

First Nations Direct Award Forest Tenure Opportunities Guidelines

1. Table of Contents

I.	Introduction:.....	2
II.	Forest Tenures.....	2
III.	Forest Tenure Opportunity Agreements (FTOA).....	2
IV.	FTOA Mandates and Approvals.....	3
V.	Tenure - Revenue Sharing Linkages	3
VI.	First Nations Woodland Licence	4
VII.	First Nation Woodland Licence Considerations	4
A.	FNWL Eligibility	4
B.	FNWL Term	4
C.	Expansion Plan Pre-Assessment	4
D.	Sources of Replaceable AAC to Support the FNWL	4
E.	Joint Ventures	5
F.	FNWL Annual Rent and Annual Rent Rebate.....	5
G.	Compensation and Infrastructure Costs.....	5
H.	Determining the Area of FNWLs	5
VIII.	Replaceable Forest Licence Considerations.....	5
IX.	Appendix 1 - FNWL Expansion Criteria.....	7

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I. Introduction:

In March 2009, The Working Roundtable on Forestry report recommended First Nations should become full partners in the forest sector. A key ministry action in meeting this recommendation is by providing access to forest tenure opportunities through interim measures agreements.

II. Forest Tenures

Tenure is the mechanism by which the government authorizes harvesting rights to use Crown, or public, forest and range land and resources. First Nations, private forest companies, communities and individuals gain the right to harvest timber in public forests through tenure agreements with the provincial government. A forest tenure can take the form of an agreement, licence or permit. Each is a legally binding contract that provides the contract holder with specific rights to use public forests over a specific period of time, in exchange for meeting government objectives, including forest management obligations and the payment of fees including stumpage.

New opportunities for forest tenures are usually available through a competitive bidding process. In some cases, forest tenures may be awarded without advertising or inviting applications (direct awards) from First Nations for interim measures purposes.

For more information on forest tenures please refer to the publication titled “Forest Tenures in British Columbia” located at <http://www.for.gov.bc.ca/ftp/hth/external!/publish/web/timber-tenures/timber-tenures-2006.pdf>

III. Forest Tenure Opportunity Agreements (FTOA)

In accordance with the *Forest Act*, First Nations may be awarded forest tenures without competition, as part of an interim measures agreement, treaty related measures agreement or economic measures agreement. In the past, this was accomplished through Forest and Range Agreements and Forest and Range Opportunity Agreements (FRA and FRO) and through stand-alone agreements such as Mountain Pine Beetle Agreements, and other direct award agreements.

The FRO and FRA are being replaced with a Forest Consultation and Revenue Sharing Agreement (FCRSA) and this new agreement will no longer include direct award of forest tenure opportunities. Forest tenures will now be awarded in Forest Tenure Opportunity Agreements (FTOA), satisfying the requirement for interim measures agreements within the *Forest Act*. Two versions of FTOAs are available depending on the type of forest tenure:

- FTOA “A&B” – non-replaceable and replaceable volume based forest tenures (i.e. forest licence, forestry licences to cut)
- FTOA “C” – replaceable area based forest tenures (i.e. First Nations Woodland Licence)

The FTOAs include language acknowledging that the direct award of the tenure supports the reconciliation of aboriginal rights and title and assists to help First Nations meet the goals and objectives of the Transformative Change Accord. The FTOAs also describe important features

of the tenure, such as its location (if applicable), partnerships, specific licences that may need to be surrendered prior to the award of the new tenure, and other terms and conditions.

Forest tenures that have been issued as part of FRAs or FROs, whether the FRA or FRO has expired or not, continue to be in force in accordance with the licence agreement.

IV. FTOA Mandates and Approvals

In the following circumstances, FTOAs will require prior mandate approval prior to negotiations with First Nations:

- First Nation Woodland Licences;
- Community Forest Agreements and Woodlot Licences;
- Replaceable Forest Licences;
- Non-replaceable licenses using allocations of Mountain Pine Beetle uplift volumes available during a given time within a particular management unit (Timber Supply Area or Tree Farm Licence);
- Non-replaceable licenses using major licensee unused volumes (undercut and uncommitted volumes); and
- Any licenses associated with Treaties, Reconciliation Agreements, or Interim Treaty Agreements.

During the implementation of the Forest Revitalization Plan, over 2.4 million m³/yr of replaceable allowable cut was obtained from forest companies and allocated to certain First Nations. These allocations can continue to be offered, subject to apportionment decisions within respective management units.

The Minister will approve mandates for First Nation Woodland Licences (FNWLs) and Community Forest Agreements (CFAs). The Deputy Minister will approve all other mandate requests.

Following the approval of a mandate and a successful conclusion of a negotiation, the FTOA will be signed by the First Nation and forwarded to the by the Minister of Forests, Lands and Natural Resource Operations for approval.

V. Tenure - Revenue Sharing Linkages

The FCRSA is an agreement with First Nations that provides for a share of forest revenue from forestry operations within a First Nation's territory. A component of this new revenue sharing approach includes a share of stumpage paid from certain direct award licences issued to First Nations subject to a number of conditions:

- The First Nation must be eligible to sign a FCRSA;
- The portion of the licence stumpage will be shared proportional to the Bill 28 Allowable Annual Cut (AAC) allocation for each First Nation from Forest Revitalization unless mandates have been approved by Ministry of Aboriginal Relations and Reconciliation (MARR) to share stumpage in excess of these allocations.

- Eligible forest tenures must be appraised through the Market Pricing System (MPS). Thus, licences appraised with tabular rates (Community Forest Agreements and Woodlot Licences) are not eligible for revenue sharing.

VI. First Nations Woodland Licence

On June 8, 2011 the First Nations Woodland Licence (FNWL), became an area based, long term forest tenure unique to First Nations' interests in the land and resources. It includes the opportunity for the protection of traditional use practices, the harvest and management of non-timber forest products, and other potential future benefits if approved through future regulation. Unless otherwise approved, FNWLs will now replace CFAs and Woodlot Licences (WLs) as the preferred area based forest tenures available for First Nations.

However, the FNWL may not be the best fit in all situations. The FNWL will require both a strategic plan (e.g. management plan) and an operational plan (e.g. forest stewardship plan or a woodlot licence plan) and some First Nations may not be interested in undertaking this level of planning. Also, locating areas for these tenures will take a number of years to implement. In some situations, a replaceable forest licence might be more appropriate than a FNWL.

While the ministry and First Nations begin to move forward on the new FNWL, ministry staff have the ability to use current forms of volume based forest tenures. To improve these opportunities, licence terms may be longer than five years so long as the ministry is satisfied that there is sufficient allowable annual cut, and adequate timber supply in available operating areas.

VII. First Nation Woodland Licence Considerations

A. FNWL Eligibility

All First Nations are eligible for a FNWL, if they sign a FTOA, and if there is a source of replaceable AAC, and available operating area. However, unless otherwise approved by MARR, only First Nations who have a source of Bill 28 AAC from Forest Revitalization and can sign an FCRSA, can participate in the revenue sharing feature of this licence.

B. FNWL Term

Unless otherwise approved by the Minister, the FNWL term will be 25 years.

C. Expansion Plan Pre-Assessment

It is recommended that ministry staff undertake a scoping exercise to determine which First Nations could be considered for a FNWL. Doing so will help prioritize efforts where government objectives would be achieved, improve chances of success, ensure opportunities make sense on the 'landbase', and result in fair and equitable assessment of opportunities. Refer to Appendix 1 for potential FNWL criteria.

D. Sources of Replaceable AAC to Support the FNWL

Forest tenures that have been issued as part of a previous FRA and FRO, that include replaceable AAC may be converted to a FNWL. Competitive forest tenures that have been acquired by First

Nations are not usually eligible for conversion but there may be some circumstances where a conversion could meet government objectives. A case by case review will be required as part of the mandate approval process.

E. Joint Ventures

In order to improve the viability of potential FNWL opportunities, current legislation allows for First Nations to partner with other First Nations and with other parties including BC Timber Sales, communities and forest industry clients. Further policy work on partnership details will be undertaken in the future to provide guidance on revenue sharing and other details.

F. FNWL Annual Rent and Annual Rent Rebate

FNWL holders will be required to pay annual rent equal to \$.12/m³/yr of AAC. In addition, when the FTOA is signed, a commitment will be made to rebate the ‘general rent’ portion paid by a First Nation, associated with the replaceable allowable annual cut within direct award licences since 2008. The rebate will be paid when the FNWL is issued, subject to their accounts being in good standing.

G. Compensation and Infrastructure Costs

Compensation may be triggered when landing a FNWL if it impacts an existing licensee’s harvest operations (i.e. unamortized improvements). Compensation questions and issues need to be addressed at the start of the planning process

In order to minimize the potential for triggering compensation, FNWLs should generally be located in areas where compensation is not likely payable. Review the *“Principles for Locating New Forest Tenures”* for guidance on potential compensation mitigation strategies.

H. Determining the Area of FNWLs

FNWL should be calculated based on the replaceable AAC and ‘sized’ using the same assumptions that were determined in the most recent timber supply review (TSR) for the management unit. Additional details on locating tenure areas and developing corresponding timber supply analysis are detailed within the document, *“Principles for Locating New Forest Tenures”*.

VIII. Replaceable Forest Licence Considerations

In some situations, replaceable forest licences might be more appropriate than FNWLs:

- where a replaceable forest tenure may mitigate the need for infrastructure investment and/or third party compensation to existing forest tenure holders;
- land suitability (i.e. catastrophic losses over the land base);
- where allocations of replaceable AACs are not adequate;
- where forest health requires the salvage of small areas of diseased, damaged or threatened timber over a large area;
- where First Nations are not interested in the increased obligations associated with FNWLs;

- where First Nations may prefer less participation in the forest sector (i.e. benefit of appointing a third party to manage and harvest the tenure); and
- where the time required to establish FNWLs would lead to ‘gaps’ in revenue sharing.

IX. Appendix 1 - FNWL Expansion Criteria

- a. Government Objectives: The award of FNWL is a significant step in the process of reconciling aboriginal rights and title with crown sovereignty. In general, FNWLs should be considered for those First Nations who commit to, or are at an advanced stage of reconciling rights and title (i.e. agreement in principle treaty negotiations or negotiating reconciliation agreements). FNWLs should also be considered for those First Nations that have signed FROs/FRAs and have performed well on those tenures.
- b. Forest Consultation and Revenue Sharing Agreement Linkages: To avoid a potential gap in revenue sharing payments, FNWLs should be considered for those First Nations whose FRA/FRO have expired or about to expire and, the associated forest tenures have been harvested or will soon be harvested.
- c. Adequate Source of Replaceable AAC: Sufficient replaceable AAC must be available in addition to other local factors (location, quality and operational considerations).
- d. Area Suitability: Where an existing direct award CFA or WL is being converted to a FNWL, the tenure area will remain the same. Where this isn't the case, direction on finding FNWL areas can be found in the document titled "*Principles for Locating New Forest Tenures*". Some of the key principles as they apply to FNWLs include:
 - i. Locate in core (not shared) territory where possible or as directed by the interim measures agreement.
 - ii. The FNWL should be located, as a first priority, in operating areas occupied by *Forestry Revitalization Act* licensees who did not have appropriate operating areas reduced. If this option is not possible, refer to the "*Principles for Locating New Forest Tenures*" for further details.
 - iii. Avoid areas with significant unamortized investments by existing licensees.
 - iv. Avoid areas where a First Nation's ability to manage for botanical forest products may conflict with crown range tenure holders. However, if there are no or minimal anticipated range conflicts, sufficient available range, and the First Nation has interests in managing range resources, a consideration to award a FNWL could allow for increased access to grazing licences and hay cutting licences through recent amendments to the *Range Act*.
 - v. Areas with viable access should be considered. "Viable" means that the current forest logging road and associated access structures provide safe and sound access for the desired configuration of loaded logging trucks and other harvesting related equipment.
 - vi. Ideally, the land base should be contiguous with or adjacent to Indian Reserves or proposed Treaty Settlement Lands.
 - vii. Consider as a priority, areas that contain traditional use and cultural values that will offer the First Nation the ability to manage these values (e.g. on existing log around areas or sacred areas).
 - viii. Consider if a proposed FNWL will improve access to other licensee's operating areas (e.g. is adjacent or close to reserve and the First Nation effectively controls access).

- ix. Consider, as an objective, if a proposed FNWL will provide for wildfire hazard abatement issues around communities that have been impacted by mountain pine beetle.
 - x. FNWLs should not generally be located in areas experiencing huge catastrophic losses due to mountain pine beetle attack – unless the First Nation is agreeable to managing the tenure (and associated ongoing obligations) during the period prior to reforested stands meeting minimum harvest age (i.e. 80-120 years).
 - xi. FNWLs should be located within a representative management unit profile within a First Nations' traditional territory. This ensures that the FNWL area is not comprised of the best or worse timber profile.
- e. First Nation Interest: Has the First Nation been pursuing an area-based tenure in the past? Does the First Nation have the support of the entire community for the tenure?
- f. First Nation Capacity: FNWLs will require the development of a management plan and operational plans (Forest Stewardship Plans or Woodlot Licence Plans). First Nations who understand the requirements and responsibilities, and have the capacity to undertake long-term forest management obligations should be considered over First Nations who do not.

First Nations who have internal harvesting, technical, training, and manufacturing capacity should be considered over First Nations who do not. FNWLs should be considered for those First Nations who have demonstrated experience in the forest sector through successfully harvesting direct award and competitive tenures.

- g. Jointly held FNWLs: First Nations who would hold a FNWL jointly with other First Nations should be preferred over FNWLs held by individual First Nations. Staff should encourage First Nations to join together where possible as it streamlines administration, reduces costs, and may be easier to find a suitable area.
- h. Nature of the existing agreements and tenures: Preference should be given to First Nations who have a signed FRO/FRA/FCRSA and who have completed or are in the advanced stages of the associated forest tenure.
- i. Compensation: Areas should be located so as to not require asset compensation.
- j. Research: FNWLs should be considered for First Nations who commit to conducting research with institutions (e.g. universities or research institutions) regarding traditional use, cultural practices, and/ or the management of non timber forest products.