

**Strategic Policy**  
**Approaches to Accommodation**  
**Ministry of Forests**  
Final Draft  
July 31, 2003

**1. Scope**

This policy applies to the Ministry of Forests in respect to provision of opportunities to First Nations for access to timber and revenue sharing. The application of this policy may change as a result of court decisions. The establishment of a treaty will supersede the provisions of this policy.

**2. Policy**

In consideration of the provincial objective to create certainty on Crown lands and promote economic development by addressing asserted aboriginal rights and title, it is the policy of the Ministry of Forests to provide access to timber and revenue sharing through a negotiated agreement with a First Nation. This access will be provided on the basis of identified volume and revenues as outlined in this policy.

**3. Background**

In the Speech from the Throne on February 11, 2003, the government announced its intention to pursue two specific initiatives with First Nations. Firstly, the government announced that it would pursue revenue sharing with First Nations. Secondly, the government also announced that it would seek to create greater opportunities for First Nations to participate in the forest sector, specifically through access to timber.

The courts have held that First Nations' aboriginal title and rights in respect of land and resource use are recognized and affirmed under Section 35 of the *Constitution Act, 1982*. Aboriginal title, where it exists, has been determined by the courts to have an economic aspect. Recent legal decisions (Haida, Skeena) have determined that an obligation of the Crown exists to seek to accommodate potential First Nation aboriginal rights and title interests when making forest management decisions. In this paper, the term "aboriginal interests" is used to refer to potentially existing but unproven aboriginal rights and/or title.

The uncertainty created by unresolved aboriginal rights and title negatively affects British Columbia's investment climate. This situation has adversely affected the value of Crown lands and resources and provincial revenue. In response, the government of British Columbia has developed a framework to ensure the appropriate, consistent, and fair application of accommodation measures including:

- Accommodation should provide a clear and demonstrable economic benefit to British Columbia;
- Accommodation should contribute to certainty with respect to the management and development of Crown land and resources;
- Accommodation should be undertaken when there is evidence of a sound claim to aboriginal rights and/or title;
- Accommodation should be acknowledged as a fulfilment by the Province of a legal obligation;
- Accommodation should be founded on a sound business case and increase First Nations' stake in the economy; and,
- Accommodation should be managed across government and Crown agencies in a manner that is consistent, fair and mindful of precedent.

This policy is consistent with the approved provincial framework.

#### **4. Policy Approach**

Court decisions have increased the requirements for the Ministry of Forests to consult with First Nations on a wide-range of forest and range management decisions. The Courts have indicated that if First Nations have a reasonable probability of aboriginal title, then the Province is obligated to seek to accommodate the First Nation for unjustifiable infringements of that title.

Further, if there is the potential that somewhere in the asserted traditional territory the First Nation has a prima facie (“on the face of it”) aboriginal title claim, and forestry and range activities/approvals cover significant areas within that territory so as to make it likely that they may unjustifiably infringe on as yet unproven aboriginal title, there may be a need to provide accommodation in respect to that possible infringement, even though the areas where that aboriginal title is a real probability have not been ascertained.

The uncertainty created by unresolved aboriginal rights and title negatively affects the ability of the Ministry of Forests to effectively manage the forest and range resources for the benefit of all British Columbians. This in turn affects the value of the forest resource and the flow of provincial revenue.

The uncertainty also creates a difficult operating climate for the forest industry in British Columbia. A key objective of this policy is to provide a stable operating environment for the forest and range sector in British Columbia. A stable operating environment will lead to a better investment climate and will maintain the value of the forest resource for all British Columbians.

The policy approach to implementing the accommodation strategy is to offer access to economic benefits (revenue sharing and access to timber) through negotiated agreements with individual First Nations. In exchange for the economic benefits, agreements will contain provisions that promote a stable operating environment for the forest and range

sector, including consultation procedures and terms indicating that the Province is providing workable accommodation of the First Nation's economic interests arising from forest and range decisions.

## **5. Eligibility**

The Province has introduced this initiative to respond to calls by the courts to seek to accommodate First Nations' interests in areas where First Nations have a reasonable probability of title. BC also wants to improve the provincial economy by enhancing operational stability. As such, there are two primary filters to determine eligibility for the initiative:

- a) the First Nation must have bona fide claims of unresolved aboriginal rights and title; and,
- b) forestry and range activities (including timber harvesting, tenure transfers, AAC determinations and operational planning) must be likely to impact potential aboriginal rights and title in the First Nation's asserted traditional territory. If there is no appreciable forestry or range activity in the area (i.e. in urban areas) then aboriginal title is not likely being infringed by the forestry and range activity.

Before engaging a First Nation under this policy, Ministry of Forests staff should assess whether the above two factors apply to the First Nation.

## **6. Forestry/Range Agreements**

Access to the revenue and timber volumes as outlined in this policy will be through a negotiated interim measures agreement between the Ministry of Forests and the First Nation (referred to as Forestry/Range Agreements). In order to enter into negotiations with a First Nation for a Forestry/Range Agreement (FRA), Ministry staff must receive a negotiating mandate from the Deputy Minister of Forests.

The Ministry of Forests is seeking to accommodate the economic aspect of First Nation's potential aboriginal title interests through the provision of economic benefits. The Ministry of Forests will seek to negotiate provisions in the FRA to facilitate consultation on operational planning and administrative decisions that may impact potential aboriginal rights and title.

Key objectives of the Ministry of Forests in negotiating FRA are:

- To outline the initiatives the Ministry of Forests is able to undertake to address aboriginal interests arising out of potential aboriginal title.
- To address legal obligations with regard to the economic aspect of potential aboriginal title interests and to seek to accommodate those interests through the provision of economic benefits;

- To develop consultation arrangements to address potential aboriginal rights and other issues the First Nation may have in relation to operational and administrative decisions; and,
- To provide greater certainty for forest and range tenure holders.

By accommodating the First Nation's interests, the Ministry of Forests is attempting to meet a number of objectives around certainty for forestry and range development. As such the key deliverable being sought by the Ministry of Forests in exchange for the benefits in a FRA is stability on the land base. As long as the FRA remains in effect and in good standing, provincial interests are being met.

The main components of a FRA are:

**a) Revenue Sharing**

The government has allocated funding in the Ministry of Forests' budget as follows: \$15 million in 2003/04; \$30 million in 2004/05; and, \$50 million in 2005/06. It is anticipated that funding will be available in future fiscal years.

The amount budgeted provides an implementation period in 2003/04-2004/05 that reflects the ability of the Ministry to negotiate agreements with a limited number of First Nations each year. In 2005/06, the government will have allocated the full amount available annually for forestry revenue sharing with First Nations in the pre-treaty environment. As a result, it is the policy of the Ministry of Forests that, should all First Nations participate in the initiative, each First Nation in the Province will receive an equitable share of the budgeted forestry revenue. The amount available for an individual First Nation will be set through a mandate provided by the Deputy Minister of Forests.

Funding allocated through a FRA is being provided to address the First Nations possible aboriginal title interests in the land. As a result, the Ministry of Forests is not requiring that funding be used to support any specific initiatives undertaken by the First Nation. The First Nation should be able to decide best use of the revenue source based on the needs of its constituents.

Notwithstanding the above, the revenue allocation must be used by the First Nation in a manner authorized by the First Nation government and may be subject to audit by the provincial government.

**b) Provisions regarding access to tenure**

Tenure Invitation

The FRA will include a provision that the Minister of Forests will invite an application for the First Nation for a timber tenure, where timber volume is available.

In the Spring 2002, session of the legislature, the government introduced Bill 41 (*the Forest (First Nations Development) Amendment Act, 2002*), which amended the *Forest Act* to allow the Minister of Forests to directly invite tenure applications from First Nations without competition. Tenures awarded under the accommodation policy will use the provisions of the *Forest (First Nations Development) Amendment Act, 2002*.

Invitations to First Nations under Section 43.5 and 47.3 of the *Forest Act* may only be made to implement or further a treaty-related measures, interim measures, or economic measures agreement. For the purposes of this policy a FRA will be considered an interim measures or economic measures agreement under the *Forest (First Nations Development) Amendment Act, 2002*.

Pursuant to the FRA, a Minister's invitation will:

- Include the details of the tenure type, term, volume;
- Request a business plan from the First Nation that demonstrates the viability of the business, without subsidies;
- Request that the First Nation demonstrate that the intended holder of the tenure is a person or other legal entity and has been appointed by the First Nation as its representative;
- State that the tenure will include a condition that the First Nation must comply with the agreement (or appendix to the agreement, as the case may be) approved by the Minister of Forests;
- State that the tenure cannot be transferred unless agreed to by the Minister of Forests; and,
- Establish a deadline for receipt of the application, business plan, and legal status information.

#### Tenure Type and Term

Tenures awarded under this initiative will be for a time period that corresponds with the FRA being negotiated with the First Nation. As these agreements will likely be short term (i.e. +/- 5 years) in nature, tenures offered under this program should be non-replaceable, subject to the renewal of the FRA. Initially the tenure will be offered in the form of volume-based licences, to provide flexibility to identify and access volume. Tenures awarded under this initiative will be non-transferable unless the consent of the Minister of Forests is obtained.

As the First Nation moves towards treaty, non-replaceable licences could be replaced by replaceable area based licences or could be transferred to form part of treaty settlement land. Any tenure would not form part of a constitutionally protected treaty agreement and will remain subject to the provisions of the *Forest Act*.

Tenure type, volume and term will be determined through the provision of a mandate provided by the Deputy Minister of Forests.

## Volume

Through this policy the Ministry of Forests is setting a target of 8% (about 5.6 million m<sup>3</sup>) of the provincial AAC to be held by First Nations.

The amount of volume available for First Nation tenures in a specific management unit will be based upon an assessment of:

- Volumes currently available for disposition including uncommitted AAC apportionment outside of the BC Timber Sales Program, AAC uplifts, lump sum volumes arising from cut control decisions, or temporary AAC opportunities arising from section 61 of the *Forest Act*;
- Volume that comes available as a result of the timber reallocation made as a result of the *Forestry Revitalization Act*, 2003;
- Existing or anticipated demands for tenure for other First Nations in the management unit under this policy;
- The size and nature of tenure(s) being considered (e.g. replaceable vs. non-replaceable, area based vs. volume based) and any re-apportionment that may be required;
- The availability of a suitable land base within the First Nation area of interest and any significant impacts of the removal of the land base from the existing management unit, where Community Forest Pilot Agreements and woodlots are being considered;
- The location of the First Nation community and areas of shared interest with other First Nations;
- Current operating areas for First Nations that hold harvesting agreements;
- Operational issues that may affect the nature and size of tenure opportunities that should be offered; and,
- Other demands and possible uses for the volume.

In some instances, additional volume may be made available due to temporary uplifts, or because the Ministry has been unable to negotiate a FRA in a management unit. Should this occur, the Ministry may use this volume to negotiate a FRA with another First Nation in the same management unit. Under this policy, First Nations will be eligible for a direct award of timber through the First Nation Forestry Agreement for a volume that is consistent with a mandate provided by the Deputy Minister of Forests.

## Current Tenures held by the First Nation

The Ministry may examine opportunities to “roll-over” tenure currently held by First Nations when sufficient volumes are not available to achieve the per capita target. For example, if the Ministry of Forests enters into negotiations with a First Nation that currently holds a 30,000m<sup>3</sup>/yr non-replaceable tenure, and the First Nation is eligible for a 50,000m<sup>3</sup>/yr tenure, the Ministry of Forests may provide 20,000m<sup>3</sup>/yr of “new” AAC and may commit to replace the 30,000m<sup>3</sup>/yr currently held by the First Nation when it expires, for a total of 50,000m<sup>3</sup>/yr. It is possible that some tenures could roll over with a lesser volume depending on the circumstance.

The Ministry may only take this approach if:

- The tenure held by the First Nation is non-replaceable;
- The timber volume that makes up the tenure is replaceable AAC; and,
- The tenure is not a licence issued under the BC Timber Sales program or its predecessor.

Furthermore, if a First Nation holds a replaceable licence, the volume attributed to that licence may be considered a contribution to the First Nation allocation in a FRA. This should only occur when it can be demonstrated that the tenure was awarded in a non-competitive process and there is documentation indicating that the tenure was awarded to address aboriginal interests expressed by the First Nation. If the volume exceeds the First Nation allocation under the model, then a FRA would not contain further tenure opportunities, and will focus on the revenue sharing component.

### **c) Provisions regarding consultation and accommodation**

#### *1) Accommodate the Economic Aspect of a First Nation's Potential Aboriginal Title*

With regard to Ministry decision-making, case law has made it apparent that the Ministry of Forests likely must consult on a number of administrative decisions to attempt to determine and seek to address aboriginal interests.

In negotiating FRA the Province is attempting to provide a vehicle for meeting its legal obligations as well as reducing the level of uncertainty regarding the administrative regime that supports the operation of forest and range tenures.

The FRA will contain clauses that indicate the government is providing economic benefits to accommodate the economic aspect of the First Nation's potential aboriginal title interests that may be infringed by the issuance of tenures and administrative or operational decisions made by statutory decision makers. As a result, the Ministry of Forests will, on an annual basis provide a list to the First Nation of the following administrative decisions that may affect the first Nations aboriginal interests during the term of the FRA:

- Decisions that set or vary Allowable Annual Cut (AAC) for a Timber Supply Area or a forest tenure,
- The replacement of forest and range tenures,
- The disposition of volumes arising from undercut decisions on a forest tenure,
- AAC apportionment and reallocation decisions,
- Transfer or change in control of forest or range tenures, including any associated reductions in AAC and exchange of rights, and
- The issuance or subdivision of a forest or range tenure.

In providing information on administrative decisions to the First Nation, the Ministry of Forests will attempt to address any non-economic interests identified by the First Nation, consistent with the Ministry of Forests' *Protection of Aboriginal Rights Policy*. The Ministry will commit to continue to consult on operational decisions that may impact potential aboriginal rights and, if appropriate other First Nation interests. First Nations will continue to have access to administrative and legal remedies.

2) *Commitments that disputes will be resolved through discussion as opposed to direct action*

The Ministry of Forests will seek commitments that a First Nation will not support acts of civil disobedience or other activities by its members that would obstruct or be aimed at negatively affecting forestry or range activities.

3) *Commitments by the Ministry of Forests to consult.*

The FRA may contain provisions around a consultation process. The Ministry will reaffirm its commitment to consult with the First Nation on operational planning that may impact potential aboriginal rights and other interests.

The FRA may include provisions for a consultation protocol that will provide for a process to address potential aboriginal rights and other interests that may be impacted by operational decisions.

The terms of existing interim measures agreements or protocols may be incorporated into the FRA. Alternatively, the Ministry may re-negotiate existing agreements to incorporate the provisions of this policy.

4) *Address issues of local interest*

With the agreement of the parties, other issues (such as road access) could be addressed through the FRA.

5) *Consistent with provincial legislation*

FRA will not require the government of British Columbia to act in a manner inconsistent with provincial or federal law, and will not fetter the authority of any government decision-maker.

**d) Provisions regarding term, suspension or cancellation of the agreement**

FRAs may be for a term of up to 5 years and will include provisions for the suspension and cancellation of the agreement. The First Nation may still use the court system to resolve disputes, although if the litigation asserts that the Ministry of Forests has not sought workable accommodation for any aboriginal interests,

the Ministry of Forests may suspend or cancel the FRA. The Ministry of Forests may also suspend or cancel the FRA should the First Nation support civil disobedience that interferes with forestry operations in the asserted traditional territory.

This policy has been adopted to address the accommodation of aboriginal interests in the pre-treaty environment. As such, the FRA will terminate upon the coming into effect of a treaty. However, components of the FRA may be superseded by a treaty-related measure at the time of Agreement in Principle. If this occurs, the remaining terms and conditions of the FRA will continue.

## **7. Application of existing provincial consultation policy**

Many First Nations may not feel that the offer presented by the Ministry sufficiently meets their interests. In situations where an agreement cannot be reached, Ministry staff should continue to consult with First Nations in a manner consistent with the Ministry of Forests' *Protection of Aboriginal Rights Policy*.

Any offer made to a First Nation, even if it ends up ultimately being rejected, will be made on a "with prejudice" basis. This means that if faced with litigation, the province will provide information to the court that an accommodation offer was made, and will inform the court of the terms of that offer. It is important that Ministry staff inform the First Nation of this fact.

## **8. Eligibility for other programs**

First Nations may request additional funding from the province to support capacity building and economic development initiatives. The accommodation package does not preclude the First Nation from being eligible for other provincial programs such as the Economic Measures Fund. Consistent with the terms of the program, First Nations should continue to be eligible to access the Economic Measures Fund to support business and economic development related initiatives.

Notwithstanding the above, the First Nation will be able to use the funds from revenue sharing to support its capacity development, economic development and participation in consultation processes. As a result, in the absence of alternative sources of funding, the Ministry of Forests will still expect that the First Nation will meet its obligations under the FRA.

## **9. Implications for Existing Direct Award Agreements**

The Minister of Forests has made a number of invitations for tenure applications under the provisions of the *Forest (First Nations Development) Amendment Act, 2002*, and has signed interim measures agreements in support of these invitations.

Existing agreements may be amended to include opportunities for revenue sharing as long as the revised agreement meets the terms and conditions of this policy. Amendment of the access to timber provisions of an agreement may not be required until the termination of the existing agreement.

## **10. Linkages to negotiations led by other agencies**

FRA will not limit the positions the parties may take in future treaty negotiations and will not recognize, affirm or deny the existence of aboriginal rights, including title.

There may be situations where other agencies are negotiating broader framework agreements around such issues as land use planning (MSRM) or interim measures (TNO). There may be potential for those agreements to incorporate references to processes of other Ministries including the Ministry of Forests.

The Ministry of Forests will look for opportunities to co-ordinate its accommodation initiatives with the initiatives of other agencies. However, any participation in co-ordinated initiatives should be approved by the Deputy Minister of Forests and should not adversely impact the ability of the Ministry of Forests to address its operational issues in a timely manner.

Negotiations led by other agencies should not commit to tenure or revenue sharing from the Ministry of Forests that is in addition to any contributions made through FRA.

Ministry of Forests staff will be required to participate in any provincial tracking system for accommodation initiatives.

## **11. Additional Opportunities for Timber Tenures**

This policy will not restrict the ability or discretion of the Ministry of Forests to use the provisions of the *Forest (First Nations Development) Amendment Act, 2002* and does not replace the interim policy on *First Nations Access to Timber Tenures Through Sections 43.5 and 47.3 of the Forest Act*.

In some situations, temporary timber volumes may become available. In situations where the Ministry wishes to use the *Forest (First Nations Development) Amendment Act, 2002* to award tenure, it must be made clear that this offer is not a FRA as outlined in this

policy and will not have a revenue sharing component. FRAs must be negotiated on the basis of the volume and revenue allocations as outlined in this policy.

First Nations may still apply for tenure through existing competitive processes, outside of the context of this policy.

## **12. Range Opportunities**

Range activities may unjustifiably infringe aboriginal title if title exists in a particular location, especially in the interior of the province. Any such range activities are considered to be addressed through the provision of the economic benefits provided under a FRA. In addition, the policy approach of accommodating potential title by offering revenue and access to timber may also be supplemented, where range vacancies exist, by offering access to grazing and hay cutting through section 14.1 of the *Range Act*.

Direct awards of up to 100 animal unit months or up to 10 tonnes of hay may be made to a First Nation; they must not be made to individual band members. Consideration must be given to participation in the ranching industry by non-aboriginals, and the impacts that direct awards of vacancies may have on third parties. In general these direct awards should be confined to permits of not longer than five years, rather than licences.