

# ACFN Consultation Policy Document



# ACFN CONSULTATION POLICY

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## INHERENT RIGHTS AND CONSULTATIONS IN K'AI TAILE DENE TERRITORY

Athabasca Chipewyan First Nation (ACFN) are an Athabaskan-speaking people. We call ourselves K'ai Taile Dene, meaning “people of the land of the willow”, a reference to the delta of the Peace and Athabasca Rivers. We have used and occupied our traditional lands in the Athabasca region for thousands of years, hunting, trapping, fishing, and gathering to sustain ourselves from the lands, to carry out our livelihood and to practice and pass down our culture. Our traditional territory spans over many kms, see map of ACFN Consultation Notification Area.

Ancestors of the present-day ACFN, then known as the Athabasca Chipewyan Band, signed Treaty No.8 at Fort Chipewyan in 1899 in good faith, with the intent to share the land, not give it away. As Elder Rene Bruno stated in testimony at the Joint Review Panel Public Hearing for the Frontier Oil Sands Mine Project:

*Fred Daniels was an interpreter and there was a Mr. Conroy who was part of the treaty, and they -- he stated that before any -- before you come to our land you are to ask permission of us. Part of the agreement was that we would share the land, but if anything was -- a big development was to happen, they are to ask us for our permission.*

Elder Rene Bruno, 87

Today, ACFN members actively exercise Treaty rights on our traditional lands and carry out traditional activities, as our ancestors have for generations. We maintain our identity as K'ai Taile Dene by living from our traditional lands and maintain our culture by exercising traditional activities. Our hunters, trappers, gatherers, and fishers keep our connection to our traditional lands alive and pass down traditional knowledge to younger generations. Our youth are active on the land and exercise their Treaty rights.

K'ai Taile Dene, have lived in our *land* for thousands of years. Our rights to use our lands and resources, and the corresponding responsibility to protect them for future generations, are thus “inherent” and sacred. They flow from the Creator. ACFN decides how to exercise such rights and responsibilities through self-determination. ACFN has been self-determining since time immemorial and have always governed our lands in accordance with our own Indigenous laws, notwithstanding the Crown’s interference.

*I used to pray all in Dene, I prayed for all the elements. It’s an old prayer. We prayed by the lake, we thanked the creator for giving us all the air, water, land, plants, and all the spiritual people to help us and keep us safe in healthy. All the Dene around the great lakes up north and east and south and west: everything is inter-connected.*

*Way, way back our Dene people were boreal forest Dene, we are called the great lake Dene, great river Dene, great forest Dene. How our Dene used to walk all over this land, we were Dene people using our lands freely: our barren lands, forests, birch mountains. We never stayed in one place; we followed the caribou, and we fished in great lakes and rivers. At that time those laws of respect have always been there: to speak to truth, it was our word of honor to respect one another. We all trapped in the bush and met up with each other. Our land made us the people we are, and we were strong.*

-Elder Jimmy Henry Deranger, 72

## Consultations: A Matter of both Respect and of Law

Our inherent rights have been recognized and affirmed by Canada through section 35 of Canada's Constitution Act, 1982, which states that "the existing aboriginal and Treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." ACFN is an Aboriginal group within the meaning of section 35 of Canada's *Constitution Act, 1982*.

The Supreme Court of Canada has established that Aboriginal Peoples asserting Aboriginal and Treaty rights must be consulted and accommodated prior to occurrence of any decisions, conduct or activities that may have an impact on the rights and interests of Aboriginal peoples (the duty to consult). When this duty is delegated to parties engaged in development activities on ACFN territories, the parties must carry out and fulfill the duty to the standard required under Canada's common law.

In addition to requirements of consultation and accommodation under Canadian common law, Dene Law and international law also apply on ACFN territory. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) imposes additional standards under International Law, which requires that proponents and states obtain free prior and informed consent "*prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*" UNDRIP's Article 32(1) states that "*Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*"

*Everything comes from the land, and you got to take care of the land, otherwise it will die. Respect is very important, respect the land and what is part of the land: animals, plants, berries, birds, and fish etc. Knowledge is important and practice what you learned in your lifetime.*

## APPLICATION AND INTERPRETATION OF THE POLICY

This Consultation Policy (“Policy”) sets out the terms on which ACFN’s consent to a Proposed Activity in or affecting ACFN Traditional Territory may be obtained. This Policy applies to any and all land- and resource-use related decisions (“Proposed Activities” or “Proposed Activity”) potentially affecting the Aboriginal and Treaty Rights, Values or interests of ACFN within its Traditional Territory (Appendix 1). Values refers to cultural connections to, heritage values in, and spiritual uses of ACFN Traditional Territory (Values). For the purposes of this Policy, Proponents include private corporations or public governments, including municipal governments (“Proponent”).

For greater clarity, this Policy applies both to Proposed Activities and any other Crown decisions (including but not limited to permits or authorizations) that may directly or indirectly impact the constitutionally protected rights of ACFN and its members or the lands and resources on which they rely to exercise such rights. ACFN reserves the right to deal with Proposed Activities outside of ACFN Traditional Territory as they determine may be necessary or reasonable to protect its Traditional Territory.

This Protocol has been published by ACFN in August 2021. It applies to all consultation and accommodation processes going forward, until such time as ACFN withdraws or replaces it. This Protocol also applies to consultation and accommodation processes that began prior to August 2021, to the extent that the Protocol can be reasonably applied.

Notwithstanding the above, if ACFN has entered into a written agreement with the Proponent—such as an Impact Benefit Agreement or Accommodation Agreement—that sets out a consultation process and accommodation and/or ACFN's consent for a particular Proposed Activities or decision, that agreement will take priority over this Policy.

ACFN may specify that another process will apply in place of this Policy. Nothing in this Policy is to be interpreted to limit any consultation or accommodation obligations owed to ACFN by the Crown and/or any proponent. Notwithstanding anything in this Policy, ACFN retains the right to challenge any action or decision by the Crown or a proponent who fails to secure and maintain ACFN’s free, prior and informed consent. ACFN’s consent to any Proposed Activity is not to be construed as a waiver of its Aboriginal and Treaty Rights with respect to any other development or project.

## Accommodation and Consent: Pathway to a Respectful Relationship

This Policy sets out the terms on which ACFN's consent to a Proposed Activity in or affecting ACFN Traditional Territory may be obtained. The Policy ensures that consultation and accommodation engagements apply to and are triggered by every action or decision by any Proponent that might affect ACFN's Aboriginal and Treaty Rights, Traditional Territory, and Values. Consultation leading to accommodation must be completed in order to acquire ACFN's consent. Consultation leading to accommodation must include addressing all of ACFN's legitimate concerns about the Proposed Activity and its potential impacts. Where all such concerns are addressed, ACFN's consent may be set out in an Accommodation Agreement with Project proponents, with the Crown, or both.

A respectful relationship is an essential component to successful consultation and accommodation. Without a respectful relationship, there can be no consent. A respectful relationship requires an open and honest dialogue, and respect for ACFN Values. The Proponent must be committed to a successful long-term relationship with ACFN. Commitment to a long-term relationship will enhance mutual understanding and lead to a productive co-operative relationship that supports both ACFN and Proponent social, cultural, economic and environmental goals.

Canadian courts have repeatedly confirmed that all consultation must be carried out by the Crown (and to the extent they are delegated, by the Proponent) in good faith, with the intent to substantially address the concerns of the affected Indigenous people. Concerns are addressed through accommodation measures. Such measures include:

1. *preventing* impacts that can be fully prevented;
2. *mitigating* impacts that cannot be fully prevented;
3. *compensating* for impacts left over; and
4. *sharing* in upside benefits to reflect the sharing treaty relationship.

Consultation is thus the process that is to lead to the result of accommodation. Consultation on its own is merely the vehicle through which to take the journey; the measurement of its success is the destination of accommodation and consent.

**A Proponent must follow the consultation and accommodation requirement outlined for each and every one of their Proposed Activities.** In most cases, adherence to the Policy will lead to an accommodation agreement establishing ACFN's consent to the Proposed Activity, on specified

terms. A large-scale, long-term Project such as hydro, mining or forestry development will usually take the form of a long-term Impact Benefit Agreement. In contrast, a small-scale, short-term projects will usually take the form of a smaller scale agreement of more limited duration, such as an Accommodation Agreement. Cooperative arrangements are central to any process that recognizes shared decision-making and self-determination and potentially provides support and consent to mining-related Projects.

ACFN supports responsible development that provides sustainable and regenerative benefits to its people, and that is conducted in a manner that respects its Aboriginal and Treaty Rights and Values. The Consultation Policy will serve as a basis for Proponents to engage with ACFN in a respectful, productive, and non-adversarial manner.

*It's important to leave something behind and share with people. I saw my grandfather give away lots and then next time he hunted he always got something. I remember one time in a boat we camped, and he told me tomorrow morning we will go get our moose over there - sleep tonight and rest. Sure enough, we got it and he knew exactly where it was. I didn't believe him, I was surprised. He tried to teach me as much as he could: saying thank you; don't kill the cow moose, don't kill the mother. If you don't give thanks and pay respect it comes back to you in a negative way - you might go hunting and not get anything.*

-Elder Ricky Piche, 56

## K'ai Taile Dene Laws – Connection to our land

As K'ai Taile Dene, we have our own laws, which flow from our inherent collective and individual right to self-determination. K'ai Taile Dene laws reflect our Ancestors' teachings, traditions, and values. Just as the K'ai Taile Dene have been on our traditional territory for thousands of years, K'ai Taile Dene laws have existed on these lands for thousands of years.

The K'ai Taile Dene respect our past and our future. Like all Beings, we are part of the life cycle of the land, and as such, we have the right to properly nourish and heal our bodies from a land that is healthy. Everything is alive, and this Consultation Policy recognizes the inherent rights of water, land, and the Beings in and of the water and land to their rights of self-determination and peaceful existence.

Our *land* is a gift from the Creator and as such must be respected, nurtured, cared for and protected to ensure long-term sustainability and use for future generations. We take care of our land, and our *land* takes care of us. Our *land* is central to our identity as a Nation. We honour and respect our *land* by being stewards of the land, its resources, and all of its creatures for now and

for future generations. ACFN's designated and surveyed reserve lands represent only a small portion of our land. The reserves do not limit our rights, use or stewardship responsibilities to our land.

These K'ai Taile Dene laws apply on ACFN territory and are guiding principles for this Policy:

- Principle 1: Take care of the land
- Principle 2: Take only what you need
- Principle 3: Use everything you take
- Principle 4: Pay respect process
- Principle 5: Pay the land for what you take

*You pay the water when you travel: when you travel on the land you pay the land with tobacco, and when you make the fire and have picnic camp and you're done, you put a stick in the middle after you put water in the fire and rocks all around. When I first went to Carswell all the bones were piled in one place: it was all tied together, all the antlers, bones and everything in one place. When you killed a moose, you fed everyone; now today we just put it all in the fridge. Dene laws said that when a boy turned into a man with his first kill, they had a big feast, and everyone had some of the kill and it would give him good luck for life. Even if it was one chicken, they would feed all the Elders first. When the baby was born, they had the baby far away and stayed away for a month, and then they came back to camp with the baby. When the men go hunting, they have to show the blood on them to make sure they killed something, they would bring the meat too. Where they worked on the meat you can see it on their foot, that's why they look at their feet first after they come back from hunting.*

-Elder Dora Flett, 81

## Role of the DLRM

The ACFN's **Dene Lands & Resource Management** ("DLRM") was established to create capacity for the community in order to work with industry and government to assess the environmental impacts of industrial development on the ACFN territory. DLRM is the vehicle through which all consultation must occur.

DLRM protects ACFN's Treaty and Aboriginal rights to Land, Water, Air, and Livelihood. DLRM supports the infrastructure that preserves ACFN culture, language, and knowledge. DLRM fosters growth and progress through collaboration, economic development, and building relationships.



DLRM works with the Elders Council, Chief and Council and Membership to understand the Key Concerns and determine the process for consultation with the ACFN. DLRM represents ACFN (where applicable) on regional committees, forums, conferences, regulatory hearings, task forces and working groups.

DLRM also facilitates the collection of Indigenous Knowledge and conducts studies on impacts to the territory it's wildlife and people. The purpose of DLRM is to work with Industry and Government to determine consultation requirements, including assessment of the impacts of development on ACFN's territory, uses, rights and well-being.

## THE DUTY TO CONSULT AND UNDRIP

The Supreme Court of Canada held that the Crown owes a legal Duty to Consult Aboriginal People in the *Haida*, *Taku River*, and *Mikisew* cases. The Crown is required to consult, and where appropriate accommodate, Aboriginal People prior to project approval or where the Crown contemplates conduct that may impact Aboriginal and Treaty rights. This legal duty stems from the Crown's fiduciary duty toward Aboriginal Peoples and is grounded in the Honour of the Crown.

While the legal Duty to Consult rests with the Crown, the Crown may delegate certain procedural aspects of consultation to third parties engaged in development activities that require government authorization and may impact constitutionally protected Aboriginal and Treaty rights. Third Parties must recognize the government-to-government relationship between Aboriginal People and the Crown through its historical treaties. ACFN is a government and is not just another stake holder or interest group. ACFN has sovereignty and self-determination over our land through our Dene Government and institutions and we continue to define them in accordance with our inherent rights to live as Dene people and as a Dene Nation.

ACFN's Aboriginal and Treaty rights may be potentially affected by development or other activities within ACFN Traditional Territory and are therefore subject to the Duty to Consult. Treaty No. 8 protects the way of life of the aboriginal signatories to that treaty, guaranteeing rights to hunt, fish, trap, and "practice [their] usual vocations." Use of waters to travel by boat is also protected as an incidental right. Water-based access by boat is the preferred mode of practicing ACFN's aboriginal and Treaty rights. As a result, ACFN's ability to maintain our identity as K'ai Taile Dene and practice our Treaty Rights depends on our ability to exercise our right to travel by boat.

The Duty to Consult and the Honour of the Crown are constitutional obligations, which means that they prevail over legislation and policy. The Government of Alberta and the Government of Canada can determine how to fulfill these constitutional obligations, but ultimately, they must meet the legal standard. Decisions which do not uphold the Duty to Consult or the Honour of the Crown may be overturned by the courts.

## UNDRIP and Consent

Fulfilling the Duty to Consult and accommodate alone does not amount to ACFN consent a project or development activity. The international standard set out in the UNDRIP requires seeking Free, Prior, and Informed Consent (FPIC):

Article 32 of UNDRIP states that:

- 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*
- 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free and informed consent prior** to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources.*

FPIC has been incorporated into the Equator Principles, a risk management framework for determining, assessing, and managing environmental and social risk in projects. The Equator Principles provide a minimum standard for due diligence and monitoring to support responsible risk decision-making. Equator Principles Financial Institutions (EPFIs), which include all of the major Canadian banks, are committed to implementing the Equator Principles, including FPIC.

## CONSULTATION AND NEGOTIATION OF ACCOMMODATION PROCESS

### Step 1: Proponent Obligations

Prior to seeking ACFN consent for an activity, Proponents must take steps to fulfill the Proponent's Obligations that arise under this Consultation Policy. The Proponent's Obligations include (1) engaging early; (2) sharing information with DLRM; and (3) compensation for DLRM costs.

#### (1) Early Engagement

Engagement with DLRM must come early, as soon as the Proponent has familiarised itself with ACFN's land use planning and priorities. Proposed Activities will have a much higher chance of success when the Proponents engage early, allowing a Process Agreement to be put in place before the Proponent makes decisions or commits resources in relation to the Proposed Activity.

It is a well-established principle within Canadian law that consultation must occur early if it is to be meaningful.<sup>1</sup> Failing to engage early will not meet the standard required in the duty to consult and will put the entire consultation process at risk of failing.

## (2) Information Sharing with DLRM

An information sharing protocol will be required to ensure that the discussions and actions pursued and taken by both parties will be kept confidential. This protocol will facilitate the determination of which information can be shared in relevant contexts such as the Technical Review, Community Engagement, or for the purposes of a regulatory hearing, if necessary. The information sharing protocol will also provide a framework for ensuring the confidentiality of ACFN's Indigenous knowledge and for outlining the circumstances under ACFN consents to its use, if applicable.

## (3) Compensation for DLRM costs

The proponents must compensate DLRM for their costs of engagement. Canadian courts have made clear that funding for technical assistance is one of the factors they will consider in assessing whether consultation and accommodation is adequate.<sup>2</sup>

This compensation arrangement should be agreed upon in advance of negotiations, and should compensate DLRM for all reasonable costs, including costs of negotiators, legal counsel and such technical and expert assistance as DLRM may require in order to negotiate and implement a Process Agreement and subsequent Accommodation Agreements, if applicable.

Examples of reasonable costs of engagement include:

- Expenses to collect, copy and disseminate information.
- Expert fees and expenses (if required).
- Legal fees and expenses (if required).
- Fees or honoraria and expenses for ACFN Representatives for their work in the consultations and negotiations.
- Meeting costs (including travel and disbursements).
- Internal community consultation costs (booking meeting rooms, refreshments for meetings, creating, copying and disseminating written information packages, administrative and staff work for this).

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<sup>1</sup> *Samba K'e Dene Band v Duncan*, 2012 FC 204. See also *Kwikwetlem First Nation v British Columbia (Utilities Commission)*, 2009 BCCA 68 and *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43.

<sup>2</sup> See for example *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40 or *Gitxaala v Canada*, 2016 FCA 18

## Step 2: Process Issues Scoping

A Process Agreement will be agreed upon between DLRM and the Proponent that will establish the process by which they will communicate, share and evaluate information, and negotiate the potential participation of ACFN in the Proposed Activity. This agreement will inform the proponent what ACFN requires in order to consider the application, will scope out the issues requiring determination, and will enable and facilitate effective communication, consultation and negotiation between the Parties.

Common features of a Process Agreement include the establishment of a technical working group and a community engagement process. The Process Agreement will also detail a workplan and a budget, which would include funding amounts to compensate costs of consultation, and payment terms.

## Step 3: Technical Review

The technical review will allow the DLRM and the Proponent to share and evaluate environmental, engineering and other technical information, including Indigenous Knowledge, concerning the Proposed Activity. The technical review will also allow DLRM and the Proponent to review, consider and seek agreement on proposed joint submissions concerning approval conditions for the Proposed Activity, if applicable.

Depending on the extent of the Proposed Activity and its location, additional studies may be required including archaeological, socio-economic, biophysical, cultural and food, traditional knowledge and use / occupancy, harvest, mitigation or other studies involving ACFN. All studies must be carried out with the advance approval of and/or under the supervision of DLRM. Detailed study methodologies will be provided if required. Any studies carried out without DLRM approval or supervision may not be considered adequate by DLRM.

All studies, land use information, or other information regarding ACFN that a Proponent obtains through consultation and engagement or consultation with DLRM will remain the property of ACFN. This may include but will not be limited to data, maps, analysis and written reports provided by ACFN to the Proponent. Such information will be held in confidence and cannot be redistributed or used for any purpose without the express and advance written approval of ACFN.

Proponents will be required to meet or exceed government environmental regulations and guidelines in all aspects of their operations. In addition, Proponents must demonstrate respect for ACFN environmental and cultural concerns by preparing a detailed environmental and cultural protection plan including specified mitigation measures for review and approval by ACFN. ACFN will require that Proponents facilitate visits by ACFN Guardians to their sites. ACFN Guardians are invaluable to developing a good working relationship with the Proponent at the Project site.

## Step 4: Community Engagement

The community engagement process will ensure ACFN members are informed about the Proposed Activity and will gather their views on how it may affect them, and what measures might be implemented to address their concerns. Community engagement will also ensure that the Process Agreement and the Proposed Activity adhere to K'ai Taile Dene Law.

Proponents will have an ongoing obligation to keep ACFN informed about the Proposed Activity. This includes details on the location and duration of the Proposed Activity, as well as future plans. Proponents will provide annual reports and other corporate information to ACFN, which the DLRM can then share with the community. Proponents may also be invited to give updates to ACFN members directly.

The rights of the hunters, fishers and trappers of ACFN must be accounted for at all times. In cases where the potential for interference with such activities exists, ACFN will facilitate meetings and information-sharing between the Proponent and affected harvesters to obtain their consent and determine appropriate avoidance and mitigation measures.

Elders' council

## Step 5: Negotiated Accommodation Agreement(s)

The Accommodation Agreement formalizes the relationship between ACFN and the Proponent in regard to the Proposed Activity. It will describe in detail the consultation and accommodation terms that have been agreed to between ACFN and the Proponent. Important terms in an Accommodation Agreement typically include formalizing ACFN business, investment and contracting opportunities associated with the Proposed Activity, as well as opportunities for employment, education and training.

An Accommodation Agreement would also typically include oversight and monitoring terms, including environmental management and mitigation measures and social and cultural protections; opportunities for employment, education and training; and any relevant investment opportunities. Note that this is not an exhaustive list, and each Accommodation Agreement will be unique to the Proponent and the Proposed Activity.

## Step 6: Long Term Relationship

The relationship between ACFN and the Proponent does not end when the Accommodation Agreement has been established or at any other fixed point in time. The Proponent must be committed to a successful long-term relationship with ACFN. Commitment to a long-term relationship will enhance mutual understanding and lead to a productive co-operative relationship that supports both ACFN and Proponent social, cultural, economic and environmental goals.

# Appendix 1: Map of ACFN Consultation Notification Area

