

Report on **What We Heard**

Summary of Engagement on U.S. Tribes Consultation Policy Development

Acknowledgement

We would like to extend our sincere thanks to the First Nations, First Nations' organizations and U.S. Tribes who participated in this engagement process. Your insights, experiences, and perspectives were invaluable in shaping our understanding of the issues and opportunities at hand. We deeply appreciate the time and thoughtfulness you brought to the conversation.

This report was gratefully produced in the territory of the Lekwungen-speaking peoples, the Songhees and Esquimalt Nations, who have stewarded this land since time immemorial.



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Introduction

This report summarizes what B.C. government staff heard from First Nations in B.C. during a two-phase process to gather input to inform the B.C. government's development of a policy which will guide how the B.C. government meets its legal obligations to consult U.S. Tribes. Phase 1 occurred from May to July 2025, and Phase 2 occurred from February to March 2026. Both phases focused on engaging with the affected First Nations in B.C. and First Nation organizations through written submissions and virtual meetings. In the second phase of engagement, the draft policy was also sent to U.S. Tribes who have asserted rights in B.C. as a notification and an opportunity to provide input.

Following Phase 2, the draft policy was revised based on feedback received and reviewed by the B.C. government for decision. The B.C. government will share the decision with First Nations in B.C., First Nation organizations, and U.S. Tribes with asserted rights in B.C.

The insights shared by participants in this process are foundational to understanding the impacts of the colonially imposed border. They reflect lived experiences, legal understandings, and community priorities that must inform the B.C. government's approach to consultation with U.S. Tribes. This report does not represent consensus or agreement, but rather reflects the diverse views, concerns, and recommendations expressed by participants.

The B.C. government has a legal duty to consult Indigenous Peoples when contemplating actions or decisions that may impact their Aboriginal rights and title. This duty extends to circumstances involving U.S. Tribes whose assertions may have implications for First Nations in B.C. In this context, the B.C. government must ensure that its approach to consultation is consistent with constitutional obligations, the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration), the Declaration on the Rights of Indigenous Peoples Act (Declaration Act), as well as the principles of reconciliation.

The Ministry of Water, Land and Resource Stewardship (WLRS) is leading this work as the coordinating body, in collaboration with other ministries, to develop a policy framework that supports a consistent, transparent, and rights-based approach to consultation with U.S. Tribes. The ministry's role includes facilitating engagement with First Nations and affected U.S. Tribes, gathering and summarizing input,

ensuring inter-ministry coordination, and developing a policy that reflects the complexity and significance of cross-border Indigenous relationships.

The B.C. government developed this policy through a two-phase engagement process. Initial engagement gathered perspectives from First Nations in B.C. to inform policy development, followed by review and feedback on a draft policy. First Nations in B.C. were engaged throughout both phases, while U.S. Tribes were notified of the draft policy and invited to provide written input.

Background

In *R. v. Desautel*, 2021 SCC 17 (Desautel), the Supreme Court of Canada (SCC) found that the Lakes Tribe of Colville Confederated Tribes located in Washington state, as a modern-day successor of the Sinixt people, are “an Aboriginal people of Canada” for the purposes of Section 35 of the Constitution Act, 1982 (s. 35). The SCC also confirmed the Lakes Tribe has an Aboriginal right to hunt and is entitled to assert Aboriginal rights in B.C. Knowledge of asserted or established Aboriginal rights triggers a duty on the Crown to consult Aboriginal people of Canada regarding potential impacts on their rights.

The SCC in Desautel raised complex and significant considerations regarding the recognition of s. 35 rights held by Indigenous groups residing in the United States, and the corresponding implications for Crown consultation. In particular, the Court signalled that consultation with U.S. Tribes may differ from consultation with Canadian-based First Nations and may require consideration of how to engage affected communities both within Canada and across the border.

Citing Desautel, the B.C. government has subsequently received assertions of Aboriginal rights from multiple U.S. Tribes. Current policy addresses how the B.C. government consults First Nations in Canada but does not contemplate how the B.C. government will address any legal obligations that may be owed to U.S. Tribes. A policy addressing this gap and reflecting the Desautel decision is needed and is the objective of this policy work.

First Nations in B.C. have raised important concerns regarding the assertions made by U.S. Tribes, particularly where those assertions may affect their rights, interests, and territories. The B.C. government is committed to responding to these concerns in a respectful and transparent manner, and to working in partnership with First

Nations in B.C. to clarify and co-develop a policy approach that reflects shared priorities and addresses the B.C. government's legal obligations.

Phase 1 Engagement

In May 2025, the B.C. government invited 58 First Nations in B.C. and First Nation organizations whose territories may be subject to overlapping assertions of Aboriginal rights by U.S. Tribes.

In this round of engagement there were 13 First Nations represented. Feedback was gathered from online meetings and written submissions. The process was guided by a set of questions set out in Desautel around the duty to consult. This report outlines the perspectives and interests that government heard.

The report is organized by three key topics emerging from the engagement:

- Topic 1: New Assertions of Section 35 Rights in B.C.
- Topic 2: Determining Duty to Consult and Scope of Consultation
- Topic 3: Determining Appropriate Accommodations

First Nations in B.C. were invited to review this What We Heard Report and the draft policy in the subsequent round of engagement.

New assertions of section 35 rights in B.C.

The SCC decision in Desautel affirms that Aboriginal communities located outside Canada can hold s. 35 rights. However, the court also notes that these rights may differ to those of communities within Canada due to varying historical, legal, and geographic contexts of U.S.-based Tribes. This section explores what some of those differing circumstances might be.

- Participants consistently agreed that the Van der Peet test, the framework for defining an Aboriginal right, remains unchanged by the Desautel decision
- The Van der Peet test is a legal test used by Canadian courts to decide whether an Indigenous practice, tradition, or custom is protected as an Aboriginal right under s. 35. In simple terms, the test asks:

- Was the practice a central and defining part of the Indigenous group's culture before contact with Europeans?
- Is the practice connected to the group's identity and way of life?
- Has the practice continued in some form over time, even if it has changed?
- If the answer to these questions is yes, then the practice may be recognized as a constitutionally protected Aboriginal right
- Participants largely agreed that differences may arise in how rights are exercised and if they need to be accommodated
- It was raised that U.S. Tribes are not Canadian Indian Act bands, and as such do not have rights in Canada; much in the same way that Canadian based Indigenous groups are not recognized by the U.S. government. It was also raised that assertions of Aboriginal title from a U.S. Tribe may not be compatible with Canadian legal standards. This is referring to the jurisdictional and legal mismatch between how Aboriginal title is recognized and asserted in Canada versus the United States. The Tribe may not meet the Canadian legal test for Aboriginal title. The Tribe may not be recognized as having legal standing under Canadian law
- Some participants stressed that the B.C. government should not be considering assertions from U.S. Tribes because it is an intergovernmental issue between First Nations. They stressed that the B.C. government is not the sole decision-maker in Indigenous homelands, and Indigenous governance and law should be respected. Their view is that the B.C. government is undermining Indigenous governance and sovereignty of First Nations in B.C. by considering assertions in their territories. They underscored that although U.S. Tribes may have kinship ties, this does not equate to holding governance rights in B.C.
- They also noted that Indigenous legal orders, oral histories, kinship relations, stewardship knowledge and cultural protocols are critical in assessing rights claims and should inform the application of the Van der Peet test. For example, the Indigenous governance principle of continuous occupation and the idea that only those living on the land can perform stewardship responsibilities
- Participants highlighted that early engagement of First Nations in B.C. is critical. They desire to be notified when assertions from U.S. Tribes are made in their territories. Early dialogue between the B.C. government and the relevant First

Nation(s) in B.C. can prevent misunderstandings and further foster reconciliation. They reiterated that engaging with First Nations in B.C. is essential to avoiding undermining their respective rights and jurisdiction

- In addition, they felt that decision-making processes around new assertions should include First Nations in B.C. The B.C. government should prioritize the rights and laws of First Nations in B.C. when considering assertions by U.S. Tribes
- They expressed the need for acknowledgement of their contemporary political dynamics. U.S. Tribes and First Nations in B.C. live under different legal systems and have experienced different colonial histories. Exclusion of First Nations in B.C. from this assertions process may undermine trust and reconciliation efforts with First Nations in B.C.

Determining duty to consult and scope of consultation

In Desautel, the SCC noted that, “Given the requirement of actual or constructive knowledge, the duty to consult may well operate differently as regards those outside Canada” (paragraph 33) and further stated that, “Because groups outside Canada are not implicated in [the process of reconciliation] 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” (paragraph 76).

The Haida framework establishes that the scope of consultation should be proportionate to the strength of the asserted Aboriginal or treaty right and the seriousness of the potential adverse impact on that right (paragraph 39).

In this context, participants were invited to consider whether there are general distinctions between Canada-based First Nations and U.S. Tribes (for example, geographic, legal, cultural, logistical or relational) that should inform how potential impacts to s. 35 rights are assessed.

Duty to consult

There were varied responses from participants on this topic:

- Several participating First Nations in B.C. flagged that U.S. Tribes are not subject to Canadian Crown sovereignty. As such, they are not part of Canada's reconciliation framework. It is their view that this legal distinction should affect the scope and nature of consultation, and that constitutionally protected rights of First Nations in BC should take precedence
- Participants consistently iterated that the duty to consult arises only when a credible claim is established. Consultation depth should be guided by the strength of the asserted rights and potential impacts, consistent with case law (for example, Haida Nation v. B.C.)
 - Some are supportive of consultation proportional to impacts
 - Others were supportive of meaningful consultation for all Indigenous Peoples, regardless of borders
 - Several First Nations emphasized the importance of respecting existing Indigenous laws and inter/intra-nation protocols, including deferring to local Indigenous governments for decisions about access for exercising Indigenous rights and land use without interference from the B.C. government
- Some First Nations in B.C. expressed frustration that U.S. Tribes making assertions in their core territories add further burden to First Nations in B.C., especially when they already face complex engagement requirements with their B.C.-based neighbors when they undertake projects "in their own backyard"
- There were concerns about the B.C. government consulting, or engaging with, U.S. Tribes without informing, or involving, First Nations in B.C. They highlighted a need for transparent process and communication. It was also raised that in some cases, the B.C. government consulting unilaterally with a U.S. Tribe may go against commitments in existing government-to-government agreements between the B.C. government and First Nations in B.C., where they exist

Overlapping territory and shared ancestry

- Several groups emphasized the importance of acknowledging shared ancestry and overlapping territories among modern-day successors, including those in

the U.S. and Canada. First Nations in B.C. may represent, or share governance, with U.S. Tribes due to familial or cultural ties

- There was strong support for maintaining respectful, Nation-to-Nation relationships with all successors, regardless of their current geographic location
- Participants re-affirmed the current approach, whereby consultation requirements are determined on a case-by-case basis
- Some groups called for transparent criteria to determine who should be consulted and how impacts to rights are assessed, especially when multiple groups assert connections to the same ancestral territory. The importance of understanding historical migration, displacement, and cultural continuity was highlighted as essential in assessing rights and impacts
- A few responses expressed concern that recognizing too many successors without clear criteria could dilute the rights of First Nations in Canada
- There was interest in collaborative models for consultation and decision-making that include both Canadian and U.S.-based successors where appropriate
- Participants recommended that the B.C. government defer to Indigenous law regarding access to territory and rights (for example, hunting). They stated that existing Indigenous protocols should be respected, especially when conflicts arise between groups. In cases of conflicting information, First Nations in B.C. should be prioritized and consulted for verification

Determining scope of consultation (strength of claim and seriousness of impacts)

- Some advocated sharing in a more transparent manner the information used to make decisions about the Crown's duty to consult, specifically strength of claim analysis. Beyond the citations of government-produced ethnohistoric reports, participants advocated including cultural and linguistic context, and requested review by First Nations in B.C. prior to decision making
- Participants stated that U.S. Tribes are not physically present in B.C. and may not be impacted by proposed activities to the same degree as First Nations in B.C. The seriousness of environmental and daily impacts from resource

extraction are more immediate and tangible for First Nations in B.C. Indigenous law emphasizes that stewardship and rights are tied to continuous occupation. Absentee claims (from outside Canada) should not carry the same weight in impact assessments

- There is concern that the absence of cumulative effects data from the portion of a U.S. Tribe's territory could lead to inappropriate consultation level and accommodations
- Several participants expressed the view that conservation may constitute a valid justification for the infringement of s. 35 rights, particularly in contexts of scarcity. In this context, they emphasized that accommodation measures should prioritize the exercise of First Nations' in B.C. rights, especially for food, social, and ceremonial purposes, over those asserted by U.S. Tribes

Determining appropriate accommodations

Collaboration on the development of accommodations is a central component of meaningful consultation, aiming to reconcile Crown and Indigenous interests where potential impacts to rights are identified. Participants were invited to consider how this process may differ for U.S. Tribes.

- One perspective was that any accommodation for U.S. Tribes should not infringe upon the rights of First Nations in B.C., and any proposal must be subject to early and meaningful engagement with the First Nations in B.C. who hold legal authority over the affected areas
- Another perspective was that those not residing in B.C. should not receive economic benefits from First Nations in B.C. lands and territories
- It was noted that U.S. Tribes are not implicated in Canada's reconciliation process to the same degree as First Nations in B.C. U.S. Tribes are not Indigenous governing bodies within Canada and therefore should not have governance or economic roles in the B.C. government's decision-making processes. As such, accommodation measures involving revenue-sharing or co-management are not appropriate

- Another Nation acknowledged the complexity of shared benefits and co-management in cross-border projects, noting implications for title and jurisdiction
- One participant asserted that the B.C. government should assess legitimacy of governance structures and avoid conflicting accommodations that undermine existing agreements
- Accommodations should only be considered where U.S. Tribes have rights or are impacted on lands in B.C. Impacts occurring solely in the U.S. (for example, downriver effects) should not trigger accommodation obligations from the B.C. government
- One Nation highlighted the disproportionate impacts on First Nations in B.C. living near the borders
- There was concern U.S. Tribes may already be engaged and accommodated through U.S. regulatory systems and benefit-sharing arrangements
- It was noted that sharing sensitive information or engaging U.S. Tribes in certain processes could pose risks to Canada's national security and international negotiations

Role of First Nations in B.C in consultation approach

- Some participating First Nations in B.C. felt they should be actively involved in designing and implementing consultation processes related to determining accommodations with U.S. Tribes
- Where consultation with a U.S. Tribe is required, a tripartite model was a suggested model for consideration. The proposed model was direct engagement between the First Nation in B.C. and the B.C. government and a separate bi-lateral process between the First Nation in B.C. and the U.S. Tribe, with facilitation if needed. The preference is to facilitate Nation-to-Nation dialogue to address overlaps and minimize conflict

Phase 2 Engagement

The B.C. government's engagement on the development of a U.S. Tribes consultation policy was designed as a two-phase process.

Phase 1 occurred from May to July 2025, during which the B.C. government engaged with affected First Nations in B.C.

Phase 2 took place from February to March 2026 and included engagement with First Nations in B.C., as well as notification to U.S. Tribes with an opportunity to provide written submissions. Engagement with First Nations in B.C. in both phases included virtual meetings, where requested, in addition to written submissions.

The feedback received through this process is summarized below and is organized into separate sections for First Nations in B.C. and U.S. Tribes.

Summary of First Nations' in B.C. feedback

Protection and prioritization of First Nations' in B.C. rights

Phase 2 engagement reinforced and deepened several themes from Phase 1 regarding the protection of First Nations' in B.C. rights in the context of U.S. Tribal assertions. The feedback generally reflected a shared concern that the B.C. government's approach to consultation with U.S. Tribes must centre around the constitutional rights of First Nations in B.C. and the Crown's reconciliation obligations to them. Key feedback from First Nations in B.C. included the following:

- First Nations' in B.C. rights are constitutionally protected under s. 35. Consultation with U.S. Tribes must not limit, redefine, or erode those rights
- Consultation with U.S. Tribes, if not carefully structured, could risk superseding or diluting First Nations' in B.C. rights, interests, or jurisdiction, including through resource access assertions in areas of potential overlap
- Decision-making related to cross-border assertions should prioritize reconciliation with First Nations in B.C. One perspective extended this prioritization to funding, resources, engagement, and accommodation
- Reconciliation and consultation approaches differ for Indigenous groups outside B.C. and Canada due to distinct colonial histories, legal systems, and relationships with U.S. governments. While the Crown's duty to consult may extend to such groups where s. 35 rights are asserted, participants asserted that the scope and manner of consultation should vary accordingly. These distinctions inform an approach that must prioritize and safeguard First Nations' in B.C. constitutionally protected rights
- U.S. Tribes occupy different legal and historical positions than First Nations in B.C., and consultation should reflect these differences. Relevant considerations may include governance structures, membership composition, physical presence in B.C., the potential to establish Aboriginal title in Canada, and the extent to which proposed activities may affect them
- Consultation may also account for the fact that U.S. Tribes do not reside in B.C., may be affected differently by proposed activities, and may already engage in U.S. regulatory processes addressing impacts to their interests

- First Nations in B.C. should not be left to navigate cross-border disputes alone. The B.C. government and federal government share responsibility for a coordinated intergovernmental approach, given that cross-border claims are fundamentally intergovernmental in nature
- Treaty-based rights, roles, and governance authorities are distinct and foundational and must be explicitly recognized within the policy

Transparency, early notification, and two-way communication

Transparency and communication emerged as a prominent theme in Phase 2, building on concerns raised during Phase 1 about the B.C. government consulting with U.S. Tribes without adequately informing or involving First Nations in B.C. Participants offered specific recommendations on how the B.C. government can improve its engagement practices including:

- First Nations in B.C. should be notified early when the B.C. government is engaging with U.S. Tribes on assertions that overlap their territories including when new assertions are received, not only when specific authorizations are being considered
- Following notification that a U.S. Tribe has asserted rights in an area overlapping a First Nation's in B.C. territory, First Nations in B.C. should have an opportunity to share information, context, and Indigenous knowledge that may inform the B.C. government's approach. This supports two-way communication and ensures First Nations' in B.C. perspectives are part of the process from the outset
- Some grounded this request in the UN Declaration (Articles 11, 18, 19, and 31), emphasizing that the B.C. government must not form its own understanding of Indigenous history, laws, or traditions without engaging the relevant First Nations in B.C.
- Engagement on overlapping U.S. Tribal assertions should be directed to First Nations' in B.C. leadership, not through referrals alone, to support clear, transparent, and effective communication on matters with potentially significant impacts
- Where multiple provincial agencies are engaging with a First Nation in B.C. on related matters involving U.S. Tribal assertions, they should coordinate to ensure communication is clear, consistent, and transparent

- The final policy should be publicly accessible and shared with First Nations in B.C. to maintain the B.C. government's commitment to transparency

Clarity and consistency in the consultation policy and in practice

Participants provided detailed feedback on the draft policy's approach to consultation scope, accommodation, and treaty rights. Responses reflected a diversity of perspectives, from those advocating for more restrictive approaches to U.S. Tribal consultation to those emphasizing process clarity and balanced engagement. There was broad alignment on the need for clear and consistent application of the policy across ministries, and recognition of the distinct positions of First Nations in B.C and U.S. Tribes.

Consultation scope and distinctions

Participants underlined that the policy should clearly define how differences between First Nations in B.C and U.S. Tribes are considered when determining the appropriate and consistent level of consultation. This includes establishing transparent criteria, such as governance structures, membership, physical presence in B.C., and the nature of rights asserted, to support predictable and uniform decision-making across cases.

- The policy should provide guidance on how to address uncertainties related to U.S. Tribes, including where governance structures or membership are not well understood, where Aboriginal title may not be established in Canada, and where the extent of cumulative or direct impacts is less clear or differs from those experienced by First Nations in B.C.
- The scope of the policy should be explicitly defined, including whether it applies across all provincial agencies or within specific mandates. It should also distinguish between the threshold for recognition as an Aboriginal people of Canada and the threshold for establishing specific section 35 rights
- The policy should clarify how participation by U.S. Tribes in U.S. regulatory processes is considered in assessing consultation requirements, including how differing positions between U.S. Tribes and First Nations in B.C on the same matters are understood and addressed to ensure consistent application

Scope and nature of accommodations

Participants highlighted that the policy should clearly define the scope and limits of accommodation measures for U.S. Tribes to ensure consistent, predictable, and transparent application, while safeguarding the rights and interests of First Nations in B.C.

- Accommodation measures for U.S. Tribes should be clearly bounded within the policy to avoid conflicts with existing treaties, government-to-government agreements, or arrangements that could exclude First Nations in B.C from associated benefits
- The policy should specify the types of accommodations that are considered appropriate and inappropriate. Participants emphasized that approaches such as revenue-sharing or co-management may not be suitable for U.S. Tribes, and that accommodations should focus on impacts occurring within Canada rather than downstream effects in the United States
- The policy should establish a consistent approach for considering whether U.S. regulatory processes already address impacts to U.S. Tribal interests, including when such existing processes may reduce or inform the need for additional provincial accommodation
- The policy should clearly state that accommodation with U.S. Tribes must not result in adverse impacts to First Nations in B.C or their territories, nor be interpreted as conferring governance authority or decision-making power within B.C.

Treaty rights and cross-agency consistency

Participants expressed that the policy should clearly recognize the distinct and foundational nature of treaty-based rights, roles, and governance authorities, and ensure they are consistently reflected in both policy and practice.

- Treaty-based rights, roles, and governance authorities should be explicitly and clearly articulated within the policy to support consistent understanding and application across all decision-making contexts
- The B.C. government should ensure alignment and coherence between this policy, related regulatory frameworks, and recent legislative reforms where treaty rights may be engaged. Clear coordination across provincial agencies is

necessary to provide First Nations in B.C with a consistent, predictable, and integrated approach

- The policy should adopt clear and consistent terminology, including the use of “Indigenous Peoples” and distinctions-based language where appropriate, while reserving “Aboriginal peoples” for section 35–specific references, in alignment with the Declaration Act

Role of First Nations in B.C in consultation and accommodation decisions

Participants stressed that the policy should clearly define the role of B.C. First Nations in informing consultation and accommodation decisions to ensure transparency, consistency, and respect for their governance systems and knowledge:

- The policy should establish that decisions related to strength of claim, scope of consultation, and potential accommodation are not made unilaterally by the B.C. government but are informed through engagement with First Nations in B.C, including consideration of their Indigenous laws, histories, and governance systems
- The policy should require early and consistent engagement with First Nations in B.C prior to making determinations on the strength of a U.S. Tribe’s claim, ensuring an opportunity to provide relevant context, including on successorship and historical relationships
- The policy should clearly state that the B.C. government will not independently interpret or define the histories, laws, practices, customs, or traditions of First Nations in B.C without direct engagement. It should also provide guidance on how Indigenous laws are considered in determining whether and how First Nations in B.C are involved in consultation processes with U.S. Tribes
- The policy should outline how input from First Nations in B.C is meaningfully incorporated into decision-making and clearly communicate how their identified needs are considered alongside the B.C. government’s legal obligations, recognizing the policy as an evolving framework informed by ongoing engagement

Summary

Phase 2 engagement with First Nations in B.C reinforced the importance of prioritizing and safeguarding their constitutionally protected section 35 rights in the development of a U.S. Tribes consultation policy. Participants emphasized that consultation with U.S. Tribes must not limit or adversely affect First Nations' in B.C rights, and called for clear distinctions between the two, particularly in relation to consultation scope and accommodation measures. Strong themes included the need for early notification, transparent and coordinated communication, and meaningful opportunities for First Nations in B.C to inform decision-making. Overall, feedback highlighted the need for a clear, consistent, and legally sound policy framework that prioritizes reconciliation with First Nations in B.C while addressing cross-border complexities.

Summary of U.S. Tribes' feedback

In April 2026, the draft policy was shared with U.S. Tribes that have asserted Aboriginal rights in British Columbia as notification and an opportunity to provide input. Written submissions were received from four U.S.-based Tribes and organizations. While each submission reflected the specific context and interests of the respective Tribe or organization, several common themes emerged.

Overall, responses expressed concerns with the draft policy and its alignment with legal obligations and existing frameworks. Feedback was broadly consistent across submissions, with Tribes identifying similar issues related to consultation approach, procedural requirements, and the policy development process.

Consultation approach and standard

A central theme across submissions was concern that the draft policy establishes, or may be interpreted as establishing, a lower standard of consultation for U.S. Tribes relative to First Nations in B.C. In particular, several respondents highlighted the inclusion of language suggesting consultation would generally begin at the lower end of the consultation spectrum, such as notification.

Respondents emphasized that the scope and depth of consultation should continue to be guided by established legal principles, including the strength of the asserted claim and the seriousness of potential impacts, rather than by the geographic location of the Indigenous group. Many submissions also noted the importance of recognizing U.S. Tribes as governments and indicated a preference for engagement approaches that reflect government-to-government relationships.

Threshold for triggering consultation

All submissions raised concerns regarding the evidentiary requirements set out in the draft policy for triggering consultation. Respondents noted that the requirement to provide detailed and comprehensive information in advance of consultation appears to establish a higher threshold than is applied to First Nations in B.C.

Several submissions expressed the view that this approach may blur the distinction between a preliminary assessment of a credible claim and a determination of rights. Respondents emphasized that, consistent with existing legal frameworks, a duty to consult should arise where the Crown has knowledge of a credible claim, rather than requiring proof of the claim at the outset.

Capacity and participation

The absence of capacity funding for U.S. Tribes was raised in all submissions as a potential barrier to meaningful participation. Respondents noted that engagement in consultation processes, particularly those involving complex technical, environmental, or legal considerations, requires adequate resources.

It was suggested that without appropriate support, U.S. Tribes may face challenges in fully engaging in consultation processes, particularly where multiple projects or processes are underway.

Alignment with legal and policy frameworks

Submissions consistently referenced the need for the policy to align with relevant legal and policy frameworks, including the UN Declaration, the Declaration Act, and key court decisions such as *Haida Nation v. British Columbia*, *R. v. Desautel*, and *Gitxaala v. British Columbia*.

Respondents highlighted the importance of meaningful consultation conducted in good faith and noted that principles such as free, prior, and informed consent and the recognition of cross-border Indigenous relationships should inform the B.C. government's approach.

Policy development process

Some submissions identified concerns with the process used to develop the draft policy, including the timing and extent of engagement with U.S. Tribes.

Respondents indicated a preference for earlier and more direct involvement in policy development and expressed interest in opportunities for ongoing dialogue and co-development.

Additional considerations

Several additional themes were raised across submissions, including the need for greater clarity regarding the range and nature of potential accommodation measures, the importance of transparency in how information is shared and decisions are made, and the consideration of transboundary impacts, particularly in relation to shared watersheds and natural resources.

Summary

While perspectives varied in emphasis, submissions from U.S. Tribes reflected a high degree of alignment on key issues. Feedback indicates a shared interest in ensuring that the policy provides a clear, consistent, and legally sound framework

for engagement, and that it supports meaningful participation by U.S. Tribes in processes that may affect asserted Aboriginal rights in B.C.

Considerations for policy development

Feedback from both First Nations in B.C and U.S. Tribes highlights the complexity of developing a policy that addresses cross-border Indigenous rights within B.C.

First Nations in B.C consistently emphasized the importance of protecting and prioritizing their constitutionally recognized rights, interests, and governance authority within the B.C. government. Many expressed concern that consultation with U.S. Tribes should not diminish, override, or create uncertainty with respect to their rights, territories, or existing relationships with the Crown. There was also a strong expectation for early, ongoing, and transparent engagement with First Nations in B.C where overlapping assertions arise.

Submissions from U.S. Tribes emphasized the need for consultation processes that are consistent with established legal principles where the duty to consult is triggered. These submissions highlighted expectations for meaningful engagement that reflects applicable jurisprudence and recognizes cross-border Indigenous relationships.

Feedback from both groups contributed to the B.C. government's understanding of key issues. Policy refinements were informed primarily by operational and process-related considerations raised through engagement with First Nations in B.C, while submissions from U.S. Tribes largely focused on legal considerations that are reflected in the B.C. government's application of existing legal frameworks.

Taken together, these perspectives reinforce that the B.C. government must ensure its approach is grounded in its constitutional obligations. This includes prioritizing its obligations to First Nations in B.C within the context of reconciliation, while also recognizing that a duty to consult with U.S. Tribes may arise where there is knowledge of a credible assertion of section 35 rights and potential adverse impacts.

In this context, the B.C. government's role is to apply established legal frameworks to determine when a duty to consult is triggered and to ensure that any consultation carried out is proportionate and appropriate to the circumstances, and does not adversely affect the rights of First Nations in B.C. The policy is intended to provide clarity on how these obligations will be met in practice, without extending beyond what is required under current law.

This balance will continue to inform the implementation of the policy, alongside evolving jurisprudence and ongoing engagement with First Nations in B.C.

Appendices

Engagement process overview

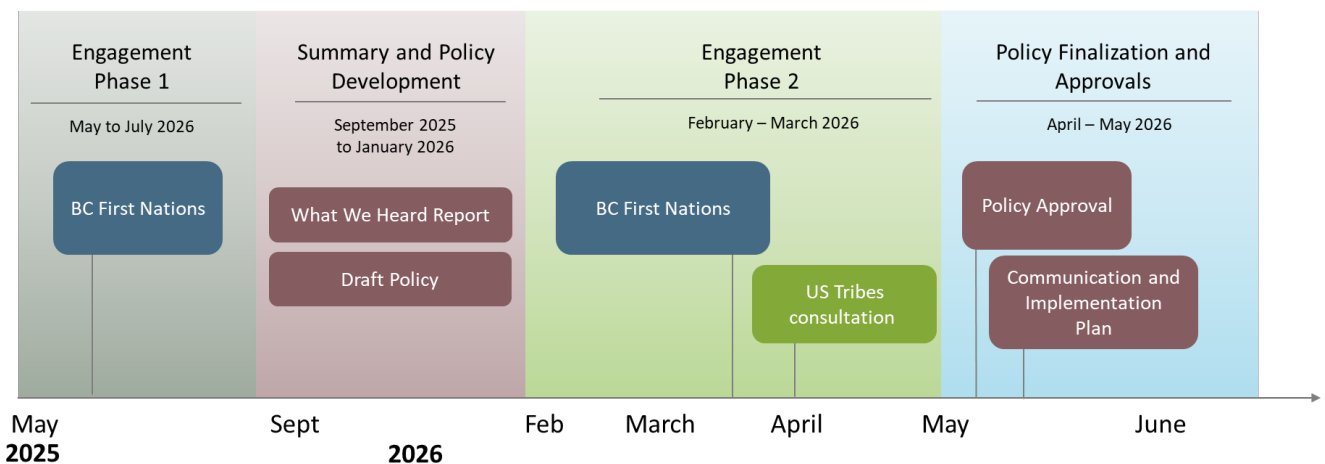
Policy development and engagement process

The development of the policy on consultation with U.S. Tribes included two phases of engagement with First Nations in B.C.:

- Phase 1 (May–July 2025): Early engagement to gather perspectives from B.C. First Nations through written submissions and virtual meetings
- Phase 2 (February–May 2026): Engagement on a draft policy, including feedback from First Nations in B.C. and notification to U.S. Tribes with an opportunity to provide written input

An overview of the policy development process and timeline is provided below.

Project Timeline



Phase 1: Early engagement (complete)

- 58 First Nations in B.C. and First Nation organizations were invited to participate based on overlaps between their consultation areas and lands asserted by U.S. Tribes

- Virtual meetings were offered to 18 First Nations based on treaty status, prior engagement, or known connections to asserting U.S. Tribes; additional meetings were held upon request
- Invitation letters were sent on May 26–27, 2025, including background on the Desautel decision and key policy questions
- Written submissions were requested by July 4, 2025, with an extension to July 18 upon request
- Feedback from Phase 1 informed the draft policy and is summarized in the “What We Heard” report

Phase 2: Engagement on draft policy

- In February 2026, the same 58 First Nations in B.C. and organizations were invited to review and provide feedback on the draft policy
- In April 2026, the draft policy was shared with 14 U.S. Tribes as notification, with an opportunity to provide written submissions
- Written input was received from four U.S. Tribes or affiliated organizations

Finalization

Following Phase 2, the B.C. government revised and finalized the policy. The final policy will be shared with affected First Nations in B.C., First Nation organizations, and U.S. Tribes that have asserted rights in B.C.

Phase 1: Policy questions

Assertions of Section 35 rights

The Supreme Court of Canada's decision in *Desautel* affirms that Aboriginal communities located outside Canada can hold section 35 rights. However, the Court also notes that their circumstances may differ from those of communities within Canada, which can influence how these rights are understood and applied. This section explores what some of those differing circumstances might be, particularly in relation to U.S.-based Tribes and their connections to lands and communities in B.C.

1. What are some differences in circumstances for communities outside of Canada, compared to communities within B.C., that may be relevant to how we understand the Aboriginal rights of U.S. Tribes?
2. Are there any ways in which an assertion of rights by a U.S. Tribe should be considered differently from an assertion by a First Nation in B.C.? Are there specific principles or guidelines?
3. When the B.C. government receives a new assertion of section 35 rights by a U.S. Tribe, what types and sources of information should be considered?

Reconciliation, consultation and a distinction-based approach

The Court in *Desautel* posed that "Given the requirement of actual or constructive knowledge, the duty to consult may well operate differently as regards those outside Canada" (paragraph 33) and further stated: "Because groups outside Canada are not implicated in [the process of reconciliation] 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" (paragraph 76).

4. In what ways might U.S. Tribes not be implicated in the process of reconciliation with the Crown to the same degree?
5. What are some relevant considerations that might inform a different approach to the section 35 consultation process with U.S. Tribes as compared to consultation with First Nations in B.C.?

Scope of consultation

The Haida framework sets out that the scope of the consultation required is “proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed” (paragraph 39).

6. Are there any general distinctions between Canada-based First Nations and U.S. Tribes that should inform the assessment of potential impacts to their respective section 35 rights?

For example, how might the location of U.S. Tribe communities inform the assessment of impacts?

7. Where the systems of Indigenous law and governance of Canada-based First Nations and U.S. Tribes may be shared or overlap, what mechanisms or approaches could be used to ensure that these systems are respected during the processes of consultation by the Crown? What do you see as the role of First Nations in this process?

Accommodations

8. Collaboration on the development of accommodations is a key component of consultation that seeks to reconcile Crown and Indigenous interests. If U.S. Tribes are not implicated in the process of reconciliation to the same degree, how might this impact the development of accommodations for impacts to the rights of U.S. Tribes compared to accommodations for impacts to the rights of First Nations in B.C.?

Report writing methodology

Theming approach

Given the qualitative nature of the data, we used a structured theming process to identify and organize key insights. This process involved both AI-assisted analysis and human interpretation to ensure depth, accuracy, and contextual sensitivity.

1. Initial AI-based theming

Using natural language processing, AI tools were applied to group responses by question and detect patterns in language, sentiment, and frequently mentioned topics. The AI generated preliminary themes by clustering similar ideas and highlighting commonly used terms and phrases

2. Manual thematic refinement

Analysts then reviewed the AI-generated themes to:

- **Validate** the relevance and coherence of each theme
- **Refine** theme labels to better reflect the language and intent of participants
- **Merge or split** themes as needed to capture nuance or distinguish between overlapping ideas
- **Identify outliers or unique perspectives** that may not have been prominent but were important to include

3. Integration across questions

Once themes were finalized within each question, cross-cutting themes were identified across the dataset. This helped surface broader insights and systemic issues that emerged across multiple areas of discussion

This approach ensured that the analysis was both scalable and sensitive to the richness of qualitative input, allowing for a balanced representation of common and diverse viewpoints.

Participants by phase

Engagement phase 1

First Nations in B.C. that provided input in the engagement phase 1, through written response and/or virtual meetings:

- yaqan nuʔkiy
- Malahat Nation
- Musqueam Indian Band
- Okanagan Nation Alliance, including the following First Nations:
 - Lower Similkameen Indian Band
 - Okanagan Indian Band
 - Osoyoos Indian Band
 - Penticton Indian Band
 - Upper Nicola Band
 - Westbank First Nation
- Tahltan Central Government
- Tsawwassen First Nation
- ʔakisq̓nuk First Nation
- ʔaq̓am

Engagement phase 2

First Nations in B.C. that provided input through written response and/or virtual meetings:

- Ktunaxa
- Malahat Nation
- Musqueam Indian Band
- Okanagan Nation Alliance
- Semiahmoo First Nation
- Shuswap Nation Tribal Council
- Tahltan Central Government,
- Taku River Tlingit First Nation
- Tsartlip First Nation
- Tsetsaut Skii Km Lax Ha Nation
- Tsawout First Nation
- Tsawwassen First Nation

A total of **18 U.S. Tribes and tribal organizations** were invited to participate in phase 2 engagement on the draft U.S. Tribes Consultation Policy.

Correspondence was sent to the following 18 U.S. Tribes and tribal organizations:

- Central Council of the Tlingit and Haida Indian Tribes of Alaska
- Chilkat Indian Village
- Craig Tribal Association
- Douglas Indian Association
- Hydaburg Cooperative Association
- Ketchikan Indian Community
- Klawock Cooperative Association
- Lummi Nation
- Metlakatla Indian Community
- Organized Village of Kake
- Organized Village of Kasaan
- Organized Village of Saxman
- Petersburg Indian Association
- Southeast Alaska Indigenous Transboundary Commission
- Sinixt Confederacy
- Sitka Tribe of Alaska
- Wrangell Cooperative Association
- Yakutat Tlingit Tribe

The following U.S. Tribes and organizations provided written responses:

- Central Council of the Tlingit and Haida Indian Tribes of Alaska
- Ketchikan Indian Community
- Southeast Alaska Indigenous Transboundary Commission
- Sinixt Confederacy