

MNDM POLICY: SITES OF ABORIGINAL CULTURAL SIGNIFICANCE – WITHDRAWALS AND SURFACE RIGHTS RESTRICTIONS

The following is operational policy describing MNDM's approach to implementation of the criteria prescribed in O.Reg 45/11 pertaining to sites of Aboriginal cultural significance for the purposes of ss. 35 and 51 of the Mining Act.

I. INTRODUCTION

II. OBJECTIVES

III. CONFIDENTIALITY

IV. GUIDING PRINCIPLES

- i) 25 hectares or less*
- ii) The nature of the site*
- iii) The geographic description of the site*
- iv) The community support*
- v) Consideration of other mechanisms*

V. INFORMATION COLLECTION

VI. PROCESS

- i) Application for withdrawal*
 - Reopening lands*
- ii) Consideration of surface rights restrictions*
 - Claim holder representations*
 - Withdrawals on reversion of claims to Crown*

I. INTRODUCTION

The *Mining Act* includes provisions intended to assist the Ministry of Northern Development and Mines (“MNDM” or “ministry”) in minimizing or avoiding disruption to “sites of Aboriginal cultural significance” caused by mineral exploration and development activities: withdrawing lands from prospecting, staking, sale or lease, pursuant to section 35 of the Act where no mineral tenure yet exists, or; restricting a claim holder’s rights to use certain portions of the surface of his or her mining claim (“surface rights restriction”), pursuant to subsection 51(4).

The decision to use either of these tools is a discretionary decision and will be made consistent with: the purposes of the Act generally; the criteria prescribed in O.Reg 45/11; and the principles and processes set out in this Policy.

Withdrawals and surface rights restrictions made pursuant to the *Mining Act* have the effect of constraining or prohibiting mineral exploration and development activities only. If an Aboriginal community wants other protections for specific areas, application must be made to other appropriate ministries or agencies. They, in turn, may require different information than what may be required by MNDM for its purposes specific to the *Mining Act*.

The consideration of sites of Aboriginal cultural significance for the purposes of the *Mining Act* is intended to be a straight-forward process based on readily available information about areas known to an Aboriginal community. This Policy and process do not require, duplicate or initiate land use planning, values mapping, archeological studies, or other similar processes, though information gathered through those processes may be submitted and helpful to MNDM in making a determination about any specific site.

Finally, MNDM’s consideration of sites of Aboriginal cultural significance as prescribed in O.Reg. 45/11 is not intended to detract from any obligation MNDM may have to consult with Aboriginal communities, nor to interpret or determine Aboriginal or treaty rights. For further clarity, lands eligible for consideration as a site of Aboriginal cultural significance for the purposes of the *Mining Act* need not be lands that would otherwise be protected by section 35 of the *Constitution Act, 1982*.

II. OBJECTIVES

MNDM wants to ensure that lands identified by Aboriginal communities as sites that might meet the prescribed criteria as a site of Aboriginal cultural significance are given due consideration in order to avoid or minimize disputes with Aboriginal communities and to help build relationships between communities, MNDM and industry proponents. This can best be achieved by early identification of lands so that they can be withdrawn from prospecting, staking, sale and lease and MNDM encourages communities to apply for site withdrawals at their earliest opportunity.

Where an area has not been withdrawn prior to a claim being staked, the ministry will consider site specific terms and conditions on an exploration permit and will

encourage dialogue between communities and industry proponents, in an effort to address outstanding concerns that a community may have. As a last resort, the ministry may also consider the imposition of a surface rights restriction.

III. Confidentiality

MNDM recognizes that concerns about ownership and confidentiality of sensitive information are often an obstacle and disincentive to Aboriginal communities in identifying sites they wish to have considered for some form of protection.

For the purpose of withdrawals, while MNDM requires sufficient information on which to base a decision, information collected will be considered and classified as sensitive and confidential information and be available internally on a need-to-know basis only. In appropriate circumstances, MNDM may also share certain information with other ministries.

Areas that have been withdrawn from prospecting and staking will be indicated on MNDM's CLAIMap system but will not indicate the specific reason for the withdrawal or the information on which the decision was based (eg: "This area is withdrawn for reasons of its cultural, ecological or other sensitive nature"). The information contained in an application for a withdrawal will not become a part of the public record.

Information that MNDM gathers in considering whether to impose a surface rights restriction will necessarily be treated differently given that the claim holder who would be affected by the restriction is entitled to notice of any proposed restriction and to make representations to the MNDM about the proposal. Surface rights restrictions are also recorded on the abstract associated with the mining claim, though not necessarily the reason for that restriction. That abstract is publicly accessible.

Finally, MNDM is subject to the *Freedom of Information and Protection of Privacy Act* (FIPPA) and, despite efforts to maintain confidentiality, may nonetheless be compelled to disclose information that has been collected in support of a withdrawal or surface rights restriction in certain circumstances.

IV. GUIDING PRINCIPLES

O.Reg. 45/11 provides that:

(1) Land, with a surface area of 25 hectares or less, may be considered as a site of Aboriginal cultural significance for the purposes of the Act if the following criteria are met:

- 1. it is strongly associated with an Aboriginal community for social, cultural, sacred or ceremonial reasons or because of its traditional use by that community, according to Aboriginal traditions, observances, customs or beliefs.*

2. *it is in a fixed location, subject to clear geographic description of delineation on a map.*
3. *its identification is supported by the community as a whole, as evidenced by appropriate documentation.*

(2) In determining whether a site of Aboriginal cultural significance should be the subject of a withdrawal order and an order to restrict the right to the use of portions of the surface rights on a mining claim, the Minister may consider whether other mechanisms are available and appropriate to protect the site.

The principles and explanations that follow will guide the ministry in its consideration of these criteria.

i) 25 hectares or less

Sites that will be considered for withdrawal as a “site of Aboriginal cultural significance” for the purposes of the *Mining Act* must be 25 hectares or less. Lands that exceed this criterion would be considered through MNDM’s usual processes for withdrawals generally. In order to further address confidentiality and sensitivity concerns, withdrawals of sites of Aboriginal cultural significance will generally be made in standard size and shape increments (four sided polygons in increments of 4, 9, 16 or 25 hectares). The area withdrawn will be the minimum size necessary as determined by MNDM through dialogue with the community, and will include a sufficient area of land surrounding the specific value to ensure its features or uses are appropriately addressed.

Surface rights restrictions will be applied to the smallest area of land necessary to address the use and significance of the site identified and the boundaries will conform to the nature of the specific site rather than to a standard four sided polygon.

ii) The nature of the site

The criteria above are intended to be interpreted and applied with a certain degree of flexibility, recognizing that these sites cannot always be defined with absolute precision. Aboriginal customs and histories vary and what may be of significance in one community’s tradition may not be in another’s. As such, when determining whether land is a site of Aboriginal cultural significance for the purposes of the Act and regulation, the MNDM will accept the views of the Aboriginal community on the question of the land’s association with that community, subject to certain reporting requirements detailed below.

While a certain degree of flexibility in interpretation and application is expected, in general, examples of types or categories of lands that are intended to be captured by the Act and regulation include those such as:

- Places of worship or other sacred purpose;
- Burial grounds;

- Traditional teaching or meeting places;
- Ceremonial lands; and
- Pictographs and petroglyphs.

Lands or areas generally *not* intended to be captured by the Act and regulation but for which other tools exist to address concerns that Aboriginal communities may have about adverse affects, include:

- Trap lines and areas;
- Hunting or fishing grounds;
- Wildlife migration routes;
- Travel or trade routes;
- Waterways.

Similarly, the regulation is not intended to address lands that have been identified in land claims, treaty land entitlement cases, or for protection through Far North planning exercises. Those lands will continue to be considered for withdrawals or other measures through MNDM's usual processes.

Where a site does not fall neatly into the categories or types of sites listed above, other factors the Minister may consider in relation to determining whether a site should be considered a site of Aboriginal cultural significance for the purposes of O.Reg. 45/11 include:

- whether the significance or features of the site are of a physical nature (an object or artifact) that could be relocated to address concerns;
- whether proximity of sites creates issues regarding access for exploration purposes otherwise;
- whether the identified site is particularly unique relative to other sites in close proximity;
- whether the nature of the feature associated with the lands changes or shifts over time (eg. seasonally).

The mineral potential of the lands, or whether mine hazards exist, will not affect the decision to withdraw a site of Aboriginal cultural significance pursuant to this Policy but may be factors the ministry considers under its usual processes for withdrawals under the *Mining Act*.

iii) The geographic description of the site

Where a withdrawal Order is made under the Act, the area withdrawn must be depicted on MNDM's CLAIMaps to ensure prospectors are aware of lands that are not open for staking. Similarly, a surface rights restriction must be depicted on maps or other documentation sufficient to inform the claim holder of the area subject to the restriction.

O.Reg. 45/11 requires that lands being considered as sites of Aboriginal cultural significance be in a fixed location that can be delineated with precision on a map. Aboriginal communities will be asked to identify sites to MNDM with map sketches or GPS coordinates sufficient to plot a polygon on CLAIMaps for withdrawals or on the abstract for a mining claim subject to a proposed surface rights restriction. The sketch or coordinates should be specific to the value or site for which the community seeks protection and should not include an additional buffer or boundary around the site. See section *i)* above with regard to how decisions will be made with regard to the extent of the withdrawal or restriction.

iv) The community support

To be considered as a site of Aboriginal cultural significance for the purposes of O.Reg. 45/11, the MNDM requires that the identification of the site be supported by the community as a whole.

For a withdrawal, Applications should typically be accompanied by a Band Council Resolution or Community Council Resolution or similar documentation which confirms the community's support and awareness of the Application and the information submitted in support of the Application.

Surface rights restrictions do not follow an application process but similar documentation may be required before a determination will be made to place a restriction on a mining claim.

v) Consideration of other mechanisms

Where lands otherwise meet the criteria as a site of Aboriginal cultural significance for the purposes of the *Mining Act*, their withdrawal or restriction are not automatic. The ministry will consider whether other mechanisms exist which would sufficiently protect the identified value or significance of the lands. For example, restrictions or processes may exist under other legislation which would apply to the circumstances or the MNDM may consider terms and conditions on an exploration permit to address the expressed concern.

V. Information collection

The decision to withdraw lands from prospecting, staking, sale and lease, must be made based on appropriate and sufficient information. Equally, a decision to restrict a mining claim holder's rights to use certain portions of the surface rights of his or her claim must not be made lightly or without sound supporting information and rationale.

In the case of sites of Aboriginal cultural significance, MNDM considers Aboriginal communities themselves to be in the best position, based on their traditions, observances, customs or beliefs, to identify those areas that are strongly associated with their community for reasons of their historical, social, cultural, ceremonial or traditional use.

MNDM will require Aboriginal communities to submit information sufficient to describe the nature of the site and its uses and significance to the community as well as information pertaining to the process used by the community to identify the site as a potential site of Aboriginal cultural significance for the purposes of the *Mining Act*. MNDM is not asking communities to generate new information or studies in support of the proposed site but, rather, to rely on existing information of known areas, readily available to communities. This may, however, require that communities record or transcribe stories or testimonials that have not previously been captured. Typically, documentation which will serve to satisfy MNDM's information requirements will include:

- testimonials (written or audio/video recorded) as to uses and significance to the community collected from elders, land users or other community knowledge holders;
- transcripts of oral history and stories pertaining to the area identified;
- existing reports or land use studies that document the site;
- documentation created for other processes (land claims; mapping projects; archeological studies; etc.);
- historic references in secondary materials to the site and its uses and significance;
- photographs of the site and particular features;
- surveys, current or historic, of the site and its features; and
- other ministry or agency designations or protections afforded to the same site.

In exceptional circumstances, including where supporting documentation is limited, MNDM may, at its discretion, require further information collection, independent review, site visits with community members, or other measures prior to making a decision as to whether to withdraw lands or to impose a surface rights restriction.

VI. PROCESS

i) Application for Withdrawal

This will be an application based process that ensures the MNDM has sufficient information on which to base a decision to withdraw lands from prospecting, staking,

sale and lease. Application must be made in the approved form, which sets out the information that is required to be submitted.

Applications will be screened for completeness on receipt and returned to communities if critical information is missing. Specifically, the Application will be considered incomplete if it does not contain a geographic description or delineation of the site (suitable for mapping purposes), if it is not accompanied by appropriate documentation of community support, or if it does not include specific narrative and descriptive information on the nature of the site and the process used by the community to identify the site.

The information and supporting documentation provided in a complete Application will then be assessed for its substantive content relative to the criteria and expectations described in the regulation and this Policy. The Application process is designed to be as administratively efficient as possible. Ideally, where the lands requested to be withdrawn fit squarely and objectively within the criteria and categories described earlier, Applications can be processed and a withdrawal Order made within 21 days from receipt of a complete Application. Where further information is required to make an assessment, or where further dialogue with the community may be necessary, the process may take longer but every effort will be made to process the Application expeditiously.

Reopening lands

The Minister may consider reopening lands that have been withdrawn pursuant to O.Reg 45/11 and this Policy, including at the request of the community which originally sought the withdrawal and where supported by appropriate documentation and rationale as to why the lands no longer require the protection that had originally been sought.

ii) Consideration of Surface Rights Restrictions

A surface rights restriction is a last resort and will be used only in exceptional circumstances, where, for instance, agreement cannot be reached on voluntary measures to protect a value or feature or use, or where terms and conditions on an exploration permit are, in the sole discretion of the Minister, inadequate.

There is no application process. Rather, MNDM's consideration of the use of surface rights restrictions as provided by subsection 51(4) will typically arise through the notification and consultation processes undertaken once a claim has been staked and recorded and early exploration activities are proposed. See O.Reg. 308/12 and MNDM's *Policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration*.

Claim holder representations

Consideration of a surface rights restriction will not occur until all other measures have been considered to address the value or use identified. MNDM will discuss concerns brought forward by Aboriginal communities and will facilitate dialogue with

the claim holder in an effort to find mutually agreed to measures to address any concerns. See MNM's *Policy: Consultation and Arrangements with Aboriginal Communities at Early Exploration*.

While agreement on measures to mitigate concerns are preferred, the ministry can also consider site specific terms and conditions on an exploration permit where that would address concerns, prior to resorting to the imposition of a surface rights restriction.

Where, in the anticipated rare case, a surface rights restriction is proposed to address a site of Aboriginal cultural significance; and despite dialogue and consultation that may have already occurred, the claim holder is entitled to receive formal notice of that proposal and to make representations to the Minister within 30 days of having received notice (subsection 51(5)).

Where a claim holder makes representations objecting to a proposed surface rights restriction and the objection is based on, for example, challenges to the veracity of the identified site or, proposes alternate approaches to address concerns about impacts to the identified site, MNM may require additional information from communities or independent review of the information supporting the identification of the site. MNM may also encourage or facilitate dialogue between the community and claim holder, if that has not already occurred, to further discuss measures to mitigate concerns raised.

Withdrawals on reversion of claims to Crown

Where a surface rights restriction is imposed, a withdrawal order, in the appropriate polygon, will be filed concurrently with the restriction. Accordingly, when a mining claim reverts to the Crown, for whatever reason, those portions of the claim that had been the subject of a restriction will be automatically subject to a withdrawal order. Communities may request that withdrawn lands be re-opened, and that request should be supported by appropriate documentation and rationale as to why the lands no longer require the protection that had originally been sought.