BRITISH COLUMBIA
Ministry of Forests

POLICY SUBJECT		
Aboriginal Rights and Title		
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MINISTRY POLICY

Scope

This document applies to Ministry of Forests operational planning and approval processes. This document replaces the previous Ministry of Forests *Protection of Aboriginal Rights Policy*. The application of this document may be superseded by a modern land claim agreement, or by court decisions concerning aboriginal rights or title. This document, and the Ministry of Forests *Consultation Guidelines* are consistent with the Ministry of Aboriginal Affairs' Crown Land Activities and Aboriginal Rights—Policy Framework and the Provincial Consultation Guidelines (September, 1998). The term "aboriginal interests" is used throughout this document to refer to potentially existing aboriginal rights and/or title.

Policy

Aboriginal rights, including aboriginal title, are recognized and affirmed in Section 35 of the *Constitution Act, 1982*. The effect of this recognition is that existing aboriginal rights must not be unjustifiably infringed by the resource development activities of the Crown, or its licensees. It is the policy of the Ministry of Forests to meet its constitutional obligations with respect to those rights while maintaining a timely approval process for forest activities. The Ministry of Forests also has the objective of building and maintaining cooperative relationships with aboriginal groups.

Background

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

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 legally exist "on the ground," the following outlines the provincial government's view of aboriginal rights and title as defined by court decisions and constitutional obligations.

Aboriginal Rights

Aboriginal rights, in relation to land, generally consist of the use of certain areas for the purpose of carrying out communal practices integral to the distinctive culture of the aboriginal society. To qualify as an aboriginal right, the practice, tradition, or custom must have been a central and significant part of the society's distinctive culture prior to contact with European society (R. v. Van der Peet, Supreme Court of Canada, August, 1996). Different aboriginal rights may exist in different places, depending upon the traditional use or occupation of the land in question.

Depending on the particular aboriginal culture, examples of aboriginal rights may include fishing, hunting and trapping for food, and perhaps in some circumstances, the use of land and resources for medicinal, spiritual, and ceremonial purposes. The singular fact of aboriginal presence on the land is insufficient to give rise to aboriginal rights; there must have been use of land or resources, for purposes integral to that particular culture, in a defined area to qualify as an aboriginal right. The traditional activity may be practiced in a modernized form (i.e., with changes in technique or technology) but activities which were not integral to aboriginal culture prior to European contact or which came about as a result of that contact, do not qualify as aboriginal rights.

Government activity which prevents the exercise of aboriginal rights may be challenged in the courts. Government is required to bear the burden of justifying any activity that interferes with the exercise of an aboriginal right protected under Section 35 of the *Constitution Act, 1982*. However, the First Nation has the obligation to substantiate the right or practice as being central and significant to the First Nation's distinctive culture, and having been carried out in the area in question.

Aboriginal Title

On December 11, 1997, the concept of aboriginal title was addressed in a decision by the Supreme Court of Canada. The decision, known as *Delgamuukw*, set out principles with respect to aboriginal title and provides some guidance to governments in considering aboriginal title within statutory decision making processes. To prove aboriginal title, the group asserting title must satisfy the following criteria: 1) The land must have been exclusively occupied prior to sovereignty (1846); 2) If present occupation is relied on as proof of pre-sovereignty occupation there must be a continuity between present and pre-sovereignty occupation; 3) Occupation must have been exclusive at sovereignty, although there may have been, in some cases, shared exclusivity resulting in joint title.

The *Delgamuukw* decision described aboriginal title as a particular type of aboriginal right, being a right to the land itself. When proven, aboriginal title is a proprietary interest, held communally, and includes the right to choose how the land can be used. Aboriginal title is subject to the ultimate limit that aboriginal uses of land cannot destroy the ability of the land to sustain activities that gave rise to the claim of title in the first place.

Since the onus to prove aboriginal title lies with First Nations, the Crown does not assume the existence of aboriginal title where its existence has not been legally proven. Negotiations with First Nations were identified by the Supreme Court of Canada as a desirable way to resolve issues associated with aboriginal title.

The *Delgamuukw* decision discussed a number of principles by which government could justify its use of proven aboriginal title land, provided that the level of consultation with First Nations was appropriate to the degree of infringement of such title.

A two-stage test was cited by the Supreme Court of Canada in this regard. In the first stage of the test, a number of activities including forestry were specifically cited by the Supreme Court as valid legislative objectives that could be pursued on aboriginal title land. The second stage of that test refers to the justification of an activity based on fiduciary considerations.

In the absence of legal confirmation of existence of aboriginal title over particular lands, the Ministry of Forests carries out consultation to gather information regarding specific aboriginal interests. Levels of appropriate consultation will vary with the contemplated use of the land, and the degree of the potential for aboriginal title to exist in the area in question. Through consultation, the Ministry of Forests will identify whether considerations of aboriginal title issues may be appropriate for operational decisions, and will apply subsequent consultation processes appropriately (described in the Ministry of Forests Consultation Guidelines).

Treaty Rights

Treaty rights are those 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 may modify existing aboriginal rights and title to be defined treaty rights. When dealing with treaty rights or treaty issues, staff should consult with the section on treaty rights in the aboriginal issues binder, or contact Regional Aboriginal Affairs Managers, Aboriginal Affairs Branch or Ministry of Attorney General to discuss the terms of a particular treaty.

Additional Considerations

The Ministry of Forests may develop consultation procedures or processes with First Nations to establish mutually acceptable and efficient processes of consultation. The Ministry of Forests Consultation Guidelines provide 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 this document and the Ministry of Forests Consultation Guidelines, and should be reviewed through the Aboriginal Affairs Branch and Ministry of Attorney General before finalization.

The Ministry of Forests strives, where possible, to build and maintain working relationships with First Nations based on trust and respect. Involvement in aspects of strategic or long-term planning processes can provide aboriginal groups with greater understanding of subsequent operational planning stages. This involvement can increase the effectiveness of MOF planning processes.

The Ministry of Forests Consultation Guidelines do not address the specific requirement to protect archaeological sites as defined by the *Heritage Conservation Act*; rather they address aboriginal rights and title issues as defined by case law. The Ministry has a dual obligation to address

aboriginal interests, as well as to ensure archaeological sites are properly addressed. If the ministry consults a First Nation on community knowledge regarding the location of archaeological sites it does not mean that potential aboriginal rights and/or title have necessarily been addressed as well. Staff should consider requirements under the relevant sections of the *Forest Practices Code of BC Act* (The Code), the *Heritage Conservation Act*, and/or district procedures for issues specific to archaeological resources.

The Ministry of Forests Consultation Guidelines do not address concerns outside of constitutionally recognized aboriginal interests (such as LRMPs or Timber Supply Review), as these are dealt with through a range of existing forest management processes.

References

No applicable references.