

**WESTBANK FIRST NATION
CROWN LANDS REFERRAL DIRECTIVE**

February 8, 2021

Confidential until passed by Council

WHEREAS since time immemorial, the *syilx* Peoples have lived in the Okanagan and adjoining valleys and have exercised jurisdiction and ownership of *syilx* Territory;

WHEREAS the *syilx* Peoples are a historical community of Peoples sharing language, customs, traditions, experience, territory and resources at the time of first contact and the Crown's assertion of sovereignty, and presently;

WHEREAS the *syilx* Peoples hold *syilx* Title and Rights throughout *syilx* Territory, which are recognized and affirmed by section 35 of the *Constitution Act, 1982*, and which have never been ceded, surrendered or relinquished by the *syilx* Peoples;

WHEREAS the *syilx* Peoples exercise rights as recognized in UNDRIP;

WHEREAS as part of the *syilx* Peoples, Westbank and Westbank Members have and exercise *syilx* Title and Rights, and rights under UNDRIP, within *syilx* Territory;

WHEREAS the *syilx* Peoples have and continue to utilize and benefit from the natural resources within *syilx* Territory;

WHEREAS within *syilx* Territory, Westbank shares in the responsibility to take care of *syilx* Territory and, in accordance with the *syilx* Decision-Making Protocol, Westbank is the caretaker of the lands in and about the area depicted as the Westbank Area of Responsibility; and

WHEREAS within the Westbank Area of Responsibility, Westbank has jurisdiction over Westbank Lands pursuant to the Westbank First Nation Self-Government Agreement,

NOW THEREFORE, the Council of Westbank First Nation adopts the following:

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PART I: DEFINITIONS AND INTERPRETATION

1.0 DEFINITIONS AND INTERPRETATION

1.1 In this Directive:

“Activity” means any legislation, regulation, policy, procedure, plan, tenure, grant, license, permit, restriction, amendment, approval, authorization, transfer, transaction, operation, development or other action or proposed action which may have an impact on the *syilx* Title and Rights of Westbank or Westbank Members, or the *syilx* Peoples;

"Applicant" means the Crown, Westbank, other band, First Nation or Indigenous group, or Third Party proposing an Activity on Crown Lands within the Westbank Area of Responsibility that is the subject of an Application;

"Application" means a written request received from an Applicant under this Directive regarding an Activity within the Westbank Area of Responsibility, and includes a notice or referral from the Crown regarding a proposed Activity within the Westbank Area of Responsibility;

"Archaeological Artifact" means any portable, physical evidence used, made or modified by humans, including tools, beads, and pottery;

"Archaeological Feature" means any non-portable element of an Archaeological Site, including but not limited to cultural depressions, roasting platforms, and culturally modified trees;

"Archaeological Site" means a geographical location where there are or may be Archaeological Artifacts or Archaeological Features;

"Archaeology Supervisor" means the person directed by the Westbank Director of Title and Rights to carry out the duties and responsibilities set out in the Westbank First Nation Archaeology Directive;

"CEC" means the Chiefs Executive Council, which is the decision-making body of the Okanagan Nation acting together with the administrative and technical support of the ONA;

"Crown" means the Crown in right of Canada or British Columbia, their cabinets, ministries, Crown corporations, agencies, employees and contracted agents, representatives and delegates for the purpose of the duties of consultation and accommodation;

"Crown Lands" means lands within the Westbank Area of Responsibility where title is registered in the name of the Crown, whether or not it is covered by water and, for greater certainty, does not include Westbank Lands as defined in the Westbank First Nation Self-Government Agreement;

"Council" means the Chief and Council of Westbank First Nation, elected in accordance with the *Westbank First Nation Constitution*;

"Large Project" means and includes large industrial or manufacturing facilities, pulp and paper mills, sawmills, large mines, major power plants (more than 50 MW) or energy transmission lines, petroleum or natural gas processing plants or pipelines, dams (more than 15m high or holding 10 million ft³ of water) or natural water diversion projects (more than 10 million ft³ of water), large resort developments (600 commercial bed units or 2000 permanent bed units and

larger), waste disposal (hazardous, liquid or solid waste), and transportation projects (public highways more than 20 km with two lanes, railways with more than 20 km of track and for high speed trains, airports with runways longer than 1500 m ferry terminals with large vehicle capacity) including those projects referred to the ONA by the province or by Canada;

“Okanagan Nation” means and includes the Okanagan Indian Band, Westbank, the Upper Nicola Band, the Penticton Indian Band, the Osoyoos Indian Band, the Upper Similkameen Indian Band and the Lower Similkameen Indian Band;

“ONA” means the Okanagan Nation Alliance, an entity established by the members of the Okanagan Nation to assist in the protection and advancement of their collective interests and to provide administrative, regulatory, and technical support to the CEC on issues that affect the collective interests of the *syilx* Peoples;

“Referrals Officer” means the person identified by the Westbank Director of Title and Rights as responsible for receiving, administering and carrying such other responsibilities set out in this Directive in relation to Applications;

“Review Panel” means the committee responsible for reviewing Applications, established in accordance with article 8.0;

“*syilx*” or “*syilx* Peoples” means the community of Okanagan Nation peoples, including Westbank, sharing language, customs, traditions, experience, territory and resources at the time of first contact and presently;

“*syilx* Territory” means the territory held by the *syilx* Peoples, as depicted on the map attached as Schedule “A”;

“*syilx* Title and Rights” means the Aboriginal title and rights held collectively by the *syilx* Peoples;

“Third Party” means any individual, corporation, firm, municipality, regional district, industry, society or non-governmental organization carrying on or proposing to carry on an Activity within the Westbank Area of Responsibility;

“UNDRIP” means the *United Nations Declaration on the Rights of Indigenous Peoples*;

“Westbank” means Westbank First Nation;

“Westbank Area of Responsibility” means the geographic area within *syilx* Territory as shown on the map attached as Schedule “A” to this Directive; and

“Westbank Member” means a person who is a member of Westbank in accordance with Part III of the *Westbank First Nation Constitution*.

- 1.2 Unless otherwise provided in this Directive, words, expressions and rules of construction used in this Directive have the same meaning as in the *Westbank First Nation Constitution* or the Westbank First Nation Archaeology Directive, as applicable.
- 1.3 Words in the singular include the plural and words in the plural include the singular.
- 1.4 The Schedules attached to this Directive form part of and are integral to this Directive.
- 1.5 This Directive shall be consistent with and exercised in accordance with any relevant protocols or policies of the *syilx* Peoples.
- 1.6 In this Directive, a reference to an enactment includes all amendments to or replacements of it, and all regulations made under it.

PART II: PURPOSE AND SCOPE

2.0 PURPOSE

- 2.1 The purpose of this Directive is to establish procedures for assessing Applications that may have an impact on the *syilx* Title and Rights of Westbank or the *syilx* Peoples.
- 2.2 This Directive is an exercise of and is consistent with the rights of Westbank and the *syilx* Peoples under UNDRIP and section 35 of the *Constitution Act, 1982*.

3.0 SCOPE

- 3.1 This Directive applies to all Crown Lands.
- 3.2 No person may carry out an Activity on Crown Lands except through compliance with this Directive and the Westbank First Nation Archaeology Directive.
- 3.3 For greater certainty, every Application that may have an impact on the *syilx* Title and Rights of Westbank or Westbank Members, or the *syilx* Peoples shall be assessed in accordance with this Directive.
- 3.4 Nothing in this Directive obliges Westbank to consent to any Activity on Crown Lands.

- 3.5 No person or body shall acquire a right, vested or contingent, on Crown Lands, unless the Activity has been approved under this Directive.
- 3.6 Westbank shall not be deemed to have ceded, relinquished, abrogated or derogated *syilx* Title and Rights by receiving or responding to any such Application.
- 3.7 Nothing in this Directive shall limit or take away from the Crown's legal obligations with respect to consultation and accommodation of Westbank and the *syilx* Peoples, and Westbank and the *syilx* Peoples shall not be considered to have been consulted or accommodated with respect to any Activity by the Crown or a Third Party on Crown Lands unless this Directive has been complied with.
- 3.8 Nothing in this Directive shall be construed so as to prejudice any legal or other positions taken, or that may be taken, by Westbank or the *syilx* Peoples in any court, tribunal or administrative proceedings, treaty or reconciliation negotiations or otherwise.
- 3.9 Nothing in this Directive shall be interpreted in a manner which extinguishes or denies the *syilx* Title and Rights of Westbank or the *syilx* Peoples, regardless of whether such title, rights or privileges are recognized, established or defined at the time this Directive comes into force.
- 3.10 Nothing in this Directive, except as specifically provided otherwise, shall be construed as conferring consent or providing approval of any past, existing, new or ongoing Activities within *syilx* Territory.

PART III: APPLICATION PROCESS

4.0 APPLICATIONS

- 4.1 All Applications shall be submitted to the Referrals Officer in writing, together with the fee set out in Schedule "B", and shall include the following information:
 - (a) the name, telephone number and address of the Applicant;
 - (b) the location of the land where the Activity will occur;
 - (c) clearly drawn or reproduced referenced maps of the area where the Activity will occur;
 - (d) a complete description of the Activity including work plan and a description of the land and resources involved;
 - (e) a description of the current and anticipated value of the Activity;

- (f) all reports, studies, assessments and background information relating to the Activity including any with respect to archaeology, ethnography, traditional use, or the environment;
- (g) the commencement date and period of time during which the Activity will take place;
- (h) what steps have been taken to determine the impact on *syilx* Title and Rights in the area where the Activity will take place;
- (i) information as to the anticipated social and economic benefits for Westbank; and
- (j) where the Third Party has sought approval from the Crown to carry out an Activity, a copy of the documents submitted to the Crown.

4.2 The Referrals Officer shall securely store original copies of all Applications.

5.0 REVIEW OF APPLICATION

5.1 Upon receipt of an Application the Referrals Officer shall review the Application for completeness, and determine whether the proposed Activity:

- (a) is within the Westbank Area of Responsibility;
- (b) is on Crown Lands;
- (c) involves ground disturbance;
- (d) is a Large Project; and
- (e) has the potential to disturb a site of spiritual or cultural significance to the *syilx* Peoples.

5.2 The Referrals Officer may request further information from the Applicant

- (a) where the Application is incomplete;
- (b) where the Referrals Officer does not have sufficient information to make a determination under section 5.1; and
- (c) at any other time as the Referrals Officer deems necessary.

5.3 Where the Referrals Officer determines that the Activity does not fall within Crown Lands, the Referrals Officer shall advise the Applicant and there shall be no further consideration of the Activity under this Directive.

5.4 Where the Referrals Officer determines that the proposed Activity may involve ground disturbance, the Referrals Officer shall refer the Application to the Archaeology Supervisor for review in accordance with the Westbank First Nation Archaeology Directive.

5.5 Where the Activity is also within the Area of Responsibility of another member of the Okanagan Nation, the Referrals Officer shall send a copy of the Application to the other member of the Okanagan Nation.

6.0 ACTIVITIES AFFECTING OTHER OKANAGAN NATION MEMBERS

6.1 Where a proposed Activity is located within the Westbank Area of Responsibility and the area of responsibility of another member of the Okanagan Nation, Westbank and the other member of the Okanagan Nation shall work together towards a common decision using their own processes or an agreed-upon harmonized process and, if a decision cannot be reached between Westbank and the other member of the Okanagan Nation, the matter shall be submitted to dispute resolution mechanisms established under *syilx* Peoples' protocols.

6.2 If a proposed Activity is a Large Project, or has the potential to disturb a site of spiritual or cultural significance to the *syilx* Peoples, the Referrals Officer shall refer the matter to the CEC.

7.0 ACTIVITIES PROPOSED BY WESTBANK

7.1 Where Westbank proposes an Activity within the Westbank Area of Responsibility, Westbank shall prepare and submit an Application to the Natural Resource Committee of the ONA, and request the committee to review the Application in accordance with this Directive.

PART IV: REVIEW PANEL

8.0 ESTABLISHMENT OF REVIEW PANEL

8.1 The Review Panel is hereby established for the purposes of:

- (a) evaluating Applications to assess the impacts of an Activity, taking into consideration
 - i. the cultural, historical and archaeological significance of the area that is the subject of the Application to the traditional land uses and practices of the *syilx* peoples in the area,
 - ii. the presence of Archaeological Sites, and

- iii. any other factors the Review Panel deems relevant;
- (b) reporting to Council on Applications, including recommendations for approval or rejection of an Application and any conditions that might be attached to an approval; and
- (c) carrying out such other duties and responsibilities as may be assigned to the Review Panel by Council resolution or under Westbank law.

8.2 The Review Panel shall be composed of:

- (a) the Westbank Director of Title and Rights;
- (b) the Archaeology Supervisor; and
- (c) the Referrals Officer.

9.0 SUBMISSION TO REVIEW PANEL

9.1 If the Referrals Officer determines that an Application is complete, and contains sufficient information for it to be considered, the Referrals Officer shall provide to the Review Panel a copy of the Application and any other material submitted by the Applicant.

10.0 CONSIDERATION BY THE REVIEW PANEL

10.1 After receiving an Application package from the Referrals Officer in accordance with section 9.1, the Review Panel shall review the Application package and prepare a written report, which report shall include recommendations regarding:

- (a) whether input from other members of the Okanagan Nation or such persons having knowledge of *syilx* Territory and its uses is needed before a decision is made;
- (b) whether further archaeological research is needed before a decision is made;
- (c) whether further research or studies are needed to assess environmental impacts;
- (d) whether Council should
 - i. consent to the Application without conditions,
 - ii. consent to the Application, with conditions, or

- iii. reject the Application;
 - (e) whether, in the case of a time-sensitive Application, an extension of time should be requested; and
 - (f) such other matters relevant to the Application as the Review Panel deems appropriate.
- 10.2 In preparing a report under section 10.1, the Review Panel may take into consideration the following with respect to the proposed Activity:
- (a) whether further archaeological research is required to assess the Application;
 - (b) whether further information is required to assess the environmental impacts of the Activity;
 - (c) the potential impact of the Activity on *syilx* Title and Rights;
 - (d) whether the Activity is consistent or complies with any land use, forest stewardship or management plan of Westbank;
 - (e) whether the Activity relates to an existing usage and whether it is a renewal of a license or permit;
 - (f) whether the Activity is compatible with any Westbank economic development strategy;
 - (g) whether the Activity will provide socio-economic benefits to Westbank, to members of the Okanagan Nation, or to the ONA;
 - (h) whether the Activity is for an identified public purpose; and
 - (i) any other matters the Review Panel deems relevant.
- 10.3 The report prepared under section 10.1 shall be provided to
- (a) Council;
 - (b) the Westbank Council Secretariat;
 - (c) the Archaeology Supervisor;
 - (d) the Westbank Director of Title and Rights; and

- (e) any other Westbank staff member the Referrals Officer deems appropriate.

11.0 COUNCIL CONSIDERATION AND DECISION

- 11.1 In making a decision on an Application, Council shall review all reports of the Review Panel prepared in accordance with article 10.0, including any other documents or reports relevant to the Application, and shall take into consideration:
 - (a) the report and recommendations of the Review Panel; and
 - (b) any other factors Council deems relevant.
- 11.2 Before making a decision regarding an Application, Council may hold a Special Membership Meeting to receive feedback from Westbank Members.
- 11.3 After considering an Application, Council shall:
 - (a) approve the Application with or without conditions;
 - (b) reject the Application;
 - (c) request an extension of time from the appropriate body before making a decision where the Council deems appropriate; or
 - (d) refer the Application back to the Review Panel for further consideration and a further report.
- 11.4 Council shall provide a copy of its decision to the Referrals Officer.
- 11.5 Notwithstanding this article, where an Application is time-sensitive or urgent, the Director of Title and Rights may make a decision on the Application, provided that the Director of Title and Rights reports their decision to Council as soon as possible.

12.0 NOTIFICATION OF COUNCIL DECISION

- 12.1 Upon receipt of Council's decision under article 11.3, the Referrals Officer shall notify the Applicant and any other person the Referrals Officer deems appropriate in writing of Council's decision.

PART V: GENERAL

13.0 OTHER LAWS

- 13.1 Where a proposed Activity requires a permit under the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187, nothing in this Directive exempts a party from the application of that Act.
- 13.2 Where a proposed Activity is subject to the *Impact Assessment Act* (S.C. 2019, c.28, s.1) nothing in this Directive exempts a party from the application of that Act or the consideration of the interests of Westbank, members of the Okanagan Nation or *syilx* Peoples under that Act.
- 13.3 For greater certainty, nothing in the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187 or the *Impact Assessment Act* (S.C. 2019, c.28, s.1) prevents or precludes the application of this Directive.

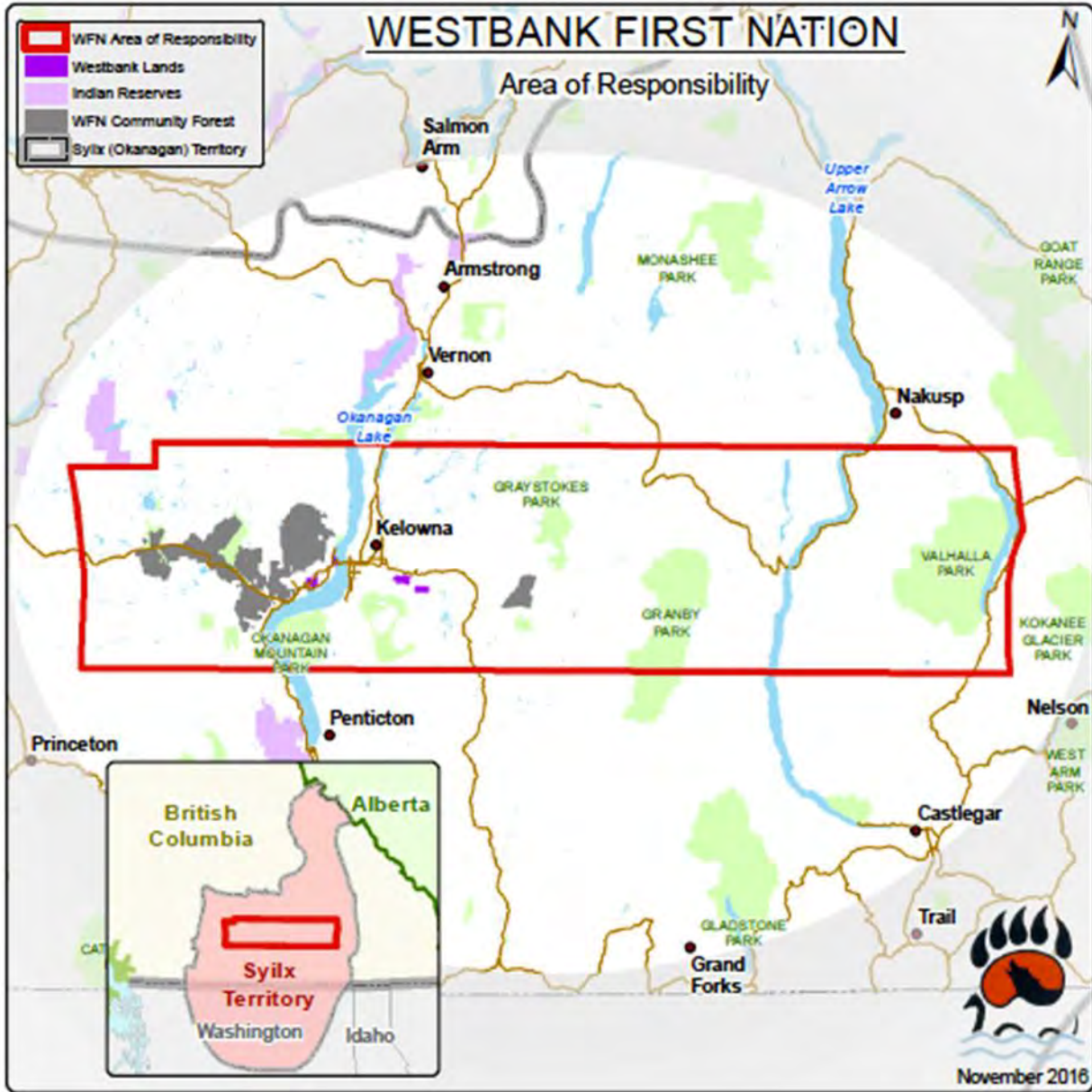
14.0 BREACH

- 14.1 In the event of a breach of this Directive, Westbank may
- (a) notify the Crown, in writing, of its opposition to the proposed Activity;
 - (b) revoke any consents previously given with respect to the Activity;
 - (c) take the breach into consideration with regard to future Applications or other future interactions with the Applicant; and
 - (d) exercise all of its legal rights, including but not limited to initiating legal action.

15.0 FEES AND CHARGES

- 15.1 Fees and charges payable under this Directive are set out in Schedule “B”, as amended or replaced from time to time.

Schedule "A" – Map of *syilx* Territory and Westbank Area of Responsibility



Schedule “B” – Fees and Charges

1. Fee for review of an Application: \$350
2. Notwithstanding section 1, where a fee is payable in respect of an Activity under the Westbank First Nation Archaeology Directive, then the fee for review of an Application regarding that Activity under this Directive may be waived or reduced.
3. For greater certainty, the process of including an Application includes the following:
 - Referrals Officer reviewing the Application and related documents for completeness
 - Referrals Officer requesting additional documents if needed
 - Referrals Officer preparing and submitting a report to the Review Panel
 - Review Panel considering the Application
 - Review Panel preparing and submitting a summary report to Council
 - Council and management reviewing the Application and the Review Panel’s report
 - Council notifying Referrals Officer of its decision
 - Referrals Officer notifying the Applicant of Council’s decision