

PETER GRANT & ASSOCIATES
M E M O R A N D U M

TO: Chief Judith Sayers

FROM: Peter Grant

RE: Hupacasath Consultation in Accordance with Court Decision

I would like to recommend that you stress that Judge Smith in the *Hupacasath* decision made significant findings of fact. These include the following:

1. Hupacasath have names which pre-date contact for places found throughout their traditional territory.
2. Hupacasath have traditional use of the traditional territory for hunting wildlife (including deer and marmot), gathering food and medicinal plants, fishing for trout and salmon (a mainstay of their diet), and harvesting red and yellow cedar for numerous uses, including the building of houses and canoes.
3. Hupacasath have visited sacred sites throughout their traditional territory for spiritual purposes and continue to do so. One particularly important site is Grassy Mountain, which is in the Removed Lands and has never been logged.

The Judge found that this evidence of traditional use was not contradicted.

It is of significance that the Court found that although there are “overlap claims” to the Hupacasath territory, about 40% of the Removed Lands “is not subject to any competing claim from other First Nations”.

Prima Facie Case

1. The Court found that Hupacasath has “a strong *prima facie* case for aboriginal rights including title with respect to the portion of their asserted traditional territory on the Crown land which is not subject any overlapping claims.”
2. The Court found that Hupacasath has a *prima facie* case for aboriginal title to the portion of Crown lands subject to the overlap.
3. The Court found that Hupacasath have a good *prima facie* case for aboriginal rights to hunt, fish, gather food, harvest trees, and visit sacred sites within the portion of their territory on Crown land in which there are overlapping claims.

Petitioners' Rights on the Removed Fee Simple Lands

The Court found the following:

1. The Petitioners have a *prima facie* case for aboriginal rights to hunt, fish, gather food, harvest trees and visit sacred sites on their asserted traditional territory “subject to the rights of the fee simple owner of that land to prohibit their access”. The Court made no distinction between those portions of the Removed Lands in which there are overlapping claims.
2. A *prima facie* case for aboriginal title with respect to the portion of traditional territory in the Removed Lands not subject to overlapping claims.

What is your focus in consultation? Based on the summary of areas you wish to cover in consultation, this is all based on the issue of where you have aboriginal rights. Therefore, the aboriginal rights to hunt, fish, gather food, harvest trees, and visit sacred sites are based on a *prima facie* case on the Removed Lands. For this reason, it is not necessary for you to prove the “strength of claim” with respect to those lands or those rights.

Stage of the Consultation

Unlike most cases in which the Crown is implementing the forestry consultation policy guideline (which is out of date on the basis of the caselaw), there is no court decision such as there is in the Hupacasath case.