

**INTERPRETATION REQUEST**  
FSC CA National Boreal Standard (2004) Indicator 3.1.2  
July 31, 2016

3.1.2 The **applicant obtains agreement** from each affected Indigenous community verifying that their interests and concerns are clearly incorporated into the management plan. Such agreement will also include:

- A description of the roles and responsibilities of the parties;
- The interests of the parties;
- A description of appropriate decision-making authorities for all parties;
- A **dispute resolution mechanism**; and
- Conditions under which consent has been given and under which it might be withdrawn, if any.

*This agreement is not intended to abrogate or derogate from their Aboriginal and Treaty Rights.*

*Verifier:*

*Each Indigenous community indicates that it is satisfied that the applicant has incorporated their interests and concerns within the management plan. [Emphasis added]*

**When a formal agreement has not been reached with an Indigenous community, what does it mean to “obtain” agreement?**

The goal and on-going objective of a consent agreement between the applicant and an Indigenous community is the granting of consent for forest management activities that affect the interests and concerns of the Indigenous community. The trust and confidence required to build and maintain a relationship that supports such an agreement may require significant effort over a long period of time on the part of the certificate holder and the Indigenous community.

There are various and extenuating factors beyond the sphere of influence of an applicant that may impact an agreement building process with an Indigenous community. However, implicit in Principle 3 (and in Principle 2) of the NBS, is the right of Indigenous Peoples to meaningful and effective consultation (FSC-GUI-30-004). Therefore, assuming ongoing and meaningful consultation between the applicant and the Indigenous communities is practiced, certifying bodies should be able to determine whether the relationship between the applicant and the Indigenous communities has improved. This means that positive change in the development of the nature, scope and terms of the relationships can be demonstrated at the time of audit.

If there is insufficient progress in the agreement making process, or if the engagement efforts used by the applicant are inappropriate for the Indigenous

community, it may result in the withholding consent. The relationship between the applicant and the Indigenous community is evaluated over the lifecycle of the certificate, making allowances for minor setbacks and dispute resolution processes to take effect. However, in the case of disputes of substantial magnitude, the Auditor should evaluate the relationship for demonstrated improvements from the time of the dispute to the time of audit.

The indicator includes provisions for a mutually defined and agreed to dispute resolution mechanism within the agreement. If an agreement has not yet been achieved, but the general level of trust between the applicant and Indigenous community is high, a dispute resolution process ought to be developed outside of the agreement and implemented *in situ* to the process in order to move the relationship beyond any stalemate.

However, when the level of trust is low between the applicant and the Indigenous community, and an agreement has not been achieved, the parties to the process may employ third party mediation mechanisms agreed to by all parties (FSC-DIS-30-004).

*Verifiers:*

The following means of verification may be used to evaluate the relationship between the applicant and the Indigenous community:

- The applicant has clearly defined and communicated to the IP the terms and conditions for which they were seeking an agreement.
- The applicant provides evidence of their repeated, persistent, and sincere efforts using different strategies to engage with the appropriate decision-makers in the Indigenous community.
- The Indigenous community expresses satisfaction with the engagement process with the applicant
- The CH demonstrates through engagement and strategy;
  1. Each Indigenous community's interests and concerns related to the forest management plan;
  2. Awareness of how the conditions of consent will be communicated by the Indigenous community to the applicant
- It has been clearly communicated that the agreement sought by the applicant includes the condition for Indigenous People to grant or withhold consent for those parts of the management plan that may directly impact the interests and concerns of the Indigenous community.

Below are further clarifications based on the inquiry made:

**1. Do negotiations about Indigenous rights between Indigenous communities and government preclude consent?**

No, as negotiations are government-to-government processes that occur outside the sphere of influence of certificate holders. The interests and concerns of an Indigenous community related to a specific forest management plan may be accommodated within the context of an agreement between the certificate holder and the Indigenous community without solving the larger issue of Indigenous rights. The certificate holder should work with the community to delineate a culturally appropriate process that would allow for smaller, more incremental decisions, activities and support that are focused on achieving consent over a specified period of time (e.g. MOU or community protocol).

However, while consent may be withheld for reasons beyond the control of the certificate holder and/or for an unspecified period of time, it is expected that the certificate holder would continue to maintain and further advance a relationship with the Indigenous community. Conditions within the sphere of influence of the certificate holder that lead to withholding or withdrawal of consent ought to be addressed through an agreement process, and a final binding agreement between parties, that includes a dispute resolution mechanism.

Note 1: Relevant NBS (2004) Criteria, Indicators and Guidance

*Excerpt Intent 3.1*

*The onus is on the applicant to make best efforts to obtain informed consent, understanding that there may be **exceptional circumstances that may influence whether or how consent is achieved** given that circumstances vary from Indigenous community to Indigenous community [Emphasis added]*

*3.1.1 The applicant keeps abreast of and, in the management plan, is able to demonstrate a good working knowledge of the Indigenous communities, their legal and customary rights and **their interests related to forest lands** within the forest management planning area.*

[Relevant] *Verifiers:*

- *The extent to which there is agreement, or lack of agreement, between the Crown and the respective Indigenous community as to the nature and extent of the rights and interests asserted by each People;*
- *The existence, and current status of negotiations between the Crown and the Indigenous community regarding rights and interests asserted by each respective Indigenous community. [Emphasis added]*

*3.1.2 The **applicant obtains agreement** from each affected Indigenous community verifying that their interests and concerns are clearly incorporated into the management plan. Such agreement will also include:*

- *A description of the roles and responsibilities of the parties;*
- *The interests of the parties;*
- *A description of appropriate decision-making authorities for all parties;*
- *A **dispute resolution mechanism**; and*
- *Conditions under which consent has been given and under which it might be withdrawn, if any.*

***This agreement is not intended to abrogate or derogate from their Aboriginal and Treaty Rights.***

Verifier:

- *Each Indigenous community indicates that it is satisfied that the applicant has incorporated their interests and concerns within the management plan. [Emphasis added]*

Note 2: FSC IC (2012) FSC Guidelines for the Implementation of the right to FPIC.

Consent is:

- *Not the same as engagement or consultation. These are only the necessary means to arrive at a consent decision*
- *The expression of rights (to self-determination, lands, resources and territories, culture)*
- ***Given or withheld in phases, over specific periods of time for distinct stages or phases of the forest management operation***
- *Not a one-off decision that gives an everlasting social license to a forest operation. Rather, it is part of an iterative process, described by various indigenous peoples as 'living consent', which requires continual monitoring, maintenance, and reaffirmation throughout the various stages of a forest operation*
- *Likewise, **decisions to withhold consent are not necessarily forever binding** and can also be revisited by rights holders as situations change or become more favourable*
- *Once consent is given, the community is, however not able to withdraw consent arbitrarily. **The FPIC agreement is a binding agreement for both parties.** If the conditions upon which the original consent was based are being met, ongoing consent is implied. (13) [Emphasis added]*

## **2. Are Indigenous communities required to provide clear and substantial justification for withholding consent?**

If a binding agreement exists between the certificate holder and Indigenous community, the dispute resolution mechanism ought to detail the responsibilities of each party should consent be withdrawn, including the level of substantive information provided by each party, presentation format and timeframe.

If no binding agreement exists between the certificate holder and the Indigenous community, but a relationship-building process is underway with clear objectives to obtain consent, then it would be incumbent upon the certificate holder to ascertain and document the reasons for withholding consent.

In either scenario, an auditor ought to be able to assess the decision to provide or withhold consent based on documents kept on file by the certificate holder that support the consent decision. The auditor can then verify these records with the Indigenous community.

It is important to note that a consent-building process requires the initiation of a relationship that will require significant effort over a long period of time on the part of the certificate holder and the Indigenous community. Auditors ought to be able to identify evidence of various persistent and sincere efforts on the part of the forest manager to

connect with the appropriate decision-makers in the Indigenous community.

Note 3: FSC IC (2012) FSC Guidelines for the Implementation of the right to FPIC.

*Step 5: Negotiate agreement on decision-making process and capacity-readiness of the community.*

*5.5. The community decides freely on the proposal*

*There may be disapproval, or acceptance of only certain parts of the process or proposal. It is essential that the right of a community to reject the proposal made by the Organization is respected, and that the Organization does not try to immediately re-negotiate the deal. However, a community can be asked to indicate under what conditions it would be prepared to consider the proposal again. If the community agrees to explain why they withheld consent it may be possible to revise the proposal until it is acceptable. **Be aware that the community is not obliged to explain their reasons for withholding consent, but if the negotiations occurred in good faith and in an open and transparent way it is more likely that the reasons will be explained.** (60)*

**3. Does participation of the applicant and the Indigenous community in a government-led community consultation process demonstrate compliance with 3.1.2 in NBS (2004)?**

No, unless the Indigenous community explicitly supports the government-led community consultation process, it cannot be assumed that the scope and nature of the government process supports the intent of Criterion 3.1.

However, a government process may provide a venue for initiating a consent-based agreement building process between the certificate holder and an Indigenous community as per the intent of Criterion 3.1.2.

Note 4: Criterion 3.1 of NBS (2004)

*Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.*

## **Guidance for Certification Bodies**

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FSC CA also offers the following guidance to the attached interpretation on 3.1.2 NBS.

***Under the following condition: An Indigenous community withholds consent based on conflict of between the Indigenous community and government that is outside the sphere of influence of the CH.***

If a written agreement is not yet in place, the following questions should be answered to make an assessment of 3.1.2 of the NBS (2004):

- How aware are the communities of the forest management plans and operations of the CH?
- How aware are the communities of their roles and responsibilities under the existing certification or new certification application?
- How aware is the CH or proponent of the interests of the Indigenous community?
- How aware are the Indigenous communities of existing dispute resolution processes either within the FSC system or with the CBs directly?
- Has the CH determined if the Indigenous community would consider an alternative form of agreement to the stated 3.1.2 agreement – e.g. an MOU?
- Has the CH attempted to communicate with the Indigenous community in a variety of ways at various times during the life of the certificate?

If the CH and Indigenous community are able to answer the questions above in a positive, constructive manner demonstrating that the agreement/relationship building process is a “work in progress” and that there is a clear understanding of where the parties are heading, then FSC CA believes the 3.1.2 can be achieved under the above scenario.