



Indian and Northern
Affairs Canada

Affaires indiennes
et du Nord Canada

NWT

Plain Talk

On Land and Self-government

Respecting Rights and Doing Good Business



MVEIRB

Indian and Northern Affairs Canada (INAC) recognizes the importance of consultation and the need to respect Aboriginal rights. It takes an approach to consultation that works with the unique environmental regulatory system of the NWT, to achieve clarity and effectiveness.

Why does the Crown consult?

The Crown regularly consults on a wide variety of topics with Aboriginal people, other members of the public and interested groups and organizations, on matters of interest and concern to them.

Consultation is an important part of good governance, policy development and sound decision-making. In addition, the federal government consults with Aboriginal people to meet its statutory, contractual and common law requirements.

- **Statutory or contractual requirements** - those arising from legislation and treaties, including modern land claim agreements.
- **Common law requirements** - those arising from court decisions over time that have stated that the Crown must consult and, where appropriate, accommodate when the Crown has knowledge of potential or established Aboriginal or Treaty rights and contemplates conduct that may adversely affect those rights.

Engagement and Consultation

The terms *engagement and consultation* are commonly used to describe when government discusses issues directly with people.

Consultation is also used more formally to describe the Crown's duties under the law—established by treaties, legislation and decisions of the courts—such as the duty to consult Aboriginal people about their rights.

The Crown has overall responsibility for consultation with Aboriginal people based on s.35 of the *Constitution Act*. In the context of the *NWT Mackenzie Valley Resource Management Act*, parties seeking authorizations engage with the public as part of the process. In addition, resource management boards consult Aboriginal groups as per the *Act*.

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Spring 2011

The purpose of our newsletter is to keep you informed on the progress of land and self government negotiations in the Northwest Territories, and to provide some answers to frequently asked questions. We also feature the people and communities involved in negotiations, celebrate milestones, and announce upcoming events. On behalf of Indian and Northern Affairs Canada (INAC), we hope you will find our newsletter informative and easy to read.

Canada

What is the Crown’s common law duty to consult?

The purpose of consultation based on s.35 rights is the reconciliation of potential and established Aboriginal and Treaty rights with the Crown’s ability to act in the public interest.

It is the process of ensuring that Aboriginal peoples’ potential and established rights are fairly considered prior to the government making a decision that could potentially affect those rights, particularly in the approval of developments involving land and resources.

In recent years, the Supreme Court of Canada has provided guidance—that is, common law— relating to the Crown’s legal duty to consult. The *Haida Nation* (2004), *Taku River Tlingit* (2004), *Mikisew Cree* (2005), *Carrier-Sekani* (2010), and *Little Salmon/Carmacks* (2010) decisions, as well as other decisions, have a significant influence on how the Crown consults with Aboriginal peoples.

The Supreme Court has confirmed that it is the Crown’s duty to consult Aboriginal people, and where appropriate accommodate interests and mitigate impacts, when it knows that it is considering actions that might negatively impact potential or established Aboriginal or Treaty rights and related interests. The courts have also ruled that:

- the process of consultation may be delegated to third parties, but the legal duty is ultimately the Crown’s responsibility
- consultation should be meaningful, proactive and done in good faith by all parties
- the extent of consultation is determined by the strength of a claim to a right and the seriousness of the potential negative impact on that right
- consultation may reveal a need to accommodate

- it is not necessary that consultation lead to full agreement. Aboriginal groups do not have a veto over the Crown’s contemplated decisions
- each situation must be reviewed on a case-by-case basis

In its decisions, the Supreme Court also determined that the legal duty to consult comes from the Crown’s special relationship with Aboriginal peoples and must be done in a manner that upholds the Honour of the Crown and promotes reconciliation of Aboriginal and public interests.

“Crown conduct” includes activities that allow development projects to move forward—for instance, the approval of mining or other projects through the issuance of authorizations such as a water licence, or a land use permit. Crown conduct can also include certain operational, policy and program decisions and activities of the government.

Government of Canada Action Plan on consultation and engagement



Canadian Zinc

In November 2007, the Government of Canada launched a plan to address the legal duty of federal departments and agencies to consult with Aboriginal groups.

The Action Plan provides more predictability, certainty and transparency on when and how to practically consult and, if necessary, accommodate.

The Action Plan ensures that:

- federal officials receive consultation guidelines and related training;
- federal officials begin monitoring and improving the coordination of consultation and accommodation practices across departments;

- a repository of information is created to track the location and nature of potential and established Aboriginal and Treaty rights; and
- Aboriginal groups, provinces, territories and industry groups are engaged in the development of policy on consultation and accommodation.

Consultation guidelines have been developed to assist federal departments and agencies in fulfilling the Crown’s duty to consult. These guidelines can be viewed at: www.ainc-inac.gc.ca/ai/arp/cnl/intgui-eng.asp

Roles and Responsibilities

What is the role of the Crown?

The federal government is responsible for ensuring consultation and, where appropriate, accommodation obligations are fulfilled. It is important for federal departments and agencies involved to work together to fulfill the duty.

Departments and agencies must ensure that information regarding their decisions or activities is provided to appropriate Aboriginal groups in a timely manner. A point of contact needs to be identified, and any timelines made clear.



MVLMB

What is INAC's role in Crown consultation in the NWT?

INAC recognizes the importance of consultation, the need to respect potential and established Aboriginal and Treaty rights, and the desire by all parties for clarity and improved efficiency.

The action plan provides guidance and best practices for federal employees seeking practical ways to implement the common law duty to consult in the NWT, and focuses on using the environmental regulatory system in place pursuant to treaties and legislation.

INAC recognizes that the Crown approach to consultation is evolving. It is committed to working with other federal government departments, Aboriginal groups, regulatory boards, industry, the territorial government and other interested parties to make consultation effective and understandable.

As part of consultation, it must first be assessed whether there is a legal duty to consult and how it can be met. In many cases, the Crown must use the regulatory processes conducted by the boards established by the *Mackenzie Valley Resource Management Act*.

In all cases where a duty to consult is identified, the federal government must make sure that the appropriate extent of consultation is undertaken with Aboriginal groups and that industry is provided with information and advice.

Along with other federal government departments, INAC's goals for consultation in the NWT are to:

- meet the Crown's legal duty to consult, and where appropriate, accommodate Aboriginal groups
- avoid duplication of existing consultative processes carried out by the boards established or set out in land claim agreements.
- respect agreements reached through ongoing negotiation processes, such as Interim Measures Agreements

How is the Government of Canada organized for Crown consultation in the NWT?

Consultation Support Unit (CSU)

To support federal consultation overall, and its own consultations, INAC Northwest Territories Region established the Consultation Support Unit (CSU) in 2008. This unit provides support and advice to INAC NT Region directorates with respect to s.35

Crown consultation for minerals, lands and other matters, and also supports the overall government approach to making sure the duty to consult is met, particularly through the regulatory board processes.

Consultation and Accommodation Unit (CAU)

At the national level, the Consultation and Accommodation Unit (CAU) of INAC was established in 2008 to carry out the elements of the Action Plan on Aboriginal Consultation and Accommodation. The functions of the CAU have expanded since the release of the Action Plan to address the evolving nature of the legal duty to consult.

The CAU is responsible for leading a "whole of government approach" to Aboriginal consultation and accommodation including:

- Implementing Guiding Principles and Consultation Directives to define Canada's approach to consultation and accommodation
- Entering into consultation arrangements/ protocols to streamline consultation processes with Aboriginal groups and provinces/territories
- Entering into MOUs with provinces and territories improve efficiency and reduce duplication on consultation
- Enhancing consultation and accommodation tools designed to assist federal officials in effective and efficient decision making by:
 - Implementing the Consultation Information Service, to provide baseline information for external stakeholders and advisory input for federal departments and agencies
 - Providing updated guidelines and expanded training for federal officials
 - Strengthening government-wide coordination efforts
- Enhancing the Aboriginal and Treaty Rights Information System

Northern Project Management Office (NPMO)

In September 2009, the Northern Projects Management Office (NPMO) was established as a core program within the Canadian Northern Economic Development Agency (CanNor) to support economic development in Yukon, the Northwest Territories and Nunavut.

NPMO coordinates federal regulatory participation, tracks project progress, and maintains the Crown consultation record on northern projects. NPMO works with federal partners, territorial and aboriginal governments, regulatory boards, and stakeholders to facilitate improved communication and coordination and ensure environmental assessments and permits proceed smoothly on northern projects.

Other government departments often have a key role to play, including Environment Canada (EC) and Fisheries and Oceans Canada (DFO), National Energy Board (NEB), and Natural Resources Canada (NRCan).



MVEIRB

What does Crown consultation mean for Third Parties?

Third parties, such as developers, do not have a legal duty to consult with Aboriginal peoples.

However, certain parts of the consultation process may be delegated to third parties. For example, there are normal due diligence, regulatory and other business practices that are carried out by industry in the course of their dealings with the public, including Aboriginal groups. Engagement and consultation by developers or other third parties may be taken into account when the Crown is assessing consultation obligations.

For example, a mining exploration company may meet with a First Nation to explain a proposed drilling exploration project, answer any questions, and possibly address their concerns.

If the decision on permitting for the proposed project is identified as requiring consultation, boards and the Crown can take the company's consultation efforts into account.

The Mackenzie Valley Land and Water Board (MVLWB), including regional boards for Gwich'in, Sahtu and Wek'eezhii, and the Mackenzie Valley Environmental Impact Review Board (MVEIRB), have developed guidelines for third party consultation with Aboriginal groups that require applicants to provide evidence of their consultations.

Third parties benefit from being proactive, building relationships and sharing information with potentially affected Aboriginal groups from the very beginning stages of a proposed project—it makes good business sense, and is part of the regulatory process.

Consultation and engagement activities (meetings, discussions, letters, emails, phone calls), and their results (commitments, information, options and outcomes) should be recorded and well-documented by all parties.

Good consultation involves all parties!

When it comes to consultation, the Crown, Aboriginal groups and third parties all have a role to play. All are expected to act in good faith in order to better understand each others' concerns. This is done by:

- sharing information
- identifying concerns related to specific rights and proposed decisions or actions
- taking steps to avoid or minimize any negative impacts

For example, if a developer has applied to the MVLWB for a land use permit, and the Crown has a duty to consult, terms and conditions can be included in the land use permit to mitigate or avoid potential negative impacts.



What is the role of Aboriginal groups in consultation?

An Aboriginal group is responsible, under the same common law that applies to government, for clearly outlining the nature and scope of its potential or established Aboriginal or Treaty rights, as well as the potential impacts of a given decision or action on such rights.

Most importantly, this includes participation in regulatory processes, particularly those carried out by the boards established by the *Mackenzie Valley Resource Management Act (MVRMA)* for environmental assessment and land and water permitting and licensing. The act can be viewed at <http://laws.justice.gc.ca/en/M-0.2/>

In order for the process to be effective, Aboriginal groups must:

- clearly outline the nature and scope of their potential or established Aboriginal or Treaty rights
- clearly outline potential negative impacts that the Crown’s conduct will have on such rights

- accept reasonable good faith attempts by the Crown to consult and take reasonable positions to help government make decisions in a timely way
- attempt to achieve solutions in the spirit of reconciling interests

What is the role of the Government of the Northwest Territories?

Supreme Court of Canada decisions also apply to provincial and territorial governments. These governments have put in place their own consultation processes for their conduct. In cases where both levels of government are involved, Canada looks for opportunities to coordinate efforts with the provinces and territories to make the process work better by minimizing duplication and conflict.

It is essential that Aboriginal groups actively participate in and contribute to the consultation process by communicating their concerns and providing information in a timely way—particularly as part of regulatory processes that have been specifically created to deal with Aboriginal concerns and interests.

NWT existing Aboriginal and Treaty rights:

Rights in a signed land claim (modern treaty), an historic treaty (Treaty 8 or 11) or that have been recognized by the courts.

NWT potential Aboriginal and Treaty rights:

Rights that have not yet been agreed on or decided by the courts, but that are asserted by an Aboriginal group.

Both potential and existing Aboriginal and Treaty rights are constitutionally protected under s.35 of the *Constitution Act, 1982*.

Considering a project? Start engaging early!

- Follow regulatory board guidelines (MVLWB and MVEIRB).
- Meet with Aboriginal groups from the beginning.
- Record and document all activity.
- Contact the Consultation Support Unit, the Consultation and Accommodation Unit or the Northern Project Management Office for additional information.

Crown:

The Crown means the Government of Canada or the government of a province. By extension, the Crown includes all territorial governments, government departments, agencies and boards established under federal or provincial legislation.

The major difference between a Canadian province and a territory is that provinces are jurisdictions that receive their power and authority directly from the *Constitution Act, 1867*, under Commonwealth law, whereas the mandates and powers of territories come from the federal government. Each province has its own “Crown” represented by the lieutenant-governor, whereas the territories are not sovereign and are considered parts of the federal realm and have a commissioner.

In the Northwest Territories, the territorial government represents the Crown indirectly through federal legislation—the *NWT Act*.



Paul Vesel



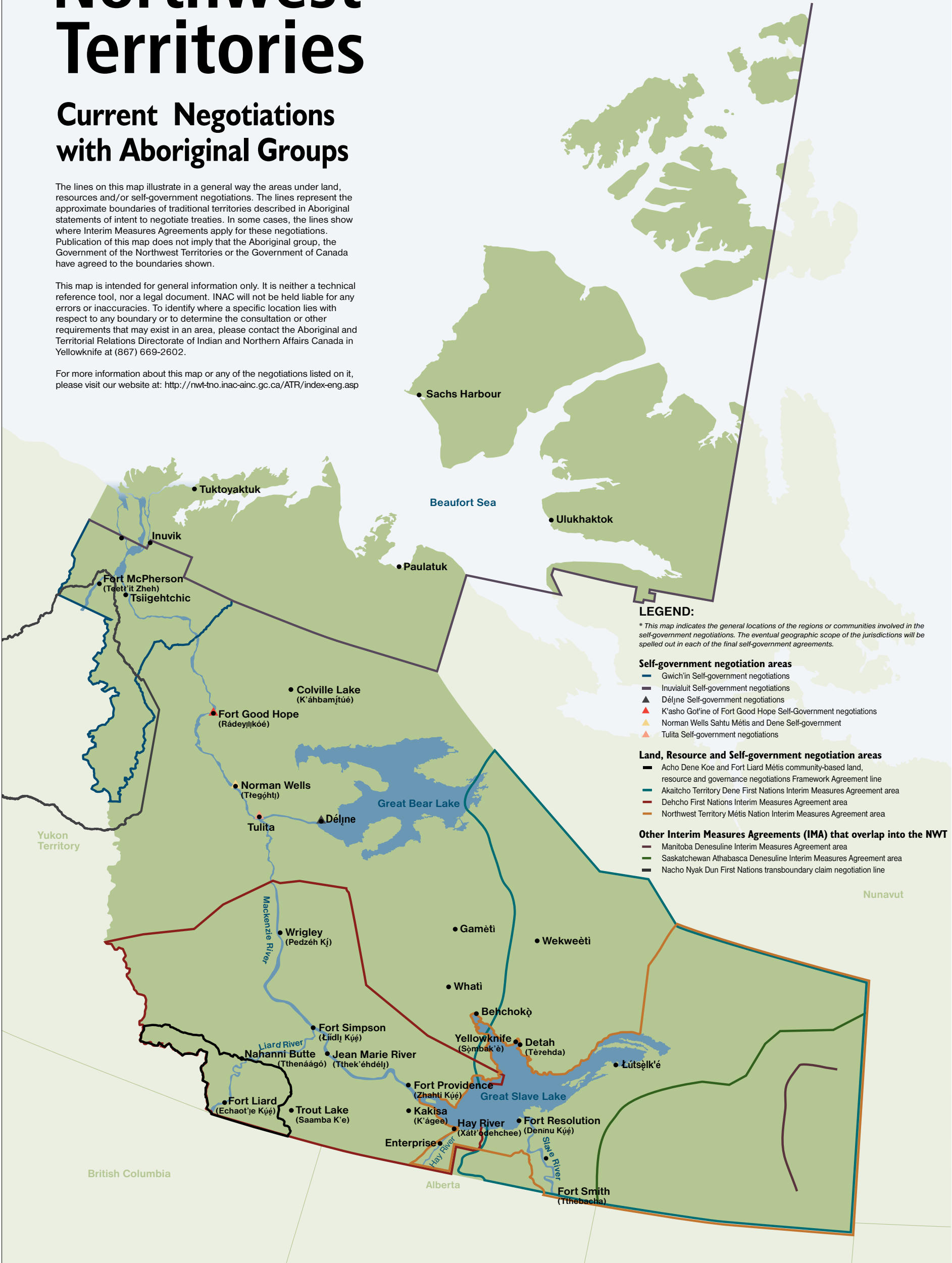
Northwest Territories

Current Negotiations with Aboriginal Groups

The lines on this map illustrate in a general way the areas under land, resources and/or self-government negotiations. The lines represent the approximate boundaries of traditional territories described in Aboriginal statements of intent to negotiate treaties. In some cases, the lines show where Interim Measures Agreements apply for these negotiations. Publication of this map does not imply that the Aboriginal group, the Government of the Northwest Territories or the Government of Canada have agreed to the boundaries shown.

This map is intended for general information only. It is neither a technical reference tool, nor a legal document. INAC will not be held liable for any errors or inaccuracies. To identify where a specific location lies with respect to any boundary or to determine the consultation or other requirements that may exist in an area, please contact the Aboriginal and Territorial Relations Directorate of Indian and Northern Affairs Canada in Yellowknife at (867) 669-2602.

For more information about this map or any of the negotiations listed on it, please visit our website at: <http://nwt-tno.inac-ainc.gc.ca/ATR/index-eng.asp>





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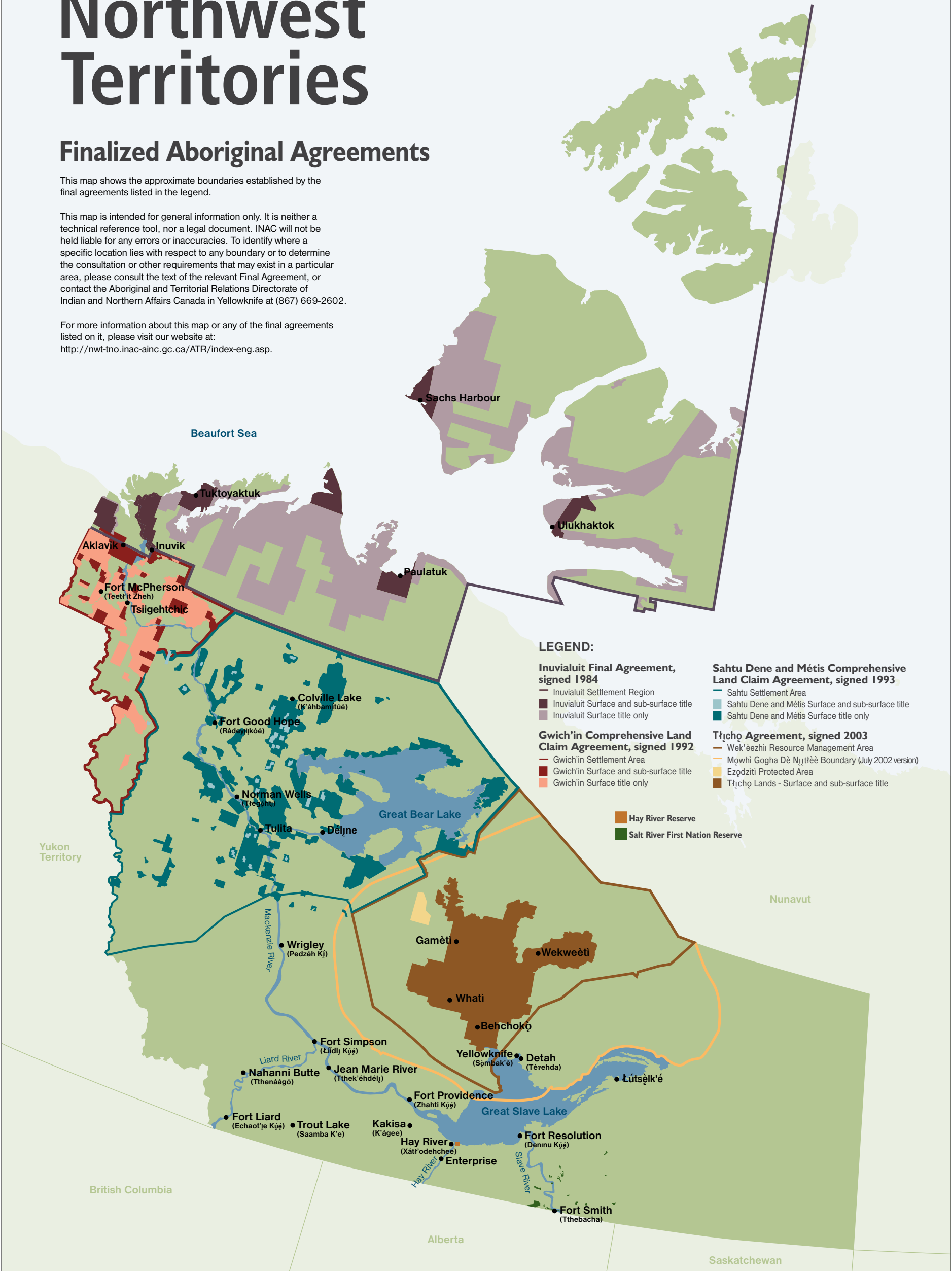
Northwest Territories

Finalized Aboriginal Agreements

This map shows the approximate boundaries established by the final agreements listed in the legend.

This map is intended for general information only. It is neither a technical reference tool, nor a legal document. INAC will not be held liable for any errors or inaccuracies. To identify where a specific location lies with respect to any boundary or to determine the consultation or other requirements that may exist in a particular area, please consult the text of the relevant Final Agreement, or contact the Aboriginal and Territorial Relations Directorate of Indian and Northern Affairs Canada in Yellowknife at (867) 669-2602.

For more information about this map or any of the final agreements listed on it, please visit our website at:
<http://nwt-tno.inac-ainc.gc.ca/ATR/index-eng.asp>.





Laurie Nowakowski

Where can you find more information on consultation?

Parties interested in and affected by consultation need to get involved and informed on obligations and rights related to consultation.

Here are some links to get started:

Action Plan on Consultation and Engagement

www.ainc-inac.gc.ca/ai/arp/cnl/index-eng.asp

Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult

www.ainc-inac.gc.ca/ai/arp/cnl/intgui-eng.asp

INAC NT Region Consultation Support Unit (CSU)

www.ainc-inac.gc.ca/ai/scr/nt/cns/index-eng.asp
consultationsupportunit@inac.gc.ca

Consultation and Accommodation Unit (CAU)

www.ainc-inac.gc.ca/ai/arp/cnl/ca/index-eng.asp

Northern Project Management Office (NPMO)

(867) 920-NPMO (6766)
NPMO-BGPN@cannor.gc.ca
www.north.gc.ca/pr/npm-eng.asp

Aboriginal Consultation in the Northwest Territories brochure

www.ainc-inac.gc.ca/ai/scr/nt/ntr/pubs/cnslt-eng.asp

Negotiations and Agreements in the NWT

www.ainc-inac.gc.ca/ai/scr/nt/na/index-eng.asp

Government of the Northwest Territories

(867) 873-7500

www.gov.nt.ca

Mackenzie Valley Land and Water Board

(867) 669-0506

www.mvlwb.com

Mackenzie Valley Environmental Impact Review Board

(867) 766-7050 (General inquiries)

(866) 912-3472 (Toll Free NWT, Nunavut and Yukon only)

www.reviewboard.ca

Got something to tell us?

Here's who to contact:

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PO Box 1500, Yellowknife NT X1A 2R3
Phone: (867) 669-2576 Fax: (867) 669-2715
Email: ntcommunications@inac.gc.ca

Plain Talk on Land and Self-government is produced by Indian and Northern Affairs Canada in the NWT to help residents understand these concepts, how they work, and what they mean in our day-to-day lives. It is not a legal document.

Our Vision

The NWT region of INAC is a respected partner in a strong and healthy Northwest Territories. We strive for:

- respectful, effective relationships with Aboriginal people
- creating and enhancing opportunities for all Northerners
- responsible resource development in healthy ecosystems
- northern control over northern resources
- responsive and accountable northern governments as partners
- national initiatives that reflect the interests of all Northerners

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TTY only 1-866-553-0554
ISSN 1708-0002 (Print)

QS-Y137-064-EE-A1
ISSN 1708-0010 (Online)

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Cette publication est aussi disponible en français sous le titre : Franc Parler – printemps 2011

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nwt-tno.inac-ainc.gc.ca

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ainc-inac.gc.ca/ai/scr/nt/edu/bzz/index-eng.asp

Agreements
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Plain Talk on the web
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