



IMPLEMENTATION MONITORING COMMITTEE



BULLETIN NO. 4

LAND SELECTIONS WITH PORTAGES, AND GENERAL GUIDANCE ON MFA INTERPRETATION

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Introduction:

This is the fourth Bulletin issued by the Implementation Monitoring Committee (“IMC”). IMC issues Bulletins to provide practical procedural and operational advice for the Entitlement First Nations (“EFNs”) and the Parties to the 1997 Manitoba Framework Agreement on Treaty Land Entitlement (“MFA”), in support of more effective MFA implementation and in hope of avoiding disputes going forward.

This Bulletin differs from the previous three in that it relies upon the first Adjudicator’s Decision ever rendered under the MFA’s dispute resolution provisions. On April 16, 2014, two weeks short of the seventeenth anniversary of the MFA’s signing, Adjudicator Mr. Laurie Cherniak rendered his decision report on IMC Referral File No. 2007-TLEC-005 respecting the Bunibonibee Cree Nation (“BCN”) Trout Falls and Wipanipanis Portage Selections: a dispute between the Treaty Land Entitlement Committee of Manitoba Inc. (“TLEC”) and Her Majesty the Queen in Right of Manitoba (“Manitoba”).

Due to the opportunity presented by this first formal legal scrutiny of the MFA, this Bulletin highlights not only the specific decision related to portage selections but provides the additional and undoubtedly more generally useful insight on how the MFA and its provisions were interpreted and relied upon by the Adjudicator when rendering his decision. As such, the Adjudicator’s words are used verbatim as much as possible in order to avoid adding additional layers of interpretation.

This Bulletin attempts to maximize its usefulness by distilling Mr. Cherniak’s thirty-eight page report down to its most salient points. Should the reader wish to better understand the Adjudicator’s reasoning, do not hesitate to refer back directly to the decision report which is well written and fairly easy to understand. As always, before relying upon the advice provided herein, it is advisable that the facts of each situation be compared to determine the applicability, and when in doubt consult legal counsel.

Topic:

MFA land selections that include portages, as well as general guidance on MFA interpretation.

The Dispute

In October 2002, BCN selected parcels of land along the Hayes River. Two of those selections (600 acres around Trout Falls and 319 acres around the Wipanipanis Portage) included portages intermittently used by canoeists to avoid waterfalls and rapids that are not navigable.

Manitoba did not have concerns with the selections themselves; in fact, Manitoba deemed the selections eligible, but expressed the desire “to meet with BCN to discuss the retention of the right of public access” to the portages “by way of an access easement¹ or possibly exclusion” (page 25) of the decision. Ultimately, Manitoba’s position was that MFA subsections 3.01(4) and (5), “provide it with the right to raise the issue of a compelling public interest to protect the portages in question” (page 5).

TLEC’s view was that those subsections do not apply and once Manitoba accepted the selected lands as eligible to be set apart as reserve in partial fulfillment of treaty obligations and the MFA, “it cannot put conditions on that process” (page 5).

In accordance with the MFA dispute resolution provisions, the disputing parties, as coordinated by the IMC Chairperson, posed a series of questions to the Adjudicator. Therefore, the actual resolution of the dispute at hand is in the form of answers to five questions (reproduced in their entirety in Annex A).

In the Adjudicator’s own words, “the issue ultimately revolved around whether or not the MFA allows for some form of reservation of the portages for public use that would be binding on BCN” (page 5). In reaching his decision, the Adjudicator was required to review and interpret the MFA, and in particular determine the meaning of subsections 3.01(4) and (5), among others. The various assumptions, interpretations, and conclusions made by the Adjudicator may serve as guidance for the EFNs and the Parties going forward.

Adjudicator’s General Assumptions, Interpretations and Conclusions:

Although the Adjudicator found the MFA to be very carefully written, he also commented on how difficult it can be to interpret due to its detail and complexity, and provided the following assumptions, interpretations, and conclusions that may be useful going forward:

- A. Contract interpretation begins with an assumption that the Parties intended every word in the order in which the words appear and that there is no excess verbiage, illustrating that the contract has been carefully written. “It is clear that in this case the assumption is factually true”, and therefore “every word in the MFA is to be given a meaning” (page 13).
- B. Conversely, “words that are not in the MFA are intended not to be there” (pages 27 - 28).
- C. The MFA Preamble states the Parties’ intentions for developing and agreeing upon the MFA. Therein, Canada acknowledges the land shortfalls that persist for EFNs in fulfillment of treaty, and agrees to address those for each EFN in the manner and to the extent provided in the MFA. For its part, Manitoba acknowledges its obligations to Canada under the *Manitoba Natural Resources Transfer Act* and agrees to satisfy them in the manner and to the extent provided in the MFA.
- D. “The purpose of the MFA is to define a process to facilitate the selection or acquisition of land by an EFN which will become part of its reserve in fulfillment of the treaty obligations

¹ Although not clarified in the quote, this would presumably be an access easement agreement that would be converted to an instrument under the *Indian Act* upon transfer of the land from Manitoba to Canada.

that Canada undertook over a century ago. The purpose of the MFA can be used to facilitate the interpretation of the MFA” (page 16).

- E. MFA Article 2 provides EFNs the right to select and acquire land in accordance with the Principles for Selection and Acquisition of Land set out in MFA subsections 3.02 through 3.10 inclusive and including the other provisions of the MFA incorporated into those sections. “If that land is selected in accordance with the Principles, it shall be eligible to be set apart as reserve land. There is a mandatory aspect to this” (page 16).
- F. “Clearly the Principles set out in sections 3.02 to 3.10 inclusive must be considered paramount” (page 17) in determining eligibility of EFN land selections and acquisitions.
- G. Portages are mentioned in the definition of Crown Reservations in subsection 1.01(21). “The inclusion of public access to portages in the definition of Crown Reservations shows that the parties were aware of the issue of the right of public access to portages when they entered into the MFA” (page 27). The fact that portages are not mentioned in the Principles set out in subsections 3.02 through 3.10 means that portages “were intended to be excluded” (page 28) from the Principles.
- H. “When land is selected and Canada and Manitoba confirm that the land is eligible to be set apart as Reserve in accordance with the Principles”, and Manitoba is in receipt of the surveyed legal description of that land from Canada, then “Manitoba is obligated to transfer to Canada all interests of Manitoba in that land, including any Crown Reservations ... which Crown Reservations include the right of public access to portages” (page 28).

In the context of these assumptions, interpretations and conclusions, the Adjudicator turned to determining the meaning and application of subsection 3.01(4) and (5).

The Meaning and Application of MFA Subsection 3.01(4) and (5)

In turning to determining the meaning and application of subsections 3.01 (4) and (5), the Adjudicator states that “the purpose of the MFA ... is to facilitate the selection or acquisition of land by an EFN” and therefore these subsections “should be read in light of that purpose” (page 30):

(4) The Principles may not address all of the issues or circumstances to be encountered and considerations affecting the Selection or Acquisition of land by an EFN.

(5) Any issues or circumstances encountered in and considerations affecting the Selection or Acquisition of land by an EFN which are not addressed by the Principles shall be addressed by the parties and the EFN to the extent that they are able, and if they are unable to resolve any issues or circumstances encountered in or considerations affecting a Selection or Acquisition to the satisfaction of any party or the EFN, Section 3.11 shall apply.

The Adjudicator states that “the dispute resolution process that has culminated in this adjudication allows me to consider only matters that meet the description in 3.01(4)” (page 21). He notes that “both parties take for granted that the question was simply whether the issue of the portages had been considered in the MFA”, and calls this the “standard interpretation of the

subsections” (page 17). TLEC’s position was that the issue had been considered, whereas Manitoba’s position was that it had not. The Adjudicator then provides an in-depth analysis of the subsections to determine whether the question is as clear as this.

The analysis begins with a determination that the use of all three nouns (**issues**, **circumstances** and **considerations**) and verbs (**encountered**, **affecting** and **address**) in the two subsections “is intentional” (page 19) and therefore each must be read as being different from the others. Using the various dictionary definitions, he attempts to provide clarity on the meaning of these six words.

He interprets “**issue** as being some important idea or concept that is in contention between parties; and **circumstance** as being a fact that has a significant effect on something to be done” (page 19), and that both of these must be **encountered**, “meaning to come across by chance or meet in an adverse way” and that “was neither already considered nor reasonably foreseeable at the time the MFA was entered into” (page 20).

Similarly, he interprets “a **consideration** as being an important fact or idea which reasonably ought to be taken into account in making a decision” (page 19), and that it must have an **affect**, “meaning to have a significant influence or have a material effect” (page 20).

“In addition, any of these issues or circumstances encountered, and any consideration affecting the selection or acquisition of land by an EFN must also not have been **addressed** in the Principles”, meaning “matters to which attention was directed ... or were reasonably foreseeable” ... “at the time of the signing of the MFA” (page 20).

The Adjudicator then substitutes the dictionary definitions for these nouns and verbs, and recasts subsection 3.01(4) as follows:

“The Principles may not have directed attention to points in contention, or facts that have arisen, after the time of entering into the MFA, or that the Parties did not deal with, or that were not reasonably foreseeable, at the time of entering into the MFA, or may not have directed attention to matters which are significant and which have a material effect on the selection or acquisition of land by an EFN, if such matters were not considered or could reasonably have been considered, at the time of entering into the MFA” (page 21).

The Adjudicator acknowledges that this recasted subsection “goes beyond the standard interpretation” (page 21), and commits to providing his decision using both the standard interpretation and his own interpretation based on the recasted subsection. The main differences in the two interpretations are that the standard interpretation “does not invoke the purpose of the MFA or include the notion of reasonable foreseeability” (page 31).

In turning his attention on the application of the subsection, the Adjudicator concludes that “if raising such a matter would facilitate the selection or acquisition of land by an EFN, then any party could raise the matter” (page 30); however, if raising such a matter would be contrary to the purpose of the MFA, and thereby hinder or delay the selection or acquisition of land by an EFN, then there is an evidentiary burden on the party raising the matter to prove that both these conditions exist:

- a) the matter is important and significant, and therefore a “compelling public interest” (page 30), and

- b) the matter is “something not contemplated by the parties or reasonably foreseeable when they entered into the MFA” (page 30).

Furthermore, that evidentiary burden weighs “heavier on Canada and Manitoba” than on an EFN, because “it is probable that anything Canada or Manitoba raised would hinder or delay the selection and acquisition of land” (page 31), whereas an EFN would be unlikely to raise anything that would hinder or delay that process.

In Annex B a chart is provided for triggering rights under subsections 3.01(4) and (5), based on the Adjudicator’s interpretation.

The Adjudicator’s Decision

In summary, the Adjudicator ruled that even though “there has been a public right of passage over a portage on those two sites” (page 36) in question, “the protection of that public right of passage is not an appropriate basis for determining that the portion of the selection is not eligible to be set apart as reserve on any terms, including a form of access agreement” (page 37).

As a result, “Manitoba must fulfill its obligations under the MFA and transfer to Canada the eligible lands in question, including the public access to portages (one of the Crown Reservations to be transferred), for the benefit of the BCN” (page 33).

In explaining his decision, the Adjudicator states that “Manitoba has not met the required evidentiary burden” to show that the issue concerning public access to portages is something not contemplated by the parties. In fact, it was contemplated by the parties in the definition of Crown Reservations and the Parties chose to exclude it from the Principles. Therefore, Manitoba has “not provided a basis to invoke any right under subsections 3.01(4) and (5)” (page 31). He further “points out that even on the standard interpretation of subsections 3.01(4) and (5) — one that ... does not invoke the purpose of the MFA or include the notion of reasonable foreseeability — Manitoba has not been able to show that the Parties did not address the issue of public access to portages” (page 31).

Presumably to provide coverage if the decision had been appealed (which it was not), the Adjudicator provides an alternative finding should his interpretation of subsection 3.01(4) be wrong and the existence of a compelling public interest is alone sufficient to invoke rights under subsection 3.01(5). He states that “Manitoba has not established that the issue of public access to the two portages is a compelling public interest” (page 32). More specifically, he found that “access to recreational portages, and in particular these portages, is not sufficiently compelling or significant so as to become an issue, circumstance, or consideration not addressed by the Principles” (page 32). On balance, “the right of an EFN to the fulfillment of Canada’s treaty obligations ... overwhelmingly defeats ... the convenience of a select and historically small group of highly experienced boaters to have a short rather than a long portage (page 33).

Other Issues Raised in the Adjudication

The Adjudicator states that he is unable to “extend the concept of the Honour of the Crown to the point of saying that the Crown cannot raise a legal issue which may have merit”.

Furthermore, he determined that Manitoba's position was "not vexatious or abusive, and it was grounded on an interpretation of the MFA which was neither absurd nor deliberately done to delay matters" (page 34). He also states that "the Honour of the Crown was in fact fulfilled by entering into the MFA" (page 29) for the purpose described².

In addition, he accepts "the concept that BCN is a nation and that it can be trusted to make decisions as a government"; however, "BCN has the right to make decisions in its own best interests" (page 35), and unlike Manitoba those are local not public interests.

² Note that the Adjudicator's Decision predates important Court Decisions such as *Canada v. Long Plain (et. al)* 2015 FCA 177, and as such the reader is encouraged to review IMC Bulletin No. 5 which more fully deals with the Honour of the Crown.

Annex A:

Verbatim Adjudicator's Answers to the Questions Submitted by the IMC

My answers to the questions submitted to me by the IMC are as follows:

1. Has Manitoba established the existence of "a public right of passage over a portage", which is a Crown Reservation under Article 1.01(21), in the following Selections? a. Site: 15-02 Trout Falls; b. Site: 20-02 Wipanipanis Portage.

- *Yes, there has been a public right of passage over a portage on those two sites.*

2. If the answer is yes to question 1, is the protection of that "public right of passage over a portage" located in the listed Selections an appropriate basis for determining that that portion of the Selection is not eligible to be set apart as Reserve, except under some form of access agreement that guarantees the continued "public right of passage over a portage"?

- *No, the protection of that public right of passage is not an appropriate basis for determining that that portion of the Selection is not eligible to be set apart as Reserve on any terms, including a form of access agreement.*

3. Can Manitoba assert an additional consideration (in this case, a "compelling public interest") not expressly contemplated by the terms of the MFA in determining eligibility of a Selection? Specifically, is the MFA subject to consideration and application by Manitoba of a "compelling public interest" in maintaining a "right of public access over a portage" as asserted by Manitoba? a. If so, what is the definition, criteria for determining, and information that must be provided by Manitoba when asserting a "compelling public interest" in these circumstances?

- *No, the MFA is not subject to consideration and application by Manitoba of compelling public interest in maintaining a right of public passage over a portage.*
- *In addition, the public interest in maintaining a right of public access over a portage is not a compelling public interest.*
- *Although the concept of a "compelling public interest" may be necessary, it is not in and of itself sufficient to allow a matter to be dealt with under subsections 3.01(4) and (5).*
- *Under subsections 3.01(4) and (5) to the MFA any issues or circumstances or considerations which will facilitate the selection or acquisition of land by an Entitlement First Nation and which do not appear to have been addressed in the MFA may be raised.*
- *Under subsections 3.01(4) and (5) to the MFA any issues or circumstances or considerations which will hinder or delay the selection or acquisition of land by an Entitlement First Nation may be raised only if:*
 - *Such matters are compelling or significant and are in the public interest, and*

- *Such matters were not considered by the parties or were not reasonably foreseeable at the time the MFA was entered into. The burden of proof is on the party raising such matters.*

4. If the answer is yes to questions 2 or 3, what legal instrument and what content in that legal instrument is appropriate to guarantee the “public right of passage over a portage” after the Selected lands have been set apart as Reserve?

- *The answers to questions 2 and 3 are no. Therefore no legal instrument is appropriate. If the BCN wished to pass a Band Council Resolution providing public access, that might be a gracious thing to do, but it is not required to do so.*

5. Is the “Honour of the Crown” at risk where additional considerations not expressly contemplated by the MFA (such as the existence of a “compelling public interest” regarding a “public right of passage over a portage) are being asserted by a Party?

- *No, the Honour of the Crown is not at risk in this particular case, subject to any issue as to costs.*
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Annex B:

Triggering Rights Under MFA Subsections 3.01(4) and (5)

1. Does raising the matter facilitate the selection or acquisition of entitlement land by an EFN?

YES: Any party may raise the matter.

NO: The party has an evidentiary burden of proof related to steps 2 and 3.

2. Is the matter important and significant, and therefore a compelling public interest?

NO: There are no rights triggered under 3.01(4) and (5).

YES: Provide evidence, and proceed to step 3.

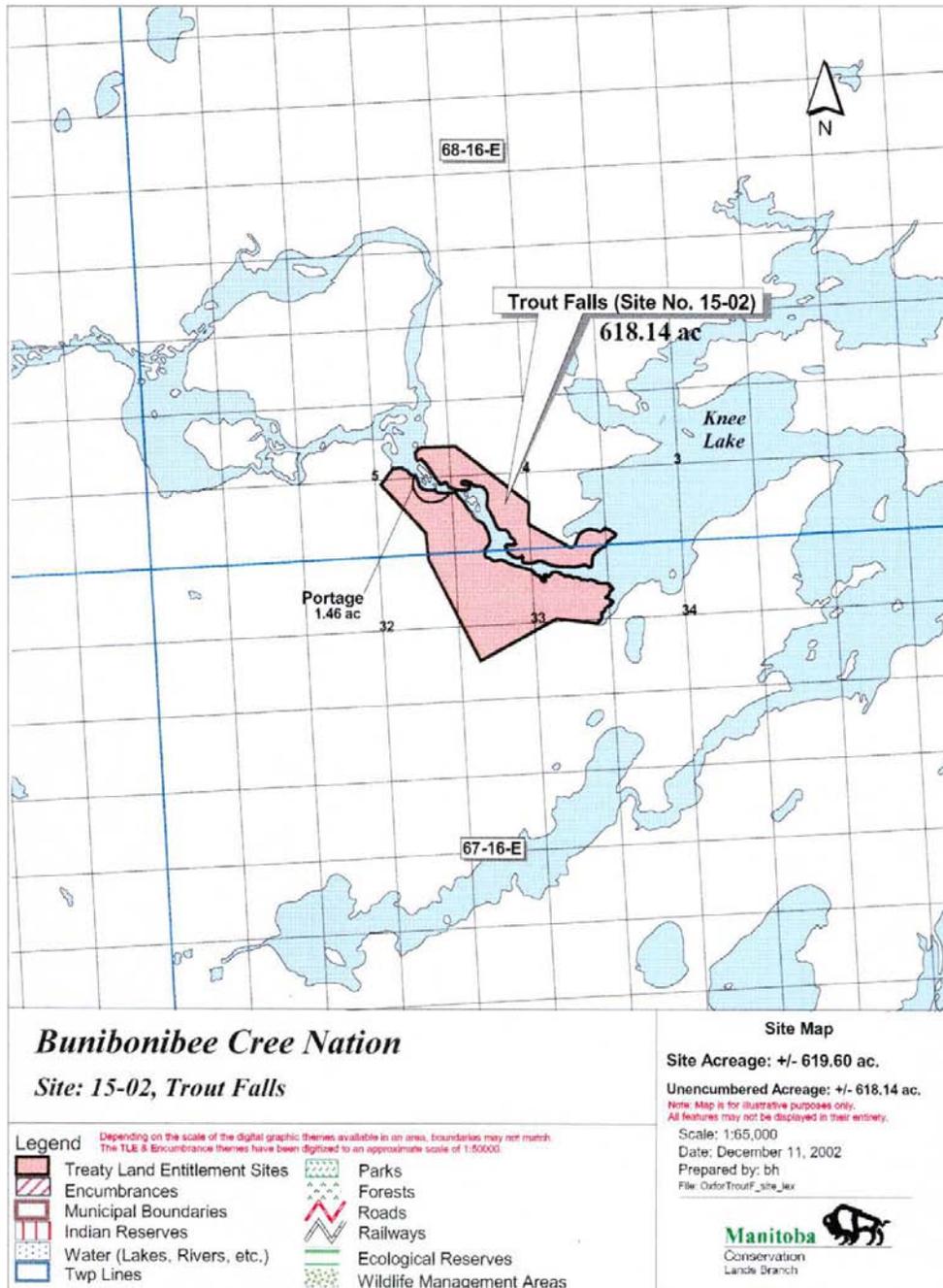
3. Was the matter contemplated by the Parties, or reasonably foreseeable, at the time of signing the MFA?

YES: There are no rights triggered under 3.01(4) and (5).

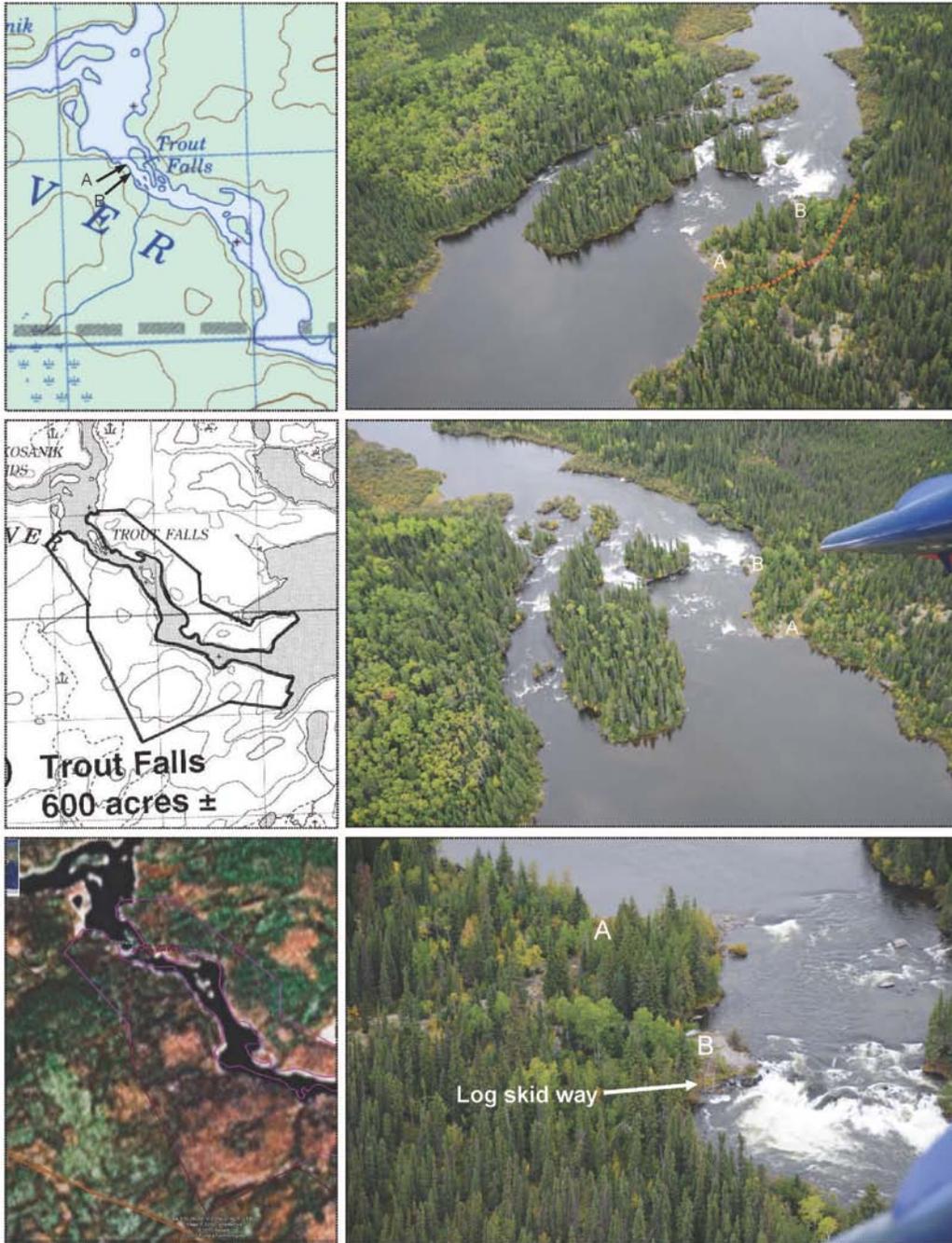
NO: Provide evidence, and invoke rights under 3.01(4) and (5).

Annex C:

Maps and Photos of BCN Trout Falls Selection



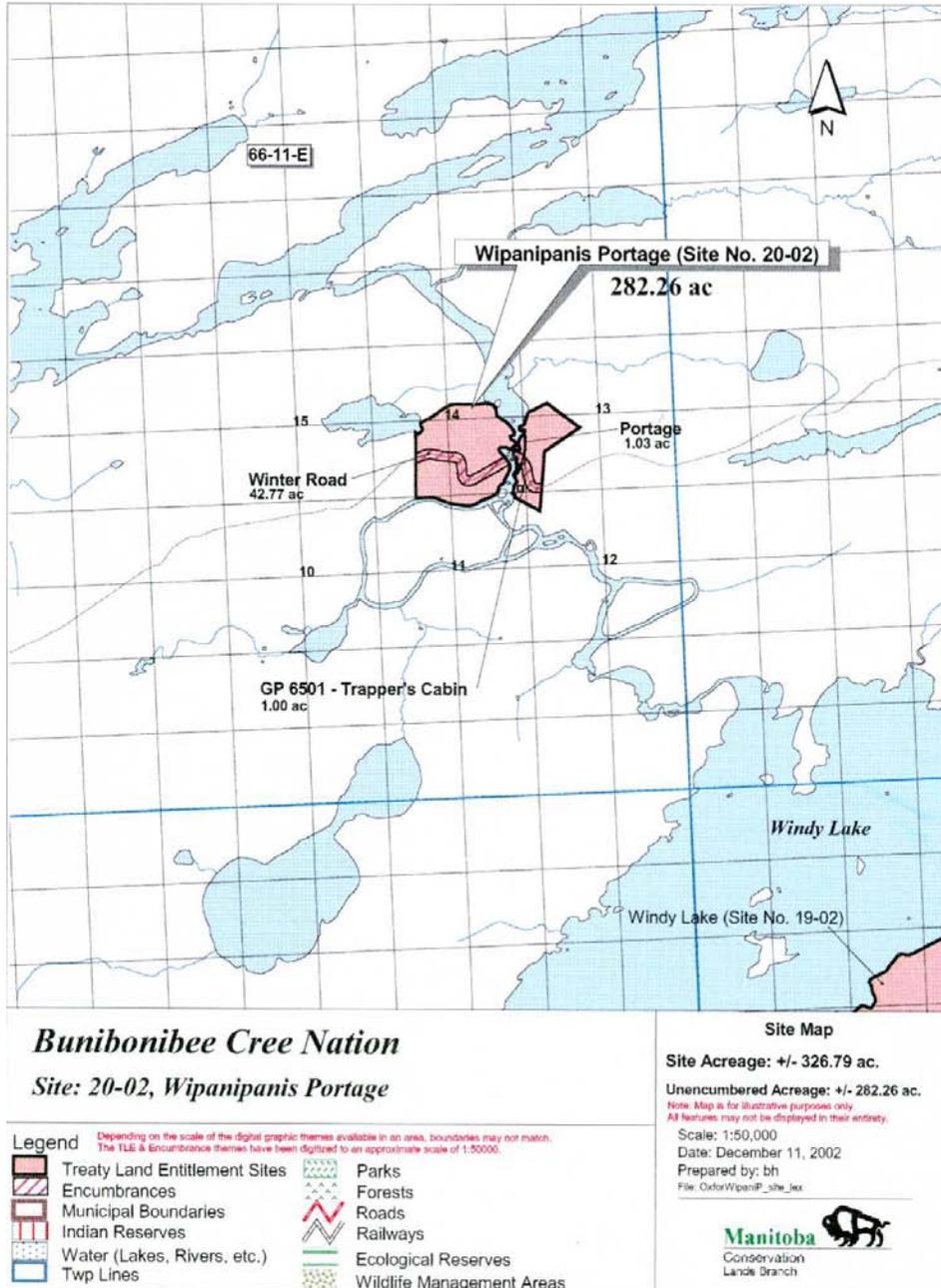
Site No. 15-02 - Trout Falls - Bunibonabee Cree Nation Selection



The photos were taken on September 9, 2010. Water levels were exceptionally high after frequent and heavy rains during the later part of August.

Annex D:

Maps and Photos of BCN Wipanipanis Selection



Site No. 20-02- Wipanipanis Portage - Bunibonibee Cree Nation Selection



The photos were taken on September 9, 2010. Water levels were exceptionally high after frequent and heavy rains during the later part of August.