

Title:	Guide to Applying PLAR in the context of Aboriginal Peoples' Rights
Number:	AEP Public Land Management 2018 No. 6
Program Name:	Public Land Policy
Effective Date:	April 1, 2018
This document was updated on:	May 10, 2018

Version History	
March 12, 2012	<p>Section 3 page 6 changed regulation name to Public Lands Administration Regulation.</p> <p>Section 5 page 7 changed Director contact number to 780 427-4768.</p>
March 15, 2018	<p>Formerly titled Standard Operating Procedures (SOP) Applying PLAR to Aboriginal Issues.</p> <p>Section 1.3, under Reasonably Incidental Activities, added exemption of Sundown cabins from definition of ancillary facility.</p> <p>Section 1.3, under Reasonably Incidental Activities and under Access Permits, updated to reflect Public Lands Administration (Exercise of Rights) Amendment Regulation O.C. 106/2017.</p> <p>Updated Ministry references, updated content to align with other approved policies, changed title of policy, and changed references of SOP to Guide.</p>
May 10, 2018	Updated to reflect Ministry's organization for officer reports.

1. Introduction

1.1 Background

Alberta Environment and Parks (AEP) is responsible for managing and regulating Alberta's public lands.

Public Lands Act amendments that came into force on April 1, 2010, and the Public Lands Administration Regulation (PLAR) include provisions to enable responsible use of public lands for a variety of uses. These include time-limited use of public lands for a listed set of activities and uses (collectively defined as recreational purposes). Access permits and closures are among the tools in PLAR for managing use of vacant public land.

Part 2 of PLAR provides the right to all persons to enter and occupy vacant public land for recreational purposes as defined. Recreational purposes include any of the activities listed in section 30 of PLAR (hunting within the meaning of the *Wildlife Act*, camping, fishing, etc) undertaken for a purpose other than a commercial purpose. Vacant public lands include lands that are not disposed and vacant disposition areas (lands where the disposition holder can't exclude others from the lands under disposition).

1.2 Purpose

This Guide describes how PLAR applies in the context of Aboriginal peoples' rights, so that PLAR is applied in a way that is supportive of Aboriginal peoples' rights and of reconciliation with Aboriginal peoples. Aboriginal is a collective name for the original or Indigenous peoples of North America and their descendants. There are three constitutionally recognized groups of Aboriginal peoples: First Nations (Indians), Métis and Inuit. AEP recognizes that the term "Indigenous peoples" is often used interchangeably with "Aboriginal peoples".

For the purpose of this guide, the term "Aboriginal peoples" is used as in section 35 of the *Constitution Act, 1982*, which defines the term to include "Indian" and "Métis" peoples.

1.3 Scope

This Guide will be used by any and all officers who are administering or enforcing PLAR, in relation to how PLAR applies in the context of Aboriginal peoples' rights.

Aboriginal Peoples (Indians and Métis) and PLAR

Areas within public lands were, and continue to be, culturally important to Aboriginal peoples today and important for the exercise of their rights. Strong connections were formed with various landscapes as peoples engaged in seasonal activities that brought them in recurring contact with hunting, gathering, harvesting, ceremonial and cultural sites in various areas. Aboriginal peoples continue to have strong cultural, spiritual and physical connections with various landscapes today. The administration and enforcement of PLAR is expected to be mindful of this sensitivity.

"Indians"

In this Guide "Indians" means Indians within the meaning of the *Natural Resources Transfer Agreement* (NRTA). Under the treaties between the Crown and First Nations, as modified by the NRTA, Indians are entitled to hunt, fish, and trap for food on lands to which they have a right of access for such purposes (*R. v. Badger*, [1996] 1 SCR 771, para 83-84). In this Guide, "Indians exercising rights" means Indians hunting, fishing, or trapping for food on lands to which they have a right of access for such purposes, and may include "reasonably incidental" activities as described in more detail below.

As a result, portions of PLAR are not applicable to Indians exercising rights. This Guide sets out how PLAR implementation should be reconciled with these rights.

Métis

For Métis, AEP has adopted a policy based on case law called Métis Harvesting in Alberta. This policy is currently under review. If an applicant proves eligibility under that policy, AEP recognizes the applicant's ability to hunt for food year-round on "unoccupied Crown land" and "other land to which they have a right of access for hunting", but only within 160 km of a specific community. Approved Métis harvesters acting within the scope of the harvesting policy will be treated under PLAR in the same manner as Indians doing the same activity, such as hunting.

PLAR is a provincial law of general application that applies to all persons including Indians and Métis. However, as explained above, Indians and Métis do enjoy constitutionally protected rights to some activities on provincial Crown land in Alberta. Section 35 of the Constitution Act, 1982 recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.

NRTA Land Categories and PLAR

The term “public land” applies to land that is administered by the Minister responsible for the administration of the *Public Lands Act*. It does not generally include other provincial Crown lands administered by any other provincial Minister or any federal Crown lands.

PLAR does not define “unoccupied Crown lands”. Case law interprets the meaning of unoccupied Crown lands for the purposes of the NRTA as determined by the purpose to which the land has been put. Therefore, unoccupied Crown land will continue to be determined on a case-by-case basis, as is the right of access to land for the purpose of exercising rights.

Reasonably Incidental Activities Generally

AEP is aware of case law that defines some activities reasonably incidental to the exercise of hunting, fishing, or trapping for food and therefore may be legally part of the exercise of that treaty right.

The law on what activities are reasonably incidental is evolving and very fact-specific, but suggests that reasonably incidental activities include “not only those which are essential, or integral” but also those that are “significantly connected” (*R. v. Sundown*, [1999] 1 S.C.R. 393).

Reasonably Incidental Activities: Shelters

Depending on the facts of the particular situation, reasonably incidental activities could include building a shelter, including the harvesting of material for the purpose of building such a shelter. These shelters, sometimes referred to as “Sundown Cabins”, that are located on public lands, are exempt from the definition of ancillary facilities as described in PLAR, “...ancillary facility means a structure identified as an ancillary facility in a disturbance standard.” [section 5(1)]. These shelters are not used for residency by any one person nor for a commercial purpose. Shelters of this kind are acknowledged by both AEP and the relevant First Nation and are then identified in AEP’s recordkeeping system.

These shelters may also be the same ones as those used for commercial trapping by a senior Registered Fur Management Licence (RFML) holder if the shelter is in the licence holder’s respective Registered Fur Management Area (RFMA). Such shelters are not required to align with the usual policies for structures under a RFML, but should comply with other regulations or policies that outline conservation objectives that help support healthy wildlife and fish habitat (such as requirements to control waste under *Environment Protection and Enhancement Act*). Depending on the facts of the situation, it may be prudent to discuss with the relevant First Nation any acknowledged shelters that give rise to a conservation or safety concern.

Structures identified by a Senior Registered Fur Management Licence holder may be also used by individuals exercising a treaty right. These may not be considered a ‘Sundown Cabin’ if not identified for communal use and depending on other facts of the situation. Therefore, dual purpose structures are to be evaluated on a case by case basis.

Reasonably Incidental Activities other than Shelters

The concept of “significantly connected” is important in acknowledging how Indians exercising rights continue to do so today. To the extent that such activities are connected with hunting, fishing, or trapping for food, some examples of activities that may be “reasonably incidental” include but are not limited to: ceremonial activities, transfer of cultural knowledge and practices, constructing smoke racks, starting and maintaining fires for cooking and warming.

Amendments made to PLAR in 2017 allow Indians exercising rights, or Indians traveling to a location to exercise rights, to:

- enter on and occupy vacant public land that is a bed or shore of a permanent and naturally occurring body of water or a naturally occurring river, stream, watercourse or lake;
- operate a motorized boat within a Public Land Use Zone;
- operate off-highway vehicles or snow vehicles within a Public Land Use Zone;
- take an off-highway vehicle or motorcycle within a Public Land Use Zone;
- camp overnight within 100 metres of a lake within Public Land Use Zones;
- tether or graze a horse within 100 metres of a lake within Public Land Use Zones; and
- camp or maintain a fire within 1 km of a Public Land Recreation Area or provincial recreation area located within a Public Land Use Zone.

AEP expects PLAR enforcement to take into account whether a particular activity is reasonably incidental to the treaty right to hunt, fish, or trap for food.

Activities Other Than Those Reasonably Incidental to Hunting, Fishing, or Trapping for Food

It is expected that enforcement officers will take a culturally sensitive approach when interacting with Indians on public land. For PLAR enforcement (as distinguished from consultation) the following apply:

- Indians exercising rights, including reasonably incidental activities to such rights (see previous section) may need to be treated differently from other persons, because of treaty and NRTA rights.
- Indians participating in other activities would not be treated differently from other persons. However, as with the traditional activities of any identifiable group of persons (Indians or others), a culturally sensitive approach should be taken.

In general, harvesting of resources for food and medicines for personal consumption is not considered a commercial purpose. For harvesting for a “commercial purpose”, an access permit is required (see Access Permits).

In the *Government of Alberta’s Policy on Consultation with First Nations on Land and Natural Resource Management*, Alberta makes a policy commitment to consult First Nations about potential adverse impacts to both rights (hunting, fishing, and trapping for food) and Traditional Uses (uses of public lands such as burial grounds, gathering sites, and historic or ceremonial locations).

Access Permits

Indians exercising rights, including reasonably incidental activities to such rights (see previous sections) do not need an access permit [PLAR section 42.1].

Indians participating in commercial activities need an access permit whenever other persons are required to do so [PLAR section 37.1(1)].

Commercial Purposes

Entry and occupation of vacant public land for commercial purposes generally requires an authorization. The exercise of treaty or NRTA rights does not include commercial activity on public lands.

First Nation members receiving payment of expenses or an honorarium (for example from consultants) to identify the First Nation's traditional activities on the land is not considered a commercial purpose. These types of payments relate to the personal services of the First Nation members, not to the use of the land therefore the service does not require an authorization.

Indians participating in recreational activities that are not reasonably incidental to the exercise of rights need an access permit whenever other persons are required to do so.

In issuing access permits, officers should keep in mind that access permits can be issued only to "persons" (individuals or incorporated bodies). A First Nation ("band" within the meaning of the *Indian Act*) is neither an individual nor an incorporated body. However, one person may obtain an access permit for an activity attended by, or involving, many persons (for example, for a large group band-organized event).

Closures, Prohibitions, Restrictions, and Consultation

There will be occasions when access to vacant public land is closed, prohibited, or restricted under PLAR, which will impact Indians exercising rights (for example, an area that is closed to **all** persons due to an emergency situation). These are tools to address public safety issues (fire, flood, avalanche and other hazards), other emergency situations, and support land management (including conservation of land and resource).

If a contemplated closure, prohibition, or restriction (for example, under a disturbance standard) has potential adverse impact, AEP staff are to consider whether consultation is required under the *Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013* and the *Government of Alberta's Policy on Consultation with Métis Settlements on Land and Natural Resource Management, 2015*, and associated guidelines. Depending on the situation, prioritization of access for Indians exercising rights may be one outcome of the consultation.

Even if prior consultation is not required under applicable Government consultation policy (for example, in an emergency situation), consideration should be given to informing in writing those First Nations and Métis Settlements whose members may be affected by an already implemented closure, prohibition, or restriction.

2. Procedures

Regulating Access to Vacant Public Land Under Part 2 of PLAR

When regulating access to vacant public land under Part 2 of PLAR, officers should be mindful that the person might be exercising a constitutionally protected right and should ask themselves the following:

- a. Is the person an Indian? AEP encourages Indians to carry identification, such as a card

issued by Indigenous and Northern Affairs Canada, which officially identifies them as a status Indian, when hunting, fishing, or trapping for food.

- b. If the person is an Indian, is it a case of Indians hunting, fishing, or trapping for food?
- c. If the person is an Indian, are they participating in an activity “reasonably incidental” to hunting, fishing, or trapping for food?
- d. If the person is an Indian hunting, fishing, trapping for food, traveling to exercise such rights, or participating in an activity “reasonably incidental” to exercising rights, are they doing it on land where they have a right to do so (unoccupied crown lands or on lands to which Indians have a right of access for that purpose)?
- e. Whatever the person or activity, are there cultural sensitivities that should be taken into account?

The above factors could be established in a variety of ways, including direct inquiry (such as asking the person who they are and what they are doing) as when approaching any persons on public lands or observation of the circumstances (such as the person’s location, activities, or equipment). In general, PLAR is expected to be applied in a manner mindful of Aboriginal peoples’ rights, without unnecessary conflict.

Reporting Violations

Due to the complexity of matters involving members of Aboriginal peoples and their established or asserted constitutionally protected rights, any AEP officer who encounters or investigates a violation as part of PLAR enforcement must notify AEP’s Regional Compliance Manager prior to proceeding with any charges.

A Fish and Wildlife Enforcement Branch officer who encounters or investigates a violation as part of PLAR enforcement must notify Inspector, Compliance Unit prior to proceeding with any charges.

3. References

To learn more about the legislation that applies to this procedure, visit the Government of Alberta Queen’s Printer website at qp.alberta.ca :

- *Public Lands Act*
 - o Public Lands Administration Regulation

You may also be interested in reading the following Government of Alberta documents:

- [Métis Harvesting in Alberta](#) (2010)
- [Hunting by Treaty Indians in Alberta](#): Rights and Responsibilities
- [Government of Alberta’s Policy on Consultation with First Nations on Land and Natural Resource Management](#)
- [Government of Alberta’s Guidelines on Consultation with Métis Settlements on Land and Natural Resource Management](#)

4. Definitions

The following definitions are from PLAR and referenced within this Guide:

- Access permit: In this part (Part 2), access permit means an authorization issued under Section 37.

- Commercial purposes [PLAR Sec. 30(b)]: a use or an activity undertaken i) with the intention that the use or activity may produce an economic benefit whether for the person or persons that undertake the use or activity or for a charity or other person, or ii) in connection with the business of the person or persons that undertake the use or activity [PLAR Sec. 30(b)]
- Recreational purposes [PLAR Sec. 30(d)]: a use or activity, including without limitation the following that is undertaken for a purpose other than a commercial purpose [PLAR Sec. 30(d)]:
 - hunting as defined by the *Wildlife Act*
 - camping, fishing, boating
 - nature study, including viewing, drawing and photographing
 - staging for air travel, including hang-gliding and hot-air ballooning, but not including air travel by aerodromes within the meaning of the *Aeronautics Act (Canada)*
 - human-powered travel, including hiking, swimming, underwater diving, snorkelling, skiing, snowshoeing, skating, and sliding
 - animal-powered travel, including dog-sledding, horseback riding, carting, tracking
 - the use of any conveyance
- Vacant disposition area [PLAR Sec. 1(1)(ff)]: public land (i) on which no development is occurring or is likely to occur for 90 days, (ii) that is under the administration of the Minister, and (iii) that is the subject of:
 - an authorization, easement, miscellaneous permit, commercial trail riding permit, pipeline agreement, or provincial grazing reserve
 - a licence of occupation, unless the public land is a closed road within the meaning of Section 54.01 of the *Public Lands Act*
 - a timber disposition under the *Forests Act*
 - a grazing allotment under the *Forest Reserves Act*
 - a registered fur management licence
- Vacant public land [PLAR Sec. 1(1)(gg)]: a vacant disposition area or other land that is under the administration of the Minister and that is not the subject of any formal disposition.

5. Contacts

Contact the Director, Public Land Policy at 780 427-4657 if you have any questions about this Guide.

Original Signed By: Eric Denhoff

Date: March 27, 2018

Deputy Minister,
Alberta Environment and Parks