

**Consultation and Accommodation and Fraser Salmon Management
Special workshop in support of building the
Fraser River and Marine Approach co-management process**

March 30 & 31, 2010 – Tsleil-Waututh Nation Community Centre

ATTENDANCE:

Marcel Shepert, Facilitator
Ken Malloway, FRAFS, Kwaw Kwaw Apilt
Doug West, ITO
Susan Anderson Behn, FRAWG, Vancouver Island
Brian Wadhams, MTTC
Carl Edgar, Ditidaht First Nation
Con Charleson, Hesquiaht Nation
Shamus Curtis, UFFCA
Murray Ned, Sto:lo Tribal Council, Sumas First Nation
Pat Matthew, Secwepemc Fisheries Commission
Mike Staley, FRAFS
Jim Webb, Tl'az'ten First Nation
Dave Antoine, Bonaparte Band
Deana Machin, FNFC
Gord Sterritt, Northern Shuswap Tribal Council

Brenda Gaertner, Mandell Pinder
Neil Todd, FRAFS
Saul Terry, ITO, St'at'imc Nation
Jeff Thomas, Snuneymuxw First Nation, FRAWG
Greg Wadhams, Namgis First Nation
Tony Roberts Jr., A-tlegay, Campbell River Band
Murray Sam, Shxw'ha'y Village
Dan Smith, First Nations Summit
Flavian Harry, Tsawwassen First Nation
Eddy Jules, Skeetchestn First Nation
Roy Harris, Chemainus First Nation
John Pierro, Bonaparte Band
Dominic Hope, Yale First Nation
Howie Wright, Okanagan Fisheries Alliance

Jennifer Trotti, DFO
Brigid Payne, DFO Vancouver
Elan Park, DFO Vancouver
Corey Jackson, DFO Vancouver
Susan Farlinger, DFO
Shannon Williams, Department of Justice @ DFO

Greg Thomas, DFO Nanaimo
Gordon Curry, DFO Nanaimo
Barry Huber, DFO BCI
Kaarina McGivney, DFO Vancouver
Les Jantz, DFO BCI

Record Keeper: Aimee Arsenault, FRAFS

Day 1 – March 30, 2010

Meeting overview and opening remarks

Marcel Shepert, Facilitator

This consultation workshop was convened with the goal of engaging DFO and First Nations from the Fraser River watershed and marine approach areas in a dialogue regarding consultation for Fraser salmon. Three main objectives were identified: 1) improve our respective understanding of issues and approaches around consultation (including guiding principles); 2) discuss how accommodation can be achieved; 3) consider how these aspects can be reflected in the development of a DFO-First Nations co-management process for Fraser salmon.

At the January 2010 Forum meeting, a letter to FRAWG from the Nicola Tribal Association was presented. The letter highlighted various concerns around the FRAWG, Forum and Roadmap processes, particularly questions about how these processes fit into DFO's consultation process for Fraser salmon. First Nations Forum participants agreed that consultation is a serious issue that requires clarification from both DFO and legal counsel. In the midst of the many processes addressing fisheries issues in B.C., it was decided that a consultation workshop would help to identify the benefits and risks of First Nations' involvement in these processes, clarify First Nations' and DFO's perspectives and expectations on consultation and accommodation, and improve communication at all levels.

Consultation and accommodation: A legal perspective

Shannon, Department of Justice

While the crown has a legal duty to consult with First Nations, consultation also helps to ensure good governance and policy. Incorporating First Nations' perspectives in the development of policy and legislation is important for building trust and strong relationships.

The legal duty to consult is grounded in the "honour of the crown", a concept relevant to many cases pertaining to aboriginal rights, and interpretations of treaties and statutory provisions which could impact those rights. It refers to the crown's obligation to maintain integrity in all of its dealings with aboriginal people. In the spirit of reconciliation, the government is required to consult if activities have the potential to infringe on aboriginal rights and/or title; the honour of the crown is said to always be "at stake" in the government's interactions with aboriginal people.

Honour of the crown is an important part of the "justification test" as outlined in the SCC decision *R v. Sparrow*, which determines whether infringement on aboriginal rights by the government can be justified. Rights are defined as an element of practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. In discussions about fisheries, we refer to the aboriginal right to fish for food, social and ceremonial purposes, which is a communal right held at the community level. Some cases have found that First Nations have an aboriginal right to fish commercially as well (e.g. *Gladstone, Ahousaht*).

One specific type of aboriginal right is *title*, which refers to the exclusive occupation of land at the time of sovereignty (not the date of contact, as is the case with other forms of aboriginal rights). In some cases, consent is required from the title holders in order to justify infringement of title.

Discussion:

Concepts like "honour of the crown" can be difficult to accept for First Nations in the context of their historical relationship with the government. There is still a great deal of healing that needs to take place before a positive relationship can be established. While the history is not something that can be fixed by the court, principles like honour of the crown can help us to work toward better relationships. Lawyers and government staff who work with First Nations should have a thorough understanding of the history.

Honour of the crown applies not only to legal representatives, but also to government staff members who work with First Nations. Honour of the crown is present in all the crown's dealings with aboriginal people.

Section 35(1) of the constitution recognizes existing aboriginal treaty rights (as of 1982) as established in historic or modern treaties. Section 35(3) recognizes rights that might be established after 1982 through treaties or other means.

First Nations and DFO have had different interpretations of fisheries case law in the past (e.g. "bearing the brunt of conservation"). First Nations and DFO need to work toward a common understanding of the law, and agree on how it should be applied through management regulations. The law often puts forward a set of principles that could be interpreted in different ways depending on the circumstances. Often it is up to the parties involved to decide how the law will be applied in practice. One of the goals of this workshop is to find a way to reconcile the different interpretations of the law.

Brenda Gaertner, Mandell Pinder

There's not much difference in DFO's and First Nations' perspective on basic principles on how far the law has gone in terms of consultation, but there is a difference in the way the law is applied, particularly when it's contrary to the history of policy and lobbying that DFO has traditionally answered to. How we change old and ensconced policies comes down to interpretation of the law, not actual law.

Justification of an infringement on aboriginal rights rests on 1) the existence of a compelling and substantial government objective (e.g. conservation), and 2) whether there has been proper consultation

and accommodation with the rights holders (includes priority for FSC, minimizing the infringement, and fair compensation). In Brenda's view, conservation is the only government objective that could justify infringement by DFO.

Right of priority for food, social and ceremonial purposes

Brenda reviewed several cases that address the issue of priority. As these cases show, the challenges lies not with the law, but in how to effectively change DFO policies to meet DFO obligations.

R. v. Sparrow [1990] determined that the constitutional protection of aboriginal rights must be reflected in the priority by which resources are allocated. Crown obligations are described as follows:

"If in a given year, conservation needs required a reduction in the number of fish to be caught such that the number of fish available after conservation would go to the Indian s according to the constitutional nature of their fishing right. If, more realistically, there were still fish after the Indian food requirements were met, then the brunt of conservation measures would be borne but the practices of sport fishing and commercial fishing."

R. v. Nikal [1996] clarified that the Sparrow justification test is to be considered against a standard of reasonableness.

"So long as the infringement was one which in the context of the circumstances presented could reasonably be considered to be as minimal as possible then it will meet the test."

R. v. Gladstone [1996] emphasized that the justification test must be considered in the full context of the circumstances at issue.

"...priority under Sparrow's justification test cannot be assessed against a precise standard, but must rather be assessed in each case to determine whether the government has acted in a fashion that reflects that it has truly taken into account the existence of aboriginal rights."

R. v. Jack [1995] addressed the retention of Chinook by sport fishermen while the appellant was prohibited from harvesting the same fish for FSC purposes. The Court rejected DFO's position that their obligation to First Nations had been met when sport and commercial fisheries had "borne the brunt" of conservation, as evidence showed that preventing Chinook retention was a reasonable management option that DFO failed to implement.

In **R. v. Douglas** [2007], however, the Court ruled in favour of DFO when the appellants were charged with fishing for Early Stuart in-river during a time not authorized by a DFO license. The defence stated that their right was not properly accorded because DFO had authorized a marine sport fishery permitting retention of Early Stuart while there were restrictions on FSC. Under the standard of reasonableness as stated in *Nikal*, priority as required by *Sparrow* does not mean that FSC fisheries must precede or occur simultaneously with non-aboriginal fisheries, as DFO must consider the movement of the fish.

In **R. v. Joseph** [1990] the treaty right to fish was admitted for Tsawout (a Douglas Treaty band). The Court concluded that DFO's knowledge around FSC fishing was vague and imprecise at a time when both recreational and aboriginal fisheries were closed, and that the Chinook harvest fell short of the Tsawout band's needs. The Court stated that DFO failed to meet its priority obligation because it adopted a management strategy that applied reductions equally to all sectors. According to Brenda, the implication is that when FSC needs are not met, the full burden of conservation must be borne by commercial and recreational sectors.

R. v. Tommy [2008] considered the disastrous early timed Chinook fisheries in 1999 and 2000. While no commercial fisheries were authorized, DFO authorized a recreational fishery with a retention limit of 4 Chinook, despite the fact that estimates showed insufficient early timed Chinook to meet FSC needs. Where insufficient numbers are known in advance of the season, the Court is clear about DFO's obligation. The requirement for minimal infringement will not be met when aboriginal fisheries are closed while non-aboriginal fisheries remain open.

"... I am of the view that all of the available Chinook had to go to the First nations, regardless of the minimal impact the recreational fisheries may have had on the stocks. This was necessary in order to guarantee the appellants their constitutional right of priority to the fish in the circumstances that existed and were known to exist before the commencement of the 1999 fishing season. The appellants did not, in my view, receive priority when the DFO closed the aboriginal fishery while the sports and recreational fisheries continued to enjoy access to the Chinook, albeit on a limited basis."

With respect to non-retention recreational fisheries, Brenda stated that impacts are significant to conservation when DFO lacks effective monitoring. In her opinion, allowing non-retention fisheries during times of very low abundance is not consistent with the Honour of the Crown.

The Court considers overall stock allocation and conservation factors in order to determine if DFO adopted all reasonable management measures to meet FSC needs. In situations where the fish are so depleted that the overall catch falls short of meeting FSC needs, Sparrow requires that all fish go to FSC. Recreational fisheries opened on a retention basis in this case would offend the priority standard.

Summary of applicable principles:

1. The right of priority includes a right of priority in allocation after conservation, and where there is insufficient fish to meet FSC requirements, a right of priority in time (*Sparrow, Jack, Joseph, Tommy*).
2. The Courts have introduced a more nuanced analytical approach that is influenced by the reasonableness standard.
3. The interpretation of the priority obligation is fact sensitive.

Obligation to consult and accommodate within the context of fisheries management

The Crown is obligated to engage First Nations in a meaningful consultation process, and where appropriate, accommodate First Nations prior to implementing the infringing action. This obligation is rooted in the principle of the Honour of the Crown.

Consultation requires that the *process* by which the allocation of a resource occurs reflects the interests of aboriginal peoples; accommodation means the *actual* allocation of the resource resulting from consultation reflects these interests. Accommodation extends beyond economic interests (e.g. cultural interests), and can include the need to change government policy.

The obligation to consult and accommodate varies according to 2 factors: 1) the strength of case supporting the asserted aboriginal or treaty right at issue, and 2) the potential for adverse impact to that right. The obligation is triggered at a relatively low threshold (specific evidence of impact is not required).

Meaningful consultation should occur early in the process of program development in order to accommodate aboriginal concerns prior to final decisions being made. It also extends to the program implementation stage. Once the obligation is triggered, it must be determined whether the process and actions adopted by DFO are sufficient to discharge the Crown's duties.

Courts have determined that it is reasonable for DFO to rely on multi-tribal processes (e.g. Forum) for information sharing and receiving input from First Nations (*Ahousaht, Douglas*); this is often considered reasonable and sufficient in cases where the potential for adverse impacts to rights is not high. When the potential is high, however, bilateral consultation at the community level is often required.

Responsiveness is fundamental to consultation. Soliciting information is not sufficient; the Crown must take First Nations' input into account through measures and actions that address concerns (it is not required to agree to every request, but must seriously consider and address aboriginal interests).

Consultation is not a process through which to define or limit aboriginal rights.

Content of DFO's duty

Brenda discussed several points concerning DFO's duty to consult and accommodate First Nations:

Where there is a strong *prima facie* case and potential for serious infringement, consultation may require opportunity for submissions, formal participation in decision-making, and written reasons showing aboriginal concerns were considered and to reveal the impact they had on the decision (*Haida*).

While there is no obligation to agree – obligation for consultation continues throughout the permitting, approval and strategic planning stage (*Taku*).

Even where the case for title is not strong or the potential for infringement is minor, the duty may still require notice, disclosure of information, and discussion of issues raised in response to the notice (*Haida*).

Consultation with aboriginal peoples requires a distinct process from public consultation.

All information must be exchanged in a timely fashion to provide adequate opportunity to express interests and concerns.

Consultation must take place at the strategic and operational stages (*Haida*).

Consultation should begin in the earliest stages of the planning process.

Aboriginal Nations cannot avoid consultation, and must engage in process to the degree of obtaining necessary information and expressing interests and concerns. They cannot frustrate the process by refusing to participate or imposing unreasonable conditions.

Representations of aboriginal people must be seriously considered and demonstrably integrated into any proposed plan of action.

While aboriginal groups do not have a veto over actions pending final proof of rights and title, consent is appropriate in cases of established rights (*Haida*).

While there is no duty to agree (*Haida*), compromise is essential to the process of reconciliation (*Taku*).

Government may wish to adopt dispute resolution procedures with impartial decision makers (*Haida*).

It is open to governments to set up regulatory schemes to address procedural requirements, thereby strengthening the reconciliation process and reducing recourse to the courts (*Haida*).

Guidelines for fulfilling this duty include:

Providing full and timely disclosure of all relevant information to First Nations.

- Meaningful consultation depends on First Nations having access to information required to assess implications of proposed actions.
- “Deep consultation” requires aboriginal participation in decisions, which requires the same level and detail of information as DFO (participation could be compromised by information disparity).

Providing First Nations with a meaningful opportunity to engage.

- Opportunity must be provided sufficiently far in advance for First Nations to prepare a response, and for DFO to incorporate input into its proposed actions.
- Subject to timing restrictions that arise from rapid changes of in-season return estimates (where conservation concerns require immediate action, DFO may act without consultation).
- DFO must provide a meaningful forum in which to consult (multi-tribal processes such as the Forum supplemented by one-on-one bilateral sessions may meet this standard).
- In Brenda, view, the obligation to provide opportunity for engagement includes funding support.

Considering and responding to First Nations’ concerns and interests.

- DFO is obliged to seriously consider First Nations’ input and provide responses that explain their actions (or why recommended actions are not taken).

Demonstrably integrating First Nations’ concerns into proposed conservation and management plans (this is where consultation leads to accommodation).

- Accommodation measures depend on the nature and extent of infringement, First Nations’ expression of concern and recommendations, and reasonableness of proposed measures.
- Where rights are established, the Crown must justify any substantial infringement (through the Sparrow justification test and any other measures identified during consultation).

General steps to use as a starting point for discussions regarding the content of consultation and accommodation for Fraser River stock conservation and management:

1. Information gathering and sharing
2. Addressing interests and concerns
3. Seeking reasonable accommodation and concluding agreements and/or outlining decisions and disagreements.

DFO’s roles and responsibilities with respect to management of salmon fisheries

Sue Farlinger, Director of Fisheries Management, DFO Pacific Region

Sue expressed that DFO and First Nations need to avoid arguing about differing interpretations of cases and focus on implementation and how it relates to policy and fisheries management – what it means on the ground for communities, what it means to DFO in terms of policy and management changes, and what it means to fish and conservation.

Brenda's presentation contained a great deal of useful information on how to engage in a meaningful way, and what the outcome should be at the end of engagement. On the ground we have about 80 DFO resource management staff members, including a significant number of aboriginal fisheries staff. The work we need to do on consultation with First Nations is built into their work, which is complex because of the differences in species, geography, and governance between communities. It is estimated that 40-60% of time for aboriginal fisheries staff is spent on consultation. Lots of resources are being put into improving discussions, making DFO information available to First Nations, collecting information, and building understanding of First Nations fisheries. DFO is heavily invested in creating meaningful consultation opportunities, as we can't deliver on our obligation to First Nations without effective processes. For Fraser stocks, DFO must consider the overall process of fisheries management – how many groups of First Nations, what is the priority between First Nations, what are the differences in understanding and objectives for stocks between First Nations communities, etc. DFO must build understanding in these areas in order to make informed decisions, and to build honourable and deep consultation. While we might not always agree, we can work toward success in these areas.

DFO also needs to communicate within their own department as they participate in treaties, negotiate international agreements, etc.

We have invested significantly in building processes to improve information exchange understanding. A great deal of progress has been made over the last year.

All DFO employees are expected to uphold the Honour of the Crown. While we might not always agree, we must understand each other.

Forecasts allow us to come together to discuss "what if" scenarios, but actual decisions are generally made in-season when the salmon appear. Pre-season discussions help to establish a framework of options. A structure is needed to have discussions in-season when decisions are made; necessary adjustments and changes made in-season cannot be predicted during pre-season discussions. In a constantly changing environment, a process is needed to keep each other informed, and to respond to situations in a way that everyone can understand. This is a huge challenge in terms of communication. We need to build a process that allows us to address fluidity, with a resilient structure that allows us to build on bilateral discussions.

DFO needs to build internal capacity for facilitation and mediation, because the issues we're dealing with are enormously complex. This could be an area where DFO and First Nations could work together.

The PICFI program will only be around for the next 2 years, and then we'll be falling back on AAROM and AFS funds. We need to seize the opportunity we have now with PICFI to build a resilient process to sustain us into the future. The communications facilitation issue is a good place to start.

First Nations commercial fishing – PICFI and the allocation transfer process are 2 programs that provide economic access to First Nations. DFO does not control the market price of licenses.

Recreational fishing – Just because we don't agree on a solution doesn't mean we don't agree on various aspects of the problem. First Nations recommendations are added to the list of options put on the table, but the issue is very complex. Changes have been made to recreational and commercial sectors, and harvest has been reduced on weak stocks (e.g. Chinook). We have not agreed to close the sport fishery, but we need to work together to analyze the information about it. While there are things we disagree on, we can engage in more meaningful discussions to understand the implications of management actions, and to understand each other.

Discussion:

Ken Malloway expressed that the Lower Fraser has not had adequate opportunities to meet with DFO in a timely manner to discuss fishing plans. The IFMP from last year is still being carried on. He suggested that planning should begin much earlier instead of in June when the IFMP is finally ratified. Early timed Chinook fishing is almost finished before the IFMP is adopted.

Jeff Thomas expressed concern about the recommendation to close the sport fishery falling on deaf ears. First Nations agreed to stop fishing spring 4₂ Chinook, but the sport fishery remains open.

Brenda asked Sue to clarify how discussions occur around DFO options for management actions. First Nations provide input and receive a report from DFO after the fact, but do not have a clear understanding of the decision-making process. Sue replied that information is collected from First Nations and other stakeholders at various levels and brought together internally, back into a core group led by the salmon programs coordinator. It is then reviewed internally with science and management staff, making sure that options are evaluated in terms of priority, conservation, etc. These are all built into the IFMP, and DFO provides several opportunities for feedback at various stages. It then goes up through the various levels of approval in DFO (Sue's office, RDG, Deputy Minister and Minister).

2008 Chinook management

Mike Staley, FRAFS Biologist

Mike provided an overview of a case study agreed to by First Nations and DFO, which involved deep consultation on Chinook from a technical level. A group was convened to discuss a document brought forward to manage Chinook in 2008 in response to conservation concerns for early timed stocks. The group was called the Joint Technical Working Group (JTWG).

Early timed Chinook has been a concern for at least a decade, but the concern became more acute in 2008 (these stocks continue to decline). Management actions were proposed to reduce exploitation by 50% relative to 2006-07 fisheries. DFO claimed that these actions distributed the burden of conservation in such a way that the "brunt" was borne by groups other than First Nations. There was no process for First Nations technical staff to adequately understand the implications of these actions from a technical perspective.

The first draft of the 2008 post-season report raised many complex technical questions and concerns, including sparse data, information gaps, whether the available information was substantive enough to support conclusions, and whether priority was adequately addressed by DFO when reducing fisheries in all sectors (including FSC). In order to address these concerns, the working group was convened. It has been very useful in helping Mike and other technical staff to answer First Nations' questions in a more complete way.

As a result of the JTWG's work, it was determined that section on limitations and assumptions would be included in the final report, as well as data corrections and updates. The former evaluation method for early timed Chinook management actions will be discontinued and a new evaluation method will be implemented for spring 4₂, spring 5₂ and summer 5₂ Chinook.

A common database of background information is needed to ensure consistency in relevant data being used for analysis by both First Nations and DFO technical staff.

Concern for early timed Chinook has broadened to more stocks. Stock productivity is in serious decline. First Nations need to know whether their priority is being addressed adequately. From a technical perspective, it is difficult to try to answer those types of questions when First Nations and DFO have differing views on how priority should be implemented.

Discussion:

Violet expressed serious concerns about the declining stocks, and that First Nations concerns are not being heard by DFO. First Nations understand that the fish are disappearing, but DFO science and management actions are not solving the problem.

Howie Wright addressed the management issue ongoing infringement of rights for terminal First Nations. The Okanagan Nation jointly submitted a recommendation with DFO to move fish back into terminal areas. How much can you reduce FSC fisheries on spring 4₂s before you infringe on that right? How can we help to make those changes in other fisheries? We also need to address the issue of data limitations.

How good does the information need to be to ensure that rights are not infringed upon? Policy changes are needed to improve information, and it needs to happen more quickly.

Sue Farlinger expressed that DFO intends to take a longer-term approach to protecting and rebuilding south coast Chinook, as actions taken over the last few years have not improved returns. DFO will be looking to work with First Nations on that. In terms of monitoring, PICFI resources have been invested to make improvements across the board. There are stumbling blocks of putting the necessary mechanisms in place. This is a key element of improving management, and it needs to take place across all fishing interests, including First Nations. These types of improvements will help to improve data, and therefore improve decision making. Catch monitoring is a foundational piece in management, and needs to be improved coast-wide and in-river. Sue suggested connecting with the ISDF monitoring and compliance group.

Tony Roberts Jr. expressed concern about DFO's approach to the 4₂ Chinook issue. First Nations throughout the Fraser River and approach areas have agreed to conserve, yet sport fisheries continue to harvest these stocks. Fish need time to recover, and it's his obligation to conserve the fish for the next 7 generations of his people. He is concerned that DFO is able to ignore a recommendation that has been put forward by so many First Nations groups.

Neil Todd inquired as to whether DFO equates meaningful consultation with the term collaborative management (whether a collaborative management framework and a consultation process are one and the same from DFO's perspective). Sue replied that the answer is situation-specific; collaborative management is an extension of consultation. The effect becomes evident in the implementation of policy; both co-management and consultation will be more effective if we can develop a process to understand each other's information and perspectives.

Brian Wadhams expressed concern about the early Chinook runs in the Broughton Archipelago inlets. DFO needs to look at blanketing policies and processes and focus on rebuilding stocks. He has seen management plans at the local level that have been successful. First Nations have a great deal of experience in local rivers and streams. Sport fishing and fish farms remain serious issues.

Greg Wadhams commented on the issue of the cost of licenses on the coast. The cost of licenses is market-driven, but the market is driven by stocks that have crashed as a result of mismanagement. He also expressed a need for improved monitoring and test fisheries. We need tools to address conservation.

Barry Huber expressed that he senses the level of frustration in the room. While the answers are not easy to find, he believes the answers are there. Consultation needs to consist of more than just information sharing. We need to determine what elements are required for First Nations to have meaningful participation. Barry also echoed Sue's statement that DFO needs to build internal capacity for mediation, negotiation and facilitation. DFO is adjusting, and can realign priorities on how they engage with First Nations. If we agree on the framework for engagement and clarify responsibilities on both sides, we could sign a formal agreement that has broad support from both First Nations and DFO. Representation is a major issue that needs to be addressed as well, on both sides. From a technical perspective, we need to agree on a common data set and common understanding of the data; according to the Washington tribes, this technical aspect is the key to successful collaborative management.

Ken Malloway pointed out that our discussions are focused mostly on consultation, without addressing accommodation.

Saul Terry expressed serious concern about Chinook stocks. There are so few fish in some areas that there's no option left but to shut fisheries down. Fish need time to rejuvenate. First Nations need to hear a decision about DFO's plan for early timed Chinook. First Nations have already made the decision to shut down fisheries.

Brenda Gaertner inquired about the relationship between collaborative decision-making processes and the consultation process. If we build a collaborative decision-making process on higher level issues, and get clarity on how it feeds into consultation, it will help to clarify this relationship. First Nations need to understand DFO's goals around collaboration and consultation. Sue Farlinger responded that nobody in DFO has the right to delegate decision making authority. If we build an effective process to consult and

collaborate on designing a plan at a strategic and operation level, we're effectively created a collaborative management structure. That is DFO's intention.

A First Nations-only (Tier 1) session was held in the afternoon.

Day 2: March 31, 2010

A First Nations-only (Tier 1) session was held in the morning.

Brenda Gaertner, Mandell Pinder

Fundamental challenges exist with the institutionalized lack of trust between First Nations and DFO. DFO has failed to show First Nations that they are taken seriously as it relates to salmon, and that their concerns are being heard when decisions are made. For example, when First Nations expressed their absolute bottom line on 4₂ Chinook, DFO listed it as an "option" for Chinook management, but it remains unclear how that decision will be made. Management actions need to result in changes on the ground, and need to respond to First Nations' needs and concerns. First Nations need incentives to continue to work with DFO in these larger forums; incentives need to extend beyond funding capacity to include changes in decision-making about salmon management.

Recommendations:

- Continue to develop an understanding of how aboriginal rights and title can be honourably reconciled with DFO responsibilities.
- A clear commitment from DFO to focus on rebuilding stocks.
- More transparency around decision-making structures used by DFO, and who is making those decisions. (A lack of understanding about decision making makes First Nations feel isolated from management processes, which precludes the development of collaborative management structures.)
- Continue to build trust and change attitudes to show incentives on both sides. First Nations need to see DFO's willingness to change their decision-making processes; DFO needs to see First Nations' willingness to work together on matters of common interest to help them make decisions.
- DFO should not make decisions regarding 4₂ Chinook in isolation; First Nations should be engaged in the process. It would be an insult to First Nations if DFO made the decision themselves. The influence of commercial and recreational sectors on DFO is one of the main elements of distrust. Taking First Nations' recommendation to close all fisheries on 4₂ Chinook would be a positive step forward in building trust.

Kaarina McGivney, DFO

Kaarina expressed her appreciation for the comments, effort and discussion to bring forward these points. She agreed that there is a challenge in the lack of trust between First Nations and DFO. Trust can be built by working together and sharing information.

DFO appreciates the joint proposal put forward by First Nations in regards to 4₂ Chinook this year. Chinook management is complex, with many different stocks, timing overlaps, etc. We need to understand the implications for more abundant overlapping stocks. No exploitation on 4₂ Chinook could restrict harvest opportunities on other fisheries that First Nations are interested in. This issue will need to be explored through further discussion.

DFO has been working toward building a collaborative process, which will help to provide the incentives that Brenda Gaertner discussed. Proposals and suggestions from First Nations (individually and in larger groups) are taken seriously by DFO, but must be considered within the context of the whole fishery.

Kaarina reiterated Sue Farlinger's point about the DFO decision-making process – that substantial decisions are made by the Minister. Processes that we've developed provide input into that decision. With further discussion, DFO is willing to explain further who the decision-makers are at various stages. While the Minister is unable to attend meetings relating to the many decisions she has to make, but the process within DFO is that staff members attend meetings and bring information back.

Kaarina expressed appreciation that First Nations are working together to bring forward commitments on common issues. Bringing forward the broadly supported priorities will allow DFO and First Nations to work together through various issues. Sharing technical information and understanding the implications of management actions will come from further discussions and further collaboration. Perspectives gained from the Fraser watershed and approach processes are incorporated into DFO's decision-making process; issues are then raised in the context of overall management issues and how we can move forward effectively. We need to develop that collaborative process so we can hear your input and understand tradeoffs. DFO must also ensure that the interests of those not at the table are being considered.

DFO wants to meet with First Nations on the Chinook 4₂ issue to discuss the implications not only for other sectors, but for First Nations fisheries.

Kaarina expressed her hope that a willingness to work together and exchange ideas will help DFO and First Nations move forward together in salmon management.

Barry Huber, DFO

Barry has learned in his years at DFO and in life that we need to work together; walking away from responsibilities is not an option. As frustrating as it gets, we need to continue to improve. He expressed his optimism about working together. Now is the time to take advantage of the skilled people around the table.

Barry expressed his appreciation for First Nations' determination to save depleted salmon stocks, and acknowledged the comments made by Violet

Significant progress has been made over the last couple of years, with lots of good ideas. Now we need to move those ideas forward. The FRAWG group has been helping to move us forward, and build a process where we can continue to make progress. We need to reach a point where we can address stock management concerns, build action plans, and understand roles and responsibilities. We need to build linkages between the First Nations fisheries groups (FRAWG, ITO, FNFC, FRAFS, etc.), and address representation issues. DFO will clarify their responsibilities and identify decision makers, and will ask First Nations to do the same. The sooner this process becomes operational, the sooner we can make real change in fisheries management.

The ultimate question is how do we take these processes and make them work, for the fish and in the communities. We need to get the right people to the table and start getting into the details.

Discussion:

First Nations would like a response from DFO on the recommended moratorium on Chinook 4₂ fisheries.

Brenda Gaertner requested that DFO clarify their comments about decision making processes, and reiterated her recommendation to DFO that decisions related to 4₂ Chinook should be made with First Nations involvement. This is vitally important to keeping First Nations invested in working together to benefit the stocks.

DFO is currently in the process of putting together written responses to First Nations about the Chinook 4₂ recommendation. Decisions have not yet been made on lower river sport fisheries yet, but there will definitely be reductions. DFO wants to discuss this specific issue with First Nations.

Brigid Payne expressed her appreciation for the comments made. Many of the recommendations discussed in this workshop describe a fundamental cultural shift for DFO, and she advised that patience

is needed as this shift takes place. While the Chinook decision is critically important, she felt that it should not be positioned as a “make or break” issue, as timeframes are extremely short and process is already underway. There are many important decisions to follow, and we must acknowledge that we might not come up with full solutions for this year because of the short timeframe.

There are 203 First Nations communities in the province, and there are many cultural differences. The autonomy of each group has to be respected; First Nations might not always agree.

Saul Terry expressed his disappointment that DFO has not made a decision about 4₂ Chinook. Broad First Nations support was provided for a moratorium on fishing these endangered Chinook, but DFO will only commit to limited actions to curtail certain fisheries.

Responses from DFO Staff

Les Jantz explained that advisory process take place with different groups, and First Nations are engaged in bilateral discussions with DFO. Input from these tables feeds into the IFMP process, and goes to the Salmon Working Group, which meets several times a year. The Salmon Working Group is made up of area chiefs, leads in stock assessment, SEP, and the Salmon Coordinator (Jeff Grout). This group develops recommendations that go up to the Director of Fisheries Management (Sue Farlinger), then to the RDG (Paul Sprout), then to Ottawa to the Minister's office.

Les also explained the Chinook 4₂ issue from DFO's perspective. Management of the recreational fishery is a very complex process, and having the recommendation from First Nations to close all recreational fisheries impacting 4₂ Chinook within a 10-day timeframe is very difficult for DFO to do. In order to implement this type of management action, DFO would have to meet with groups, and be prepared to provide a rationale about why this action was taken. DFO receives different input from different groups that describes various stocks and timeframes. A meeting is needed to work through the recommendation, along with the available data to assess the impacts, and review proposals for actions for different fisheries.

Barry Huber recommended getting First Nations and DFO technical staff together to discuss the technical issues around 4₂ Chinook. The group could then report back broadly. A lack of communication on this issue will not help us to move forward.