First Nations interests and the approval of forest harvesting near Ucluelet, B.C.

Complaint Investigation 060708

FPB/IRC/131

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Table of Contents

Board Commentary

This investigation addresses the interaction between the Toquaht Nation, a First Nation group with traditional territory west of Maggie Lake (near Ucluelet) considered sacred and culturally important, and the Ministry of Forests and Range concerning an amendment to a forest development plan.

However, because the issues are complex and exist in a larger context of treaty negotiations and consultation on a broad range of issues, the Board provides the following commentary in the hope that it will facilitate future consultation in similar situations.

Consultation and Section 41 of the former *Forest Practices Code Act of British Columbia*

The duty to consult, "always requires meaningful, good faith consultation and a willingness on the part of the Crown to make changes during the process".[i]

In this particular case, there was no indication that the government was willing to entertain or discuss any changes to the forest development plan amendment, or alternatives to it. Rather than consult interactively, the government only solicited information for its administrative decision-making process under Section 41 of the *Forest Practices Code of British Columbia Act.*

Under Section 41, a district manager's role is to approve, or not approve, a plan or amendment, but the legislation does not encourage a district manager to engage in meaningful consultation. While the district manager did provide information and opportunity for the Toquaht Nation to comment, the Toquaht feel they were not properly consulted as there was no dialogue between the government and themselves.

Under the Code Act the district manager did not have authority to instruct the licensee to move the cutblock, alter the boundaries, or make other substantive changes to the plan. In this case, by the time the district manager made his decision, it was obvious that the licensee took a risk and had spent considerable time and effort in planning and engineering the block in question prior to receiving the approval.

Other significant issues that arose that were not appropriately addressed include the traditional and ceremonial use of the land. As stated in the district manager's rationale:

> I agree that the presence of old growth cedar trees are important for continuance of certain TN traditional practices and I appreciate that it is the TN's objective to keep some forests intact to afford opportunity to experience the traditional TN way of life. I am not however in a position to determine the extent to which forests must remain intact and where these areas could be

> located. These decisions are better made through more strategic land use planning processes or other higher level negotiations such as treaty. The determination before me for consideration is a Forest Development Plan application, which has been applied for pursuant to a previously approved Timber Sale Licence.

The result of this last oversight was that the Toquaht were compelled to devote substantial energy, on short notice, to establish their "credentials" and formulate their approach. Nevertheless, they were denied a serious opportunity to discuss the merits of, and possible alternatives to, the proposed development.

Therefore, in light of the specifics of this case, the Board suggests that the consultation process was not early and meaningful enough. The involvement of the Toquaht excluded opportunities to discuss moving the cutblock, as the licensee had already made significant investments and had committed to the location of the block without discussing it with the Toquaht.

As well, the process used was exclusive. For example, the Toquaht stated that the licensee never discussed alternatives to the general location of the cutblock, and that while the licensee spoke with the Toquaht about the planned operations, it did not have further interaction or dialogue with them beyond that. The Toquaht say that the licensee never discussed changes made to the plans, nor did it discuss what on-block measures, if any, the licensee planned to implement to address potential Toquaht rights or title.

The Board strongly supports meaningful dialogue between First Nations and licensees. Licensees should consider First Nations interests and discuss options with them before finalizing plans. The discussions must be collaborative. The B.C. government retains the duty to consult with First Nations. Even though the licensee does not have that duty, licensees should engage First Nations early in operational planning to allow for changes. Doing so encourages sound forest stewardship.

The Investigation

On February 13, 2006, the Toquaht Nation submitted a complaint to the Forest Practices Board about the approval of an amendment to the BC Timber Sales 2001-2006 Forest Development Plan. The amendment applied to one cutblock (9305A of TSL A64035) near Paradise Creek and Maggie Lake, north of Ucluelet. The Toquaht Nation asserts that the approval of the amendment was unreasonable, as the government failed to adequately consult with and accommodate the Toquaht Nation, and the approval did not follow ministry policy and guidelines respecting First Nations' interests.

Board Jurisdiction

This investigation examines the process by which the government considered the Toquaht Nation's rights and titles when the Ministry of Forests and Range approved a forest development plan amendment.

The Board's jurisdiction is bounded by the *Forest and Range Practices Act*. Matters such as determining Aboriginal rights and interests are beyond the Board's legal mandate; for example, the Board cannot determine whether or not title and rights exist. However, the Board can investigate complaints about practices and planning under the *Forest and Range Practices Act*, and consider whether asserted Aboriginal rights and associated consultation have been appropriately addressed.

Background

The nature of consultation

Section 35 of the *Constitution Act* of 1982 recognises Aboriginal title and rights, which include cultural activities involving the right to carry out practices, traditions or customs that were integral to First Nations' cultures. Courts affirm that the Crown has an obligation to consider potential Aboriginal rights and title when forest management decisions may impact or infringe upon them.

When the government has knowledge of the potential existence of Aboriginal rights or title and is considering actions that that might adversely affect them, they have a duty to consult with affected First Nations. This can lead to a further duty to modify plans or policy to accommodate Aboriginal concerns. The Crown's duty to consult exists with or without actual proof of rights and title, and decisions under the *Forest and Range Practices Act* must be consistent with Canadian Supreme Court findings on the application of section 35 of Canada's *Constitution Act.*

MFR has two polices relevant to this investigation:

- a May 14, 2003, *Aboriginal Rights and Titles* (ART policy); and,

- a December 6, 2003, *Ministry of Forests Consultation Guidelines 2003 (MFR Consultation Guidelines)*.

These policies outline the approach taken by the ministry to consultation and are meant to be consistent with the October 2002 *Provincial Policy for Consultation with First Nations*.

Toquaht Nation and the forest development plan amendment

The Toquaht Nation (the TN) is small, consisting of just over 100 members. It is one of five Maa-nulth First Nations that live in the Barkley Sound and Kyuquot Sound areas on the west coast of Vancouver Island. The TN considers the Maggie Lake basin important for traditional use and for spiritual reasons.

In August 2002, the Minister of Forests and Range (MFR) announced an agreement with Weyerhaeuser Co. Ltd. to remove 8,700 hectares of Crown land from the company's Ucluelet Working Circle of Tree Farm Licence 44, stating that decisions on the management of the area – including re-allocation of timber volume to offset the effects of reduced harvests in nearby Clayoquot Sound – would be made later that year. Because access to timber on the west coast of Vancouver Island is limited, a license here is considered especially valuable.

In 2002, the MFR awarded the Ucluelet Economic Development Corporation (the licensee) a three-year, 75,000 cubic-metre timber sale licence. The licensee, which is the economic corporation of the District of Ucluelet, stated that removed volume would allow it to pursue forest tenure possibilities with its partners, the Ucluelet First Nation and the TN.

The two First Nations, however, were not included as signatories to the licence, but the TN supported the awarding of the license. The licensee and the TN entered into an agreement to share any profits, giving the TN a beneficial interest in harvesting under the timber licence.

The planning and harvesting of the 2002 timber sale licence proved challenging. BC Timber Sales' timber sale licence tender application package specified that the timber sale was to come from the former Ucluelet Working Circle of Tree Farm Licence 44. The tender application package also stated that further engineering, planning and layout would need to be conducted by the successful applicant.

Under the proposal, timber volume was to come from seven cutblocks approved in the BCTS Forest Development Plan and the licensee was responsible for producing a development plan for any additional volume. The licensee proposed harvesting the seven cutblocks and invested in engineering and road works, but had several setbacks. As a result, the licensee sought to harvest cutblock 9305 at Paradise Creek, which was not one of the original seven cutblocks, in order to obtain the volume of the timber sale licence.

Cutblock 9305 had been previously approved in a forest development plan for TFL 44, and it consisted of three units (small blocks) with a combined gross area of 26 hectares which were to be partially cut. This cutblock was subsequently included as a Category 'A' approved cutblock in BC Timber Sales' *2002-2006 Forest Development Plan for the Alberni Operating Area*.

The proposed amendment took the northern-most eight-hectare unit in the original cutblock and added substantially new area adjacent to it. The licensee labelled this 'cutblock9305A'. The proposed enlarged 9305A cutblock consisted of 99 hectares, and harvesting using a clearcut with reserves silviculture system was planned.

The licensee also undertook the public review and comment process and First Nations information sharing that were required for the amendment to proceed on behalf of BCTS.

The district manager approved a shortened public review and comment period for the amendment – from 60 to 15 days – and the amendment was advertised for public review and comment from August 3 to 17, 2005.

When the public review process was over, things began to move rapidly:

- In October 2005 the licensee provided the TN with a fisheries assessment, a wildlife habitat assessment and a culturally modified tree survey;
- On December 1, 2005, the licensee provided the TN with a revised amendment; and,
- On December 6, 2005, the licensee submitted it for approval.

By this point, the cutblock had been reduced in size from 99 to 39 hectares. Of that, only 25 hectares were to be harvested, with the remaining area consisting of wildlife tree patches and aggregate reserves.

On January 12, 2006, MFR approved the amendment as revised. On January 19, the TN requested a copy of the rationale for the determination, which was provided on February 8 (see Appendix A - district manager Rationale).

Discussion

The Complaint

The TN asked the Board to investigate if applicable legislation, policy and guidelines were followed in the approval of the amendment, and if there was adequate consultation with, and accommodation for, the concerns of the TN. In its view, consultation requires two-way communications which it felt had not happened.

The TN was concerned that the Crown did not safeguard its interests because, in making its decision, the MFR put weight on the fact that the licensee had decided to pay for final engineering of the cutblock before it had received the district manager's approval to harvest there.

Finally, the TN believed that filing a complaint with the Forest Practices Board might be a suitable alternative to the using the courts in forestry circumstances.

The Board's Investigation Approach

The approval of the amendment was made under Section 41 of the *Forest Practices Code of British Columbia Act* (Code Act). The *Forest and Range Practices Act (FRPA)* replaced the Code Act but contained transitional requirements[ii] to allow for the gradual implementation of the new legislation. The transitional requirements allow licensees to continue to use forest development plans for forest operations, but in the meantime development plans and amendments are still governed by the Code Act until a licensee produces a forest stewardship plan under FRPA. As of April 1, 2007, however, all licensees must have approved forest stewardship plans for future development planning.

Section 41 of the Code Act governs the approval of operational plans for forest operations on Crown land. An operational plan in the Act includes an amendment to a forest development plan. Section 41 is a two-part test:

- Section 41(1)(a) states that district managers may only approve a plan if it has been prepared according to the Code Act and related regulations (the Code).
- Section 41(1)(b) requires that district managers must also be satisfied that the plan will "adequately manage and conserve" forest resources in the area of the plan.

The MFR pointed out to the Board that the decision maker must make two determinations in order to consider potential Aboriginal rights and title and aboriginal interests. Namely, the district manager must first determine if the amendment meets the requirements of the

Code Act. The decision maker must then determine whether there has been adequate consultation with affected First Nations.

The TN said that, in their view, there had been virtually no consultation regarding the TN interests. The TN stated that the MFR had failed to meet them on-site and that no changes were made to safeguard their cultural and environmental interests. The TN wrote the MFR about those interests in letters dated October 12, November 7 and December 20, 2005 (see appendix E). Those interests included:

- The Chief's right to approve (or not) activities in the area;
- The sacredness of the area;
- Gathering, including medicinal plants;
- Maintaining old growth cedar for ceremonial purposes;
- Preserving future economic opportunities - cumulative and future impacts; and,
- Clean water and water reservation.

The TN stated that the district manager did not engage in meaningful discussion about these concerns and that they were not addressed in the amendment approval.

To address the TN concerns raised in this complaint, the Board examined the district manager's approval of the forest development plan amendment under Section 41(b) of the Code Act. The approval is a discretionary decision. Such discretionary decisions should be reasonable, based on an adequate assessment of relevant, available information and should consider government policy with due care and consideration.

In this investigation, the *2003 MFR Consultation Policy* was relevant and applicable and it holds that the district manager's caution and deliberation should match the importance of the decision and the potential risk created by the proposed forest practices.

Therefore this investigation examined the process that the district manager used to make the decision to approve the amendment.

The Board investigated:

1. Was the Toquaht Nation provided with adequate information about the proposed activity?
2. Did the approval process consider the potential for infringement of Toquaht Nation's interests?
3. Did the MFR adequately discuss alternatives with the Toquaht Nation?
4. Did the licensee adequately discuss alternatives with the Toquaht Nation, as suggested by the 2003 MFR Consultation Guidelines?

1. Was the Toquaht Nation provided with adequate information about the proposed activity?

The 2003 *MFR Consultation Guidelines* provide guidance to staff about consultation. It outlines a process to determine what level and method of consultation may be appropriate in a given situation, and provides a framework and standards for consultation meant to ensure that consultation practices are consistent across the ministry. The document provides guidance and direction to staff where forest management decisions may potentially infringe upon Aboriginal interests, and it applies where there are asserted, even if unproven, Aboriginal rights or title.

The consultation policy recommends that relevant information about proposed forest management activity be provided to potentially affected First Nations, and that First Nations should receive all relevant and reasonably available information as early as possible. It also notes that licensees need to be involved, and should provide specific information on development proposals. First Nations' interests and responses regarding claims will guide the level and scope of subsequent consultations.

The Board examined if the TN was given adequate time for consultation and if they received adequate information as early as practically possible.

1.1 Was the Toquaht Nation given adequate time for consultation?

The MFR consultation policy does not indicate any time frames for consultation, other than recommending that consultation be flexible, workable and efficient.

The TN told the board that it was subjected to a series of shifting and unreasonable time constraints which resulted in them feeling pressured and always under the threat of a new deadline.

On July 27, 2005 the licensee emailed the complainant, noting for the first time that it had dropped its plans for the Draw Lake block and was proposing a new amendment for a cutblock in the Paradise Creek area. The next day, the licensee wrote the complainant again advising of the amendment, and stating that the review period would begin on August 3rd and end August 17. This letter also said that the deadline for any comments on the plan was August 17th, and it invited the complainant to meet with the licensee to discuss the cultural significance of the areas in question. The attached development plan text noted that First Nations would be given copies of the amendment on August 3rd and that meetings with them would be attempted during the general public review and comment period.

On August 22, 2005, the MFR wrote the complainant, clearly stating that the MFR was responsible for consulting with First Nations and that it would explain the proposed operations and identify Aboriginal interests that may be affected by the operations. MFR advised the complainant that it had requested BC Timber Sales to initiate information

sharing related to the FDP during the 15-day review and comment period. The letter concluded that the TN may wish to submit written information to the MFR because the amendment would soon be submitted for approval.

On September 23, 2005, the MFR wrote to clarify that comments specific to the area should be provided within 60 days of receipt of the FDP – on August 13, 2005 – stating this was consistent with the MFR consultation policy. Specifically, the MFR requested any pertinent information be received by October 3rd, notifying the TN that there were, at that time, ten days left. The same day, the complainant asked for an extension of the review period to October 12, 2005.

On October 12, 2005, the TN wrote the MFR to explain the historical significance of the area to them, and the values and customs associated with it. The TN requested a field review with MFR staff.

The MFR replied on October 19, 2005, noting that the licensee had already offered a field review as part of the information sharing process, and requested that any additional information obtained though the licensee field review be sent to them. The MFR offered to meet the TN at the end of the month to discuss any additional information, and also stated that the district manager would be making a decision on the amendment some time after October 28, 2005.

The TN provided several binders of information to the MFR on October 25, 2005, and on October 27, 2005 the complainant and the licensee visited the site together.

On November 7, the TN again wrote the MFR and provided more information on their traditional use of the area. The TN also stated that, in its view:

- there had still been virtually no consultation with them respecting the amendment, and that this was unfortunate as there may have been an opportunity for the MFR and licensee to reach an accommodation with the TN;
- it had requested a field trip with MFR staff but only the licensee had been present on October 27th (the MFR's notice, with an offer for a subsequent meeting, was sent too late to be met);
- the information provided to the MFR presented a strong prima facie case for Aboriginal rights and title to the area; and,
- forest practices proposed in the amendment had an extremely high potential to impact this sacred and culturally important site.

On November 15, 2005 the MFR replied to the TN stating that there had been extensive consultation and that timelines in the MFR consultation policy had been extended to provide the TN with ample opportunity to supply information As well, the MFR requested

a video of the October 27, 2005 meeting and requested it before November 18, 2005 so the district manager could review it prior to making a determination.

On November 30, 2005, the MFR and the complainant met to discuss issues.

On December 1, 2005, the licensee provided the TN with a map of the revised amendment . Subsequently, the licensee submitted its final revised amendment to the MFR on December 7, 2005.

The MFR, TN and the licensee conducted a field review on December 11, 2005.

The MFR wrote the TN on December 20, 2005, and summarized their understanding of the TN issues with the proposed amendment. The MFR requested further details of any information that the TN consider relevant by December 21.

On December 20, 2005 the TN wrote the MFR. Again the TN stated that there had not been adequate consultation and that the potential for cumulative and derivative impacts was high. The TN also said that additional information was available to illustrate a strong prima facie case for Aboriginal title over the area.

The MFR replied by letter on December 23, 2005. The MFR summarized the information that the TN had provided to them and stated it would consider this in the pending decision "around the accommodation of Toquaht interests."

The MFR approved the amendment on January 12, 2006.

In summary, although the complainant was originally given a very short timeframe for consultation – only 15 days – consultation and information sharing occurred from August 3, 2005 to December 20, 2005. The amendment was approved on January 12, 2006.

> **Given that the complainant, MFR, and the licensee met and corresponded for approximately four months, and had met on site, the time period for consultation was adequate and met the MFR policy.**

1.2 Did the complainant receive relevant and available information as early as possible?

The TN was provided with the forest development plan amendment on August 3, 2005. The TN was also provided with a fisheries assessment, wildlife habitat assessment and culturally modified tree survey in October. On December 1, 2005, the licensee provided a revised amendment to the complainant.

During a meeting on October 27, 2005, the licensee said that the final engineering of the cutblock was likely to dramatically reduce its size. The licensee noted that the change would

reduce the timber volume to 15,000 cubic metres. The licensee had indicated that they needed, and were allowed, only 15,000 cubic metres to meet the licence requirement of 75,000 cubic metres.

The predicted reduction occurred, as the 98.8 hectare cutblock proposed in August was reduced to 39.8 hectares in December. Of that, 26.4 hectares would actually be harvested, with the remaining 12.4 hectares consisting of reserves within the cutblock. Although the final proposal was not presented until December, the general area of operations had been identified in August. That was sufficient to solicit comment on the general area and First Nations' interests.

> **The complainant was given the relevant information within a reasonable amount of time.**

2. Did the approval process address the potential for infringement?

The 2003 *MFR Consultation Guidelines* provide direction for consultation where forest management might infringe upon Aboriginal interests. It requires that, during consultation, the ministry consider and address the information in relation to the potential for unjustifiable infringement by proposed forestry decisions. To do this, the district manager was advised to follow the *2003 Aboriginal Rights and Titles* policy (ART).

The 2003 MFR consultation guidelines advice MFR staff to:

1. Identify potential affected First Nations;
2. Provide those First Nations with all information about a proposed activity;
3. Request information from the First Nations which would identify and provide a basis for any claims of interest; and,
4. Consider and address the information in relation to the potential for infringement by forest decisions.

The TN's main contention is that the fourth step of the consultation policy, namely, for the statutory decision maker to address the potential for infringement, was not done.

2.1 Did the approval process illustrate that the potential for infringement in terms of availability of cedar and medicinal plants was considered?

The district manager's approval rationale (Appendix A) describes how he considered the potential for Aboriginal rights and title. He followed the format expressed in the *2003 Aboriginal Rights and Titles* policy, addressing each of the stages in the policy specifically.

The TN expressed its concerns to the MFR on November 7, 2005. It maintained that there had been virtually no consultation. The TN was concerned that the MFR had failed to meet

with its representatives on-site, and that no changes had apparently been made to safeguard the TN's cultural and environmental interests. The TN said that there was no constructive dialogue about the issues, or about on-block measures to address its interests. The TN believed that the licensee's decision to pay for final cutblock engineering put pressure on MFR to approve the amendment, leaving the TN in a reduced position to defend its interests. The TN offered to help find the licensee an alternative area for harvest but the licensee refused the offer.

The TN submitted that the area west of Maggie Lake area is a sacred and culturally important area known to the TN as *T'aaT'aaki?apas*, meaning, "standing trees that belong to the *hawii?a* (the Chief)".

To the TN, the area near Maggie Lake belongs to the hereditary chief. Families are given access to resources in such special community places if they perform services or contribute to the community. Hereditary chiefs are the custodians of those special community places, and the disposition of resources in these areas is the sole prerogative of the chief. The *T'aaT'aaki?apas* is also the source of bark strips that were made into ceremonial robes for the chief.

The TN believes that the MFR failed to appreciate some subtle resource value distinctions, such as the type of cedar and value that was represented in the higher elevation area that characterizes the *T'aaT'aaki?apas*. It is culturally incorrect to simply ensure access to cedar; the quality and attributes of cedar vary with location in important ways that affect traditional use.

Historically, the TN utilized the timber found on the shore of Toquaht Bay for resources for canoes, lumber and bark, but the best-utility cedar grows in higher elevation stands. It is close-grained and splits straight, so it was used for arrows. By contrast, lower elevation cedar is usually best-suited to products like canoes. The TN also pointed out that cedar was often used for barter, and was traditionally analogous to money – that is, members traded individual cedar for loads of halibut, salmon or other resources.

The TN maintains that there is currently a shortage of cedar of suitable quality for traditional purposes, and that these valued trees are of the type normally found in old growth stands. Such stands are now, in the TN view, in short supply. The TN points out that, through the old growth retention strategy, the Integrated Land Management Bureau[iii] (ILMB) confirmed a limited amount available in the Maggie Lake landscape unit.

On the other hand, the MFR noted that the 13,500 hectare Maggie Landscape Unit makes up only 33 percent of the TN's 38,000 hectare traditional territory, and that there is adequate cedar available elsewhere in the territory to meet the TN's cultural needs.

The TN disagrees. It asserts that high quality cedar is not available. In fact, the Maggie Lake drainage has a concentration of high quality old growth, including quality cedar, not found elsewhere in the landscape unit. There may be scattered old growth throughout the landscape unit, but the Maggie lake area and, in particular, the *T'aaT'aaki?apa*s area, has a concentration of scarce old growth, including quality cedar. The TN challenged the MFR to identify suitable stands elsewhere, and maintains that, had the consultation been sincere and in good faith, the consultation would have provided the information needed as opposed to MFR "guessing" at the amount and location of available cedar.

The district manager recognized the TN assertion of rights to protect cedar, even though the rationale notes that neither title nor the right to cedar had yet been proven to be an existing Aboriginal right. However, the district manager stated that he couldn't determine the nature of the asserted right, nor the basis for the asserted infringement, from the information provided. Regardless, the district manager did not speculate on the strength of claim; he simply accepted, for purposes of the approval, that there have been traditional activities in the area.

The MFR agreed that it was difficult to determine the amount of cedar in the unit, because it was formerly part of TFL 44, and forest inventory for only a small portion was difficult to analyse. Instead, the district manager relied on data regarding percentages of mature or old forest obtained by the Integrated Land Management Bureau (ILMB) in 2004. From this information, the district manager deduced that most old growth on the west coast includes a component of cedar.

The ILMB information notes that 41 percent of the total forested area is mature or old, and 29 percent of the timber harvesting land base is mature and old forest type. This means that roughly 71 percent of the land that can support harvesting in the landscape unit is second-growth and not old enough to harvest. This conclusion is supported by the TN which maintains that, although the Maggie Lake Landscape unit is only a portion of the TN territory, it contains the majority of old growth cedar, as other areas in the territory have already been logged extensively.

The rationale indicated that the district manager used what information he had to assess the amount of cedar available in the TN territory. The district manager accepted that approval of the amendment may reduce the TN members' opportunity to harvest cedar bark and individual trees, as some cedar would be harvested. He concluded the same for yew wood, which is also traditionally important to the TN for tool making. The district manager also concluded that similar access opportunities would exist in adjacent areas, including the Maa-nulth treaty land. The MFR ultimately decided that the removal of cedar was not unreasonable in the circumstances, and would not deny the TN the means of carrying out its traditional activities. The district manager concluded that the harvesting of the cutblock would not create an undue infringement or hardship in regard to harvesting of cedar or on availability of food or medicine.

The district manager recognized the TN assertion of rights to protect cedar as he accepted, for purposes of the approval, that there have been traditional activities involving cedar in the area. The district manager assessed the availability of cedar and concluded that, while there may be some reduction in TN members' opportunity to harvest cedar bark and individual trees, there would be other areas available for these traditional activities. It is reasonable to conclude that the approval process adequately considered the potential for infringement in terms of availability of cedar and medicinal plants.

2.2 Did the approval process illustrate that the cultural importance of the area was adequately considered?

The TN states that the Crown did not genuinely consider the cultural importance of the area. The TN is strongly concerned about the proposed forest development, so much so that the TN Council deliberated the issue at three council meetings. The TN noted that, for such a small First Nation, this much attention to a single cutblock was extraordinary.

The MFR did have a detailed report on the TN's claims to Aboriginal title to their territory. The October 24, 2005 report, *Toquaht Aboriginal Title Preliminary Report*, includes a detailed discussion of evidence of TN occupation and cultural interests in the area. This report states that the TN's culture influenced customary law, which includes rights of ownership within a distinct territory that are subordinate to a senior chief. These rights of ownership include social and economic rights as well as resources such as areas for gathering berries and roots, and other property resources. Furthermore, the rights to utilize resources are managed by members of the tribes, and members' rights to hunt and fish in the chief's areas are subject to conditions.

These Nuu-chah-nulth First Nations rights of ownership to territory and resources are also described in oral accounts from elders and cultural advisors. The descriptions are in early written records from the area and also in later historical documents.

Prior to approving the amendment, the district manager wrote the TN on December 23, 2005, and described the MFR understanding of the *T'aaT'aaki?apas* area in terms of its use and sacredness.

The district manager's rationale recognizes the importance of the *T'aaT'aaki?apas* area (for the complete MFR discussion of infringement, please refer to the appendix, pages 5 and 6). It notes that Chief Mack advised the MFR that there were approximately eight special areas for the chief in the territory, including an exclusive burial ground for chiefs. The rationale also noted the TN statements that that some of the special places have been impacted by forestry activities.

The rationale noted that the district manager could not determine the extent to which forests are needed to protect such special areas. . There was no physical evidence of cultural use of the area because the disposition of resources by the chief does not occur regularly. The rationale addressed infringement generally, and concluded that accommodations that would involve the future economic needs of the TN were best addressed through strategic land use planning or other higher level negotiations.

The district manager concluded that the harvesting of the cutblock was justifiable and reasonable, as it wouldn't deny the TN members their preferred method of traditional activities or impose undue hardship for them. However, the decision did not address the specific cultural significance of the lands belonging to the chief for his use, and it did not deal with the disposition, uniqueness and, perhaps, rarity of the area.

The district manager considered the nature of the TN interests; the strength of its claim; and, the degree of probable infringement and concluded that no additional accommodation measures were needed above what the government was already doing. The rationale listed several ways that the TN had to access cedar, including:

1. a non-replaceable forest licence (NRFL) as part of the Clayoquot Sound Interim Measures Agreement;
2. access to Free Use permits as required; and,
3. access to the Woodlot Licence held by the TN.

In response, the TN noted that the woodlot licence and the NRFL were won in competition. As well, the woodlot is a very small tenure and the non-replaceable forest licence does not provide for sustained wood volumes in the future. Therefore, the TN does not consider either licence as an accommodation. However, the district manager noted that the TN is currently identifying other future benefits to mitigate potential infringements.

The MFR Consultation Guidelines advises decision makers to undertake more intensive consultation to address potential interests where there appears to be a strong claim to Aboriginal title or rights. The policy notes that such situations may require further consultation or further measures to mitigate impacts, such as adjustment to proposed developments. The policy advises a decision maker to address concerns and, if applicable, explore possible accommodation measures with other levels of government. In this case, the district manager apparently did discuss this approval with staff in the Ministry of Attorney General.

> **The district manager's rationale did not indicate that the Crown considered the potential significance of the cultural value of the *T'aaT'aaki?apas* being left intact. The *T'aaT'aaki?apas* may be the only area of its kind for the TN, or the only area of its kind culturally controlled by the chief. The**

approval process did not specifically address the potential cultural importance of the area.

3. Did the Ministry of Forests and Range adequately discuss alternatives with the Toquaht Nation?

As noted previously, the TN believes that consultation requires two-way communication and a willingness to consider changes. This view is consistent with what the courts have said. For example, the duty to consult, "always requires meaningful, good faith consultation and a willingness on the part of the Crown to make changes during the process."[iv]

Consultation is not effective if there has been little exploration of possible alternatives to reduce impact on a First Nation's Aboriginal interests. In *Mikisew Cree*[v], it was noted that:

> Consultation that excludes from the outset any form of accommodation would be meaningless. The contemplated process is not simply one of giving the Mikisew an opportunity to blow off steam before the Minister proceeds to do what she intended to do all along.

Was there a willingness on the part of the Crown to make changes?

The MFR described its view of the consultation process in an August 22, 2005 letter to the TN, as follows:

> The purpose of consultation is to explain the proposed operations for the area to the First Nation and to identify Aboriginal interests that may be practised within the proposed operating area and that may be affected by these operations. The district manager can then consider these interests in making a determination on the proposed FDP amendment (emphasis added).

This approach to consultation was further emphasised in the district manager's letter of December 20, 2005, stating:

> I appreciate the time and effort that Toquaht First Nation has taken in highlighting their Aboriginal interests in this area around Maggie Lake and I assure you that I will consider these issues in the pending determination (emphasis added).

In other words, MFR was operating within the framework of Section 41. However, the decision framework of Section 41 in isolation may not be well suited to meaningful consultation. A district manager's decision under Section 41 is essentially a decision to approve or not approve a plan or amendment (although there is a limited ability to approve with conditions) – it is an "on/off" switch. A district manager has no authority to make

changes, or to instruct a licensee to make changes, nor can a district manager move a cutblock, alter its boundaries, or make other substantive changes.

The MFR confirmed this during the investigation, explaining that the district manager could only refuse to approve the cutblock if he determined that there was undue infringement upon Aboriginal interests. In this case the district manager had made no such determination (discussed in the rationale).

TN representatives wanted to discuss possible alternative locations for the cutblock, as well as possible alterations to the proposed cutblock. However, this discussion did not happen, as neither the MFR nor the licensee was willing to engage in such a discussion.

The MFR and the TN met on September 20th (2005) and again on November 30th, and all three parties participated on a field trip on December 11, after the licensee had submitted its amendment for approval. The MFR meeting notes reinforce the MFR approach on information sharing; MFR did not discuss alternatives or options with the Toquaht. In other words, at this stage, the MFR was not engaging the TN in discussions about alternatives for this single cutblock; it was collecting information.

On December 20, 2005, the TN wrote the MFR stating that it still had not been adequately consulted. The TN offered to work with the licensee and MFR to find an alternative location for the cutblock. The MFR again did not discuss alternative locations.

> **The TN was contacted, provided information on the proposal, and asked to explain its interests to the MFR. However, alternatives for the cutblock were not explored with the TN. Under Section 41, when the amendment was considered for approval, the district manager did not have the authority to instruct the licensee (UEDC) to move the cutblock, alter the boundaries, or make other substantive modifications. The process excluded the MFR from discussing alternatives with the TN, such as the option of moving the cutblock into another area of BC Timber Sales' operating areas.**

4. Did the licensee adequately discuss alternatives with the Toquaht Nation?

The 2003 *MFR Consultation Guidelines* provide direction to MFR staff but also note that licensees may be required to share information to explain a forest activity, to gather information on Aboriginal interests and to suggest measures to address interests prior to requesting statutory decisions.

The TN stated that the licensee never presented alternatives to it; rather, the licensee simply presented a proposal that had been created prior to contacting the TN. The TN stated that the licensee would select cutblocks, spend money on engineering and planning and, only

after doing those plans, would it engage the TN. Furthermore, when they did present their plans, the licensee spoke with the TN and then unilaterally made changes the licensee thought were necessary, without further interaction with the TN.

The TN stated that it was the licensee's normal practice to invest money in planning and engineering before entering into any discussions. Hence, the TN routinely felt pressured. The TN asserts that this approach made alternatives less feasible and prejudiced discussion and mitigation options. The TN characterized the licensee's approach to discussion as, 'here are our plans." The TN said that completing cutblock engineering prior to the block being approved in a forest development plan is unusual in the industry.

The TN also says that the licensee never discussed any changes made to the plans, nor did it discuss what on-block measures, if any, the licensee planned to implement to address potential TN rights or title. In its December 20th letter, the TN stressed that the licensee did its final engineering without First Nations involvement at the landscape level.

During the investigation, the MFR explained its view of the consultation process. MFR stated that the Crown has the legal obligation to consult and, where appropriate, accommodate. This obligation is not on the licensee. However, the licensee may wish to address First Nations interests nevertheless. The effect is that the Crown is not in a position to tell the licensee to address Aboriginal interests, but the Crown can follow up with a First Nation when a plan or amendment is submitted and examine the degree to which the licensee has proposed to address Aboriginal interests. The Crown can then determine if this is appropriate or whether something more, or different, is required. The Crown must determine for itself whether the level of consultation was appropriate, whether accommodation was appropriate and, if so, whether what was proposed and discussed with the affected First Nation was appropriate.

There was no explicit instruction given to the licensee, either from BC Timber Sales or from the MFR, to consider alterations to its operations; the licensee was simply told to share information. Nevertheless, the licensee took some measures to address the complainant's interests in its November 30, 2005 submission to the MFR. At the cutblock level, the licensee listed other cutblocks considered in the past and noted that, in those areas, use was made of variable retention prescriptions and small clear-cuts with reserves.

The licensee also described specific measures for cutblock 9305A, including:

- Designing the block to ensure future availability of red cedar and yew trees for cultural uses, since wildlife tree patches were located in areas with cedar and cypress, with potential for yew trees.
- Plans to plant cedar in the block.
- Reducing the size of the block, so that substantial areas outside the block still contained similar timber types to those in the block.

The licensee also provided copies of terrain, cultural, wildlife and fisheries studies to the TN. However, the licensee rejected the TN request to move the entire block because its engineering expenditures would be lost.

The licensee contends that flexibility was exercised earlier, which made this block necessary to provide the final volume of its licence. Specifically, the TN had earlier asked for a delay in harvesting a block that was located close to its reserve because the block might be part of a land claims settlement.

As well, two other cutblocks were removed to accommodate the Ucluelet First Nation (adjacent to Ucluelet harbour), and the licensee had already constructed the road and engineered the two cutblocks and was seeking restitution from government. A fourth block was proposed adjacent to Draw Creek (cutblock 301A). The licensee withdrew that block, explaining that the trees were very young and that the block had too many braided fish streams, making it uneconomical to harvest. Consequently, the licensee proposed harvesting cutblock 9305A at Paradise Creek.

The TN view is that the previous cutblock proposals and harvesting were not directly relevant to the consultation on the Paradise Creek cutblock. The TN note that potential impacts to Aboriginal interests must be considered and, where necessary, accommodated based on the amendment at hand.

Anticipating approval of cutblock 9305A, the licensee took a risk and proceeded with engineering the layout of the cutblock before it received MFR approval. That decision had two outcomes. First, the licensee needed to have the block approved as proposed in order to harvest the block before its forest licence expired and to recover the money already spent. Second, the licensee became less amenable to moving the block as requested by the TN.

> **The licensee provided information on the proposed cutblock to the TN but did not discuss the option of moving the block, as the licensee had already spent money engineering the cutblock in anticipation of the approval. The licensee proposed other measures in its amendment to address TN interests, but did not specifically discuss this with the TN. The licensee did not adequately discuss alternatives with the Toquaht Nation.**

Conclusions

1. Was the Toquaht Nation provided with adequate information about the proposed activity?

Yes. The complainant, MFR, and the licensee met and corresponded for approximately four months and had met on site, and the time period for consultation was adequate and met the MFR consultation policy. The complainant was given the relevant information within a reasonable amount of time.

2. Did the approval process address the potential for infringement?

No. The approval process adequately considered the potential for infringement for some interests, including availability of cedar and medicinal plants, but did not specifically address the potential cultural importance of the *T'aaT'aaki?apas* area. The rationale did not indicate that the Crown adequately considered the necessity of the *T'aaT'aaki?apas* being left intact for cultural purposes

3. Did the Ministry of Forests and Range adequately discuss alternatives with the Toquaht Nation?

No. The TN was contacted, provided information on the proposal, and asked to explain their interests to the MFR. However, alternatives for the cutblock were not discussed or considered during planning prior to forestry decisions being made as recommended by the 2003 *MFR Consultation Guidelines*. Under Section 41 of the *Forest Practices Code of British Columbia Act*, the district manager did not have the authority to instruct the licensee (UEDC) to move the cutblock, alter the boundaries, or make other substantive changes. However, that did not prevent the MFR from discussing alternatives with the TN, such as the option of moving the cutblock into another area of BC Timber Sales operating areas.

4. Did the licensee adequately discuss alternatives with the Toquaht Nation?

No. The licensee provided information on the proposed cutblock to the TN but did not discuss the option of moving the block, as the licensee had already spent money engineering the cutblock in anticipation of the approval.

Recent Developments

Since the start of this investigation in 2006, there have been several events that are pertinent to forest management in the area.

The Board was told that BCTS no longer issues these types of tenures. However, any future operations under the BCTS program are administered under the Strait of Georgia Business Area BCTS Forest Stewardship Plan. The BCTS stewardship plan's result/strategy for the cultural heritage resource objective states that BC Timber Sales will annually refer any

proposed operations to a First Nation within whose traditional territory operations may occur. BC Timber Sales has offered to develop consultation protocols in concert with First Nations at their request.

On December 9, 2006, the B.C. government and the TN signed an *Interim Measures Agreement* (agreement). The agreement was created to facilitate the conclusion of the *Maa-Nulth First Nations Final Agreement* (treaty); to address economic benefits to the TN; to establish working relationships among the TN, MFR and licensees; and, to address consultation and provide an interim workable accommodation with regard to any infringement of the Aboriginal interests of the TN from administrative decisions, operational plans and operational decisions.

The agreement includes a protocol for consultation between the MFR and the TN. This protocol establishes how the MFR, UEDC and any licensees need to work together in delivering forest management in the TN traditional territory. The future relationship will have to be consistent with the interim measures agreement, including the protocol for consultation.

The protocol contains useful guidance to the parties. Notably, the protocol states that:

- Consultation will be in an expeditious manner before substantive decisions are made;
- The MFR will encourage BCTS or the licensees to communicate with the TN about the TN comments on operational plans prior to submitting an operational plan to the MFR for a determination;
- The MFR may attend any information sharing meetings between BCTS, licensees and the TN;
- Licensees and BCTS will consider information provided by TN, and identify changes they can make to the operational plan prior to submitting the plan for determination; and,
- After a plan has been submitted for a determination, the MFR will review licensee and BCTS responses with the TN and seek to resolve any outstanding site-specific, or other impacts, on the TN Aboriginal interests.

Given the new legislative regime offered by the *Forest and Range Practices Act* and the interim agreement, the Board encourages the MFR, the licensee and the TN to consider the issues identified in this report in their future consultation on forestry developments.

Lastly, the TN was invited to apply for a community forest agreement in its traditional territory. As well, the licensee, UEDC was also invited to apply for a separate community forest agreement in the TN territory. In October 2007, the TN and UEDC jointly wrote the MFR asking that the invitations for separate community forest licenses be withdrawn and that the MFR consider an invitation for a joint UEDC and TN community forest licence. This illustrates that the two parties are working together in a positive relationship.

Appendix A – Ministry of Forests and Range Decision Rationale
Appendix B – December 6, 2003, Ministry of Forests Consultation Guidelines 2003

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[i] *Taku River* at paragraph 29.

[ii] FRPA, Division 4 - Transition for Forest Operational Plans and Practices, Sections 187 & 188.

[iii] The Integrated Land Management Bureau, Ministry of Agriculture replaced the former Ministry of Sustainable Management.

[iv] *Taku River*, para. 29.

[v] *Mikisew Cree First Nation v. Canada* (Minister of Canadian Heritage) 2005 SCC 69.

BRITISH COLUMBIA

South Island Forest District

BC Timber Sales: TSL A64035 / Forest Development Plan Amendment
Decision Rationale – January 12, 2006

Background

I have been requested by BCTS to approve a Forest Development Plan (FDP) Amendment for TSL A64035 issued to the Ucluelet Economic Development Corporation (UEDC). This FDP amendment is within the asserted traditional territory of the Toquaht First Nation (TFN) and has been the subject of extensive consultation with the TFN.

As part of the BCTS 2002-2006 Alberni Operating Area FDP (TFL 44 carry-over) determination this 24-hectare cutblock and associated roads received initial category "A" approval. There were no comments received from TFN specific to the smaller cutblock 9309 that formed the basis of proposed cutblock 9305A. This FDP Amendment dated August 30, 2005 and as amended December 7, 2005 proposes a new configuration for cutblock 9305A encompassing 39 hectares. Block 9305A is located on slopes west of Maggie Lake. The review and comment period for the FDP Amendment was from August 3-17, 2005 - a shortened period as approved by the District Manager.

- UEDC provided a copy of the proposed FDP Amendment to the TFN on August 1, 2005.
- The South Island Forest District followed up with a letter dated August 22, 2005 to clarify the Ministry of Forests and Range (MOFR) role in consultation with First Nations and requested specific information with respect to aboriginal interests.
- On August 24, 2005 the UEDC representative met with Rick Shafer, TFN representative to review the content of the FDP amendment. TFN raised concerns around visuals and streams and the TFN representative noted he would review the FDP amendment with the council to determine any historical or cultural issues and advise UEDC accordingly.
- On September 23, 2005 SIFD staff followed up with a letter to TFN to request that any information regarding aboriginal interests be provided to the District Manager by October 3, 2005 in order for a determination to occur sometime after October 4, 2005.
- TFN advised SIFD staff they would be unable to provide comments by October 4, 2005 and requested an extension to this date. SIFD staff agreed that they would wait until comments were submitted with the expectation this would occur on October 10, 2005.
- On October 12, 2005 TFN provided a letter referencing the area being culturally sensitive, as it is one of the few remaining areas of old growth. Specifically, this stand of trees belongs to the Chief and is a special area where bark is gathered for ceremonial robes. The letter notes the area is used as a source of winter food and that yew wood is collected for making tools. The letter notes that TFN wishes to involve MOFR staff in a field review of the area.
- In a telephone discussion, TFN and UEDC were advised that SIFD staff considered the field review information sharing and that the review should involve UEDC staff.
- A SIFD letter to TFN and dated October 19, 2005 confirmed that the SIFD should be advised of the outcome of the field review and that SIFD staff would be available to meet with TFN on October 27th or October 28th, 2005. The letter further stated that the District Manager was

preparing to make a decision on the FDP sometime after October 28, 2005.
On October 25, 2005 SIFD and Coast Forest Region staff met with Rick Shafer in the Regional office at which time TFN presented MOFR staff with additional information relating to the aboriginal interests of the TFN, this list is included as Appendix I. This information demonstrates TFN members used the general area of Maggie Lake.

- The field trip occurred on October 27, 2005 and involved Rick Shafer and 3 representatives of the TFN. Notes indicate discussions around visuals and old growth availability. TFN indicated there would be discussion later in the day with Chief Bert Mack and that results would be forwarded to the SIFD.
- On October 28, 2005, SIFD received an email from TFN advising that there would be a presentation to Chief and council the following week and that more information would be forthcoming.
- On November 4, 2005 an email was received from Rick Shafer stating that he met with Chief and council on November 3, 2005 - TFN did not support the FDP Amendment and more information would be forthcoming.
- MOFR received a letter from TFN on November 7, 2005 suggesting that SIFD staff should have attended the field review, as they may have been able to accommodate TFN. The letter references that the trees in the area belong to the Chief specifically for bark stripping to create ceremonial robes, that it is a important area for yew wood, hunting, berry picking and gathering medicinal plants. TFN believe they have a strong prima facie claim to the area.
- A video of the field review was provided to the SIFD on November 24, 2005. This included discussions with Archie Thompson around the importance of the area to the Chief for cedar. Toquaht First Nation advised that a second video was also produced however this video has not been made available, although requested by SIFD staff on numerous occasions.
- The District Manager and SIFD staff met with TFN representatives Chief Bert Mack, Archie Thompson, Kevin Mack and Rick Shafer on November 30, 2005 and TFN discussed their desire for economic opportunities. Archie Thompson described the trees in this area were for the sole use of the Chief through generations; uses included trade and dowries. TFN noted that the higher elevation cedar as found in this area did not split as easily as valley bottom specimens; thus the value for trade. There was a discussion around medicinal plants TFN described the important plants as growing along small streams and as also being available at Cataract Lake. TFN noted some plants were used for bedding but indicated that these same plants could be collected in other locations. Chief Mack advised this area was one of about eight special areas for the Chief, other areas are already impacted by forestry activities.
- On December 7, 2005 UEDC submitted a revised FDP amendment that reflected the refined cutblock layout and reduces the gross cutblock size to 38.9 hectares. Additional information submitted by the UEDC indicates a net size of 25 hectares, although this is not part of the FDP determination.
- On December 11, 2005 a SIFD representative attended a field review involving TFN and UEDC representatives. Don McMillan explained the adjustments that had been made to the proposed cutblock as a result of fieldwork and that resulted in a revision to the original FDP amendment submission. SIFD asked about the eight special places referenced by the Chief at the previous meeting and was advised that the Stopper Islands were one of these places and used as burial areas, several other locations had already been impacted.
- On December 16, 2005 SIFD staff requested that any additional information be provided by December 20, 2005, making specific reference to the second video.

A December 20, 2005 SIFD letter advised TFN of changes to the original FDP based on the UEDC submission dated December 7, 2005 and highlighted the MOFR understanding of issues raised by the TFN to date.

- A December 20, 2005 letter from Toquaht First Nation advised they wished further consultation, reviewed their ongoing concerns with the proposed FDP and advised the reduction of the cutblock size did not address these concerns satisfactorily. The letter advised that if the FDP Amendment was approved TFN would require accommodation.
- On December 23, 2005 SIFD sent a letter to the TFN to provide further detail around the general nature of how the TFN interests would be considered in the FDP determination.

Sources of information considered by the District Manager in making a decision included correspondence with TFN and information submitted by TFN on October 25, 2005 and listed in Appendix I. TFN have previously supplied information and communicated with SIFD staff regarding their concerns around timber supply in asserted TFN territory and loss of opportunity for the TFN membership.

SIFD staff have obtained an estimate of the amount of old growth available in the Maggie Lake landscape unit based on information supplied by the former Ministry of Sustainable Resource Management (June, 2004). It is challenging to determine the amount of cedar in this landscape unit given that a portion of this was a reversion from TFL 44, and forest cover data while available, will be time consuming to query. Given the majority of old growth on the West Coast includes a component of cedar the landscape unit data is considered adequate for these purposes and indicates 41.6% of the forested area is mature or old and 29.2% of the timber harvesting land base (THLB) is mature and old forest types.

Morris Sutherland completed a culturally modified tree (CMT) survey on proposed cutblock 9305A on October 11, 2005 and found no CMTs. Arcas Consulting Archaeologists Limited prepared an Archaeological Impact Assessment (HIA 2003-073) on block 0302A across the lake in 2003. One post 1846 CMT was identified and the field assessment confirmed the site had low potential for CMTs and other archaeological sites. This may indicate that Maggie Lake was not an area of high cedar use.

My summary of the information provided by TFN is as follows:

- TFN assert rights and title in their asserted traditional territory and the area of the cutblock.
- There is a concern about the Visual Impact Assessment for the cutblock
- TFN still collect cedar bark and will continue to do so, there is a concern about the supply of cedar in TFN territory
- There could be medicinal plants in the area, I am not aware of specifics.
- The area is important for collection of yew wood associated with tool making.

SIFD staff has reviewed Traditional Use Study information and has identified several sites in proximity to the proposed cutblock, specifically:
Polygon 151 (upland slopes around Maggie Lake) - fishing, hunting and trapping
Polygon 105 (Maggie Lake) – named place, fishing, and forestry
Polygon 98 (Maggie Lake shoreline point) – trade route, hunting route

Consultation

Through the course of this decision making process, other SIFD staff and I have followed the consultation steps outlined in the Ministry of Forests *Aboriginal Rights and Title Policy.*

1. ***Identify First Nations potentially affected by proposed activity:***
   It appears likely that members of what is now the TFN have been present in Barclay Sound since before 1846. It is not clear whether any other First Nations were also using this area historically.

2. ***Provide relevant information on proposed project / decision to First Nation:***
   All relevant information was provided in the form of FDP text and maps, fisheries assessments and the CMT report.

3. ***Where information indicates a need to consider aboriginal interests, hold a meeting between staff, the First Nation (and where possible the licensee) to discuss the proposed activity and aboriginal interests:***
   Relevant information was discussed at one meeting and a field review with the licensee as part of the information sharing process. The most recent meeting involved TFN and MOFR staff and occurred on November 30, 2005. To the best of my knowledge, all requests for additional information and answers to questions were provided. The type of forest activity was made apparent as well as any potential impacts.

Decision

As stated in the Ministry of Forests *Aboriginal Rights and Title Policy* (January 15, 2003) existing aboriginal rights, including title, are recognised and affirmed under Section 35 of the *Constitution Act* (1982). The effect of this recognition is that existing aboriginal rights must not be unjustifiable infringed by forest development decisions of the Crown or its licenses.

Potential Aboriginal Rights and Title (Aboriginal Interests):

The TFN were asked to provide information regarding their aboriginal interests in response to the proposal in question. As identified at the meeting and in the letters from TFN, the TFN are asserting aboriginal title and rights and more specifically the right to red cedar which in this case includes the assertion of a right to "protect" cedar.

Neither aboriginal title nor the right to red cedar have been proven as existing aboriginal rights of the TFN at this point in time. In terms of claimed aboriginal title, I am unable to specifically determine the nature of this asserted right and the basis for the infringement claim based on the information provided. It is my understanding that the occupation and use of the land where the activity is taking place may or may not be sufficient to support a claim of aboriginal title to the land. Comments provided by the TFN relate to retaining the cedar and their desire to maintain it for future use by the Chief. It is evident from the interviews with TFN membership and the TUS information that there were some traditional activities that occurred in the area in question.

Infringement

I agree that the presence of old growth cedar trees are important for continuance of certain TFN traditional practices and I appreciate that it is the TFN's objective to keep some forests intact to afford opportunity to experience the traditional TFN way of life. I am not however in a position to determine the extent to which forests must remain intact and where these areas could be located. These decisions are better made through more strategic land use planning processes or other higher level negotiations such as treaty. The determination before me for consideration is a Forest Development Plan application, which has been applied for pursuant to a previously approved Timber Sale Licence.

I believe the forest harvesting under this FDP amendment application may reduce the TFN opportunity to harvest cedar bark and individual cedar trees to the extent to which some cedar will be removed from the proposed cutblock. In addition, there may be some impact on the availability of yew wood. However, those opportunities will continue to exist in adjacent areas and additional opportunities will be available in the Maa-nulth Treaty land, currently protected as part of the Maa-nulth Designated Area (*B.C. Reg 152/2005*). I have concluded that the harvest of this cutblock likely does not in itself pose an unjustifiable infringement of aboriginal interests, on the basis that the removal of any cedar trees is not unreasonable in the circumstances, will not deny TFN their preferred means of carrying out their traditional activities, and will not create an undue hardship for TFN in being able to continue to carry out those activities.

I consider that forest harvesting of this proposed cutblock will have little impact on the availability of traditional use plants for food or medicine within the traditional territory of the TFN. There is only a small amount of forest harvesting proposed in this FDP amendment and there continues to be other areas available for medicinal plants. Rare and unique plants could be identified through the operational planning process and the licensee could consider excluding any such areas from forest harvesting during subsequent cutblock layout.

I am not aware of any specific wildlife habitat attributes in the area of this proposed cutblock that would be affected by forest harvesting. On a broader level, the Integrated Land Management Bureau (ILMB) is responsible for establishing old growth management areas (OGMA) through the landscape unit planning process and the Ministry of Environment (MOE) is responsible for ungulate winter range (UWR) and wildlife habitat area (WHA) designation. There are no designated UWR, WHA or draft OGMAs in the area proposed for the cutblock.

The harvesting of the cutblock and associated roads could constitute an infringement of title, should such title be proven. I find it difficult to conclude that the evidence before me constitutes a strong prima facie claim of aboriginal title to the area of the proposed cutblock and associated road right-of-way. This is based on my view that there may be uncertainty as to whether the indicia for aboriginal title would be made out in this location. I note there are no identified village sites in close proximity to the proposed cutblock / road network and there appears to be no evidence of new CMT creation in the area, and no evidence generally of continuous occupation.

The Ucluelet Economic Development Corporation was awarded a Timber Sale Licence A64035 on June 2, 2002 with a term of 3-years and an allowable annual cut of 75,000 m3. The TSL was initially to expire on June 1, 2005 but this date has been extended to June 1, 2006. The licensee has the legal right to harvest this AAC provided the proposed activities meet requirements of legislation and Ministry of Forests policy. The harvest of this timber generates economic opportunity to people of the province and revenue, in the form of stumpage, to the Crown. The scope of this proposed road and associated cutblock is not unreasonable and is consistent with the type of development in the area and the approved FDP.

Conclusion

In developing my decision I have considered the concerns brought forward by the TFN regarding the impact this amendment could potentially have on their aboriginal interests in this area. I have also considered the UEDC economic interests and the greater public need in this area and I have attempted to balance these interests in my decision. Based on my review of the nature of the claims, I am satisfied that in the approval of this FDP amendment that the Crown has, in my view, met its duty to consult and seek to address the concerns of the TFN. In general, TFN has not provided site-specific information to preclude approval of this FDP amendment from an aboriginal interest perspective.

The December 1, 2005 revision to the August 30, 2005 FDP amendment reducing the block size to 38.9 hectares demonstrates efforts have been made by UEDC to avoid some areas of old growth and address concerns around block size. A November 30, 2005 letter from UEDC indicates that WTP's that have been identified within the block include red and yellow cedar, that although no yew trees were found in the block there remain areas where yew could grow and that red cedar will be a component of the reforestation strategy.

TFN has advised they do not wish to commence negotiations on a Forest and Range Agreement and MOFR will continue to proceed based on the MOFR *Aboriginal Rights and Title Policy*. A 162,000 m3 non replaceable forest licence (NRFL A71504) was made available to EchaPeh over a five-year term, awarded as a component of the May 22, 2003 *Interim Measures Agreement* and was intended to address prospective infringements. The continued availability of Free Use Permits, the fact that TFN hold Woodlot Licence 1903 and are partners in the NRFL A59658 (18,664 m3/yr expiring 2014) through EchaPeh (Toquaht / Coulson partnership) will continue to provide the TFN opportunity to access cedar. In addition, MOFR is engaged in a process to contemplate additional benefits to ameliorate any potential infringements. TFN are advanced in the Treaty process with the treaty lands identified and protected which will continue to provide the TFN opportunity to access cedar for traditional practices over the long-term.

[redacted]
District Manager
South Island Forest District

MINISTRY OF FORESTS
CONSULTATION GUIDELINES
2003

Background and Context

This document has been drafted to provide guidance regarding Ministry of Forests consultation activities, and is consistent with the Provincial Consultation Policy (2002), and the Ministry of Forests Policy on Aboriginal Rights and Title. The term "aboriginal interests" is used throughout this document to refer to potentially existing aboriginal rights and/or title.

This document is not intended to provide a definition of aboriginal rights or title, but provides guidance and direction to Ministry of Forests staff where forest management decisions may potentially infringe aboriginal interests.

The Provincial Government and First Nations may have differing viewpoints regarding the nature, extent, and locations of aboriginal rights and/or title in British Columbia. In the absence of further definition of aboriginal rights and/or title, particularly in terms of where those interests actually exist "on the ground," the following outlines the Ministry of Forests' approach to issues concerning unproven aboriginal rights and title, in a manner that is consistent with direction from the courts.

For additional context, it is recommended that staff review the summaries of recent court decisions and overviews concerning aboriginal rights and title contained in the Provincial Consultation Policy.

The Ministry of Forests may develop consultation procedures or processes with First Nations to establish mutually acceptable and efficient processes of consultation. This document provides general direction to staff in carrying out consultations with First Nations where a formal consultation procedure or process has not been developed. Any consultation processes that are negotiated must be consistent with the Ministry of Forests Policy on Aboriginal Rights and Title, and should be reviewed through the Aboriginal Affairs Branch and Ministry of Attorney General before being finalized.

The following procedures are to assist staff in addressing aboriginal interests in statutory decisions. Flexibility exists within each step to allow staff to develop processes that are responsive to specific issues or concerns. Districts and regions may develop further processes that are consistent with this document. The Ministry of Forests will rely on working relationships between local staff and aboriginal groups to carry out consultation in a flexible, workable and efficient manner.

The following pages outline a process to determine the appropriate level and method of consultation. They provide a framework and standards for consultation, ensuring that consultation practices are consistent across the Ministry of Forests.

THE CONSULTATION PROCESS - GENERAL

Steps should be taken to consult with First Nations early in the process, prior to making forestry decisions. As consultation is a "two-way street" requiring First Nations to participate in consultation processes, forest management decisions will continue to be made in cases where a First Nation chooses not to participate in consultation processes.

During consultation processes all reasonable steps must be taken to:

- identify potentially affected aboriginal groups,
- provide them with all relevant and reasonably available information regarding the proposed forest management activity,
- request information from them which will assist in the identification of, and provide a basis for any claims of aboriginal interests, and
- consider and address that information in relation to the potential for infringement of aboriginal interests by forest decisions.

As aboriginal interests are held by collectives rather than individuals, staff should deal with appropriate representatives of aboriginal groups (usually Chief and Council, or those authorized by Chief and Council).

It is recommended that consultation begin with a description of proposed forest activities and general considerations of aboriginal interests within potentially affected areas. First Nations responses (that may be related to aboriginal interests) from these initial discussions will guide the level and scope of subsequent consultation processes.

Not all situations will require consultation beyond the initial stages of informing a First Nation of a proposed project's scope and providing an opportunity for input. However, it is important to consider statutory decisions on a case-by-case basis in order to employ an appropriate level of consultation for that situation (i.e. informing only, carrying out further research into the strength of a claim, calling for further consultation, or otherwise).

Licensee Involvement

In some instances, licensees may be required to undertake the information sharing component of consultation activities, with the role of:

- explaining proposed forest activities,
- gathering information on aboriginal interests and issues for reporting to ministry staff, and
- suggesting measures that could address aboriginal interests and concerns prior to requesting statutory decisions.

Licensee involvement in the consultation process will vary according to the type of activity.

Treaty Issues

Treaty rights are rights held by specific aboriginal groups under a particular treaty. They are also recognized and affirmed in Section 35 of the *Constitution Act, 1982*.

Treaty rights vary in scope from one treaty to the next, and also between historic and modern treaties (sometimes referred to as land claim agreements). Historic treaties (such as Treaty 8) generally serve to extinguish aboriginal title and/or rights in relation to the land, replacing them with treaty rights. Land claim agreements (such as the Nisga'a Agreement) may modify existing aboriginal rights and title to be defined treaty rights.

When dealing with treaty rights or treaty issues, staff should be aware that treaty provisions may limit the scope of applicability of this policy and may include consultation requirements in addition to those described in this policy. More specifically, the approach for consultation efforts involving a number of First Nations should be reviewed carefully when a treaty First Nation is involved, as a different method to consultation will likely be required. Staff should contact Regional Aboriginal Affairs Managers, Aboriginal Affairs Branch or Ministry of Attorney General to discuss the terms of a particular treaty.

Discussion – Prioritizing Consultation Activities
First Nations often state that they are not able to keep up with the volume of referrals sent by the Ministry of Forests, and the ministry shares this concern. Two areas of effort can help to address this concern:

1. Where possible, districts should hold discussions with First Nations on the different forms of forest management activities on which they wish to receive information and those activities if any, about which they do not wish to be consulted. These discussions will focus the efforts of consultation to areas of mutual priority.

2. **Where consultations with the First Nation reveal that the soundness of the potential claim is relatively low,** a number of factors may also be considered to evaluate the degree of further consultation that needs to be undertaken before the approval of a particular activity. These include:
   - the potential impact of the proposed forest activity on aboriginal interests;
   - the nature of the land at issue;
   - emergency measures; and
   - public safety.

Consideration of these factors in setting priorities for consultation, along with discussions with First Nations on desired areas of consultation, will enable the Ministry of Forests and First Nations to conduct more productive consultation on activities that are particularly critical to both parties.

Approaches to Consultation
A number of suggested approaches to consultation for different Ministry of Forests activity areas are provided in the following sections:
1. Operational activities (e.g. forest development plans, forest stewardship plans, range use plans)
2. AAC determinations
3. Other statutory decisions (tenure replacement, new tenures, tenure sales/transfers)

PROCESS STEPS FOR OPERATIONAL CONSULTATION

Step	Activities
1	• If not already done, districts and/or licensees identify First Nation(s) that may be potentially affected by the proposed forest activity, taking into account overlapping First Nations asserted territories. • If necessary, contact other line ministries to determine if they dealt with similar situations or have received advice from AG's / DMs Committee regarding the particular First Nation. • Notify and provide relevant information to the First Nation(s) about the proposed forest management activity. Correspondence explaining the location, nature, and extent of the proposed activity should provide aboriginal groups with an understanding of the on-the-ground impact of the proposed activity. Technical and descriptive information, such as diagrams and appropriate mapping products depicting the location of the proposed activity, should be sent or delivered to the offices of the potentially affected First Nations. Provide an opportunity for the First Nation(s) to have the information explained to them. • During this exchange between First Nations, districts and/or licensees, First Nations will have the opportunity to provide any comments and concerns that are directly related to the proposed activities, along with any explicit examples of how their aboriginal interests may be impacted by the proposed activity. Individuals engaging in consultation are to record each of the aboriginal interests brought forward by the First Nation. • First Nations who expect consultation to reflect their claim of aboriginal rights or title will need to provide information to support, or clarify the basis for, those claims. • Further meetings may be necessary to address aboriginal interests where the First Nation requires time to review the operational information.
2	• The district reviews full documentation of results from information sharing activities with the First Nation, along with any possible proposed mitigative measures. • Document and consider information such as whether the FN was settled in the area or nomadic, TUS info, AIA's, location of Indian reserves, and other information related to aboriginal interests. • Determine the necessity of further consultation in accordance with the soundness of the claim for the area in question and the likely degree of infringement. This may require discussions with headquarters staff to examine the cumulative information available regarding the First Nation in question, such as data from past consultations that provide a sense of the soundness of their potential claim. Consideration on the soundness of a claim may require advice from Aboriginal Affairs Branch and / or Ministry of Attorney General. Staff from Aboriginal Affairs Branch, the Ministry of Sustainable Resource Management, and the Aboriginal Law Group of the Ministry of Attorney General may be able to provide guidance in this regard.
3	• A meeting should be held with the relevant First Nation(s) to obtain specific information concerning the length or timeframes of use or occupation, location, kind, and importance of aboriginal interests, if any, within the operational plan area or the area that will be affected by the proposed activity, as appropriate. Consider measures that may be available to address interests and concerns raised. Where possible, initiate processes to facilitate ongoing communication between the Ministry and the First Nation (and other parties if appropriate) with respect to further decisions that will be made regarding the forest activity. • Where information is not provided by the potentially affected First Nation(s), Ministry staff should make efforts to gather information that is available on reasonable inquiry regarding the potential existence of aboriginal interests in the forest management area.

	• It is important that all reasonable efforts have been made to initiate and carry out a consultation process with the affected First Nation. If the affected First Nation refuses to participate, or will only participate on a "without prejudice" basis (which has the same effect as refusing to participate), reasonable steps should be taken to inform them of operational planning processes or decisions being made on an ongoing basis and to request their participation in them. Refusal to participate, or insistence on "without prejudice" participation, is not a reason for delaying the decision-making process. In situations where a First Nation says that consultation activities are "without prejudice", explain to the First Nation that the Crown is carrying out consultation activities in fulfillment of their legal duties associated with aboriginal rights and title. • At this stage, licensees may propose and discuss adjustments to operational plans in relation to stated aboriginal interests.
4	• Carry out internal consideration processes that will seek to address concerns raised by the First Nation(s) in respect of aboriginal interests, if any, which come to light through the consultation and information gathering processes outlined above, including the geographic location and extent of such an interest. • Situations where there is a strong claim (i.e. where there is a reasonable probability of aboriginal title or rights being present) will increase the likelihood that an infringement may occur and warrant deeper levels of consultation and activities that seek to address the potential interest. These situations may require further consultation, or further mitigative measures (adjustments to development plans), etc. • Seek to address the concerns brought forward by the First Nation during consultation; if applicable, explore possible accommodation measures with the Aboriginal Affairs Branch, Ministry of Attorney General, and/or Ministry Executive. Accommodation measures (economic/cultural) should be consistent with precedents set across government.
5	• Draft a final decision and a rationale for decision. Notify relevant parties (More discussion on this stage in the section "Considerations for the Consultation Process"--Stage 4).

SECTION II – Timber Supply Review

Overview

The Timber Supply Review consultation procedures for First Nations will ensure that First Nations have an opportunity to raise concerns and provide input on the data assumptions and the timber supply analysis. All First Nations input will be provided to the Chief Forester for consideration in the AAC determination.

The following procedures should, where possible, adhere to the TSR schedule, and to resource, policy and legal constraints of government. By working with these procedures, licensees in the case of TFLs, or the BCFS regional and/or district staff in the case of TSAs, will ensure that First Nations who have an interest in the area develop an understanding of the TSR process, thereby encouraging their meaningful participation.

Step 1 - Data/Information package

- Appoint a contact person to 1) document the actual steps undertaken for the consultation process, and 2) be the point person to answer any TSR questions prior to and during First Nations consultation. That individual should contact the TSR Regional Coordinator for available information regarding potentially interested First Nations.
- Once the data package for a TSA, or an information package for a TFL, has been drafted, the licensee (TFL) or BCFS staff (TSA) will send the First Nation(s) the following material: a letter explaining the objectives and timelines of the TSR process, a brochure detailing the legislative requirements and overall TSR process for a TSA or TFL, and the draft data/information package. The letter will indicate that First Nations are encouraged to participate and can request a timber supply review presentation or meeting, at which time the process, data and any TSR-related issues can be discussed.
- After the material has been sent out, the licensee (TFL) or BCFS staff (TSA) will follow up to determine whether the First Nation(s) wish to participate further. If further participation is requested, then discuss the options for meeting with the band or tribal council to discuss the TSR.
- If possible, the assigned timber supply analyst should attend the session(s) and provide examples of the type of information that could be included in the data/information package with respect to First Nations' issues. For example, First Nations data pertaining to culturally modified trees, traditional use areas, cultural heritage resources or other site-specific information could be included in the data/information package.

- First Nations should be provided with sufficient time (suggested 60 days) to review and provide comments on the data/information package. First Nations should be encouraged to provide comments in writing (copies to the licensee for TFLs or to BCFS for TSAs) to ensure their interests are objectively communicated to the Chief Forester.
- Determine whether there is an issue regarding strength of claim. If necessary, gather available information related to the strength of any claims of aboriginal rights / title for First Nations within the TSA area. Aboriginal Affairs Branch and Ministry of Attorney General may have to provide assistance and guidance during this consideration.
- Information related to strength of claim should be considered and addressed in the preparation of the upcoming analysis report.

Step 2 - Analysis Report

- Upon release of the analysis report for a TFL or the analysis report and public discussion paper for a TSA, licensees (TFL) or BCFS (TSA) staff will send a covering letter and copies of the analysis reports to the First Nations.
- As with the data/information package, after the material has been sent out, follow up to determine whether the First Nation(s) wish to participate further. If further participation is desired, then discuss the options, for example meeting with the band or tribal council with TSR as an agenda item.
- During this stage, if aboriginal interests warrant further consideration, offer to meet with those First Nations to discuss those interests.
- First Nations should be provided with sufficient time (suggested 60 days) to review and provide comments on the analysis report package. First Nations should be encouraged to provide comments in writing to ensure their interests are objectively communicated to the chief forester.

Step 3 -AAC determination

- Ensure that all comments and submissions are presented to the Chief Forester during the AAC determination and included in the summary of public input.
- When the rationale report and summary of public input is released, send copies to the First Nation(s).

SECTION III – Administrative Activities and Decisions

General
The following provides a suggested approach to consultation with First Nations for a number of different decisions within the Ministry of Forests' statutory authority. Ministry staff (and in some cases, licensees) will engage in consultation for a number of administrative decisions with First Nations who may have a sound claim with respect to affected areas.

A recommended approach for consultation on different tenure types and activities is provided below to address the great number of forestry activities that may be of interest to First Nations, and that may impact aboriginal interests, and to provide an effective consultation approach for each.

Cases where a First Nation may have an apparently sound claim of aboriginal rights and / or title will warrant relatively deeper levels of consultation.

Consolidating Administrative Consultation
Where possible, the ministry should take steps to consolidate consultation activities on administrative decisions at the TSA level. The process of "batching" administrative consultation activities can be conducted to reflect the nature of the impact of these activities on the landbase, and also to address the volume of referrals that would be provided to First Nations.

Batching consultation for administrative activities will provide a more holistic picture of forest development at the TSA level, and provide a more meaningful opportunity for ministry staff and First Nations to discuss forest planning. RTEB staff have identified the following tenure types that may fit into a consolidated consultation process:

- Forest licenses
- Pulpwood agreements
- Woodlots
- Timber sale licenses
- Non replaceable forest licenses

Administrative Consultation - General Process
Consultation processes will involve discussions related to the nature of the proposed activity, explain the nature of the tenure and its associated legislated requirements, along with any conditions that may be attached to the tenure. Staff should also encourage the First Nation to raise any aboriginal interests in relation to the decision and to describe and provide evidence that shows the basis of their title or rights claim, if one is made.

Suggested procedure for administrative considerations involving First Nations who may have a sound claim with respect to affected areas:

1. Consultation meetings between the interested First Nation, the relevant tenure holder and district and/or headquarters staff will be organized under existing legislated timelines. These meetings will provide:
   - an overview of administrative process and timelines,
   - the terms of the specific tenure / license,
   - subsequent planning processes to take place under the tenure,
   - abilities to address interests raised under the legislative framework, and
   - tenure holder's planned operational approach (if available).

2. First Nations are encouraged to raise, explain and discuss any aboriginal interests they may have in relation to the statutory decision and to describe and provide evidence that shows the basis of their claim(s) if one is made.

3. MOF staff will document and summarize this information.

   In situations where guidance on consultation activities and the soundness of a claim is sought, staff should:
   - Forward available information related to the factors under step 1 above, along with other information provided by the First Nation, to the Aboriginal Affairs Branch;
   - Aboriginal Affairs Branch will review and discuss information/analysis requests with the Ministry of Attorney General;
   - Advice regarding the soundness of claim analysis will be discussed between staff from the district, Aboriginal Affairs Branch and Ministry of Attorney General;
   - A recommended approach for the situation will be developed based on this consideration process.

4. Issues of proposed adjustments / accommodations in relation to aboriginal interests should be discussed with the Aboriginal Affairs Branch, Ministry of Attorney General and/or, Ministry Executive as necessary, prior to making any accommodations.

5. Any information received from the First Nation and how interests raised will be addressed or accommodated will be provided to the decision-maker exercising the statutory authority in relation to the decision.

CONSIDERATIONS for the CONSULTATION PROCESSES

The following sections outline necessary considerations for information gathered during consultation on forestry decisions. Each of the stages below contain considerations to help decision makers focus relevant information for the forestry decision in question.

1. **From data gathered during consultation and from provincial sources, consider the soundness of the potential claim for aboriginal interests in relation to the proposed activity (Consideration Stages 1A, 1B);**
2. **Determine whether there may be an infringement, and if so, the degree of likely impact (Consideration Stages 2A, 2B);**
3. **Determine the justifiability of any likely infringement and the necessity for accommodation of the aboriginal interest (Consideration Stages 3A, 3B).**

CONSIDERATION STAGE 1A Documenting and considering the potential for aboriginal rights

Rights Considerations

If the aboriginal interest can best be characterized as resource use for purposes that were integral to that particular distinctive aboriginal culture, but not exclusive use and occupation of a particular land area, then that aboriginal interest may signal an aboriginal right (as distinct from aboriginal title). Aboriginal rights may include (but are not necessarily limited to) fishing and hunting.

The existence of an aboriginal right is primarily a question of historical fact, which can only conclusively be determined by the courts or modified and redefined through the treaty process. However, in the absence of court rulings on the scope and location of particular rights or title, or a treaty, circumstances require Ministry staff to take reasonable steps to obtain relevant information, and to use that information to determine:

1. Whether the potential for aboriginal rights exists in the proposed forest management area, and if so,
2. the nature, location and extent of those potential rights.

Determine with available information whether there may be potential aboriginal rights in the management area and if so, the nature, content, location of any such potential rights, and who can assert them. Relevant considerations will usually include:

- Did aboriginal people use land or resources within the proposed forest management area prior to contact with European society?
- What was the nature of the use, and where within the forest management area did it take place?
- Can the uses fairly be described as integral to the culture of the particular aboriginal societies in question? If assistance is necessary in this regard, staff should consult the Aboriginal Affairs Branch.
- Other information provided from provincial sources on the aboriginal interests of the First Nation.

If there are potential aboriginal rights, the considerations in Stage 2A (in addition to those in 1B, below) should be used.

CONSIDERATION STAGE 1B Considering the potential for aboriginal title

If the aboriginal interest as of 1846 was **exclusive** use and occupation of a particular area of land, there may be a sound claim for potential aboriginal title in that area. For example, aboriginal title may exist over (but is not necessarily limited to) lands near a reserve or former settlement, areas of documented exclusive traditional use or archaeological sites indicating exclusive occupation, lands subject to a specific claim, and lands close to known fishing, hunting, trapping, gathering or cultural sites.

This stage may require correspondence with headquarters staff to examine the cumulative information regarding the First Nation in question, such as data from past consultations that provide a sense of the soundness of their claim. Staff from Aboriginal Affairs Branch, the Ministry of Sustainable Resource Management, and the Aboriginal Law Group of the Ministry of Attorney General may have to provide guidance in this regard. Any assessment on the soundness of claim is to remain internal to government, and field staff are not responsible to make this assessment independently.

The following factors are relevant in considering whether the potential for aboriginal title warrants further examination within the proposed forest management area:

- Has the land been Crown land since 1846?
- Are the affected lands near or adjacent to a reserve or former settlement or village sites?
- Is the land in areas of traditional use or archaeological sites?
- Is the land used for aboriginal activities?
- Has there been significant notice of interest from the First Nation?
- Is the land subject to a specific claim?
- Is the land close to known fishing, hunting, trapping, gathering or cultural sites?
- Other information provided from provincial sources on the potential claim of the First Nation

Other relevant factors in the consideration that may point to a reduced likelihood that aboriginal title is present as an exercisable interest necessitating consultation may include:

- The land is already subject to an existing treaty.
- The land is already substantially altered by way of development that precludes continuing aboriginal use.
- The land is distant from reserves or settlement areas with no known aboriginal interests.
- The land is already alienated or on a long-term lease to third parties.
- There is no indication that an aboriginal group has maintained a substantial connection or special bond with the land since 1846.
- The particular area of land was subject to disputes between two or more First Nations as of 1846.

In situations where guidance on consultation activities and the soundness of a claim is sought, staff should:

1. Forward available information related to the factors above, along with other information provided by the First Nation during discussions, to the Aboriginal Affairs Branch;
2. Aboriginal Affairs Branch will review and discuss information/analysis requests with the Ministry of Attorney General;
3. Advice regarding the soundness of claim analysis will be discussed between staff from the district, Aboriginal Affairs Branch and Ministry of Attorney General;
4. A recommended approach for the situation will be developed based on this consideration process.

CONSIDERATION STAGE 2: Infringement examinations

Since the infringement considerations are different for aboriginal rights than for aboriginal title, they are considered separately.

Rights Considerations

CONSIDERATION STAGE 2A:
Infringement considerations related to potential rights

Infringement within the meaning of this policy occurs where a forest management activity will physically prevent or impair the exercise of an aboriginal right.

Determining whether or not the proposed forest management activity will infringe the identified potential for aboriginal rights involves a consideration of the following factors:

- the nature, location and extent of the potential aboriginal right in relation to the proposed forest management activity;
- the terms and purpose of the forest management activity;
- the nature and extent of the forest management rights and obligations of the licensee/permittee; and,
- whether the potential aboriginal right will be precluded by the forest management activity or may still be practiced in the preferred manner without undue hardship on the remainder of the traditional territory, unaffected by the forest activity.

Infringement does not occur where:

- forest management activities will have no impact on potential aboriginal rights; or
- potentially existing aboriginal rights can be accommodated with the activities specified within the tenure.

An infringement will occur if the proposed forest management activity:

- imposes undue hardship on the First Nation;
- denies the First Nation their preferred means of exercising the right; or
- limits the potential aboriginal right unreasonably in the circumstances.

If an infringement may occur, then go to Stage 3A (in addition to addressing considerations under 2B, below).

Title Considerations

CONSIDERATION STAGE 2B: Infringement considerations related to potential title

If it is determined that the potential for aboriginal title needs to be addressed in decision making processes, then the potential degree of infringement should be examined to assist in determining whether further consultation or mitigative measures are required.

Examine the extent to which the activity will affect the landbase.

- Does the proposed activity interfere with aboriginal activities on the land or limit what the First Nation might be able to do with the land?
- Will the forest activity change or damage the nature of the land?
- Will any of the land be sold to third parties as part of this activity?
- Will long term leases or tenures be provided to third parties?
- Are the leases or tenures renewable?

If one or a combination of the above considerations indicate an impact on the landbase (i.e. impacts not temporary in nature, little chance of the land being returned to its original state), decision makers should carry out the steps in STAGE 3B, below.

Rights Considerations

CONSIDERATION STAGE 3A:
Justification / accommodation considerations related to aboriginal rights issues

Any infringement of potential aboriginal rights must be justifiable according the principles found in the Supreme Court of Canada's judgement in *Sparrow*:

1. Is there a valid legislative objective, such as conservation?
2. After conservation measures are taken, has priority been given to the aboriginal right?
3. Have other considerations been addressed (i.e.: Is there as little infringement as possible? Has there been appropriate consultation?).

If it appears that the proposed forest management activity may infringe on a potential aboriginal right, the following steps should be taken to attempt to accommodate the aboriginal right and forest activity:

1. In conjunction with discussions with the First Nation, identify ways to reconcile the potential aboriginal right and the forest management activity, by attempting to address their concerns if possible.

2. Consult with affected First Nations and third parties with respect to proposed accommodations or attempts at addressing the First Nation's concerns.

3. In considering whether reconciliation of competing interests is possible, the following considerations can be taken into account:
   - the potential impact of the forest activity on the potential aboriginal right
   - measures to limit possible impact to the aboriginal right (for example, relocate forest activity or identify alternate areas where the aboriginal right may be exercised)
   - the economic implications for the local community and affected First Nations
   - conservation or resource management concerns
   - whether the potential aboriginal right is site specific, or likely in relation to a wider area

4. Where an infringement of a potential aboriginal right is likely, statutory decision makers should request assistance before making a final decision, through the appropriate channels, from the Regional Manager, Aboriginal Affairs Branch, and the Ministry of Attorney General. A final decision should include the considerations detailed in Stage 4.

Title Considerations

CONSIDERATION STAGE 3B:
Justification / accommodation considerations related to aboriginal title issues

In circumstance of infringement of aboriginal title, courts will seek to determine whether the legislative objectives of the Crown were compelling and substantial. Forestry has been included as a form of activity that could qualify as a compelling and substantial legislative objective, provided that proper consideration has been given to a number of factors.

If one or a combination of the considerations in the infringement examination indicate an effect on the landbase (i.e. long-term impacts, little chance of reclaiming the land to its original state), flowing from considerations under 2B, above, decision makers should

1. Examine the following considerations along with advice from Aboriginal Affairs Branch and Legal Services Branch, and where necessary, direction from ministry executive:
   - the relative soundness of the claim for aboriginal title;
   - the potential impact of the forest activity on the landbase (extent of potential infringement);
   - the level of consultation undertaken to date; and
   - possible mitigative measures that may be taken in an attempt to accommodate potential title, or address the concerns of the First Nation, and minimize the project's impact

2. Identify ways to mitigate impacts of forest development decisions to attempt to accommodate the potential aboriginal title or otherwise attempt to substantially address the First Nation's concerns. These may include providing for or supporting the First Nation's participation in, or receiving some form of benefit from or in consideration of the activity and/or the First Nation's involvement in monitoring operations. These may also include changing plans or suggesting that licensees change or adjust plans to avoid areas of high importance, and other measures.

3. Statutory decision makers should request further assistance to provide advice, such as the Regional Manager and Aboriginal Affairs Branch, (and coordinated through Aboriginal Affairs Branch): Assistant Deputy Minister, Executive, and the Ministry of Attorney General where an infringement of an potential title appears likely, or where a decision not to proceed with development is made on the basis of aboriginal interests.

4. Consult further with affected First Nations and third parties with respect to proposed mitigation and/or accommodation measures in response to aboriginal interests. Depending on the degree or level of infringement identified in Stage 2B, invite First Nations to participate more directly in planning, and consider options associated with mitigation and/or accommodation measures seeking to address the potential title.

5. Along with advice from Aboriginal Affairs Branch, and Ministry of Attorney General, determine whether the level of consultation and mitigation and/or accomodation measures are sufficient. A final decision should include the considerations detailed in Stage 4.

CONSIDERATION STAGE 4: The final decision

After having considered the factors summarized in the previous stage, the decision maker will make a final decision with respect to:

- whether the proposed forest management activity will take place and on what terms
- levels of consultation undertaken in relation to information gathered on aboriginal interests
- how a First Nation's interests and concerns were appropriately considered and, where necessary, accommodated or substantially addressed in the decision making processes and
- instructions to proponents regarding mitigation measures where appropriate.

Statutory decision makers should inform the First Nation in writing of the decision. Reasons for decisions may be made available to First Nations on request.

Documentation/Rationale

Good documentation regarding the First Nations consultation process should be kept.

Records should include:

- First Nation(s) contacted and why,
- communication log of telephone conversations, discussions, letters, meeting, activities (i.e., studies), correspondence between licensees and First Nations and contact attempts made by the Ministry
- responses provided,
- considerations of aboriginal interests, including the nature of those interests,
- actions taken to examine the nature and extent of aboriginal interests which may be present,
- description of how the level of consultation/mitigative measures have sought to accommodate aboriginal interests,
- actions taken to avoid infringement of aboriginal interests, and
- aboriginal concerns where no action was taken and why.

Rationales for decision should document how aboriginal interests brought forward by the First Nation were addressed through consultation and planning processes.