

Communal Licence Handbook

**Aboriginal Fisheries
Department of Fisheries and Oceans
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TABLE OF CONTENTS

| | | |
|-----|-------------------------------------------------------------------|---|
| 1.0 | INTRODUCTION..... | 1 |
| | 1.1 Purpose of Handbook..... | 1 |
| | 1.2 Where to find updates..... | 1 |
| 2.0 | CONSULTATION..... | 1 |
| 3.0 | PREPARATION OF A COMMUNAL LICENCE..... | 2 |
| | 3.1 Types of Communal Licences..... | 2 |
| | 3.2 Where to find the templates..... | 2 |
| | 3.3 Specifics of drafting Communal Licences..... | 3 |
| | 3.4 Who is responsible for preparation of Licences..... | 4 |
| | 3.5 How to number/name a Communal Licence..... | 4 |
| | 3.6 Limitations and Conditions..... | 5 |
| 4.0 | ISSUING A COMMUNAL LICENCE..... | 7 |
| | 4.1 Who should review a Communal Licence..... | 7 |
| | 4.2 Who should sign a Communal Licence..... | 7 |
| | 4.3 How many copies should be prepared/ who gets one, etc..... | 7 |
| | 4.4 Distribution..... | 8 |
| 5.0 | AMENDING A COMMUNAL LICENCE..... | 8 |
| | 5.1 Appropriate circumstances for amending a licence... 8 | 8 |
| | 5.2 Variation Orders..... | 8 |
| 6.0 | TRACKING AND FILING SYSTEM..... | 9 |
| 7.0 | LICENCE QUALITY CONTROL..... | 9 |
| 8.0 | APPENDICES | |
| | 8.1 Legal Opinion - <i>Sparrow</i> | |
| | 8.2 Legal Opinion - <i>Nikal</i> | |
| | 8.3 Legal Opinion - <i>Jack, Jack and John</i> | |
| | 8.4 Legal Opinion - <i>Van der Peet, Gladstone, Smokehouse</i> | |

1.0. INTRODUCTION

1.1 Purpose of Handbook

The purpose of this handbook is to describe and standardize the licensing process. This will allow communal licences to be drafted, reviewed (if necessary), and issued efficiently and effectively.

1.2 Where to find any electronic updates to the Handbook

An electronic version of this handbook, as well as any future versions is located on the afs_neg drive at the address c_licenc\handbook\(\month&year) i.e. 10-97.

2.0 CONSULTATION REGARDING COMMUNAL LICENCES

Through negotiations with Aboriginal groups, DFO attempts to attain mutually agreeable arrangements that facilitate effective fishery activities. It is understood that these arrangements are reflected in the communal licences.

Where consultations with an Aboriginal community fail to produce an agreement on the quantity of fish to be taken and the conditions under which the community will fish for food, social and ceremonial purposes, DFO's policy is to issue a communal licence. This policy should be followed consistently. DFO's policy ensures that we have taken all reasonable steps to authorize the fishing activity and to specify the conditions that apply to it. As such, this is an important management tool and enforcement mechanism.

Where there is no AFS agreement in place and DFO "imposes" a communal licence DFO should be cautious in setting the conditions that will apply to the communal licence. Conditions attached to such a licence should be the minimum required to effect valid legislative objectives, such as conservation measures. Conditions should restrict the preferred harvesting methods, seasons, times and locations as little as possible. While licence conditions may specify that fish harvested under the licence are for food, social and ceremonial purposes, the conditions should not specify that fish may be used for only one of the purposes, nor should they specify the quantity of fish attributable to each purpose.

3.0 PREPARING A COMMUNAL LICENCE

3.1 Types of Communal Licences

Communal licences are issued to various aboriginal organizations to carry on fishing and related activities. In recent years specific versions of communal licences have been crafted to fit particular circumstances. Listed below are the different versions of licences which have been used within Aboriginal Fisheries.

- "Single species" communal licence: This template is used to licence a single species, typically salmon. It is used to licence all fisheries on the Fraser River and for the spawn-on-kelp fishery in the North Coast.
- "Multi-species" communal licence: This template uses separate schedules to licence a number of different species, for example salmon, herring, and shellfish. Typically it is used in the North and South Coast Divisions.
- "Supplemental" licence: This licence is required when food fishing occurs outside of the area described in the communal licence. This is approved due to the inability to achieve the required harvest under the existing communal licence.
- "Dry rack" licence is used exclusively to licence First Nations who are fishing in the Fraser Canyon.
- "Ceremonial" licences may be issued when fishing is restricted or prohibited due to management reasons when local stocks cannot support an open fishery but may not be threatened by limited effort. It is intended to allow fishing for ceremonial purposes only. Ceremonial licences are used almost exclusively in the lower Fraser River.
- "Interim" communal licences are generally issued to aboriginal organizations pending completion of negotiations. Legal counsel have made a few suggestions to keep in mind while carry out this type of licence. After issuing the initial licence any changes to that communal licence necessitated by subsequent negotiations would therefore be addressed by way of amendments to the licence. A further suggestion is that a cover letter could be drafted to emphasize to the aboriginal organization receiving such a communal licence that its conditions may be amended through negotiations.

3.2 Where to find the templates

The revised single and multi-species templates are available as Word documents on the Regional AFS_NEG drive.

Because of numerous small changes to the single species licence document, it is important that you draft single species Communal Licences using the new template rather than try to modify a licence created in a previous year.

Moreover, using templates ensures that the standard wording is relatively consistent.

3.3 Specifics of drafting communal licences

From an enforcement point of view it is critical that these Licences are accurate and available as much in advance of a Fishery as possible. It is also important that the format used to create the licences follows the accepted policies and procedures.

Key Points to Verify

- Organization

Communal licences should be issued to the same entity or organization with which DFO has entered into a fisheries agreement. AFS agreements "support" communal licences by providing evidence of consultation and agreement. If DFO enters into an AFS agreement with one organization but issues the communal licence to another, that link between the agreement and the communal licence may be lost.

- DFO Contact Name

Some of the communal licences contain a specific DFO contact for harvest reporting (e.g. Barry Rosenberger). Contact names can alleviate potential problems and they ensure that harvest information and other information can be disseminated.

- Shared Harvest Quantity

If there are multiple licences that make up the same allocation, each licence should contain reference to the other organization under the heading "Species Allocation" (i.e. the licences for the NWSFA and the NNTC contain reference to the other organization).

- Restriction Harvest

Licence conditions may specify the species that may be harvested under the licence, but should identify species that may not be taken only where this restriction can be justified.

- Designations

It is within the discretion of the band to determine who will be designated to participate in their fishery. Bands regularly designate non-members to fish under their communal licence.

- Consistent use of wording

It is important that words be used consistently in a document, particularly in licences and agreements or where words have been defined. If words are not used consistently, a court could conclude that similar versions of the same wording are intended to have different meanings.

For example, if both "Participant" and "participant" are used in an agreement, a court could conclude that the parties to the agreement intended that the two words would have different meanings (especially if "Participant" is a defined term). Similarly, if the words "the aboriginal organization" and the words "the First Nation" are used in a communal licence, a court could conclude that DFO intended to refer to different entities.

In order to ensure that communal licences are issued to legal entities, it is recommended that licences be issued to Indian Bands rather than to "First Nations". Nevertheless, the term "First Nation" or "First Nations" may be used as a defined term in a communal licence.

example: ABC First Nation means ABC Indian Band and its members

- Once a term is defined in a licence, only the defined term should be used thereafter (e.g. "TTC").

3.4 Who is responsible for preparing a communal licence.

Licences can be issued from either the Division offices or from the field offices.

3.5 How to number/name a Communal Licence.

Regional Numbering System

The following sequence demonstrates the numbering system:

e.g. **SCD-98-CER001/AMD01-Cowichan**

1. The first block of letters refers to the Division where the Aboriginal Organization is situated:

SCD - South Coast Division
NCD - North Coast Division
YT-NBC - Yukon Territory & and Northern British Columbia Division
FRD - Fraser River Division

2. The second block refers to the year.

98 - Calendar year of licence issue

3. The third block refers to the type of the licence:

CL - Communal Licence
CER - Ceremonial Licence
SUP - Supplemental Licence
DR - Dry Rack Licence
INT - Interim Licence

4. The number associated with the licence (**001**) are sequential within each of the Divisions. You must use three digits (i.e. 001 not 01 or 0001). SCD has assigned numbers geographically to each band. FRD was assigned blocks of numbers according to geographical location so that the upper river uses 000-099, the mid-river uses 100-199, and the lower river uses 200-999. NCD assigns a number to each group prior to issuing the licences and then used these numbers as needed. In the Yukon, the licences are assigned numbers chronologically as they are issued.
5. The fifth block **\AMD01** is used to reflect the number of amendments that a specific Communal Licence undergoes mid-season. The number is sequential., so that 01 is the first amendment, 02 is the second, etc. You must use 2 digits (i.e. 01 not 1 or 001).

Note: The **\AMD01** is not used until the original licence has changed

- If a communal licence replace in-season a new "CL" number would be assigned and the previous amendments may be incorporated. At this point, any amendments to this new licence would be numbered starting at "AMD01".

6. The final block lists the name of the **Aboriginal Organization or First Nation**

3.6 Limitations and conditions

Communal licences issued to Aboriginal organizations must be consistent with the principles set out in the Sparrow decision. Where licence conditions infringe an aboriginal or treaty right to fish for food, social and ceremonial purposes, they must be justified in accordance with the test set out in the Sparrow decision. The concept of "reasonableness" forms an integral part of this test.

The requirement to have a licence does not in and of itself infringe an Aboriginal right to fish protected by section 35 of the *Constitution Act, 1982*. However, it could be an infringement if the licence could only be obtained with great difficulty or expense or at locations many kilometres from a reserve.

Conservation is a valid legislative objective; fishing restrictions or licence conditions can be justified for reasons of conservation. An aboriginal right to fish must be balanced against the need to conserve the fishery stock. Conservation can include measures to reasonably increase the resource, not just maintain it.

Conditions must be developed in a manner consistent with principles set out by the Supreme Court of Canada in *R V Sparrow* to ensure that they are enforceable.

Two stages to test:

1. prima facie infringement of an aboriginal right must be established
2. determination as to whether there is any justification for that regulation or limitation.

Stage 1:

1. Are the licence conditions unreasonable?
2. Does the licence condition impose undue hardship?
3. Does the licence condition deny the holder of the aboriginal right his other preferred means of exercising that right?

Stage 2:

1. Is there a valid legislative objective (e.g. conservation) for the licence conditions?
2. Has the allocation of priorities after valid conservation measures have been taken given top priority to the aboriginal right to fish for food, social and ceremonial purposes?
3. Has there been as little infringement as possible to effect the desired result?
4. Has the First Nation been adequately consulted with respect to the licence condition?

Where an AFS agreement is in place for fishing for food, social and ceremonial purposes, conditions in the communal licence should reflect the agreement. Where an Aboriginal group agrees to the restrictions or licence conditions, it is likely that such restrictions or conditions would be justifiable, even where they infringe an aboriginal or treaty right to fish for food, social and ceremonial purposes.

The regulations also have specific provisions for persons fishing under a communal licence; for example, they are exempted from the requirement to hold a fisher's registration card or to register their vessel.

In some select instances, the communal fishing licence may include the opportunity for commercial sale where this has been negotiated as part of a negotiated agreement.

4.0 ISSUING A COMMUNAL LICENCE

4.1 Who should review a communal licence (and in which circumstances)

Aboriginal Fisheries Sector must consult with Fisheries Management Sector and Conservation and Protection Sector before producing a licence.

Legal Counsel may review the Licence if it contains unique conditions or raises other legal issues.

According to Operations Branch - Roles and Responsibilities document, C&P staff are required to review licences for enforcement needs and, if necessary, attend band meetings with AFS staff to explain and negotiate conditions of licences.

4.2 Who should sign a communal licence

Communal Licences do require a signature from fishery officers. In the past communal licences have routinely been signed by AFS officers who remain gazetted as fishery officers. This practice is not consistent with the Operations Branch - Roles and Responsibilities document that states only C&P fishery officers may sign these licences.

4.3 How many copies should be prepared/who gets one, etc.

A "true" copy should be sent to the First Nation(s) followed by copies to C&P, Fisheries Management and Aboriginal Fisheries in Vancouver.

5.0 AMENDING A COMMUNAL LICENCE

5.1 The different ways to amend a licence under the Fisheries Act and regulations.

Licences issued under the Fisheries Act and regulations may be amended in one of the following circumstances:

1. For the purposes of conservation and protection of fish (pursuant to section 22.(2) of the Fishery (General) Regulations;
2. Where the licence contains an error or was issued in error (pursuant to section 14.(2) of the Fishery (General) Regulations); or
3. On the request of the licence holder (pursuant to section 14.(1) of the Fishery (General) Regulations).

If amendments pursuant to section 14.(1) of the Fishery (General) Regulations are issued in situations where, for example, the quantity of fish specified in a communal licence is being changed, DFO has been advised to include a cover letter with the licence amendment to confirm that the amendment has been requested by the licence holder.

All schedules should generally be issued at the same time as the licence. In the event that a schedule is required to be added at a later date, the licence would be amended.

5.2 Variation Orders

It is important to note that an amendment to a communal licence does not have the effect of a variation order. In other words, if a close time, fishing quota or limit on the size or weight of fish is fixed by regulations, that close time, fishing quota etc. may only be changed by way of variation order under section 6 of the Fishery (General) Regulations. Accordingly, licence amendments cannot be used to permit, for example, fishing during a close time.

Occasionally, when estimates of run size drop below the spawning goal, it becomes necessary to close fisheries on very short notice. A variation order made pursuant to the Fishery (General) Regulations is made and signed by the Regional Director General. Variations orders are made to vary the closed time as set out in a specific regulation. In the case of the Fraser River, variation orders are sometimes used to manage fisheries however in most cases, they are used when the pre-season or in-season run estimate drops below the escapement goal and a modification of the fishing plan is urgently required. Therefore, in the Fraser River, variation orders are used to close and then when run estimates improve, reopen fisheries.

6.0 TRACKING AND FILING SYSTEM

6.1 Filing System

Two original copies are signed, so that the Aboriginal group retains an original as well as the issuing office.

A copy of the licence is sent to Regional office for filing and tracking. We will maintain a list of every licence sent to us, as well as maintaining a hard copy on file.

Communal licences, not drafts, must also be entered on the AFS_NEG drive for access by AFS staff.

A standardized system of record keeping for communal licences issued in the Region has been adopted i.e. the originals of all communal licences and amendments kept in binders in each Area AFS manager's office. Further a copy of every licence and amendment is to be provided to AFS Headquarters. From a legal perspective, it is important that originals, and copies, of communal licences be available and accessible.

6.2 Tracking System - Aboriginal Fisheries Information Database

An efficient user friendly tracking system has been developed in order to make data and information from Communal Licences and Agreements readily available to Aboriginal Fisheries, the Treaty Unit and other interested sectors. The tracking system is run using *Microsoft Access97*. It is recommended that staff seek out tutorials and/or training to enable themselves to fully utilize this application. Furthermore, the application does require certain software and hardware minimums.

7.0 LICENCE QUALITY CONTROL

Given the number of Communal Licences that Aboriginal Fisheries produces each year, a number of errors do occur throughout the drafting process. Reducing the overall incidence of errors is a high priority.

7.1 In-season Approach

The implementation of AFID should improve the ability to be aware of errors within Communal Licences on a Regional basis. The process of entering data into AFID will enable the individuals entering the data to identify inconsistencies, errors and omissions. The corresponding Implementation Officers should be notified in order to alleviate the errors.

7.2 Post-season Approach

Any errors that have resulted in enforcement issues or have created other difficulties during the fishing season should be identified. An invitation to C&P and Fish Management should be extended to make the process a more thorough one.