obligations. Strategic measures, such as revenue sharing, will not be offered as accommodation. Capacity funding to support participation in the consultation process will not be provided to U.S. Tribes.