

# The Duty to Consult

## What Does It Really Mean For Project Proponents?

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# INTRODUCTION

## **(1) Consultation and Accommodation**

*I. Asserted Claims*

*II. Historical Treaty Areas*

*III. Modern Treaty Areas*

## **(2) Agreements with First Nations**





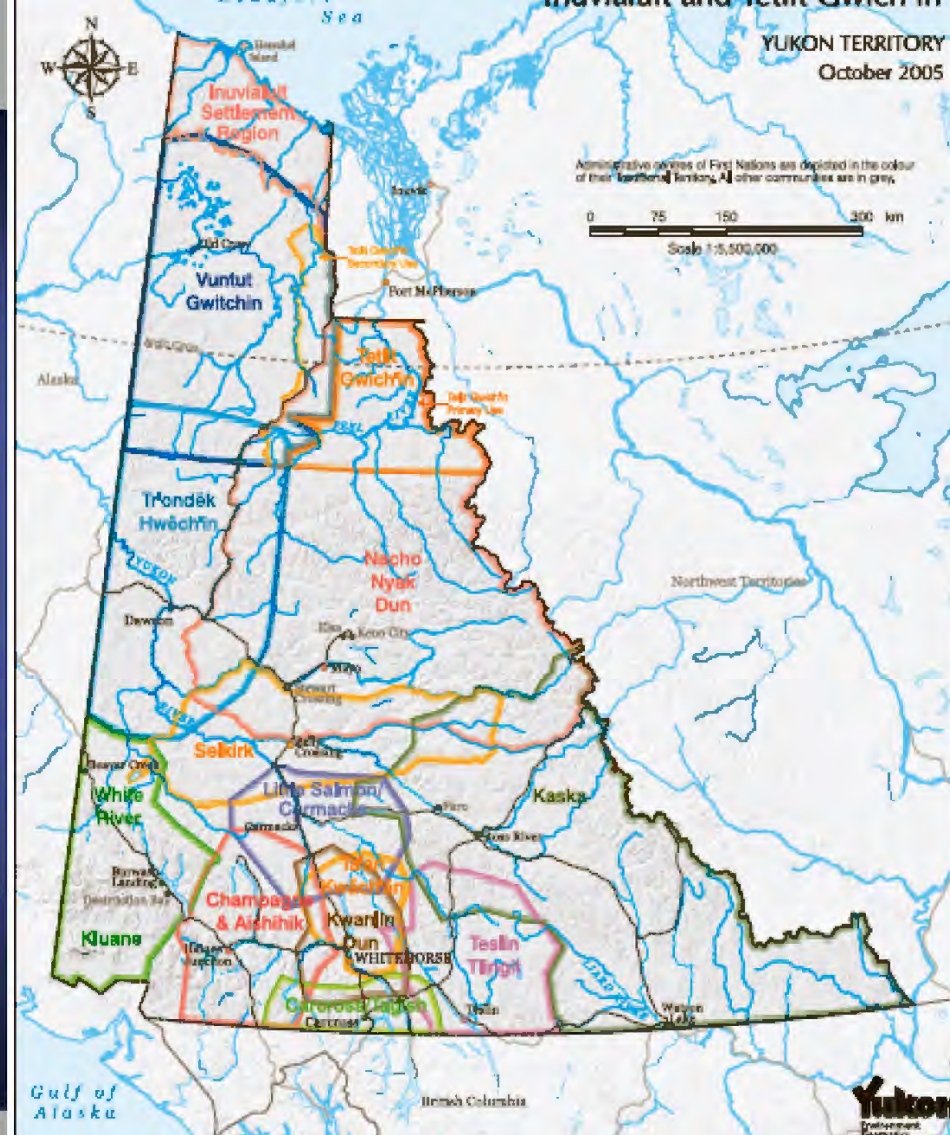






# Traditional Territories of Yukon First Nations and Settlement Areas of Inuvialuit and Tetlit Gwich'in

YUKON TERRITORY  
October 2005



Department of Environment Map ID: G52003-047-02

**Yukon**  
Environment  
Government

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# *The Duty to Consult*

## **What triggers the Duty to Consult?**

- When the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.

# *Haida Nation v. British Columbia*

1. The Crown (both Federal and Provincial) has a legal duty to consult and, if necessary, accommodate in respect of asserted Aboriginal claims
2. The source of the duty to consult is the “Honour of the Crown”
3. Third parties do not have a duty to consult



# *Haida Nation v. British Columbia*

- ▶ *The Crown can delegate  
“procedural aspects of  
consultation”*

# *Haida Nation v. British Columbia*

## **Scope and content of duty on a “spectrum”**

1. Strength of Claim
2. Seriousness of the Impact

# Historic Treaties (The Numbered Treaties)

- 1871 and 1923
- 11 numbered treaties – Ontario, Manitoba, Saskatchewan, Alberta, Northwest Territories



# Historical Treaties of Canada

- Peace & Friendship Treaties 1722 - 1779
- Upper Canada Land Surrenders 1784 - 1802
- Robinson's 1850s 1850
- Numbered Treaties 1869 - 1921
- Williams Treaties 1922



Indian and Northern Affairs Canada

Ministère des Affaires indiennes et du Nord Canada

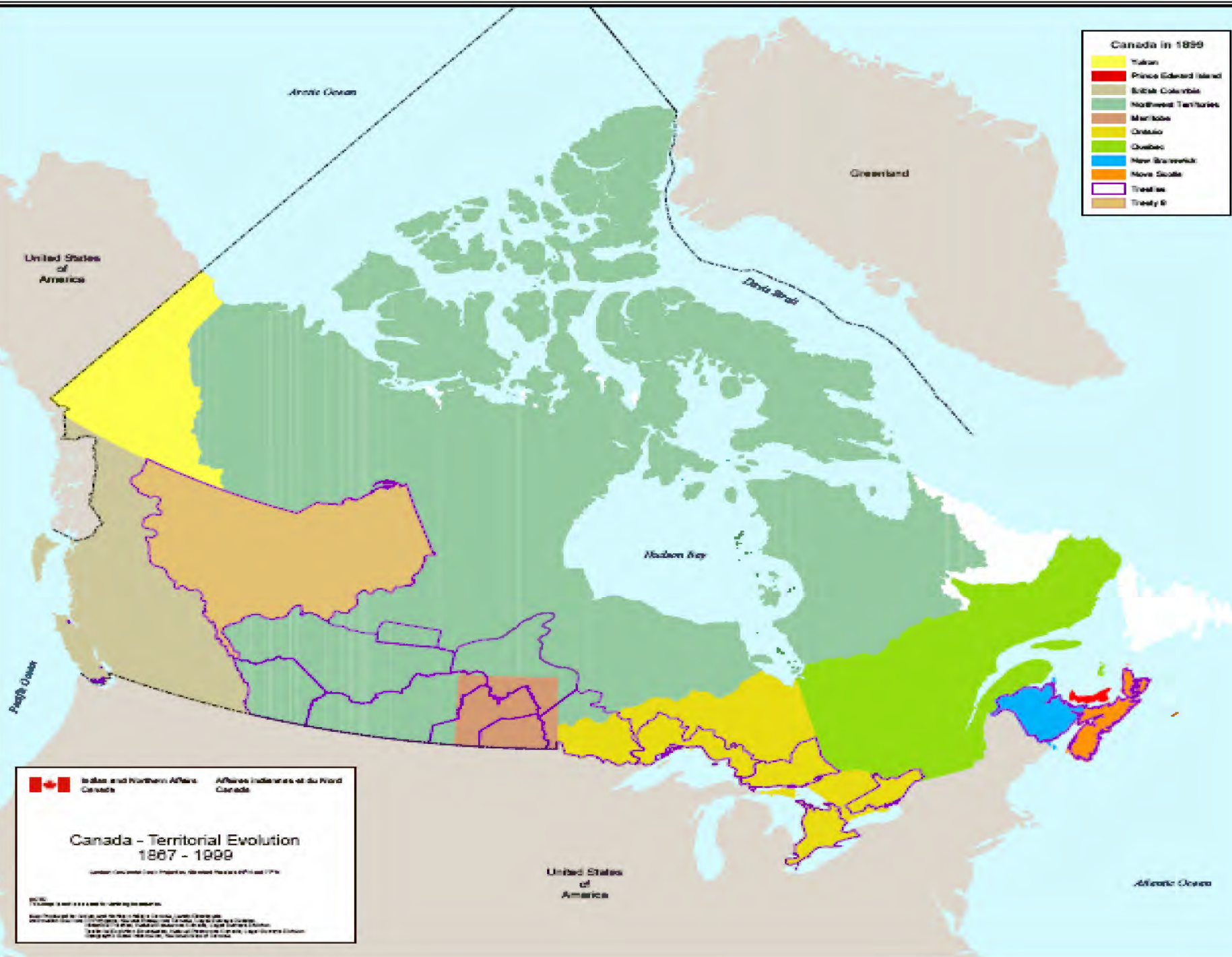
## Historical Treaties of Canada

Copyright: Canadian Crown Protection, Standard Property, 48-2 and 78-5

### NOTE:

This map is a general guide for treaty boundaries.

Map prepared by the Department of Indian and Northern Affairs Canada, Ottawa, Ontario. The map is based on the following sources: Department of Indian and Northern Affairs Canada, Upper Canada Land Surrenders, 1784-1802; Department of Indian and Northern Affairs Canada, Robinson's 1850s, 1850; Department of Indian and Northern Affairs Canada, Numbered Treaties, 1869-1921; Department of Indian and Northern Affairs Canada, Williams Treaties, 1922. The map is based on the following sources: Department of Indian and Northern Affairs Canada, Upper Canada Land Surrenders, 1784-1802; Department of Indian and Northern Affairs Canada, Robinson's 1850s, 1850; Department of Indian and Northern Affairs Canada, Numbered Treaties, 1869-1921; Department of Indian and Northern Affairs Canada, Williams Treaties, 1922.



# TREATY NO. 8

“And Her Majesty the Queen **HEREBY AGREES** with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered...saving and excepting such tracts as may be required or *taken up* from time to time for settlement, mining, lumbering, trading or other purposes.”



# *Mikisew Cree First Nation v. Canada*

## **Background:**

- winter road proposed to connect three aboriginal and one non-aboriginal communities to Alberta highway system
- did not talk to Mikisew Cree

# *Mikisew* - -Supreme Court of Canada

## *Power to Take Up Land Confirmed*

- not limited to express purposes stated in treaty

## *Requires Consultation Where Taking Up Infringes Treaty Rights*

# *Mikisew Cree First Nation v. Canada*

## **Spectrum**

### **1. Specificity of the Treaty**

#### **Promise**

### **2. Seriousness of Potential Impact**



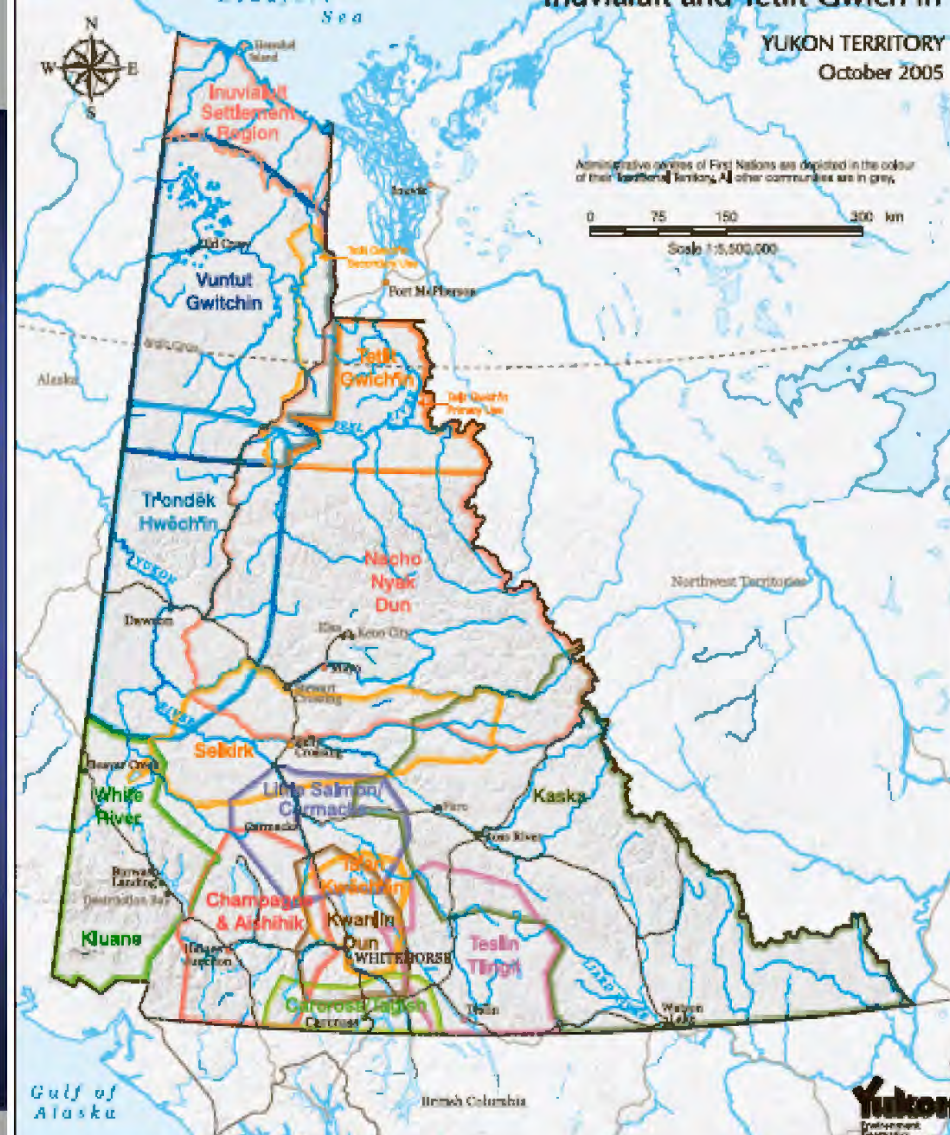
# Consultation under Modern Land Claims Agreements

## Since 1973

- ▶ Sixteen (16) comprehensive land claims in Yukon, NWT and Nunavut
- ▶ Four (4) other comprehensive land claim in the rest of Canada

# Traditional Territories of Yukon First Nations and Settlement Areas of Inuvialuit and Tetlit Gwich'in

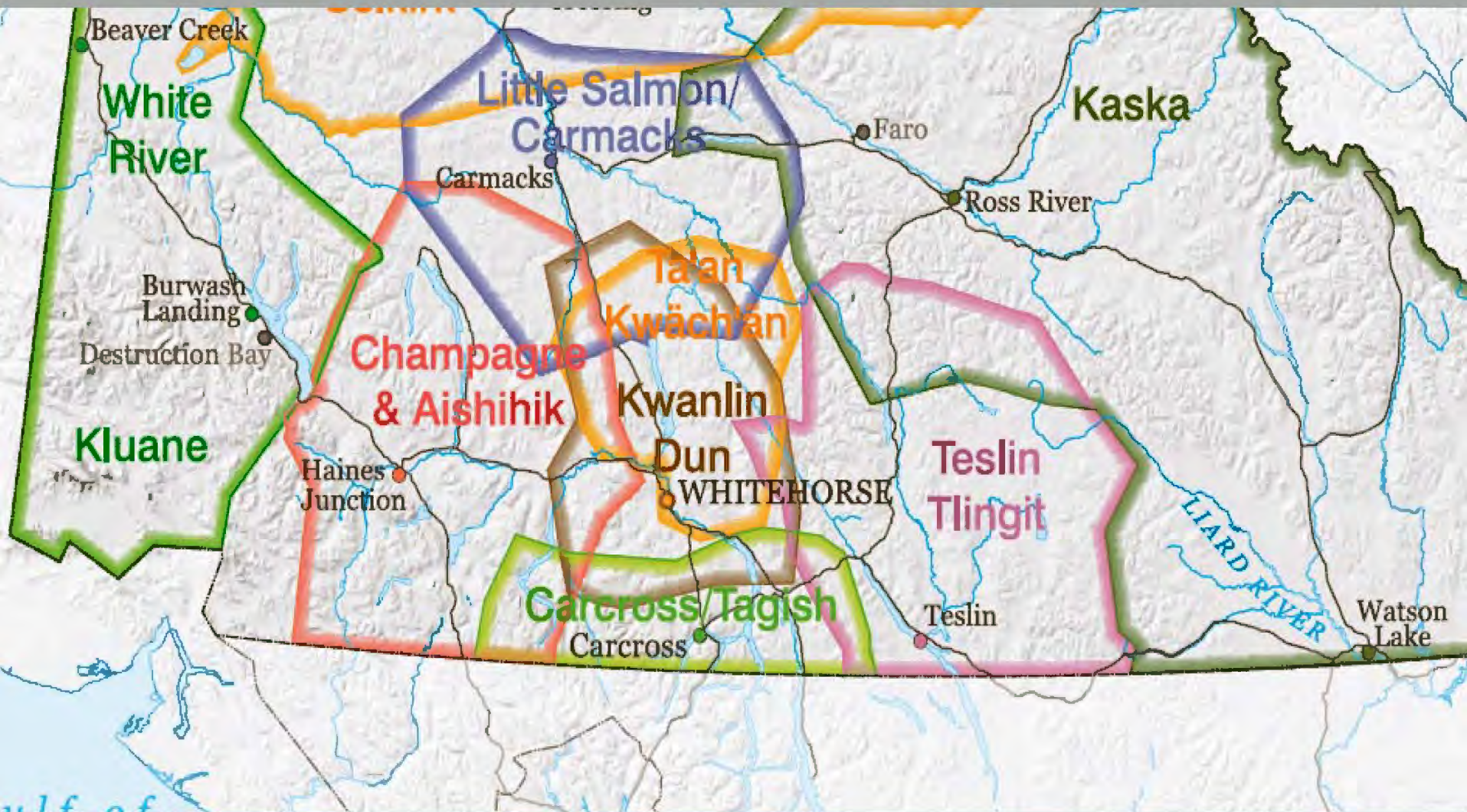
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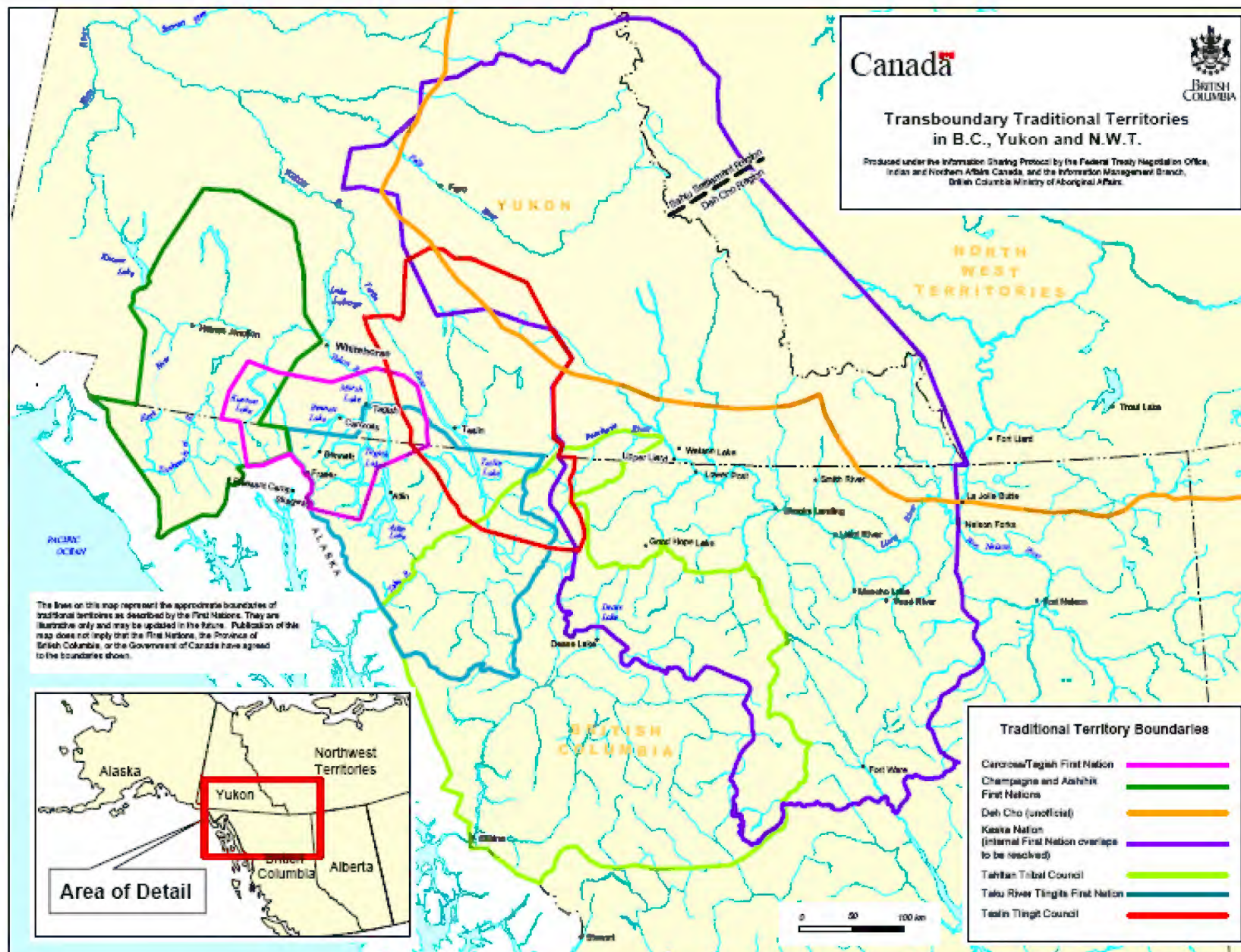


Canada



# Transboundary Traditional Territories in B.C., Yukon and N.W.T.

Produced under the Information Sharing Protocol by the Federal Treaty Negotiation Office,  
Indian and Northern Affairs Canada, and the Information Management Branch,  
British Columbia Ministry of Aboriginal Affairs.



The lines on this map represent the approximate boundaries of traditional territories as described by the First Nations. They are illustrative only and may be updated in the future. Publication of this map does not imply that the First Nations, the Province of British Columbia, or the Government of Canada have agreed to the boundaries shown.

## Traditional Territory Boundaries

- Carondek/Tagish First Nation —
- Champagne and Ashihik First Nations —
- Deh Cho (unofficial) —
- Kaska Nation (internal First Nation overlaps to be resolved) —
- Tahltan Tribal Council —
- Taku River Tlingit First Nation —
- Teslin Tlingit Council —

# Consultation under Modern Land Claims Agreements

- ▶ Lands in fee simple
- ▶ Management Area *participate in*:
  - *land use planning*
  - *land and water use*
- ▶ Still larger tract of land
  - *Hunting fishing and trapping*
  - *May be overlapping with other groups*



[illegible]

WILLIAMSON (1977) DISCOVERED ANOTHER FORM OF VULCAN LIGNITE

National or Technical Park



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 North Slope CWC 2004/55 - Lands required for a national park and other conservation purposes

Indicate Character of Land from entitled Title and the

**Environmental Protection Agency (EPA) -** EPA is the lead agency for environmental protection in the United States. It is responsible for developing and enforcing federal laws that protect the environment. EPA also provides technical assistance and funding to state and local governments to help them protect the environment.

change in applicable Orders in Council (made pursuant to the

for Juvenile First Nation Settlement (Lands)

## Settlement Lands (Yukon First Nations) Category A -

Access for various uses is set out in Final Agreement

new author these rights issued by First Nation.

Switzerland: Lands (Fibon First Nations) | Category B  
and C, Boreal - Average for 2000-2009: 100% in 2000-2009

in First Amendment constitutional rights issues.

by Yukon Government.

Special Management Area (SMA) (Red File)

Not wind more from disposition

Yukon North Slope (Inuvialuit Settlement Region)

Access for various users is set out in the Final Agreement

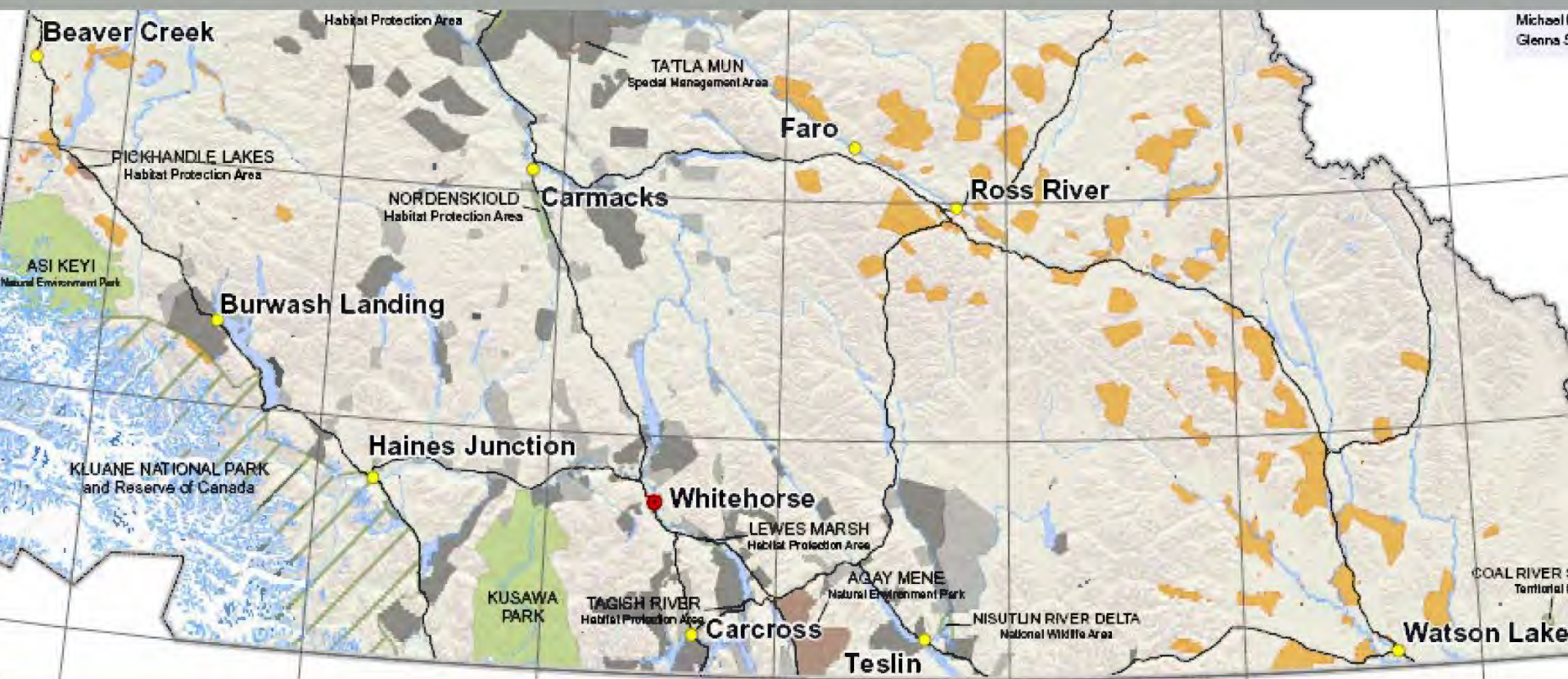
<p>1. 下列各句，没有语病的一项是（3分）</p> <p>A. 在“一带一路”的宏伟蓝图下，中国正以空前的速度，向全球输出中国方案。</p> <p>B. 随着“一带一路”的深入推进，沿线国家正以空前的速度，向全球输出中国方案。</p> <p>C. 随着“一带一路”的深入推进，中国正以空前的速度，向全球输出中国方案。</p> <p>D. 随着“一带一路”的深入推进，中国正以空前的速度，向全球输出中国方案。</p>	<p>2. 下列各句，没有语病的一项是（3分）</p> <p>A. 随着“一带一路”的深入推进，中国正以空前的速度，向全球输出中国方案。</p> <p>B. 随着“一带一路”的深入推进，中国正以空前的速度，向全球输出中国方案。</p> <p>C. 随着“一带一路”的深入推进，中国正以空前的速度，向全球输出中国方案。</p> <p>D. 随着“一带一路”的深入推进，中国正以空前的速度，向全球输出中国方案。</p>
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Age Group	Percentage
18-24	18%
25-34	15%
35-44	12%
45-54	10%
55-64	8%
65-74	6%
75-84	4%
85+	2%

[illegible]





Michael  
Glenna S

# Consultation under Modern Land Claims Agreements

**Does a modern land claim agreement  
displace the common law duty to  
consult?**

*Little Salmon/Carmacks First Nation v. The Gov't of  
Yukon (Min. of Energy, Mines and Resources),  
2007 YKSC 28  
(Under Appeal – heard in June 2008)*

# Summary

## Asserted Claims - *Haida* and *Taku*

Duty to consult applies to asserted (not yet proven) claims

## Historic Treaties - *Mikisew Cree*

Duty to consult applies in the context of the historic numbered treaties

## Modern Land Claim Agreements – *Little Salmon*

Expressly define consultation obligations

# LEGAL PRINCIPLES: ACCOMMODATION

## ■■■ When is Accommodation Required?

“When the consultation process suggests amendment of Crown policy, we arrive at the stage of Accommodation” (*Haida*, at para 47).

## ■■■ Accommodation is Not Required in Every Situation



# LEGAL PRINCIPLES: ACCOMMODATION

## **Accommodation May Include:**

***(1) Avoidance of Specific Areas***

***(2) Minimizing Impacts***

***(3) Compensation***

# Types of Agreements

## **Binding Agreements**

- Access/Benefit Agreements
- Impact/Benefit Agreements
- Impact Management and Benefit Agreements
- Participation Agreements
- Cooperation Agreements

# Building Better Access and Benefit Agreements

## Who?

- Project Proponent
  - Parent company/subsidiaries
  - Contractors/subcontractors
  - Successors and assignees

# Building Better Access and Benefit Agreements

## Who?

- First Nation
  - Band (*Indian Act*)
  - Tribal Council
  - Nation
  - Corporations or societies
  - Land claim/self-government agreement entities (governments)
  - Metis

# Building Better Access and Benefit Agreements

## Who?

- Government
  - Canada
  - Provincial government
  - Territorial government



# Building Better Access and Benefit Agreements

## Why Not The Crown?

- Duty to consult and accommodate is a legal duty of the Crown (Haida)
- Crown can delegate “procedural aspects of consultation” to Project Proponents
- Industry seeking “sign-off” on Crown’s duty

# Building Better Access and Benefit Agreements

## How?

- Employment opportunities
- Contracting opportunities
- Financial consideration
- Communications Committee
- Legal certainty

# Building Better Access and Benefit Agreements

## Why?

- Industry: Proceed with the Project and Legal Certainty
- First Nation: Share in the benefits and provide input on the Project
- Both parties: Build relationships

# Building Better Access and Benefit Agreements

## The Alternatives

- Judicial review
- Appeal
- Injunction
- Litigation (nuisance, etc.)
- Delay in permit authorization
- Lack of access



# The Bottom Line

■■■ **Timely**

■■■ **Cost-effective**

■■■ **Competitive Advantage**

# Building Better Access and Benefit Agreements

## Past Grievances/Infringements

- *Gitxsan v. British Columbia (Minister of Forests)*
- *Gwasslam v. British Columbia (Minister of Forests)*

*“If a...licence has been issued in breach of the Crown’s duty to consult, the duty continues and the Crown is obliged to honour its duty each time it has a dealing with the licence.” (Gitxsan, p. 81)*

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