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# Policy brief

# One Land Administration

## Opportunities and constraints in the Joint Ministerial Regulation for the settlement of land claim in forest zones

### Introduction

Approximately 68% of Indonesia's land area is forest zones. These zones contain various forms of land tenure, including:

- Communal land of indigenous communities (*masyarakat hukum adat*);
- Control of land by a village (*desa*);
- Control of land by individuals both with and without land titles;
- Control of land by a legal company (*badan hukum perusahaan*);
- Control of land by religious social organizations (*badan sosial keagamaan*); or
- Control of land by government agencies that use the land for government offices or public and social facilities.

How can these land tenure issues be settled? Can the Joint Regulation of the Minister of Home Affairs, Minister of Forestry, Minister of Public Works and the Head of the National Land Agency on Procedures for Land Claim Settlements inside Forest Zones resolve[1] this issue?

### Why is there overlapping land tenure in forest zones?

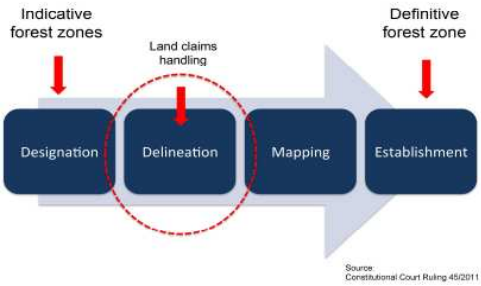
There are four issues causing the overlapping land tenure in forest zones. First, control of the land preceded designation (*penunjukan*) of forest zones. Indigenous communities, for example, controlled land before the nation was formed. Second, gazettement (*pengukuhan*) of the forest zones (see Figure 1) was incomplete. The Directorate General of Forestry Planology (*Direktorat Jenderal Planologi Kehutanan*) stated that up until the year 2009, only 11.29% of the total forest zone area has been established (*penetapan*) as forest zones. One reason for this was the demarcation of forest boundaries (*penataan batas*) that should be a step in handling land claims in forests that will be determined as forest zones was not done correctly and was often unsatisfactory for land claimants. As a result, claims to the land in the forest zones were not resolved.




### Executive Summary

Dualism in land administration in Indonesia has led to legal uncertainty and the absence of recognition and protection of the rights of citizens to land in forest zones (*kawasan hutan*). The Joint Regulation of the Minister of Home Affairs, the Minister of Forestry, the Minister of Public Works and the Head of the National Land Agency (BPN, *Badan Pertanahan Nasional*) regarding land tenure settlements in forest zones provides verification procedures and measures for land tenure settlements. This Joint Regulation must be understood and executed as a discretionary regulation. Nonetheless, it still needs some adjustments to explain issues briefly and straighten out existing misconceptions. Similarly, strategies for planning, socialization, community preparation and the monitoring and evaluation design need to be developed.

Figure 1
**Stages of Forest Zones Gazettement**




The third cause is designation of forest zones in the early stage of the establishment of forest zones was carried out without informing the public (*masyarakat*) and was not based on accurate data on land tenure, land use or the bio-physical conditions of the land. As a result, many people were unaware of the designated forest zones as well as the inappropriateness of the bio-physical conditions with the purpose of establishing forest zones. Finally, we had to acknowledge that the boundaries of the forest zones with the non forest zones in the field are not clear.

## Misconceptions of forest zones

Some parties consider that land rights within forest zones are prohibited. Forest zones (mainland forests)[2] are defined as state forests (*hutan negara*) on which there is no right to the land by Indonesian citizens, including government agencies outside of the Ministry of Forestry. This is reinforced by Government Regulation (PP) No. 16 of 2004 on the Use of Land (P*enatagunaan Tanah*) that prohibits granting rights to land in forest zones.

Law No. 41 of 1999 on Forestry actually does not hold a similar view. After correction from the Constitutional Court (MK) Ruling No. 45/PUU/IX/2011, a forest zone according to this Law is "a particular area determined by the government to be maintained as permanent forest". In forest zones there is land tenure, which is stated in Article 5 paragraph (1) as state forests and titled forests (*hutan hak*). Titled forests, according to Constitutional Court Ruling No. 35/PUU-X/2012 (*Putusan MK 35*) consist of individual titled forests (*hutan hak perorangan*) and forests of legal entities (*badan hukum*) as well as customary forests (*hutan adat*).

There is a misconception that forest zones are state forests (*hutan negara*). This is derived from the old Forestry Law (Law No. 5 of 1967) which states that "state forests (*hutan negara*) are forest zones and the forests growing on land that are not encumbered with ownership rights (*hak milik*)" and the doctrine of the domain in colonial regulations.

Thus, land tenure in forest zones may consist of forests controlled by the state, indigenous peoples, individuals or legal entities. Therefore, Government Regulation No 16 of 2004 is inconsistent with Law No. 41 of 1999 and the Constitutional Court Ruling Number 35.

The understanding that forest zones are state forests is a misconception. This is derived from the old Forestry Law (Law No. 5 of 1967) that stated "state forests are forest zones and the forests growing on land that is not encumbered with ownership rights ". In addition, there is also a similar view in the domain doctrine (known as *Domein Verklaring* or Domain Declaration), which existed in the colonial forestry regulations.[3]

## The impact on land administration

There are misconceptions over the impact of dualism practices in land administration. The National Land Agency (BPN) only registers claims (*penguasaan*), ownership (*pemilikan*), use (*penggunaan*) and utilization (*pemanfaatan*) of land outside of the forest zones, while authority to do this within forest zones is with the Ministry of Forestry, through granting licenses (*izin-izin*) for utilization (*pemanfaatan*) and use (*penggunaan*) of the zones and forest products (*hasil hutan*). This situation causes legal uncertainty and eliminates legal recognition and protection to those who legally control the land.

## Penetrating the impasse: Discretion through the join ministerial regulation

The Joint Regulation (*Perber*) of the Minister of Home Affairs, the Minister of Forestry, the Minister of Public Works and the Head of BPN on Procedures for Settlement of Land Claims in forest zones was enacted for implementing the Constitutional Court Ruling number 45 and Ruling number 35. In addition, it is also to implement the Constitutional Court Ruling No. 34/PUU-XI/2011 that states the importance of the recognition of the rights of citizens and indigenous people to land in the implementation of forest tenure. This *Perber* also relates to the Memorandum of Understanding of 12 ministries and state institutions together with the Corruption Eradication Commission (KPK) to accelerate the gazettement of forest zones in Indonesia.

We must understand this Joint Regulation as a form of discretionary power of the central government. The goal is to break the logjam as a result of not recognizing or protecting the control, ownership, use and utilization of land by the people and government agencies outside of the Ministry of Forestry. As a discretionary power, this Regulation is justified by Law No. 30 of 2014 concerning Public Administration.

Parties that can use this Joint Regulation include indigenous peoples, individuals, social religious agencies and government agencies. The object of the land claims that will be resolved with this Joint Regulation is the land in forest zones, both in designation or final establishment phases.

Box 1
**Members of the IP4T Team**

**At District level (legalized by a head of District Decree)**

- Head of the District Land Office (Chairperson)
- Forestry Services (Secretary)
- MoEF's Regional Unit of Forest Gazettement (BPKH)
- District agency for spatial planning affairs
- Head of the sub-district
- Village Chief

**At Provincial level (legalized by a Governor's Decree)**

- Head of the Provincial Land Office (Chairperson)
- Provincial Forest Services (Secretary)
- MoEF's Regional Unit of Forest Gazettement (BPKH)
- Provincial agency for spatial planning affairs
- Head of the District
- Head of the sub-district
- Village Chief

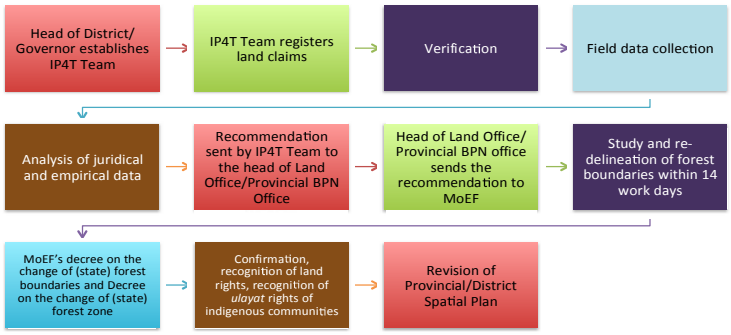
## Procedures and types of land claim settlements

In settling land claims, the heads of districts (*bupati*) or governors will establish a Team for Inventorying Land Claims, Ownership, Use and Utilization/ IP4T (*Tim Inventarisasi Penguasaan, Pemilikan, Penggunaan dan Pemanfaatan Tanah*). If the zone to be settled is located in one district or municipality, the team will be formed by the Bupati. If it is situated across-districts/municipalities, the team will be formed by the Governor (see Box 1 for the composition of the team's members).

Following, the team will receive a land claim request, verify written evidence, do field data collection, analyze juridical and physical data as well as provide recommendations for the settlement to the Head of the District Land Office/the Head of the NLA Provincial Office.

Figure 2

**Procedures for Settlement of Land Claims in Forest Zones**




Source: 2014 Perber

The Head of District Land Office/NLA Provincial Office will submit the reports and recommendations to the Ministry of Forestry (Directorate General of Forestry Planology). Within 14 days, the Director General of Forestry Planology will conduct a study and re-delineate the forest zone boundaries. Then the Director General on behalf of the Minister will issue a decree (SK) for changes in forest boundaries. Based on this, the Minister will issue a decree for changes to the forest zone. This decree becomes the basis for the NLA to grant land rights.

Granting of land rights can be done without having to wait for the revision of the Provincial or District Spatial Plan (RTRW). When the spatial planning revision is carried out, the zone that has been granted land rights is integrated into the spatial plan. This is the form of dispensation made by the Government concerning the spatial regulation.[4]

The IP4T team makes recommendations on the forms of land claim settlements in the forest zones based on the validity and comprehensiveness of the juridical data (written evidence) that the applicant submitted. If there is no written evidence then physical evidence can be used as a basis. References used are Government Regulation Number 24 of 1997 on Land Registration and the Minister of Agrarian Affairs/Head of the NLA Regulation, Number 3 of 1997.

The IP4T team forms of recommendations includes three things:

- If the land claims or land use have been going for 20 consecutive years or more, then the claims are recognized and granted land rights through the process, namely confirmation of land rights (*penegasan hak*).
- If land claims in forest zones are less than 20 years old, then land rights can be granted if the land has become the object of agrarian reform.
- If the land claims are less than 20 years old and the land is not the object of agrarian reform then community access can be recognized through community empowerment programs in state forest zones (community forestry or *hutan kemasyarakatan*, village forests or *hutan desa* and people planted forests or *hutan tanaman rakyat*).

There are several unclear provisions in this Joint Regulation. One of the examples is the determination of the 20 year limit. Does this refer to the time this Joint Regulation was enacted, or the time of the first or the last designation of the forest zone? There is similar ambiguity over land that can be categorized as objects of agrarian reform: is it only for convertible forests (*hutan produksi konversi*) or for land where there are inactive forestry permits.

The absence of complaints mechanisms for applicants or other parties that are disadvantaged from this land claims settlement process needs to be regulated. Similarly, this Joint Regulation has not confirmed an acceptable form of recognition for indigenous peoples, either in the form of a district regulation (*Perda*) as required by Law No. 41 of 1999, or another legal product such as a Bupati decree as recognized in Minister of Home Affairs Regulation No. 52 of 2014 or recognition from a Court such as what happened with the recognition from the Constitutional Court concerning the legal standing of indigenous peoples in several petitions.

It is also important to emphasize the division of responsibilities of the IP4T team members. What are the duties of the Land Office, the Forestry Service, BPKH, sub-district heads and village heads? The Implementation of socializations has also not been regulated. Details regarding the shortcomings of the Joint Regulation are in Box 2.

## Ignoring the ecocentric perspective

This Joint Regulation holds an anthropocentric view, where land and forest is merely for the benefit of the people. Therefore, when defining forms of resolution for land claims, our strong impression is that this Joint Regulation promotes the exclusion of applicants' land claims from forest zones.

Clearly, the makers of this Joint Regulation cannot be separated from the misconceptions concerning the concept of forest zones (see earlier description). A forest zone is interpreted as an area that is free from ordinary citizens or indigenous peoples' land claims. Supposedly, when this Regulation refers to Constitutional Court Ruling number 35, then there is the possibility of recognizing the land claims of citizens and indigenous peoples in forest zones that have individual titled forests (*hutan hak perorangan*) and customary forests. The individual titled forests are recognized through the existence of land rights and recognition of customary forests depends on the recognition of communal land rights (*hak ulayat*) in the forest zones. This Joint Regulation also forgets the importance of ecological functions embedded in land claims (see Article 15 of the 1960 Basic Agrarian Law).

From a legal and scientific perspective, there is not a problem if titled forests or customary forests exist in forest zones. In this case, the recognition of land rights can be upheld as well as the obligations of citizens to preserve the environment.

Box 2

**Joint Ministerial Regulation**

**What is regulated?**

- Applicant
- Land objects
- Procedures for land claim requests
- IP4T: structure, tasks, working methods
- Funding
- Changes to forest boundaries and changes to the legal status of forest zones
- Integration with the Spatial Plan (RTRW)
- Land claim boundaries
- Strengthening the recognition of land less than 20 years old as the implementation of the agrarian reform in forest zones

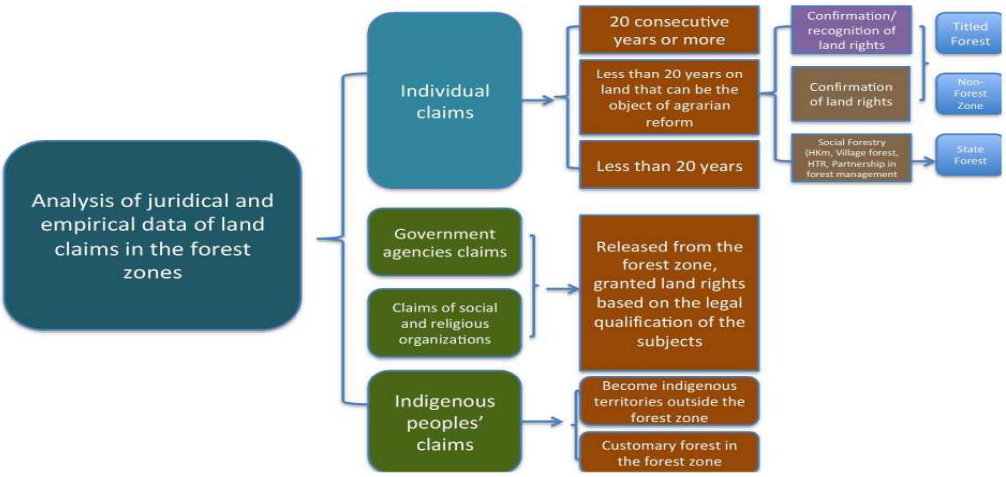
**What is not (clearly) regulated?**

- The division of tasks among the members of IP4T in accordance with their authority and capacity
- Information on forest zone and land use maps
- Determining the limit of 20 year old land claims: after the Joint Regulation was enacted; the time of the first designation of forest zones; the time of last designation; or the time of the final enactment of the forest zone?
- Criteria of agrarian reform land objects in forest zones
- Complaints handling mechanism for the applicants or disadvantaged parties
- Proof of indigenous peoples
- Use of ancestral land maps

This ecocentrism should be a reference in formulating types of land claim settlements. The decision to release land from forest zones also needs to consider the empirical condition of land utilization. If the utilization of forest land is still able to be converted into permanent forest (*hutan tetap*) such as agroforestry land then it can remain in a forest zone with the status of an individual titled forest or customary forest.

Similarly, village-owned forests (*hutan milik desa*) as stipulated in Law No. 6 In 2014 on Villages can also be in a forest zone. Only if the actual land utilization does not enable it to be a forest such as housing land, or land used for public and social facilities, then it can be released from the forest zone.

Figure 3
**Proposed Types of Land Claim Settlements in the Forest Zones**




## Recommendations

The Joint Regulation concerning procedures for the settlement of land claims in forest zones should be supported to implement unity in land administration in Indonesia. Nevertheless, efforts are still required to improve this policy by implementing several matters as follows:

- The first effort is the preparation of Technical Guidelines for the implementation of the Joint Regulation as it is now being drafted by the government. The shortcomings and ambiguities in this regulation mentioned in Box 2 should be thoroughly resolved in the technical guidelines. In order to enrich the guidelines draft, public consultations with relevant stakeholders are required.
- The second is to design changes in the land claim settlement procedures as proposed in Figure 3.
- The third is to initiate socializations on the Joint Regulation with all of the officials who will be members of the IP4T Team and with indigenous peoples and other local communities living in the forest zones.
- Fourth, the districts and municipalities and provincial governments prepare annual plans for land claims settlements in forest zones. This plan is prepared with the participation of civil society groups and indigenous peoples and farmers organizations that have many claims in the forest zones. Local governments should make priorities in handling land claims planning. Completion of indigenous peoples, and local communities claims by government agencies' need to be prioritized.
- The fifth is to design a mechanism for monitoring and evaluation of the implementation of this Joint Regulation in each district or municipality. It is important to collect and analyze the lessons learned from the weaknesses and innovations in the implementation of this Regulation to improve this policy in the future. Independent monitoring from civil society groups can also provide input for monitoring and evaluation of the Joint Regulation. Initial monitoring needs to be prepared for the first year of implementation of this Regulation. Following, annual monitoring needs to be carried out.
- Sixth, if it is necessary to strengthen this Joint Regulation, the status could be upgraded to become a Presidential Regulation that would bind other relevant ministries to support this Regulation, for example the Ministry of Villages, Disadvantaged Regions and Transmigration and the Ministry of Agriculture. The monitoring results in the first year of implementation of this Regulation can be used as a recommendation to decide whether the regulation needs to have a higher legal status or not.

[1] Regulation Number 79 of 2014, Number PB.3/Menhut-II/2014, Number 17/PRT/M/2014; Number 8/SKB/X/2014.

[2] Forest zones in Indonesia also include marine conservation areas. Data and information on forest zones in this document refer to terrestrial forest zones.

[3] Domain Declaration stated that land without any titled belongs to the state.

[4] According to Law No. 30 of 2014, dispensation consists of a Government Official Decree that is authorized as a form of approval of the Publics petition which is an exception to the prohibition or order in accordance with the provisions of legislation.

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