

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

| <b>Step</b> | <b>Activities</b>   |
|-------------|---|
| <b>1</b>    | <ul style="list-style-type: none"> <li>• 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.</li> <li>• 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.</li> <li>• 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.</li> <li>• 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.</li> <li>• 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.</li> <li>• Further meetings may be necessary to address aboriginal interests where the First Nation requires time to review the operational information.</li> </ul> |
| <b>2</b>    | <ul style="list-style-type: none"> <li>• The district reviews full documentation of results from information sharing activities with the First Nation, along with any possible proposed mitigative measures.</li> <li>• 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.</li> <li>• 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.</li> </ul>  |
| <b>3</b>    | <ul style="list-style-type: none"> <li>• 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.</li> <li>• 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.</li> </ul>   |

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|---|--|
|   | <ul style="list-style-type: none"> <li>• 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.</li> <li>• At this stage, licensees may propose and discuss adjustments to operational plans in relation to stated aboriginal interests.</li> </ul>   |
| 4 | <ul style="list-style-type: none"> <li>• 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.</li> <li>• 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.</li> <li>• 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.</li> </ul> |
| 5 | <ul style="list-style-type: none"> <li>• 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).</li> </ul>  |

## **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

### Title Considerations

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.

**CONSIDERATION STAGE 2A:**

**Infringement considerations related to potential rights**

Rights Considerations

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).

**CONSIDERATION STAGE 2B: Infringement considerations related to potential title**

Title Considerations

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.

### CONSIDERATION STAGE 3A:

#### Justification / accommodation considerations related to aboriginal rights issues

#### Rights Considerations

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.

**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 accommodation 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.