

REPORT ON NORTH AMERICAN
MODELS FOR
FIRST NATIONS
PARTICIPATION IN ENERGY
DEVELOPMENT
WITH EMPHASIS ON
ENVIRONMENTAL PROTECTION

FOR
THE UNIVERSITY OF
CALGARY/OLADE
ENERGY AND ENVIRONMENTAL
PROJECT

MAGDALENA A. K. MUIR
INTERNATIONAL ENERGY, ENVIRONMENTAL AND
LEGAL SERVICES

1997 SEPTEMBER 30

TABLE OF CONTENTS

EXECUTIVE SUMMARY	4
Introduction.....	4
Models for First Nation Participation	4
<i>The Land Claims Model</i>	5
<i>The Indian Lands (Alberta) Model</i>	5
<i>The Alberta Energy and Utilities Board Model</i>	6
Role and Initiatives of the Indian Resource Council of Canada.....	6
Role and Initiatives of the Canadian Association of Petroleum Producers.....	7
APPENDIX: ESSAY ON FIRST NATION RIGHTS AND PARTICIPATION IN ENERGY PROJECTS ..	8
Introduction.....	8
Aboriginal and Treaty Rights	8
Models for First Nation Participation	10
Potential International Applications of Models	14
LAND CLAIMS MODEL: RESOURCE MANAGEMENT OF ENERGY PROJECTS UNDER LAND CLAIM AGREEMENTS	16
Regulators	16
Interests of First Nations	16
Process	16
Assessment	17
CASE STUDY: ENVIRONMENTAL REVIEW OF GULF CANADA RESOURCES LIMITED'S KULLAK DRILLING PROGRAM UNDER THE INUVIALUIT FINAL AGREEMENT	18
Scenario	18
Inuvialuit Final Agreement Process.....	18
Decision of the Environmental Impact Review Board.....	20
Assessment	20
INDIAN LANDS (ALBERTA) MODEL: REGULATION OF ENERGY PROJECTS ON INDIAN LANDS WITHIN ALBERTA.....	22
Regulators	22
Interest of First Nations	22
Process	22
Assessment	24

ALBERTA ENERGY AND UTILITIES BOARD MODEL: REGULATION OF ENERGY PROJECTS BY THE BOARD WITHIN ALBERTA25

 Regulators25

 Interest of First Nations25

 Process25

 Assessment26

CASE STUDY: REVIEW OF ALBERTA ENERGY AND UTILITIES BOARD’S PROCEEDING FOR UNOCAL CANADA MANAGEMENT LIMITED’S SOUR GAS PLANT IN LUBICON LAKE AREA....27

 Scenario27

 Alberta Energy and Utilities Board Process27

 Decision of the Alberta Energy and Utilities Board.....29

 Assessment29

TABLE OF FIGURES

Figure 1- Continuum of First Nations Participation in Energy Projects5

Figure 2 - Comparison of First Nation Involvement in Energy Projects under Different Models11

Figure 3 - Schematic of Process for Land Claims Model.....17

Figure 4 - Wildlife and Environmental Structures: Appointing Agencies and Linkages19

Figure 5 - Inuvialuit Final Agreement Environmental Assessment Process20

Figure 6 - Schematic of Process for Indian Lands (Alberta) Model – Pilot Project.....24

Figure 7 - Schematic of Process for Alberta Energy and Utilities Board Model26

EXECUTIVE SUMMARY

INTRODUCTION¹

Throughout the Americas, indigenous peoples are recognized as having distinct interests and concerns which are tied to the historic use and occupancy of the land. As a result of Canada's constitutional protection of aboriginal rights, Canada has been at the forefront developing models for First Nation (Canada's indigenous peoples) participation in government, the economy and resource management. This report reviews First Nation participation in Canadian energy projects with a focus on the environment in order to develop different models for that participation. These models are extensively examined in the Appendix in order to understand alternative ways of incorporating indigenous concerns into energy projects in other parts of the world, including Latin America.

First Nations and energy industry associations are also important as First Nations involvement affects many aspects of the Canadian energy industry. Therefore, the role and initiatives of the Indian Resource Council of Canada and the Canadian Association of Petroleum Producers are discussed in the Executive Summary.

Finally, a descriptive essay in the Appendix provides a legal and conceptual framework for aboriginal and treaty rights, and First Nation participation in Canadian energy projects. The essay also provides some brief comments about the potential application of the different models to energy projects in Latin America.

MODELS FOR FIRST NATION PARTICIPATION

There is a wide continuum of models in Canada for First Nations' participation, and for the inclusion of First Nations concerns in energy projects. This continuum ranges from very extensive First Nation participation in all aspects of energy projects in a claim area under the Land Claims Model to the more geographically restricted but extensive participation under the Indian Lands (Alberta) Model. At the other end of the continuum, First Nation may be an interested party under the Alberta Energy and Utilities Board Model, where the Board considers their concerns about energy projects alongside other concerns. Given the range of First Nation participation in energy projects, several models are considered. Case studies are utilized, where appropriate, in order to understand the model. These models are briefly reviewed in the Executive Summary. The models and the applicable case studies are discussed more fully in the Appendix.

¹ This report was written by Magdalena A. K. Muir at the request of Professor Alastair R. Lucas, Director, Environmental Legislation Project, the University of Calgary/ OLADE Energy and Environmental Project. Professor Lucas has consented to this report being released to interested parties, and being submitted for publication. Please contact Magdalena A. K. Muir at makmuir@ieels.com if you have any comments or questions about the report. Please contact Professor Lucas at the Faculty of Law, University of Calgary, if you have any comments or questions about the Environmental Legislation Project and the consideration of indigenous issues within that project.

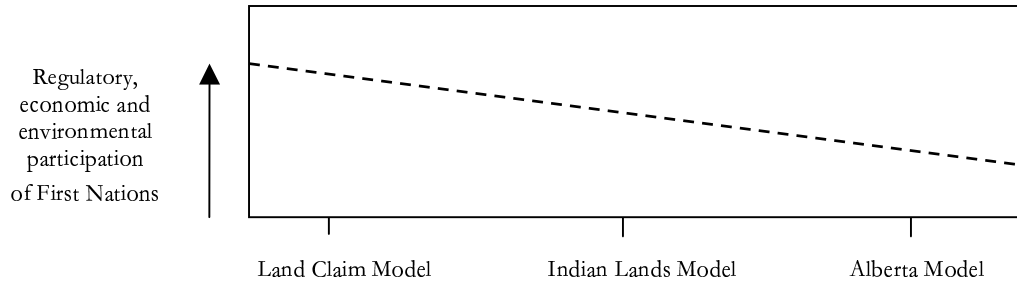


Figure 1- Continuum of First Nations Participation in Energy Projects

THE LAND CLAIMS MODEL

Constitutionally protected comprehensive land claims agreements have been finalized in the Northwest Territories, the Yukon Territories and Quebec, and are being negotiated for British Columbia. These complex agreements transfer land, money and rights to the First Nation, and establish constitutionally protected resource management processes that apply to the entire claim area. The First Nation may own the surface of the land and underlying mineral rights under the Land Claims Model. They may be a proponent for an energy project, or a party whose land and rights are adversely affected by the project. As a result, the First Nation will participate extensively in regulatory, economic and environmental aspects of an energy project.

The land claim agreements also establish First Nation-government joint management boards for the claims area. These boards are usually referred to as institutions of public government as they replace the existing legislative regime for the claims area. The board members are government or First Nation nominees, and the boards have jurisdiction over land, waters and wildlife within the claim area. These boards review all aspects of energy projects, including land and water regulation, land use planning, environmental review and impacts on wildlife. The boards then issue decisions which are endorsed, rejected or modified by the relevant government authority. Further detail about the Land Claims Model is provided in the Appendix, and the case study focuses on the environmental review under the Inuvialuit Final Agreement of Gulf Canada Resources Limited's Kullak drilling proposal in the Beaufort Sea.

THE INDIAN LANDS (ALBERTA) MODEL

First Nations participate extensively in decision-making for energy projects on Indian Lands, or on those reserve lands set aside under treaty. In Alberta, First Nations beneficially own both the surface land and subsurface mineral rights on Indian Lands. These lands are subject to a unique management regime. The Alberta Energy and Utilities Board energy regulatory process applies as a result of the *Indian Oil and Gas Regulations* which incorporate provincial energy regulations. The federal Department of Indian Affairs and Northern Development manages Indian Lands on behalf of the First Nations. Indian Oil and Gas Canada, a division of the department, administers oil and gas on Indian Lands. Indian Oil and Gas Canada, in consultation with and with the consent of the First Nation, issues mineral leases and surface access agreements for energy projects on these lands. The surface access agreement includes environmental terms and conditions.

The First Nations Oil and Gas Management Initiative (the Pilot Project) is underway between five First Nations, the Department of Indian Affairs and Northern Development, and the Indian Resource Council of Canada to enable these First Nations to move towards full management and control of oil and gas resources. The Pilot Project has a three phase approach: co-management, enhanced co-management and full management. Parties are currently at the enhanced co-management stage. Further detail about the Indian Oil and Gas Canada's environmental management process, and the Pilot Project is provided in the Appendix under the Indian Lands (Alberta) Model.

THE ALBERTA ENERGY AND UTILITIES BOARD MODEL

First Nations concerns are also considered by the Alberta Energy and Utilities Board. The Board regulates all energy projects within Alberta, including environmental aspects, and has an established public process. Indian Lands or First Nation wildlife harvesting rights may be affected by an energy project. If that occurs, the First Nation is a directly affected party and has the right to object to a project and to participate in any review of the project. A proponent is required to consult with affected First Nations prior to filing an application with the Board. The Board considers First Nation concerns by requiring adequate notification and communication by the proponent prior to an application, and by considering any concerns raised by the First Nation. Further detail about the First Nations' ability to participate in the Board's regulatory process, and the Board's proceeding for Unocal Canada Mangement Limited's sour gas plant in the Lubicon Lake Area are provided in the Appendix under the Alberta Energy and Utilities Board Model.

ROLE AND INITIATIVES OF THE INDIAN RESOURCE COUNCIL OF CANADA

The Indian Resource Council of Canada was established as a political body in 1987 by oil and gas producing First Nations. The Indian Resource Council consists of fifteen Directors appointed by the Chiefs of their respective First Nations to represent Treaty areas 6, 7, and 8, Saskatchewan, Ontario, Manitoba and British Columbia. The Council has the following objectives and mandates:

(a) To support the member First Nations in their efforts to attain full management and control of their oil and natural gas resources;

(b) To complement, through the collective strength of the resource Bands across Canada, initiatives being taken by First Nations to gain economic self reliance and to ensure the preservation of the federal responsibilities established under Treaties with First Nations;

(c) To coordinate, under the direction of its First Nation members, the promotion of initiatives with federal and provincial governments, with industry and with other groups associated with oil, natural gas and related activities to enhance economic benefits realized by the First Nation from resource development;

(d) To encourage a greater development and utilization of First Nation human resources in oil, natural gas and related economic activities; and

(e) To ultimately replace and perform the duties of Indian Oil and Gas Canada in five years, and that the Board evolve a 5 year plan to achieve this objective, including the training and employment of First Nations persons within IOGC in the interim. (Quotation from Indian Resource Council of Canada—Status Report dated March 27, 1997)

The Indian Resource Council is involved in a number of projects to fulfill this mandate. In June 3, 1996, the Council signed a memorandum of understanding with the Minister of Department of Indian Affairs and Northern Development to establish a Board of Directors to co-manage Indian Oil and Gas Canada. This co-management Board of Directors has nine directors, three of which are appointed by government and six of which are appointed by the Indian Resources Council. The Board of Directors will establish the future direction of Indian Oil and Gas Canada, and develop a strategy for First Nations to manage and control their oil and gas rights. The Indian Resource Council has also signed a memorandum of understanding with the Canadian Association of Petroleum Producers which is described below. Lastly, Indian Resource Council has an advisory and supportive role with the First Nations Oil and Gas Initiative (the Pilot Project).

ROLE AND INITIATIVES OF THE CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS

The Canadian Association of Petroleum Producers represents 170 member companies who produce approximately 95 % of Canada's natural gas and crude oil, and 110 associate member companies who provide a broad range of services that complete the infrastructure of the upstream crude oil and natural gas industry. The oil and gas industry is also important for the nation's economy as there was oil and gas trade surplus of \$13 billion in 1996. This oil and gas trade surplus was the second largest net contributor to Canada's merchandise trade balance of \$37 billion. Canada was also the third largest producer of natural gas and the eleventh largest producer of crude oil in the world in 1996.

In March 1993, the Canadian Association of Petroleum Producers signed a memorandum of understanding with the Indian Resource Council. One component of this memorandum is the formation of a joint committee which has a mandate to identify issues of concern to the respective memberships and to develop strategies to deal with these issues. Since 1992, the Canadian Association of Petroleum Producers has also participated in annual meetings between senior petroleum industry representatives and First Nations Chiefs from across Canada to discuss economic development opportunities and address issues of joint concern. The Canadian Association of Petroleum Producers is currently developing a communications toolkit to assist member companies in their relations with communities including First Nations and other distinct cultural groups. Lastly, the Association, in conjunction with the Department of Indian Affairs and Northern Development and the Indian Resource Council, is an equal founding partner in a First Nations Employment and Training Program being developed.

APPENDIX: ESSAY ON FIRST NATION RIGHTS AND PARTICIPATION IN ENERGY PROJECTS

INTRODUCTION

First Nations participation in energy projects depends on a complex assortment of treaty and aboriginal rights, and relationships with different governments. This essay provides an overview of these diverse rights. The essay also discusses a continuum of models for First Nations' participation and how they include First Nation environmental concerns. Lastly, the essay discusses the potential international applications of these models.

The essay begins with a description of the relationship between the federal government and the First Nations. This description is followed by a discussion of the constitutional status and legal interpretation of aboriginal and treaty rights. This review is followed by a more specific review of aboriginal title to land, and Nations' rights to fish, hunt and trap wildlife. Following the discussion of aboriginal and treaty rights, this essay reviews models for First Nation participation in energy projects and suggests possible international applications. Depending on the rights and relationships between the parties, there is a continuum of models for First Nations' participation and for the inclusion of their environmental concerns in energy projects. This continuum ranges from joint resource management under land claims agreements, to resource management rights arising from the ownership of Indian Lands, to governmental processes where First Nations' environmental concerns are considered as part of a spectrum of interests.

ABORIGINAL AND TREATY RIGHTS

First Nations individuals are characterized as aboriginal, status or non-status Indian, Metis, or Inuit for the purposes of the Canadian Constitution, and federal and provincial legislation. This categorization is complex, and will vary with the act, legislation or document in question. Members of each First Nation will have different rights and benefits as a result of how they are categorized, and as a result of specific agreements and the history of dealings between First Nations and government.

In Canada, First Nations have a special relationship with the federal government. In certain circumstances, this has been judicially interpreted as a fiduciary relationship, or a relationship of trust that requires the federal government to act honorably in its dealings with First Nations. In particular, the Minister of the Department of Indian Affairs and Northern Development has been held to have special responsibilities to carry out Canada's fiduciary responsibilities with First Nations. Provincial governments may also have a special relationship with First Nations as a result of constitutional documents (the Natural Resources Transfer Agreement), and federal legislation (the *Indian Act* and the *Indian Oil and Gas Regulations*). Provincial governments may also have a relationship with First Nations as a result of specific agreements between that province and First Nations. For example, Alberta has entered into agreements with the Alberta Metis to establish settlement associations and Metis settlement lands. Alberta has enacted the *Metis Settlements Act* in furtherance of the agreements.

The federal government has the authority to make laws in relation to “Indians, and Lands reserved for Indians” under s. 91(24) of the *Constitution Act, 1867*. Many provincial and territorial laws also apply to First Nations. Provincial laws which apply generally throughout the province will also apply to “Indians” on “Indian lands”. A provincial law which applies just to Indians may not be valid, and a provincial law which conflicts with a treaty right or federal law will not apply to “Indians”.

Since 1982, the Constitution has recognized and protected existing aboriginal and treaty rights. An aboriginal right can be said to exist if it was historically possessed by a First Nation and if that right was not extinguished prior to 1982. Aboriginal title may be extinguished by treaty and, prior to 1982, by government action inconsistent with the right or which demonstrates a clear intention to extinguish the right. Section 35(1) of the *Constitution Act, 1982* recognizes “existing aboriginal and treaty rights”. As a result of s. 35(1), laws which infringe these rights will be unconstitutional except if there is a very good reason for passing a law which interferes with an aboriginal right, and unless that law interferes with the right in the least intrusive way possible.

Aboriginal and treaty rights are collective rights that belong to the community as a whole and not just individuals, though individuals may enjoy the benefits of these rights. Aboriginal rights include rights to land, and rights to hunt, fish and trap wildlife. These rights are considered to be inherent rights that originate from First Nations use and occupation of lands and resources prior to the arrival of the Europeans. Unlike treaty rights, these rights are not the result of government grants or negotiations. Aboriginal title to land is recognized in Canada, and continues to exist where no treaty or land claim agreement has been signed, or where title has not otherwise been extinguished. This title includes the right to occupy and possess lands. Aboriginal title to land can only be surrendered to the federal government, and can not be surrendered to the provinces.

Treaty rights are those rights which are set out in a treaty negotiated between the federal government and the First Nation. Most treaties in Canada were signed between 1800 and the early 1900s. The treaties transfer reserve lands (Indian Lands), and the underlying oil and gas rights to the First Nations, with this land being beneficially held on their behalf by the federal government. The *Constitution Act, 1930* confirms agreements between the four western provinces (Alberta, British Columbia, Manitoba and Saskatchewan) and the federal government with respect to natural resources. The Natural Resources Transfer Agreements between the federal governments and Alberta, Saskatchewan and Manitoba (agreements under the *Constitution Act, 1930*) do not transfer Indian Lands to the respective prairie provinces. They also do not permit these provinces to share in the administration of resource development on Indian Lands, or to receive a share of mineral revenues or royalties. The written text in most treaties is relatively brief and negotiated in circumstances that were unfavorable for the First Nation, giving rise to a presumption of legal interpretation that any ambiguity in a treaty be interpreted to favor the First Nation.

Land claims agreements are referred to as “modern treaties”. Section 35(3) of the *Constitution Act, 1982* states rights in these agreements are protected “treaty rights”. These land claims agreements also contain provisions confirming they are agreements within the context of s. 35(3), and that the agreements override any inconsistent legislation. Different

principles of legal interpretation may govern these more complex agreements, and the courts have suggested that the presumption that ambiguity be resolved to favor First Nations may not apply to these agreements.

The federal government has entered into ten comprehensive land claims settlements. Two agreements apply to northern Quebec, and the remainder apply to the Northwest Territories and Yukon Territories. Under these agreements, aboriginal title to lands is exchanged for the rights and benefits contained in the agreements. The Inuvialuit Final Agreement (1984) is one of the first comprehensive land claims agreements ratified and implemented by the federal government, and applies to the Northwest and Yukon Territories. First Nations in British Columbia have asserted overlapping claims to most of the land in that province, and the federal and provincial governments are jointly negotiating comprehensive land claims agreements with many of those First Nations. The first agreement-in-principle for British Columbia was executed between the Nisga'a Nation and the federal and provincial governments in 1995. Other areas of Canada, such as Newfoundland, are or may in the future be subject to comprehensive land claims agreements. Specific land claims may also be filed where a First Nation does not receive their land entitlement under a treaty.

First Nation rights to hunt, fish and trap exist as a result of specific treaties, oral discussions during the negotiating of these treaties, aboriginal title, and legislation. The *Constitution Act, 1930* confirms certain aboriginal harvesting rights. The federal government attempted to preserve aboriginal hunting rights after the prairie provinces assumed ownership of the land. The Natural Resources Transfer Agreements which between the federal government and Alberta, Saskatchewan and Manitoba respectively provide that status Indians have the right to hunt, fish and trap during all seasons of the year on unoccupied government lands or on any other lands to which they may have a right of access. These agreements effectively merged and consolidated the harvesting rights of Indians under treaties in the prairie provinces, and restricted the powers of the provinces to regulate First Nations harvesting rights. Under the agreements, the province and not the federal government guarantees the right to hunt and fish for food. Therefore, the province can not pass wildlife legislation that is inconsistent or narrows the scope of First Nation harvesting rights. As a result, Alberta must consider impacts on First Nations harvesting rights when issuing mineral leases or approvals for energy projects. Federal legislation that restricts hunting and fishing still applies, though it is subject to the constitutional protections contained in section 35(1) of the *Constitution Act, 1982*.

MODELS FOR FIRST NATION PARTICIPATION

After this overview of aboriginal and treaty rights, this essay now considers different models for First Nation participation. The figure below compares basic elements of the Land Claims Model, the Indian Lands (Alberta) Model and the Alberta Energy and Utilities Board Model.

Aspects of Model	Land Claims Model	Indian Lands (Alberta) Model	Alberta Energy and Utilities Board (AEUB) Model
Location of Model	Land claim agreements apply to the Northwest Territories and Yukon Territories, and the province of Quebec.	Indian Lands are federal lands located within the provinces. Only Indian Lands within Alberta are considered.	The AEUB applies to all lands within Alberta, including Indian Lands.
First Nations Interests	First Nations receive money, land and subsurface mineral rights, and wildlife harvesting rights under the agreements. They may also have economic and social benefit rights under the agreement. Lastly, they have the ability to nominate members to and participate in resource management boards for the claims area.	Indian Lands include both the surface of the lands and the subsurface mineral rights, and the First Nation is the beneficial owner of these lands and rights. The federal government manages these lands on their behalf.	First Nation are an interested party if the energy project affects Indian Lands, or First Nations rights, including wildlife harvesting, are affected.
The Energy Project	Proponents must enter into agreements with the owner of the resource, and the surface. The owner is likely to be either the First Nation or government. The proponent may also have to enter into economic and social benefit agreements with First Nation. The First Nation may be the proponent or in a joint venture with the proponent of an energy project.	A proponent of an energy project on Indian Lands will require mineral lease and surface access agreements with the federal government and the First Nation. The proponent may also enter into economic and social benefit agreements with the First Nation in order for the energy project to proceed. First Nations are increasingly proponents in energy developments on their lands.	A proponent of an energy project will consult with any affected First Nations as a result of the requirements of the AEUB. They may also, but are not required to, enter into economic and social benefit agreements with the First Nation.
Resource Regulatory Regime	Land claims agreements create First Nations – government boards as institutions of public government. These resource management boards usually replace the existing legislative regime.	Federal environmental legislation and the Indian Oil and Gas Act and Regulations apply. Provincial energy legislation and the AEUB apply.	Provincial energy and environmental legislation applies, and the AEUB is the key regulator for energy projects in Alberta
First Nation Participation in Resource Regulatory Process	Yes, participation before First Nation – government resource management boards.	Yes, participation in Indian Oil and Gas Canada regulatory process, and before AEUB.	Yes, participation in AEUB process if Indian Lands or First Nation’s rights directly affected by energy project.

Figure 2 - Comparison of First Nation Involvement in Energy Projects under Different Models

Aspects of Model	Land Claims Model	Indian Lands (Alberta) Model	Alberta Energy and Utilities Board Model
<p>Economic Participation:</p> <p>Ownership of the surface of lands, and subsurface mineral rights</p> <p>Economic and social benefit agreements</p> <p>Proponent for energy projects</p>	<p>Yes, on certain lands within claims area</p> <p>Yes, in claims area under most agreements.</p> <p>Often for project in the claims area.</p>	<p>Yes, as beneficially own surface and subsurface of Indians Lands.</p> <p>Yes, if required by First Nation.</p> <p>Increasingly likely.</p>	<p>No.</p> <p>Maybe, but no requirement</p> <p>Perhaps but not likely.</p>
<p>Establishment of First Nations – government resource management boards and processes</p>	<p>Yes, variety of environmental, land and resource management processes established for the claims area. The government and First Nation nominate board members. The boards must also consider specific First Nation concerns specified in the agreements.</p>	<p>Yes, First Nations consent required for mineral and surface access agreements, and for environmental terms and conditions of Indian Oil and Gas Canada.</p> <p>No, First Nations do not nominate board members and not directly involved in AEUB decision-making for Indian Lands.</p>	<p>No, First Nations do not nominate board members, and not directly involved in AEUB decision-making process.</p>

Figure 2(continued) - Comparison of First Nation Involvement in Energy Projects under Different Models

The Land Claims Model provides the most extensive First Nation participation in energy projects. First Nations will be involved in energy projects throughout the claims area. Their involvement is not limited to projects on their lands. Comprehensive land claims agreements contain formal processes to consider First Nations concerns for energy projects which include but are not limited to environmental concerns.

Given the complexity of the agreements, a First Nation may be both a participant in the energy project, and a party whose lands and wildlife harvesting rights are affected by the project. The First Nation owns the surface and subsurface mineral rights on certain lands within the claims area. They are also likely to have entered into joint venture agreements and employment participation agreements with the proponent of the project. Lastly, they will have preferential or exclusive wildlife harvesting rights that will be affected by an energy project.

The land claim agreements also establish First Nation-government joint management boards which will apply to all energy projects in the claims area. The jurisdiction and autonomy of each board will vary with the land claims agreement. In most of these agreements, the boards are similar to public government institutions which either replace or overlay existing governmental structures. These joint management boards review all aspects of energy project, including land and water regulation, land use planning, environmental review and impacts on wildlife. The joint management boards then issue decisions which are endorsed, rejected or modified by the relevant government authority.

The Inuvialuit Final Agreement was one of the first comprehensive land claim agreements when it was ratified and implemented by the federal government in 1984. The agreement applies to the Inuvialuit Settlement Region which is comprised of the Western Arctic region of the Northwest Territories, the Yukon North Slope in the Yukon Territory and offshore marine areas in the Beaufort Sea. The agreement was in part precipitated by the high level of oil and gas activities in the region in the 1970's and 1980's. The agreement transfers 35,000 square miles of land to the Inuvialuit, with subsurface rights being transferred for 5,000 square miles of that land, and provides for \$162 million of financial compensation.

The Inuvialuit are a marine people who have traditionally relied on marine mammals and fish for food. As a result, the agreement recognizes exclusive or preferential wildlife harvesting rights, uses environmental assessment to prevent damage to those harvesting rights, and provides compensation when those harvesting rights are adversely affected. Unlike later land claim agreements, the Inuvialuit Final Agreement does not replace existing legislative processes for the Inuvialuit Settlement Region. Instead, the agreement's resource management regime is superimposed on existing processes.

A number of energy projects in the Inuvialuit Settlement Region have been subject to environmental assessment under the Inuvialuit Final Agreement, with the most recent and extensive scrutiny occurring for Gulf Canada Resources Limited's Kullak drilling proposal in the Beaufort Sea. The Gulf Kullak case study is examined because it illustrates the different interests of the Inuvialuit with respect to an energy project, and the complex joint resource management regime that can occur under a land claim agreement.

The Indian Lands (Alberta) Model is in the middle of the continuum for First Nation participation. The First Nations participate extensively in energy projects that take place on Indian Lands, where they beneficially own the surface land and subsurface oil and gas rights. However, the geographical scope of the Indian Lands (Alberta) Model is quite limiting as it applies only to those lands owned by the First Nations. However, certain of these lands contain extensive oil and gas reserves, and are relatively unexplored in comparison to the remainder of Alberta. Therefore, both the energy industry and the First Nations are interested in exploring and developing these reserves. Many of the First Nations are also establishing energy companies to develop their oil and gas reserves.

The federal Department of Indian Affairs and Northern Development manages Indian Lands on behalf of the First Nations. Within Alberta, the Alberta Energy and Utilities Board regulates energy projects on these lands as a result of the *Indian Oil and Gas Regulations* which incorporate provincial energy regulations. The Board has a uniform regulatory policy throughout Alberta, which is examined below under the Alberta Energy and Utilities Board Model. Indian Oil and Gas Canada, a division of the Department of Indian Affairs and Northern Development, also has its own administrative and environmental process for energy projects. Indian Oil and Gas Canada executes mineral leases and surface access agreements with a proponent, with the consent and cooperation of the First Nation. They also require the proponent to provide a project environmental assessment under the *Canadian Environmental Assessment Act* and will attach environmental terms and condition to

the surface access approval. Lastly, they may also apply other federal environmental legislation.

Five First Nations and the Department of Indian Affairs and Northern Development, with the assistance of the Indian Resource Council, are participating in the First Nations Oil and Gas Management Initiative (the Pilot Project). The Pilot Project is designed to enable First Nations to move towards full management and control of their oil and gas resources through a three-phased approach: co-management, enhanced co-management and full management. First Nations from two provinces are currently participating in the initiative: the White Bear First Nation from Saskatchewan, and the Horse Lakes First Nation, Dene Tha' First Nation, Blood (Kainaiwa) Tribe and Siksika Nation from Alberta. The project is currently in the enhanced co-management phase where the First Nation performs all the administrative functions previously performed by Indian Oil and Gas Canada. Government retains its authority under the regulations, and its consent is still required for approvals.

The Alberta Energy and Utilities Board Model is at the far end of the continuum as it provides the least participation for First Nations. The Alberta Energy and Utilities Board regulates all energy projects within Alberta, including environmental matters related to those projects. The Board has an established public process to consider energy projects. While most projects do not take place on Indian Lands, these lands or First Nation's wildlife harvesting rights may be affected by these projects. If that is the case, the First Nation is a directly affected party and has the right to object to a project, and to participate in any regulatory review.

The Board considers First Nations concerns by requiring adequate notification and communication by the proponent about an energy project prior to a public hearing, and by considering those concerns raised. First Nations' ability to participate in the Alberta Energy and Utilities Board process is reviewed in the context of the Board's proceeding in Unocal Canada Management Limited's sour gas plant in the Lubicon Lake Area. This proceeding is discussed because it illustrates some of the uncertainties which may arise as to aboriginal title to land and how the Board responds to those issues. The proceeding also illustrates the manner in which the Board considers First Nation interests. First Nation interests and concerns are considered similarly to any other adversely affected party before the Board. Given the potential cultural and communications differences between First Nations, the energy industry and the Board, the case study illustrates the emphasis that the Board places on appropriate consultation and communication between the parties at an early stage in the energy project.

POTENTIAL INTERNATIONAL APPLICATIONS OF MODELS

Canadian models for indigenous participation arguably have broader applications beyond Canada's borders. Though Canada's constitution and legislative regime with regard to its indigenous peoples may differ from other countries, some parallel themes may be extracted from these models which are likely to be applicable to energy projects in Latin America. Indigenous peoples are exhibiting concerns and opposition to energy projects in countries as diverse as Brazil, Columbia and Ecuador. These concerns and opposition are likely to increase over time, unless and to the extent they are addressed in the design and approval of energy projects.

Three parallel themes are evident throughout the Americas. First, irrespective of the country, indigenous peoples and communities are likely to be very attached to the land due to historic uses of land for hunting and gathering activities or agriculture. Second, there are likely to be parallel needs in all countries for extensive communication and consultation with indigenous peoples and communities due to the cultural differences between these communities, proponents of energy projects and government regulators. Third, if a public process exists for energy regulation, that process must possess some flexibility to address the concerns of indigenous peoples. This flexibility is required because of the cultural differences between these peoples and the dominant community. In the absence of a public process for energy regulation, some other means of addressing indigenous concerns is required. Given these three themes, the Alberta Energy and Utilities Board Model is applicable throughout the Americas as represents a model for ensuring the consideration of indigenous concerns in energy decision-making.

The Indian Lands (Alberta) Model and the Land Claims Model may also be applicable to Latin America in certain circumstances. These two models represent a more comprehensive approach to the inclusion of indigenous concerns as they include the recognition of indigenous title to land, the transfers of these lands and the underlying mineral rights, and the establishment of co-management regimes. Some or all of these criteria may already be present in certain Latin American countries. This situation may develop also over time in other countries.

**LAND CLAIMS MODEL: RESOURCE MANAGEMENT OF ENERGY PROJECTS UNDER
LAND CLAIM AGREEMENTS**

REGULATORS

Canada has entered into ten comprehensive land claims agreements which include all of the Northwest and Yukon Territories, and most of northern Quebec. The federal and provincial governments have also entered into an agreement-in-principle in British Columbia. The agreements establish resource management regimes which apply to all land and water within the claims area, and beyond in some circumstances. These regimes are composed of First Nation-government joint management boards, with members of the boards being nominated proportionately by the First Nation and relevant governments. These boards usually have to adhere to specific rights in the agreement when reviewing a project and issuing an approval.

INTERESTS OF FIRST NATIONS

Under the agreements, the First Nation own land and subsurface mineral rights. If the energy project is on First Nation Lands, the First Nation will have entered into surface or mineral leases. They may enter into economic and social benefit agreements with the proponent. They may also be a proponent themselves. The project may also affect First Nation land, lifestyle or wildlife harvesting. Lastly, the First Nation also participates in resource decision-making for the claims area as they nominate board members to joint resource management boards with jurisdiction over that area.

PROCESS

Land claims agreements establish constitutionally protected resource management regimes which override any inconsistent federal legislation. These regimes are either designed to be superimposed upon or to replace the existing legislative regime for the claims area. While they have common elements, each agreement tends to be unique as it reflects the concerns and interests of that First Nation. The First Nation-government joint management boards review aspects of energy project such as land and water regulation, land use planning, and environmental review. These boards then issue decisions which are either endorsed, modified or rejected by the relevant authority.

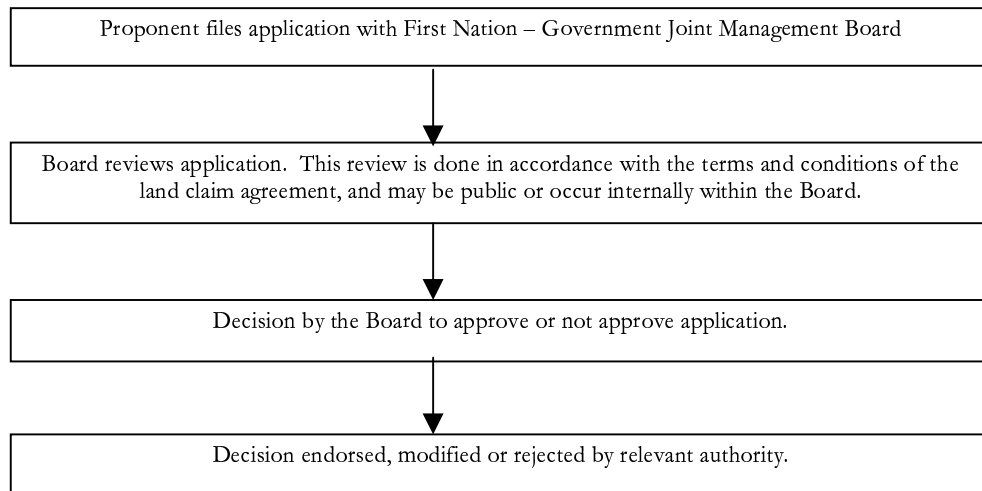


Figure 3 - Schematic of Process for Land Claims Model

ASSESSMENT

The land claim agreements establish complex procedures that usually replace, but may be superimposed on, existing energy and environmental legislation. These processes reflect the concerns of the First Nation, and permit them to be fully involved in the decision-making process. However, resource management regimes differ for adjacent claims areas and, thus, may prevent the development of an integrated approach to resource management in that region. The agreements are neutral with respect to energy projects. On one hand, the agreements resolve uncertainty over aboriginal title and make the First Nation an economic partner in projects for the claims area. On the other hand, the agreements may discourage projects in the area because of the expense, time or uncertainty associated with compliance.

**CASE STUDY: ENVIRONMENTAL REVIEW OF GULF CANADA RESOURCES
LIMITED'S KULLAK DRILLING PROGRAM UNDER THE INUVIALUIT FINAL
AGREEMENT**

SCENARIO

Gulf Canada Resources Limited (Gulf) submitted an application to the Canada Oil and Gas Lands Administration for a three year drilling program in the eastern Beaufort Sea between 1990 and 1992. Gulf wished to drill in these areas because they centered on the Amauligak field, the largest proven reserves in the Beaufort Sea, and because additional reserves needed to be explored and established before Gulf could develop the Amauligak field.

Gulf's drilling proposal was a "development" under the Inuvialuit Final Agreement (IFA), and referred to the Environmental Impact Screening Committee. The Committee reviewed the application, and referred it to the Environmental Impact Review Board because of concerns regarding the thoroughness of the contingency plan and countermeasures in the event of a oil spill, and because insufficient information was provided about the second or third years of the drilling program. The Environmental Impact Review Board then conducted a public review of Gulf's application. A public notice was published in regional newspapers and advertised on local radio stations, with public meetings being held in Inuvik from June 4 to 9, and on June 18, 1990. Other IFA bodies also participated in this public review.

INUVIALUIT FINAL AGREEMENT PROCESS

The IFA has a detailed process for First Nation-government resource management. Figure 4 describes the wildlife and environmental structures in the IFA, and linkages between these structures and the government and the Inuvialuit. Figure 5 overviews the IFA environmental assessment process. Fifteen parties, in addition to Gulf, actively participated in the proceeding, including such IFA bodies as the Inuvialuit Game Council, the Inuvialuit Regional Corporation and the Wildlife Management Advisory Councils for the Northwest Territories and the Yukon North Slope. The Inuvialuit Game Council, which represents the collective Inuvialuit interest in wildlife, and the Inuvialuit Regional Corporation, which manages Inuvialuit lands and investments, had different positions with respect to the application. The Inuvialuit Game Council had concerns about the potential impact on wildlife, while the Inuvialuit Regional Corporation supported the application for economic reasons. The Wildlife Management Advisory Councils and the Inuvialuit Game Council are resource management bodies established under the IFA, and participated as interested parties before the Board.

Key issues in the proceeding were the biological effects and operating season of the drilling program; the evaluation of the worst case scenario, versus the more probable case, in the event of a well blowout; mitigative and remedial measures in event of a blowout; liability and wildlife compensation under the IFA; and international implications of a blowout. One of the overarching matters raised in the proceeding was wildlife compensation and financial liability for clean-up measures. Gulf had previously entered in a wildlife compensation agreement with the Inuvialuit Game Council for actual wildlife harvest loss, which extended

to the drilling program. Gulf's liability was estimated at a maximum of \$5,000,000 over five years under this agreement. However, the agreement did not extend to future wildlife harvest loss and liability for clean-up measures. The Board was not able to estimate those costs, and also expressed concerns as the financial ability of Gulf to pay in the event of a spill. The IFA also provides that the federal government is liable for clean-up measures if the developer is unable to pay. There is some ambiguity in the IFA as to the extent of government liability in the event of the spill, and the federal government at that time suggested its liability was limited to \$40,000,000 under federal regulation.

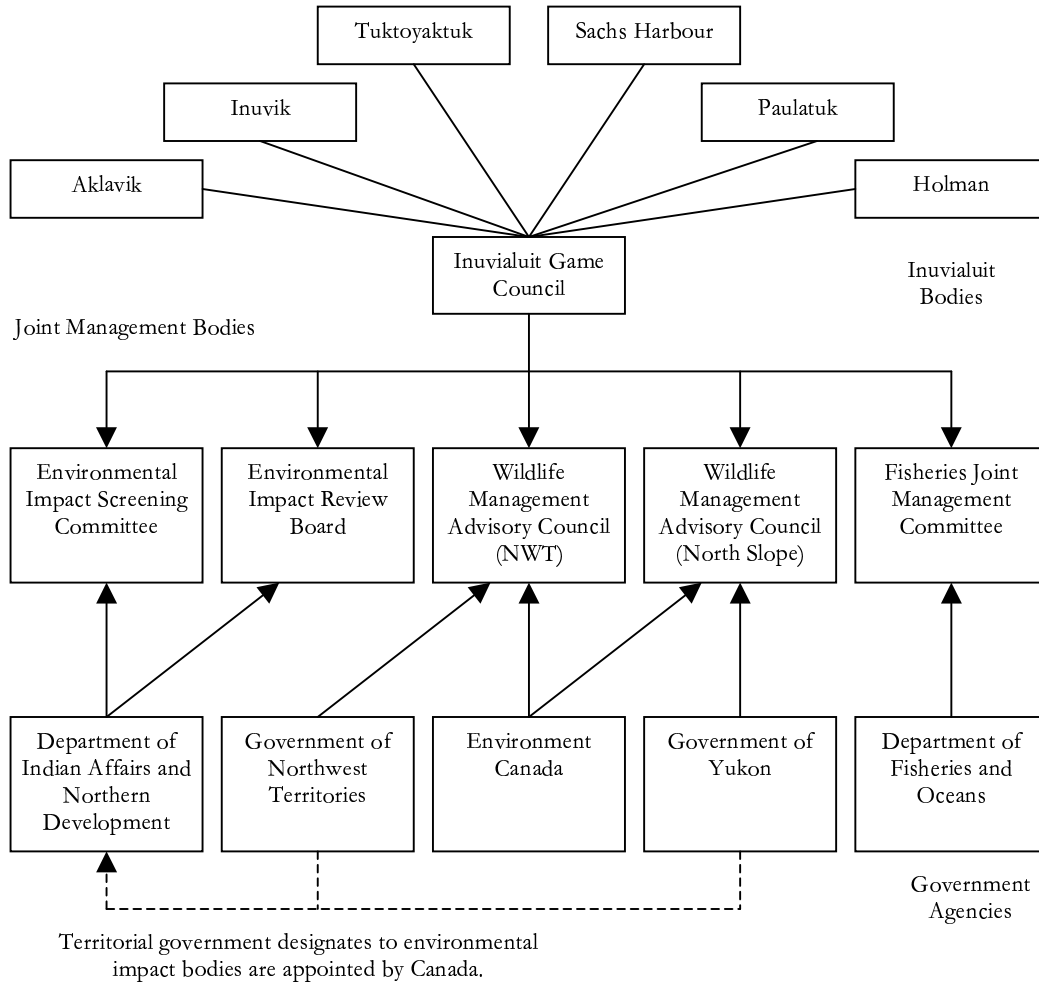


Figure 4 - Wildlife and Environmental Structures: Appointing Agencies and Linkages

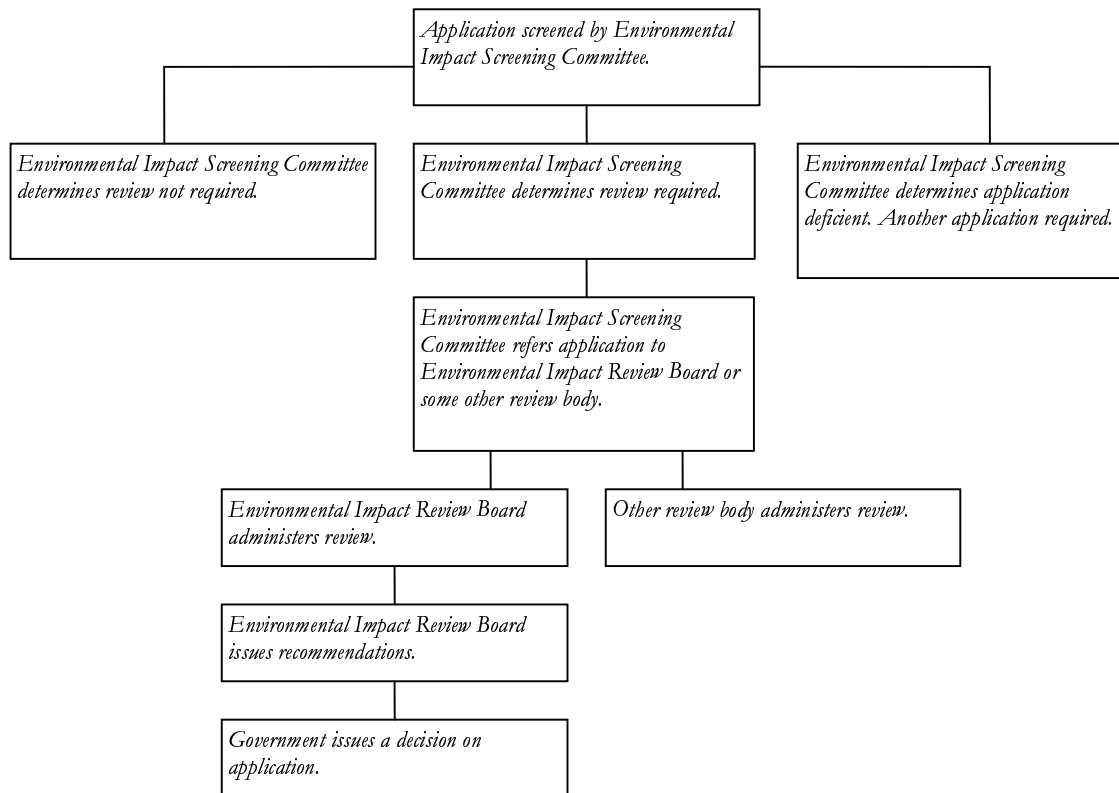


Figure 5 - Inuvialuit Final Agreement Environmental Assessment Process

DECISION OF THE ENVIRONMENTAL IMPACT REVIEW BOARD

The Board subsequently issued a decision recommending strongly against approval of the Gulf drilling program. The Board made this recommendation for two reasons. First, it found that Gulf and the federal government were unprepared to deal effectively with a major oil well blowout in the Beaufort Sea during the open water season in the summer. Second, the Board was unable to make a recommendation about Gulf's potential liability in the event of a worst case blowout, one of the obligations imposed on the Board by the IFA. The Board also made a number of other recommendations concerning oil spill contingency plans and cleanup, and the role of the federal government and the Inuvialuit. The Board's recommendation with respect to Gulf's application was deemed to be accepted by federal government, as government did not indicate within 30 day period required by the IFA that they were not prepared to accept the Board's recommendation. Therefore, Gulf's application was not approved.

ASSESSMENT

The Gulf Kullak review was not the first occasion that Environmental Impact Review Board had considered drilling applications in the offshore as they had previously approved an offshore drilling application. However, it was the first proceeding that fully canvassed oil spill contingency plans and wildlife compensation. The Board seemed to decide against Gulf's application, in part, because of ambiguities and uncertainties with the IFA. Similar matters have not arisen in subsequent applications as no significant drilling has occurred in the Beaufort Sea since that time. Given the low rate of activity in the region, it is not clear whether the IFA environmental review or wildlife compensation processes will act as an

impediment to future energy activity in the Inuvialuit Settlement Region. Compliance with the IFA may only make that activity more costly.

The Gulf Kullak review successful incorporated different Inuvialuit views and perspectives. Several IFA resource management boards were involved in the proceeding. The Environmental Impact Screening Committee and the Environmental Impact Review Board reviewed Gulf's application, while the Wildlife Management Advisory Boards participated in the Board's proceeding. Lastly, two wholly Inuvialuit bodies, the Inuvialuit Regional Corporation and the Inuvialuit Game Council, put forth differing positions in the proceeding reflecting their respective roles under the IFA.

**INDIAN LANDS (ALBERTA) MODEL: REGULATION OF ENERGY PROJECTS ON
INDIAN LANDS WITHIN ALBERTA**

REGULATORS

The federal Department of Indian Affairs and Northern Development (DIAND) manages Indian Lands on behalf of the First Nations. The Alberta Energy and Utilities Board's process applies to these lands as a result of the Indian Oil and Gas Regulations which incorporate provincial energy laws. Indian Oil and Gas Canada (IOGC) is the specific division within DIAND that administers energy projects on Indian Lands located in Alberta, Manitoba, Saskatchewan, Ontario, and British Columbia. The IOGC has its own process for energy projects, including environmental impacts, on Indian Lands that may vary from region to region. Only the IOGC process for Alberta is considered here.

INTEREST OF FIRST NATIONS

The First Nations beneficially own both the surface and subsurface mineral rights on Indian Lands within Alberta. Though these lands are managed on their behalf by DIAND, their consent and support is required for any energy project on Indian Lands. First Nation consent is required before the IOGC will issue mineral leases or surface access agreements, and any environmental authorization. Increasingly, First Nations are also a full partner in energy projects on their lands.

PROCESS

The *Indian Oil and Gas Act* is a brief Act that provides for regulations under the Act, which states Minister of DIAND must consult with the First Nations on an ongoing basis, and confirms that the rights of the First Nations to receive royalties collected on their behalf. The *Indian Oil and Gas Regulations* authorize the granting of permits, leases and contracts for the exploration and development of hydrocarbons on Indian Lands. These oil and gas rights are disposed of by IOGC with the prior approval of the elected band council. The regulations contain a fair amount of discretion, suggesting that fiduciary obligations may arise from the decisions of the Minister and DIAND on behalf of First Nations with oil and gas resources.

IOGC executes mineral leases and surface access agreements with a proponent, with the consent and active cooperation of the First Nation. IOGC requires the proponent to provide a project environmental assessment under the *Canadian Environmental Assessment Act* for seismic, well sites, compressor sites, oil battery sites and pipelines prior to issuing approval for the surface lease. Environmental terms and conditions are then included in that surface lease including the possible appointment of a First Nation individual as an environmental monitor, the incorporation of certain Alberta Energy and Utilities Board guidelines, and site specific measures for timber salvage, trap lines and wildlife harvesting. If relevant, IOGC will apply other federal legislation such as the *Fisheries Act* or the *Navigable Waters Protection Act*.

The federal process applicable to Indian Lands is changing as the federal government moves with the First Nations to devolve and transfer responsibilities for energy management

on Indian lands. The First Nations Oil and Gas Management Initiative (the Pilot Project) has been underway since February 1995. The Pilot Project is designed to advance First Nations management and control of oil and gas resources on Indian Lands through a joint process involving the First Nations, DIAND and the Indian Resource Council of Canada. Five First Nations from two provinces are currently participating in the initiative: the White Bear First Nation from Saskatchewan, and the Horse Lakes First Nation, Dene Tha' First Nation, Blood (Kainaiwa) Tribe and Siksika Nation from Alberta.

The Pilot Project will go through three stages: co-management, enhanced co-management and full First Nations management. It is currently at the enhanced co-management stage where the participating First Nation performs all the functions currently done by IOGC. However, IOGC maintains all its authority under existing regulations and their consent is required for all approvals.

The Pilot Project is directed by a Steering Committee and supported by Working Groups. The Steering Committee is made up of representatives of DIAND, IOGC, the participating First Nations and the Indian Resource Council. The committee is responsible for monitoring the progress of the initiative and for setting its future directions. Working groups have been established to support the efforts of the Steering Committee and the participating First Nations, and are composed of staff of those First Nations and IOGC. These groups are responsible for conducting research aimed at facilitating and supporting the orderly transition of responsibilities from IOGC to the First Nations. This research includes educational and training needs, technical support requirements and how to transfer existing administrative processes from the IOGC to the First Nations. A signed co-management agreement is expected for the fall of 1997, and management guidelines and a procedural handbook are also being developed for that time.

Under the enhanced co-management regime, proponents contact both the First Nations and IOGC with an application for an energy project on Indian Lands. The First Nation is likely to have been contacted first by the proponent to discuss site selection, access and other economic arrangements as IOGC will not approve any application that does not have the support of the First Nation. After both parties receive the application, which includes a project environmental assessment, the First Nation drafts the approval with terms and conditions. IOGC then has the right to review and will either agree, modify or reject that approval.

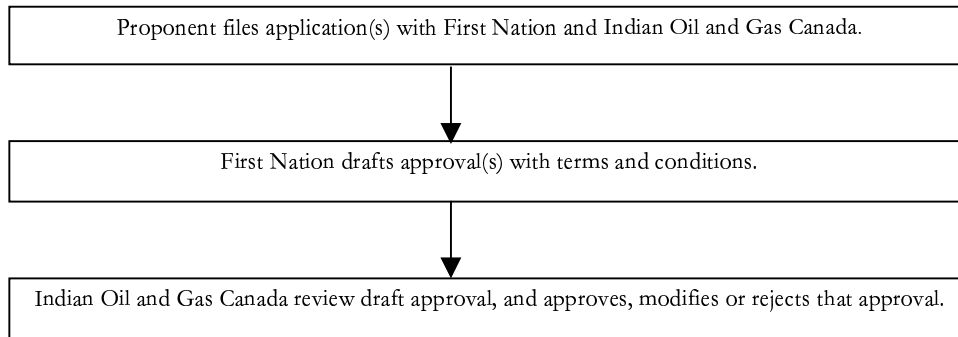


Figure 6 - Schematic of Process for Indian Lands (Alberta) Model – Pilot Project.

ASSESSMENT

The IOGC energy approval process, including environment matters, is a co-management regime. First Nations involvement is likely to increase as they own the surface land, the subsurface mineral rights, and increasingly participate in energy projects on their lands. The Pilot Project is currently at the enhanced co-management stage, and is not significantly different from the existing IOGC regime. This is likely to change as the Pilot Project extends to more participants and evolves to full management. At that time, different energy and environmental regimes are likely to develop for each First Nation and the associated Indian Lands in response to local concerns and objectives.

**ALBERTA ENERGY AND UTILITIES BOARD MODEL: REGULATION OF ENERGY
PROJECTS BY THE BOARD WITHIN ALBERTA**

REGULATORS

The Alberta Energy and Utilities Board is the key regulator for energy projects in Alberta. In most cases, the Alberta government owns the subsurface mineral rights, and leases those rights to third parties for exploration, production and sale.

INTEREST OF FIRST NATIONS

First Nations do not own the land or subsurface mineral rights except on Indian Lands, or reserves set aside under treaty. Indian Lands are also subject to the regime described here and in the Indian Lands (Alberta) Model which will not be discussed here. First Nations lands, lifestyle or wildlife harvesting rights may be adversely impacted by an energy project. Additionally, First Nations may seek to attain economic and social benefits from an energy project, including employment and the use of First Nation businesses.

PROCESS

The Board's jurisdiction is prescribed by Alberta statutes. The Board has a mandate to regulate energy resource development in the province and to assure it takes place in the general public interest. Before the Board considers an application, the proponent must have the right to explore for these resources from the owner, and surface access to the lands. In Alberta, mineral and surface access leases on public lands are issued by Alberta provincial government. Freehold mineral leases must be negotiated with the mineral owner. Therefore, the Board requires mineral leases and surface access agreements before considering applications on Indian Lands.

The Board has a public process to consider all aspects of energy project, including the environment. First Nations are interested parties and have a right to object to an energy project before the Board, and to participate in the Board's review of that project along with other interested parties. The Board addresses First Nation concerns by requiring adequate notification and communication about energy project by the proponent prior to filing an application with the Board, and by considering First Nation's concerns about a project within the course of reviewing that application.

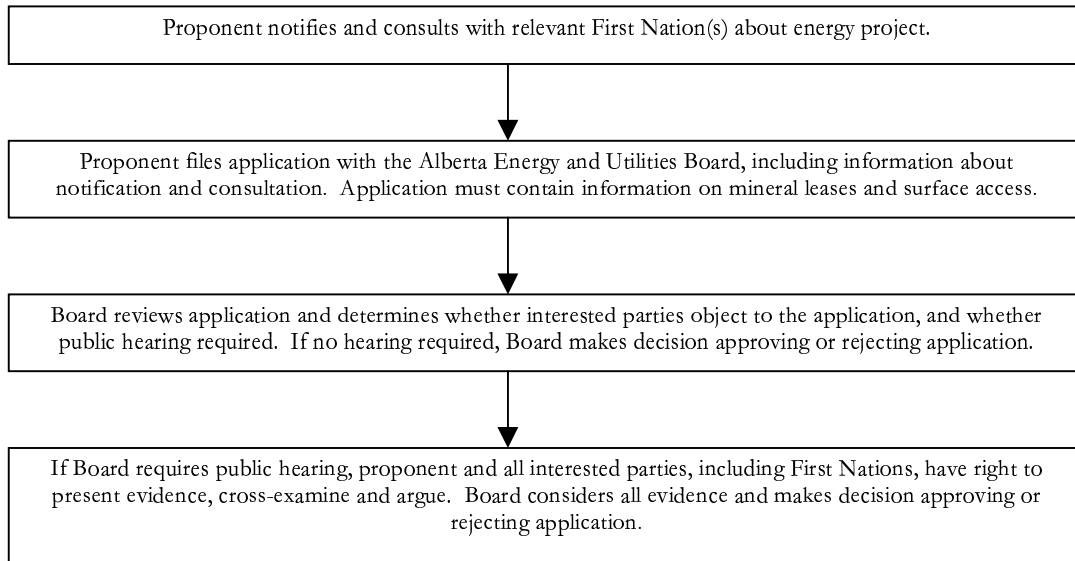


Figure 7 - Schematic of Process for Alberta Energy and Utilities Board Model

ASSESSMENT

The Alberta Energy and Utilities Board has a mandate to consider the public interest of all Albertans, and not just the interests of First Nations. As such, the Board's decisions may not always reflect the interests or priorities of First Nations. The Board incorporates First Nations into their process by requiring early communication and consultation between the proponent of an energy project and the First Nation, and by considering the First Nation's concerns in the public review of the energy project. Given the resources and responsibilities of the Board, the success of this approach may depend on the initial and ongoing efforts of proponents and First Nations to establish meaningful communication and cooperation.

**CASE STUDY: REVIEW OF ALBERTA ENERGY AND UTILITIES BOARD'S
PROCEEDING FOR UNOCAL CANADA MANAGEMENT LIMITED'S SOUR GAS PLANT
IN LUBICON LAKE AREA**

SCENARIO

In November 1993, Unocal Canada Management Limited (Unocal) filed an application with the Board for the construction and operation of a sour gas plant; and in December, Unocal filed supplemental information. The application and information indicated that Unocal and the Lubicons had met on three prior times to discuss the project. The Board also received a letter dated December 9, 1995 from the Lubicons indicating they did not oppose the plant. The Board referred the application to Alberta Environmental Protection for their approval, this approval being received in January 1994. Unocal subsequently advertised this approval in local newspapers, but did not receive any objections. The Board reviewed the application, and found it met all regulatory requirements. Given Unocal's public consultation, the response of the Lubicons and the lack of objection by local producers, the Board approved the application in February 1994.

In July 1994, the Lubicons contacted the Board and indicated they had never agreed not to oppose the application; that they opposed the application to construct the plant in their traditional lands; and that Unocal had not responded to their concerns. Subsequent meetings took place between Unocal, the Lubicons and, on occasion, with the Board over the next three months, but the matter was not resolved. In September, the Lubicons requested a public hearing. Given the fact situation, the Board set the sour gas plant and a related power plant application to hearing in November 1994. However, the Board did not stop completion of the sour gas plant as construction was 75 per cent complete by the time the Lubicons objected.

ALBERTA ENERGY AND UTILITIES BOARD PROCESS

The public hearing on Unocal's sour gas plant took place from November 8 to December 2, 1994 and was contentious with the Lubicons and many other intervenors participating. The Board indicated three significant issues in the proceeding: rights with respect to energy development, public consultation and plant review. Each issue will be review in turn as they shed light both on this specific application and how the Board addresses First Nations' concerns for energy projects.

The Board's jurisdiction and notification area were raised in the context of the rights to energy development. The Lubicons and a number of intervenors raised the Lubicons' ongoing land claim negotiations with the federal and provincial governments, and the close proximity of Unocal's plant to the proposed reserve area. The Lubicons were not prepared to consent to a sour gas plant in its present location, and argued that the Board did not have the authority to approve the plant without their consent. The Board took the view that it was the provincial regulatory agency with specific authority to regulate energy development in the public interest, but that it had no authority to deal with land claims. While the Board would not consider an application unless the proponent had acquired surface and subsurface leases from the rightful owner. In this case, Unocal had obtained the valid leases from the provincial government.

The Board's notification area for the Lubicons was also discussed. This administrative procedure was established in 1986 following discussions with the Lubicons. At that time, the Lubicons had objected to all energy projects within their traditional lands. The Board established a notification area of 2300 square kilometres, or 25 townships, and expected industry to notify the Lubicons about any application they intended to submit to the Board. A similar notification was used by Alberta Environmental Protection to advise the Lubicons of any seismic activity in the area. The intent of this notification was to provide the Lubicons with an awareness of new projects and with an opportunity to have any concerns with those projects addressed. The Board did not expect a proponent to get the Lubicons consent. However, the Board did expect the proponent to provide them with full details of the project and to respond to any concerns or questions which were raised.

The Board noted that the notification area for the Lubicons greatly exceeded the distance that the Board normally expected proponents to notify First Nations on Indian Lands, but that it had been put in place due to the uncertainty about the specific lands at that time. As the Alberta government and the Lubicons agreed in principle to specific lands under the Grimshaw Accord in 1988, the Board stated it would discontinue the formal notification area of 2300 square kilometres and would in future adopt a process of public consultation similar to that used for energy projects near other reserves in the province.

The Board also discussed the Lubicons' right to public consultation. The Board believed that the Lubicons had the same rights as any other resident, landowner or any other individual that may be adversely affected by any proposed project. The Board requires any party that may be directly and adversely affected by a Board decision to receive full and clear details of the application, to have the opportunity to identify concerns with the application, to furnish evidence and to have a fair opportunity to have their concerns addressed. However, a public hearing would not always be required. The Board maintained that the proponent should consider the concerns of affected party and address them, keeping in mind the ability of the party to understand the basic nature of the operation. With respect to a sour gas plant, the Board would expect the proponent to discuss the impacts, whether real or perceived, in any communication program and to include potential impacts on the environment.

In this situation, the Board believed that cultural differences between the parties resulted in inadequate communication about the sour gas plant and its impact, and that the Lubicons did not give informed consent. However, the Lubicons did not have the right to prevent the plant being developed on this fact alone. Instead, the Board must make this decision considering information in the application and any new information or concerns in the hearing, including objections by the Lubicons and other intervenors.

Lastly, under plant review, the Board considered the need for the sour gas plant, the plant location and the impacts of the plant. Items such as emissions, human health, wildlife, and safety were considered under impacts of the plant. On most of these matters, Unocal's evidence and perceptions differed significantly from the Lubicons and other interested parties. The Board concurred with Unocal's perspective, but imposed some obligation on Unocal to communicate with the Lubicons on an ongoing basis.

DECISION OF THE ALBERTA ENERGY AND UTILITIES BOARD

The Board issued a decision on February 25, 1995 indicating that the Unocal's sour gas plant met or exceeded all reasonable public interest tests applied to such facilities. Moreover, the Board believed that the plant can be operated in a safe manner, and that it will not represent a substantive risk to people living in the area or the future lifestyle on the proposed reserve. Therefore, the Board did not rescind its prior approval.

ASSESSMENT

The Alberta Energy and Utilities Board reopened Unocal's approval after the Lubicons indicated adequate consultation did not occur, and gave them and other intervenors an opportunity to respond to Unocal's application. Therefore, it is interesting to examine what resulted from the Board's public review process. While the Lubicons were not able to overturn the Board's earlier approval, they did expose Unocal's conduct to scrutiny and encouraged the imposition of limited additional obligations by the Board. However, the Lubicons were not able to preclude development adjacent to the proposed reserve, or further land claims negotiations with the federal and provincial governments.

It is significant that this dispute occurred in the context of a sour gas plant, and in the context of differing industry and public perceptions about the risk of sour gas facilities. Subsequent Board proceedings in other areas of the province have also focused on the degree of risk associated with sour gas facilities. In these situations, it has often been very difficult for the energy industry to communicate with local communities about these risks, or for the parties to achieve any consensus as to an acceptable level of risk.