

**Government of Alberta** ■  
Aboriginal Relations

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SHEET

First Nations and Métis Relations

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**Date:** July 18, 2011

**To:** Grand Chief Richard Kappo

**Organization:** Treaty 8 First nations of Alberta

**Fax Number:** 780-484-1465

**From:** Aboriginal Relations

**Comments:** Original Letter to follow in the mail

**If any problems with transmission, please call Nicole @ 422-9526**

**Number of pages to follow 9**

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ALBERTA  
ABORIGINAL RELATIONS

*Office of the Minister*

July 14, 2011

Grand Chief Cameron Alexis  
Confederacy of Treaty Six First Nations  
Suite 204, 10310 – 176 Street  
Edmonton, AB T5S 1L3

Grand Chief Charles Weaselhead  
Treaty 7 Management Corporation  
Suite 400, 9911 Chilla Boulevard  
Tsuu T'ina, AB T2W 6H6

Grand Chief Richard Kappo  
Treaty 8 First Nations of Alberta  
Santa Fe Plaza  
18178 – 102 Avenue  
Edmonton, AB T5S 1S7

*Chief!*

Dear Grand Chief Alexis, Grand Chief Weaselhead and Grand Chief Kappo:

Further to my July 8, 2011 letter, I am writing to provide you with a preliminary response to the Position Papers on Consultation you presented to the Government of Alberta ("Alberta") last fall. This letter will address the content of your September 30, 2010 correspondence. Substantive responses to the points raised in Appendix A of your Position Papers are contained in a corresponding appendix to this letter.

Initially, I would like to make some general remarks on Alberta's review of *The Government of Alberta's First Nations Consultation Policy on Land Management and Resource Development* (Consultation Policy) which policy remains in place until a revised policy is created. First Nations and Alberta have come a long way in this process. From the Premier's and Grand Chiefs' direction on the review process in 2009, to the Position Papers in 2010, and our *Protocol Agreement on Government to Government Relations* meetings this year and last, we have made progress in understanding our mutual consultation perspectives. Conducting the review has impressed upon Alberta the complexity of consultation issues requiring analysis to help develop a stronger Consultation Policy, while attempting to address the concerns of all parties.

Our discussions under the *Protocol Agreement* and the willingness of First Nations to engage with Alberta in the Consultation Policy review process have marked positive steps in our relationship. Alberta is also eager to continue working with First Nations to improve our developing relationship and address issues of shared concern.

Alberta understands and greatly appreciates that First Nations view the role of Treaties as integral in maintaining First Nations' cultures and traditions. We respect the importance of Treaties to First Nations, the rights stemming from them, and the Crown's duty to consult First Nations. Alberta is interested in fostering the relationship between First Nations and the provincial Crown in a way that mutually addresses each other's interests. We believe a meaningful First Nations Consultation Policy can contribute to this shared goal.

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*Alberta*

Grand Chiefs Alexis, Weaselhead and Kappo  
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As the Premier noted in his October 2, 2009 letter to the Grand Chiefs, the principles outlined in the *Mikisew Cree First Nation v. Canada* decision serve as a foundation for discussing changes to the Consultation Policy. While Alberta and First Nations may have differing perspectives on the scope and principles contained in the various legal cases cited in your Position Papers, I strongly feel this should not foreclose discussions between us. Alberta is looking forward to engaging in a broad dialogue with First Nations regarding the application of the *Mikisew* principles in the Province's consultation approach.

With regard to the key consultation objectives and interests set out in your letter, I am pleased Alberta and the First Nations agree on the importance of many of these points to ensure a strong consultation process respectful of Treaty rights and traditional uses. Alberta wants to ensure First Nations continue to be able to meaningfully exercise these rights and uses. Where our perspectives differ, I would encourage ongoing dialogue to identify key issues, bridge understanding, and to address these differences in a respectful manner. To this end, I view our upcoming discussions on the Consultation Policy as a starting point rather than a conclusion.

To reiterate my July 8<sup>th</sup> letter, Alberta is offering First Nations an opportunity to engage in an open, broad consultation dialogue process. While Alberta does not view this dialogue as negotiation of a new Consultation Policy, we do want to work with First Nations to address challenges and strengthen Alberta's approach to First Nations' Consultation through this process. You have Alberta's commitment to honourably consider First Nations' views on the topics set out in your Position Papers, as well as the perspectives offered in ongoing dialogue between us. We further commit to seek comment from First Nations and affected stakeholders on a revised draft Consultation Policy to be distributed later this year, as proposed in my July 8, 2011 letter.

We look forward to hearing from you and thank you for your ongoing contribution to Alberta's First Nations consultation process.

Sincerely,



Len Webber  
Minister

Enclosure: Appendix A

Copy: Honourable Ed Stelmach  
Premier

Clayton Kootenay, Interim Director of Operations  
Confederacy of Treaty Six First Nations

Ryan Robb, Chief Executive Officer  
Treaty 7 Management Corporation

Joseph Jobin, Chief Operating Officer  
Treaty 8 First Nations of Alberta

**Government of Alberta ■**  
Aboriginal Relations

**Appendix A**  
**Response to Treaty 6, Treaty 7 and Treaty 8 First Nations Consultation Position Papers**

**1. Alberta has too narrow a view of First Nations' rights.**

The Position Papers highlighted the importance First Nations place on respect for Treaty rights in the consultation process. The Position Papers state on page 15<sup>1</sup> that Treaty rights cannot be narrowly defined and argue that Alberta take a limited approach to what constitutes the rights of First Nations.

**Alberta's Perspective**

Alberta highly respects First Nations Treaty rights as set out in the historic Treaties, the *Natural Resources Transfer Agreement*, as well as the guarantee of those rights by the *Constitution Act, 1982*. Both the Consultation Policy and Guidelines recognize and respect the Treaties. Alberta is committed to consult with First Nations when land management and resource development decisions may adversely impact Treaty rights.

Consultation where there are potential adverse impacts on First Nations' traditional uses is also addressed in the Consultation Policy and Guidelines. Alberta also recognizes the importance of First Nations traditional uses. First Nations' engagement in the Geodata Mapping Project is facilitating discussions on the practice of treaty rights and traditional uses and Alberta wants to further engage with First Nations in a Consultation Policy dialogue process to ensure we fully understand First Nations' views.

**2. Alberta's approach to consultation lacks precision.**

The Position Papers state on page 16 that there is little discussion of process-related issues about consultation and accommodation, such as when the duty to consult will be triggered, determinations of impact levels and the degree of consultation required. The Position Papers also state that this has led to inconsistent consultation approaches across Alberta government ministries.

**Alberta's Perspective**

The nature of First Nations consultation in Alberta depends on specific factors such as project scope, the extent of the potential adverse impact, the Treaty rights and traditional uses that could be adversely affected, and the specific resource development activities involved. A key factor that Alberta uses to determine if its duty to consult is triggered is a proposed project's potential to adversely impact the exercise of Treaty rights and traditional uses, ranging from low to high-level disturbances. The level of consultation required will vary with the potential for adverse impact on the exercise of treaty rights, requiring the Crown to make case-by-case assessments based on specific circumstances.

Alberta is interested in discussing these process-related consultation issues with First Nations. Dialogue on consultation triggers will offer First Nations an increased understanding of Alberta's process for determining when consultation needs to occur

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<sup>1</sup> References to Treaty Organization Position Paper page numbers specifically refer to the Treaty 8 Position Paper. Page numbers may differ slightly in Treaty 7 and Treaty 6 Position Papers.

and to what level. Further to the Position Papers' statements on these matters, Alberta wants to hear First Nations' views and suggestions for improvement to help ensure a consistent Alberta cross-ministry consultation approach. To begin dialogue on process-related issues, it would be helpful to explore the kinds of impacts that might trigger consultation and the depth at which the consultation would need to occur.

**3. There are no standards against which to assess consultation and accommodation.**

Similar to the perspective in point two, the Position Papers state that Alberta's consultation approach lacks a mutually agreed-upon set of standards or objectives to measure consultation and accommodation, allowing for varying consultation approaches between and within ministries. It is further argued that this impacts First Nations consultation with industry project proponents.

**Alberta's Perspective**

Alberta is open to discussing consultation standards and wants to hear First Nations' views on how adequacy should be determined in the consultation process. Further, for the consultation process to be meaningful and effective, Alberta is also of the view that First Nations, the Crown and stakeholders must work together on strategies to mitigate, when necessary, potential adverse impacts on Treaty rights and traditional uses. The Consultation Policy contains provisions to facilitate parties working together on alternative approaches to resolve specific issues. Alberta wishes to dialogue with First Nations to further develop this area and promote a clear and consistent consultation process and approach across the Government of Alberta.

**4. Alberta has failed to recognize and implement the Duty to Accommodate.**

Page 16 of the Position Papers comments on accommodation and states that Alberta minimizes and downplays the need for accommodation, the means by which it might take place, and the kinds of accommodation available. It further states on page 16 that Alberta assumes any form of mitigation proposed by a company will be acceptable.

**Alberta's Perspective**

Alberta's current view of accommodation is that it is part of the Crown's duty to consult. Where it is likely that adverse impacts on First Nations' Treaty rights and traditional uses will occur, accommodation may be appropriate. It would be beneficial for both First Nations and Alberta to gain a greater understanding of our respective perspectives on accommodation to better inform ongoing consultation dialogue.

**5. Alberta delegates substantive aspects of project specific consultation to industry.**

On page 17, the Position Papers note that Alberta delegates practically all aspects of consultation to industry and has no clear understanding of procedural or substantive consultation.

**Alberta's Perspective**

The duty to consult First Nations on Crown-authorized decisions potentially impacting Treaty rights and traditional uses rests with Alberta and cannot be delegated to project proponents. However, procedural aspects of the duty may be delegated. Examples of procedural aspects of consultation may include First Nations notification; project information on scope and location; identification of potential project impacts; engaging with First Nations to discuss their concerns; and summarizing consultation efforts. More substantive aspects may include the Crown's responsibility to conduct the preliminary consultation assessment, identify the scope and extent of the required consultation,

engage with First Nations to discuss their concerns, in certain instances, and make final determinations of adequacy.

Proponents with intimate project knowledge are better situated than the Crown to discuss the potential adverse impacts of their projects on First Nations' rights and traditional uses. Another reason for delegation of procedural aspects of the consultation process is that given the very large volume of Crown dispositions considered every year, it would be unrealistic and untenable for the Crown to meaningfully carry out all components of the consultation process. That said, Alberta recognizes its responsibility to inform itself of potential adverse impacts on First Nations' rights prior to making decisions.

Through the Consultation Policy review process, Alberta has heard from First Nations and industry that delegation is an issue of concern. Alberta feels it would be beneficial to engage in dialogue with First Nations on this topic. Some themes to consider regarding delegation may include discussion of elements in the consultation process that should remain the role of the Crown and those which can be appropriately delegated to proponents. Such dialogue may also lead to a broader discussion of the Crown's overall role in the consultation process.

#### **6. Environmental Assessments and similar processes are developed without the participation of First Nations.**

Also on page 17, the Position Papers state that the consultation process does not address environmental assessments and allows decision-makers to continue to ignore First Nations' procedural and substantive concerns about rights.

##### **Alberta's Perspective**

The Environmental Assessment (EA) process allows companies and government decision-makers to examine the effects that a proposed project may have on the environment. The information gathered during the process helps the appropriate regulatory board determine if the project is in the public interest. In conducting EAs, proponents are required to collect traditional ecological knowledge and traditional land use information in cooperation with First Nations. This includes the identification of potential adverse impacts that a project may have on First Nations' rights and traditional uses within the project area. Information on the cumulative effects of development, mitigation strategies to minimize impacts, and proponents' efforts to incorporate traditional ecological knowledge into project planning are also part of the EA process. This regulatory process provides information on how a First Nation's rights and traditional uses may potentially be impacted. In addition, for each project, First Nations have an opportunity to provide comments on the terms of reference for the environmental impact assessment report.

Further dialogue on how this and other regulatory processes interface with consultation will help strengthen these inter-related processes.

#### **7. Consultation must be structured on a government-to-government basis.**

Statements on page 18 of the Position Papers relate to more direct Alberta involvement in the consultation process. You also imply that proponent-led consultation requires an increased Crown role to ensure consultation practices are well-designed.

**Alberta's Perspective**

As mentioned above, discussions regarding a greater Crown consultation role may be needed, and Alberta is willing to enter into that dialogue. While Alberta ultimately determines consultation adequacy, the government is aware both First Nations and proponents have concerns with the procedures by which the consultation process is implemented. To help promote the government-to-government relationship articulated by the *Protocol Agreement*, Alberta is most interested in First Nations' thoughts on how to strengthen this relationship through a potentially greater Crown consultation role.

**8. The capacity to consult is a persistent hindrance to meaningful consultation.**

Comments on the levels of available consultation capacity funding (page 18) and how this affects meaningful consultation have frequently been put forward by First Nations.

**Alberta's Perspective**

Although Alberta provides capacity funding through the First Nations Consultation Capacity Investment Program, Alberta does appreciate First Nations' ongoing capacity challenges and knows all parties in the consultation process incur costs to participate. To help address this issue with First Nations, Alberta has committed to engaging in a dialogue with First Nations after the Consultation Policy review is completed. Mutual benefits could provide greater economic capacity for First Nations and increased resource development certainty for Alberta.

**9. There is a general lack of clarity regarding the use of First Nations' input**

On page 18, the Position Papers state that First Nations are unclear about what input will be considered by Alberta and the role their feedback will play in determining potential adverse impacts in resource development decision-making. The Position Papers put forward the view that Alberta refuses to meaningfully engage First Nations on critical issues such as water allocation, fish and wildlife management and environmental and regulatory approval processes.

**Alberta's Perspective**

Although Alberta has, and continues to, engage First Nations on a number of government-wide initiatives linked to consultation, the points regarding greater clarity for First Nations about how feedback is considered and used in decision-making is well taken. Alberta is interested in developing processes to determine when and at what level First Nations input should be addressed on government-led initiatives and would like to dialogue with First Nations on this matter. Dialogue leading to the development and implementation of processes for First Nations feedback in, and consultation on, these initiatives will clarify this issue. Discussions in this regard might focus on determining what First Nations consider to be strategic initiatives and how Alberta might work to improve its approach to gathering information and incorporating First Nations' feedback on such initiatives.

**10. Consultation occurs on a project-by-project basis, devoid of critical information about cumulative impacts on First Nations' rights.**

Page 18 makes statements regarding cumulative impacts in Alberta's decision-making process in relation to First Nations' rights.

**Alberta's Perspective**

Alberta is aware of the importance of addressing the cumulative impacts of development. The Environmental Impact Assessment (EIA) Terms of Reference require proponents to address anticipated future environmental conditions based on existing and

potential planned projects. EIAs require proponents to examine potential direct and cumulative project impacts on natural resources to sustain hunting, fishing and trapping.

Regional plans under the Land-use Framework will also provide cumulative environmental effects management tools at the regional level. When completed, Regional Plans will guide regulatory decision makers in setting objectives to achieve desired regional outcomes.

First Nations have important perspectives to share regarding cumulative impacts as they relate to consultation and traditional land use, and ongoing dialogue with Alberta will facilitate understanding between parties on these important matters of mutual interest.

#### **11. Consultation rarely, if ever, occurs at the strategic planning stage**

On pages 18 and 19, the Position Papers argue that the granting of tenures/mineral dispositions is a key strategic planning stage and it is crucial for Alberta to analyze how current or future development affects First Nations' rights before more tenure is granted.

##### **Alberta's Perspective**

The leasing of Crown mineral rights does not, in and of itself, adversely impact the exercise of First Nations' rights and traditional uses and does not trigger a duty to consult. Alberta does consult on many government-led strategic initiatives, and is willing to discuss how First Nations wish to be consulted on these initiatives, where there is the potential to adversely impact Treaty rights.

#### **12. There is a duty to consult in relation to private lands**

Page 19 of the Position Paper notes that the Consultation Policy does not address private lands and sets out several factors arguing that consultation on such lands may be required.

##### **Alberta's Perspective**

While the Policy largely addresses consultation with First Nations on Crown land, Alberta recognizes a duty to consult may exist in limited circumstances when private land development is likely to adversely impact the exercise of First Nations' rights or traditional uses. Given the limited situations in which a duty to consult might be triggered, Alberta assesses its obligations on a case-by-case basis. Alberta would like to hear First Nations' perspectives on private land consultation, as well as engage in a broader discussion of this matter.

#### **13. The duty to consult and accommodate applies to decisions that affect reserve lands.**

On pages 19 and 20, it is also stated that there is a duty to consult related to reserve lands, such that Alberta can make decisions affecting First Nations' reserve lands which can adversely impact Treaty rights. The Position Paper also states that Alberta has refused to address claimed Treaty rights in the Consultation Policy and that this approach is inconsistent with the flexible nature of these rights. It is also stated that it is not honourable for the Crown to deal with lands and resources, which are the subject of accepted land claims, without consultation and accommodation.

##### **Alberta's Perspective**

Alberta has constitutional authority to legislate and manage certain activities both on and off reserve, within the scope of its legislative powers. However, it is largely the federal government which has the authority to make decisions affecting reserve lands that may trigger the duty to consult. With respect to the issue of consultation and accommodation



on claimed lands, Alberta works with First Nations on accepted claims in the Treaty Land Entitlement process and fulfills its obligations under the *Natural Resources Transfer Agreement* in this way.

#### **14. Municipal decisions and actions can impact First Nations' rights.**

The Position Papers state on page 20 that Alberta's consultation process does not address municipal consultation. It is stated that municipal decisions can potentially impact First Nations' rights and interests and that Alberta must ensure, where necessary, it exercises oversight regarding the adequacy of consultations related to municipal decisions.

##### **Alberta's Perspective**

Alberta would welcome comments regarding instances when municipal decisions may potentially impact First Nations' rights and traditional uses. Further, where applicable, Alberta treats municipalities as proponents and may delegate procedural aspects of consultation to them. Alberta agrees this issue requires additional clarity in relation to consultation and is interested in First Nations' views on this topic.

#### **15. Alberta has an obligation to be forthright about consultation**

The Position Papers comment (pages 20 and 21) on transparency in the consultation process to uphold the honour of the Crown.

##### **Alberta's Perspective**

When consultation is required, Alberta consults in good faith with the intention of substantially addressing the affected First Nation's potentially affected Treaty rights and traditional uses. As mentioned previously, Alberta's Consultation Policy provides a process for First Nations, the Crown and industry to work together to mitigate potential adverse impacts on Treaty rights and traditional uses. The basis of this collaborative approach is transparency in information-sharing between all parties in the consultation process.

Alberta would like to engage in information-sharing with First Nations to help the Crown make more informed decisions, and will allow First Nations to more meaningfully participate in the consultation process. Alberta is interested in First Nations' views on how and what information could be used to enhance consultation decision-making.

#### **16. Alberta must be flexible and conduct itself honourably with respect to Traditional Territories and Traditional Knowledge.**

The Position Papers' final point on page 21 conveys perspectives on the reality of First Nations' overlapping areas and on traditional uses, as these relates to the consultation process. The Position Papers criticize Alberta for adopting a "dots on a map" approach to determining traditional territories and areas where First Nations may have an interest in being consulted.

##### **Alberta's Perspectives**

Alberta respects that First Nations' traditional use areas will often overlap. The GeoData Mapping Project is currently tasked with assembling information about where a First Nation may have an interest in being consulted based on exercise of Treaty rights and traditional use activities on Crown land.

As mentioned earlier, Alberta would also like to discuss First Nations' broader concerns regarding rights and traditional uses and their application in the consultation process through an ongoing dialogue.

**Suggested Approach to Consultation (Appendix B to the Position Papers)**

In addition to the concerns outlined in Appendix A, the Position Papers have offered a Suggested Approach to address these issues (Appendix B). A number of areas of mutual interest were highlighted, such as strategic engagement, identifiable triggers for consultation and meaningful incorporation of First Nations' input. Alberta and First Nations may disagree on the scope of some of these approaches and on the language used in the Suggested Approach but Alberta is confident that through ongoing dialogue with First Nations on these and other consultation-related issues, Alberta will be able to continually develop the consultation process, improving clarity and consistency in approach, and leading to an overall strengthened Consultation Policy. The current policy, of course, remains in force until creation of the revised policy.