Introduction

The Government of Saskatchewan First Nation and Métis Consultation Policy Framework (CPF) is for use by government ministries, agencies, Crown corporations, First Nations and Métis communities and proponents. The CPF states that the province will consult with, and where appropriate, accommodate* First Nations and rights-bearing Métis communities in advance of decisions or actions that have the potential to adversely impact the exercise of:

1. Treaty and Aboriginal rights, such as the right to hunt, fish and trap for food on unoccupied Crown lands and other lands to which First Nations and Métis have a right of access* for these purposes; and,

2. Traditional uses of lands and resources, such as the gathering of plants for food and medicinal purposes and the carrying out of ceremonial and spiritual observances and practices on unoccupied Crown lands and other lands to which First Nations and Métis have a right of access for these purposes.

The CPF, which became effective June 2010, provides direction to government ministries, agencies and Crown corporations to establish operational procedures to consistently implement the consultation policy across Government. In accordance with the CPF, the Government of Saskatchewan is responsible for determining whether a duty to consult is triggered and, if so, the level of consultation required. In the case of asserted rights*, the Government is also responsible for determining whether there is a credible basis for the claim.

The CPF will be reviewed and updated on a regular basis to ensure consistency with case law, legislation and/or policy.

*Accommodate
Consultation may result in the accommodation of Treaty and/or Aboriginal rights and/or traditional uses. Accommodation is more often about incorporating what has been learned during consultation to minimize or prevent potential adverse impacts by avoiding, changing, or amending the plan or action; not about financial compensation. For example, accommodation may include one or more of the following:

- attaching certain conditions to approvals to undertake activities;
- requiring proponents to adjust the proposed activity or program;
- delaying making a decision or issuing an approval pending further consultations; or
- denying the application to conduct an activity.

*Asserted Rights
The Supreme Court recognized in Haida Nation that governments may be required to consult with First Nations and Métis communities when governments have knowledge, real or
constructive, of asserted rights, even if governments do not recognize the rights being asserted. In these cases, consultations may be required where the Government determines that there is a credible basis for the asserted right and the community is actively pursuing recognition of the right either through negotiations or litigation. The degree of consultations required in these cases will depend upon the strength of the claim supporting the asserted right as well as the extent of the potential adverse impact from the proposed government action.

*Right of Access*

The Treaty or Aboriginal right to access land, public water bodies and resources to carry out activities associated with hunting and fishing for food and carrying out traditional uses. These include:

- unoccupied Crown land;
- public water bodies;
- occupied Crown land that is open at any time of the year to non-Aboriginal people for hunting or fishing, except Agricultural Leased Land.

**Municipalities Duty to Consult**

*In what circumstances would a municipality have a duty to consult with First Nations and Métis?*

Municipalities are established by provincial legislation and exercise powers delegated by the provincial government. Municipalities may have a duty to consult whenever they independently exercise their legal authority in a way that might adversely impact the exercise of Treaty and Aboriginal rights (to hunt, trap or fish) or carry out traditional uses on unoccupied Crown land or other lands to which First Nations and Métis have a right of access. In cases where the municipality is the proponent of a development, the government may assign procedural aspects of a duty to consult process to the municipality, as it may with any other proponent.

Independent decisions could include rezoning (in an urban municipality), development permits, building permits, subdivision of land (where the municipality is the approving authority), and road construction (which does not involve Ministry of Highways and Infrastructure).

**Examples where a duty to consult may occur:**

- The municipality is developing or improving an undeveloped road allowance adjoining a First Nations reserve or Crown land;
- An urban municipality rezones an area of land on the edge of the municipality for a more intensive use, or one that introduces additional noise, traffic or an increase in the number of people visiting a site. The change in use may affect the use of adjoining unoccupied Crown land at the construction stage or into the future.
As illustrated above whenever a decision or action of a municipality requires an approval, license or permit from the province, the duty to consult process will be led by the approving ministry. Municipalities who wish to consult with First Nations on a particular project should first contact the Ministry responsible for issuing the permit, license or approval to ensure its consultation efforts can be integrated into the Ministry’s formal duty to consult process.

Generally speaking there is no duty to consult where a development occurs inside municipal boundaries on privately or municipally owned land, and the impacts do not extend beyond the boundaries of those land. However, even where a duty to consult is not triggered, municipalities are encouraged to focus on regular engagement with First Nations and Métis to discuss planning and development.

**Evaluating Duty to Consult and Determining Level of Consultation**

*How would a municipality determine if it has a Duty to Consult?*

The following flowchart walks the municipality through a series of questions to determine if they would have a duty to consult.
**Pre-Consultation Assessment**

To determine whether the duty to consult is triggered, in the scenario where the municipality makes an independent decision to approve a project, consider the following questions. Each question should be answered and documented prior to moving forward.

Does the proposed action or decision have the potential to impact unoccupied Crown lands or occupied Crown lands where the Crown permits access?

*If no,* is there a potential for impacts on these lands or Indian reserve lands in the general vicinity?

- **Yes**
  - Does the decision have the potential to:
    1) Adversely impact a Treaty or Aboriginal right or traditional use; or
    2) Lead to an adverse impact to a Treaty or Aboriginal right or traditional use?
  - **No**
  - **Yes**
    - Does the action, or future decisions flowing from this action, affect First Nations and Métis right of access?
    - **No**
      - The duty to consult has not been triggered
    - **Yes**
      - The duty to consult has been triggered. Based on the duration and magnitude of the impacts identified, refer to the Consultation Matrix in the *First Nation and Métis Consultation Policy Framework* to determine what level of consultation should occur.

Municipalities will need to identify which First Nations and Métis communities are to be consulted.*

*Note:* Municipalities may contact the Ministry of First Nations and Métis Relations to assist them in determining which First Nation and Métis communities to consult when the duty to consult has been triggered.
If the municipality has the Duty to Consult, how does it determine the level of consultation and how does the duty affect timelines for decisions?

If it is determined there is a duty to consult, the CPF (which can be found at [http://www.fnmr.gov.sk.ca/Consult-Policy-Framework.pdf](http://www.fnmr.gov.sk.ca/Consult-Policy-Framework.pdf)) includes a consultation matrix which helps determine the level of consultation typically required based on the duration and magnitude of the potential adverse impact to Treaty and Aboriginal rights and traditional uses. The consultation matrix also provides guidance on notification protocols and timelines for a response from a community, and timelines for making and reporting a decision.

Where a municipality has identified a duty to consult how does this affect timelines for decision making?

Municipalities should confirm if timelines are contained in their bylaws which affect decision making and notify applicants of the anticipated delays. The duty to consult needs to be met prior to making a decision or taking an action that has the potential to adversely impact Treaty and Aboriginal rights and traditional uses. The time required for consultation will depend upon the level of consultation. The ability to manage project timelines is directly affected by the amount of time required to complete a meaningful duty to consult process. Identifying the level of consultation and beginning consultation as early as possible will help facilitate the process and manage timelines contained in any bylaws.

Where a municipality has identified a duty to consult, how does this affect their authority to make a decision?

Governments retain final decision making authority within their jurisdictions as long as they fulfill the duty to consult. Following the consultation process outlined in the CPF will ensure meaningful consultation. Where a municipality is involved, the courts would expect that the information obtained from First Nations and Métis during the duty to consult process is seriously considered by council. The purpose of the duty to consult is to identify potential impacts and to look for ways to address those impacts in a way that is reasonable. The consultation process does not provide the First Nation or Métis community being consulted with a veto.

Do municipalities have a duty to consult when they are doing land use planning or annexing land?

Municipalities are empowered under The Planning and Development Act, 2007 to plan and regulate the use of land within their boundaries. The pre-consultation assessment flowchart can assist a municipality in determining if a duty to consult has been triggered. Each circumstance will have to be examined on a case by case basis. Even where a duty to consult is not triggered, municipalities and district planning commissions should consider inviting First Nations and Métis into planning processes. Involving First Nations and Métis as full participants in the process creates the opportunity to share information, discuss the actions and implications of the
plan and work together. Building relationships with First Nations or Métis will help to instill trust and may present opportunities for joint initiatives.

*How can a municipality best involve First Nations or Métis in public processes where there is no duty to consult?*

Public engagement processes, such as those required by *The Planning and Development Act, 2007*, offer an opportunity for First Nations and Métis communities to attend and be heard. To ensure participation, it is appropriate to extend a direct invitation to affected First Nation and Métis communities rather than relying on a general invitation to participate (e.g. as a newspaper advertisement). Separate meetings with individual communities also provide an opportunity to hear and address concerns.

**Duty to Consult Procedures**

*Where the duty to consult is triggered, how does a municipality consult?*

The Ministry of Municipal Affairs and the Ministry of First Nations and Métis Relations can provide advice to a municipality when a duty to consult has been triggered. Guidance is also available in the consultation matrix [http://www.fnmr.gov.sk.ca/Consult-Policy-Framework.pdf](http://www.fnmr.gov.sk.ca/Consult-Policy-Framework.pdf) which provides some guidance on when a letter or meeting(s) is warranted and what follow up should be done. Where meetings are involved, a municipality would typically approach the potentially impacted First Nations or Métis to discuss a plan for consultation, taking into account all reasonable requests to adjust the process to their needs.

*If a duty to consult process is underway, what permanent records should be kept?*

Because actions and decisions might not be legally challenged until years after they were made, permanent records are essential if the action or decision has to be defended in court. Since council members and employees may have changed by the time a legal challenge is made, written records must be complete, comprehensive and properly indexed and archived. They should include the following:

- A list of the Aboriginal groups contacted and the reasons they were contacted;
- A communication log of telephone conversations, discussions, e-mails, letters, meetings, activities (e.g. studies, reports) and contact attempts;
- Responses from the Aboriginal group contacted;
- If no responses were received, the efforts made by the municipality to secure a response;
- Description of actions to understand the potential impact of the municipality’s actions on Treaty or Aboriginal rights;
- Description of actions to prevent or minimize the infringement of Treaty or Aboriginal rights;
- A copy of the final decision explaining the consultation efforts and how the information gathered was considered in the decision making process.

*A consultation summary is included at the end of this document to assist municipalities in recording necessary information.*
**Do First Nations and Métis have an obligation to participate in the duty to consult process?**

Yes, the courts indicated First Nation and Métis communities have a reciprocal responsibility to participate in duty to consult processes in good faith by making their concerns known and responding to attempts to meet their concerns.

**Where are “Métis” Aboriginal rights recognized in Saskatchewan?**

Métis Aboriginal rights to hunt, fish and trap for food purposes are recognized north of the Northern Administration District Line, and in the Meadow Lake area (includes Green Lake, Meadow Lake, Pierceland and west to the Alberta border). The duty to consult applies to these Métis communities in the same manner as First Nations. A Municipality must consults with the elected leadership of the appropriate Métis Local(s) or their formally authorized delegate such as Métis Region.

Métis Aboriginal rights to hunt, fish and trap for food purposes in other areas of the province continue to evolve with court decisions and formal negotiations and are asserted rights under the CPF. When the pre-consultation assessment in southern Saskatchewan indicates a duty to consult resulting from a potential impact to asserted Métis Aboriginal rights, the Municipality should contact the Ministry of Justice and Attorney General to make determinations on a case-by-case basis. Where the duty to consult is not triggered, municipal governments should build relationships with Métis leaders and communities through interest based engagement.

**What happens when a municipality and First Nation or Métis community do not agree?**

Duty to consult is about ensuring First Nation and Métis communities have the meaningful opportunity to:
- be fully informed of proposed actions;
- understand the action and how it might adversely impact their ability to exercise Treaty and Aboriginal rights or the exercise of traditional uses;
- prepare a response; and
- work with the local municipality to avoid, mitigate or minimize the adverse change.

To be meaningful First Nation and Métis communities should have sufficient time to work with the municipality to develop a consultation plan, have discussions and complete the process.

When a municipality is confident they have made every effort to identify potential impacts, have gathered and considered the information received from the First Nation or Métis community(s) and addressed/accommodated any impacts in a reasonable fashion they should proceed with the decision.

**What are the municipality’s responsibilities if it is acting as a developer or the proponent of a project which requires approval from the province?**

Whenever a municipality requires an approval, license or permit for an activity which has the potential to adversely impact Aboriginal or Treaty Rights to hunt, trap or fish or traditional uses
the duty to consult process is the responsibility of the province and will be led by the approving ministry or agency. For example, the municipality may be a proponent of a project to construct a new sewage lagoon. As the proponent, the municipality may be asked by the province to work with potentially affected First Nation and Métis communities to provide clear, accurate and complete information on the project prior to development. The municipality may also be asked to participate in meetings to discuss the impacts of the proposed activity or to develop and implement measures to address adverse impacts of the project if necessary.

**NOTE:** Municipalities who wish to consult with First Nations or Métis on a particular project should first contact the Ministry responsible for issuing the permit, license or approval to ensure their consultation efforts can be integrated into the Ministry’s formal duty to consult process. Communicating with the regulating ministry early in the process, will result in a more timely and effective duty to consult process.

**Is there funding to support First Nations or municipalities participating in the duty to consult?**

FNMR provides funding to First Nation and Métis communities to engage in the process where the duty to consult is triggered. There is no funding for municipalities.

**Failure to Follow Duty to Consult Procedures**

*What are the consequences for a municipality that does not complete a required duty to consult?*

Where a municipality must fulfill the duty to consult, not doing so could have serious consequences. First Nations or Métis communities could initiate legal action resulting in decisions being invalidated; resulting in a project or development shut down, delayed or not permitted to proceed until consultation takes place. The court could require financial compensation to be paid.

*Will municipal officials ever be required to testify in court about a particular duty to consult process?*

A matter challenged in court will require the municipality to present evidence outlining its actions regarding the duty to consult. It would involve officials testifying under oath. As previously noted, it is important to keep a complete summary of all consultation efforts.
SAMPLE: Duty to Consult Summary

<table>
<thead>
<tr>
<th>Duty to Consult – Consultation Summary</th>
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<tbody>
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<td><strong>Date:</strong></td>
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<td><strong>Name of Official:</strong></td>
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<td><strong>Location:</strong></td>
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<td><strong>Proposed Action/Decision:</strong></td>
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<tr>
<th>Pre-Consultation Assessment</th>
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<tr>
<td><strong>1. Land Status</strong></td>
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<td>- Is the proposed action/decision on unoccupied Crown lands or occupied Crown lands where the Crown permits access?</td>
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<tr>
<td>- If no, is there a potential for impacts on these lands or Indian reserve lands in the general vicinity?</td>
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**Description**: (Provide any additional land status information relevant to the decision):

<table>
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<th><strong>2.</strong> Do the environmental impacts of the proposed action/decision have the potential to:</th>
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<tr>
<td>- Adversely impact a Treaty or Aboriginal right or traditional use; or</td>
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<td>- Lead to an adverse impact to a Treaty or Aboriginal right or traditional use?</td>
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**Description**:

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<th><strong>3. Decision</strong>: Level of Consultation if any?</th>
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<td><em>(If the Duty to Consult has been triggered, identify the Level Determined)</em></td>
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**Documentation Checklist**:

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<th>Copy of original notification letter(s)</th>
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<tr>
<td>Record of correspondences with proponent</td>
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<td>Complete consultation log(s)</td>
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1. **Summary of meetings**  
   Include Agendas, participant lists and notes about what was discussed.

2. **Copy of First Nations response(s)**  
   1. Responses and information put forward by the community throughout the consultation process.  
   2. If no responses were received, document the efforts made to secure a response (letters, phone calls, etc).

3. **Reports/communications back to First Nation and/or Métis community**

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**Consultation Results Summary:**

**Mitigation Actions:**

1. Actions taken to examine First Nation and Métis concerns regarding Treaty or Aboriginal rights or traditional uses and the potential impact of the decision or action on those rights.  
2. Actions taken to avoid or minimize the adverse impacts on Treaty or Aboriginal rights or traditional uses.  
3. Summary and rationale for the decision.  
4. Written communication to report the decision back to the Aboriginal community.

**Summary and rationale for the decision:**

**Written communication to report the decision back to the Aboriginal community:**  
Should include the final decision, summarizes the consultation efforts and explains how the information gathered was considered in the decision making process.

**Consultation Log:**

**NOTE:** A consultation log should be kept for each of the First Nations or Métis Community which has been consulted. Typically this would include telephone conversations, discussions, hard copies of e-mails, letters, meetings, activities (e.g. studies, reports), and contact attempts. Specific details required for telephone conversations include:

- The date and time when calls were made:  
  - A note of calls placed but not answered and all messages left;  
  - A list of who was involved in the phone conversation; and the information or issues discussed.
<table>
<thead>
<tr>
<th>Date</th>
<th>Activity</th>
<th>Participant(s)/Respondent</th>
<th>Discussion Notes/Summary:</th>
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**First Nation or Métis Community:**

**Date notification letter sent:**

**Contact Information**
For more information contact the Community Planning Branch of Saskatchewan Ministry of Municipal Affairs.

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