

YESAB

Yukon Environmental and
Socio-economic Assessment Board

INFORMATION BULLETIN

CONSIDERATION OF ABORIGINAL AND FINAL AGREEMENT RIGHTS IN YESAB ASSESSMENTS

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PREFACE

This bulletin is intended to provide information to Decision Bodies, First Nations, proponents, and other participants as to how YESAB will fulfill its responsibilities under s.42(1)(g) and (g.1) of the *Yukon Environmental and Socio-economic Assessment Act* (YESAA, or the “Act”) in respect of Aboriginal and Final Agreement rights. Specifically, the bulletin clarifies how asserted and established Aboriginal and Final Agreement rights will be considered in assessments conducted under the Act. Note that Yukon First Nations’ interests, as referenced under s.42(1)(g.1) of the Act, can be broader than impacts on asserted and established Aboriginal rights, and s.42(1)(g) considerations are broader than the need to protect Final Agreement rights. However, this bulletin will focus on two components of s.42(1)(g) and (g.1) of the Act: Final Agreement rights under (g), and asserted and established Aboriginal rights under (g.1).

Disclaimer

This Bulletin is not intended to provide legal advice or direction. The Bulletin provides information only, and should not be used as a substitute for the Act or its associated regulations and rules. In the event of a discrepancy, the Act, regulations, and rules prevail. Portions of the Act have been paraphrased in the Bulletin, and should not be relied upon for legal purposes. YESAB disclaims liability in respect of anything done in reliance, in whole or in part, on the contents of this Bulletin.

Legislative Context

YESAA provides direction on the factors which must be considered in assessments conducted under the Act, and also outlines specific matters that assessors must make determinations on. The duty to consider a given factor means assessors must take that factor into account in their assessment of the project. Specifically, assessors must consider the factors set out in s.42 when reaching their determinations as to whether or not the project will have, or is likely to have, significant adverse environmental or socio-economic effects in or outside Yukon.

Sections 42(1)(g) and (g.1) outline the following considerations specific to Yukon First Nations and the Tetlit Gwich’in:

- the need to protect the Final Agreement rights of “Yukon Indian Persons”, as defined in the *Umbrella Final Agreement*;
- the special relationship between Yukon Indian Persons and the wilderness environment of Yukon;
- the cultures, traditions, health and lifestyles of Yukon Indian Persons; and
- Yukon First Nations’ interests.

Yukon First Nations’ interests can include impacts on asserted and established Aboriginal rights.

How and when do assessors consider asserted and established Aboriginal and Final Agreement rights?

YESAB does not *directly* assess, or make findings about, a project's impacts on asserted or established Aboriginal and Final Agreement rights. YESAB makes factual, not legal, determinations about the significance of the project's likely adverse effects on valued environmental and socio-economic components (VESECs).

Asserted and established Aboriginal and Final Agreement rights are, however, considered in assessments conducted under the Act. There are two ways in which these rights may factor into YESAB's determinations:

1. they can help inform or guide the choice of VESECs utilized in an assessment; and
2. may provide context relevant to determining the significance of likely adverse effects of the project on identified VESECs.

These two processes are discussed below.

1. Inform or Guide the Choice of VESECs Utilized in An Assessment

Asserted and established Aboriginal and Final Agreement rights may help inform or guide the identification of some of the VESECs used in an assessment.

YESAB identifies VESECs for each assessment. In addition to YESAB's knowledge and experience, and the project proposal, YESAB relies on input from the public and First Nations to help inform the identification and selection of VESECs.

Some of the VESECs ultimately used in an assessment may encompass or overlap with First Nations' asserted or established Aboriginal and Final Agreement rights. For example, the VESEC "First Nations' way of life" may encapsulate, amongst other things, the impacted First Nation(s) rights to harvest fish and wildlife.

If there is no pathway of effects between project activities and the potential VESEC associated with the right(s) at issue, then that VESEC will not ultimately be utilized in the assessment. Assessment reports shall include an explanation of, and rationale for, VESEC identification and selection.

2. Significance Determination

Asserted or established Aboriginal and Final Agreement rights may also inform assessors' determinations as to whether the project's direct and associated cumulative adverse effects are significant. Specifically, if a right is encapsulated within the VESECs ultimately selected for the assessment, then the right will form part of the context considered by YESAB when determining whether or not the adverse effect of the project on that VESEC is significant or not. Ultimately, the right may impact the threshold used to determine significance of that impact.

Consistent Methodology

YESAB will follow the same methodology to assess the adverse project effects on VESECs which overlap or encapsulate established or asserted Aboriginal and Final Agreement rights as it does to assess project effects on VESECs which do not overlap with or encapsulate those rights.

APPENDIX 1: EXPLANATION OF TERMS

This appendix provides some definitions of key terms, as used in this Bulletin.

Aboriginal rights:

An “element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.”¹ Aboriginal rights flow from the Aboriginal group’s prior occupation of land, as well as from the Aboriginal peoples’ distinctive cultures and prior social organization on that land. These rights, and specifically the manner in which they are exercised, can evolve over time.

Aboriginal rights cover a spectrum from land-based activities to non-land based rights. An example of the former would be the right to harvest berries at a particular site. An example of the latter is the right to self-government.

Aboriginal title:

A sub-category of Aboriginal rights specific to rights and interests in land. Aboriginal title is derived from regular and exclusive use of land, and confers exclusive decision-making rights in respect of the land, as well as the right to the benefits from the use of that land. Once Aboriginal title is established, government and other users can only use the land if they either obtain the consent of the Aboriginal group, or the use has substantial and compelling public interest, and is consistent with the Crown’s fiduciary duty towards the Aboriginal group.²

Asserted Aboriginal rights:

rights which have been claimed by an Aboriginal group or members of the Aboriginal group, but not yet established. An Aboriginal right is established once it is either recognized by the Crown, or a court declares that the practice, custom or tradition is an Aboriginal right. Aboriginal rights are inherent, and exist prior to being acknowledged or proven. A court declaration or Crown acknowledgment simply identifies the nature and extent of the right.³

Consider (as in “consider a factor”):

means take into account, but does not require a resolution or a determination of this specific factor Determine (as in “determine if the project will have, or is likely to have, significant adverse effects”): make a finding, decide or resolve.

Final Agreement rights:

These rights derive from negotiated agreements set out in land claims agreements between Aboriginal people and the Crown. The Final Agreements established pursuant to the *Umbrella Final Agreement* are modern treaties.

¹ R v. Van der Peet, [1996] 2 S.C.R. 507

² Tsilhqot’in Nation v. British Columbia, 2014 SCC 44

³ Saik’uz First Nation v. Rio Tinto Alcan Inc., [2015] B.C.J. No. 694

The rights established under Yukon Final Agreements include but are not limited to:

- Title to settlement land
- Protection of access to settlement land
- Rights of access to Crown land
- Rights to harvest fish and wildlife
- Rights to harvest forest resources
- Economic development measures
- Provisions for negotiating self-government agreements
- Rights in respect of water use, quality and flow
- Potential for royalty sharing
- Special management areas
- Rights to representation and involvement in land use planning and resource management.
- Ownership and management rights in respect of specified ethnographic moveable heritage resources and documentary heritage resources

Valued environmental and socio-economic components (VESECs):

Components of the physical and socio-economic environment that are valued for various reasons (e.g. ecological integrity, health, sustenance, livelihood, scientific, social, economic, traditional, or cultural reasons) and require evaluation within an assessment.

Interests of First Nations: For the purposes of reaching determinations under s.56, 58 and 72(4), “interests of First Nations” as referenced in s.42(1)(g.1) of YESAA may include, but is not limited to, asserted and established Aboriginal rights.