

DIRECTIVE

AMENDMENTS TO A FIRST NATION'S MAP OF ITS TRADITIONAL TERRITORY

Purpose

This Directive is issued by the British Columbia Treaty Commission ("Treaty Commission" or "BCTC") under the authority of subsection 8.1 of the British Columbia Treaty Commission Agreement, 1992, and subsections 18 and 20 of the *British Columbia Treaty Commission Act*, S.C. 1995, c. 45. and the *Treaty Commission Act*, R.S.B.C. 1996, c. 461, respectively.

The purposes of this Directive are to:

- 1) provide guidance regarding the interpretation and application of the Treaty Commission's Policies and Procedures, 6 Stage Process, Stages 1-4, April 11, 1997, as amended December 15, 1997 ("BCTC Policies and Procedures") for *Amendments to a First Nation's map of its traditional territory*, including the requirement that any new map be consistent with the traditional territory of the First Nation requesting the amendment;
- 2) highlight the general policy that where a First Nation requests an amendment to its Statement of Intent ("SOI") boundaries, the Treaty Commission will not accept the new SOI map until the First Nation has made best efforts to resolve any overlapping or shared territory issues resulting from the amendment; and
- 3) draw attention to the relationship between amendments to SOI boundaries and Treaty Commission policies on overlaps.

Background

Traditional Territory

A core element of the definition of a First Nation for the purposes of the B.C. treaty process is a connection to a traditional territory:

"First Nation" means an aboriginal governing body, however organized and established by aboriginal people within their traditional territory in British Columbia, which has been mandated by its constituents to enter into treaty negotiations on their behalf with Canada and British Columbia.
(BC Treaty Commission Agreement, article 1.1)

Before a First Nation can enter the B.C. treaty process it must provide to the Treaty Commission a Statement of Intent containing, among other things, a description of the "general geographic area of the First Nation's traditional territory" (BC Treaty Commission Agreement, article 7.1 (a) (ii)). This is to ensure that a First Nation's SOI boundaries correspond, as closely as possible, to the historic boundaries of its traditional territory.

The Treaty Commission recognizes that a First Nation may need to change the map of its traditional territory after it has begun negotiations. In most cases, a request by a First Nation to amend its SOI map boundaries has been prompted by the need to rectify errors or omissions in its original SOI. As a result, it is not uncommon for the initial description of a First Nation's traditional territory to be revised at a later date as additional information

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becomes available. This Directive is not intended to prevent these changes to SOI map boundaries.

Overlapping/shared territories policies and SOI map boundary amendments

The Treaty Commission has policies on overlapping and shared territories including reporting and other requirements to encourage First Nations to resolve these important issues as they advance through the treaty process, as contemplated by Recommendation 8 of The Report of the British Columbia Claims Task Force, June 28, 1991 ("Task Force Report"). These policies are incorporated in the six stage B.C. treaty process and include the following.

Stage 1 – The First Nation must identify overlaps or shared territory.

Stage 2 – The First Nation must, at a minimum, establish a process to address overlapping or shared territory issues.

Stage 3 – The First Nation must implement its process for resolving overlaps by making best efforts to resolve the overlapping or shared territory issues and report to the Treaty Commission on these efforts.

Stage 4 – The First Nation must report to the Treaty Commission periodically on the status of and efforts made to resolve overlap or shared territory issues. The First Nation is expected to demonstrate that it has made "best efforts" to resolve overlapping or shared territory issues, and the Treaty Commission will report near the end of Stage 4 negotiations on the nature of the dispute, and whether "best efforts" have been made by all parties to resolve it. (BCTC Policies and Procedures, p. 30)

This Directive reinforces that the requirement that a First Nation use best efforts to resolve overlapping and shared territory issues will also be applied to requests to change SOI map boundaries at the time of the requested change.

The rationale for this Directive

Amendments to SOI map boundaries not only affect the First Nations requesting the amendment, but also "have important implications for other First Nations, which use the maps to identify overlaps, and for Canada and British Columbia, which use them for consulting third parties and as a basis for identifying the First Nation's key interests in its territory" (BCTC Policies and Procedures, Addendum, December 15, 1999, p. 3). For these reasons, the Treaty Commission is committed both in its policies and practices to ensuring:

- 1) Amendments to SOI map boundaries are consistent with the traditional territory of the First Nation requesting the amendment; and
- 2) Best efforts are made to resolve overlapping and shared territory issues resulting from these amendments.

The Treaty Commission also notes with some interest and concern the recent increase in requests by First Nations to amend their SOI map boundaries and, in some cases, the large geographic scope of some of these amendments. This prompted a review by the Treaty Commission of its policies on SOI amendments and the issuance of this Directive.

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Marine and/or other Shared Harvesting Areas

In recent years some First Nations have submitted amended SOI maps to the Treaty Commission in which they distinguish between a "core" area and a shared or non-exclusive "harvest" area. Delineating or demarcating a traditional territory in this way may be necessary to meet the interests of a First Nation and can be useful in overlapping or shared territory discussions with other First Nations. However this approach does not exempt a First Nation from the basic requirement to ensure that any new SOI area is within its traditional territory.

If an amended SOI map distinguishes between a core and shared or non-exclusive harvest area, a written explanation to BCTC must be included with the amended SOI map indicating:

- 1) the purpose for differentiating between core and, shared or non-exclusive harvest areas; and
- 2) the implications of that approach for treaty negotiations and overlapping or shared territory discussions with other First Nations including,
 - a. whether the First Nation intends to select treaty settlement land in the shared or non-exclusive area(s);
 - b. the nature of any jurisdiction or rights that are asserted will be negotiated by the First Nation that potentially affect the shared or non-exclusive harvest area(s); and
 - c. whether other First Nations recognize all or part of the boundaries of the core and shared or non-exclusive areas being asserted by the First Nation.

Amending SOI maps to give effect to protocols between First Nations

Some First Nations have indicated an interest in amending their SOI boundaries to enable their members to exercise harvesting rights outside of their traditional territories where protocols or other agreements exist with other First Nations. Giving effect in a treaty to harvesting protocols or other agreements between First Nations is a valid interest. However, the Treaty Commission is of the view that amending a First Nation's SOI map is not an appropriate way to achieve this interest as this approach is not consistent with the basic requirement that a First Nation's SOI map correspond with the general boundaries of its traditional territory.

The Commission understands that some First Nations have been successful in negotiating arrangements with Canada and British Columbia to give effect to harvesting protocols and other agreements between their First Nation and other First Nations without enlarging their SOI areas. The Treaty Commission encourages First Nations in similar circumstances to contact the Treaty Commission for further information about these options.

Best Efforts

The requirement that a First Nation must use best efforts to resolve overlapping or shared territory issues arising from an SOI map amendment is not intended to be unduly prescriptive of the methods or approaches that can be used to address these issues. "Best efforts" will be assessed by the Treaty Commission according to, among other things, the

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type of territory and traditional uses, the extent of the overlap in relation to the traditional territory, the potential impact on the negotiations, how the overlap resolution process is working, and the potential for settlement. A number of different approaches and tools are available to First Nations according to their circumstances including:

- 1) the First Nations Summit's Recognition Protocol;
- 2) traditional and other culturally appropriate methods for dispute resolution;
- 3) the use of professional mediators; or
- 4) discussions or negotiations facilitated by the Treaty Commission.

In assessing whether a First Nation has made best efforts to resolve overlapping or shared territory issues, the Treaty Commission will consider any relevant information from the First Nation. First Nations are encouraged to document their efforts and activities to resolve overlapping or shared territory issues on an ongoing basis. The Treaty Commission may also verify information with other parties.

Policies and procedures for amendments to a First Nation's map of its traditional territory

The policies and procedures contained in the attached checklist apply effective immediately to:

- 1) Any new request by a First Nation to amend its SOI map; and
- 2) Any request by a First Nation to amend its SOI map that has not been finally accepted by the Commission by written notice to the First Nation.

First Nations are encouraged to contact the Commission if they have any questions or concerns regarding the interpretation or application of this directive and the attached policy and procedures.

This directive with the attached policies and procedures has been duly approved and adopted by the Commission.

British Columbia Treaty Commission

Sophie Pierre, O.E
Chief Commissioner

**CHECKLIST FOR
AMENDMENTS TO A FIRST NATION'S MAP OF ITS TRADITIONAL TERRITORY**

This document contains a checklist and other information to guide First Nations requesting an amendment to their SOI boundaries. It consists of a two step process.

In step 1, a First Nation that intends to amend its SOI map boundaries must provide all of the listed material to the Commission in support of its request. In step 2, the First Nation is required to satisfy the Commission that it has made "best efforts" to resolve overlapping or shared territory issues resulting from the amendment.

Step 1 - Written Explanation and Connection to Traditional Territory

To amend its SOI map boundaries, a First Nation will provide the following to the Treaty Commission:

- A written request to amend its SOI map boundaries.
- A revised map of acceptable quality and detail showing the First Nation's new SOI boundaries (both hard copy and shape file if possible).
- A written explanation stating the reasons for the amendment.
- A summary of the facts or information indicating that the new SOI area is within the traditional territory of the First Nation (e.g. historic use or occupancy).
- The names and mailing addresses of any First Nations, both within and outside of the treaty process, that are affected by the amendment.
- Copies of letters indicating that First Nations affected by the amendment have been provided with clear notice of the request to amend the SOI map, a copy of the amended SOI map detailing the changes between the current boundary and the amended boundary and a written explanation of the reasons for the amendment.
- or
- When requested by the First Nation, the Treaty Commission will distribute the amended SOI map and written explanation of the reasons for the amendment to affected First Nations, and provide confirmation to the First Nation requesting the amendment.

On receipt of a request from a First Nation to amend its SOI map boundaries, the Treaty Commission will:

- 1) Acknowledge receipt of the request;
- 2) Review the request and supporting material; and
- 3) Either:
 - a) Inform the First Nation that it has complied with step 1 requirements; or
 - b) Inform the First Nation what further information is needed.

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If more information is needed indicating that the new SOI area is with the First Nation's traditional territory, the Treaty Commission may obtain and consider information from other parties, including First Nations affected by the amendment. Any information received by the Treaty Commission from other parties will be provided to the First Nation requesting the amendment and the First Nation may respond.

If a First Nation does not comply with a request by the Treaty Commission for more information within one year of filing the SOI amendment, the Treaty Commission will consider the SOI amendment request inactive and may return it.

Step 2 - Best Efforts to Resolve

After the First Nation has complied with the requirements in stage 1, the First Nation will provide to the Treaty Commission a detailed description of the following with supporting documentation:

- The processes established and efforts made to address all overlapping or shared territory issues resulting from the amendment;
- The outcome or current status of these processes or efforts; and
- Any other information showing best efforts have been made to resolve all overlap or shared territory issues resulting from the amendment.

In considering whether a First Nation has made best efforts to resolve all overlapping or shared territory issues resulting from the SOI map amendment, the Treaty Commission may obtain and consider information from other parties including First Nations affected by the amendment. Any information received by the Commission from other parties will be provided to the First Nation requesting the amendment and the First Nation may respond.

If, in the opinion of the Treaty Commission, the First Nation has made best efforts to resolve all overlapping or shared territory issues resulting from the amendment, the Treaty Commission will accept the amended SOI map and:

- 1) provide written notice of the updated SOI map to the First Nation, Canada, British Columbia, and First Nations affected by the amendment;
- 2) date and attach the revised map and the explanatory note to the original or previous SOI along with the original map; and
- 3) post the updated map to the Commission's website.

Where the Treaty Commission is of the opinion that the First Nation requesting an amendment of its SOI map boundaries has not made best efforts to resolve all overlapping or shared territory issues resulting from the amendment, it will not accept the amendment and:

- 1) the First Nation will be notified of the Commission's opinion and reasons; and
- 2) the Commission will, if appropriate, make suggestions on further or other efforts the First Nation might pursue to resolve the outstanding overlapping or shared territory issues.