

## **1 SCOPE**

### **1.1 Authority**

This policy is approved by Cabinet under the authority of General Administration Manual (GAM) Policy 1.1, Section 2.1.4 - Maintenance of General Administration Manual. This policy may be amended in accordance with GAM Policy 1.1.

### **1.2 Application**

This policy applies only to departments as defined in GAM Policy 1.1<sup>1</sup>, excluding the Legislative Assembly Office and the Workers Safety and Compensation Board.

This policy applies in any situation in which the Government of Yukon has, or may have, a legal obligation to consult, and possibly accommodate, an Indigenous government<sup>2</sup>.

This policy applies to any decision or action made by or on behalf of the Government of Yukon that has the potential to adversely impact an established or asserted Indigenous right (including title). This policy also applies to consultation that is otherwise required by a statute, treaty (i.e. a Yukon First Nation Final Agreement, the Yukon Transboundary Agreement within the Gwich'in Comprehensive Land Claim Agreement, the Inuvialuit Final Agreement, or Treaty 11) or other agreement (e.g. a Yukon First Nation Self-Government Agreement).

This policy does not apply:

- retroactively, or
- to decisions or actions that are either not likely to adversely impact an Indigenous right or to processes which do not involve a legal consultation obligation.

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<sup>1</sup> [Government of Yukon. General Administration Manual, Volume 1: Corporate Policies – General. Policy 1.1: Maintenance of General Administration Manual.](#)

<sup>2</sup> For the purposes of consultation, "Indigenous government" refers to both elected Indigenous governments and entities that are formally designated to represent individual Indigenous rights-holders (i.e. Gwich'in Tribal Council, Tetlit Gwich'in Council, Inuvialuit Regional Corporation, Inuvialuit Game Council, and the Tahltan Central Government) but does not include Indigenous advocacy organizations such as the Assembly of First Nations, the Council of Yukon First Nations (other than in specific limited circumstances identified in statutes, treaties, and self-government agreements), the Kaska Dena Council (now dissolved) or boards, committees or councils established to represent community interests (e.g. Renewable Resource Councils).

This policy may not apply when a representative of a Crown government has declared an emergency in accordance with applicable legislation or otherwise identified the need for actions to be taken on an expedited basis in the public interest. If a decision or action that would typically be subject to this policy is carried out during an emergency, the Yukon government will advise the affected Indigenous government(s) as soon as practicable.

This policy will be reviewed and updated periodically, and as needed to reflect evolving case law.

### **1.3 Interpretation**

In Canada, Aboriginal rights are protected by the Constitution of Canada. The term “Aboriginal rights” comes from Section 35 of the *Constitution Act, 1982* and refers to the collective inherent rights that flow from practices, traditions and customs that are integral to the distinctive cultures of Aboriginal Peoples and that were practiced prior to contact with Europeans. Aboriginal rights vary among groups of Aboriginal Peoples, although common examples include hunting, fishing, gathering, and trapping (or generically, “harvesting”) on ancestral lands. “Aboriginal title” is a specific type of Aboriginal right; it is a communal right to exclusively use, benefit from and occupy land, similar in principle to fee simple title but without conferring individual ownership. “Established rights” include both “treaty rights” (i.e. Aboriginal rights that have been recognized in historic and modern treaties, which are legally binding agreements made between Aboriginal Peoples and the Crown) and Aboriginal rights that have been recognized in court decisions. Some Aboriginal Peoples claim Aboriginal rights and/or Aboriginal title that have not been established in a treaty or by a court; these are referred to as “asserted” Aboriginal rights and “asserted” Aboriginal title. Both established and asserted Aboriginal rights may be the subject of consultation.

In this policy and supplemental materials, the term “Indigenous” is used in place of “Aboriginal” as a more modern equivalent. For greater clarity, references to “Indigenous rights” are references to “Aboriginal and treaty rights” as set out in the *Constitution Act, 1982*, and may be further distinguished as “asserted Indigenous rights” and “treaty rights”.

Through evolving case law, it has been recognized that the Crown<sup>3</sup> has a legal duty to consult, and potentially accommodate, Indigenous rights-holders when contemplating conduct that may adversely impact the exercise of established and/or asserted Indigenous rights. Specific consultation obligations are also written into treaties, legal agreements, legislation, and regulations; such obligations are not necessarily connected to potential adverse impacts to Indigenous rights. In certain instances, the duty to consult and accommodate may also extend to Crown or statutory organizations authorized by legislation to make final decisions on behalf of the public government.

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<sup>3</sup> An executive branch of a federal or provincial government in Canada. In the Yukon, the territorial government is part of the federal Crown.

The Supreme Court of Canada has also established that the specific requirements of the duty to consult and accommodate must be guided by the context. The duty to consult exists on a spectrum, from a low level of consultation to deep consultation. In determining what part of this spectrum applies in any context, consideration must be given to the strength of the evidence supporting any asserted rights, the nature of the rights and the severity of the potential adverse impact of a Crown decision or action on the rights.

## **1.4 Purpose**

The purpose of this policy is to provide departments with clear and consistent direction about how to discharge the Government of Yukon's consultation and accommodation obligations to Indigenous Peoples for potential adverse impacts to Indigenous rights and/or in accordance with its constitutional and legal obligations.

This policy does not create, abrogate, interpret or define any Indigenous rights; nor is it intended to encompass all measures taken by the Government of Yukon to advance reconciliation or understand or address Indigenous governments' interests in the Yukon.

Additionally, Yukon government departments may continue to pursue other forms of government-to-government relationship building or collaboration as appropriate.

# **2 POLICY**

The Government of Yukon is committed to the overall objective of reconciliation.

The Government of Yukon recognizes that it has a duty to consult, and potentially accommodate, Indigenous governments when proposed Yukon government decisions or conduct may adversely impact the exercise of Indigenous rights in the Yukon. The Government of Yukon also recognizes that additional consultation obligations have been established in treaties, statutes, contracts, court orders, other agreements applicable in the Yukon, and in common law.

## **2.1 Consultation**

The Government of Yukon will make reasonable efforts to consult Indigenous governments in a meaningful way in advance of making a decision or taking an action which may adversely impact their Indigenous rights in the Yukon. The Government of Yukon will also consult as stipulated in treaties, legal agreements, court orders and statutes that are applicable in the Yukon. The specific activities that constitute meaningful consultation and accommodation will be informed by the context and must be determined on a case-by-case basis.

The duty to consult is triggered when the Yukon government has knowledge of an Indigenous right and is contemplating a decision or action that might adversely impact that right. The duty to consult is owed to the Indigenous government(s) whose rights and traditional territory coincides with the geographic area where the potential adverse impact may occur, or as explicitly committed to in a treaty, agreement, or statutory instrument.

The Government of Yukon may have a duty to consult with more than one Indigenous government in relation to a particular decision or action. This may come about due to collective or jointly held Indigenous rights or title; or because of potential adverse impacts to Indigenous rights or title in overlapping traditional territories or in adjacent traditional territories. The Yukon government will consult separately with each potentially impacted Indigenous government, unless two or more Indigenous governments agree to a multi-party consultation process.

Although the Yukon government generally consults with (and accommodates if necessary) an Indigenous government as the representative of a group of Indigenous rights-holders, in situations where a deeper level of consultation is warranted, and the Indigenous government requests that the consultation process include community consultation, the Yukon government must consider whether consultation with the individual Indigenous rights-holders themselves (i.e. community consultation) is appropriate, and must provide rationale for its decision in this regard.

The duty to consult is to be understood and applied along a spectrum, which ranges from providing notification of a proposed decision/action at one end, to undertaking significant dialogue and exchanging detailed information and views at the other end. Consultation processes will be conducted at a level that is reflective of the nature and scope of the Indigenous rights at issue. This includes the Yukon government's awareness of a proximal site of significance to the Indigenous government, and the potential severity of adverse impacts on Indigenous rights in relation to the specific decision or action that triggered the consultation. For some proposed decisions, consultation may be carried out through a continuum of stages of decision-making, which may involve more than one Yukon government department or decision-maker, or a third party.

Consultation requires that the Yukon government reasonably inform the Indigenous government whose exercise of rights may be adversely impacted about the proposed decision or action in advance of making the decision or taking the action. Through meaningful consultation, the Yukon government is seeking to gather, consider, and respond to the relevant perspectives and concerns raised by the Indigenous government about potential adverse impacts to their rights. This requires a two-way flow of information between the Yukon government and the Indigenous government, such that there is a reciprocal responsibility of Indigenous governments to participate in the consultation process. Both parties must conduct consultation in good faith and attempt to reach a mutual understanding of potential impacts to Indigenous rights and appropriate accommodations for any such impacts, which will inform decision-making about whether, and under what conditions, to proceed with the proposed decision or action.

The Yukon government must balance the need to conduct meaningful consultation with its legislated requirements including applicable statutory timelines. Staff should be aware of these timelines and any provisions for their extension and bring this to the attention of the decision-maker if it appears that consultation may not be completed within the statutory timeline.

When a consultation process concludes, the Government of Yukon will communicate to Indigenous governments how their views were considered in relation to the proposed decision or action and, where applicable, how potential adverse impacts to the affected rights were addressed. The level of detail provided should be commensurate with the level of the consultation.

## **2.2 Duty to Accommodate**

In some circumstances, the consultation process may reveal that the Government of Yukon has a related duty to accommodate when potential adverse impacts to Indigenous rights are identified in relation to the proposed decision or action. Accommodation is a means of addressing concerns and reconciling interests related to the potential adverse impacts of the decision or action that triggered consultation. The Yukon government will be open to considering and discussing potential accommodations during the consultation process, although consultation may not always result in the need for accommodation. When determining an appropriate accommodation, the Government of Yukon must balance the need to address the concerns of Indigenous governments about impacts to their rights with the collective interests and rights of all Yukoners.

Accommodations should be proportionate to the severity of the potential adverse impact to rights and should be connected to the nature of the impact when possible. As such, determining the appropriate accommodation(s) involves using what was learned about the potential impacts to Indigenous rights during consultation and making reasonable efforts to avoid, eliminate or minimize adverse impacts on those rights. When it is not possible to avoid, eliminate, or substantially minimize adverse impacts, other accommodations may be needed to address any residual adverse impacts on the exercise of Indigenous rights.

Determining appropriate accommodation measures requires both parties to make reasonable efforts in good faith to identify mutually satisfactory accommodations for the potential adverse impacts. The determination and/or implementation of accommodations may include the involvement of a third party (e.g. a proponent); however, the Yukon government is responsible for ensuring that the agreed-upon accommodation(s) are undertaken if they are being relied upon to fulfill its duty to accommodate.

Accommodations must be determined on a case-by-case basis, and do not generally deal with past actions. Accommodations for potential impacts to asserted Indigenous rights must not infringe on established Indigenous rights. Where the potential adverse impacts cannot be reasonably accommodated, the Yukon government may decide not to approve or proceed with the decision or action.

## **2.3 Joint Consultation**

The Government of Yukon may elect to coordinate or collaborate on consultation and accommodation activities with another government representative(s) of the Crown that has consultation obligations. Where there are areas of overlapping jurisdictions or responsibilities, the Yukon government may work with the other government representative(s) of the Crown to develop and implement a joint approach, which may include determining the Indigenous rights subject to consultation, the process to be used and appropriate accommodation measures.

If joint consultation occurs, the Yukon government may rely upon the associated consultation and accommodation activities but remains responsible for discharging its own duty to consult and, where necessary, accommodate, and ensuring any joint consultation processes are sufficient to meet this obligation or taking the additional steps that are necessary to do so.

## **2.4 Delegation and Reliance**

The Government of Yukon may choose to delegate some procedural aspects of consultation and accommodation to a third party (e.g. a proponent). Examples of procedural aspects that may be delegated include but are not limited to: relationship building activities; holding information sessions; undertaking studies or surveys; and undertaking mitigation measures and other forms of accommodation. The Yukon government may consider and rely upon engagement, consultation and accommodation activities carried out by the delegated third party (including those undertaken in accordance with legislative requirements or regulatory processes), as well as the information gathered through these activities, to help fulfill its duty to consult and accommodate.

The Yukon government may rely upon processes carried out under statutes that are applicable in the Yukon, and by Boards appointed under statutes that are applicable in the Yukon (e.g. the *Yukon Environmental and Socio-economic Assessment Act* and Yukon Environmental and Socio-economic Assessment Board; the *Waters Act* and Yukon Water Board) to inform consultation and accommodation discussions with respect to potential adverse impacts to Indigenous rights; but if doing so, must confirm that the duty to consult has been adequately discharged and conduct further consultation as necessary.

The Yukon government acknowledges that it bears responsibility for fulfilling the duty to consult when consultation is required. When delegating procedural aspects to a third party, at a minimum, the Yukon government will identify and provide direction regarding the Indigenous government(s) to whom a duty to consult is owed, the Indigenous rights that may be adversely impacted by the proposed decision or activity and the level of consultation that should be carried out. If the Government of Yukon intends to rely upon engagement, consultation or accommodation activities undertaken by a third party to support its decision-making and to fulfill its duty to consult and accommodate, in whole or in part, it must make that clear to the Indigenous government(s) to be consulted, in

advance of the consultation, and must satisfy itself that the duty has been adequately met or take additional steps to meet this requirement before consultation is concluded.

## **2.5 Engagement**

Legally-required consultation is not the same as public, stakeholder, or government-to-government engagement. The Yukon government uses the term 'engagement' to refer to planned processes to share information, gather input for use in decision making, and/or collaborate to develop programs, policies and/or procedures. Such engagement processes are different from, but complementary to, carrying out the duty to consult, which is specifically about identifying and potentially accommodating for impacts to Indigenous rights. However, the Yukon government may rely on information gathered through an engagement process when determining or discharging its duty to consult and potentially accommodate.

The Yukon government may choose to engage with Indigenous governments to inform its decision making and actions, prior to identifying a duty or obligation to consult. In particular, departments should consider engaging with Indigenous governments on matters that relate to the governance authorities or responsibilities that have been recognized in the self-government agreements, and as a means of building positive government-to-government relationships.

At times, an engagement process may lead to the recognition of a duty or obligation to consult. In these situations, departments should make it clear to the Indigenous government that because a duty or obligation to consult has been identified, the Yukon government is initiating consultation either in place of or in addition to the engagement process, as appropriate. Engagement may also intentionally occur during or after a consultation process regarding matters related to the decision or action that do not involve potential adverse impacts to Indigenous rights or accommodations for such impacts.

## **2.6 Consultation and Engagement Records Management System and Records**

The Consultation and Engagement Records Management System is the web-based platform used by the Government of Yukon to support communicating with Indigenous governments during engagement and consultation processes and to create and store associated records in accordance with applicable information and records management policies and legislation.

Substantive consultation and engagement records in the Consultation and Engagement Records Management System will be held until the defined retention period, identified in the applicable records schedule, has been met. The records that are saved in the Consultation and Engagement Records Management System are subject to the *Access to Information and Protection of Privacy Act* and any other applicable legislation and legislative instruments.

## **2.7 Agreements about Consultation Processes**

The Government of Yukon may enter into agreements with Indigenous governments and/or other parties (e.g. the Government of Canada) to establish or clarify aspects of a consultation process related to a specific decision or action, insofar as they remain consistent with this policy. The Yukon government will seek to develop project-specific consultation plans to guide consultations carried out at the higher end of the spectrum, in advance of the consultation process.

## **3 ROLES AND RESPONSIBILITIES**

### **3.1 All Departments**

All departments must carry out consultation processes with Indigenous governments in accordance with this policy. This responsibility involves identifying whether and to what extent there is an obligation to consult when executing departmental mandates, and ensuring such obligations are met, including seeking legal advice and legal opinions from the Department of Justice, Legal Services as necessary.

All departments must use the Consultation and Engagement Records Management System (once available) to communicate with Indigenous governments for the purpose of consultations and engagements, which includes identifying and recording consultation obligations and decisions about whether to engage for good governance purposes when a consultation obligation has not been identified. This responsibility includes documenting efforts and activities in accordance with applicable information and records management policies and legislation to ensure that a complete and accurate log of every consultation and engagement is recorded in the Consultation and Engagement Records Management System. Departments must include the Consultation and Engagement Records Management System in search plans when responding to an access request and respond with any responsive records found therein.

Departments must contact the Policy and Consultation Branch of the Aboriginal Relations Division, Executive Council Office, to advise of the need to change or create spatial data related to Indigenous governments for integration into the Yukon government's geospatial data sets if appropriate; and for assistance with using historical use and occupancy information to assess and inform consultation and accommodation obligations. Spatial data received during an engagement or consultation process must be provided to Aboriginal Relations for potential inclusion in the Consultation and Engagement Records Management System.

Departments must contact the Executive Council Office, Aboriginal Relations Division (Policy and Consultation Branch) and the Department of Justice, Legal Services, if an Indigenous government makes what they believe to be a new assertion of Indigenous rights.



### **3.2 Policy and Consultation Branch, Aboriginal Relations Division**

The Policy and Consultation Branch will develop corporate policies and supplemental materials including guidance, strategies, tools, templates, and training on the Yukon government's obligations pertaining to consultation and accommodation and provide related advice and guidance to departments as needed. This responsibility includes supporting all departments in using the Consultation and Engagement Records Management System and, in coordination with Legal Services, using historical use and occupancy information to assess and inform consultation and accommodation obligations.

The Policy and Consultation Branch has additional responsibilities as a guardian of spatial data and information that relates to Indigenous rights and title and in supporting the administration and updating of the Consultation and Engagement Records Management System.

### **3.3 Department of Justice, Legal Services**

Legal Services is responsible for providing legal advice and opinions to departments on fulfilling the Government of Yukon's consultation and accommodation obligations.

Legal Services also represents the Government of Yukon when the adequacy of consultation and accommodation is challenged in court. In this capacity, Records Identification & Preservation Hold Notices sent to the deputy head of a department by Legal Services cover Consultation Records within the Consultation and Engagement Records Management System as well as all other relevant records.

### **3.4 Department of Highways and Public Works, Information Communications and Technology Division**

The Service Innovation and Support Branch is responsible for functional and technical oversight, management, and support related to the software on which the Consultation and Engagement Records Management System operates.

Geomatics Yukon of the eServices for Citizens Branch of Highways and Public Works is responsible for storing corporate spatial data and managing security, access and permissions capabilities related to the mapping applications and services used as part of the Consultation and Engagement Records Management System and other applications used to inform consultation and engagement, on behalf of the Policy and Consultation Branch of Aboriginal Relations.

Under service agreements with Aboriginal Relations, Geomatics Yukon provides support to develop and amend map layers and mapping applications related to Indigenous governments and peoples, as well as facilitate any other technical changes as requested.

## **4 QUESTIONS AND CONTACT**

For questions regarding this policy, contact the Director, Policy and Consultation with the Aboriginal Relations Division of the Executive Council Office.