



FRPA ADMINISTRATION BULLETIN

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Forest Stewardship Planning: First Nations Information Sharing Bulletin

Introduction

This document is a First Nations Information-Sharing Bulletin prepared by the Ministry of Forests and representatives of forest tenure holders. The purpose is to create consistency by providing an overview and a complete set of tasks associated with statutory review and comment requirements and common law consultation processes with First Nations related to Forest Stewardship Plans (FSPs) under the *Forest and Range Practices Act* (FRPA).

The “Bulletin” is based on the premise that the legal obligations associated with consultation in respect of aboriginal interests rest with the Crown. However, in fulfilling its consultation obligations, the Crown may choose to delegate the procedural aspects of consultation to licensees seeking a particular approval: this has been done in FRPA by the Crown requiring licensees to undertake review and comment with First Nations in relation to the licensee’s FSP. (For the purposes of this bulletin, ‘licensee’ and ‘proponent’ includes BC Timber Sales (BCTS), unless otherwise noted.) This Bulletin is consistent with government’s legal obligations and with licensee’s statutory obligations under FRPA. It also offers a number of relatively simple procedural suggestions that are voluntary on the part of licensees that, if adopted, are designed to make the review and approval of FSP’s more timely and efficient for both parties. The Crown may rely upon “third party” information-sharing *activities* of which it has knowledge in fulfilling its consultation obligations. Procedural aspects of consultation completed by licensees may preclude the need for government having to independently undertake these activities. Information received from First Nations through the review and comment process will be considered by the delegated decision-maker when making a decision regarding the FSP and the adequacy of the First Nations consultation process prior to making the statutory decision with respect to the FSP.

The “Bulletin” recognizes the importance of the participation of Aboriginal groups in the consultation process to provide information about aboriginal interests, treaty rights and proven aboriginal rights and how government decisions may affect them.

It is important to note that consultation on the Forest Stewardship Plan is part of a continuum of First Nations consultation regarding decisions made by the Ministry of Forests. The Ministry of Forests (MOF) consults with First Nations on a range of decisions from strategic decisions, such as the Timber Supply Review, to decisions regarding particular areas of land.

Background

Consultation with First Nations is intended to appropriately reflect provisions in the *Constitution Act 1982* that state in Section 35:

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

Case law on the proper interpretation and application of these provisions is evolving. At this time, the following principles and definitions have been affirmed:

- a) **Aboriginal Rights:** Aboriginal rights are “cultural” activities that have been described by court decisions to involve the following:
 - A right which may be a non-exclusive right to carry out a practice, tradition or custom that was integral to the distinctive culture of an aboriginal society prior to European contact and continues to be integral to the aboriginal society in the present.
 - Aboriginal rights may be exercised in a modern form.
 - The existence of an aboriginal right is fact and site specific based on the culture, customs and traditions of each aboriginal society.
 - Aboriginal rights are held communally but may be exercised individually.
- b) **Aboriginal Title:** Aboriginal title is a form of aboriginal right that has been defined and described through court decisions to involve the following:
 - The exclusive use and occupation of the land, which use existed at the time of sovereignty (1846) and continues to current times.
 - The right to choose to what uses the land will be put, so long as the uses are not inconsistent with the activities that gave rise to the title in the first place, where such choice does not bind Crown decisions about use of that land.
 - Title has an inescapable economic component, is held communally and can only be alienated to the Crown.
- c) **Aboriginal Interests:** A term used by the Ministry of Forests in its Aboriginal Rights and Title Policy “to refer to potentially existing but unproven aboriginal rights and/or title.” This term is used in the same manner for the purposes of this Bulletin.
- d) **Infringement:** Court rulings have confirmed that rights protected under Section 35 of the *Constitution Act, 1982*, including title, are not absolute. They may be infringed by the federal or provincial Crown if the infringement is justified.
- e) **Justification:** The test for justifying an infringement of an aboriginal right has been established by the courts and includes the following considerations:
 - Has the First Nation been consulted; has the honour of the Crown been maintained?

- Is the activity that causes the infringement further to a valid legislated objective? (The Supreme Court of Canada has said that in the case of aboriginal title, forestry, mining, agriculture, etc., are valid legislative objectives.)
- Has the infringement been limited as much as possible to what is necessary for the activity to proceed?
- Have reasonable steps been taken to seek to address the First Nation's aboriginal rights through some form of accommodation, including efforts to mitigate the impact on the First Nation's interests and, additionally, in the case of aboriginal title, efforts to provide economic benefits to the First Nation?

f) Purpose of Consultation: The purpose of Consultation is to determine:

1. Whether there are aboriginal or treaty rights protected under Section 35 of the *Constitution Act, 1982* in the geographic area that is the subject of the decision. If such rights are asserted but not proved, they may be referred to by the province as "aboriginal interests."
2. (If the answer to 1. is "yes") Whether the contemplated decision or activity would potentially infringe the aboriginal or treaty rights, or aboriginal interests?
3. (If the answer to 2 is "yes") Whether the infringement can be avoided through plan adjustments or through accommodation of the aboriginal or treaty right, or aboriginal interest?
4. (if the answer to 3 is "no") Whether the infringement can be justified.

Administrative and Operational Decisions

The consultation process may vary depending upon whether the forest or range decision being consulted on with a First Nation is considered an administrative or operational decision.

An administrative decision is one made by a statutory decision-maker related to forest or range resources under the *Forest Act* or the *Range Act*. In general, administrative decisions do not result in immediate on-the-ground activities: rather they relate to the administrative regime supporting the forest and range tenure system in British Columbia. Such decisions would include, but not be limited to, decisions by the Chief Forester that set or vary Allowable Annual Cut, the issuance of a new forest or range tenure (including a Timber Sale License issued by a Timber Sales Manager), or the replacement of a forest or range tenure.

An operational decision is considered to be a decision made by a statutory decision-maker with respect to the statutory approval of a Forest Development Plan, Forest Stewardship Plan (FSP), Range Use Plan, or Range Stewardship Plan, including forest and range activities that are carried out pursuant to the plan. The decision-maker under FRPA is the Minister or his/her Delegated Decision-Maker (DDM).

Post FSP Approval

An FSP approval signifies that the tests of FRPA have been met. Where specific concerns or issues regarding aboriginal interests become known after the approval is granted, more consultation may be required prior to the Cutting Permit and/or Road Permit issuance. Examples include:

- Where the First Nation provides additional information about aboriginal interests after the FSP approval that needs to be considered before CP/RP issuance.
- Where there is a commitment in the FSP for further information-sharing regarding relevant operational information with First Nations prior to a CP/RP issuance.
- Where the First Nation has asked for more site-specific information relevant to the activities under the FSP.

In addition, a Timber Sales Manager must consider and ensure that First Nations have been adequately consulted prior to issuing a Timber Sales License.

Forest and Range Agreements (FRA)

The Ministry of Forests has implemented an initiative that may determine a specific First Nation's consultation process. As part of the Forestry Revitalization Plan and in consideration of the provincial objective to create stability on Crown lands and promote economic development by addressing asserted aboriginal interests, the ministry is providing access to timber and revenue sharing through negotiated agreements. The agreements are known as "Forest and Range Agreements" (FRAs) and are a component of the ministry's First Nations Forest Strategy.

The agreements provide opportunities for First Nations to share in the economic benefits from the forest and range sector as well as provide stability for operations on the land base. As part of the FRA, the signatory First Nation is required to participate in a consultation process and to recognize the government's efforts to accommodate the First Nation's aboriginal interests. In addition, FRAs provide for a consultation process to address operational plans as well as administrative decisions. This consultation process is consistent with court decisions, provincial policy and legislation.

Consultation Related to Treaty Rights

The existence of a treaty does not eliminate the need for consultation with First Nations, but it will likely affect the consultation process in the following ways:

- If a treaty (i.e. Nisga'a) includes provisions for a consultation process, then that process will take precedence over any general consultation policies or processes, except in circumstances where an infringement of the treaty rights is likely;
- If a treaty is in place, the focus of consultation will be the rights that are set out in the treaty and how those rights may be affected by the forestry decision being addressed. In most cases, the treaty rights will be clearly described in the treaty agreement and therefore identification of those rights will not depend on the criteria used for identification of interests.
- The legal analysis for "infringement" and "justification" applies to treaty rights in the same manner as aboriginal rights.
- Where a treaty is in place, aboriginal title will not be a consideration for the consultation process.

Forest Stewardship Plan Task List

The following is a list of tasks associated with the Forest Stewardship Plan (FSP) preparation and approval process. The list contains a mix of steps that are driven either by policy or statutory requirement. The list also includes some voluntary steps and suggestions compiled from experiences in similar situations that proponents and ministry staff may find useful and are likely to contribute to an effective and timely consultation and approval process.

In 2004, government brought FRPA into force, with major changes to forest practices legislation. It is recommended that the Ministry of Forests district and/or regional staff provide a letter to First Nations regarding these legislated changes. This letter should also state how these changes may influence the review and comment and consultation processes for the First Nation with respect to Forest Stewardship Plans.

Plan Preparation and Submission:

Task	Source of Direction	Responsible
<p>1. Information Maintenance and Storage</p> <p>Maintain available and relevant information for use by ministry staff and FSP proponents:</p> <ul style="list-style-type: none"> • a map & list of First Nations with aboriginal interests in the management unit including the appropriate contact people, and agreements signed with government (eg. Forest and Range Agreements, Protocol Agreements, Interim Measures Agreements, etc.), • information on cultural heritage resources that have been identified by the Minister as “resource features” • known information on traditional use and archaeology. (This information may be available through Traditional Use Studies and Archaeological Assessments. In some cases First Nations consent may be required in order to access this information.) • In most instances other agencies are custodians/collectors of this information. 	<p>Policy requirement</p> <p>In (Government Actions Regulation section 5 (1)(e)) Policy requirement</p>	<p>MoF</p> <p>MoF</p> <p>MoF</p>
<p>2. Development of Results or Strategies</p> <p>Develop results or strategies consistent with applicable objectives set by government (FRPA & FPPR), especially the objective set by government for cultural heritage resources.</p> <p>Suggestions:</p> <ul style="list-style-type: none"> • The FSP proponent may consider acquiring information relevant to the FSP preparation from the Ministry of Forests and other agencies regarding First Nations with interests in the FSP area, the contact people, and agreements signed with government. District staff have constant interaction with local First Nations and also have access to information regarding broader government initiatives including those of other provincial agencies and the federal government. The proponent may find this information useful and that it contributes to the development of specific results and strategies. The FSP proponent may consider involving the First Nations in the FSP area in planning process as early as possible. This practice builds relationships and enables early planning considerations that may avoid costly delays later in the process. To this end, consider asking First Nations in the FSP area for information on cultural heritage resources prior to writing results or strategies for these resources. • Consider any guidelines for cultural resource management such as the <i>Guidelines for Managing Cedar for Cultural Purposes</i>. 	<p>FRPA section 5 and Forest Planning and Practices Regulation (FPPR) section 10</p> <p>Voluntary</p> <p>Voluntary</p>	<p>FSP Proponent</p> <p>FSP proponent</p> <p>FSP Proponent</p>
<p>3. Providing Notice</p> <p>Publish a notice in a newspaper as required</p>	<p>FPPR section 20</p>	<p>FSP</p>

Task	Source of Direction	proponent Responsible
<p>4. Review and Comment</p> <p>Make “reasonable efforts” to meet with affected First Nations to review the plan and solicit FN comments prior to plan finalization. Document efforts made to meet. There is no formula (i.e. how many letters or phone calls) to determine what constitutes a reasonable effort. Reasonable is generally considered to be fair, proper, just and suitable under the circumstances.</p> <p>Note: Be aware that formal agreements, such as Forest and Range Agreements (FRAs), have consultation standards that stipulate plan provision and time frame requirements.</p> <p>Suggestions:</p> <ol style="list-style-type: none"> 1. the FSP proponent may want to consider: <ol style="list-style-type: none"> a. Sending a letter to the affected First Nation explaining the FSP review and comment process. Items worth communicating to the FN in the letter include: <ol style="list-style-type: none"> i. The time frame for the review & comment period ii. Suggested times and locations to meet and to discuss the Plan iii. Offering to provide advance copies of the Plan or specified parts based on requests from the First Nation. iv. Recommending to the FN that they submit their comments on the FSP in writing, as the FSP proponent must consider all written comments. b. Focus efforts proportional to the nature and scope of the First Nation interests being affected by the plan and the degree to which these interests may be impacted by the FSP. c. Allowing an appropriate time for response from the First Nations d. Having a system to confirm that communication was received by the First Nations e. Maintaining communication with the Ministry regarding the results of communication efforts with First Nations 2. If a meeting is arranged with First Nations affected by the plan, consider the following: <ol style="list-style-type: none"> a. Inviting MoF District staff to the meeting to promote continuity. b. Explaining the content of the FSP, particularly aspects of the FSP that may be important to the First Nations such as results or strategies for cultural heritage resources (ideally developed with the First Nation’s input, as per the previous section). 	<p>FPPR section 21(1) (d)</p> <p>FRA agreements</p> <p>Voluntary</p>	<p>FSP proponent</p> <p>MoF (proponent needs to consider)</p>

<p>c. Collecting and recording specific information from the First Nation on their aboriginal interests relevant to the plan and how these interests may be impacted. Ask for specific information on how the FSP results or strategies & Forest Development Units may impact their specific aboriginal interests, including the nature & scope of aboriginal interests.</p> <p>d. Identifying action items to address concerns raised.</p> <p>e. Reiterate the timelines for providing comments and importance of providing these comments in writing.</p> <p>f. Outline the decision making process</p> <p>g. Providing the First Nation with a written summary of comments received from the First Nation, with a request for comment on any errors or omissions.</p> <p>h. Contacting the district to inform them of the information-sharing process to date and concerns or issues raised by the FN that cannot be addressed by the licensee</p> <p>3. Consider developing an internal process to describe how to:</p> <ul style="list-style-type: none"> • Consider comments received, • Determine what changes to the FSP are appropriate, • Include a description of the changes made in the FSP submission for approval • Inform the affected parties of how the comments were considered. 		
<p>5. Responding to Review and Comment</p> <p>1. Consider any written comments received in respect of the FSP during the advertisement period.</p> <p>2. Include a description of the changes made to the FSP as a result of the comments received in step 1, above.</p> <p>3. Describe efforts made to meet with First Nations.</p> <p>Submit the FSP to the DDM for approval</p> <p>Suggestions:</p> <ul style="list-style-type: none"> • If the FN has not already been provided a copy of the plan submitted to the DDM, provide copies for any affected First Nation who requests a copy of the plan or part of the plan. • Respond to the First Nation regarding their concerns and copy the MOF district office. • Consider providing a written response to any written comments received from the First Nation 	<p>FPPR section 22 (1)</p> <p>FPPR section 22 (2)</p> <p>FPPR section 22 (2)</p> <p>FRPA sections 3, 16</p> <p>FPPR section 2 (2)</p> <p>Voluntary</p>	<p>FSP Proponent</p> <p>“</p> <p>“</p> <p>“</p> <p>FSP Proponent</p>

Plan Consideration and Approval:

Task	Source of Direction	Responsible
<p>Plan Received and First Nations Informed</p> <p>Write a letter to all affected First Nations indicating the review and comment period has ended and the FSP has been received. The letter should also:</p> <ul style="list-style-type: none"> • Outline the post-submission process and advise that a determination is pending • Note the date by which the DDM expects to make a decision • Include a summary of the information sharing to date and the changes/plan alterations made to address/accommodate First Nation’s aboriginal interests • Include a summary of any research information that will be used (e.g. traditional use studies, cultural heritage overviews, strength of claim assessments) • Request immediate feedback if the First Nation believes cultural heritage or other aboriginal interest information is incomplete or inaccurate, if new information is available, or if results or strategies, or commitments made in the FSP will not address concerns • Advise that the DDM will notify the First Nation of the final determination by copying the determination letter to them 	<p>Policy requirement</p>	<p>MoF</p>
<p>Considerations in the determination process</p> <p>The DDM must consider</p> <ol style="list-style-type: none"> 1. whether the FSP meets FRPA section 16, and 2. if the consultation process regarding the FSP has been adequate; <p>as detailed below.</p> <ol style="list-style-type: none"> 1. FRPA in relation to Forest Stewardship Plans The legislation states: <ul style="list-style-type: none"> • Consider the content of the FSP, particularly the results or strategies for the Cultural Heritage Resources Objective (Must consider whether the results or strategies are consistent with the objective and whether the legislative content requirements have been met, particularly around the Cultural Heritage Resources Objective.) • Consider whether the review and comment process meets legislated requirements. 2. Consultation considerations <ol style="list-style-type: none"> a. Consider the degree to which aboriginal interests have been addressed through the FSP: <ul style="list-style-type: none"> • Degree to which First Nations have been provided with all relevant and reasonably available information regarding the FSP. • Specificity of information requested from and 	<p>FRPA sections 5, 16; FPPR sections 10, 21, 22,; GAR section 5</p> <p>Policy requirement</p>	<p>MoF</p> <p>MoF</p>

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