Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

AMENDMENTS TO THE LAND MANAGEMENT MANUAL

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This glossary contains a list of key terms found in the Land Management Manual. This is an evergreen document that will be continually updated.

Various instruments, agreements and orders may use the same language as what is found in the list of terms contained in the Land Management Manual, but those terms may have different definitions. While this list of terms and definitions was developed to apply to the Land Management Manual, readers are advised to be discerning and mindful of the context if they are using this glossary to apply to documents that are external to the chapters and procedures contained in the Land Management Manual.

Definitions

Abstract: a summary in sequence of the documents, facts and events evidencing or affecting the nature of a person's title or interest in a given tract of land.

Access: the way or means to approach, enter and leave a tract of land from a public way without trespassing on other property.

Accretion: the imperceptible and gradual addition to land by the slow action of water.

Addition of Lands to Reserves and Reserve Creation Act: is legislation that enables the setting apart of lands as reserves for the use and benefit of First Nations. Its technical tools include: a) the approval of all reserve creation proposals by Ministerial Order rather than by Order in Council; b) the ability for all First Nations in Canada to designate lands for leasing before the lands are set apart as reserve (also known as pre-reserve designation); c) the ability for First Nations to arrange for leases and permits before the land is set apart as reserve; and, d) statutory easements and voluntary land exchanges linked to a reserve creation proposal approved by Ministerial Order.

Addition to Reserve: the act of adding land to the existing reserve land base of a Band.

Administrative Plan: a plan prepared under section 31 of the *Canada Lands Surveys Act* used for defining boundaries or parcels. It is approved by the Surveyor General before being recorded in the Canada Lands Surveys record.

Administrative Transfer: the instrument used by the executor of a will or the administrator of an estate, to transfer reserve lands to the heirs or beneficiaries of a will or an estate, pursuant to section 49 of the *Indian Act*.

Administrator: a person appointed by the Minister to administer an estate. If there is no will, the Minister will appoint someone to handle all the legal and financial matters of the deceased's estate.

Affidavit of Execution: a written declaration sworn before a person with the power to administer affidavits (e.g., a lawyer, a commissioner for oaths or a notary public) where an individual attests to witnessing another individual sign a document.

Allotment: the process by which an individual Band member receives lawful possession of reserve land from the Band Council under section 20 of the *Indian Act*.

> **Allotted Land**: a parcel of reserve land which the Band Council has validly allotted under the *Indian Act*; the right to possession of the land is generally evidenced by a Certificate of Possession.

Alterations: any substantial changes, restorations, renovations, relocations, reductions, additions, expansions, reconstructions, removals, replacements, repairs or modifications of any premises.

Ancillary Uses: in the context of reserve land management, it is a broad term that means uses or activities that provide an essential support function to the primary use, activity or service.

Appraisal: a written opinion of an estimate of a specific type of value (e.g., highest and best use) prepared by an appraiser, in accordance with generally accepted appraisal practices.

Appraisal Institute of Canada: is a real property valuation association in Canada. Its members provide unbiased appraisals, reviews, consulting, reserve fund planning and machinery and equipment valuations.

Appraiser: a registered member of an accredited provincial organization and registered or licensed with the Appraisal Institute of Canada.

Architect: a professional who is licensed as an architect by an accredited provincial organization (e.g., a professional who designs buildings and supervises their construction). The definition of an architect may also include general contractors.

Area Development Plan: a general conceptual plan, certified by an architect or engineer, identifying the premises and setting out the basic development proposal for the lands, including, if available, those principles governing land use, environment, transportation and infrastructure.

Artifact: any burial site, human remains, or any item of archeological or cultural interest.

Assignment: an instrument used when a lessee transfers its leasehold interest to another party. The lessee's interest may be a lease, sublease, or mortgage. An

assignment entails the full transfer of a lessee's interest in a lease to a third party, known as the assignee. An assignment cannot be used as a means to change the terms of an existing lease and it generally does not relieve the original lessee from its obligations under a lease, unless the lessee obtains an express release from the department.

> **Assignee**: refers to the third party to which a lessee has transferred its leasehold interest. The assignee becomes a new lessee by agreeing to perform the responsibilities of the former lessee under the terms of the lease.
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> **Assignment Consent Agreement**: a document in which the assignee agrees to perform and observe all of the lessee's responsibilities under the lease. An assignment of a lease will not be valid until this document is executed and signed by the assignor, the proposed new assignee, the department, and the Band Council (if the Band is a contracting party to the lease).
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> **Assignor**: refers to the lessee who transfers its leasehold interest to a third party.

Authority: any federal, provincial, municipal, First Nation/Band having jurisdiction over or use of the premises, including the Band Council and any utility company lawfully acting under its statutory power.

Ballot: paper or other means used during the process voting (e.g., a piece of paper or cardboard on which a voter marks their vote).

> **Mail-in Ballot**: a ballot that is delivered by mail. An elector completes and mails it to the electoral officer. Band electors that do not live on reserve often use them to vote because they may be unable to vote in person.
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> **Rejected Ballot**: a ballot which cannot be counted due to improper marking by the voter. An example of a rejected ballot is one that has more than one mark so the intent of the voter cannot be ascertained.

Band: a body of Indians for who(m): a) lands, the legal title to which is vested in the Crown, have been set apart (before, on or after September 4, 1951) for its collective use and benefit; b) moneys are held by the Crown for its collective use and benefit; or, c) have been declared to be a Band by the Governor in Council for the purposes of the *Indian Act*. Many Indian bands have elected to call themselves a First Nation and have changed their name to reflect this. In the context of reserve land management, the term is often used interchangeably with "First Nation," a term not defined under the *Indian Act*.

Band Council: the governance structure administered under the *Indian Act*. The "council of the band" is defined in subsection 2(1) the *Indian Act* as: "a) in the case of a Band to which section 74 applies, the council established pursuant to that section; b) in the case

of a Band that is named in the schedule to the *First Nations Elections Act*, the council elected or in office in accordance with that act; c) in the case of a Band whose name has been removed from the schedule to the *First Nations Elections Act* in accordance with section 42 of that act, the council elected or in office in accordance with the community election code referred to in that section; or, d) in the case of any other Band, the council chosen according to the custom of the Band, or, if there is no council, the chief of the Band chosen according to the custom of the Band." Also known as **Council** and **First Nation Council.**

Band Council Resolution: a document which contains an official determination, decision or expression made by a Band Council at a duly convened Band Council meeting which has been discussed, voted on, and passed by a quorum of council.

Band Electors: means Band members who are eligible to vote in a referendum.

Band Land Manager: a person who holds the position and is responsible to manage reserve lands, environment and natural resources.

Band Lands: reserve lands which the Band Council have not allotted to a Band member. This term is also sometimes referred to as "common Band lands."

Band Membership: includes persons that are recognized as part of a First Nation, including individuals that live on and off reserve. Membership may be defined by the Band itself or by the *Indian Act*.

> **Band Member**: a person whose name appears on the Band list of a First Nation or who is entitled to have their name appear on that list.

Beneficiary: a person or persons (e.g., child, cousin or friend) or organizations (e.g., religious organization or charity) specifically named in the will to inherit from the estate.

Buckshee: a colloquial term for an agreement entered into between a Band member or the Band and another individual where the agreement has not been formally approved by the department in accordance with the *Indian Act*. Buckshee agreements can include deeds, leases, permits, licenses, contracts, instruments, documents or agreements of any kind, whether written or oral. Buckshee agreements create risks for all parties involved; they are not registered and are not considered to be valid by the department.

Business Days: a day that is not a Saturday, a Sunday, a federal or provincial statutory holiday, National Indigenous Peoples Day, or, with respect to obligations owed by or owing to the First Nation, a day designated by the First Nation as an official holiday on which the First Nation's administrative offices are closed.

Bylaw: a regulation made by a local authority, corporation or Band Council. Within the context of reserve land management, a Band by-law is a local law that is passed by a Band Council to regulate affairs within its community. A by-law governs the activity in question on all reserve lands under the control of the Band Council that passed the by-law. The by-law applies to everyone present on the reserve, regardless of whether they are a Band member or whether they actually live on the reserve. Sections 81, 83, and 85.1 of the *Indian Act* provide the authorities for Band Councils to pass by-laws.

Canadian Environmental Assessment Act, 2012: former federal legislation regarding the environmental assessment of certain activities and the prevention of significant adverse environmental effects. The *Canadian Environmental Assessment Act, 2012* was repealed on August 28, 2019 and replaced by the *Impact Assessment Act*.

Canadian Impact Assessment Registry: a searchable record of potential and current projects, regional and strategic assessments and projects on federal lands.

Canadian Standards Association: a not-for-profit organization that develops and maintains consensus standards for business, industry, government and consumers.

Capital Improvement Investment: the amount a lessee is required to invest in the leased premises to create or improve capital assets, such as buildings, fences and roads.

Capital Recapture Period: for commercial leases, it is the length of time the lessee will require to repay, from revenues, the capital improvement investment made in the leased property. For non-commercial leases, it is the period during which the lessee's investment in improvements to the property is deemed to be repaid, either by loan repayment or through enjoyment of the use of the capital asset.

Cardex Holding: a historical individual interest in reserve land created by a Band Council Resolution and approved by the Minister, pursuant to section 20(1) of the *Indian Act*. Although the parcel of land is not surveyed, the Band Council Resolution is registered in the Indian Land Registry System by the Registrar who will issue a No Evidence of Title. Cardex Holdings are no longer issued, however, existing interests remain active. Land descriptions related to Cardex Holdings were often vague and inaccurate. While Cardex Holdings are registered in the Indian Lands Registry, a proper survey must be done before any further transactions can take place on the particular land.

Cardex Holder: a person who is in lawful possession of land.

Certificate of Financial Advice: written instruction on the management of money or enterprise from a financial professional.

Certificate of Occupation: documentary evidence issued under subsection 20(5) of the *Indian Act* regarding a Band member's authority to temporarily occupy reserve lands described therein pursuant to subsections 20(4) and (6) of the *Indian Act*.

Certificate of Possession: documentary evidence issued under subsection 20(2) of the *Indian Act* regarding a Band member's right to lawful possession of reserve lands described therein pursuant to subsections 20(1), (3) or sections 22, 24 or 49 of the *Indian Act*.

Clause: in the context of reserve land management, it means a single statement in an agreement.

> **Amending Clause**: a clause which provides that minor adjustments to account for clerical mistakes or errors can be made to the designation upon submission of a Band Council Resolution and approval of the Minister by way of a Ministerial Order.
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> **Revoking Clause**: a clause that provides the Band Council with the authority to cancel a designation (in part or in whole) for parcels of land where no interests have been granted.

Clear Days: refers to where there is a reference to a number of clear days (i.e., a day means 24 hours as a unit of time) or at least a number of days between two events, when calculating that number of days on which the events happen are excluded.

Civil Code: the general principles of law that govern persons and relations between persons and property. In the Land Management Manual, this term refers to the Civil Code of Quebec, a body of laws used in the province of Quebec that is in harmony with the Canadian Charter of Human Rights and Freedoms.

Collective Asset: a resource with economic value that is owned, controlled and/or shared by a group of people.

Community Vote: in the context of reserve land management, it means an election on an important question that is open to all Band electors and is held in accordance with the *Indian Referendum Regulations*.

Compiled Plan: a plan of parcels or boundaries prepared from information found on plans and field notes recorded in the Canada Lands Surveys record or provincial registry (i.e., not based upon any new field survey). It may be dealt with under or section 29 or section 31 of the *Canada Lands Surveys Act*. It is either approved or confirmed by the Surveyor General before being recorded in the Canada Lands Surveys record.

Consent: to give permission or to agree.

> **Informed Consent**: permission granted in the knowledge of the possible consequences. In the context of reserve land management, informed consent is often required for making major decisions (e.g., for a designation to be successful, informed consent is obtained from Band electors through a vote held in accordance with the *Indian Referendum Regulations*).

Consideration: Also known as **Rent**. See **Rent.** / Also known as **Fee**. See **Fee** (under the section on **Rent**).

Construction Plan: dependent on the stage of building, individually or collectively, plans, design briefs, construction specifications, cost estimates, as built plans and any other documents that the lessor reasonably requires, of the improvements or premises prepared and certified by an architect or engineer, and includes all site plans drawn to scale showing the various features with appropriate dimensions. Also known as a **Development Plan**.

Contaminant: any toxic or hazardous substance, hazardous waste, hazardous recyclable, ozone-depleting substance, halocarbon, pesticide, designated material or substance as defined in or pursuant to any applicable environmental laws.

***Contaminated Sites Management Policy*:** provides guidance for the management of contaminated sites located on reserve lands, on federal lands north of the 60th parallel, and on any other lands under the department's custodial responsibility. It provides direction to meet Treasury Board requirements and to support the principles of the Sustainable Development Strategy.

Corporate Standing: a determination that indicates whether a corporation has filed all necessary reports and paid all necessary fees.

Corporation: a group of people authorized to act as an individual, especially in business. A corporation must be registered federally or provincially.

> **Band-owned Corporation**: refers to a corporation in which the Band is the proprietor.

Council: Also known as **Band Council**. (See **Band Council)**.

Credit Check: a process in which financial information is shared with a lender, bank or other financial service provider to determine a person's financial history. Its main purpose is to confirm that the person has sufficient means to pay the agreed upon rent.

Crown: a source of sovereign authority and power in constitutional monarchies such as Canada and refers to the fact that the monarch is the head of state.

Custom Election or Ratification Process: means the Band decides how an election will take place (e.g., the *Indian Act* requirements on length of time in office and the *Indian Referendum Regulations* voting procedures do not apply; the Band's custom election code determines these rules).

Custom Interests or Rights: Not all Bands use the allotment provisions of the *Indian Act*. Some Bands provide individual Band members the rights to certain reserve lands by the custom or tradition of the Band. Since the department is not involved in addressing or negotiating these interests, the Band Council must extinguish these interests or exclude them from the lands proposed for designation before the referendum vote, before a permit can be issued or another land interest such as a set aside (section 18(2) of the *Indian Act*) can occur.

Date: day, month and year when an event takes place. In the context of reserve land management, there are specific dates for particular activities and some specific terminology such as:

Commencement Date: the starting date of the Term of the instrument.

Expiry Date: the date on which the Term of an instrument ends.

Instrument Date: the date the instrument was dated for reference. This date is used solely for administrative purposes (e.g., "**THIS LEASE**, made in quadruplicate and dated for reference this 21st day of June, 2021.")

Registration Date: the date of registration of an instrument in the Indian Lands Registry System.

Received Date: the date that an instrument is stamped as received by the departmental regional office. (The received date is sometimes referred to as the "forwarded date.")

Term: a period of time starting on the commencement date and expiring on a subsequent and agreed upon date, or an earlier date if there is an early termination, which is known as the termination date. (See **Termination Date**).

Termination Date: the date, determined by His Majesty, as the early end of the Term of the instrument. Termination of the Term is a unilateral action by His Majesty, usually due to the interest holder's material breach of one or more terms and conditions of the instrument. (The termination date is sometimes referred to as the "cancellation date").

Delegation of Authority: the transfer of responsibility for a task from one department or person to another department or person (e.g., delegated ministerial authority to the Band Land Manager under subsection 53(1) of the *Indian Act*).

> **Delegation of Authority Document**: a record outlining the process of transferring responsibility for a task from one department or person to another department or person.

Department: A branch of administration. All federal departments are named in Schedule I of the *Financial Administration Act*. In the Land Management Manual, unless otherwise specified, the department means the Department of Indigenous Services Canada and/or the Department of Crown-Indigenous Relations and Northern Affairs Canada (or its successor.

Designated Project: means one or more physical activities that are carried out in Canada or on federal lands, and, are designated by regulations made under paragraph 109(b) or designated in an order made by the Minister under subsection 9(1) of the *Impact Assessment Act*. It includes any physical activity that is incidental to those physical activities, but it does not include a physical activity designated by regulations made under paragraph 112(1)(a.2) of the *Impact Assessment Act*.

Designation: allows for exclusive use of a specified portion of the reserve to a third party. Bands that operate under the *Indian Act* can designate reserve land or designate lands that are intended to be added to or set apart as a reserve for leasing or other purposes. Before a lease being issued on land that has not been allotted to an individual, it must first be designated. When a Band designates land, it allows the Minister to grant land instruments that allow for exclusive use of a specified portion of the reserve to a third party for economic development or other purposes. Designated lands do not lose reserve status.

> **Combination Designation**: when general and specific proposals are considered together under one referendum, it is commonly referred to as a combination designation. Some regions refer to combination designations as “hybrid” designations.
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> **Designated Lands**: defined in the *Indian Act* as “a tract of land or any interest therein the legal title to which remains vested in His Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition.”
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> **General Designation**: a type of designation where no specific or immediate project is planned but land is designated for a range of defined potential uses.

General designations are used in anticipation of future development so that a Band may be in a position to quickly lease reserve land when a specific project arises.

Pre-reserve Designation: identifies land for a specific or general purpose before that land receives reserve status. If the Band Council has requested that the Minister set apart certain lands as a reserve, the Band may designate any interest or right in or to the lands, including for the purpose of the replacement of an existing interest or right in or to those lands. By obtaining a pre-reserve designation, the Band is assured that the land can be used for the intended purpose(s) before advancing through the addition to reserve process. Where there is an existing exclusive use business on the land where an *Indian Act* lease will be required upon reserve creation to satisfactorily replace an existing third-party interest, a pre-reserve designation is required before the lands may be added to reserve. Pre-reserve designations are available to Bands through the *Addition of Lands to Reserves and Reserve Creation Act*. Before the *Addition of Lands to Reserves and Reserve Creation Act* was in force, pre-reserve designations were available to Bands located in Alberta and Saskatchewan through the *Claim Settlements (Alberta and Saskatchewan) Implementation Act* and in Manitoba through the *Manitoba Claims Settlement and Implementation Act*.

Specific Designation: is a type of designation when a particular project and/or activity (e.g., a small area of land for a gas station, a strip mall or rental cottages) is proposed for a parcel of reserve land.

Designation Document: contains detailed information such as the duration, purpose, land description and conditions upon which reserve lands can be leased. The Band Council provides it to Band electors when undertaking a referendum vote. It is used as a key piece of information and is voted on during a referendum by Band electors. If the vote is successful, the Band Council signs it.

Development Plan: Also known as a **Construction Plan.** (See **Construction Plan**).

Discount Rate: the rate by which prepaid rent payments are reduced to reflect their present value.

Easement: a non-exclusive interest in land owned by another giving the right to use the other owner's land for a particular purpose, or to prevent the other owner from using their land in a particular way. The land which benefits from the easement is referred to as the "dominant tenement" and the land over which the easement is exercised is referred to as the "servient tenement." In common law, an easement must have both a dominant and servient tenement. However, in the case of an easement created by or under the

authority of a statute (sometimes referred to as a “statutory easement”), a dominant tenement may not be required.

Electoral Officer: the person in charge of the local office of the department or any officer of the department acting under the direction of the Minister or Assistant Deputy Minister for the purposes of a referendum.

> **Deputy Electoral Officer**: a person appointed by an electoral officer for the purposes of a referendum.

Encumbrance: an interest or right in real property that may diminish the value of the premises, but does not prevent its conveyance (e.g., easements, mortgages and judgments).

> **Encumbrance Check**: an examination to verify if any interests or rights in real property exist. In the context of reserve land management, an encumbrance check is conducted in the Indian Lands Registry System before the issuance of any lease.

Engineer: a professional who is licensed as an engineer at an accredited provincial organization (e.g., professional specializing in the application of science to the design, building and use of machines). The definition of an engineer may also include general contractors.

Environment: means the components of the earth. It includes three elements: a) land, water and air, including all layers of the atmosphere; b) all organic and inorganic matter and living organisms; and, c) the interacting natural systems that include components listed in the first and second elements.

Environmental Audits: provide a snapshot of existing environmental practices on a property, in a facility or within an organization. They are useful tools for environmental monitoring and enforcement but are not part of the environmental review process for a project. They generally examine operations, physical activities, monitoring, sampling, recordkeeping and reporting practices with respect to air and other emissions, water and discharge quality, land and soil contamination, training and awareness, contingency planning, internal organization and response measures, and ongoing maintenance practices. They are conducted by an independent qualified environmental professional in accordance with the International Standard Organization and are generally undertaken by the proponent.

Environmental Inspections: are used for monitoring and enforcement purposes, such as evaluating the compliance of a business or ongoing activity with the environmental terms, conditions, and best practices stipulated in a land instrument or funding

agreement. They are not part of the environmental review process. Environmental inspections are undertaken by a qualified environmental professional, or equivalent, from the department or the Band to identify any issues with follow-up from the department to determine if any further action is required.

Environmental Integrity: a condition where the natural processes of a place occur within the expected frequency and strength in its natural state. It includes normal environmental patterns such as rainfall, snowfall, and, plant and animal ecosystems that contain native species in the area. Environmental integrity is often used in legal and philosophical writing to refer to an undisturbed state of natural conditions in which plant, animal and human life can continue freely.

Environmental Laws: are a) any laws relating, in whole or in part, to the assessment and protection of the environment; and, b) any decisions, determinations, mitigation measures, standards, codes, guidelines, or environmental protection measures made pursuant to those laws.

Environmental Management Processes: a wide-ranging term for various procedures such as site assessments, reviews, and audits that may be required.

Environmental Review Process: is used to evaluate, anticipate and mitigate potential environmental risks associated with projects carried out on reserve for which the department is issuing a land instrument or providing direct funding. Proponents are responsible for all costs related to the environmental review process. Due to the environmental review process, projects on reserve are carefully considered before the issuance of federal funding or land tenure.

Environmental Site Assessment: an analysis of a property that includes a review of past and present uses that may have impacted or have the potential to impact the property's environmental quality. Environmental site assessments identify if contaminants are present and, if so, their location and concentration. Environmental site assessments are conducted by an independent qualified environmental professional and include a report documenting the study results.

Equity of Redemption: refers to the right of a mortgagor in law to redeem their property once the debt secured by the mortgage has been discharged.

Erosion: the imperceptible and gradual loss of land by the slow action of water.

Estate: the real (immovable) property, (e.g., land and buildings or structures) and personal (movable) property that someone owned or had in their possession when they died.

Evidence of Title: documentary proof of a Band member's lawful possession of reserve lands pursuant to the *Indian Act* such as a Certificate of Possession, Oka Letter, Notice of Entitlement, Certificate of Occupation, Cardex Holding and No Evidence of Title Issued.

Exchange Lands: lands held by the expropriating authority that form part or all of the compensation to a First Nation for a section 35 transaction or lands held for another purpose (e.g., a First Nation can absolutely surrender their interest in a parcel of reserve land for the purpose of transferring it to another entity (usually a province) in exchange for lands being transferred by that entity (known as the exchange lands) for the purpose of having the lands received set apart as reserve).

Exclusive Use: means that no other parties can use the land (e.g., in a lease, the lessor retains exclusive rights and control of the land while the lessee is entitled to exclusive use of the land during the term of the lease).

Executor: a person named in the will to administer (handle all of the legal and financial matters) the estate of the deceased and to ensure the details of the will are carried out.

Explanatory Plan: a graphical description of a parcel prepared without a full field survey under section 31 of the *Canada Lands Surveys Act*. Parcel boundaries are defined by, or in relation to, existing boundaries or monuments shown on plans or field notes recorded in the Canada Lands Surveys Record. It is used for short-term or non-exclusive interests (e.g., short-term leases, utility easements, access roads, permits, and First Nation surrender or designation votes). It may also be used for exclusive-use interests, including fee simple, for purposes such as parcel consolidations, replacing meters and bounds descriptions, and road closures, provided that using explanatory plans for these purposes is acceptable to the government body. The plan is approved by the Surveyor General before being recorded in the Canada Lands Surveys record.

Expropriating Authority: a provincial government, municipal or local authority, or corporation that has legislative authority, through federal or provincial law, to take or use lands or any interest in the land without the consent of the landowner. While the Governor in Council may consent to the taking of reserve lands by expropriating authorities and Band consent is not required, it is departmental policy to make the transaction only after consultation with the Band and consent from the Band is obtained.

Extinguish: to destroy or terminate (e.g., rights or interests in reserve land).

Fact Letter: a letter from Canada sent to both a Band and an expropriating authority setting out the substantive facts (including compensation, legal descriptions, the handling of third party interests and other requirements set out in the Federal Requirements List) of the transaction pursuant to section 35 of the *Indian Act*.

Fair Market Value: the most probable price that a property will bring in a competitive and open market under all conditions requisite to a fair transaction and not affected by undue stimulus, with the seller and purchaser each acting prudently and knowledgeably, and assuming that the property is held by the seller in fee simple (notwithstanding that the property may have been reserve lands and inalienable except to the Crown) and has no charges or encumbrances existing against title.

Federal Real Property and Federal Immovables Act: federal legislation that provides primary statutory authority for the real property conveyance practices of the federal government.

Federal Requirements List: the list of standard legal and policy requirements of Canada necessary to process a transaction pursuant to section 35 of the *Indian Act*.

Fiduciary: a person or organization that acts on behalf of another person or persons and puts the other person or persons' interest ahead of their own, with a duty to preserve good faith and trust. Being a fiduciary requires being bound both legally and ethically to act in the other's best interests. In the context of reserve land management, the federal government has a fiduciary responsibility for reserve lands administered pursuant to the *Indian Act*.

***Financial Administration Act*:** federal legislation that provides the foundation for the financial administration of the Government of Canada, the establishment and maintenance of the accounts of Canada, and the control of Crown corporations. It is the legal framework for general financial management and accountability in the Public Service of Canada and sets out a series of fundamental principles on which government spending may be approved, expenditures made, revenues obtained and public funds borrowed.

Financial Advice: instruction from a professional on the management of money or monetary support for an enterprise.

First Nation: a term that is often used interchangeably with the term "Band." (Although the term "First Nation" is commonly used by many people, it is not defined in the *Indian Act*.

First Nation Council: Also known as **Band Council**. (See **Band Council**).

First Nation Member: Also known as **Band Member**. (See **Band Member**).

First Nations Commercial and Industrial Development Act: legislation that enables complex projects to proceed and closes the regulatory gap on reserves. At the request of the First Nation, this act is used to develop federal regulations for complex commercial

and industrial development projects such as large mines or hydro facilities. The regulations are project-specific, developed in cooperation with the First Nation and the relevant province, and are limited to the particular lands described in the project.

***Fisheries Act*:** federal legislation that manages and protects fisheries resources, and contains requirements to prevent pollution in Canadian waters.

Fixed Term: a specific period of time.

Foreclosure: an action before the court where the mortgagee asks the court to become the owner of the mortgaged property.

Forest Management Plan: is a technical planning document outlining the objectives, strategies, administration and commitments related to a large area of forests and their undergrowth. It identifies intended methods of cutting, reforestation, and managing timber resources sustainably within the defined area of responsibility during a longer time frame, usually ten years. Forest management planning ensures that forestry operations and related activities are carried out in ways that support the sustainable management of all forest resources for generations to come.

Framework Agreement on First Nation Land Management: a historic, government-to-government agreement that recognizes First Nations' inherent right to govern their reserve lands. It applies to First Nations that are signatories to the agreement. Each signatory community assumes the administration and full law-making authority of their reserve lands, environment and natural resources, when they ratify their land code.

Framework Agreement on First Nation Land Management Act: is legislation that allows First Nations to opt out of the 44 land management related requirements of the *Indian Act* and manage their land, resources and environment under their community-approved land codes.

Geotechnical Evaluation Report: provides a description of the site geology and a general assessment of the mineral resources that could potentially be explored and exploited from a specific site. It generally provides background data for more accurate assessments of potential future site developments for mineral disposition.

Governor in Council: refers to the Governor General, acting by and with the advice and consent of the King's Privy Council for Canada. The Governor in Council is assigned many duties including providing recommendations on proposed bills, dissolving Parliament, opening and closing parliamentary sessions, and appointing senior governmental officers. In many cases the Governor in Council needs to give final approval on legislative changes.

Grantee: the person, corporation, partnership or other entity acquiring the interest.

Grantor: the person, corporation, partnership or other entity from who the interest is to be acquired.

Gross Revenue: the total revenue earned before deduction of taxes and expenses.

Guardian *ad litem*: a guardian appointed by the court to represent the interests of a minor or person who is incapable of managing their own affairs in legal actions.

Heir: a person(s) who may inherit from the estate of a deceased person (e.g., spouse, children, parents and other relatives). **Highest and Best Use of the Land**: means the reasonably probable and legal use of property, that is physically possible, appropriately supported, and financially feasible, and that results in the highest value. In the context of reserve land management, it is determined through an appraisal process and included in the Designation Document to be shared with Band electors.

His Majesty: a title of respect used when referring to a king. In the context of reserve land management, it currently refers to His Majesty King Charles III (His Majesty the King in right of Canada).

Historical Band Name: refers to the former name of a Band/First Nation.

Historical Reserve Name: refers to the former name of a reserve.

Hypothec: refers to an obligation, right or security given by contract or by operation of law to a creditor over property of the debtor without transfer of possession or title to the creditor. In the context of reserve land management, a hypothec is a legal interest under Quebec Civil Law, allowing an unpaid creditor who has secured a loan with a hypothec to force the sale of the property; subsequently, the creditor has a right to follow the property into whosever hands it may be.

Hypothecary Creditor: means a person to whom a debt is owning related to any loan issued by a hypothec. (This term is used under Quebec Civil Law. Under common law, this term is similar to a lender under a mortgage).

***Impact Assessment Act*:** is federal legislation that outlines the process for considering the effects of major projects and projects carried out in Canada or on federal lands. It is used as a planning and decision-making tool to assess: a) positive and negative environmental, economic, health, and social effects of proposed projects; and, b) impacts to Indigenous groups and rights of Indigenous peoples. In 2019, it replaced the *Canadian Environmental Assessment Act, 2012*.

Improvements: any buildings, structures, works, facilities, infrastructure, services, landscaping, and other improvements (including any equipment, machinery, apparatus, and other such fixtures forming part of or attached to the improvements), made by any person that are, from time to time, situated on, under, or above the lands but excludes trade fixtures and existing improvements at the time the instrument was issued.
Indefinite Term: an unspecific period of time.

Independent Legal Advice: impartial advice provided by a lawyer to a person without any conflict of duty or interest, and is provided in the best interest of that person. The lawyer giving the advice is not connected to the other parties or the transaction and is, therefore, independent.

> **Certificate of Independent Legal Advice**: an attestation from a lawyer confirming that legal advice was given to a client.

Indian Act*:* is one of the primary pieces of legislation the federal government uses to administer Indian status, First Nations governments and the management of reserve land. The act was passed in 1876 and has been amended several times.

Indian Band Council Procedure Regulations: the prescribed rules respecting processes and practices at Band Council meetings.

Indian Lands Registration Manual: the department's guide containing the criteria and procedures for the registration of instruments in the Indian Lands Registry as amended from time to time.

Indian Lands Registry: a repository of documents related to interests in reserve land that are administered in accordance with the *Indian Act*. It is guided by a set of interacting procedures designed to govern the registration of rights or interests in reserve lands. Also known as the **Indian Lands Registry System**.

Indian Mining Regulations: the prescribed rules that provide for disposition of reserve minerals. Some federal-provincial mineral agreements may affect the administration of minerals on reserve lands and the benefits from their disposition.

Indian Oil and Gas Canada: a special operating agency within Indigenous Services Canada. It regulates oil and gas resources on designated First Nation lands. Its dual mandate is to fulfill the Crown's fiduciary and statutory obligations related to the management of oil and gas resources on First Nation lands and to further First Nation initiatives to manage and control their oil and resources.

Indian Oil and Gas Regulations: the prescribed rules that include the regulatory tools to manage oil and gas activities on designated First Nation reserve lands.

Indian Referendum Regulations*:* the prescribed rules that govern the holding of votes on reserves.

Indian Reserve Waste Disposal Regulations: the prescribed rules that require an operator to obtain a permit to operate a garbage dump on a reserve or to store or dispose of wastes on reserve land.

Indian Timber Regulations: the prescribed rules that apply to the cutting of timber on surrendered lands and on reserve lands.

Individual Land Holding: a parcel of reserve land that is allotted by a Band Council to a member of that Band in accordance with section 21 of the *Indian Act.*

Initial Period: the period of time starting on the commencement date of an instrument often used in reference to periodic rental payments. An initial period is often a five year period; however, there may be circumstances where it may be longer or shorter.

Information Document: a summary which outlines all knowledge or news that the Band Council considers necessary for Band electors to give their informed consent to a designation (e.g., any additional benefits such as employment and taxation). Mandatory information requirements include: the land description, duration, proposed use, appraisal, consideration, and amending and revoking clauses. Information provided in this document must not conflict with the Designation Document. It is posted and made available to Band electors for all proposed designations in advance of the Information Meeting.

Information Meeting: an assembly to share relevant knowledge or news on the proposed designation project(s). The Band Council must hold at least one Information Meeting with Band electors.

Instrument: a legal document dealing with transactions relating to interests in reserve land. The document specifies the type of transaction, the parcel of land, the parties to the transaction, and any legal details. (Also known as a **Lands Instrument**).

Insurance: provides protection against a possible eventuality. In the context of reserve land management, several types of insurance may be necessary such as construction insurance, errors and omissions insurance, commercial general liability insurance, liability and property insurance, and equipment breakdown insurance.

> **Additional Insurance**: a type of general liability insurance that provides coverage to other individuals and/or groups not initially named in the insurance.

Named Insurance: a type of insurance for the person (or people) or business (or businesses) actually named in the policy.

Interdepartmental Letter of Agreement: an arrangement related to cooperation between the department and another federal department (e.g., between the department and the Department of Justice, or, the department and Natural Resources Canada in the area of surveys and the specifications for descriptions of lands for transactions on reserve lands).

Interest: a legal right to occupy, use or otherwise benefit from reserve land.
Interpretation Act: federal legislation about the construction of certain words and phrases, and, words of enactment, amendment or repeal of law.

Joint Tenancy: a form of ownership in the same property by two or more persons. The individuals, called joint tenants, share equal ownership of the property and have the equal, undivided right to keep or dispose of the property. Upon death, the share of a joint tenant who dies goes to the surviving joint tenants, not to the estate of the deceased joint tenant.

Joint Venture: is a business arrangement or commercial enterprise undertaken together by two or more parties which otherwise retain their distinct identities. The undertaking is its own entity, separate from the participants' other business interests.

Land Instrument: See **Instrument**.

Landlocked: describes land belonging to one person, which is surrounded by land belonging to others. The land cannot be accessed except by travelling over the other person's land.

Land Management Manual: the department's guide on reserve land management as amended from time to time. It includes chapters with policies, procedures and other resources.

Lands: are a solid part of the earth's surface. In the context of reserve land management, the term "lands" often refers to those lands situated and being in the reserve. In general, reserve land includes not only the surface but whatever else is present within the boundaries of the lot, and everything above the surface including the buildings on the land and the columns of air. In some cases, it also includes whatever is under the surface of the reserve (e.g., minerals).

Cultivated Lands: lands that are worked by plowing, sowing and raising crops.

Uncultivated Lands: lands or fields not prepared for raising crops.

Land Status Report: a report that contains all pertinent information from the Indian Land Registry, and appropriate departmental files, regarding the encumbrances and/or interests on a particular parcel of reserve land. The report identifies existing registered interests such as leases, permits, easements, Certificates of Possession, or potential encumbrances such as Cardex Holdings or designations.

Land Use Area Plan: an outlined area on a photo map for certain types of land transactions such as agricultural or grazing permits.

Land Use Plan: a document that outlines the future location and type (e.g., residential, commercial, industrial) of development activities. In the context of reserve land management, it helps to define particular areas of reserve land for specific purposes or uses.

Lawful Possessor: a Band member who has been allotted the right to use and occupy a parcel or parcels of reserve land pursuant to the *Indian Act*.

Laws: all legislation, statutes, regulations, codes and Band by-laws.

Lease: a contract by which one party (the landlord or lessor) grants to another party (the tenant or lessee) exclusive use and possession of a property for a specified period of time and purpose in return for a specified rent.

> **Agricultural Lease on Designated Lands**: a type of lease used for planned agricultural activity that involves real, immovable property (i.e., improvements such as barns for an intensive livestock operation or greenhouses) requiring exclusive occupation of the land. This type of lease is authorized under subsection 53(1)(b) of the *Indian Act.*
>
> **Agricultural Lease on Undesignated Band Lands**: a type of lease used for agricultural purposes and authorizes the production of agricultural crops or the grazing of livestock on lands which are uncultivated and unused. This type of lease is authorized under subsection 58(1)(c) of the *Indian Act.* Once a lease under subsection 58(1)(c) has been issued on the land, this section of the *Indian Act* cannot be used again on the land.
>
> **Commercial-Industrial Lease on Designated Lands**: a type of lease used when the leased property is intended for most commercial or industrial ventures. Commercial ventures could include shopping centres, restaurants, banks, gas stations, hotel facilities and casinos. Industrial ventures could include manufacturing facilities for various goods and materials. This type of lease is authorized under subsection 53(1)(b) of the *Indian Act*.

Cottage Lease: Also known as an **Individual Residential Lease on Designated Lands**. (See **Individual Residential Lease on Designated Lands**).

Head Lease: a lease made directly between the department and a lessee.

Individual Residential Lease on Designated Lands: a type of lease designed to reflect the special requirements attached to leasing land for single family use such as seasonal or year-round cottage recreation (e.g., such a lease might restrict use of the leased land to only the summer months). This type of lease is authorized under subsection 53(1)(b) of the *Indian Act.* Also known as a **Seasonal Recreational Lease** or **Cottage Lease**.

Leasehold: is a property held under the tenure of a lease.

Leasehold Interest: is the interest of a lessee in any leased property. A lessee who leases property acquires a leasehold interest in that property regardless of whether or not any capital cost is incurred in respect of that interest.

Lessee: means a person holding a property by lease.

Lessor: means a person who lets (rents) a property by lease.

Multi-Unit Lease: Also known as **Strata Lease on Designated Lands**. (See **Strata Lease on Designated Lands).**

Oil and Gas Lease: a type of lease that confers surface or subsurface rights or interests or the option to acquire such a lease for the purpose of oil and gas exploration or exploitation. Before leasing, the land is designated. This type of lease is issued under the *Indian Oil and Gas Act*.

Seasonal Recreational Lease: Also known as an **Individual Residential Lease on Designated Lands**. (See **Individual Residential Lease on Designated Lands**).

Strata Lease on Designated Lands: a type of lease used when leasing multiple housing units for residential purposes. This type of lease is typically used within the same building or housing complex such as an apartment building, condominiums, multiple story homes and/or terrace/town homes. This type of lease is authorized under subsection 53(1)(b) of the *Indian Act.* Also known as a **Multi-Unit Lease.**

Legal Land Description: a representation by which property can be definitely located by reference to surveys or approved recorded plans within a system set up by law or approved by law.

Letters Patent: an instrument issued by a government to the patentee, granting or confirming a right to the exclusive possession and enjoyment of land.

Licence: authorizes the use or occupation of land for a specific purpose. It is defined in the *Indian Act* and its regulations (e.g., *Indian Timber Regulations*). Regions also issue licences under the *Federal Real Property and Federal Immovables Act* in the course of managing federal Crown lands held in the name of His Majesty which have not yet been set apart as reserve.

Life Interest: when a Band member has a Certificate of Possession on reserve land and another person (typically a family member) is granted the right to use and occupy the land and live in the house. The life interest lasts as long as the person with the life interest is living or until they relinquish their life interest.

Locatee: a Band member in lawful possession of lands that has been allotted to them in accordance with the *Indian Act*. A locatee might have acquired their interest under the following scenarios: a) subsection 20(1) – Right to Allotted Lands; b) subsection 20(3) – Location Ticket; c) section 22 – Lawful Possession from Reserve Creation; d) historical individual interests; e) section 24 – Transfer of Possession to the Band or another Band Member; or, f) section 49 - Devisee's Entitlement.

Locatee Lands: reserve lands that have been allotted to a Band member under section 20 of the *Indian Act*.

Logging and Harvesting: the practice of felling and removing trees or the removal of dead and damaged trees from an area.

Logging Plan: provides site-specific details, harvesting methods and technology to be used that is necessary to ensure that harvesting operations achieve certain standards and obligations.

Lot: a parcel of land that has been subject to a recognized subdivision of property and has a written legal description addressing permissions and constraints upon its development.

Memorandum of Understanding: an agreement between two or more parties which expresses a convergence of will between the parties and indicates an intended common line of action. It is often used in cases where parties do not imply a legal commitment or where the parties cannot create a legally enforceable agreement. It can also be used between a government agency and a non-commercial, non-governmental organization.

Migratory Birds Convention Act: federal legislation that protects and conserves migratory bird populations and individual birds. It also provides legal protection for their eggs, nests and any part of the bird.

Minerals: means ore of metal and every natural substance that can be mined and that: a) occurs in fragments or particles lying on, above, or adjacent to the bedrock source from which it is derived and commonly described as talus; b) is in place or position in which it was originally formed or deposited, as distinguished from loose, fragmentary, or broken rock or float, which, by decomposition or erosion of rock, is found in wash, loose earth, gravel, or sand*;* and, c) includes coal, petroleum, and all other hydrocarbons, regardless of gravity and recovered natural gas, methane, coal bed methane, and other gases, building and construction stone, limestone, dolomite, marble, shale, clay, sand and gravel*.*

Minister: means the head of a government department. In the Land Management Manual, this term can refer to either the Minister of Indigenous Services or the Minister of Crown-Indigenous Relations and Northern Affairs (or their successor). The Minister of Indigenous Services and the Minister of Crown-Indigenous Relations and Northern Affairs are both responsible for additions to reserve and pre-reserve designations (e.g., both ministers can issue a Ministerial Order under the *Addition of Lands to Reserves and Reserve Creation Act*). The Minister of Indigenous Services is largely responsible for all other reserve land management activities.

Ministerial Loan Guarantees: are used to secure loans to build, purchase or renovate on-reserve housing. Subsection 89(1) of the *Indian Act* prevents the use of reserve land to be used as security for loans as the lender is unable to seize the real or personal property of the owner. As a result, an impediment is created for First Nations wishing to access financing for housing projects. To offset this barrier, the department issues Ministerial Loan Guarantees to secure loans for First Nations for the purpose of construction, acquisition or renovation of on-reserve housing. By providing a Ministerial Loan Guarantee, the Minister guarantees that the Crown will pay the loss incurred by the lender if a First Nation defaults on its loan with the lender.

Ministerial Order: a decision made by a Minister of the Crown that does not require the approval of the federal cabinet.

Mitigating Measures: the elimination, reduction, or control of the adverse environmental effects of the project, including restitution for any damage to the environment caused by such effects through replacement, restoration, compensation, or any other means*.*

Mortgage: a legal agreement by which a bank or other creditor lends money at interest in exchange for taking title of the debtor's property, with the condition that the conveyance of title becomes void upon the payment of the debt.

Mortgage Acknowledgement Agreement: is a document used to ensure that a mortgage will be legally recognized.

Mortgagee: a lender under a mortgage.

Mortgagor: a person that enters into a mortgage agreement with a lender.

Municipality: a city, town, village or other built-up area with municipal authorities and includes a rural or urban municipality, as defined in relevant provincial legislation.

Negotiation: confer to reach an agreement.

No Evidence of Title Issued: means when a Band member is in lawful possession of reserve lands pursuant to the *Indian Act* but evidence of title was not issued for the land. The transaction granting possession may have been administratively deficient, or the lawful possessor who received the interest was deceased or was immediately transferring their right of possession to another Band member and therefore a Certificate of Possession was not issued. (This term is a status designator invoked within the Indian Lands Registration System against either an allotment or a section 24/49 transfer where a Certificate of Possession to 'evidence' title is not issued because of a deficiency or ambiguity).

Nominal Rent: See **Rent.**

Non-Disturbance Agreement: a contract or document that stipulates if the lease is terminated, the department will not disturb the sublessee's possession and quiet enjoyment of the subleased premises, on the condition the sublessee continues to comply with the terms and conditions of the sublease. It ensures a sublessee will not be evicted if the lessor goes bankrupt.

Non-metallic Minerals: mineral substances located at or near the surface of the land, which may be removed by an open excavation. They include sand, gravel, clay, earth, ash, marl, peat, limestone, gypsum, granite, diamond, coal, placer deposits of non-metallic minerals and other non-metallic substances, but do not include a) oil, gas and bitumen as defined in the *Indian Oil and Gas Act* and its *Indian Oil and Gas Regulations*; and, b) naturally occurring metallic substances and rock containing those substances.

Non-negotiable Terms: are firm stipulations in a lease (e.g., applicable laws and standards that must be included in the lease).

Notice: a document, registered in the Indian Lands Registry that reflects the existence of a claim or interest, whether legally valid or not, against a parcel or reserve, designated or surrendered land.

Notice of Entitlement: a historical individual interest in reserve land created by Band Council Resolution and approved by the Minster under subsection 20(1) of the *Indian Act*. After 1951, a Band member received a Notice of Entitlement as evidence of right to lawful possession to reserve lands which had not been officially surveyed. Although all existing Notice of Entitlements continue to be recognized, they are no longer issued as they have been replaced with Certificates of Possession.

Notice of Referendum: means a notification about an upcoming referendum vote. The *Indian Referendum Regulations* require it to be posted by the electoral officer or deputy electoral officer at least 14 days before the day of the Information Meeting for the referendum and at least 42 days before the day of the referendum.

Official Plan: a survey plan which is confirmed pursuant to section 29 of the *Canada Lands Surveys Act*. Official plans are used for the survey of jurisdictional boundaries of reserve lands or parcels which create a jurisdictional boundary once a land transaction has been completed.

Oka Letter: a document issued to a Band member of the Mohawks of Kanesatake informing the Band member that their rights and interests in Kanesatake lands have been recorded in the Indian Lands Registry System.

Open Excavation: means digging that is not fully underground or deep in the earth (such as a mine) but rather an open dig site. Often the width is greater than the depth and is unsupported with side slopes cut at safe inclinations to enter or exit the excavation.

Operational and Restoration Plan: a document that describes the working procedures for taking, removing and disposing of unconsolidated non-metallic substances, and, their potential impact on the environment, reserve and its surrounding lands, including an indication of remedial measures the company intends to implement.

Order in Council: a legal instrument made by the Governor in Council on the advice of the federal cabinet.

Parcel: a piece of land.

Partnership: an arrangement between two or more people to oversee business operations and share its profits and liabilities.

> **General Partnership**: a business arrangement in which two or more individuals agree to share in all assets, profits, and financial and legal liabilities of a jointly-owned business. In this arrangement, partners agree to unlimited liability meaning liabilities are not capped and can be paid through the seizure of an owner's assets. Any partner may be sued for the debts of the business.

Limited Liability Partnership: a form of business organization where all of the owners have partial personal legal responsibility for the financial obligations of the business. It is liable as an entity for any debts or obligations and the partners are not liable personally.

Party: a person or other legal entity that enters into an agreement.

Period: the legally recognized time of years, months, days, as the case may be (e.g., a five year period starting on the day following the end of a preceding five year period).

Permit: a contract by which one party (the landlord or permittor) authorizes another party (the tenant or permittee) the non-exclusive use of a parcel of land for a specified period of time in return for a specified rent.

Access Permit: is a type of permit that authorizes a party to use roads on the reserve, either to get to and from the lands for which the user has a lease or permit, or to go through the reserve to an off-reserve location.

Agricultural Permit: is a type of permit that authorizes activities for crop production. These permits do not allow for the construction of buildings (e.g., barns); only removable structures are allowed (e.g., fences).

Distribution Permit: is a type of permit that authorizes utility services where the primary purpose is to distribute services on a reserve, such as electricity, water, sewer, telecommunications, Internet, cable or natural gas.

General Permit: is a type of permit that authorizes activities on reserve lands not otherwise included in other specific permit types.

Grazing Permit: is a type of permit that authorizes cattle feeding.

Easement Permit: is a type of permit that authorizes: i) utility services where the primary purpose is to transmit services across a reserve, such as electricity, water, sewer, telecommunications, Internet, cable or natural gas; or, ii) other non-exclusive uses of reserve land, such as irrigation ditches, drainage and temporary flooding.

Interim Use and Occupation Permit: is a type of permit that authorizes the use and occupation of reserve lands to carry out construction while the Band goes through the process of designating the lands for a lease. This type of permit may also be appropriate in support of a section 35 transaction.

Natural Resources Permit: includes mineral and timber permits and other instruments authorized under the *Indian Mining Regulations* and *Indian Timber Regulations*.

Permittee: a person or party who is issued a permit or receives other official authorization to do something (e.g., the proponent).

Permittor: a person or party who issues a permit (e.g., the Department).

Waste Disposal Permit: is a type of permit that authorizes the operation of a waste disposal site on reserve land as per the *Indian Reserve Waste Disposal Regulations*.

Plan of Survey: is a plan prepared from a full field survey with official survey monuments placed to reference all corners of the parcels or boundary.
Policy on Additions to Reserve/Reserve Creation: provides guidance on assessment, acceptance and implementation of reserve creation proposals.

Power of Sale: an action taken by the mortgagee to sell the lawful possession of the mortgaged property to a purchaser, free and clear of the interest of the mortgagor or any other person having an interest subsequent to the mortgage.

Precedents: templates used when drafting documents such as standard contracts or other agreements. In the context of land management, they provide the basis for land instruments (e.g., leases) and include necessary policy and legal requirements to ensure consistency and accuracy when negotiating terms. Precedents simplify drafting, allow for a streamlined process and can be tailored to meet the needs of specific projects.

Premises: the lands and improvements or any part of the lands and improvements.

Project: is defined under section 81 the *Impact Assessment Act* as “(a) a physical activity that is carried out on federal lands or outside Canada in relation to a physical work and that is not a designated project or a physical activity designated by regulations made under paragraph 112(1)(a.2); and, (b) a physical activity that is designated under section 87 or that is part of a class of physical activities that is designated under that section.”

Proponent: the person, body, federal authority, or government that proposes the carrying out of an activity on reserve.

Public Purpose: a purpose that primarily benefits the general public or a portion of the general public, as opposed to benefitting only particular individuals or entities. Examples of a public purpose include a railway, public road, pipeline, public work or work designed for a utility that benefits the public, such as a power transmission line.

Quit Claim: is a formal renunciation of any claim against a person or of a right to land. Quit Claims are not accepted in some circumstances.

Quit Claim Deed: releases a person's interest in a property without stating the nature of the person's interest or rights, and with no warranties of that person's interest or rights in the property.

Receiver General for Canada: the central treasurer and accountant of the federal government. It oversees all the funds coming in and going out of government accounts and safeguards public money.

Referendum: means a vote on an important question that is open to all electors (on a reserve).

Region: the appropriate regional office of the department, and includes “district” offices.

Registrar: an employee of the department responsible for maintaining the Indian Register. The Registrar is the sole authority for determining which names will be added, deleted or omitted from the Register.

Registration: the process of inserting into the Indian Land Registry the instruments and supporting documentation affecting a parcel of reserve land.

Registration Number: the number assigned to an instrument registered in the Indian Lands Registry System.

Regulatory Gap: refers to an absence of laws. In the context of reserve land management, the division of law-making authority between the federal and provincial governments has resulted in some laws not applying on reserve.

Remediation Process: refers to the conduct and control of the clean-up of hazardous materials and other environmental damages on an existing environmental site. It must be completed to fulfil a remediation order or enforceable directive of any authorized governmental authority in accordance with applicable environmental law.

Rent: money or other consideration paid by a tenant/lessee to a landlord/lessor in exchange for the exclusive use and enjoyment of land, a building or part of a building. Also known as **Consideration.**

> **Additional Rent**: any amount payable to the lessor under a lease other than Annual Rent and Fair Market Rent.
>
> **Annual Rent**: the amount of rent paid annually or monthly in a year.

Fair Market Rent: the most probable rent a property should bring in a competitive and open market, reflecting all conditions and restrictions of the specified lease agreement including term, rental adjustment and revaluation, authorized uses, use restrictions and expense obligations; the lessee and lessor each acting prudently and knowledgeably and assuming consummation of a lease contract.

Fee: money or other consideration paid by a tenant/permittee to a landlord/permittor in exchange for the non-exclusive use of a parcel of land for a specific period of time. In the context of reserve land management, the term “rent” is often used when describing consideration for a lease but the term “fee” is often used when describing consideration for a permit.

Nominal Rent: a rent agreed between parties which is not related to actual value.

Prepaid Rent: the rent payable on or before the commencement date of the instrument.

Proposed Rent: anticipated amount of rent to be charged according to a rental structure.

Reduced Rent: means the amount of rent reduced from the rents charged at the fair market rate.

Rent Adjustment: means the department, with the consent of the Band Council, may reduce or adjust the amount and/or the interest payable under the contract as per subsection 59(a) of the *Indian Act.*

Rental Structure: means a payment made periodically by a lessee to a lessor for the occupation or use of land, buildings, or other property.

Rental Yield: the rental return generated by the lease.

Rent Payment Arrangement: a plan outlining the rent imbursement details. In the context of reserve land management, a designation may contemplate a deferred rent payment arrangement.

Rent Review Period: refers to the timeframe for rent reviews. In the context of reserve land management, they are based on an appraisal to determine fair market rent in every lease and the standard compensation review period is five years, but a longer or shorter period may be negotiated in the lease.

Rent Reviews: are the mechanism for adjusting a lessee's rent to the current market level. The main purpose of rent reviews is to protect the lessor against inflation.

Reserve: a tract of land, the legal title to which is vested in the Crown, that has been set apart for the use and benefit of a Band.

Joint Reserve: a reserve set aside for two or more First Nations.

Reserve Creation Proposal: a set of documents submitted by a First Nation to its respective departmental regional office to initiate the addition to reserve process. It includes a Band Council Resolution and a proposal with information that should meet the minimum requirements as set out in the Policy on Additions to Reserve/Reserve Creation.

Reserve General Abstract: contains particulars which relate to the establishment of a reserve, transactions such as a surrender or designation of reserve land and other transactions that affect the reserve as a whole.

Reserve Land Register: a list established pursuant to section 21 of the *Indian Act*. It records interests on Band land, instruments respecting lands which are allotted to individual Band members under section 20 of the *Indian Act* and other transactions relating to those individual land holdings.

Revocation: an instrument used to nullify all or part of specific legal interests.

Right of Renewal: is the tenant's option to enter into a new contract with the landlord. (It is not an extension of the existing term of the contract).

Right-of-Way: in its traditional sense, a type of easement giving the right to pass through land owned by another. At common law, a right-of-way does not give the holder a fee simple interest or the right to exclusive possession of the land. However, in modern usage, the term sometimes refers to a physical tract of land and does not describe the nature of interest in the land. In that sense, depending on the circumstances, the right-of-way may be a limited interest in the land, such as an easement, or a fee simple interest.

Right-of-Way Between Band Members: a legally delineated parcel of land, over which permission is granted to people, vehicles and utilities to cross and it exists in perpetuity (i.e., it follows the land and is not based on ownership).

Riparian: of, relating to, or living on the bank of a river or stream.

Risk: chance or possibility of danger or loss.

Royal Prerogative: refers to the power of the Crown to take action as an exercise of its executive power.

Royalties: are usage-based payments, usually expressed as a percentage of the production sold, made by one party (the permittee) to another (the permittor) for the right to ongoing use of an asset.

Run with the Land: refers to the rights and covenants in a real estate deed that remain with the land regardless of ownership. Rights and covenants "run with the land" when the property changes hands meaning the rights are tied to the property (land) and not to the owner and move from deed to deed as the land is transferred from one owner to another.

Schedule: an attachment to legal instruments which forms part of and is integral to those legal instruments.

Search of Title: is the research of public records to determine a property's legal ownership and identification of what claims are on the property.

Section 35 Agreement: a final agreement between a Band Council and the expropriating authority, usually in the form of a letter or memorandum of understanding with respect to a section 35 transaction. This agreement must satisfy the Federal Requirements List. It is departmental policy to make the section 35 transaction only after consultation with the Band and consent is obtained from the Band.

Section 35 Easement: the grant or transfer of less than a full interest in reserve lands to an expropriating authority for a specific purpose, in accordance with section 35 of the *Indian Act*. When Canada grants or transfers less than a full interest under section 35 of the *Indian Act*, the underlying interest remains with Canada and continues to have reserve status.

Section 35 Transaction: a generic term used to describe a section 35 Transfer, or a section 35 easement, authorized pursuant to section 35 of the *Indian Act* and the *Federal Real Property and Federal Immovables Act*.

Section 53/60: refers to sections 53 and 60 of the *Indian Act* whereby a Band has obtained delegated authority to manage or lease designated lands and/or exercise control and management over reserve lands occupied by the Band on behalf of the Minister.

Security deposit: a performance bond, letter of credit or other similar security required under a contract.

Service Agreements: arrangements for the provision of amenities. In the context of reserve land management, the Band Council and the relevant municipality, district, or province/territory need to arrange for services on reserve land such as water, sewer, solid waste disposal, fire, and, road or highway access.

Setting Land Aside: is a term that is generally used to refer to activities under subsection 18(2) the *Indian Act* which states the Minister may authorize the use of reserve lands for schools, the administration of affairs, burial grounds, health projects or, with the consent of Band Council, for any other purpose for the general welfare of the Band and may take any lands in a reserve required for such purposes.

Simple Majority: means the highest number of votes cast exceeds the second-highest number. For example: if there are 100 eligible electors and 49 vote in the referendum; if 25 vote in favour, the vote passes.

> **Majority:** In keeping with a plain reading of the *Indian Act* and the *Interpretation Act*, the greater number of votes cast in favour of a result (i.e., either for or against). It does not mean over 50% of the votes cast.

Site Reclamation: the process of cleaning up and reconverting disturbed and utilized land to its former state or other productive uses. This process is often related to remediation of the land.

Species at Risk Act: federal legislation that prevents wildlife species from becoming extinct and secures the necessary actions for their recovery. It provides for the legal protection of wildlife species and the conservation of their biological diversity.

Stale Dating: refers to specific timelines in which environmental site assessments completed can no longer be relied upon. In such cases, the site must be reassessed.

Statement of Vote Results: a report completed by the electoral officer indicating the outcome of the referendum.

Statutory Declaration: a statement of facts that a person puts in writing. The person making the statement must sign it to confirm they are telling the truth and must sign it in the presence of someone (a witness) who has the legal authority to take oaths or affirmations (e.g., a lawyer, a commissioner for oaths or a notary public). A person is guilty of an offence if they make a false statutory declaration. The declaration is of the same force and effect as if made under oath and therefore has value as evidence.

Stumpage fee: the price businesses and individuals pay for the right to harvest timber from a given land base.

Sublease: is created when a lessee in turn leases all or part of their interest in the land under the head lease to a third party.

Sublessee: the lessee in any sublease (i.e., the holder of the sublease).

Substantial Completion: the date on which the lessor is provided with a written certificate by an architect or engineer certifying to the lessor that: a) improvements are substantially complete in all material respects in a proper manner and in accordance with the area development plan and the construction plan, and in accordance with the requirements of a lease, except for deficiencies the correction of which, in the opinion of the architect or engineer, will be adequately addressed by the lessee*;* b) all permits for occupancy required by an authority have been obtained*;* and, c) the improvements are ready for occupancy*.*

Subsurface Materials: means earth, minerals or rocks near but not exposed at the surface of the ground.

Subsurface Rights: are rights to extract earth, minerals or rock from below the surface of the land.

Surface: refers to the land and means on the top of the ground.

Surface Consideration: See **Surface Fee**.

Surface Fee: compensation for the use and loss of land as a result of the operation. A surface fee can be negotiated as a condition to ensure the proponent extracts the minerals within the term of the permit/lease rather than holding the resource. While surface fees are ultimately negotiable, they should be based upon fair market rent or current market value of the utilized lands and coverage area required for the operation. (Also known as **Surface Consideration**).

Surrender: the release, either absolutely or not, and either conditionally or unconditionally, by a Band and its members in all or part of a reserve as provided for in subsection 38(1) of the *Indian Act*.

> **Absolute Surrender**: means the Band relinquishes its interest in all or part of a reserve to the Crown. The Crown is then allowed to "sell" or "exchange" reserve land for the benefit of the Band. Surrendered lands lose their reserve status, and the Band's interest in the land (both collective and individual) is extinguished.
>
> **Conditional Surrender**: means the release of all or part of a reserve to allow for leasing or other temporary interests in the lands.

Historical Surrender: generally refers to a surrender that occurred before 1988.

Surrendered Lands: a reserve or part of a reserve or any interest therein, the legal title to which remains vested in the Crown, that has been released or surrendered by the Band for whose use and benefit it was set apart.

Surrendered and Designated Lands Register: is a list established pursuant to section 55(1) of the *Indian Act*. It records the particulars in connection with any transaction affecting absolutely surrendered or designated lands. The Surrendered and Designated Lands Register is maintained by the department.

Survey: the legal delineation of a parcel of land resulting from the scientific process of measuring the dimensions of a particular area of the earth's surface, including its horizontal distances, directions, angles, and elevations. Artificial structures, such as a road or building, may also be recorded. Once these measurements are taken, they can be used to make a plan or a map.

Tenancy in Common: a form of concurrent ownership that can be created by deed, will or operation of law. A tenant in common may have a larger share of property than the other tenants and is free to dispose of their share without the restrictive conditions place on a joint tenancy. Unlike joint tenancy, tenancy in common has no right of survivorship, and the property goes to the deceased's heirs.

Textual Description: are prepared without survey instructions, are not based upon a field survey, and are not recorded in the Canada Lands Survey Records. Textual descriptions are suitable only for the description of limited and short term interests.

Third Party: in the Land Management Manual, this term refers to another person or other legal entity besides the two principle parties (which are generally the Band and the department).

Third Party Interest: refers to the right to occupy, use or otherwise benefit from reserve land of another person or other legal entity besides the two principle parties (which are generally the Band and the department). In cases such as pre-reserve designations and before land is added to reserve, it may be encumbered by third party interests which must be satisfied and/or discharged from title before the reserve can be created.

Timber: means trees, whether standing, fallen, living, dead, limbed, bucked or peeled.

Timber Mark: certifies ownership of the logs and helps prevent theft of timber from Crown lands. It does not authorize timber to be cut. Not all provinces issue timber marks.

Title: means right to ownership of a property with or without possession. In the context of reserve land management, title of the reserve land belongs to the Crown and is held for the use and benefit of a Band.

Trade Fixtures: typically means personal chattels installed during the term of the lease by or on behalf of the lessee or sublessee for carrying on their trades on the premises. They remain the property of the lessee or sublessee.
Transaction: an act which creates, changes, transfers or terminates interest in reserve land.

Transfer: See section 24, 35, and 49 transfers in the list below for specifics.

> **Section 24 Transfer**: allows a Band member to transfer their lawful possession of reserve land to the Band Council or to another Band member(s), with the approval of the Minister.
>
> **Section 35 Transfer**: the grant or transfer of a full interest in reserve lands to an expropriating authority, in lieu of the expropriating authority acquiring the lands without the consent of the owner pursuant to its expropriation powers. The grant or transfer is usually made for a specific purpose and is subject to a requirement that the lands be returned to Canada when no longer needed for that purpose.
>
> **Section 49 Transfer**: all transfers of lawful possession or occupation of reserve land to a person claiming to be entitled to that land by devise or descent, must be approved by the Minister.
>
> **Transferee**: the person receiving a legal interest.
>
> **Transferor**: the person transferring a legal interest.

Trustee: an individual that manages assets or holds legal title to property to administer it for a beneficiary.

Unavoidable Delay: provides for some leeway to stay out of a default situation when delays and/or interruptions occur which are out of the control of any party.

Unconsolidated Non-Metallic Substances: refers to sediments ranging from clay to sand to gravel, with connected pore spaces that allow groundwater to be stored and transported. This mainly includes sand, gravel, clay, earth, ash, marl, stone, fill material, top soil, non-metallic placer deposits and peat.

Utilities: refers to an organization supplying water, sewer, gas, electricity, telecommunications, Internet, cable or other important services to the community.

Value Assessment: means weighting the worth of a lease. In the context of reserve land management, it is undertaken during the leasing phase.

Voluntary Transfer: a voluntary transfer (done of one's free will) of a locatee's interest in the affected lands to the Band under section 24 of the *Indian Act.*

Voter Declaration Form: a document that sets out or provides for: a) the name of an elector; b) the Band membership or registry number of the elector or, if the elector does not have a Band membership or registry number, the date of birth of the elector; c) a statement that the elector has read and understood the information package regarding the proposed designation or surrender and has voted freely and without compulsion; and, d) the name, address and telephone number of a witness to the signature of the elector.

Voters List: a list comprised of Band electors (including both on-reserve and off-reserve members) that is created for a referendum or election.

Voting Package: a set of information that a electoral officer or a deputy electoral officer mails or delivers to every Band elector who does not reside on the reserve and for whom an address has been provided. It includes the Designation Document, Information Document, the Notice of Referendum, the date, time and location of the information meeting, a mail-in ballot stating the question to be submitted to the Band electors, envelopes, a voter declaration form, and a letter of instruction about voting by mail-in ballot.

Warranties/Representations: means undertaking as to the ownership or quality of something.

Will: a written document that provides instructions on what is to be done with the property of a deceased person and identifying who is to manage the property until it has been distributed.

Zoning: the act of defining particular areas for specific purposes or uses.

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1.0 Introduction

1.1 Bands that operate under the *Indian Act* can designate reserve land or designate lands that are intended to be added to or set apart as a reserve for leasing or other purposes. When a Band designates land, it allows the Minister to grant land instruments that allow for exclusive use of a specified portion of the reserve to a third party for economic development or other purposes while the designated lands remain reserve lands.

1.2 All designations require the informed consent of eligible electors (Band electors). Informed consent for a designation must be obtained through a vote held in accordance with the *Indian Referendum Regulations*.

1.3 A designation for leasing is not an absolute surrender. For more information on absolute surrenders, please see chapter five in the 2002 Land Management Manual.

1.4 Several types of land uses are not allowable on designated lands. The following sections of the *Indian Act* are not compatible with designated lands:

a) setting land aside under s.18(2) (e.g., schools, community or social housing);
b) allotting and transferring allotted land under s.20 - 25;
c) section 28 (including authorizing permits under s.28(2)) – permits may be issued on designated land pursuant to s.53(1)(b);
d) Indian estate matters under s.42, 44, 46, and 48 - 51; and,
e) sections 58 and 60 (which include granting leases of uncultivated land and locatee land and delegations of management authority over reserve land).

Types of Designations

1.5 There are two broad categories of designations: general and specific. When general and specific proposals are considered together under one referendum, it is commonly referred to as a combination designation.

General Designations

1.6 A general designation is one where no specific or immediate project is planned, but land is designated for a range of defined potential uses. General designations are used in anticipation of future development so that a Band may be in a position to quickly lease reserve land when a specific project arises.

Specific Designations

1.7 A specific designation is when a specific project and/or activity (e.g., a small area of land for a gas station, a strip mall or rental cottages) is proposed for a parcel of reserve land.

1.7.1 Specific designations do not require a negotiated lease for the purposes of the referendum, but mandatory terms, including the land description, duration, proposed use, consideration and rental structure must be clearly stated in the Designation Document.

Combination Designations

1.8 A combination designation may be used when a specific project is being contemplated for part of the lands, but a Band wishes to designate, under a general designation, additional reserve lands to provide for other potential uses in the future.

Pre-Reserve Designations

1.9 Pre-reserve designations are available to Bands through the *Addition of Lands to Reserves and Reserve Creation Act*. A pre-reserve designation identifies land for a specific or general purpose prior to that land receiving reserve status. If the Band Council has requested that the Minister set apart certain lands as a reserve, the Band may designate any interest or right in or to the lands, including for the purpose of the replacement of an existing interest or right in or to those lands. By obtaining a pre-reserve designation, the Band can assure itself that the land can be used for the intended purpose(s) before advancing through the addition to reserve process. Where there is an existing exclusive use business on the land where an *Indian Act* lease will be required upon reserve creation to satisfactorily replace an existing third-party interest, a pre-reserve designation is required before the lands may be added to reserve.

Phases of a Designation

1.10 There are three phases of the designation process:

1) **Preparation Phase** — The Band identifies lands to designate and addresses issues relating to existing allotments or interests. During this phase, the department works with the Band Council to identify and address issues, and prepare the Designation Document.

2) **Referendum Phase** — The department works with the Band Council to ensure the designation meets the requirements of the *Indian Act*, the *Indian*

Referendum Regulations, and related departmental policies (such as these policies), and to address any issues not resolved during the preparation phase.

3) **Final Phase** — Following a successful referendum, the signed Designation Document is submitted to the Minister with a Band Council Resolution recommending Ministerial acceptance.

2.0 Preparation Phase

Environment

2.1 Environmental processes such as site assessments, reviews, and audits may be required. Departmental environment officers must be included early on in planning stages and before the issuance of a lands instrument to ensure appropriate environmental considerations have been taken.

Independent Legal Advice

2.2 The department recommends Band Councils seek independent legal advice in all circumstances. In some instances, this will be a requirement. In cases where a Band Council does not wish to obtain independent legal advice, a Band Council Resolution stating that they have chosen not to obtain independent legal advice will be required.

Individual, Band and Third Party Interests

2.3 Reserve land that is to be designated must be unallotted and free of incompatible encumbrances.

2.4 At the outset of a proposed designation, an encumbrance check must be conducted to identify, to the extent possible, all registered surface and subsurface encumbrances (i.e., third party interests, locatee interests, Indian Oil and Gas Canada interests, etc.) in the Indian Lands Registry System.

2.5 After an encumbrance check has been completed, a Land Status Report must be generated and provided to the Band Council. It is the Band Council's responsibility to review this report and take any appropriate steps to address possible issues. The department does not provide representations or warranties regarding encumbrances and does not guarantee that the Land Status Report will identify all encumbrances. Consequently, there may be other unregistered encumbrances.

2.6 Although not required, it can be useful to compare aerial or satellite imagery of the proposed designated lands against the known encumbrances to determine if infrastructure exists for which there is no registered land tenure. It can also be useful for the departmental lands officer to ask the Band Council to confirm if there are any encumbrances (such as underground infrastructure) other than those identified in the Land Status Report.

Locatee Interests

2.7 A locatee must be notified in writing if there is a proposed designation on any part of their land. If a Band representative has not notified the locatee, a departmental official must do so.

2.8 If the locatee agrees to a voluntary transfer of their interest in the affected lands to the Band under s.24 of the *Indian Act*, the transfer must be finalized prior to the referendum.

Note: A quit claim deed is not an acceptable means of extinguishing lawful possession.

2.9 If the Band Council and the locatee cannot agree on a voluntary transfer under s.24 of the *Indian Act*, the locatee's land must be excluded from the designation or the department will not proceed any further with the proposed designation.

Custom Interests or Rights

2.10 Not all Bands use the allotment provisions of the *Indian Act*. Some Bands provide individual Band members rights to certain reserve lands by the custom or tradition of the Band. Since the department is not involved in addressing or negotiating these interests, the Band Council must extinguish these interests or exclude them from the lands proposed for designation prior to the referendum vote.

Third Party Interests

2.11 The department and Band Council must discuss any pre-existing registered encumbrances to determine if the interests are compatible with the proposed designation. If they are compatible, the designation should be made subject to such interests. Since land subject to incompatible interests cannot be included in the designation, those interests must be extinguished prior to the designation vote.

Unauthorized Third Party Interests

2.12 On occasion a Band may seek to designate reserve land on which there is an existing business without a valid lease (known as a buckshee lease). Such a

business is not authorized under the *Indian Act* [per s.28(1)] and the Band must designate the land to provide a lease for lawful operation to a third party.

Band Infrastructure

2.13 Designated lands should not include any lands used or intended to be used for the general welfare of the Band under s.18(2) of the *Indian Act*, such as schools, water treatment plants and health facilities.

Access

2.14 Designated lands must be accessible and the proposed designation must not create landlocked parcels of land.

General Designations and Consent for Subsequent Leasing

2.15 As general designations are used in anticipation of future development and can be used for a range of potential uses, leasing specifics are likely to be unknown at the time of the designation. When the Band Council is ready to lease, it will be required to obtain consent through its own community approval process for every lease resulting from a general designation. The Band Council Resolution providing consent to the lease must state the Band Council followed its own community approval process.

Mandatory Terms to be included in the Designation Document

2.16 The Band Council sets the terms of a proposed designation, although the terms are often subject to negotiation with the department due to the legislation and policies that specify when the Minister may accept a designation proposal. For example, if the proposal includes leasing for nominal rent, then it must also identify the benefits accruing to the Band in lieu of fair market rent. As the terms of a proposed designation may be complex and involve significant risk, it is recommended that Bands seek independent legal and financial advice.

2.17 The Band Council must provide detailed project information to Band electors within the Designation Document and the Information Document. Mandatory information requirements include: the land description, duration, proposed use, appraisal, consideration, as well as amending and revoking clauses. These six mandatory information requirements are discussed below.

a. Land Description — Mandatory

2.17.1 The description of the land set out in the Designation Document must meet the requirements contained in the Interdepartmental Agreement between the department and Natural Resources Canada.

2.17.2 The department does not provide representations and warranties with respect to encumbrances and does not guarantee that the Land Status Report will identify all encumbrances. Consequently, there may be other unregistered encumbrances. The land description should detail all encumbrances identified in the department's Lands Status Report. The department's search of title is informational in nature. The report is designed to provide a record of all relevant documents that have been deposited in the Indian Lands Registry in connection to the parcel in question. The requestor(s) is then responsible for arriving at their own (legal) opinion as to the ownership and interests of the land and mineral rights.

b. Duration — Mandatory

2.17.3 It is recommended that a designation be for a fixed term. The Band may designate for an indefinite term; however, a lease must always be for a fixed (i.e., finite) term. If a designation is for a fixed term, any lease issued pursuant to that designation cannot expire after the end date of the designation.

c. Proposed Use — Mandatory

2.17.4 The proposed land use must be clearly identified in the Designation Document. Uses can range from very specific (e.g., a gas station) to a broad category or categories (e.g., residential, commercial, and industrial) or the use may be conditional upon zoning (e.g., any uses explicitly authorized under a zoning bylaw of the Band). Broad terms such as "ancillary uses" or "all lawful purposes" are not acceptable.

2.17.5 When designating for broad categories of uses, Band Councils should ensure the categories are consistent with any land use planning definitions in the Band's land use plan, if any, and consider relevant limits, conditions or prohibitions of specific activities. For example, a definition for "agriculture" could limit livestock types (e.g., hogs), impose limits on herd size, prohibit certain crops (e.g., cannabis), or prohibit certain agricultural practices (e.g., monoculture).

d. Appraisal — Mandatory

2.17.6 The Designation Document must state that prior to the issuance of any lease, fair market rent of the "highest and best use" of land must be determined through an appraisal process.

e. Consideration — Mandatory

2.17.7 The Designation Document must state whether the consideration will be based on a fair market rent appraisal, or whether consideration will be for nominal rent.

2.17.8 Future leases under a general designation may not be for joint ventures with nominal rent. Under certain conditions, specific designations may allow leases for joint ventures with nominal rent (see section 2.20).

2.17.9 If a Band proposes that any lease be at less than fair market rent, the Designation Document must state that the lease must be structured so that 100% of the benefits of the lease go to the Band. Two examples of how this has been achieved in the past are:

a) having a corporation, 100% of the shares of which are held in trust for the Band; and,

b) having a limited liability partnership, the sole limited partner of which is restricted to being the Band and the general partner of which is a Band corporation.

2.17.10 The Designation Document must state that where a lease provides for reduced or nominal rent to a Band-owned corporation, any subsequent transfers or subleases to non-Band-owned entities are required to be at fair market rent.

f. Amending and revoking clauses in the Designation Document — Mandatory

2.17.11 A designation document must provide the Band Council with the authority to:

a) amend the terms of the designation to correct clerical or minor errors; and,
b) revoke the designation (in part or in whole) for parcels of land where no interests have been granted.

Optional Terms that may be included in the Designation Document

Rent Payment Arrangements — Optional

2.18 A designation may contemplate a deferred rent payment arrangement. For more information, please see the chapter *Leasing on Designated Reserve Land*.

Non-Disturbance Agreement — Optional

2.19 The Designation Document must authorize the use of a non-disturbance agreement if the lease and/or sublease contemplates the use of a non-disturbance agreement.

Joint Ventures with Nominal Rent — Optional for Specific Designations only

2.20 For a specific designation to allow nominal rent for joint ventures to which a Band (or a Band-owned corporation) is to be a party, the Band Council must:

a) ensure the joint venture is structured so that 100% of the Band or Band-owned corporation's portion of the benefits from the project go to the Band;
b) obtain an appraisal of the fair market rent to be expected if they were leasing the land directly to a developer;
c) obtain a Certificate of Financial Advice and a financial report stating the proposal would likely provide a return greater than fair market rent to the Band or Band-owned corporation. The report must also clearly identify the level of risk (e.g., high, medium, or low risk tolerance);
d) obtain a Certificate of Independent Legal Advice; and,
e) include any other relevant information relating to the joint venture in the Designation Document.

Revoking and/or Amending Historical Surrenders for Leasing

2.21 To ensure informed Band electors' consent to proposed leases, it is strongly recommended that existing historical surrenders (i.e., designations pre-1988) for general leasing purposes and/or with no specific end date be amended or revoked through a vote under the *Indian Referendum Regulations*. It is recommended that the department and Band Council consult with their respective legal counsel when considering this option.

2.22 If a historical surrender states leases shall be issued to a specific third party (e.g., XYZ corporation), a Band Council Resolution may be used to revise the specific third party by removing XYZ corporation which would enable leasing to any third party, as long as the proposed use remains similar to the original designation.

Interim Use and Occupation Permit

2.23 Section 28(2) may be used to authorize the interim use and occupation of reserve lands to carry out construction while the Band goes through the process of designating the lands for a lease. Interim Use and Occupation permits will be considered on a case-by-case basis.

Note: These permits should be used with caution. If Band electors do not subsequently agree to the project and do not designate the land, the permittee will be responsible for the full cost of removing the improvements and returning

the land to its previous condition. If considering this type of permit, confer with departmental headquarters and regional legal counsel.

3.0 Referendum Phase

Request for Referendum

3.1 A Band Council Resolution must be submitted to:

a) request the Minister order a referendum;
b) inform the department of the date, time and place planned for the information meeting and the referendum vote;
c) request that an electoral officer be appointed; and,
d) confirm the terms and conditions stipulated in the Designation Document.

3.2 This information must be finalized and provided to the department no later than 20 business days prior to posting the Notice of Referendum.

3.3 A referendum must not be scheduled within 30 days of a Band Council election.

Appointment of an Electoral Officer and Deputy Electoral Officers

3.4 An electoral officer must be appointed through a Ministerial Order prior to the creation of the voters list.

3.5 It is recommended the electoral officer appoint at least two deputy electoral officers. At least one of the deputy electoral officers should be a member of the Band, if possible.

Voters List

3.6 A voters list comprised of Band electors (including off-reserve members) must be created.

Information Document

3.7 The Band Council must provide the electoral officer with an Information Document, which is separate from the Designation Document and may include additional information for the Band electors. The Information Document is to be posted and made available to Band electors for all proposed designations in advance of the information meeting.

3.8 The Information Document should contain all information that the Band Council considers necessary (e.g., any additional benefits such as employment and taxation) for Band electors to give their informed consent to the designation. Information provided in this document must not conflict with the Designation Document.

3.9 If the designation contemplates the land being leased at reduced or nominal rent, this must be identified in the Information Document.

Voting Package for Off-Reserve Band Electors

3.10 The electoral officer or a deputy electoral officer must mail or deliver a voting package to every Band elector who does not reside on the reserve and for whom an address has been provided. The package must include:

a) the Designation Document(s);
b) the Information Document to be discussed at the information meeting(s);
c) the date, time and location of the information meeting(s);
d) the Notice of Referendum;
e) a mail-in ballot, initialled on the back by the electoral officer, stating the question to be submitted to the Band electors;
f) an outer, postage-paid return envelope, pre-addressed to the electoral officer;
g) a second, inner envelope marked “Ballot” for insertion of the completed ballot;
h) a voter declaration form; and,
i) a letter of instruction regarding voting by mail-in ballot.

3.11 If a postal strike occurs after the Notice of Referendum is posted and before the referendum day, the mail-in ballots will be accepted after the referendum for the number of days equivalent to the duration of the postal strike during that period.

Postponing a Referendum

3.12 If unforeseen circumstances cause a significant disruption in the referendum process, a Band Council may request a postponement of the referendum with a Band Council Resolution. The department and the Band Council must ensure that the postponement and any changes in referendum timing and process are communicated to Band electors.

Information Meeting

3.13 The Band Council must hold at least one information meeting to share relevant information on the proposed project(s). If necessary, an interpreter should be present.

3.14 The electoral officer must attend at least one information meeting to explain the referendum process. If travel or health restrictions are in place, the electoral officer may attend remotely/virtually.

3.15 The electoral officer or departmental representative must take minutes of the information meeting to document the information provided to the Band electors prior to the designation vote. If the electoral officer is unable to attend due to exceptional circumstances, the department will accept the attendance of a deputy electoral officer or a certified copy of the minutes from the Band Council.

Vote Requirements

3.16 Section 39.1 of the *Indian Act* requires that for a designation to be valid, it must be assented to by a majority of Band electors voting at a referendum held in accordance with the *Indian Referendum Regulations*. In keeping with a plain reading of the *Indian Act* and the *Interpretation Act*, the term "majority" in section 39.1 means "the greater number of votes" cast in favour of a result (i.e., either for or against the designation proposal). In this instance, the term "majority" does not mean over 50% of the votes cast.

3.17 With a plain reading of s.39.1 of the *Indian Act*, rejected ballots, while understood to be votes cast, are not to be calculated as *de facto* "no" votes.

> For example,100 electors cast ballots; 49 vote in favour of the proposal, 48 vote against the proposal, and 3 ballots are rejected. In this instance, the greater number of votes cast in favour of a result are the 49 votes cast in favour of the proposal. The 3 rejected ballots are still recorded as votes cast but do not affect the outcome. In this instance, the designation is passed successfully.

Referendum Documentation

3.18 The electoral officer must complete a statement of vote results. The electoral officer and the Chief, or a member of the Band Council, certifies the designation.

3.19 If the designation is successful, the Band Council must sign the Designation Document.

4.0 Requesting a Review of the Referendum

4.1 A Band elector may request a review of the referendum where the elector believes there has been a contravention of the *Indian Referendum Regulations* or corrupt practice(s) in connection with the referendum.

5.0 Approval Phase

Ministerial Acceptance

5.1 If the vote is successful, and a request for review is not received, then the Band Council recommends by Band Council Resolution that the Minister accept the designation by Ministerial Order.

5.2 If a Band does not consent to a proposed designation, the electoral officer must still document the results of the vote. Documents must be kept on file in the respective regional offices but are not submitted for approval or registration.

5.3 A designation of reserve land is effective on the date accepted by the Minister.

5.4 A pre-reserve designation requires ministerial acceptance and takes effect once the lands are set apart as reserve lands.

Registration in the Indian Lands Registry

5.5 Designations and any associated documentation, including forms and agreements, must be prepared in a form suitable for registration in the Indian Lands Registry and must, in accordance with s.55 of the *Indian Act*, be sent for registration in accordance with the requirements of the Indian Lands Registration Manual.

Annex A: Authorities for Designating Lands

Authorities for Reserve Land Designations

Departmental policy for designations is governed by s. 37(2), 38(2), 39.1, 40.1, and 41 of the *Indian Act*.

Subsection 38(2) of the *Indian Act* allows a Band to designate all or part of its rights and interests in a reserve.

In accordance with s.39.1, a designation is valid if:

a) it is made to the Crown;
b) is assented to by a majority of the electors at a vote held according to the *Indian Referendum Regulations*;
c) the Band Council recommends the designation to the Minister through a Band Council Resolution; and,
d) the designation is accepted by the Minister.

Section 40.1 states that a designation that has been approved in accordance with s.39.1 will be certified under oath by a departmental officer and the Chief or a member of the Band Council.

Section 41 of the *Indian Act* deems a designation to confer all the rights necessary for His Majesty to carry out the terms of the designation.

A designation will only be accepted by the Minister where the relevant statutory provisions and departmental policy requirements are satisfied.

Relevant Statutory Requirements

The relevant sections of the *Indian Act* are as follows:

> *Other transactions*
> *37 (2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been designated under subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.*
>
> *Designation*
> *38 (2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of*

the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

Conditions — designation
39.1 A designation is valid if it is made to Her Majesty, is assented to by a majority of the electors of the band voting at a referendum held in accordance with the regulations, is recommended to the Minister by the council of the band and is accepted by the Minister.

Certification — designation
40.1 (1) A proposed designation that is assented to in accordance with section 39.1 shall be certified on oath by an officer of the Department and by the chief or a member of the council of the band.

Ministerial decision
(2) On the recommendation of the council of the band, the proposed designation shall be submitted to the Minister who may accept or reject it.

Effect of surrenders and designations
41 An absolute surrender or a designation shall be deemed to confer all rights that are necessary to enable Her Majesty to carry out the terms of the surrender or designation.

Authorities for Pre-Reserve Designations

Departmental policy for pre-reserve designations is governed by the *Addition of Lands to Reserves and Reserve Creation Act*, S.C. 2018, c. 27, s. 675.

Extracts from the *Addition of Lands to Reserves and Reserve Creation Act*

Designation:
5 (1) If the governing body of a First Nation has requested that the Minister set apart certain lands as a reserve, the First Nation may designate, conditionally or unconditionally, any interest or right in or to the lands, including for the purpose of the replacement of an existing interest or right in or to those lands. The designation may be made either
(a) before the title to the lands or the administration and control of the lands are transferred to Her Majesty in right of Canada; or
(b) before the lands are set apart as a reserve under section 4.

Application of Indian Act:

(2) Sections 39.1, 40.1 and 41 of the Indian Act apply in respect of a designation under subsection (1), any references to Minister in those sections being read as references to Minister, as defined in this Act.

Power of the Minister:
(3) On the acceptance by the Minister of a designation made under subsection (1), the Minister may grant the designated interest or right to a person or entity.

Effect:
(4) If a designation made under subsection (1) is accepted by the Minister, the designation takes effect at the time the lands are set apart as a reserve under section 4. Any resulting grant of the designated right or interest, if the grant is made before the lands are set apart as a reserve, also takes effect at the time the lands are set apart as a reserve.

Certain acts deemed to have been done under Indian Act:
(5) As of the time when the Minister sets apart any lands as a reserve under section 4, any designation made under subsection (1), and any resulting grant that was made under subsection (3), are deemed to have been designated or made, as the case may be, under the Indian Act.

Annex B: Relevant Case Law

These are considered the leading cases pertaining to designations. This is not intended to be all inclusive or exhaustive:

a. Guerin v. The Queen, [1984] 2 SCR 335
b. Blueberry River Indian Band v. Canada (DIAND), [1995] 4 SCR 344 (*Apsassin*)
c. St. Mary's Indian Band v. Cranbrook (City), [1997] 2 SCR 657

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1.0 Introduction

1.1 The purpose of a lease is to support economic development and provide for the exclusive use of reserve land for an agreed upon purpose and duration. Leases offer benefits such as:

a) providing flexibility in managing reserve land by enabling the Band to retain long-term control over the land, subject to the terms and conditions of the lease; and,

b) creating economic development opportunities by generating revenue and creating employment opportunities.

For more information on lease transactions on locatee land, please see Locatee Lease Policy and Directive, 2013.

1.2 Every lease involves a grant by the lessor (the department) for the exclusive use of land. The lessor retains exclusive rights and control over the land while the lessee is entitled to exclusive use of the land during the term of the lease.

1.3 A lease made directly between the department and a lessee is called a head lease. A sublease is created when a lessee in turn leases all or part of their interest in the land under the head lease to a third party.

1.4 A sublease may be created only if terms of the designation allow for subleasing. Under a sublease, rather than stepping into the lessee's position, the sub-lessee becomes, in essence, the lessee's tenant, and makes rental payments to the lessee. The lessee continues to be bound by their obligations under the head lease.

1.5 Leases involving designated lands do not include subsurface rights to mines, minerals or other subsurface materials such as sand, gravel, potash, and petroleum. For information on Oil and Gas Leases, which are issued under the *Indian Oil and Gas Act*, contact Indian Oil and Gas Canada.

Lease Activities

1.6 A lease can be classified by the type of activity it covers.

Table 1: Types of Standard Leases

Lease Type	Authorized Leasing Activities
Commercial-Industrial Lease on Designated Lands Subsection 53(1)(b) of the *Indian Act*	A commercial-industrial lease is used when the leased property is intended for most commercial or industrial ventures. Commercial ventures could include shopping centres, restaurants, banks, gas stations, hotel facilities and casinos. Industrial ventures could include manufacturing facilities for various goods and materials. At the request of the First Nation, the *First Nations Commercial and Industrial Development Act* can be used to develop federal regulations for complex commercial and industrial development projects. This could include large mines or hydro facilities.
Strata Lease on Designated Lands Subsection 53(1)(b) of the *Indian Act*	A strata lease is used when leasing multiple housing units for residential purposes. This type of lease is typically used within the same building or housing complex. Examples could include an apartment building, condominiums, multiple story homes and/or terrace/town homes.
Single-Unit Residential Lease on Designated Lands Subsection 53(1)(b) of the *Indian Act*	A single-unit residential lease is designed to reflect the special requirements attached to leasing land for single family use such as seasonal or year-round cottage recreation.
Agricultural Lease on Designated Lands Subsection 53(1)(b) of the *Indian Act*	This type of lease is appropriate where the planned agricultural activity involves real, immovable property (e.g., improvements such as barns for an intensive livestock operation or greenhouses) requiring exclusive occupation of the land. Removable structures, such as fences, portable silos or grain bins, are allowable under a s.28(2) permit and do not require a lease.
Agricultural Lease on Undesignated Band Lands Subsection 58(1)(c) of the *Indian Act*	While rarely used, a s.58(1)(c) agricultural lease may authorize the production of agricultural crops or the grazing of livestock. This type of lease requires the land to be uncultivated or unused and may only be used once.

Lease Precedents (Templates)

1.7 Lease precedents (available from the department) provide the basis for all leases and include necessary policy and legal requirements to ensure consistency and accuracy when negotiating terms. The precedents simplify drafting, allow for a streamlined process, and can be tailored to meet the needs of specific projects.

Note: When leasing in the Province of Quebec under the civil code, the Harmonized Lease Precedent must be used.

1.8 First Nations, as represented by their Band Council, have the option of being a contracting party to the lease, as reflected in the lease precedents. The department and the Band Council will continue to be in a fiduciary relationship with respect to the lease and have certain fiduciary duties and remedies, respectively.

1.9 Leases contain provisions dealing with all aspects of the relationship between the lessor (the department) and the lessee (the proponent) to ensure they understand their obligations to each other. The lessor, lessee, and the Band Council must negotiate elements including consideration (rent), rent reviews, the proposed use of land, and duration of the lease as reflected in the Designation Document and the community's land use plan, if applicable. It is the responsibility of the department to ensure all non-negotiable terms such as all applicable laws, regulations and standards are included when preparing a lease.

1.10 If provincial fire regulations require regular fire inspections, based on the type of leasing activities, then the lease must include a clause requiring regular inspections of the premises with a copy of the inspection report to be provided to the department (lessor) and the Band Council.

2.0 Creating a Lease

Environment

2.1 Environmental processes such as site assessments, reviews, and audits may be required. Departmental environment officers must be included early on in planning stages and before the issuance of a lands instrument to ensure appropriate environmental considerations have been taken.

Independent Legal Advice

2.2 The department recommends Band Councils seek independent legal advice in all circumstances. In some instances, this will be a requirement. In cases where a Band Council does not wish to obtain independent legal advice, a Band Council Resolution stating that they have chosen not to obtain independent legal advice will be required.

Credit Investigations and Corporate Standing

2.3 The proposed lessee, at their own expense, must obtain and provide the department with a credit check to confirm they have sufficient means to pay the agreed upon rent. Credit checks are not required in situations where the lessee will be a Band-owned corporation paying nominal or reduced rent.

2.4 Where the lessee is a corporation, the lessee must, at its own expense, provide proof of its corporate standing and the names of its current signing officers.

Land Description (Survey)

2.5 The lease must contain a legal land description which meets the requirements contained in the Interdepartmental Agreement between the department and Natural Resources Canada.

Encumbrance Check

2.6 Before any lease can be issued, an encumbrance check must be conducted to identify all surface and subsurface encumbrances, locatee interests, and Indian Oil and Gas Canada interests registered in the Indian Lands Registry System. After an encumbrance check has been completed, a Land Status Report summarizing these third party interests must be generated and provided to the Band Council. It is the Band Council's responsibility to review the Land Status Report and take appropriate steps to ensure the removal of any conflicting encumbrances.

2.7 A lease will be subordinate to prior interests such as distribution and access permits for utilities, easements, permits, or leases or permits for mineral or oil and gas extraction.

Access to the Premises and Landlocked Parcels

2.8 Access must be provided for any lands that become landlocked as a result of the lease.

2.9 The lessee is solely responsible for securing and maintaining legal access (by public or private road, water, air or otherwise) to and from the premises.

Service Agreements

2.10 The Lessee is solely responsible for securing service agreements with the Band Council or the relevant municipality, district, or province/territory with the approval of the Band Council for services such as water, sewer, solid waste disposal, fire, and road or highway access.

Authorized Use of the Lands

2.11 It is the responsibility of the lessor and the Band Council to ensure the lease is compatible with the designation and the Band's community land use plan and/or applicable bylaws.

Duration

2.12 A lease must always be for a fixed term. If the designation is for a fixed term, it must terminate no later than one day prior to the end date of the designation, unless terminated earlier by its terms or by operation of law.

Appraisal

2.13 The Lessee is responsible for obtaining an appraisal by a person accredited by the Appraisal Institute of Canada or its successor. This appraisal must give an indication of the fair market rent of the land being used for leasing. The lessee's choice of appraiser and terms of reference for the appraisal must be approved in advance by the department and First Nation.

Consideration

2.14 Monetary consideration, payable to the Receiver General for Canada in Canadian currency and accompanied by all applicable taxes, must be received in exchange for the granting of a head-lease.

2.15 If a fair market rent lease is being proposed after the designation, and a previous fair market rent assessment is outdated or does not apply to the proposed development, then a new fair market rent assessment must be undertaken at the leasing stage.

2.16 Leases may be made to Band-owned corporations for nominal or reduced rent if provided for in the Designation Document. Otherwise, a minimum of fair market rent must be obtained for all leases.

Adjustment to Fair Market Rent

2.17 If rent (including prepaid rent) is less than fair market rent, then the fair market rent, along with any taxes on that amount, will be due for the rest of the term when:

a) less than 100% of the benefits flow to the Band;
b) a mortgagee or a receiver claims to assign any part of the lessee's interest in the lease or subleases the premises; or,
c) a court order absolutely forecloses the lessee's equity of redemption in the lease, authorizes the assignment of any of the lessee's interest in the lease, or authorizes a sublease of the premises.

Nominal Rent for Joint Ventures

2.18 A Band (or Band-owned corporation) may enter into a nominal rent lease as a party to a joint venture if the designation provides for such an arrangement. General designations do not allow for joint ventures; such projects must be undertaken with a specific designation that identifies joint venture risks.

Rent Review Periods

2.19 With the exception of prepaid, nominal, or reduced rent, there must be a provision for periodic reviews of the rent based on an appraisal to determine fair market rent in every lease. The following aspects of the rent review process are open for negotiation but must be clearly stipulated within the lease:

a) Review period (frequency): the standard rent review period is five years but a longer or shorter period may be negotiated.

b) Determination window: the designated time period in which the appraisal must be initiated, obtained and shared with the required parties.

c) Responsible party: the party (lessee or lessor) obligated by the terms and conditions of the lease to initiate and obtain the appraisal, and to notify the lessee(s) of the new fair market rent determination.

Insurance

2.20 The lessee must ensure appropriate insurance is maintained during the duration of the lease, or when removing the improvements and trade fixtures from the premises at the end of the lease. The most common forms of insurance may include but are not limited to: construction insurance, errors and omissions insurance, commercial general liability insurance, liability and property insurance, and equipment breakdown insurance.

2.21 Depending on the uses authorized under the lease, there may be additional requirements for other types of insurance.

2.22 The Band (if a contracting party to the lease) will be added as a named insured with loss payable to the insureds, including all mortgagees. The insureds will ensure the money is payable to a trustee and the money will be used for any repair or replacements needed.

Mortgage

2.23 A lessee may mortgage their interest under their lease. The lessee and proposed lender must enter into a mortgage acknowledgement agreement with the department and the Band Council. No mortgage is valid until the lessee and the proposed lender enter into a mortgage acknowledgement agreement.

3.0 Approval and Consent

Ministerial Approval

3.1 Departmental officials authorized by the Delegation of Authority Instrument under the *Indian Act* and related regulations must authorize all leases. Please consult the most current version of the Ministerial Delegation of Authority to ensure the lease is authorized by the appropriate departmental official.

Band Council Consent

3.2 The department requires Band Council consent for every lease made directly between the department and a lessee. Consent to a lease prior to execution must occur at a council meeting that is duly convened as per the *Indian Band Council Procedure Regulations* (C.R.C., c. 950). The Band Council Resolution must be attached to the lease as a schedule. When consenting to a lease under a general designation, the Band Council will be required to obtain consent

through its own community approval process and the Band Council Resolution must state this requirement has been met.

Conditions for Lease Approval Under *Indian Act* Section 53 Delegation

3.3 Approval of leases is subject to the terms, conditions and restrictions contained in the ministerial letter delegating authority to the band land manager or person who holds the position to manage the reserve lands under s.53(1). At a minimum, before a lease may be executed, the department must approve the lease and any terms that differ from the lease precedent; the Band Council must also consent to the lease by way of Band Council Resolution.

3.4 Where a Band has delegated ministerial authority and wishes to lease to its own Band-owned corporation, the department must approve the lease as well as undertake the provisions for monitoring for compliance under the lease.

4.0 Assignment of a Lease

4.1 A lease that is in good standing may be assigned if the lease terms allow for assignments. An assignment occurs when a lessee transfers its leasehold interest to a third party, known as the assignee. The assignee becomes a new lessee by agreeing to perform the responsibilities of the former lessee under the terms of the lease. An assignment cannot be used as a means to change the terms of an existing lease. An assignment generally does not relieve the original lessee from its obligations under a lease, unless the lessee obtains an express release from the department.

4.2 The assignee must, at its own expense, undergo a credit check.

4.3 Where the assignee is a corporation, the assignee must, at its own expense, provide proof of its corporate standing and the names of its current signing officers.

Consent Required

4.4 An assignment of a lease will not be valid until the lessee (assignor), the proposed new lessee (assignee), the department and the Band Council (if the Band is a contracting party to the lease) execute an assignment consent agreement in which the assignee agrees to perform and observe all of the lessee’s responsibilities under the lease.

4.5 If the lessee has mortgaged its interest, the lessee must inform the mortgagee of their intention to assign the lease and must obtain the mortgagee's written consent to the assignment, or obtain a valid discharge of the mortgage before the department can consent to the assignment.

5.0 Subleases

Subleases on Designated Lands

5.1 A sublease must:

a) be consistent with the terms of the lease and bind the sublessee to all of the terms under the head lease;
b) clearly state it is subordinate to the head lease and that the sublease will automatically terminate if the head lease is cancelled or otherwise terminated unless there is a non-disturbance agreement in place; and,
c) end at least one day before the expiry of the lease (or end upon the early termination of the lease).

5.2 If the lease is for fair market rent, the sublease can be rented out for any rate unless fair market rent is required in the Designation Document. If the lease is nominal rent, the sublease must be for fair market rent.

Consent to Sublease

5.3 Most subleases on designated land will not require Ministerial consent. The department and the Band Council must consent to the issuance of a sublease on designated land in the following circumstances:

a) where the Designation Document requires consent to subleases;
b) when the lease is for reduced or nominal rent; or,
c) when percentage rent is charged under the lease.

5.4 Where consent is required, a sublease will not be valid until the consent of the Minister and, if applicable, the Band Council has been obtained through the appropriate sublease consent agreement, sublease acknowledgement agreement or sublease non-disturbance agreement.

Non-Disturbance Agreement — Subleases

5.5 A non-disturbance agreement provides that, if the lease is terminated, Canada will not disturb the sublessee's possession and quiet enjoyment of the subleased premises, on the condition that the sublessee continues to comply with the terms and conditions of the sublease. If the Designation Document authorizes the use of a non-disturbance agreement and if the sublease contemplates the use of a non-disturbance agreement, then the Minister must be satisfied with the terms of the sublease as that sublease will become a direct lease between the Minister and sublessee if the head lease is terminated early.

Land Description — Subleases

5.6 A sublease may be for the entire land area covered by the lease, but a sublease often applies to only a portion of the leased land. The portion of land to be subleased must be accurately and clearly described in accordance with the Interdepartmental Agreement between the department and Natural Resources Canada.

Environment — Subleases

5.7 When significant construction is contemplated under the sublease, rather than at the head lease, the department will require an environmental review at the sublease level.

Assignment of a Sublease — Subleases

5.8 For an assignment of a sublease, ministerial and Band Council consent is required only if the original sublease expressly contains such requirements.

6.0 Rent Adjustments

6.1 Subsection 59(a) of the *Indian Act* provides that the department, with the consent of the Band Council, may reduce or adjust the amount and/or the interest payable under the lease.

7.0 Termination of a Lease

7.1 Only the department has the authority to terminate a lease. Termination of a lease has important consequences. Legal advice must be obtained and the Band Council must be consulted prior to initiation of any steps for early termination.

7.2 Bands with s.53/60 delegation authority may not issue a termination of lease notice. Only the department has the authority to terminate a lease.

8.0 Registration in the Indian Lands Registry

8.1 Leases, sub-leases, assignments, and any associated documentation, including forms and agreements, must be prepared in a form suitable for registration in the Indian Lands Registry and must, in accordance with s.55 of the *Indian Act*, be sent for registration in accordance with the requirements of the Indian Lands Registration Manual.

Annex A: Authorities for Leasing Designated Lands

Lease on Designated Lands

The following provision of the *Indian Act* relates to the leasing of designated lands**:**

53.(1) The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,

. . . (b) manage, lease or carry out any other transaction affecting designated lands.

Uncultivated or Unused Band Lands

Although permits under s.28(2) of the *Indian Act* are more commonly used, uncultivated or unused Band land may be leased for agricultural or grazing purposes pursuant to s.58(1)(c). Such a lease does not require a designation.

58.(1) Where land in a reserve is uncultivated or unused, the Minister may, with the consent of the council of the band...,

(c) where the land is not in the lawful possession of any individual, grant for the benefit of the band a lease of that land for agricultural or grazing purposes.

Annex B: Relevant Leasing Case Law

These are considered the leading cases pertaining to leasing. This is not intended to be all inclusive or exhaustive:

a. Guerin v. The Queen, [1984] 2 SCR 335
b. Blueberry River Indian Band v. Canada (DIAND), [1995] 4 SCR 344 (*Apsassin*)
c. St. Mary's Indian Band v. Cranbrook (City), [1997] 2 SCR 657

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Locatee Lease Policy and Directive

- Locatee Lease Policy
- Directive 7-3: Locatee Leases

The Locatee Lease Policy and Directive 7-3: Locatee Leases (2013) replaces Directive 7-3: Locatee Leases of *Chapter 7 -Leases: Drafting, Issuing and Cancelling* in the Land Management Manual, 2003.

Locatee LeasePolicy

(This policy statement will be integrated in the Directive 7-1 of Chapter 7 of the Land Management Manual)

1. Definitions

1.1. Application means an "Application for Leasing Locatee Lands within an Indian Reserve".

1.2. Band Authority means Person authorized to provide feedback to the Department on behalf of the band which may include the band land manager, the band land officers and the Band Council.

1.3. Band Council means the "council of the band" as defined in the *Indian Act*.

1.4. BCR means a Band Council Resolution.

1.5. CEAA, 2012 means the *Canadian Environmental Assessment Act, 2012*.

1.6. Department or Department of Aboriginal Affairs and Northern Development or **AANDC (Aboriginal Affairs and Northern Development Canada)** means the Department of Indian Affairs and Northern Development.

1.7. Departmental Official means the Department's lands officers and lands managers carrying out departmental duties under the *Indian Act*.

1.8. Land Management Manual means AANDC (Aboriginal Affairs and Northern Development Canada)'s Land Management Manual as amended from time totime.

1.9. Land Status Report means a report that contains all the pertinent information regarding the encumbrances and interests on a particular parcel of reserveland.

1.10. Laws means all laws, statutes, regulations, by-laws and legally binding decisions of any authority now existing or which may exist in the future, as amended, enacted or re-enacted from time to time.

1.11. Lease means a written contract granting exclusive use of lands during a specified period in exchange for a benefit.

1.12. Lessee means the tenant or tenants under a Lease.

1.13. Lessor means Her Majesty the Queen in right of Canada, as represented by the Minister of Indian Affairs and Northern Development.

1.14. Locatee means a band member in lawful possession of lands that, with the approval of the Minister, have been transferred to him or her in accordance with the *Indian Act* [1].

1.15. Locatee Lease means a Lease whereby the Lessor, with the consent of the Locatee, grants use of the Locatee's lands to the Lessee for a specified period.

1.16. Minister or **Minister of Aboriginal Affairs and Northern Development** means the Minister of Indian Affairs and Northern Development.

1.17. Person means an individual or a corporation or any other legal entity.

2. Transitional Provisions

2.1. The Locatee Lease Policy and Directive 7-3: Locatee Leases are effective as of July 17, 2013.

2.2. The terms and conditions of existing leases executed before July 17, 2013 remain in effect, unless otherwise requested for modification by the Locatee and the Lessee.

2.3. The provisions of the Land Management Manual must be interpreted and apply consistently with the Locatee Lease Policy and Directive 7-3: Locatee Leases which include the Locatee Lease Checklist-Annex A to the Directive.

3. Leasing of Locatee Lands

3.1. Authority – The Department administers the leasing of allotted lands on behalf of the Locatee under ss. (subsection) 58(1)(b) [2] and ss. (subsection) 58(3) of the *Indian Act*.

3.2. Negotiable Terms of the Lease – The Lessee and the Locatee are responsible for agreeing on the essential terms and conditions in the Lease. These elements include the identity of the Lessee, the proposed use of the lands, the duration of the Lease and the benefit to the Locatee.

3.2.1. **Lessee** – The Lessee may be any Person legally capable of entering into a leasing transaction. At the request of the Locatee, the Minister may grant a Locatee Lease to any band member, a band corporation or a band- member corporation, the Locatee in his or her personal capacity, or a non-band member [3].

3.2.2. **Use of the Lands** – The Locatee Lease states the proposed use(s) of the lands. Examples may include commercial, industrial, residential, or agricultural uses. For greater certainty, a land use description categorized as "all lawful purposes" is not acceptable.

3.2.3. **Duration of the Lease** – The Locatee Lease states a definite commencement date and termination date including options to renew and extend the Locatee Lease as negotiated by the Locatee and the Lessee.

3.2.4. **Rent** – The Locatee is solely responsible for the determination of the benefit to be obtained from the leasing transaction for the duration of the Locatee Lease [4]. For additional information refer to Annex A: Checklist for Locatee Leases.

3.3. Standard Form Locatee Lease

3.3.1. The Departmental Official drafts the Locatee Lease using the Department's standard form Locatee Lease which includes mandatory clauses such as insurance requirements, construction standards and environmental protection provisions.

3.3.2. A copy of the standard form Locatee Lease will be made available to the proposed Lessee and the Locatee.

4. Environmental Management

4.1. It is the policy of the Department to avoid the contamination of reserve lands. In processing the Locatee Lease, the Departmental Official will assess whether the use of the lands as proposed in the Application increases the risk of contamination of the land.

4.1.1. Where the Departmental Official determines an increase risk of contamination of the lands, the Lessee will be required to take the appropriate steps to mitigate such risks. Refer to the Directive 7-3: Locatee Leases (see section on Environmental Assessment).

5. Roles and Responsibilities

5.1. Locatee

5.1.1. The Locatee is responsible for submitting a completed, witnessed and signed Application which includes the Release and Indemnity Agreement.

5.2. Lessee

5.2.1. The Lessee will comply with all applicable Laws and standards including health and safety and environmental requirements, building codes, service requirements, and the terms and conditions of the Locatee Lease at all times.

5.2.2. The Lessee is responsible for determining whether the lands are suitable for the proposed use(s) as described in the Application.

5.2.3. The Lessee is responsible for obtaining adequate legal and physical access to the leased land.

5.3. Band Collective Interests – The *Indian Act* does not specifically provide for the band's consent to Locatee Leases under ss. (subsection)58(3) [5]. The Department, however, recognizes that the band has an important interest in the use and development of reserve lands, including those lands the band has allotted to its members.

5.3.1. The Band Authority should provide feedback to the Department as to whether the proposed use(s) as described in the Application comply with band's by-laws under s. (section) 81 of the *Indian Act* or other applicable Laws.

5.3.2. The Band Authority feedback to the proposed use(s) of the lands will be processed in accordance with the Directive 7-3: Locatee Leases (see section on Band Authority's Review and Feedback).

5.3.3. The Band Authority should provide supporting documents when submitting feedback to the Department.

5.4. Departmental Official

5.4.1. The Departmental Official reviews the information provided in the Application, obtains

and reviews the Band Authority's feedback and drafts the Locatee Lease in accordance with this Policy and Directive 7- 3: Locatee Leases (including the Locatee Lease Checklist provided in Annex A to the Directive).

5.4.2. Upon receipt of an executed Locatee Lease from the Lessee, the Departmental Official arranges for execution by the Lessor and registration of the Locatee Lease in the Indian Lands Registry.

Directive 7-3: Locatee Leases

Purpose

This Directive explains the steps for processing Locatee Leases under ss. (subsection) 58(1)(b) and ss. (subsection) 58(3) under the *Indian Act* in accordance with the Locatee Lease Policy. A detailed Locatee Lease Checklist is provided in Annex A to this Directive. It is important to note that some of the steps outlined below may take place simultaneously.

Process

1. Providing Information on Locatee Leasing

1.1. At the initial contact, the Departmental Official informs the Locatee and the Lessee of the policy and process requirements for processing a Locatee Lease, and makes available the following:

1.1.1. an Application; and,

1.1.2. a standard form Locatee Lease [6].

2. Application for Leasing Locatee Lands within an Indian Reserve

2.1. The Locatee and the proposed Lessee are required to complete and sign the Application, and submit supporting documents [7].

2.1.1. The supporting documents submitted will include:

2.1.1.1. a corporate certificate of good standing, if the proposed Lessee is a corporation;

2.1.1.2. an identification document, if the Lessee or Locatee is an individual;

2.1.1.3. a development proposal;

2.1.1.4. appropriate plans or survey of the land; and,

2.1.1.5. any other documents relevant to the proposed Locatee Lease.

3. Verification of the Status of the Land

3.1. The Departmental Official will complete a Lands Status Report.

4. Confirm the Legal Land Description

4.1. The Departmental Official informs the Lessee and Locatee of the need for a proper legal description of the lands to be leased and that any costs associated with the creation of a proper legal land description (including all survey costs) are not the responsibility of the Department.

4.2. The legal description of the lands to be leased is required to be in accordance with the current *Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector, Natural Resources Canada* or other agreements in place between AANDC (Aboriginal Affairs and Northern Development Canada) and Natural Resources Canada governing surveys.

4.3. The Departmental Official advises the Locatee and the proposed Lessee in writing where the legal land description is inconsistent with the information provided in the Application. The Locatee and the proposed Lessee are required to correct any inconsistency by submitting a new completed and signed Application.

4.4. The proposed Lessee is responsible for ensuring that the proposed use(s) of the lands does not conflict with existing encumbrances, if any.

5. Environmental Management

5.1. **Environmental Site Assessment** – The Lessee will conduct an Environmental Site Assessment in accordance with Chapter 12 of the Land Management Manual to determine the environmental conditions of the lands prior to the issuance of a Locatee Lease.

5.2. Environmental Assessment

5.2.1. Where there is a proposed physical activity or project being contemplated for the leased lands, the Departmental Official will determine the appropriate level of environmental review required to determine the likelihood of significant adverse environmental effects on the proposed leased lands.

5.2.2. The Lessee is responsible for providing all the required information necessary to determine the appropriate level of environmental review.

5.2.3. The Departmental Official will continue processing the proposed Locatee Lease where effective mitigation measures can be used to avoid significant adverse environmental effects or where justification of significant environmental effects has been provided by the

Governor in Council.

5.3. Environmental Audit

5.3.1. The Lessee will perform an environmental audit in accordance with Chapter 12 of the Land Management Manual to evaluate the compliance of the activities and the equipment operating on the site. This should be undertaken once the Locatee Lease has been executed, upon renewal of the Locatee Lease and periodically throughout the duration of the LocateeLease.

5.4. Reporting

5.4.1. In the event that environmental effects are caused by activities on the leased lands, it is the responsibility of the Lessee and the Locatee to immediately report these issues to the Band Authority, the Department and applicable federal and provincial departments responsible for regulating the environmental effects.

6. Band Authority's Review and Feedback

6.1. The Departmental Official will submit a written notice of a proposed Locatee Lease to the Band Authority requesting review and feedback.

6.2. The written notice of the proposed Locatee Lease will include the following information:

6.2.1. identity of the proposed Lessee and the Locatee;
6.2.2. duration of the proposed Locatee Lease;
6.2.3. description of the proposed land use(s);
6.2.4. legal description of leased lands;
6.2.5. sharing of the rent revenue arrangement with the Band Council, if any; and,
6.2.6. timeline for a written response from the Band Authority.

6.3. The Band Authority will respond by letter or by BCR (Band Council Resolution) to the Departmental Official within 45 business days of the date of the request, unless the Band Authority and the Departmental Official agree otherwise.

6.3.1. The response should indicate whether the proposed use(s) in the Locatee Lease complies with the band's by-laws under s. (section) 81 of the *Indian Act* or other applicable Laws.
6.3.2. The Band Authority should attach supporting documents to its written feedback.

6.4. Where comments have not been received from the Band Authority within the prescribed time in accordance with subsection 6.3 of this Directive or as agreed upon, the Departmental Official will proceed with the processing of the Application to lease the Locatee's lands.

6.5. Where comments are received within the prescribed time, the Band Authority's feedback will be reviewed by the Departmental Official and if necessary, the Departmental Official will request additional documents.

6.6. Where the Departmental Official determines that the proposed use(s) of the lands violates s. (section)81 of the *Indian Act* or other applicable Laws or raises issues to be addressed by the Locatee or the Lessee, the Departmental Official will advise the Locatee and the Lessee in writing indicating:

- 6.6.1. the nature of the violation or issue;
- 6.6.2. that the leasing process is temporarily suspended until the violation or issue stated in section 6.6.1 is addressed to the satisfaction of the Departmental Official;
- 6.6.3. that a written response must be provided to the Departmental Official within 30 business days of the date of notification or as agreed upon; and,
- 6.6.4. that failure to provide a written response within the prescribed period or as agreed upon may terminate the Locatee Lease process.

7. Completing and Verifying the Application

7.1. The Departmental Official informs the Locatee and the Lessee of any incomplete sections of the Application.

- 7.1.1. Where the land has been allotted to more than one Locatee, each Locatee is required to provide a separate signed and witnessed Release and Indemnity Agreement (Part 4 of the Application).

7.2. By checking the appropriate box in the Locatee Lease Checklist, the Departmental Official indicates that they have confirmed that the Application has been properly completed and signed by both the Locatee and the Lessee.

- 7.2.1. the Checklist also contains specific reminders with regards to completing the leasing transaction.

8. Drafting the Locatee Lease

8.1. The Departmental Official commences drafting the Locatee Lease once the completed and signed Application including all requested information has been received. Refer to Directive 7-4: Negotiating and Drafting Leases for general guidance on drafting Leases.

9. Amendments to the Locatee Lease

9.1. Amendments to the mandatory provisions of the standard form Locatee Lease should be kept to a minimum.

9.2. For amendments prior to the execution of the Locatee Lease, the Departmental Official will obtain the written consent of the Locatee.

9.3. After the execution of the Locatee Lease, any amendments will be in accordance with the terms and conditions of the Locatee Lease.

10. Allocate the Proceeds of the Lease

10.1. Where the Band Council has an approved policy on the division of revenue, any revenues collected are required to be divided according to that policy on revenue division. If the Band Council and the Locatee agree to divide lease revenues, a written agreement signed by the Locatee and the Band Council should be attached as a schedule to the Locatee Lease.

11. Suspension of the Locatee Lease Processing

11.1. Where the Departmental Official's request for information at any stage in the leasing process is not complied with within 30 business days of its request to the Locatee or the proposed Lessee, the Departmental Official will suspend the processing of the Locatee Lease until the requested information isreceived.

12. Execution of the Locatee Lease

12.1. A minimum of four original executed Locatee Leases are required for registration – one for the Indian Lands Registry, the Lessee(s), the Locatee(s) and theDepartment.

12.2. The Lessee will send all originally executed copies of the Locatee Lease to the Departmental Official for signature.

12.3. At no time will the Lessee be granted possession of the Locatee's lands until the Locatee

Lease is executed by all of the parties.

13. Registration of the Locatee Lease

13.1. The Departmental Official sends the fully executed Lease together with any supporting documentation to the Indian Lands Registry in the appropriate regional center for registration, and upon the completion of registration, distributes the executed originals to the Locatee(s) and the Lessee(s). Refer to the Indian Lands Registration Manual to ensure the Locatee Lease meets all requirements for registration.

14. List of Annexes

14.1. Annex A- Checklist for Locatee Lease

14.2. Annex B- Notification Letter for Band Authority Feedback

14.3. Annex C- Notification Letter for Suspension of Leasing Process

15. References

15.1. Chapter 7 (Leases: Drafting, Issuing and Cancelling) of the Land Management Manual.

15.2. Chapter 8 (Administering Leasing and Permits) of the Land Management Manual.

15.3. Chapter 11 (RLAP (Regional Lands Administration Program) and "53/60" Land Management Programs) of the Land Management Manual.

15.4. Chapter 12 of this manual for Environmental considerations of the Land Management Manual.

15.5. Delegation of Authority Instrument under the *Indian Act* and Related Regulations (refer as well to the relevant regional delegation instrument).

15.6. Indian Lands Registration Manual.

15.7. Pertinent sections of the *Indian Act*.

Footnotes

1 An allotment under ss. 20(2) of the Indian Act creates a unique form of individual land tenure which shifts the right to the use and benefit of the reserve lands from being the collective right of the band to being the right of possession of the individual member.

2 The ss.58(1)(b) allows for the leasing of uncultivated or unused locatee land for agricultural and grazing purposes, or for any purpose that is for the benefit of the person in lawful possession. Designation of the lands is not required, but the consent of the Band Authority is necessary. This mechanism is rarely used today, and Departmental Official should consider, where appropriate, the use of ss.58(3) leases or ss.28(2) permits.

3 A band corporation or member of another band is not considered a band member.

4 As determined in the Canadian Human Rights Tribunal decision in Louie and Beattie v. Indian and Northern Affairs Canada, 2011 CHRT 2.

5 Note: ss.58(1)(b) requires consent of the Band Council for agricultural or grazing leases.

6 Current applicable regional template.

7 Refer to Annex B: Application for Leasing Locatee Lands within an Indian Reserve.

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Indigenous and Northern Affairs Canada

Land Management Manual, Chapter 10

Additions to Reserve/Reserve Creation

FINAL
2016

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Directive 10 – 1:
Policy on Additions to Reserve/Reserve Creation

1.0 Application (Purpose)

This Policy on Additions to Reserve/Reserve Creation provides guidance with respect to the assessment, acceptance and implementation of Reserve Creation Proposals, including proposals by First Nations operating under the *First Nations Land Management Act.*

2.0 Effective Date

2.1 This Policy is issued under the authority of the Minister of Indigenous and Northern Affairs. This Policy will be administered by the Department of Indigenous and Northern Affairs Canada (INAC). This Policy received approval on June 29, 2016, and is effective as of July 27, 2016.

2.2 This Policy is Chapter 10 of INAC's Land Management Manual. It includes all the directives contained in this Chapter including their annexes. It replaces all prior policies, interim policies, directives, standards, procedures and guidelines relating to Reserve Creation, including Additions to Reserve.

2.3 Reserve Creation Proposals submitted prior to the effective date of this Policy will be processed in accordance with Directive 10-3: Additions to Reserve/Reserve Creation Transition Guidelines.

2.4 In this Policy, the term Reserve Creation is used to refer to both Additions to Reserve and the creation of New Reserves.

3.0 Definitions

The following definitions apply in this Policy.

"Addition to Reserve" means the act of adding land to an existing Reserve land base of a First Nation;

"Agreement" means any written agreement to which Canada is a party that includes provisions with respect to Reserve Creation;

"Approval in Principle" (AIP) is a term applicable only to the 2001 Policy. It means INAC's decision to recommend a proposal to the Minister, for consideration of

reserve status through a submission to the Governor in Council, or by means of a Ministerial Order as permitted by Claims legislation. An AIP can be granted with or without conditions. It is given by either the Regional Director General (RDG) or the Deputy Minister (DM). Where conditions are attached to the AIP, they must be satisfied before an order in council (OIC) or Ministerial Order recommendation can be made;

“Canada” means Her Majesty the Queen in right of Canada (the federal government);

“Duty to Consult” means an obligation of the government as a whole to consult with Aboriginal peoples (and accommodate where appropriate) when the Crown contemplates conduct that might have an adverse impact on potential or established Aboriginal or treaty rights protected by section 35 of the *Constitution Act, 1982*;

"Environmental Site Assessment" means an analysis of Proposed Reserve Land with respect to past and present uses, as well as on-site and off-site activities that may have the potential to affect the Proposed Reserve Land’s environmental quality, including the health and safety of occupants/residents;

“First Nation” or “Band” means a “band” as defined under the *Indian Act*;

“INAC” means Indigenous and Northern Affairs Canada (the department legally known as the Department of Indian Affairs and Northern Development Canada);

“Joint Reserve” means a Reserve that is set apart for the use and benefit of more than one First Nation;

“Land Management Manual” means INAC’s Land Management Manual;

“Letter of Support” means a letter from INAC officials to the First Nation that states that the First Nation’s Reserve Creation Proposal will be supported by INAC officials to the extent indicated in this Policy and identifies the criteria that must be satisfied before INAC officials will recommend the Proposed Reserve Land for Reserve Creation;

"Local Government" means a city, town, village or other built-up area with municipal, regional district or other authority, and includes a rural or urban municipality, as defined in relevant provincial or territorial legislation;

“Mines and Minerals” means mines and minerals, precious or base, including oil and gas;

“Minister” means the Minister of Indigenous and Northern Affairs (legally known as the Minister of Indian Affairs and Northern Development Canada);

"New Reserve" means the act of creating a Reserve for a First Nation with no existing Reserve land base;

"Proposed Reserve Land" means land proposed by the First Nation for Reserve Creation;

"Reserve" means a reserve as defined under the *Indian Act;*

"Reserve Creation" means the act of adding land to an existing Reserve or creating a new Reserve for a First Nation by Order in Council or Ministerial Order;

"Reserve Creation Proposal" means the formal proposal by a First Nation to add land to an existing Reserve or to create a New Reserve by Order in Council or Ministerial Order;

"Reserve Creation Proposal Criteria" means the relevant requirements and criteria set out in Annexes A and B of Directive 10-1 of this Policy and any other requirements or criteria as determined by INAC;

"Royal Prerogative" means the power of the Crown, as represented by the Governor in Council, to take action as an exercise of its executive power. Setting apart Reserves is one such power and it is exercised by the Governor in Council acting through an Order in Council at the request of the Minister.

4.0 Interpretation

4.1 Where the criteria or requirements in this Policy are inconsistent or conflict with the provisions in an Agreement (including but not limited to a Treaty Land Entitlement, other Specific Claim, or Self-government Agreement), the provisions of the Agreement will prevail to the extent of the inconsistency or conflict.

4.2 Any reference in this Policy to a statute or regulation includes any amendment to that statute or regulation and any successor statute or regulation.

4.3 Any reference to a policy, directive, standard, procedure or guideline includes any amendment to that policy, directive, standard, procedure or guideline.

5.0 Context

5.1 Orders in Council

The authority of the Governor in Council to grant Reserve status flows from the Royal Prerogative, which is a non-statutory authority. There is no statutory authority under the *Indian Act* to set apart land as a Reserve. Typically, lands must be acquired or a transfer of administration and control accepted by Canada under the *Federal Real Property and Federal Immovables Act*, and then granted Reserve status by federal Order in Council on the recommendation of the Minister of INAC.

5.2 Ministerial Orders

Other authorities to set apart land as Reserve are found in the *Manitoba Claim Settlements Implementation Act* and the *Claim Settlements (Alberta and Saskatchewan) Implementation Act.* These allow for Reserve Creation in the provinces of Alberta, Saskatchewan and Manitoba by Ministerial Order without the requirement for an Order in Council.

6.0 Policy Statement

Reserve Creation may be used to fulfill Canada's legal obligations, and may further serve a broader public interest by supporting the community, social and economic objectives of First Nations by expanding a First Nation's Reserve land base.

7.0 Objectives

This Policy is intended to:

a) provide clear policy direction for Reserve Creation;
b) promote consistent assessment, acceptance and implementation of Reserve Creation Proposals where possible;
c) consider the interests of all parties and find opportunities for collaboration where possible; and
d) streamline the process for Reserve Creation Proposals.

8.0 Principles

The following principles must be respected in the application of this Policy:

a) Nothing in this Policy constitutes a guarantee that any Reserve Creation Proposal will ultimately result in a particular parcel of land being set apart as Reserve. The final decision to set apart land as Reserve rests with the Governor in Council or the Minister of INAC. See clause 5.0 (Context).
b) INAC will consider the potential or established Aboriginal or Treaty rights of First Nation, Métis and Inuit peoples before setting apart lands as

Reserve.

c) The views and interests of provincial, territorial and Local Governments will be considered, and collaboration between the First Nations and those governments will be encouraged on issues of mutual interest and concern.

d) Options to address third party interests or rights on lands will be identified when considering Reserve Creation Proposals.

e) Reserve Creation Proposals will make cost effective use of financial resources.

f) The environmental condition of land proposed for Reserve Creation will be acceptable for its intended use, and will comply with applicable federal requirements.

g) Reserve Creation Proposals will comply with applicable federal requirements for land acquisition and management.

h) The use and development of community and land use planning tools is encouraged to assist First Nations in planning for land acquisition and Reserve Creation, and to facilitate land management after Reserve Creation.

i) INAC encourages accountability and transparency through the entire Additions to Reserve process. This can be achieved by communicating key milestones and decision points, where appropriate, to community members using tools such as the First Nations Gazette.

9.0 Categories of Reserve Creation

9.1 Legal obligations and Agreements – Where there is a legal obligation or a legal commitment by Canada that contemplates Reserve Creation contained within:

a) a settlement Agreement (such as Treaty Land Entitlement or other Specific Claims Agreement);

b) a Self-Government Agreement;

c) a land exchange Agreement;

d) a land transaction with a reversionary interest or right to Canada or the First Nation;

e) an Agreement for return of former Reserve land where there is no express reversionary interest or right;

f) an Agreement with a landless Band; or

g) an Agreement for the relocation of a community, the expansion of an existing reserve land base, or the establishment of a New Reserve.

9.2 Community Additions – Where a First Nation with an existing Reserve needs additional Reserve land for any of the following purposes:

a) residential, institutional, recreational uses, to accommodate community growth;

b) use or protection of culturally significant sites (such as burial grounds, archaeological, or ceremonial);

c) economic development;

d) geographic enhancements to improve the functioning of existing Reserve base; or

e) where the First Nation has entered into a legally binding agreement with the province, territory, Local Government or a corporation that is empowered by law to take or to use lands, and Canada is not a party to the agreement but agrees to implement those provisions of the agreement. This may include transactions under section 35 of the *Indian Act*.

9.3 Tribunal Decisions – Where a First Nation seeks to acquire lands with compensation awarded by the Specific Claims Tribunal for:

a) a failure to fulfill a legal obligation of the Crown to provide lands under a treaty or another Agreement;

b) a breach of a legal obligation arising from the Crown's provision or non-provision of Reserve lands; or

c) an illegal disposition by the Crown of Reserve lands.

10.0 Selection Area

The Proposed Reserve Land should normally be located within a First Nation's Treaty or Traditional Territory. Where there is an Agreement under the legal obligations and Agreements category of this Policy, Proposed Reserve Land may be outside the First Nation's Treaty or Traditional Territory, but within the province or territory where the majority of the First Nation's existing Reserve land is located.

11.0 Reserve Creation Proposals

11.1 In order for Reserve Creation to be considered under this Policy, a First Nation must provide a Reserve Creation Proposal that satisfies the minimum proposal requirements set out in Directive 10-2 "Reserve Creation Process".

11.2 All Reserve Creation Proposal Criteria identified in a Letter of Support must be met before INAC will submit a Reserve Creation Proposal to the Governor in Council or to the Minister for approval.

12.0 Proposal Assessment

12.1 Before issuing a Letter of Support for a Reserve Creation Proposal, INAC will fully review and assess the Reserve Creation Proposal in accordance with Directive 10-2, "Reserve Creation Process". This includes considering the Reserve Creation Proposal put forward by the First Nation, the Reserve Creation Proposal Criteria required to complete the Reserve Creation (see Annexes A & B

of this Policy), and the responses from provincial, territorial and Local Governments.

12.2 In providing advice to the Minister of INAC or the Governor in Council on the merits of the Reserve Creation Proposal, INAC will comment on the social and economic prosperity of the First Nation and describe any other impacts or benefits flowing from the Reserve Creation, which could include any of the following:

a) fulfillment of legal obligations or Agreements of Canada;
b) implementation of Reserve Creation Proposals related to Specific Claims Tribunal decisions;
c) economic development potential of the Reserve Creation on residents of the surrounding area;
d) costs related to the provision of services to the First Nation and the Local Government (where the First Nation is the service provider);
e) revenue adjustments resulting from a change in tax status;
f) financial implications for Canada;
g) existing First Nation, provincial, territorial, regional or Local Government land use plans;
h) regional infrastructure management;
i) regional traffic or transit management plans;
j) protected or environmentally sensitive areas (such as National Parks, Agricultural Land Reserves in British Columbia, or Greenbelt Lands in Ontario); and
k) culturally sensitive areas (such as First Nations burial, archaeological or ceremonial sites).

12.3 In advising on the Reserve Creation Proposal, INAC assigns no specific weighting to the factors for consideration, nor is any single factor determinative. On balance, the positives must outweigh the negatives. INAC will consider the factors before providing a Letter of Support, and will provide its assessment of those factors to the Minister and the Governor in Council when INAC submits the Reserve Creation Proposal to the Minister or the Governor in Council for approval.

12.4 Reserve Creation Proposals based on the Community Additions category must establish a community need for the Proposed Reserve Land. The Proposal must demonstrate that the existing Reserve base is not suitable for the intended land use. Reserve Creation Proposals for economic development under this category must further demonstrate that the benefits and positive impacts from the Reserve Creation outweigh the potential tax impacts associated with Reserve Creation, as tax advantages cannot be the sole justification for Reserve Creation.

12.5 If a proposal will be supported, INAC will identify in the Letter of Support any relevant criteria, including criteria set out in Annex A or B (where applicable) that must be satisfied before INAC will recommend that the Proposed Reserve Lands

be set apart as a Reserve.

12.6 If a proposal will not be supported, INAC will provide a written explanation to the First Nation.

13.0 Financial Implications

13.1 In the absence of an Agreement or other arrangement providing funding, INAC is not obligated nor prevented by this Policy from providing funding for Reserve Creation activities, including:

a) land acquisition;
b) surveys;
c) environmental assessment activities, remediation and monitoring/mitigation activities, or other environmental costs;
d) transactional costs associated with land acquisition;
e) incremental costs resulting from negotiations with Local Governments; and
f) any additional funding for infrastructure housing, or other capital costs.

13.2 INAC must identify any foreseeable financial implications for Canada, as well as potential sources of funding relevant to the intended use of the Proposed Reserve Land before a Letter of Support is issued.

14.0 Community Consent

14.1 A Band Council Resolution is required for all Reserve Creation Proposals.

14.2 In the limited circumstances where a Band vote is required under this Policy, a vote will be held in accordance with, or in a similar manner to, the *Indian Referendum Regulations*, and will be decided by a majority of those eligible electors of each participating First Nation who voted (simple majority). A First Nation may choose to establish a higher threshold for community consent for the conduct of these votes.

15.0 Dispute Resolution

15.1 INAC promotes a “good neighbour” approach that encourages effective relations when First Nations and Local Governments, provinces, territories, or third parties are seeking to resolve issues relating to Reserve Creation. INAC encourages discussions on issues of mutual interest and concern that are conducted with good will, good faith and reasonableness, and within reasonable timeframes.

15.2 To assist First Nations and Local Governments, provinces, territories, or third

parties in successfully resolving disputes, the following best practices are encouraged:

a) early communication on the Reserve Creation Proposal that pro-actively seeks to avoid disputes, encourages cooperation among parties, and works towards building a positive relationship;
b) the development of mutually agreeable approaches to dispute resolution between the parties at the outset of discussions in order to identify and address areas of disagreement quickly, and facilitate further resolutions as they may arise in the negotiation of agreements;
c) the inclusion of dispute resolution mechanisms in any final agreements between the parties, where appropriate, to address future disagreements as they arise;
d) the establishment of mutually agreeable time frames for efforts to resolve disagreements; and
e) the use of mediation where negotiations have reached an impasse.

15.3 It is expected that the parties to a dispute will attempt to resolve disputes on their own, both during and after the negotiation of any required agreements. Where appropriate, INAC encourages the use of non-binding dispute resolution processes, such as:

a) Conciliation: The parties may try to work out the issues by themselves such as at a joint meeting between the First Nation council and the other party. In the alternative, the parties may work out the issues with the assistance of a third party;
b) Facilitation: The parties may request assistance from neutral third party for facilitation of a joint meeting to support discussions that assist the parties to identify issues, and develop options to resolve disputes; and
c) Mediation: Pursuant to this process, a third party assists in working out a solution to the dispute. A decision is reached by consensus, which may or may not be binding depending on the terms of the mediation.

15.4 Discussions around issues of mutual interest and concern where instances of disagreement between First Nations and Local Governments, provinces, territories, or third parties have arisen should not unreasonably delay a Reserve Creation Proposal.

15.5 While INAC is not a party to agreements between First Nations and Local Governments, provinces, territories, or third parties, and has no authority under this Policy to impose agreements or arbitrate decisions among the parties, INAC will support these discussions and negotiations by:

a) encouraging the parties to contact INAC as early as possible to provide technical assistance such as general information and clarification of policy and process;
b) where requested, providing facilitated management (by INAC or a neutral third party) of a joint meeting to support discussions that assist the parties to identify issues, and develop options to resolve disputes; and

c) providing access to tools and resources to assist the parties in understanding the dispute resolution process and how to incorporate dispute resolution techniques into their ongoing relationship.

15.6 Where there are outstanding issues or concerns arising from negotiations between First Nations and Local Governments, provinces or territories, or third parties, and all dispute resolution options (including mediation) have been explored, the Regional Director General or Deputy Minister may nonetheless agree to support the Reserve Creation Proposal, or may withdraw support. In this instance, INAC will discuss the decision with the First Nation, and the Reserve Creation Proposal will be forwarded to the Minister for review.

16.0 Roles and Responsibilities

16.1 The Minister of INAC is responsible for:

a) the decision to approve Reserve Creation through the issuance of a Ministerial Order; or

b) the decision to recommend Reserve Creation where the Reserve will be created by Order in Council.

16.2 The Deputy Minister is responsible for:

a) the administration of this Policy;

b) the review and consideration of whether to issue a Letter of Support for Community Additions Reserve Creation Proposals.

c) the issuance of Clarification Bulletins where an aspect of this Policy is either ambiguous or inconsistent with another aspect of this Policy; and

d) the issuance of amendments, as may be required from time to time for the effective implementation of the Policy, to any of the templates set out in Directive 10-2 (Reserve Creation Process) of this Policy.

16.3 The Regional Director General is responsible for:

a) the review and consideration of whether to issue a Letter of Support for Legal Obligation and Agreements Reserve Creation Proposals and Specific Claims Tribunal Reserve Creation Proposals; and

b) advising the Deputy Minister on decisions to issue a Letter of Support for Community Additions Reserve Creation Proposals.

17.0 Policy Assessment and Review

17.1 Within five years from the effective date of this Policy, INAC will conduct a joint review of the effectiveness of this Policy. The review will be guided by a steering committee that will include First Nations stakeholders.

17.2 The effectiveness of this Policy will be examined by INAC using the results of assessments of this Policy and other related instruments that flow from it. INAC will identify and undertake any additional monitoring and assessment activities as necessary to undertake an effective policy review.

18.0 Legislation and Related Policy Instruments

Legislation and policy instruments applicable to the Additions to Reserve/Reserve Creation Policy include but are not limited to the following:

18.1 Legislation

a) The *Indian Act;*
b) The *Constitution Act(s);*
c) *Manitoba Claim Settlements Implementation Act* and the *Claim Settlements (Alberta and Saskatchewan) Implementation Act;*
d) The *Federal Real Property and Federal Immovables Act*, and regulations;
e) *Canadian Environmental Assessment Act 2012 (CEAA 2012)* and regulations;
f) The *Species at Risk Act;*
g) *Canada Lands Surveys Act and regulations*;
h) *Indian Lands Agreement (1986) Confirmation Act, 2010* (Statutes of Ontario*)*;
i) *Indian Lands Agreement Act (1986);*
j) *Specific Claims Tribunal Act;*
k) *First Nation Fiscal Management Act*;
l) *First Nations Commercial and Industrial Development Act;*
m) *Canadian Environmental Protection Act, 1999.*

18.2 Related Policy Instruments

a) INAC's *Land Management Manual*;
b) INAC's *New Bands and Band Amalgamations Policy*;
c) Chapter 12 of INAC's *Land Management Manual* (Environmental Obligations);
d) Treasury Board Secretariat *Policy on Management of Real Property*;
e) INAC's *Indian Lands Registration Manual*;
f) INAC's *Specific Claims Policy*;
g) Canada's *Aboriginal Consultation and Accommodation Updated Guidelines for Federal Officials to Fulfill the Duty to Consult;*
h) *Geographical* Names Board of Canada; *Principles and Procedures for Geographic Naming*, 2011; Public Works and Government Services Canada, ISBN 978-1-100-52417-7;

i) *First Nation Taxation Commission* and *Federation of Canadian Municipalities* for information on First Nation/municipal tax/service agreements and models;

j) *Framework Agreement between INAC and Legal Surveys Division, Natural Resources Canada, February 25, 2009*, registered in the Indian Land Registry under Instrument No. 258930, for the type of land description requirements for Reserve land transactions.

19.0 Enquiries

For information on this Policy or to obtain any of the above-noted references, please contact:

Indigenous and Northern Affairs Canada
Terrasses de la Chaudière
10 Wellington, North Tower
Gatineau, Quebec
Postal Address:
Ottawa, Ontario
K1A 0H4

Email: InfoPubs@aadnc-aandc.gc.ca
Phone: (toll-free) 1-800-567-9604
Fax: 1-866-817-3977
TTY: (toll-free) 1-866-553-0554

Directive 10 – 1: Annex A
Reserve Creation Proposal Criteria

The criteria that apply to all Reserve Creation Proposals within the categories set out in clause 9.0 of Directive 10-1 of the Policy include, but are not limited to:

1.0 Duty to Consult - Aboriginal or Treaty Rights

1.1 As provided in clause 8.0(b) of this Policy, INAC will consider the potential or established Aboriginal or Treaty rights of First Nation, Métis and Inuit peoples before setting apart lands as Reserve.

1.2 Before Reserve Creation, INAC will assess whether the Crown has met its Duty to Consult (where the duty exists) with First Nation, Métis and Inuit peoples, as applicable, where Crown action related to the Reserve Creation may have an impact on Aboriginal or Treaty Rights. INAC will follow the applicable policies and guidelines of the Government of Canada relating to the Duty to Consult when considering a Reserve Creation Proposal.

1.3 This assessment may also include examination of any prior consultations conducted by other parties.

2.0 Environmental Management (see Chapter 12 of the Land Management Manual)

2.1 Definitions

In this clause,

a) "Applicable Environmental Standard" means the standard established to determine whether the environmental condition of land (including water and sediments) is suitable for the intended land use. The standard for such a determination is the standard established by the Canadian Council of Ministers of the Environment, or in the absence of a Canadian Council of Ministers of the Environment standard, the provincial or territorial standard in the province or territory in which the Reserve is being created.

b) "Indemnification Agreement" means an Agreement that sets out terms satisfactory to INAC on the following matters: a release of Canada from liability for any existing and future claims relating to the environmental condition of the Proposed Reserve Land; an indemnity by the First Nation against such claims; an agreement by the First Nation to impose appropriate land use restrictions through land use plans and by-laws; the provision of funds or security for remediation; any necessary ongoing

monitoring or future remediation requirements; and any other conditions deemed necessary by INAC in the circumstances.

2.2 General Policy

It is the policy of INAC to avoid the acquisition of contaminated land for Reserve Creation. Acquisition of contaminated land will only be considered where the level of contamination is consistent with the intended use, the risks to human health and the environment are minimal, the risks to Canada are manageable, and there is a strong business case supporting Reserve Creation.

2.3 Environmental Site Assessment

a) An Environmental Site Assessment must be conducted in accordance with Chapter 12 of the Land Management Manual to determine the environmental condition of the Proposed Reserve Land. The Environmental Site Assessment identifies past or present activities that might have adversely affected the environmental condition of the Proposed Reserve Land. The Environmental Site Assessment should include information on the nature, scope and limitations of the assessment.

b) If INAC prepares or contracts for the preparation of the Environmental Site Assessment, INAC shall provide a copy to the First Nation. If the First Nation contracts for the preparation of the Environmental Site Assessment, the First Nation shall provide a copy to INAC.

c) If the Environmental Site Assessment identifies some contamination, but determines that the environmental condition of the Proposed Reserve Land meets the Applicable Environmental Standard for its intended use following Reserve Creation, INAC may consider recommending Reserve Creation provided that:

   i. in the case of industrial or commercial use, a lease will be put in place containing environmental terms and a federal regulatory regime is in place to govern the use following Reserve Creation;
   ii. the First Nation is fully apprised of the condition of the Proposed Reserve Land and has received independent expert advice;
   iii. the First Nation has, by Band Council Resolution and (if requested by INAC) Band vote, approved the acquisition of such Land on an "as is" basis; and
   iv. if requested by INAC, the First Nation has entered into an Indemnification Agreement on terms satisfactory to INAC.

d) Where the Environmental Site Assessment determines that the environmental condition of the Proposed Reserve Land does not meet the Applicable Environmental Standard for the intended use following Reserve Creation, INAC will reject the Reserve Creation Proposal but may reconsider it at a later date if the land is remediated to the Applicable Environmental Standard. Where either the vendor of the land or the First

Nation undertakes the remediation, the First Nation must provide satisfactory evidence to INAC of the remediation to the Applicable Environmental Standard, supported by an environmental consultant's report. Where, in rare cases, INAC is responsible for remediation, the Department must ensure that satisfactory remediation has been completed. In all cases, the remediation should be well documented and the documentation retained on file by INAC.

2.4 Environmental Review of a Proposed Project

a) Where there is a proposed activity or project contemplated for the Proposed Reserve Land, INAC may not be able to proceed with acquisition of the Proposed Reserve Land or with a recommendation for Reserve Creation until an environmental review with respect to the activity or project has been completed in accordance with the applicable law and a decision has been made by the appropriate authority that the activity or project is not likely to cause significant adverse environmental effects or that the significant environmental effects that it is likely to cause are justified in the circumstances.

b) In the case of certain projects, INAC may not be able to recommend Reserve Creation unless there is a federal regulatory regime in place to govern the activity or project, and the First Nation should be advised accordingly. An Indemnification Agreement may also be required in some circumstances.

c) See Chapter 12 of the Land Management Manual for more detail on environmental assessment of activities or projects.

d) Designations are usually required for activities or projects. See Chapter 5 of the Land Management Manual for more detail on designations.

3.0 Improvements to Proposed Reserve Land

a) Any improvements made by the First Nation to the Proposed Reserve Land before Reserve Creation must be in compliance with applicable federal legislative requirements that will apply once the Reserve is created.

b) Any improvement on Proposed Reserve Land may delay or prevent Reserve Creation due to environmental issues or other matters. For example, improvements on Proposed Reserve Land may require an additional Environmental Site Assessment (as described in clause 2.0 of this Annex) and, where applicable under the *Manitoba Claim Settlements Implementation Act* and the *Claims Settlements (Alberta and Saskatchewan) Implementation Act,* may require a pre-designation vote.

4.0 Other Federal Departments and Agencies

4.1 Following issuance of a Letter of Support, INAC's regional office will contact other federal departments and agencies and give them the opportunity to assess any potential impact of the Reserve Creation Proposal on their program delivery (e.g. provision of health or public safety services). Three months should be allowed for a response.

4.2 Reserve Creation Proposals arising from an Agreement are expected to have addressed the implications for other federal departments and agencies in the Agreement. In this instance, the requirement outlined in clause 4.1 of this Annex is for notification purposes only.

5.0 Existing Encumbrances or Charges

a) As provided in clause 5.1.1 of Directive 10-2 "Reserve Creation Process", the First Nation must include in its Reserve Creation Proposal the results of investigations identifying existing encumbrances or charges (third party interests or rights both registered or unregistered, such as leases, licenses, permits, easements, rights of way, etc.) normally achieved by a title search, provincial or territorial canvass, or site visit, and include supporting documentation if applicable.

b) Following receipt of the Reserve Creation Proposal and prior to issuing the Letter of Support, due diligence will be undertaken by Justice Canada to identify all encumbrances or charges and other title issues and to report on title to INAC.

c) Following issuance of the Letter of Support, all title issues must be resolved and existing encumbrances or charges should be extinguished, or replaced, or minimized such that Justice Canada is satisfied that the Crown will receive good title to the Proposed Reserve Land.

d) In certain circumstances, acquiring title or right of ownership to Proposed Reserve Land subject to an encumbrance or charge may be considered.

e) Before Reserve Creation, the First Nation must resolve any issues related to lawful possession or rights for First Nation members occupying Proposed Reserve Land pursuant to section 22 or 23 of the *Indian Act.*

6.0 Third Party Access

a) Before Reserve Creation, in conjunction with INAC, the First Nation must address:
   i. access to any third-party land that would be "landlocked" by the Reserve Creation; and
   ii. access to utilities for that third-party land.

b) If a third party has subsurface rights in the Proposed Reserve Land, the First Nation must negotiate access over the Proposed Reserve Land to exercise those rights, or a buy-out of those rights, before Reserve Creation.

c) If a third party owns the Mines and Minerals in the Proposed Reserve Land, and intends to exploit the Mines and Minerals, the First Nation must negotiate access to the Mines and Minerals in the Proposed Reserve Land, and have written consent of that party to a surface only Reserve, or a buy-out of the sub-surface title or right must be completed prior to the surface land being granted Reserve status.

d) The First Nation has the lead role in the negotiations on third party access issues. Where requested, INAC may provide facilitative or technical assistance in support of negotiations.

7.0 Land Descriptions

a) Before recommending Reserve Creation, parcel boundaries will be described in accordance with the Interdepartmental Agreement with the Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector, Natural Resources Canada, from Chapter B1-2 - General Instructions for Surveys (http://clss.nrcan.gc.ca/standards-normes/b1-2-v4-eng.php), and such description must be reviewed by Justice Canada before being finalized.

b) A land description may include a survey.

8.0 Provincial or Territorial Considerations

General:

a) While provinces or territories must be consulted, they have no general or unilateral veto with respect to a Reserve Creation Proposal.

b) Provincial or territorial concurrence is required for the return of unsold surrendered land within the province or territory where the unsold surrendered land is under provincial or territorial title (e.g. in Ontario, pursuant to the *Indian Lands Agreement Act, 1986*).

Consultation:

c) The First Nation is encouraged to initiate discussions with the province or territory as early as possible regarding a Reserve Creation Proposal.

d) Before a Letter of Support is issued, INAC will notify the province or territory in writing of the Reserve Creation Proposal and give them the opportunity to assess potential impacts and issues for discussion with the First Nation .

e) Three months must be given to the province or territory to express any

views in writing to INAC and the First Nation and set out any issues for discussion with the First Nation. It is not expected that these issues need to be resolved at this stage. These issues may inform the content of the Letter of Support, and will assist INAC in assessing the impacts and benefits of the Reserve Creation Proposal.

f) Further discussion of issues raised by the province or territory should not unreasonably delay the Reserve Creation.

g) The First Nation is responsible for discussing issues raised by the province or territory. Where requested, INAC may provide facilitative or technical assistance in support of the discussions.

h) Any issues must be addressed and documented by written correspondence between the First Nation and the province or territory before Reserve Creation.

i) Where INAC is satisfied that concerns arising from these consultations have been addressed, a Reserve Creation Proposal may proceed in accordance with this Policy.

9.0 Local Governments

General:

a) In recognition that Reserve communities and Local Governments exist side by side, INAC promotes a “good neighbour” approach, which means that any discussions between First Nations and Local Governments should be conducted with good will, good faith and reasonableness.

b) First Nations and Local Governments will discuss issues of mutual interest and concern (such as joint land use planning, by-law harmonization, tax considerations, service provision, and dispute resolution).

c) While Local Governments must be consulted, they have no general or unilateral veto with respect to a Reserve Creation Proposal. Where concerns arising from these consultations have been addressed, a Reserve Creation Proposal may proceed in accordance with the Policy.

d) A Municipal Service Agreement is required to provide essential services to a Reserve (where needed). In addition, an agreement may be necessary to address the provision of other services, by-law compatibility, a consultation and dispute resolution process for matters of mutual concern, or potential net tax loss adjustments.

e) The First Nation is responsible for negotiation of agreements with Local Governments. The Local Government and First Nation should formalize such an agreement in writing. Where requested, INAC may provide facilitative or technical assistance in support of the negotiations. For assistance with developing agreements between First Nations and Local Governments, refer to Directive 10-1: Annex C “Guidelines for First Nation-Local Government Agreements”.

f) INAC will not be a party to any agreement between a First Nation and a Local Government.

Consultation:

g) Where the Proposed Reserve Land is within or adjacent/abutting a Local Government, the First Nation is encouraged to initiate discussions with the Local Government as early as possible regarding a Reserve Creation Proposal.

h) Before a Letter of Support is issued, INAC will notify the Local Government in writing of the Reserve Creation Proposal in order to give the Local Government an opportunity to assess any potential impacts and issues for discussion with the First Nation.

i) Three months must be given to the Local Government to express any views in writing to INAC and the First Nation and set out any issues for discussion. It is not expected that these issues need to be resolved at this stage. These issues may inform the content of the Letter of Support, and will assist INAC in assessing the impacts and benefits of the Reserve Creation Proposal.

j) Further discussion of issues raised by the Local Government should not unreasonably delay the Reserve Creation.

k) The First Nation is responsible for discussing issues raised by the Local Government. Any issues must be addressed and documented by written correspondence between the First Nation and the Local Government before Reserve Creation.

l) Where INAC is satisfied that concerns arising from these consultations have been addressed, a Reserve Creation Proposal may proceed in accordance with the Policy.

Local Government Tax Considerations:

m) Unless already provided for in an Agreement or in a service agreement between the First Nation and the Local Government, and where it can be demonstrated by a Local Government, the First Nation is responsible for paying any negotiated net tax loss adjustment.

n) Negotiations concerning net tax loss adjustments are intended to allow the Local Government to adjust to the net effect of the combined reduction in Local Government servicing costs and reduced tax base caused by a Reserve Creation Proposal. It is not intended to compensate indefinitely for the gross level of lost taxes, given that servicing costs are also being reduced or are subject to a separate Municipal Service Agreement. Guidelines for the determination of payment for net tax loss adjustment are found in Directive 10-1: Annex C “Guidelines for First Nation-Local Government Agreements”.

Directive 10 – 1: Annex B
Special Circumstances Policy Requirements

1.0 Accretion/Erosion

1.1 In this clause,

"Accretion" means the imperceptible and gradual addition to land by the slow action of water; and

"Erosion" means the imperceptible and gradual loss of land by the slow action of water.

1.2 Where the gradual movement of water boundaries occurs on Reserve lands:

a) Any locatee or interest or right holder benefits from any Accretion or suffers any loss due to Erosion;
b) Any lands accreting to a Reserve takes on the characteristics of the Reserve and any lands lost by Erosion lose the characteristics of the Reserve; and
c) No Order in Council or Ministerial Order is required to change the boundary of the Reserve unless there are exceptional or controversial circumstances such as litigation or contentious relations between parties. These exceptional or controversial circumstances will be determined on a case by case basis.

1.3 For greater certainty, Accretion and Erosion do not apply to flooding.

2.0 Natural Disasters

2.1 Reserve Creation Proposals that are made as a result of natural disasters such as flooding will be considered on a case by case basis. These may include the use of replacement lands where an Agreement has been reached.

2.2 A proposal made under these circumstances will be assessed in accordance with the Reserve Creation Proposal Criteria set out in Annex "A" of Directive 10-1 "Policy on Additions to Reserve/Reserve Creation". In addition, such proposals resulting from a natural disaster may require consideration of the following:

a) The risk involved if the community remains at the original site;
b) The nature and extent of future risk;
c) Extent of preventative or remedial action required;
d) The cost of undertaking preventative or remedial measures compared to the cost of relocation; and

e) The overall benefits to the community for each option.

3.0 Subsurface Rights

3.1 This Policy does not authorize Reserve Creation which consists of subsurface rights only. This Policy does authorize Reserve Creation for specific portions of subsurface rights described in clauses 4.0 and 5.0 of this Annex.

3.2 When the land being set apart as Reserve is subject to a provincial or territorial exception in the surface title or right of ownership, every effort should be made to include the mineral rights underlying the exception even if this makes the subsurface rights greater than the surface rights.

4.0 Partial Subsurface Interest or Rights Additions

4.1 In this clause,

"Partial Interests or Rights in Mines and Minerals" means that a First Nation would acquire only a part of an interest or right in Mines and Minerals. For example, if a ¼ interest or right is purchased, only that ¼ interest or right can be set apart as Reserve providing that the conditions set out in this clause are met.

4.2 Where First Nations seek Reserve Creation to acquire Partial Interests or Rights in Mines and Minerals, the following conditions apply:

a) The surface of the land described in the Reserve Creation Proposal must be Reserve*;*
b) Title or right of ownership to the Partial Interest or Right in the Mines and Minerals must be acquired by the First Nation and transferred to Canada before Reserve Creation;
c) The First Nation must be fully informed of the complexities of dealing with Partial Interests or Rights in Mines and Minerals;
d) A Partial Interest or Right in Mines and Minerals cannot be explored or exploited without obtaining the appropriate provincial or territorial instrument, where necessary, including the written consent of each partial interest or right holder; and
e) All the owners of the partial subsurface interests or rights must sign a joint agreement before Canada proceeds with Reserve Creation. This agreement must detail the conditions under which this partial interest or right would be held and how it would be managed for the group of owners.

5.0 Small Mineral Additions

5.1 In limited circumstances Reserve Creation may be considered for subsurface rights (i.e., Mines and Minerals) where the surface land is not Reserve. This may

arise where a province or territory excludes the surface land from the transfer to Canada for Reserve Creation. The common provincial or territorial exclusions to the surface title or right of ownership are public roads, highways, certain water bodies and water courses.

5.2 Reserve Creation Proposals for subsurface interests or rights may be greater than the surface rights due to the exclusions by the province or territory from the surface title or right of ownership. These subsurface rights can include Mines and Minerals which are potentially valuable resources for First Nations. The following would create this situation:

a) The province, territory or Local Government holds the title or right of ownership to the surface while a private individual holds title or right of ownership to the subsurface. The province, territory or Local Government is willing to transfer its interest or right to the surface for the purpose of granting Reserve status but wishes to reserve a portion for purposes such as public roads, highways, certain water-bodies and water courses. However, the subsurface owner is willing to transfer the entire underlying subsurface interest or right. This will result in a lesser amount of surface rights being granted Reserve status than subsurface rights.

b) A private individual holds title or right of ownership to both the surface and subsurface and is willing to transfer this interest or right for the purpose of granting Reserve status to the land. The Mines and Minerals may be included with the surface title or may be held under a separate subsurface title. However, the province or territory has the option of reserving a portion of the surface title or right of ownership for purposes such as public roads, highways, certain water-bodies and water courses. This will result in a lesser amount of surface rights being granted Reserve status than subsurface rights.

c) Either the province or territory, or a private individual, has title or right of ownership to the surface and the province or territory holds title or right of ownership to the subsurface. The province or territory may, upon negotiated agreement, choose to transfer subsurface rights while reserving portions of the surface title or right of ownership to itself for purposes such as public roads, highways, certain water-bodies and water courses. This will result in a lesser amount of surface rights being granted Reserve status than subsurface rights.

6.0 Correcting a Reserve Creation Order in Council or Ministerial Order

6.1 Where provincial or territorial Crown land has been acquired and set apart as a Reserve by an Order in Council or Ministerial Order and the surface or subsurface rights are unclear, both an amending Order in Council from the province or territory and an amending Order in Council or Ministerial Order from Canada are required to clarify the rights.

6.2 Where small amounts of mineral rights were purchased with the intention of Reserve Creation but this has not been done, an omnibus Order in Council or Ministerial Order may be used.

7.0 Joint Reserves

7.1 Reserve Creation Proposals for the creation of Joint Reserves will be considered on a case-by-case basis where cost implications and other factors associated with the management of a Joint Reserve have been addressed.

7.2 Reserve Creation Proposals for Joint Reserves raise complex legal and administrative issues. Before a Reserve Creation Proposal for the creation of a Joint Reserve will be considered, a written co-management agreement between the parties is required, and must address the following elements:

a) Cost implications for the creation and management of the Joint Reserve;
b) The requirement for unanimity of all First Nations involved for decisions requiring consent of the band council or membership (surrenders, designations, permits, leases, certificates of possession, etc);
c) Applicability of a First Nation Land Management land code;
d) Treaty – generally speaking, in the province of British Columbia, Joint Reserve lands will not be eligible for conversion to treaty settlement lands through the implementation of a treaty under the British Columbia Treaty process unless all First Nations for whom the Reserve was set aside by-law would need to be passed by each of the First Nations involved; and
e) Interest or Right - each First Nation will have an equal undivided interest or right in the Joint Reserve lands regardless of the size of the lands.

7.3 Reserve Creation Proposals for the creation of Joint Reserves require a vote by the electors of each participating First Nation, held in accordance with the *Indian Referendum Regulations,* and will be decided by a majority of those eligible electors of each participating First Nation who voted (simple majority).

7.4 Information Session. At a minimum, one information session is held for the benefit of the electors of each participating First Nation prior to a vote. The information session should include all the details of the Reserve Creation Proposal for the creation of a Joint Reserve including, but not limited to, details of the co-management agreement, complexities associated with designation requirements, the day-to-day administration, the requirement for unanimity for any decision affecting the use of the Joint Reserve and what that means, etc.

7.5 Separate Votes. While all participating First Nations may vote at the same time, separate voting results must be tabulated for each to confirm that the membership of each participating First Nation supports the Joint Reserve.

7.6 Failed Votes. If one or more of the participating First Nations fail to consent to the Reserve Creation Proposal for the creation of a Joint Reserve, those First Nations that did not vote in favour may hold a second vote following the same procedure as the first vote. If all of the First Nations do not vote in favour, the Reserve Creation Proposal for the creation of a Joint Reserve will not normally be considered further, unless the participating First Nations have previously agreed that the Joint Reserve may proceed without the First Nations who did not hold a successful vote.

7.7 Legal obligation. Where the Reserve Creation Proposal for the creation of a Joint Reserve is in partial or full satisfaction of legal obligations, to one or more of the participating First Nations, the Reserve Creation Proposal for the creation of a Joint Reserve must address how the obligation is being satisfied with respect to those First Nations and include a release of Canada from any liability.

7.8 Indemnity. INAC will require that all participating First Nations indemnify Canada in writing from any claims by any of them or their members pertaining to the use of the Joint Reserve or the division of benefits or losses derived from the Joint Reserve.

7.9 Reserve Creation Proposals for the addition of lands to an existing Joint Reserve will follow the terms of existing agreements outlining terms for community approval of a Reserve Creation Proposal and co-management of the Reserve lands, as applicable. The co-management or other agreement should be amended to include identification of the Proposed Reserve Land. Where no such agreement or other arrangement exists, the requirements of clauses 7.1 to 7.8 will apply.

Directive 10 – 1: Annex C
Guidelines for First Nations-Local Government Agreements

1.0 Objectives

These guidelines are intended to assist in creating long term, functional and productive relationships between First Nations and Local Governments with respect to Reserve Creation development and implementation. First Nations and Local Governments should work together collaboratively to resolve issues of mutual interest and concern, with a view to building stronger communities, improving standards of living and cooperating on municipal and other services.

2.0 Definitions

Please refer to Directive 10-1 "Policy on Additions to Reserve/Reserve Creation" for an explanation of certain terms used in these Guidelines.

3.0 Requirements

3.1 As described in Directive 10-1, Annex A, clause 9.0 of the Policy, a First Nation-Local Government agreement may be necessary to address the provision of services, by-law compatibility, a consultation and dispute resolution process for matters of mutual concern, or potential net tax loss adjustments.

3.2 The following outlines and provides guidance on important aspect of the Reserve Creation Process.

4.0 Relationship-Building

4.1 Fostering positive working relationships creates strong communities and helps to provide improved services to all community members both on and off Reserve. Cooperation between First Nations and Local Governments can result in numerous benefits such as:

a) improving levels of service;
b) realizing financial savings;
c) building a stronger labour force;
d) enhancing social standards;
e) providing growth and new opportunities to both First Nation and Local Government communities; and
f) improving intergovernmental relationships.

4.2 Local Governments provide many infrastructure services to their communities. When a First Nation's Reserve land base is expanded and services cannot be provided solely within the boundaries of the Reserve, agreements between the First Nation and the Local Government must be negotiated to ensure that services continue to be provided to the land. Canada is not a signatory to any service agreements that are entered into between First Nations and Local Governments.

4.3 While both First Nations and Local Governments represent broader community interests, their approaches to decision making, governance structure, values, beliefs and culture may vary significantly and as a result, this can lead to misunderstandings. Differences also exist with respect to each community's decision making process, whether based in tradition or legislation. First Nations and Local Governments may also have different methods of interacting with their community within their decision making processes.

4.4 The creation of protocols or memoranda of understanding may assist by outlining broad principles that both parties will adhere to in working together, to define the relationship and goals of the parties, recognize each other's jurisdiction, identify the process for maintaining the relationship (working groups or forums, joint decision making) and provide for dispute resolution.

4.5 One of the most important factors in establishing and maintaining good intergovernmental relations is the development of positive relationships through open communication and face-to-face meetings. Formal and stable processes are useful tools to promote understanding and cooperation and to develop mutually beneficial solutions.

5.0 By-Law Compatibility

5.1 By-law compatibility and harmonization helps to set out a common process for two or more neighbouring governments to coordinate their approaches to land use and development. Neighbouring governments are interdependent which requires that they collaborate and collectively plan for and manage land use, economic development, as well as infrastructure services, such as water, sewer, waste and transportation.

5.2 By-laws and land use plans enacted by a First Nation and Local Government need not be the same but should strive for compatibility to achieve objectives that are acceptable to all parties. Joint Local Government and First Nation committees may be created to develop guidelines on compatible by-laws, work in partnership to review by-laws and provide a collaborative forum to air concerns and make recommendations.

5.3 Joint land use planning committees may provide an effective means through

which First Nations and Local Governments can discuss their respective issues and identify common goals and objectives. Cooperation in land use planning and ensuring compatibility on adjacent lands is of mutual interest for both First Nations and Local Governments.

5.4 A protocol may also be established between the First Nation and the Local Government to ensure that regular meetings and ongoing information sharing will occur beyond the term of the elected governments. It is also the representation of a long term commitment of both governments to work together.

5.4.1 A protocol or process document may address at a minimum issues such as:

a) Consultation;
b) Engagement;
c) Costs;
d) Services;
e) Compatibility of Uses;
f) Methods for implementation;
g) Decision making processes; and
h) Creation of implementation committees or working groups.

5.4.2 A First Nation and Local Government may wish to achieve by-law compatibility in areas such as:

a) land use or zoning standards;
b) building and safety standards;
c) public utilities;
d) animal control;
e) health and safety;
f) traffic regulation; and
g) property maintenance.

6.0 Service Agreements and Net Tax Loss Adjustment

6.1 Each province or territory has a municipal Act or Code which specifically defines which services each municipality is responsible for. The level of service provided by each Local Government varies across Canada and is completely dependent on the size of the Local Government and what level of services it may afford. In order to fund services provided to residents, a Local Government levies taxes on properties within their boundaries as a source of revenue.

6.2 When a Reserve is created or lands are added to Reserve within or adjacent to Local Government boundaries, Local Governments no longer levy property taxes nor are they required to provide services on Reserve lands. However, First Nations may request services in order to complete the requirements of a Reserve Creation Proposal. In addition, Local Governments may request that a one-time payment may be negotiated between the First Nation and the Local Government

to offset the difference in property tax revenue.

6.3 First Nations and Local Governments have similar goals and objectives in relation to the provision of services to their residents. Both governments need to work together to ensure that safe, reliable and cost effective services are provided. Effective land use planning and coordination can help to foster stable servicing relationships between a First Nation and Local Government.

6.4 Where a First Nation has determined that it is unable to physically service the Proposed Reserve Land, the First Nation may seek to purchase services from a neighbouring Local Government rather than supply the necessary services to the Reserve on its own. In such a case, the First Nation will have to request the required services from the Local Government and enter into negotiations to conclude a Municipal Service Agreement (MSA).

6.5 A Municipal Service Agreement may include the following items:

a) A description of the services that the Local Government is able and willing to supply to the First Nation;
b) The basis for the charges levied by the Local Government;
c) Payment due dates;
d) The manner in which the First Nation will be billed for the services;
e) Fees for administration and legal costs;
f) Access by the Local Government to install, maintain and operate the services;
g) Access for emergency services; including fire protection;
h) Upgrading, improvement, replacement or major repairs respecting services;
i) Costs for related engineering studies; and
j) Impacts of major development on the Reserve which may affect provision of current or future municipal services.

6.6 Where a Reserve Creation may impact a Local Government's property tax revenue arising from the loss of taxation authority over Proposed Reserve Lands, the Local Government may request the negotiation of a net tax loss adjustment payment.

6.7 A reasonable calculation of the net tax loss adjustment payable by the First Nation to a Local Government may be determined by consideration of the following factors:

a) Any funds the Local Government will receive from a Municipal Services Agreement with the First Nation;
b) Any savings which will result from a reduced delivery of services following the granting of Reserve status;
c) Agreement on a reasonable determinate time period for the calculation of net tax loss adjustment that considers the length of time the Local Government has been formally advised of the Reserve Creation Proposal

and the estimated or known time that the Reserve Creation will occur;

d) The gross amount of taxes currently assessed on the land to be set aside as Reserve, limited to the municipal share of annual taxes, excluding school and hospital taxes;

e) Any funds the Local Government is receiving in provincial equalization payments for the Proposed Reserve Creation Lands; and

f) The relative size of the loss in relation to the total tax revenues of the Local Government.

6.8 Net tax loss adjustment payment is not required for school boards where they are already funded for tuition costs for on-Reserve students through other funding arrangements.

6.9 INAC is not a party to any agreement for net tax loss adjustment payment.

7.0 Dispute Resolution

7.1 Dispute resolution is an important element of working relationships that enables both parties to work through differences of opinion and reach agreement or compromise on important issues. When issues or disputes arise, both informal and formal alternate dispute resolution mechanisms should be in place to resolve the issue. All parties need to believe that for the good of each community, a form of compromise may be necessary and every attempt should be made to create a win-win solution.

7.2 INAC promotes a “good neighbour” approach that encourages effective relations when First Nations and Local Governments are seeking to resolve issues relating to Reserve Creation. INAC encourages discussions on issues of mutual interest and concern that are conducted with good will, good faith and reasonableness, and within reasonable timeframes.

7.3 To assist First Nations and any third parties in successfully resolving disputes, the following practices are encouraged:

a) Early communication on the Reserve Creation Proposal that pro-actively seeks to avoid disputes, encourages cooperation among parties, and works towards building a positive relationship;

b) The development of mutually agreeable approaches to dispute resolution between the First Nation and Local Governments at the outset of discussions in order to identify and address areas of disagreement quickly, and facilitate further resolutions as they may arise in the negotiation of agreements;

c) The inclusion of dispute resolution mechanisms in any final agreements between the First Nation and Local Governments, where appropriate, to address future instances of disagreement as they arise;

d) The establishment of mutually agreeable time frames for efforts to resolve

instances of disagreement; and

e) The use of mediation where negotiations have reached an impasse.

7.4 Disagreements may be resolved through a number of non-binding dispute resolution processes, such as:

a) Conciliation: The parties may try to work out the issues by themselves such as at a joint meeting between the Local Government and First Nation councils. In the alternative, the parties may work out the issues with the assistance of a third party;

b) Facilitation: The parties may request assistance from INAC in providing facilitative management (by INAC or a neutral third party) of a joint meeting to support discussions that assist the parties to identify issues, and develop options to resolve disputes; and

c) Mediation: Pursuant to this process, a third party assists in working out a solution to the dispute. A decision is reached by consensus, which may or may not be binding depending on the terms of the mediation.

7.5 The parties may also agree to enter into a dispute resolution process that is binding in nature, such as arbitration, where the matter in dispute is referred to a third party for review. The third party determines on how to settle the disagreement and the final decision is usually binding on all parties.

7.6 Procedural details of dispute resolution processes that may be addressed in a First Nation-Local Government agreement may include:

a) Authority of the dispute resolution body to call meetings and conduct hearings;

b) Authority of the dispute resolution body to review and examine by-laws, reports and minutes of the Local Government and First Nation;

c) The effect of the decision of the dispute resolution body: recommendation or binding decision;

d) Timeframe for the dispute resolution process;

e) The manner in which the decision will be reached: majority vote, consensus or another method; and

f) The agreement should specify how costs for dispute resolution will be shared.

8.0 Additional Resources

8.1 The National Aboriginal Land Managers Association provides assistance to First Nations through training technical expertise on the Additions to Reserve process and other land management related activities (http://www.nalma.ca).

8.2 The First Nation Tax Commission (http://www.fntc.ca/) is able to provide technical assistance to support service agreement and tax loss negotiation processes, including the analysis of net tax loss adjustment, and facilitation, tools

and training to support service agreement negotiations. The Tulo Centre of Indigenous Economics (http://tulo.ca) also offers university accredited courses related to implementing First Nation tax powers, negotiating service agreements, developing economic strategies and plans for First Nation lands and communications with Local Governments and stakeholders.

8.3 The Federation of Canadian Municipalities, through the Canadian Infrastructure Partnership Program, has developed a number of tools to assist with navigating the process of negotiating First Nation-Local Government service agreements (http://www.fcm.ca/home/programs/community-infrastructure-partnership-program.htm).

Directive 10 – 2:
Reserve Creation Process

1.0 Effective Date

1.1 This Directive on the Reserve Creation Process is effective as of **XXXX**, and applies to all Reserve Creation Proposals received after this date.

1.2 Reserve Creation Proposals submitted prior to the effective date of this Policy will be processed in accordance with Directive 10-3: Additions to Reserve/Reserve Creation Transition Guidelines for Regional Offices.

1.3 This Directive forms part of INAC's Land Management Manual, Chapter 10, Additions to Reserve/Reserve Creation.

2.0 Application

2.1 This Directive applies to employees of INAC and provides guidance to First Nations with respect to Reserve Creation Proposals, including First Nations operating under the *First Nation Land Management Act*.

2.2 This Directive sets out the process to be followed for Reserve Creation.

2.3 Definitions used in this Directive are found in Directive 10-1, clause 3.0 of this Policy.

3.0 References

3.1 Legislation and related policy instruments relevant to this Directive are set out in Directive 10-1, clause 18.0 of the Policy.

4.0 Objectives

4.1 The objectives of this Directive are set out in Directive 10-1, clause 7.0 of the Policy.

5.0 Requirements and Responsibilities

5.1 Phase 1 - Initiation

5.1.1 The Reserve Creation Process begins when the First Nation submits a Band Council Resolution and the Reserve Creation Proposal to the INAC Region seeking Reserve Creation. At a minimum, the Reserve Creation Proposal must include:

i. The applicable Policy category;
ii. Selection area;
iii. Land Use – Unless otherwise stated in an Agreement, the First Nation must describe the current and intended use of the Proposed Reserve Land;
iv. Where available, the offer to purchase, title search including, the registered owner(s), and a general description of the Proposed Reserve Land sufficient to identify location;
v. Proximity of the Proposed Reserve Land to the nearest Local Government;
vi. Whether interests or rights in Mines and Minerals are to be included and, if so, the registered owner(s);
vii. Although an Environmental Site Assessment is not required at this stage, any environmental information of the historical, current and intended use of the Proposed Reserve Land;
viii. Transaction costs applicable under the Policy (and the potential source of funds);
ix. Other impacts and benefits of Proposed Reserve Land use;
x. Results of investigations identifying existing encumbrances or charges normally achieved by a title search, provincial or territorial canvass, and/or site visit, and including supporting documentation if applicable;
xi. Any known provincial, territorial, Local Government, Aboriginal, or other interests or rights; and
xii. Whether services are required. If services are required, enumerate what services and the plan to provide for or acquire them.

5.1.2 If the Reserve Creation Proposal adds to an existing Reserve, the Band Council Resolution should set out the name and number of the existing Reserve. If the Reserve Creation Proposal involves the creation of a New Reserve, the proposed name and number of the New Reserve should be identified in the Band Council Resolution. Naming should be in accordance with the Geographical Names Board of Canada.

5.1.3 Reserve Creation Proposals must be submitted to the INAC Region within which the majority of the First Nation's land is located, regardless of the selection area. Refer to Template 1 of this Directive for a Reserve Creation Application Form.

5.1.4 The First Nation and INAC may discuss the Reserve Creation Proposal to assist the First Nation in the preparation of the Reserve Creation Proposal where appropriate.

5.2 Phase 2 - Assessment and Review

5.2.1 Upon receipt of a Reserve Creation Proposal, a written acknowledgement of receipt will be provided by INAC Region to the First Nation.

5.2.2 Following receipt, INAC will determine whether or not the proposal meets the minimum requirements set out in 5.1.1 of this Directive. When that review is complete, INAC will advise the First Nation in writing of the results of the determination. If the Reserve Creation Proposal has not met the minimum requirements, the Region will advise the First Nation of the deficiencies to be addressed before the Reserve Creation Proposal will be considered further. Refer to Template 2 of this Directive for a Reserve Creation Proposal Development Checklist.

5.2.3 Once the Reserve Creation Proposal has met the minimum requirements, INAC will undertake the following additional assessment activities prior to issuing a Letter of Support (to the extent possible, those activities will be done concurrently):

a) Conduct a preliminary assessment and identification of requirements related to any potential Duty to Consult with Aboriginal groups on the Proposed Reserve Land;
b) Identify any financial implications for Canada and any potential sources of government funding to assist the Reserve Creation Proposal;
c) Advise the province or territory and the Local Government of the Reserve Creation Proposal (where the First Nation has not already done so); and
d) Request a title report from Justice Canada to identify encumbrances, charges and any other title issues

5.2.4 Once the additional information, if required, has been obtained for the purpose of identifying issues that will need to be resolved before Reserve Creation, INAC will complete its assessment of the Reserve Creation Proposal and decide whether or not to issue a Letter of Support.

5.2.5 INAC's concurrent review and assessment activities, while requiring a necessary level of due diligence, should not unreasonably delay the decision whether or not to issue a Letter of Support. Where appropriate, INAC will advise the First Nation of the status of the assessment of a Reserve Creation Proposal, in accordance with any applicable INAC service standards.

5.2.6 Reserve Creation Proposals that are outside the Regional Director General's authority (Community Additions) will be forwarded to the Deputy Minister with recommendations on the decision to issue a Letter of Support or not.

5.2.7 The Regional Director General (or the Deputy Minister) may issue a Letter of Support or reject the Reserve Creation Proposal. If a Letter of Support is to be issued, INAC will identify in the Letter of Support the Reserve Creation Proposal

Criteria that must be satisfied before INAC will recommend Reserve Creation.

5.2.8 INAC will provide a written explanation for any Reserve Creation Proposal that will not be supported. Such explanation may include but is not limited to:

a) Reserve Creation Proposal Criteria not able to be readily satisfied;
b) Minister's discretion not to recommend Reserve Creation; or
c) INAC Reserve Creation Proposal implementation planning.

5.3 Phase 3 – Proposal Completion

5.3.1 Where a Letter of Support is issued, Regional INAC and the First Nation will work together to develop a work plan identifying the requirements to meet the Reserve Creation Proposal Criteria identified. INAC and the First Nation will clarify their respective roles and responsibilities within the process (e.g., with respect to communications planning, Environmental Site Assessments, surveys, community planning requirements, mechanisms to address third party interests or rights, etc.). Refer to Template 3 of this Directive for a Reserve Creation Joint Work Plan.

5.3.2 INAC will initiate an annual review of each Reserve Creation Proposal with the First Nation to determine whether work plan objectives have been met. Based on this review, the work plan requirements may be revised.

5.3.3 Once all of the Reserve Creation Proposal Criteria have been satisfied, the First Nation will ensure that all of the required information has been forwarded to the INAC Region and will advise INAC that the requirements set out in the Letter of Support have been satisfied.

5.3.4 Transfer of administration and control from a province or territory or acquisition of the fee simple title or right of ownership is to be completed in accordance with the *Federal Real Property and Federal Immovables Act* and its regulations.

5.3.5 INAC Region will verify that the Reserve Creation Proposal is complete, confirm the number and name of the proposed Reserve, and notify the First Nation that the Reserve Creation Proposal will be submitted to the Minister.

5.4 Phase 4 – Approval

5.4.1 Regional INAC staff will prepare the Order in Council or Ministerial Order submission requesting Reserve Creation.

5.4.2 The Order in Council or Ministerial Order submission is sent to the Minister who may in the case of an Order-in-Council submission recommend its approval to the Privy Council, or reject or approve the Ministerial Order.

5.4.3 The Governor in Council either rejects or approves the Order in Council submission.

5.4.4 If the Order in Council or Ministerial Order is granted, the Order in Council or Ministerial Order is registered in INAC's Indian Lands Registry and in any other relevant land registries. Regional INAC staff should arrange for the registration of all related land title documents in the Indian Lands Registry to be attached to, or accompany, the registration of the Order-in-Council or Ministerial Order, as applicable.

5.4.5 INAC Region will notify the First Nation and other relevant parties of the Reserve Creation and provide each with the registration particulars as required.

6.0 Enquiries

For information on this Directive or to obtain any of the above-noted references, please contact:

Indigenous and Northern Affairs Canada
Terrasses de la Chaudière
10 Wellington, North Tower
Gatineau, Quebec
Postal Address:
Ottawa, Ontario
K1A 0H4

Email: InfoPubs@aadnc-aandc.gc.ca
Phone: (toll-free) 1-800-567-9604
Fax: 1-866-817-3977
TTY: (toll-free) 1-866-553-0554

TEMPLATE 1: Reserve Creation Proposal Application Form
TEMPLATE 2: Reserve Creation Proposal Development Checklist
TEMPLATE 3: Reserve Creation Work Plan

Template 1: Reserve Creation Proposal Application Form

The Reserve Creation Proposal Application Form below may be used as a tool to consolidate key information about the ATR Proposal.

Affaires autochtones et Développement du Nord Canada
Aboriginal Affairs and Northern Development Canada

RESERVE CREATION PROPOSAL	
PART A – GENERAL INFORMATION	
1. BAND/FIRST NATION NAME	
2. BAND/FIRST NATION OFFICE MAILING ADDRESS	
3. CONTACT NAME AND POSITION	
4. TELEPHONE	**5. TELEPHONE (MOBILE)**
6. FAX	**7. E-MAIL**

PART B – ATR PROPOSAL
8. (A) ☐ NEW RESERVE ☐ ADDITION TO EXISTING RESERVE **(B) PROPOSED RESERVE NAME (IF CREATING A NEW RESERVE)** **(C) EXISTING RESERVE NAME (IF ADDING TO AN EXISTING RESERVE)**
9. APPLICABLE POLICY CATEGORY: ☐ LEGAL OBLIGATION AND AGREEMENTS **☐ COMMUNITY ADDITIONS ☐ TRIBUNAL DECISION** **IF LEGAL OBLIGATION, EXPLAIN/PROVIDE NAME OF AGREEMENT:** **(A) IF THIS IS A COMMUNITY ADDITION ATR, OUTLINE THE RATIONALE (NEED) FOR THE RESERVE CREATION**

10. SELECTION AREA (WITHIN TRADITIONAL TERRITORY?): ☐ YES ☐ NO

(NOTE THAT THE ACCOMMODATION AND CONSULATION UNIT AT INDIGENOUS AND NORTHERN AFFAIRS CANADA MAY BE CONTACTED FOR MAPS TO HELP DETERMINE TRADITIONAL TERRITORY)

IF "NO", PLEASE EXPLAIN:

11. SUBSURFACE MINERAL RIGHTS TO BE INCLUDED? ☐ YES ☐ NO

IF "YES", IDENTIFY THE REGISTERED OWNERS:

12. IS THIS APPLICATION THE SUBJECT OF ONE OR MORE OF THE FOLLOWING?

☐ NATURAL DISASTER ☐ PARTIAL SURFACE INTEREST OR RIGHT ☐ SMALL MINERAL ADDITION ☐ JOINT RESERVE

13. BAND COUNCIL RESOLUTION ATTACHED AS "ANNEX A"? ☐ YES ☐ NO

14. OFFER TO PURCHASE ATTACHED AS "ANNEX B"? ☐ YES ☐ NO

15. TRANSACTION COSTS APPLICABLE UNDER POLICY AND SOURCE OF FUNDS

(NOTE THAT THE PROVISIONS OF AN AGREEMENT (TREATY LAND ENTITLEMENT, SPECIFIC CLAIM OR SELF-GOVERNMENT) WILL PREVAIL TO THE EXTENT OF THE INCONSISTENCY OR CONFLICT)

	SETTLEMENT/BAND FUNDED	INAC FUNDED	OTHER (PLEASE SPECIFY)
LAND ACQUISITION			
SURVEYS			
ENVIRONMENT (E.G. ASSESSMENTS, REMEDIATION, MONITORING/MITIGATION)			
TRANSACTIONAL COSTS			
INCREMENTAL COSTS (RESULTING FROM NEGOTIATIONS WITH LOCAL GOVERNMENTS)			
ADDITIONAL FUNDING (HOUSING, INFRASTRUCTURE, OTHER CAPITAL COSTS)			

PART C – PROPERTY DESCRIPTION

16. (A) ADDRESS OF THE PROPERTY/PARCEL IDENTIFICATION NUMBER/LEGAL DESCRIPTION

(B) LEGAL DESCRIPTION OF LAND TO BE ADDED (SKETCH/SITE PLAN, REGISTRATION PLAN OR SURVEY) ATTACHED AS "ANNEX C"? ☐ YES ☐ NO

PROVIDE SUFFICIENT DETAIL TO IDENTIFY LOCATION OF PREMISES TO BE ADDED.

(C) NAME OF MUNICIPALITY *OR* ☐ UNINCORPORATED CROWN LAND/CROWN LAND WITHOUT CADASTRAL SURVEY

17. LOT SIZE: ACRES:_____ HECTARES:_____
18. CURRENT LAND USE(S):
19. ADJACENT LAND USES:
20. CURRENT PROPERTY OWNERSHIP STATUS: ☐ FEDERAL ☐ PROVINCIAL ☐ PRIVATE
21. (A) CURRENT LAND USE OR ZONING: **(B) HAS THE LAND BEEN DESIGNATED PRE-RESERVE? ☐ YES ☐ NO**
22. PROXIMITY OF PROPOSED RESERVE LAND TO OTHER LOCAL GOVERNMENTS (INCLUDING DISTANCE IN KILOMETERS)

23. DESCRIPTION OF TOPOGRAPHY/SURFACE WATER/ SOIL:

PART D – PROPOSED LAND USE

25. INTENDED USE OF PROPOSED RESERVE LAND:

26. ANTICIPATED IMPACTS AND BENEFITS OF THE PROPOSAL ON THE FOLLOWING:

- **A) THE EFFECT OF THE RESERVE CREATION ON THE SOCIAL AND ECONOMIC PROSPERITY OF THE FIRST NATION;**
- **B) ECONOMIC DEVELOPMENT POTENTIAL OF THE RESERVE CREATION ON RESIDENTS OF THE SURROUNDING AREA;**
- **C) COSTS RELATED TO THE PROVISION OF SERVICES TO THE FIRST NATION AND THE LOCAL GOVERNMENT (WHERE THE FIRST NATION IS THE SERVICE PROVIDER);**
- **D) REVENUE ADJUSTMENTS RESULTING FROM A CHANGE IN TAX STATUS;**
- **E) FINANCIAL IMPLICATIONS FOR THE GOVERNMENT OF CANADA;**
- **F) EXISTING FIRST NATION, PROVINCIAL, TERRITORIAL, REGIONAL OR LOCAL GOVERNMENT LAND USE PLANS;**
- **G) REGIONAL INFRASTRUCTURE MANAGEMENT;**
- **H) REGIONAL TRAFFIC OR TRANSIT MANAGEMENT PLANS;**
- **I) PROTECTED OR ENVIRONMENTALLY SENSITIVE AREAS (SUCH AS NATIONAL PARKS, AGRICULTURAL LAND RESERVES IN BRITISH COLUMBIA, OR GREENBELT LANDS IN ONTARIO); AND**
- **J) CULTURALLY SENSITIVE AREAS (SUCH AS FIRST NATIONS BURIAL, ARCHAEOLOGICAL OR CEREMONIAL SITES).**

FURTHER, ANY BENEFITS AND POSITIVE IMPACTS OF A RESERVE CREATION PROPOSAL FOR ECONOMIC DEVELOPMENT UNDER THE COMMUNITY ADDITIONS CATEGORY OF THIS POLICY MUST OUTWEIGH THE POTENTIAL TAX IMPACTS ASSOCIATED WITH RESERVE CREATION, AS

SUCH TAX ADVANTAGES CANNOT BE THE SOLE JUSTIFICATION FOR RESERVE CREATION.

27. ENVIRONMENTAL INFORMATION (HISTORICAL/CURRENT/INTENDED USE OF PROPOSED RESERVE LAND)

☐ **ATTACHED AS A SEPARATE DOCUMENT**

28. WILL SERVICES BE REQUIRED FROM THE MUNICIPALITY?

☐ **YES** ☐**NO**

IF NO SERVICES ARE REQUIRED, DESCRIBE HOW THE FIRST NATION INTENDS TO PROVIDE

SERVICES THEMSELVES (FOR EXAMPLE, FIRE PROTECTION)

IF "YES", WILL A MUNCIPAL SERVICE AGREEMENT BE REQUIRED? ☐ YES ☐NO

IF "YES", PLEASE LIST SERVICES REQUIRED, AND INCLUDE A PLAN TO PROVIDE FOR AND/OR ACQUIRE THEM.

☐ ADDITIONAL DOCUMENTATION ATTACHED

PART E – ENCUMBRANCES OR CHARGES/INTERESTS OR RIGHTS

29. TITLE SEARCH (INCLUDE THE NAMES OF REGISTERED OWNERS ATTACHED AS "ANNEX D"
☐ YES ☐ NO

30. EXISTING ENCUMBRANCES OR CHARGES IDENTIFIED

☐ NOT APPLICABLE ☐ ADDITIONAL DOCUMENTS ATTACHED (SUCH AS A TITLE SEARCH)

31. KNOWN PROVINCIAL/MUNICIPAL/ABORIGINAL/OTHER INTERESTS OR RIGHTS IN PROPOSED RESERVE LAND ☐ **NO KNOWN INTERESTS OR RIGHTS**

Template 2: Reserve Creation Proposal Development Checklist

Section 5.1.1 of Directive 10 - 2: Reserve Creation Process of the ATR Policy states that the Reserve Creation Process begins when the First Nation submits a Band Council Resolution (BCR) and a Reserve Creation Proposal to INAC seeking Reserve Creation. Regarding the minimum requirement, the Reserve Creation Proposal must include a BCR and the 12 elements that are listed below in the checklist. The checklist tool below will be used by INAC staff to ensure that the First Nation has submitted all applicable documents for Phase I in the ATR Policy.
To use the checklist below, gather all items that the First Nation has sent to the INAC Regional office. Place a checkmark in the "received" column if you have the item or place a checkmark in the "not received" column if the item has not been obtained.

Band Council Resolution	**Received**	**Not Received**
Band Council Resolution (BCR) Document		
Minimum Reserve Creation Proposal Items	**Received**	**Not Received**
1) The applicable Policy category		
2) Selection Area		
3) Land Use – Unless otherwise stated in an Agreement, the First Nation must describe the current and intended use of the Proposed Reserve Land		
4) Where available, the offer to purchase, title search including, the registered owner(s), and a general description of Proposed Reserve Land sufficient to identify location		
5) Proximity of the Proposed Reserve Land to the nearest Local Government		
6) Whether interests or rights in Mines and Minerals are to be included and, if so, the registered owner(s)		
7) Any environmental information of the historical, current and intended use of the Proposed Reserve Land		
8) Transaction costs applicable under the Policy (and the potential source of funds)		
9) Other impacts and benefits of Proposed Reserve Land use		
10) Results of investigations identifying existing encumbrances or charges normally achieved by a title search, provincial or territorial canvass, and/or site visit, and including supporting documentation if applicable		
11) Any known provincial, territorial, municipal, Aboriginal, or other interests or rights		
12) Whether services are required. If services are required, enumerate what services and the plan to provide for or acquire them		

Template 3: Reserve Creation Joint Work Plan

Purpose:
Section 5.3.1 of Directive 10 - 2: Reserve Creation Process in the ATR Policy states that Regional INAC staff and the First Nation will work together to develop a work plan once a Letter of Support has been issued.

Process:
Under the ATR Policy, INAC will identify in the Letter of Support the requirements that must be satisfied before INAC will recommend Reserve Creation. After the Letter of Support is issued, Regional INAC staff and the First Nation will work together to develop a work plan outlining the requirements to meet Reserve Creation, timelines, and their respective roles and responsibilities.

Annual Review and Completion of File:
During the annual review of the ATR files, INAC staff will arrange to meet with the First Nation to determine whether work plan objectives have been met. In the case that work plan objectives have not been met, the work plan requirement may be revised.
In the case in which a First Nation has more than one ATR application, the First Nation will have one work plan containing all ATR submissions. First Nations may work with INAC staff to rank the submissions based on priority so that priorities can be considered as much as possible when processing ATR submissions for that First Nation.

Work Plan Template:
The following table contains a template of a work plan that may be used by the First Nation and INAC staff to assist them with preparing the work plan. Note that instructions/definitions for each field are in italics text under each box in the document.

Work Plan Template – General Information
First Nation Name:
Add the legal name of the First Nation that has submitted the Reserve Creation Proposal above
ATR Name/NATS Number/ATR Number:
Add the ATR Name/NATS/ATR Number that identifies the ATR submission above
Other Identifying Numbers:
Add any other identifying numbers that are assigned to the ATR submission if applicable, such as CIMS/Order in Council/Ministerial Order Numbers) above
ATR Purpose:
Briefly describe the purpose of the ATR above
Date the work plan was developed:
Include the date (month/day/year) that the work plan was developed above
Date the work plan was modified:
Include the date (month/day/year) that the work plan was modified (if applicable) above
Signature of the First Nation Representative and date:
Ask the First Nation Representative to sign, print his or her name, and date (month/day/year) above once the work plan is completed

Signature of the Director or the Manager in the INAC Regional Office:

Ask the accountable Director or Manager in the INAC Regional Office to sign, print his or her name, and date (month/day/year) above once the work plan is completed

ATR Submission #1

Include the ATR Name/NATS Number/ATR Number in the line above

Objective	**Activity**	**Lead**	**Costs**	**Target**	**Dates**
List the work plan requirement	*List the activity and briefly describe the purpose of the activity within the process*	*List who is ultimately responsible to complete the activity*	*List any anticipated costs and who will be responsible to pay for the activity*	*List the date (month/day/year) that the activity is expected to be completed by*	*List the date (month/day /year) that the activity was actually completed on (this column is for tracking purposes)*
Environmental Studies					
Land Description					
Service Agreements					
Third Party Interests or Rights					

ATR Submission #2

Objective	**Activity**	**Lead**	**Costs**	**Target**	**Dates**
Environmental Studies					
Land Description					
Service Agreements					
Third Party Interests or Rights					

ATR Submission #3

Objective	**Activity**	**Lead**	**Costs**	**Target**	**Dates**
Environmental Studies					
Land Description					
Service Agreements					
Third Party Interests or Rights					

ATR Submission #4					
Objective	**Activity**	**Lead**	**Costs**	**Target**	**Dates**
Environmental Studies					
Land Description					
Service Agreements					
Third Party Interests or Rights					
ATR Submission #5					
Objective	**Activity**	**Lead**	**Costs**	**Target**	**Dates**
Environmental Studies					
Land Description					
Service Agreements					
Third Party Interests or Rights					

Work Plan Sample:

The following information is an example of what a completed work plan template might look like. Note that this information is fictitious and it is to be used for illustration purposes only.

Work Plan Template – General Information
First Nation Name: **XYZ First Nation**
Add the legal name of the First Nation that has submitted the Reserve Creation Proposal above
ATR Name/NATS Number/ATR Number: **LED12345**
Add the ATR Name/NATS Number/ATR Number that identifies the ATR submission above
Other Identifying Numbers: **CIMS # LSSK123 and MO # 2014-001**
Add any other identifying numbers that are assigned to the ATR submission if applicable, such as CIMS/Order in Council/Ministerial Order Numbers) above
ATR Purpose: **To Build a Shopping Centre**
Briefly describe the purpose of the ATR above
Date the work plan was developed: **January 15, 2014**
Include the date (month/day/year) that the work plan was developed above
Date the work plan was modified: **Not applicable**
Include the date (month/day/year) that the work plan was modified (if applicable) above
Signature of the First Nation Representative and date: **Jane Smith Jane Smith January 16, 2014**
Ask the First Nation Representative to sign, print his or her name, and date (month/day/year) above once the work plan is completed.

Signature of the Director or the Manager in the INAC Regional Office: **John Doe John Doe January 16, 2014**
Ask the accountable Director or Manager in the INAC Regional Office to sign, print his or her name, and date (month/day/year) above once the work plan is completed

ATR Submission #1 - LED12345					
Include the ATR Name/NATS Number/ATR Number in the line above					
Objective	**Activity**	**Lead**	**Costs**	**Target**	**Dates**
List the work plan requirement	*List the activity and briefly describe the purpose of the activity within the process*	*List who is ultimately responsible to complete the activity*	*List any anticipated costs and who will be responsible to pay for the activity*	*List the date (month/day/year) that the activity is expected to be completed by*	*List the date (month/day /year) that the activity was actually completed on (column is for tracking purposes)*
Environmental Studies	Environmental Site Assessment	First Nation	Phase I and II - $X	July 1, 2014	To be done in Year 1 with actual results to added
Land Description	Survey	First Nation	$X	June 1, 2015	To be done in Year 2with actual results to be added
Service Agreements	Service Agreements For Water, Garbage and Wastewater	First Nation	$X for lawyers, $X for travel, $X for engineers, $X for studies	June 1, 2018	To be done in Year 5 with actual results to be added
Third Party Interests or Rights	Hydro Easement or servitude Rail Line Easement or servitude Permit – cell tower	First Nation to negotiate and INAC to process	$X	January 1, 2018	To be done in Year 5 with actual results to be added

Directive 10 – 3:
Additions to Reserve/Reserve Creation Transition Guidelines

1.0 Principles

These Guidelines will help to implement the revised ATR Policy and support transition from the 2001 ATR Policy. The following principles will guide transition activities:

i) The application of the revised ATR Policy will be efficient and fair, consider the respective workloads and capacity of the parties, focus on completing ATRs as quickly as possible, and optimize the advantages of the new process;

ii) For all ATR Proposals within INAC at the effective date, First Nations will have the ability to opt into the revised ATR Policy. All ATR Proposals submitted after the effective date will be processed according to the revised ATR Policy (unless otherwise defined in an agreement); and

iii) The prolonged application of the 2001 ATR Policy will be minimized where possible.

2.0 Purpose

2.1 The purpose of these Guidelines is to provide information and support to Indigenous and Northern Affairs Canada (INAC) staff in the Regional Offices and to First Nations using the Additions to Reserve/Reserve Creation Policy.

3.0 Transition Processes

3.1. As part of the launch of the 2016 Policy, INAC will advise all First Nations, in writing, that a new Policy has been developed and approved. The written notification will include:

a) Information to find the online copy of the 2016 Policy;
b) The date the 2016 Policy will be in effect; and
c) Contact information for the First Nation to have a discussion with an INAC official and receive a briefing on the 2016 Policy or to discuss the Reserve Creation Proposal process and next steps.

3. 2 INAC may hold regional information sessions so that First Nations may meet with INAC to discuss the changes introduced by the Policy. If requested, INAC Regional officials will meet one-on-one with a First Nation to discuss their

respective ATR files.

3. 3 INAC Regional officials will partner with First Nations to conduct a file review to determine which files will continue to be processed in accordance with the 2001 Policy and which ones will be transitioned to the 2016 Policy. The file review will take into consideration whether an Approval in Principle has been issued under the 2001 Policy. If an Approval in Principle has been issued, the proposal is likely nearing completion, and for efficiency, it could proceed under the 2001 policy.

3. 4 If an Approval in Principle has not been issued, INAC Regional officials will work with the First Nation to ensure that the file contains the information required by the 2016 Policy to proceed to a Proposal Assessment. INAC Regional officials and the First Nation will review each Proposal to identify any missing information. Where additional information is required, INAC Regional officials will send a written request for the information to the First Nation.

3. 5 Regardless of which Policy is used, INAC Regional officials will continue to partner and work with the First Nation to ensure Proposals proceed in a timely manner.

3. 6 In circumstances where a Reserve Creation Proposal is subject to an Agreement under the Legal obligations category (such as a Treaty Land Entitlement Settlement Agreement, other Specific Claim Agreement, or Self-Government Agreement), and where the criteria/requirements in the 2016 Policy are inconsistent or in conflict with the provisions in the Agreement, the provisions of the Agreement will prevail to the extent of the inconsistency or conflict. Therefore, depending on the Agreement, the 1991, 2001 or the 2016 Policy may be applied to these Reserve Creation Proposals.

4.0 Priority Consideration

4.1 INAC will work to address First Nation priorities, where possible, when processing Reserve Creation Proposals during the transition period and under the 2016 Policy.

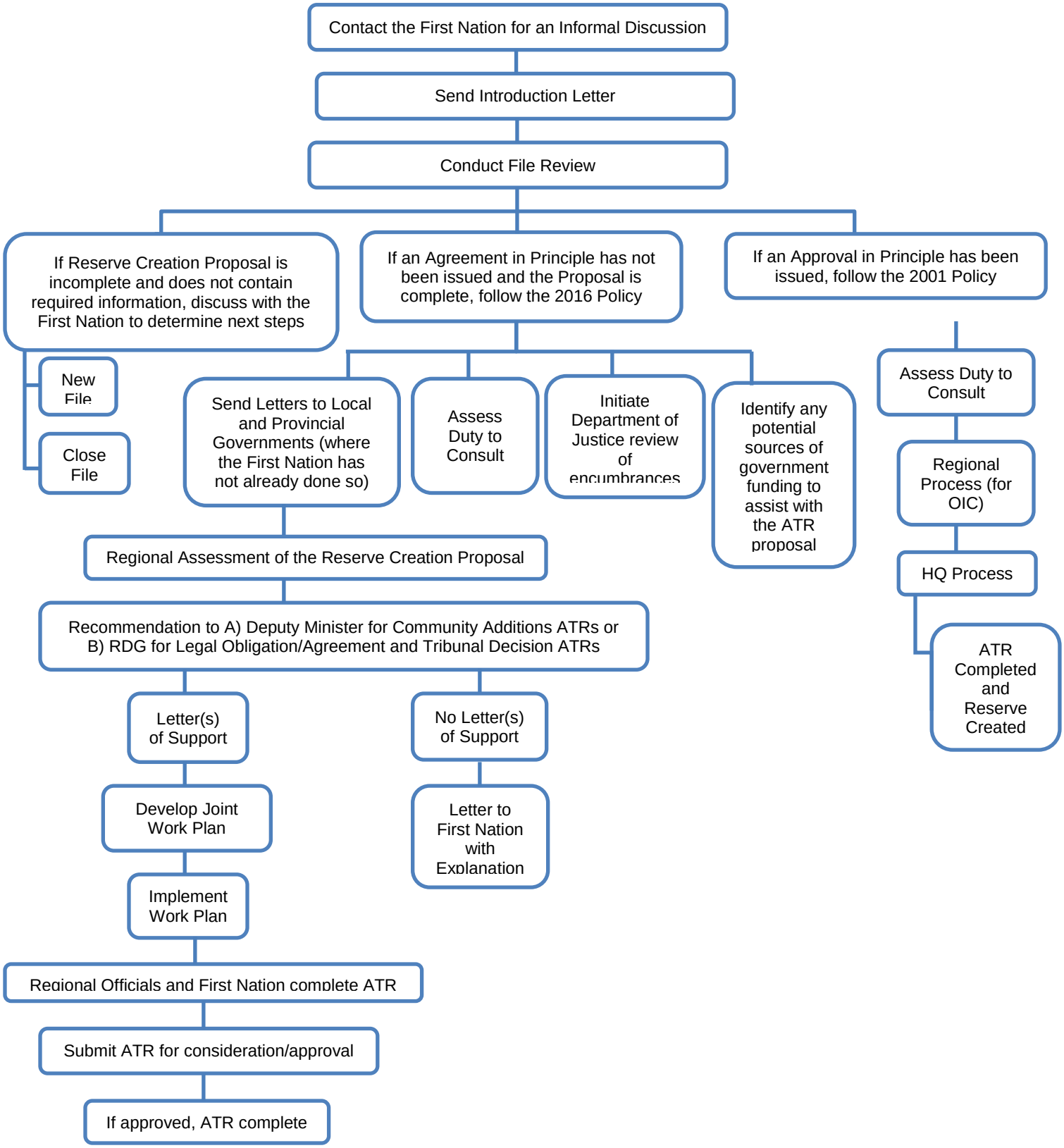
4.2 First Nations will have the opportunity to identify their priority Reserve Creation Proposals and work with INAC officials to incorporate this information into the work plan.

4.3 First Nations representatives and INAC regional staff will work collaboratively to arrive at priorities and will be realistic about what can be achieved during the transition period.

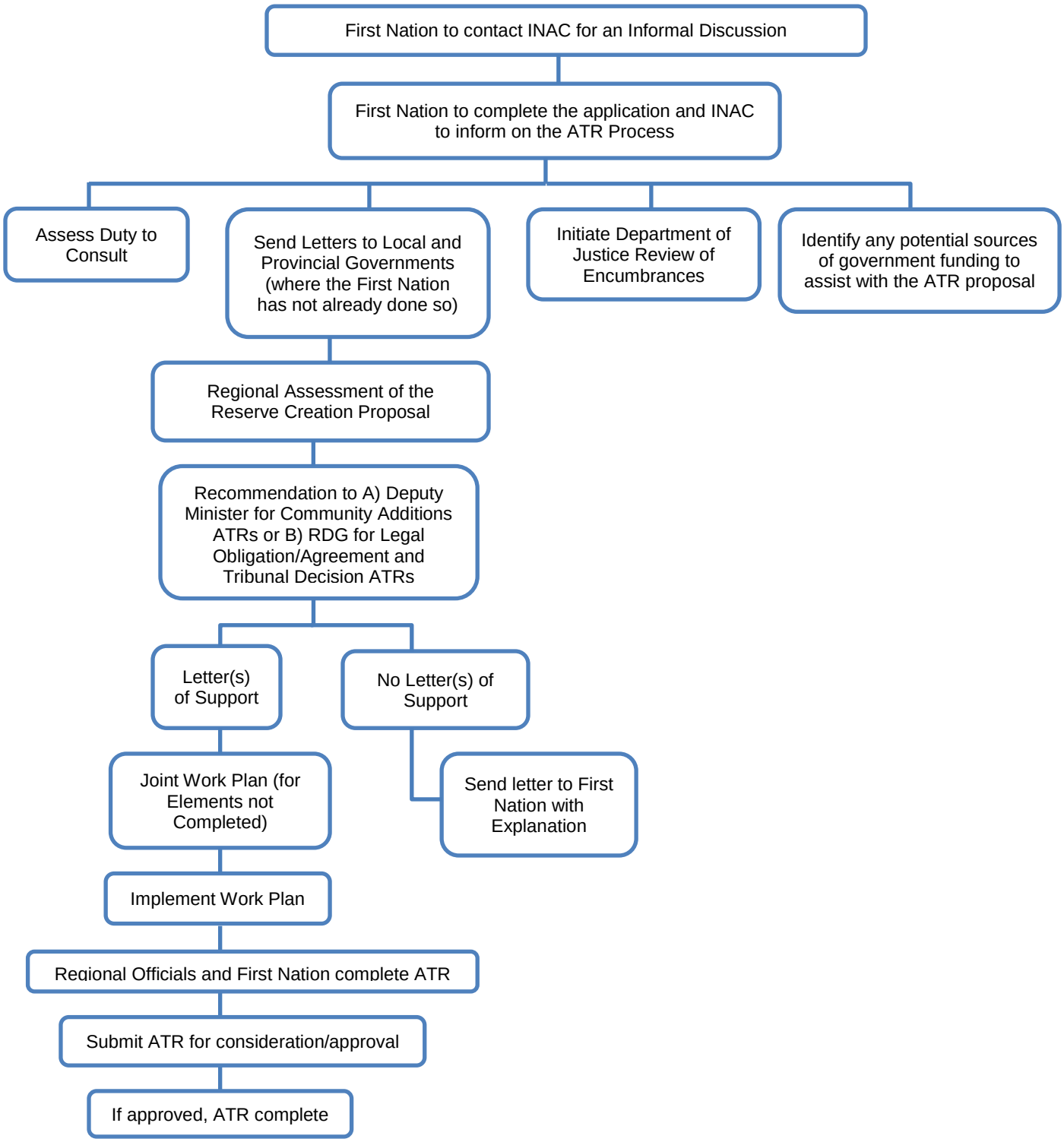
5.0 Flow Charts

The following flowcharts outline the main steps in the transition process for all remaining 2001 Policy Reserve Creation Proposals (meaning “Community Additions” or “New Reserves/Other Policy” Reserve Creation Proposals that are not subject to the Legal Obligations category), and for all new Reserve Creation Proposals once the 2016 Policy is effective. The flowcharts may be used by INAC as a guide to understand all the steps in the processes.

Flowchart 1: Transition Process for Existing Reserve Creation Proposals



Flowchart 2: Process for initiating Additions to Reserve/Reserve Creation Proposals



6.0 **Enquiries**

For additional information on this Policy or to obtain any of the above-noted references, please contact:

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Terrasses de la Chaudière
10 Wellington, North Tower
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Postal Address:
Ottawa, Ontario
K1A 0H4

E-mail: InfoPubs@aadnc-aandc.gc.ca
Phone: (toll-free) 1-800-567-9604
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1.0 Introduction

1.1 Certain activities on reserve lands must comply with applicable federal environmental laws and regulations to protect environmental integrity and human health and safety.

1.2 In the absence of federal environmental laws and regulations, where the department is issuing an instrument to a proponent providing rights to use reserve lands (e.g., a lease or a permit) or providing direct funding for construction, the department should ensure the proponent meets or exceeds provincial requirements or standards set by other regulatory or advisory bodies, where appropriate.

1.3 The lands officer should work with environment officers early on in the planning phase to ensure that environmental requirements in relation to lands activities involving the department are carried out in a timely manner. Departmental officials will inform all parties involved of environmental concerns as soon as they are identified.

1.4 The lands officer must ensure the appropriate environmental clauses (such as mitigation measures, monitoring, or enforcement requirements) and timelines identified in an environmental management process are incorporated or referenced in the terms and conditions of the land instrument to be issued by the department or as part of the funding documentation.

2.0 Environmental Management Processes Overview

2.1 Environmental management processes applicable to land instruments and certain funding arrangements are presented in Table 1 below:

Process	General Description
Environmental Review Process	Under sections 81-91 of the *Impact Assessment Act*, the department is required to determine if a proposed project on reserve will cause any significant adverse environmental effects. This determination must take place before any action or decision is made that would enable a project to proceed. The Environmental Review Process is used to evaluate, anticipate and mitigate potential environmental risks associated with projects

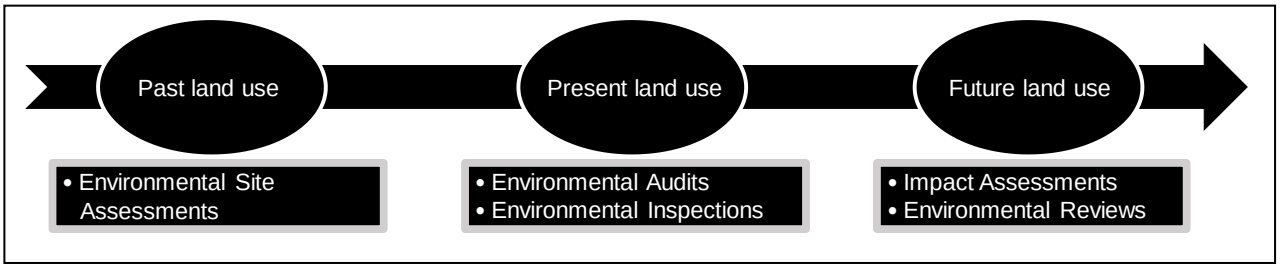
	carried out on reserve for which the department is issuing a land instrument or providing direct funding. When a project is proposed, the department may determine that an environmental review is not required because the project falls within the class of projects set out in the *Designated Classes of Projects Order*.
Projects	The *Impact Assessment Act* sets out the federal requirements for assessing the potential impacts of certain proposed projects, including those on reserve. A project is defined in s.81 as, basically, either a physical activity (something requiring physical effort by humans) in relation to a physical work (human-made structures) that is not a designated project (see below) or a physical activity that is designated under s.87, and listed in the *Physical Activities Regulations*. Section 82 prohibits federal authorities from allowing projects to proceed until their impacts have been assessed; however, as per s.88, the *Designated Classes of Projects Order* lists classes of projects that the Minister of Environment and Climate Change has determined do not need to be assessed.
Designated Projects and Impact Assessments	Section 8 of the *Impact Assessment Act* prohibits federal authorities from allowing work on a designated project unless the Impact Assessment Agency of Canada (the Agency) determines that no Impact Assessment is required or a decision statement is released stating the impacts are in the public interest. Designated projects are projects with the greatest potential for adverse environmental effects as listed and described in the *Physical Activities Regulations* (Project List). The Minister of Environment and Climate Change Canada may designate a physical activity that is not identified on the Project List if deemed to be high risk, as set out under s.9(1) of the *Impact Assessment Act*.
Environmental Site Assessments	Environmental Site Assessments are used as part of an environmental review to determine the current condition of the land and identify any environmental concerns or contamination that may impact the proposed use and value of the land.

	Environmental Site Assessments can be conducted in three sequential phases, which are followed by remediation, if necessary. **Phase I Environmental Site Assessments (Canadian Standards Association Standard Z768-01, R2016)** identify actual and potential site contamination or areas of potential environmental concern, and determine if further investigation is needed. They involve the collection and review of existing information, such as environmental records, a site visit, and interviews with the site owner or other individuals familiar with the site. The Phase I report identifies the existing and potential sources of contamination or environmental concern on the site and indicates whether further investigation is needed. Phase I Environmental Site Assessments can also provide recommendations on best environmental management practices based on observations made in the field (e.g., fuel handling practices). Phase I is observation-based and generally does not involve testing. If further investigation is needed, the Environmental Site Assessment will proceed to Phase II. **Phase II Environmental Site Assessments (Canadian Standards Association Standard Z769-00, R2013)** gather specific information about the site by using sampling and analytical techniques to confirm the absence or presence of contamination on a site, and if a remediation work plan is required. For example, this could involve taking groundwater, surface water, soil, sediment or plant samples, or measuring radiation levels. It can also include modelling and geological surveys, as well as a determination of compliance with laws, regulations and standards. Phase II results confirm the absence or presence of contamination on a property and determine whether a remediation work plan is required. If the Phase II confirms levels of contamination that exceed applicable guidelines, a Phase III assessment may be carried out. **Phase III Environmental Site Assessments** determine the nature and extent of contamination, including the volumes of contaminated materials, and the extent of the environmental impact and potential risk to human health. Phase III delineates the extent of contaminants identified at the site during Phase II, and addresses outstanding issues with respect to the development of an effective remedial action plan.

	Environmental Site Assessments assist in determining if a proposed project is suitable for the identified lands and/or how the lands will need to be remediated (if at all) as part of the project.
Environmental Inspections	Environmental Inspections are not part of the Environmental Review Process but are used for monitoring and enforcement purposes, such as evaluating the compliance of a business or ongoing activity with the environmental terms, conditions, and best practices stipulated in a land instrument or funding agreement. The responsibility of inspections may fall on the department and/or the First Nation, so this aspect should be discussed at the onset of reviewing a proposed project.
Environmental Audits	Environmental Audits are not part of the Environmental Review Process for a project but can be useful tools for monitoring and enforcement. An Environmental Audit provides a snapshot of existing environmental practices on a property, in a facility or within an organization. Environmental Audits generally examine operations, physical activities, monitoring, sampling, record keeping and reporting practices with respect to air and other emissions, water and discharge quality, land and soil contamination, training and awareness, contingency planning, internal organization and response measures and ongoing maintenance practices. An Environmental Audit may also examine physical works and the environment's impact on the operational performance of that work.

2.2 The environmental management processes for activities and projects on reserve described in Table 1 are used to determine the condition of the land in the past, present, and for future land use. Graphic 1 illustrates the processes employed along the timeline of land use.

Graphic 1



3.0 Environmental Review Process

3.1 When the *Impact Assessment Act* requires the department to make a determination on whether a project may cause any significant adverse environmental effects, this determination must be made before the project is carried out in part or in whole (i.e., before any physical activity in relation to a physical work occurs), or before providing funding to enable the project to be carried out. This determination is undertaken by an environment officer through the Environmental Review Process. If there is a determination that significant adverse environmental effects are expected, then the project may not proceed unless the Governor in Council decides those effects are justified in the circumstances. Environmental reviews initiated prior to June 21, 2019 (when the *Impact Assessment Act* came into force) are subject to the *Canadian Environmental Assessment Act, 2012*, unless otherwise determined.

3.2 Proponents are responsible for all costs related to the Environmental Review Process. Such costs may be considered eligible project costs for departmental funding program purposes.

3.3 The proponent must provide a completed Project Description Form and other requested documents to the department to support the Environmental Review Process. Using the details provided in the Project Description Form, an environment officer conducts a risk analysis to determine the level of environmental review required for a proposed project.

3.4 The department must publish information about all proposed projects subject to an environmental review on the Canadian Impact Assessment Registry for a minimum of 30 days, seeking comments from the public on those proposed projects. The department is to take any comments it receives into consideration when making a determination of whether or not the proposed project will cause significant adverse environmental effects.

3.5 The environment officer determines whether the project is in a class of projects outlined in the *Designated Classes of Projects Order* (the Order) by reviewing the information provided in sections 1 and 2 of the Project Description Form. If the environment officer determines that the project meets the Order's criteria for an exemption, then the project does not require a determination under the *Impact Assessment Act*. However, the project is still tracked via the Integrated Environmental Management System, which tracks and reports on Environmental Review Processes and contaminated sites in accordance with the department's mandate.

3.6 When environmental effects are identified in the Environmental Review Process, the environment officer must review the proposed mitigation measures and may propose additional measures. In their review of whether the project is likely to cause significant adverse environmental effects, environment officers must consider, where applicable:

a) any adverse impact the project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by s.35 of the *Constitution Act*, 1982;
b) environmental impacts;
c) Indigenous knowledge provided in relation to the project;
d) community knowledge;
e) comments from the Band or public;
f) climate change; and
g) environmental impacts of the project on social, cultural and economic conditions, and human health and safety.

3.7 If the environment officer determines that:

a) a project is **not likely** to cause significant adverse environmental effects, then the project may proceed to construction.

b) a project is **likely** to cause significant adverse environmental effects, then the department cannot provide its support (i.e., funding or regulatory authorization) to the proposed project. In such instances, the following may occur:

i. the department, proponent, and Band Council, where applicable, may explore alternative options (e.g., a different parcel of land, a different activity on the land, etc.), for the proposed project to reduce or eliminate the identified significant adverse environmental effects; or

ii. the department may seek a Governor in Council decision on whether the significant adverse environmental effects are justified in the circumstances. If the Governor in Council determines that the significant adverse environmental effects are justified, then the proposed project may proceed to construction.

4.0 Impact Assessments

4.1 The Agency determines whether an Impact Assessment is required for a designated project, as described in the *Physical Activities Regulations* and s.16 of the *Impact Assessment Act*.

4.2 Although the Agency conducts the Impact Assessment, the department may be contacted by the Agency to provide expertise in the following areas:

a) environmental and lands issues on reserve (including land instruments, land targeted for reserve creation proposals, and statutory and regulatory requirements);
b) regional operations (community infrastructure);
c) Indigenous economic development opportunities (engagement with Indigenous rights holders and organizations); and
d) Indigenous peoples' health (health services, community health and wellness programs, drinking water quality on First Nation reserves, and social determinants of health).

4.3 Please consult the following resources for more information on requirements related to Impact Assessments:

Impact Assessment Agency of Canada's website:
https://www.canada.ca/en/impact-assessment-agency.html

Impact Assessment Act:
https://www.parl.ca/Content/Bills/421/Government/C-69/C-69_4/C-69_4.PDF

Information and Management of Time Limits Regulations:
http://www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors283-eng.html

Physical Activities Regulations:
http://www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors285-eng.html

Impact Assessment Act departmental contacts and information:
https://services.aadnc-aandc.gc.ca/iems_online/disclosure.aspx

5.0 Environmental Site Assessments

5.1 Environmental Site Assessments are conducted in sequential phases where appropriate, followed by remediation if necessary (refer to Table 1).

5.2 Environmental Site Assessments are required in the following circumstances:

a) prior to land being set apart as reserve;
b) prior to issuing, transferring, renewing or cancelling land instruments (including leases, permits, easements, and s.35 instruments), with the exception of allotting lawful possession as part of an environmental review;
c) as part of housing developments funded using Ministerial Loan Guarantees; and
d) prior to and at the end of a lease to assess the condition of the land.

5.3 Environmental Site Assessments must be conducted by an independent, qualified environmental professional in accordance with the Canadian Standards Association.

5.4 The environment and lands officer must confirm the lands to be assessed and the scope of the Environmental Site Assessment prior to a Phase I Environmental Site Assessment being undertaken.

5.5 The environment officer, or other officer deemed responsible, must prepare a report confirming the lands are in a condition that meet the required standards for the proposed project. This report is to be provided to the appropriate departmental official to inform decision-making.

5.6 Where applicable, environment officers should identify specific Environmental Site Assessment report recommendations which should be addressed in the documentation approving the project. The environment officers should have an opportunity to review any applicable documentation and make recommendations.

5.7 If the Environmental Site Assessment identifies contamination on the site, lands officers and environment officers must inform the Band and discuss the level or extent of remediation required.

5.8 If remediation is undertaken by the responsible party, then the intent of the remediation process should be to result in environmental conditions acceptable to the department and the Band. If remediation is not conducted by the responsible party and is undertaken by the department, then it will be managed in accordance with the *Contaminated Sites Management Policy* and the Contaminated Sites on Reserve Program.

5.9 For reserve creations and additions to reserve, please consult the *Additions to Reserve Policy*.

Stale Dating of Phase I Assessments

5.10 If a Phase I Environmental Site Assessment indicates that no further investigation of the lands is needed, then the Phase I Environmental Site Assessment may, with the exception of leasing (see 5.11), be valid for up to five years. After five years, a Phase I Environmental Site Assessment report is considered to be stale-dated, and the site must be reassessed to update the report before it can be relied upon. Reassessments, typically paid for by the proponent, on all or part of the property, may also be required if there have been any developments, improvements or physical changes on the land, or, at the discretion of the environment officer, at any time within the maximum five-year time frame.

5.11 A Phase I Environmental Site Assessment conducted for leasing purposes will be stale-dated and it may require reassessment after one year. The Phase I Environmental Site Assessment must be current at the time that the lease is granted.

5.12 Phase I Environmental Site Assessment reports are site-specific and may be subject to different stale-dating timelines at the discretion of the department.

Environmental Site Assessment Standards

5.13 Please consult the following resources for more information on standards and requirements for Environmental Site Assessments:

Canadian Standards Association, Phase I Environmental Site Assessment: CAN/CSA Z768-01 Phase I Environmental Site Assessment (CSA, 2016)

Canadian Standards Association, Phase II Environmental Site Assessment: CAN/CSA Z769-00 Phase II Environmental Site Assessment (CSA, 2018)

In some circumstances, the National Classification System for Contaminated Sites scoring may be required.

Federal approach to contaminated sites: https://www.canada.ca/content/dam/eccc/migration/fcs-scf/8DF3AC07-5A7D-483F-B263-6DE03104319A/fa-af-eng.pdf

Federal Contaminated Sites Decision-Making Framework: https://www.canada.ca/en/environment-climate-change/services/federal-contaminated-sites/decision-making-framework.html

6.0 Environmental Inspections

6.1 Environmental Inspections are included in the terms and conditions of a land instrument based on the nature of the project and are undertaken by the environment officer. An environment officer may conduct additional inspections at their discretion based on other factors (e.g., public complaint).

6.2 Environmental Inspections do not have to adhere to the Canadian Standards Association standards applicable to formal Environmental Audits. During an Environmental Inspection, the environment officer must consult with the lands officer to confirm the terms and conditions of the land instrument, if any, that identify the authorized activities and impacts. These clauses will influence the scope and frequency of the inspection.

6.3 The environment officer and Band Council must determine the process for monitoring and Environmental Inspections prior to the issuance of the land instrument and that process must then be described in the land instrument.

6.4 Environmental Inspections are to be undertaken by a qualified environmental professional, or equivalent, from the department or the Band. The purpose of the inspection is to identify any issues and follow-up with the department to determine if any further action is required.

6.5 Environmental Inspections may result in further environmental site inspections, audits, or reviews to inform compliance and enforcement.

6.6 Any non-compliance with applicable environmental standards and regulations identified by an environmental inspection must be corrected so the project is compliant with the terms and conditions of the land instrument. Where the land instrument is silent on this issue, the department may determine the approach and timeline.

7.0 Environmental Audits

7.1 Environmental Audits are a formal process undertaken by environmental auditors or consultants for projects already in operation. Environmental Audits are evaluations that may include the assessment of the project's compliance with applicable environmental laws, regulations and standards and they may include an assessment of an environmental management system, as well as any associated reporting requirements.

7.2 The results and findings of an Environmental Audit are recorded in a final report and may include recommendations for improvements to the project. The information gathered is used to monitor compliance of existing operations with: provincial standards and codes, federal legislation and best practices prior to issuing or renewing land instruments, or in some instances, for an additions to reserve process.

7.3 If an audit is conducted before a land instrument is negotiated, then the land instruments must incorporate environmental terms and conditions based on Environmental Audits (see Table 1). Environmental clauses may include the requirement to submit periodic environmental monitoring reports or annual audits. However, audits performed after a land instrument is signed can only be used to ensure compliance with the existing terms and conditions of the land instrument.

7.4 A Band Council or the department may request the audit of an activity or facility. The lands officer should involve environment officers early in the process.

7.5 Environmental Audits must be conducted by an independent, qualified environmental professional in accordance with the Canadian Standards Association. These audits are generally undertaken and paid for by the proponent.

7.6 The Environmental Audit must be reviewed by the environment officer and provided to the lands officer. The lands officer will forward the recommendations and requirements for redress by the proponent as needed. The departmental recommendations and the Environmental Audit must be available to the Band Council upon request.

7.7 The results of the Environmental Audit and the recommendations made by the environment officer and the Band Council may be used to enforce compliance with requirements of the existing land instrument; or, it may be used during negotiation of a new land instrument.

Audit Standards

7.8 Please consult the following resources for more information on audit standards and requirements related to an Environmental Site Assessment:

Canadian Standards Association, Environmental Audits: CAN/CSA Z773 - 17 Environmental compliance Auditing

Canadian Standards Association, Environmental Audits: CAN/CSA Z751 Environmental Auditing: Principles and General Practices

Annex A: Relevant Statutory and Regulatory Authorities

Federal Environmental Authorities

The following is a list of federal environmental legislation that applies on reserves. Note, this list is not exhaustive and consultation with an environment officer is required to ensure proper adherence with all legislation that applies to a given project:

- *Impact Assessment Act*, 2019
- *Species At Risk Act*, 2002
- *Canadian Environmental Protection Act*, 1999
- *Migratory Birds Convention Act*, 1994
- *Fisheries Act*, 1985

Indian Act Requirements

The relevant sections of the *Indian Act* are as follows:

> *Reserves to be held for use and benefit of Indians*
> *18 (2) The Minister may authorize the use of lands in a reserve for the purpose of Indian schools, the administration of Indian affairs, Indian burial grounds, Indian health projects or, with the consent of the council of the band, for any other purpose for the general welfare of the band, and may take any lands in a reserve required for those purposes, but where an individual Indian, immediately prior to the taking, was entitled to the possession of those lands, compensation for that use shall be paid to the Indian, in such amount as may be agreed between the Indian and the Minister, or, failing agreement, as may be determined in such manner as the Minister may direct.*
>
> *Possession of lands in a reserve*
> *20 (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.*
>
> *Certificate of Possession*
> *20 (2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.*

Minister may issue permits
28 (2)The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

Taking of lands by local authorities
35 (1) Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

Other transactions
37 (2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been designated under subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.

Designation
38 (2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

Conditions — designation
39.1 A designation is valid if it is made to Her Majesty, is assented to by a majority of the electors of the band voting at a referendum held in accordance with the regulations, is recommended to the Minister by the council of the band and is accepted by the Minister.

Certification — designation
40.1 (1) A proposed designation that is assented to in accordance with section 39.1 shall be certified on oath by an officer of the Department and by the chief or a member of the council of the band.

Ministerial decision
40.1 (2) On the recommendation of the council of the band, the proposed designation shall be submitted to the Minister who may accept or reject it.

Transactions re surrendered and designated lands
53(1) The Minister or a person appointed be the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,

> *(a) manage or sell absolutely surrendered lands; or*
> *(b) manage, lease or carry out any other transaction affecting designated lands.*

Uncultivated or unused lands
58(1) Where land in a reserve is uncultivated or unused, the Minister may, with the consent of the council of the band...

> *(b) where the land is in the lawful possession of any individual, grant a lease of that land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession of the land; and*
> *(c) where the land is not in the lawful possession of any individual, grant for the benefit of the band a lease of that land for agricultural or grazing purposes.*

Lease at the request of occupant (locatee lease)
58 (3) The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

Disposition of grass, timber, non-metallic substances, etc.
58(4) Notwithstanding anything in this Act, the Minister may, without an absolute surrender or a designation

> *(a) dispose of wild grass or dead or fallen timber; and*
> *(b) with the consent of the council of the band, dispose of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, or, where that consent cannot be obtained without undue difficulty or delay, may issue temporary permits for the taking of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, renewable only with the consent of the council of the band.*

Relevant Regulatory Requirements

The following regulations apply to the issuance of permits on reserve:

- *Indian Mining Regulations*

- *Indian Timber Regulations*
- *Indian Reserve Waste Disposal Regulations*
- *Indian Oil & Gas Regulations*, 2019

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1.0 Introduction

1.1 This policy addresses the issuance of permits and leases under the *Indian Mining Regulations* for the exploration, extraction and production of minerals on reserve lands administered under the *Indian Act*. As the regulations lack sufficient provisions to cover all aspects and requirements to administer the construction and operation of a mine in the same manner as corresponding provincial legislation, this policy provides further clarification and additional information to help address these gaps where possible. The policy is to be used concurrently with the *Indian Mining Regulations*.

1.2 The *Indian Mining Regulations* define minerals as naturally occurring metallic and non-metallic minerals and rock containing such minerals, but does not include petroleum, natural gas and other petroliferous minerals or any unconsolidated minerals such as placer deposits, gravel, sand, clay, earth, ash, marl and peat.

1.3 Where First Nations or third parties are interested in the production of minerals by building a mine, a sub-surface mineral designation and sub-surface mineral lease is required. In addition, if mining facilities are expected to be located on reserve land, a surface designation and a surface lease may be required for those lands.

1.4 Where First Nations are interested in the production of minerals through the construction of a mine, the *First Nations Commercial and Industrial Development Act* may be used to supplement the *Indian Mining Regulations* for a specific project.

1.5 The *Indian Mining Regulations* and this policy do not apply to surrendered mines and minerals underlying reserve lands in British Columbia which are administered under the *British Columbia Indian Reserve Mineral Resources Act*, SC 1943-44, c.19, and the *Indian Reserve Mineral Resource Act*, RSBC 1979, c. 192).

1.6 For information on other requirements for permits and leases, including the steps to be undertaken to designate, please see the chapters on designations, leases and permits. For information on requirements for permits and leases on locatee lands, please see the chapter on individual land holdings.

Mineral rights

1.7 Minerals are considered collective assets on Band and allotted lands.

1.8 The right to minerals underlying reserve lands can be a complex issue and such rights may or may not in fact be included in the reserve. A review of the Order in Council or Ministerial Order establishing the reserve must be undertaken to confirm ownership of minerals, and as part of the encumbrance check before any activity takes place. In some cases this information may be missing or unclear.

Precedents (templates)

1.9 Precedents (available from the department) provide the basis for permits issued and leases granted under the *Indian Act*, and include necessary policy and legal requirements to ensure consistency and accuracy when negotiating terms. The precedents simplify drafting, allow for a streamlined process and can be tailored to meet the needs of specific projects.

1.10 National precedents for mineral permits and leases have not been developed; however, regional offices may develop region-specific precedents to suit local contexts.

2.0 Instrument Types

Instruments to authorize exploration

2.1 Mineral exploration and prospecting activities involve mining techniques, such as, but not limited to: geological surface mapping and sampling; geophysical measurements and surveys; geochemical analysis of geological samples; water and soil tests; or, drilling for core sampling.

2.2 The following instruments can be used for exploration and prospecting activities related to minerals:

Exploration permit – authorized under subsection 28(2) of the *Indian Act*

2.2.1 A s.28(2) exploration permit may be issued for prospecting and early exploration activities that do not involve the drilling of core samples, such as, but not limited to: prospecting or searching for minerals, fossils, precious metals or mineral specimens; geological surveys and mapping; geophysical surveys (measurements); or, geochemical analysis. Samples may be temporarily transported to a facility off reserve for further analysis. A designation of land and minerals is not required prior to authorizing a s.28(2) permit.

Exploration permit – authorized under the *Indian Mining Regulations*

2.2.2 An exploration permit may be issued in accordance with s.5 or 6 of the *Indian Mining Regulations* to authorize the permittee to prospect and explore for minerals within a specified area. A designation is required (surface and subsurface) prior to authorizing an exploration permit under the *Indian Mining Regulations*. A permit under the *Indian Mining Regulations* allows for samples to leave the reserve; however, this permit does not authorize the permittee to extract and produce consolidated minerals.

Exploration lease – authorized under the *Indian Mining Regulations*

2.2.3 A lease may be issued in accordance with s.5, 6 or 19 of the *Indian Mining Regulations* for exploration, including advanced drilling exploration operations where the parties may look to secure certain rights and investment financing. A designation is required (surface and subsurface). These types of leases may be contemplated as a transitional instrument towards mineral production. It grants a property interest in surrendered minerals (except in Quebec where it grants a personal right under the Civil Code of Quebec).

Instruments to authorize extraction and production

Mining and processing consolidated minerals

2.3 Operating mines range from small underground operations (e.g., 100 metric tonnes of ore per day) to large open pits producing thousands of tonnes of ore per day. The shape and orientation of an ore body, its quality, the surrounding waste rock, and the distribution of consolidated minerals, may be factors in the choice of mining method.

2.4 The most common methods are cut and fill, conventional blast hole, vertical retreat, room and pillar, shrinkage and sub-level caving. In most cases, holes are drilled into an exposed area of the ore body and then the holes are loaded with explosives and blasted. The resulting ore is then removed by machine for processing. Rubble or muck, which consist of crushed rock resulted from blasting and ore processing, is considered mining waste.

2.5 The primary opening into the underground mine provides access for personnel, materials, equipment and a way for ore to be brought to the surface. The opening may be a shaft, decline (or ramp), or adit (a nearly horizontal entrance). The cost of bringing a mine from development to production is high; therefore, mining operations are often financed by business partnerships and venture capital.

2.6 Processing begins with the crushing and grinding of ore. The ground ore (or pulp) is then fed through the recovery process to separate the elements. The most common method of recovery is smelting using heat.

2.7 Before proceeding to extract and produce minerals, a regulatory regime should be established through the development of a project specific regulation as provided for in the *First Nations Commercial and Industrial Development Act*. This *Act* closes the regulatory gap on reserves and enables complex commercial and industrial projects to proceed. It provides for the adoption of regulations on reserve that are compatible with those off reserve. This compatibility with existing provincial regulations increases certainty for the public and developers while miniminzing costs.

2.8 The *First Nations Commercial and Industrial Development Act* does not replace the *Indian Act*. For more information on the *First Nations Commercial and Industrial Development Act* please visit the department's website.

2.9 The following instruments authorized under the *Indian Mining Regulations* can be used for activities related to the extraction and production of minerals:

Extraction and production lease – authorized under the *Indian Mining Regulations*

2.10 A lease may be issued in accordance with s.5, 6 or 19 of the *Indian Mining Regulations* for extraction and production. A designation is required (surface and subsurface).

3.0 General requirements for mineral permits and leases

Environment

3.1 Before any mineral permit/lease can be issued, an environmental review in accordance with the department's environmental review process and the *Impact Assessment Act* must be completed.

For more information on environmental considerations, please see the Environmental Management Processes on Reserve chapter.

Negotiations

3.2 The Band Council and the proponent negotiate the key elements of the permit/lease including consideration (e.g., royalties, whether prepaid or reviewed periodically), the proposed use of land, and duration of the permit/lease. All elements are subject to review by the department and it is the responsibility of the department to ensure all non-negotiable terms such as all applicable laws, regulations and standards are included in the final permit/lease.

Duration (term)

3.3 Mineral permits/leases for exploration are usually short in duration, between one to two years.

3.4 A mineral lease must not exceed the term of the corresponding designation.

3.5 A renewal of a permit/lease may be granted per the requirements noted under s.7 (permits) and s.23 (leases) of the *Indian Mining Regulations*.

Land description (survey)

3.6 The description of the land must meet the requirements contained in the Interdepartmental Agreement between the department and Natural Resources Canada.

Encumbrance check

3.7 Prior to the issuance of any mineral permit/lease, an encumbrance check must be conducted to identify all surface and subsurface encumbrances, locatee interests, and Indian Oil and Gas Canada interests registered in the Indian Lands Registry System. After an encumbrance check is completed, a Land Status Report summarizing these third party interests must be generated and provided to the Band Council. It is the Band Council's responsibility to review the Land Status Report and take appropriate steps to ensure the removal of any conflicting encumbrances. If all conflicting encumbrances are not removed, a mineral permit/lease cannot be issued.

Access to the permit/lease erea

3.8 Access to the permit/lease area (e.g., road allowance, street, or lane) must be addressed in or with the permit/lease or by way of a separate access instrument.

3.9 As permits authorize non-exclusive use and occupation, the permit area remains available to the Band for uses compatible with the use authorized in the permit.

Insurance

3.10 The permittee/lessee must provide proof of liability insurance before a permit is issued or a lease is granted. His Majesty the King in Right of Canada must be on the policy as an additional insured. The requirement for insurance can be waived in certain circumstances, such as when a municipality or a province or a Crown-owned corporation/agency is the permittee or the lessee.

Operational and restoration plan

3.11 Proponents must provide an operational and restoration plan outlining the intended operations on the affected lands. The operational and restoration plan must be prepared by a registered professional geoscientist or engineer.

3.12 The operational and restoration plan must be submitted by the proponent and approved by the department before the permit/lease can be executed. The permittee/lessee must receive written approval of the department before making any alterations and changes to this plan.

3.13 The operational and restoration plan outlines the proponent's intended operation and use of land. It may also include a geotechnical evaluation report in cases where commercial operations, building of structures and/or sale of excess materials are contemplated. The level of restoration of the site must be in accordance with federal, provincial and municipal environmental regulations.

Assessment work

3.14 Section 13 of the *Indian Mining Regulations* require the permittee/lessee to prepare and submit an annual assessment work report acceptable to the department to evaluate the potential of all the permitted/leased lands in accordance with reasonable mining practices. In determining the assessment work to be performed for the exploration and development of the permitted/leased area, the department will use assessment work regulations and guidelines applicable to provincial/territorial lands.

Security deposits

3.15 Security deposits, as required by s.11 of the *Indian Mining Regulations*, must be held by the department and are handled in accordance with the *Financial Administration Act* and its *Government Contract Regulations*.

3.16 Upon termination of the permit/lease the security deposits are refunded, without interest, provided the permittee/lessee has complied with all the terms and conditions of the permit/lease.

Royalties

3.17 Royalties are charged for subsurface leases where minerals are extracted or produced. The royalty rate is provided in the *Indian Mining Regulations* or may be negotiated and specified in the terms and conditions of the lease. Negotiations should include the Band and apply the relevant provincial royalty rate as a starting point. The department will consult with the province or territory, to determine current royalty rates.

3.18 Royalties are not charged under exploration permits/leases as minerals are not extracted and sold.

Land rental fee

3.19 An annual land rental fee is charged for mineral permits/leases. The rates are provided in the *Indian Mining Regulations* in s.10 (permits) and s.24 (leases); however, an alternate rate may be negotiated upon request by the Band.

Goods and Services Tax/Harmonized Sales Tax

3.20 The department must charge, collect and remit to the Canadian Revenue Agency, all applicable taxes. Permits and leases must contain a provision requiring permittees/lessees to pay all applicable taxes.

Assignments

3.21 Mineral permits/leases are not assignable unless expressly allowed in the instrument. If assignability was not included in the terms and conditions of the permit/lease but the Band wishes to allow an assignment, the instrument must first be amended. An assignment will require a new security deposit being paid to the Receiver General of Canada.

4.0 Grouping and unitization

4.1 Under the *Indian Mining Regulations* the Minister may authorize grouping and unitization.

Grouping

4.2 Under s.37(a), a permit or lease area in a reserve may be grouped with another permit or lease in the same reserve for the purpose of providing a security deposit and performing assessment work.

4.3 Under s.37(b), a lessee may, subject to the approval of the department, group two or more lease areas within a reserve to qualify for the renewal of a lease under s.23(2) or s.23(3).

Unitization

4.4 Grouping described under s.38 is, in industry today, known as unitization. Pursuant to s.38, a permit or lease area in a reserve can be unitized with a permit or lease area in another reserve; or, with a tract of land outside a reserve to allow for the development or production of minerals. The Band Council must negotiate and approve a formula for determining their participation in revenues and other benefits derived from such development or production of minerals.

5.0 Approval and consent

Ministerial approval

5.1 All permits/leases require ministerial approval. Departmental officials authorized by the Delegation of Authority Instrument under the *Indian Act* and related regulations must authorize all permits/leases. The Ministerial Delegation in relation to s.24(2)(d) of the *Interpretation Act*, *Indian Act* and related statutes and regulations sets out the positions the Minister considers appropriate to exercise various ministerial powers. Please consult the department's most current version of the Delegation of Authority Instrument to ensure the permit/lease is authorized by the appropriate departmental official.

Bands with delegated authority under the *Indian Act*

5.2 Approval of permits/leases is subject to the terms, conditions and restrictions contained in the Order in Council and/or Ministerial Letter delegating authority to the Band to exercise control and management over their reserve lands. At a minimum, the permit/lease must be approved by the department before it is issued.

5.3 Where a Band has delegated authority and wishes to issue a permit/lease to its own Band-owned corporation, the department must approve the terms and conditions of the permit/lease and assume responsibility for all monitoring and compliance provisions in the permit/lease.

Band Council consent

5.4 A Band Council Resolution consenting to the permit/lease must be obtained prior to the permit being issued or the lease being granted.

6.0 Unauthorized removal of minerals

6.1 Mineral permits/leases allow an activity which would otherwise constitute an offence under s.93 of the *Indian Act*. Under this section, it is an offence for anyone to remove, or allow the removal of, minerals from a reserve without permission of the Minister or his duly authorized representative, or for anyone to be in possession of any minerals so removed.

6.2 Paragraphs 103 and 104 of the *Indian Act* address situations where minerals maybe seized if there are reasonable grounds to believe an offence has been committed under s.93.

7.0 Compliance with other laws and regulations

7.1 In addition to those specified in the *Indian Act* and the *Indian Mining Regulations*, compliance with related federal laws and regulations, provincial laws, municipal by-laws and Band by-laws relevant to the removal and/or transportation of minerals is required.

8.0 Cancelling a permit/lease

8.1 The department has the authority to cancel a permit/lease; however, the cancellation has important consequences. As such, legal advice must be obtained and the Band Council consulted prior to initiation of any steps for cancellation or early termination.

8.2 In general, Bands with delegated authority may not a cancel a permit or lease; however, this should be confirmed through a review of the Band's specific delegated authorities.

9.0 Registration in the Indian Lands Registry

9.1 Mineral permits/leases and any associated documentation, including forms and agreements, must be prepared in a form suitable for registration in the Indian Lands Registry and must, in accordance with s.55 of the *Indian Act*, be sent for registration in accordance with the requirements of the Indian Lands Registration Manual.

Annex A: Authorities for mineral permits and leases

Indian Act

The relevant sections of the ***Indian Act*** are as follows:

Authorizing a permit

28(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

Regulations

57 The governor in council may make regulations

(c) Providing for the disposition of surrendered mines and mineral underlying lands in a reserve;

(d) Prescribing the punishment, not exceeding one hundred dollars or imprisonment for a term not exceeding three months or both, that may be imposed on summary conviction for contravention of any regulation made under this section; and

(e) Providing for the seizure and forfeiture of any timber or minerals taken in the contravention of any regulation made under this section.

Removal of material from reserve

93 A person who, without the written permission of the Minister or his duly authorized representative,

(a) removes or permits anyone to remove from a reserve (i) minerals, stone, sand, gravel, clay or soil, or(ii) trees, saplings, shrubs, underbrush, timber, cordwood or hay, or

(b) has in his possession anything removed from a reserve contrary to this section, is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding three months or to both.

Indian Mining Regulations

The relevant sections of the ***Indian Mining Regulations*** are as follows:

Sections 5 to 16, 19 provide general standards for issuing mineral exploration permits.

Sections 17 to 36 provide general standards for issuing mineral exploration leases.

Annex B: Relevant Case Law

These are considered the leading cases pertaining to natural resources on reserves. This is not intended to be all inclusive or exhaustive:

a. Guerin v. The Queen, [1984] 2 S.C.R. 335
b. Sparrow v. The Queen, [1990] 1 S.C.R. 1075

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1.0 Introduction

1.1 This policy supersedes and replaces the Operational Policy on the Taking, Disposition and Removal of Non-metallic Substances from Reserves, 2001 and any policy statements contained within the Guidelines for Unconsolidated Non-Metallic Substances on Reserve Land, 2014. For procedural information, refer to the 2014 Guidelines until new procedures are released.

1.2 Non-metallic minerals are mineral substances located at or near the surface of the land, which may be removed by an open excavation. They include: sand, gravel, clay, earth, ash, marl, peat, limestone, gypsum, granite, diamond, coal, placer deposits of non-metallic minerals and other nonmetallic substances. They do not include: a) oil, gas and bitumen as defined in the *Indian Oil and Gas Act* and its *Indian Oil and Gas Regulations*; and, b) naturally occurring metallic substances and rock containing those substances.

1.3 Minerals are considered collective assets on Band lands and allotted lands.

1.4 This policy addresses specific provisions for non-metallic mineral permits and leases. For information on other requirements for permits and leases, please see the chapters on designations, leases and permits, as applicable.

Precedents (Templates)

1.5 Precedents (available from the department) provide the basis for permits issued and leases granted under the *Indian Act*, and include necessary policy and legal requirements to ensure consistency and accuracy when negotiating terms. The precedents simplify drafting, allow for a streamlined process and can be tailored to meet the needs of specific projects.

1.6 A National Non-Metallic Permit Precedent is under development; however, regional offices may develop region-specific precedents to suit local contexts.

2.0 Creating a Permit or Lease

2.1 The following instruments can be used for the disposal of non-metallic minerals: permits and leases.

Permit

2.1.1 Permits for the disposal of non-metallic minerals may be authorized pursuant to s.58(4)(b) or s.53(1)(b) of the *Indian Act*.

2.1.2 Paragraph 58(4)(b) non-metallic mineral permits do not require a designation of lands.

2.1.3 Paragraph 53(1)(b) non-metallic mineral permits may be issued on designated lands. The designation must include provisions enabling the issuance of such instruments and explicit authorization for the lessee to extract the non-metallic minerals. If a pre-existing designation does not specify the extraction of non-metallic minerals, an amendment to that designation or a new designation providing for such rights is required.

2.1.4 Where the Band's consent cannot be obtained without undue difficulty or delay, the department may issue a temporary s.58(4)(b) permit for a duration not exceeding one year.

Lease

2.1.5 A s.53(1)(b) lease may be granted if the operation contemplates long-term use, exclusive occupation and/or the construction of permanent structures based on the proponent's plans for the development and at the request of the Band. A designation of the land is required and must include provisions as set out in 2.1.3 above.

General Characteristics of a Permit or Lease

Negotiations

2.2 The Band Council and the proponent negotiate the key elements including consideration (fees, whether prepaid or reviewed periodically), the proposed use of land, and duration of the permit/lease. All elements are subject to review by the department and it is the responsibility of the department to ensure all non-negotiable terms such as all applicable laws, regulations and standards are included in the final permit/lease.

Duration (Term)

2.3 Non-metallic mineral permits are usually short in duration, between one to five years. A longer permit term may be appropriate in cases where the quantity of the material to be extracted is large and/or there is a schedule for the extraction.

2.4 A non-metallic mineral lease under s.53(1)(b) of the *Indian Act* may not exceed the term of the corresponding designation.

Land Description (Survey)

2.5 The description of the land must meet the requirements contained in the Interdepartmental Agreement between the department and Natural Resources Canada.

Encumbrance Check

2.6 Prior to the issuance of any permit or grant of any lease to dispose of non-metallic minerals, an encumbrance check must be conducted to identify all surface and subsurface encumbrances, locatee interests, and Indian Oil and Gas Canada interests registered in the Indian Lands Registry System. After an encumbrance check is completed, a Land Status Report summarizing these third party interests must be generated and provided to the Band Council. It is the Band Council's responsibility to review the Land Status Report and take appropriate steps to ensure the removal of any conflicting encumbrances. If all conflicting encumbrances are not removed, a non-metallic mineral interest cannot be issued.

Access to the Permit/Lease Area

2.7 Access to the permit/lease area (e.g., road allowance, street, or lane) must be addressed in or with the permit/lease (e.g., access pursuant to s.28(2) or s. 53(1)(b) of the *Indian Act* may be included in the permit/lease or by way of a separate access instrument).

2.8 As permits authorize non-exclusive use and occupation, the permit area remains available to the Band for uses compatible with the use authorized in the permit.

Surface Consideration (Surface Fee)

2.9 A surface fee is optional and is included in the permit/lease at the request of the Band. Surface fees are compensation for the use and loss of land as a result of the operation. A surface fee can be negotiated as a condition to ensure the proponent extracts the minerals within the term of the permit/lease rather than holding the resource.

2.10 While surface fees are ultimately negotiable, they should be based upon fair market rent or current market value of the utilized lands and coverage area required for the operation.

2.11 For leases, the surface fee should be based upon fair market rent for the utilized lands. Surface fees can be for less than fair market rent if allowed in the designation and consented to by the Band.

2.12 Surface fees are to be paid to the Receiver General for Canada and placed in the Band's Revenue Account.

Royalties, Bonuses and Royalty Pre-Payments

2.13 Royalty rates may be negotiated and must reflect fair market value. Non-metallic mineral value is variable, depending on the availability and location of the resource. Sources for determining standard rate non-metallic mineral value may include local suppliers, rural municipalities and provincial rates.

2.14 Royalties are calculated by weight or volume of non-metallic minerals removed from the reserve. Royalties must be paid periodically, usually quarterly or as negotiated, and stipulated in the terms and conditions of the permit/lease. Payment of royalties must be accompanied by a statement of account showing the quantity in weight or volume of material removed during the period to which the royalty payment corresponds. All royalties must be deposited into the Band's Capital Trust Account.

2.15 An annual Statutory Declaration by the permittee/lessee showing the total amount removed in previous years is also required as royalties result from a one-time sale of a resource.

2.16 A bonus payment or royalty pre-payment (i.e., an advance) may be negotiated to secure the arrangement. Such funds can be paid in the form of a lump sum or on an agreed schedule of payments.

Goods and Services Tax/Harmonized Sales Tax

2.17 The department must charge, collect and remit to the Canadian Revenue Agency, all applicable taxes. Permits and leases must contain a provision requiring permittees/lessees to pay all applicable taxes.

3.0 Environmental Considerations

3.1 Before the initiation of any mineral activity, an environmental review in accordance with the department's Environmental Review Process and the *Impact Assessment Act* must be carried out.

For more information on environmental considerations, please see the Environmental Management Processes on Reserve chapter.

4.0 Insurance

4.1 The permittee/lessee must provide proof of liability insurance before a permit is issued or a lease is granted. His Majesty the King in Right of Canada must be on the policy as an additional insured. The requirement for insurance can be waived in certain circumstances, such as when municipal and provincial departments or Crown-owned corporations/agencies are the permittee or the lessee.

5.0 Security Deposits

5.1 The permit/lease must contain a provision requiring a security deposit. Security deposits ensure there is money for site reclamation or remediation. They must be:

a) made payable to the Receiver General for Canada;
b) in the form of money, bonds or promissory notes (such as irrevocable letters of credit, safekeeping agreements) and must be verified for validity; and
c) sufficient in size to pay for remediation.

5.2 Security deposits are calculated at a minimum rate of 20% of the estimated royalties payable. If it is anticipated that the operation will cause significant damage to the land and environment, a surplus levy may be required. The surplus levy shall be remitted at various intervals during the operation based upon a pre-determined schedule.

5.3 Security deposits must be held by the department and handled in accordance with the *Financial Administration Act* and its Government Contract Regulations.

5.4 Upon termination of the permit/lease, the security deposit(s) is/are refunded, without interest, provided the permittee/lessee has complied with all the terms and conditions of the permit/lease.

5.5 If there is non-compliance with the terms and conditions of the permit/lease, the security deposit will be used to pay for work required.

6.0 Operational and Restoration Plan

6.1 The permit/lease must require an Operational and Restoration Plan. It is recommended that the Operational and Restoration Plan be prepared and signed by a registered professional engineer who is licensed to practice in the applicable province. The Operational and Restoration Plan must be submitted by the proponent and approved by the department before the permit/lease can be executed. The permittee/lessee must receive written approval of the department before making any alterations and changes to this Plan.

6.2 The Operational and Restoration Plan outlines the proponent's intended operation and use of land. It may also include a Geotechnical Evaluation Report in cases where commercial operations, building of structures and/or sale of excess materials are contemplated. The level of restoration of the site must be in accordance with federal, provincial and municipal environmental regulations.

For more information on Operational and Restoration Plan models, please see the procedures section.

7.0 Approval and Consent

Ministerial Approval

7.1 All permits/leases require ministerial approval. Departmental officials authorized by the Delegation of Authority Instrument under the *Indian Act* and related regulations must authorize all permits/leases. The Ministerial Declaration in relation to s.24(2)(d) of the *Interpretation Act*, *Indian Act* and related statutes and regulations sets out the positions the Minister considers appropriate to exercise various ministerial powers. Please consult the department's most current version of the Delegation of Authority Instrument to ensure the permit/lease is authorized by the appropriate departmental official.

Bands with Delegated Authority under the *Indian Act*

7.2 Approval of permits/leases is subject to the terms, conditions and restrictions contained in the Order in Council and/or Ministerial Letter delegating authority to the Band to exercise control and management over their reserve lands. At a minimum, the permit/lease must be based on an approved national or regional

departmental permit/lease precedent. Any terms that differ from the permit/lease precedent on which it was based must be approved by the department.

7.3 Where a Band has delegated authority and wishes to issue a permit/lease to its own Band-owned corporation, the department must approve the terms and conditions of the permit/lease and assume responsibility for all monitoring and compliance provisions in the permit/lease.

Band Council Consent

7.4 A Band Council Resolution consenting to the non-metallic minerals permit/lease must be obtained prior to the permit being issued or the lease being granted.

Locatee Consent

7.3 Locatee consent must be obtained prior to a permit/lease on locatee lands being issued or granted.

8.0 Assignments

8.1 Non-metallic mineral permits/leases are not assignable unless expressly allowed in the instrument. If ownership of an operation changes, the permit/lease is assignable at the request of the permittee/lessee if the Band approves the assignment. If assignability was not included in the terms and conditions of the permit/lease but the Band consents to an assignment, the department and current permittee/lessee must first amend the permit/lease to allow an assignment. Then the assignment can be finalized with a new security deposit being paid to the Receiver General of Canada, if necessary.

9.0 Unauthorized Removal of Non-metallic Minerals

9.1 Non-metallic mineral permits/leases allow an activity which would otherwise constitute an offence under s.93 of the *Indian Act*. Under this section, it is an offence for anyone to remove, or allow the removal of, minerals from a reserve without permission of the Minister or his duly authorized representative, or for anyone to be in possession of any minerals so removed.

9.2 Paragraphs 103 and 104 of the *Indian Act* address situations where minerals may be seized if there are reasonable grounds to believe an offence has been committed under s.93.

10.0 Compliance with other Laws and Regulations

10.1 In addition to those in the *Indian Act*, compliance with related federal laws and regulations, provincial laws, municipal by-laws and Band by-laws relevant to the removal and/or transportation of non-metallic minerals is required.

11.0 Cancelling a Permit/Lease

11.1 The department has the authority to cancel a permit/lease; however, the cancellation of a permit/lease has important consequences. As such, legal advice must be obtained and the Band Council must be consulted prior to initiation of any steps for cancellation or early termination.

11.2 In general, Bands with delegated authority may not cancel a permit; however, this should be confirmed through a review of the Band's specific delegated authorities.

12.0 Registration in the Indian Lands Registry

12.1 Permits/leases and any associated documentation, including forms and agreements, must be prepared in a form suitable for registration in the Indian Lands Registry System and must, in accordance with s.55 of the *Indian Act*, be sent for registration in accordance with the requirements of the Indian Lands Registration Manual.

Annex A: Authorities for Non-metallic Mineral Permits and Leases

The relevant sections of the ***Indian Act*** are as follows:

Authorizing a permit

58(4) Notwithstanding anything in this Act, the Minister may, without an absolute surrender or a designation

> *(b) with the consent of the council of the band, dispose of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, or, where that consent cannot be obtained without undue difficulty or delay, may issue temporary permits for the taking of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, renewable only with the consent of the council of the band.*

Proceeds

58(5) The proceeds of the transactions referred to in subsection (4) shall be credited to band funds or shall be divided between the band and the individual Indians in lawful possession of the lands in such shares as the Minister may determine.

Transactions re surrendered and designated lands

53(1) The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,

> *(a) manage or sell absolutely surrendered lands; or*
>
> *(b) manage, lease or carry out any other transaction affecting designated lands.*

Removal of material from reserve

93 A person who, without the written permission of the Minister or his duly authorized representative,

> *(a) removes or permits anyone to remove from a reserve (i) minerals, stone, sand, gravel, clay or soil, or(ii) trees, saplings, shrubs, underbrush, timber, cordwood or hay, or*
>
> *(b) has in his possession anything removed from a reserve contrary to this section, is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding three months or to both.*

Annex B: Relevant Case Law

These are considered the leading cases pertaining to natural resources on reserves. This is not intended to be all inclusive or exhaustive:

a. Guerin v. The Queen, [1984] 2 S.C.R. 335
b. Sparrow v. The Queen, [1990] 1 S.C.R. 1075

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1.0 Introduction

1.1 Timber resources on reserve are managed through permits and licences issued or granted under the authority of the *Indian Act* and *Indian Timber Regulations*. The instruments secure benefits for First Nations in the form of stumpage revenues, economic benefits, environmental protection and forest regeneration.

1.2 Timber resources are collective assets on Band lands and allotted lands. This policy addresses timber on Band lands; for information about timber on locatee lands please see the chapter on individual land holdings.

1.3 This chapter is intended to be an introduction to the *Indian Timber Regulations*, containing further clarifications and complementing those regulations with additional information.

Precedents (Templates)

1.4 Precedents (available from the department) provide the basis for permits issued and leases granted under the *Indian Act*, and include necessary policy and legal requirements to ensure consistency and accuracy when negotiating terms. The precedents simplify drafting, allow for a streamlined process and can be tailored to meet the needs of specific projects.

A National Timber Permit Precedent is under development; however, regional offices may develop region-specific precedents to suit local contexts.

2.0 Creating a Permit or Licence

2.1 According to the *Indian Timber Regulations*, timber permits and licences allow for the removal of timber for individual use, band use or sale. Additionally, tripartite agreements may also be used to allow for the removal of on-reserve timber.

2.2 The type of permit or licence that may be issued will depend on the purpose of the instrument (personal use or sale) and to whom the instrument will be issued (i.e., Band, group of Band members or third parties).

Permits

2.3 Permits may be issued to Bands, individual Band members or groups of Band members.

2.4 Permits may be issued for:

a) Band purposes and domestic use without requiring the permittee to pay compensation for the wood (section 4 of the *Indian Timber Regulations*), or
b) the cutting of timber for sale with the requirement that the permittee pay for the wood (s.5 to 8 of the *Indian Timber Regulations*).

Tripartite Agreements (Permits)

2.5 A tripartite agreement is a hybrid arrangement through which a s.5 permit is issued to the Band for the cutting of timber for sale, and which creates a contractual agreement between the Band, the harvester, and the department. The specific contractual arrangements will vary with the circumstances.

2.6 Under a tripartite agreement, a Band may transfer its rights to cut timber on reserve for sale to a third party harvester. The harvester retained by the Band is added as a party to the permit (creating a tripartite agreement) so that harvesting requirements and the payment of fees can be enforced.

2.7 A tripartite agreement must clearly indicate the Minister is not granting the right to cut timber on reserve, but that it is the Band, by contract, who is authorizing the third party harvester to cut timber, on the authority of its own s.5 permit.

Licences

2.8 Licences may be issued pursuant to s.9 to 25 of the *Indian Timber Regulations* to third parties, including Band-owned corporations. Licences are issued for the purposes of cutting, removing and selling timber with the requirement for the licensee to pay for the wood.

2.9 Licences may be issued on lands with a pre-existing designation provided that the licence does not conflict with any interests granted under the designation. If there are conflicting interests, the conflict must be resolved prior to the issuance of a licence.

2.10 Licences to third parties are generally issued through a bidding process (s.10).

2.11 The following table outlines the types of timber instruments that authorize each activity listed.

Permit Type	Authority	Activities
Permit for Band or individual use	Section 4 of the *Indian Timber Regulations*	Authorizes the cutting of timber for Band purposes, or for fuel wood for individual Band member use. Section 4 timber permits may be issued to a Band, an individual Band member or a group of Band members. Section 4 timber permits for Band use usually involve small volumes of low value timber and may be used as part of a prescribed forest fuel management plan. The cut timber cannot be sold and must remain on the reserve for Band use or be burnt.
Permit to cut for sale	Section 5 of the *Indian Timber Regulations*	With the consent of the Band Council, permits to cut timber for sale may be issued by the Minister to a Band, and individual Band member, or a group of Band members. Alternatively, a tripartite agreement may be issued as a hybrid arrangement. This is a permit issued to the Band and is a contractual agreement between three parties: the department, the Band, and the purchaser.
License	Section 9 of the *Indian Timber Regulations*	Section 9 licences are issued with the consent of the Band Council through a tender process, as outlined in s.10 of the *Indian Timber Regulations*. Section 9 licences may be issued to any successful third party.
Permit for disposal of wild grass or dead or fallen timber	Section 58(4)(a) of the *Indian Act*	Section 58(4)(a) allows for the disposal of wild grass or dead or fallen timber. This section only applies to timber that has fallen as a result of natural causes and does not authorize harvesting of standing timber.

2.12 All terms and conditions of timber permits and licenses, other than those specified in the *Indian Timber Regulations*, must comply with the general policy for permitting on reserve land.

3.0 Specific Requirements for Timber Permits and Licences

3.1 In addition to the requirement to comply with the *Indian Act*, the *Indian Timber Regulations* and other applicable federal legislation, timber permits and licences will contain terms, conditions and restrictions such as, but not limited to, the following:

Access to the Permit/Licence Area

3.2 Access (e.g., road) and construction of new logging roads, if required, must be addressed in the permit/licence.

3.3 The permit/licence must require the proponent to agree to not obstruct or damage roads, trails or property within the permit/licence area or on adjacent lands.

Security Deposits

3.4 Security deposits must be:

a) provided by the permittee/licensee to ensure there is money for site reclamation and remediation;
b) made payable to the Receiver General for Canada;
c) in the form of money, bonds or promissory notes (e.g., letters of credit, safekeeping agreements) and must be verified for validity (s.14 of the *Indian Timber Regulations*); and,
d) comprised of 15% of the estimated dues.

3.5 The security/reclamation deposits must be held by the department in safe custody and will be handled in accordance with the *Financial Administration Act* and its *Government Contract Regulations*. Upon termination of the permit/licence, the security/reclamation deposits are refunded, without interest, provided the permittee/licensee has complied with the terms and conditions of the permit/licence. In the event of non-compliance with the terms and conditions of the permit/licence, the security/reclamation deposits are used to pay for required work.

Insurance

3.6 The permittee/licensee must provide proof of liability insurance before a permit is authorized or a licence is granted. Canada must be included on the policy as an additional insured. The requirement for insurance can be waived in certain

circumstances, such as when municipal and provincial departments and other Crown entities are the permittee or the licensee.

Environmental Considerations

3.7 Before the initiation of any timber activity, an environmental review in accordance with the department's Environmental Review Process and the *Impact Assessment Act* must be carried out.

For more information on environmental considerations, please see the Environmental Management Processes on Reserve chapter.

Logging Plan

3.8 The intent of a logging plan is to provide site specific details, harvesting methods and technology to be used to ensure harvesting operations achieve the standards and obligations set out in the timber permits/licences, and ensure compliance with higher level plans, such as forest management plans (if such plans are in place).

3.9 A logging plan must be completed by the proponent. The logging plan should include a description of the area being logged, the methods and equipment being used, the season of the logging, overview and logging plan maps, silviculture prescriptions, timber cruise reports, appraisal calculations, heritage studies and other related information. It should also identify any potential logging problems and environmental concerns.

3.10 The logging plan must be consistent with and reflect the proposed mitigation measures identified during the departmental Environmental Review Process, *Species at Risk Act* reports and permits, and other relevant by-laws and legislation.

Stumpage Fees

3.11 The departmental regional office determines the prevailing stumpage rates, including export levies, if applicable. Stumpage fees are usually based on provincial average rates for the given forest district in which the timber is located.

Fire Prevention and Suppression

3.12 The permittee/licensee must assume all costs for fire protection services and fire suppression of any fire in the permit/licence area.

Compliance with other Laws and Regulations

3.13 Compliance with other federal laws and regulations, provincial laws and controls, municipal by-laws and Band by-laws relevant to timber harvesting is required.

Provincial Controls and Timber Mark

3.14 Permits/licences for sale must address transportation of timber off-reserve. Provinces regulate and establish controls over the transportation of timber. Haulers of timber are required to complete appropriate provincial forms outlining the source and destination of the timber, and keep records on a monthly basis on field scale sheets, truck and load records and other information according to provincial regulations. British Columbia, New Brunswick, Quebec and Ontario have timber marking systems which require that timber transported on public roads be marked to identify ownership.

4.0 Registering a Permit/Licence

4.1 Permits/licences and any associated documentation, including forms and agreements, must be prepared in a form suitable for registration in the Indian Lands Registry System in accordance with s.55 of the *Indian Act*, be sent for registration in accordance with the requirements of the Indian Lands Registration Manual.

5.0 Unauthorized Removal of Timber

5.1 Both the *Indian Act* and the *Indian Timber Regulations* include provisions related to timber offenses and the unauthorized removal of timber.

5.2 Under s.93 of the *Indian Act*, it is an offence for anyone to remove, or allow the removal of, timber, trees, saplings, shrubs, underbrush, or cordwood from a reserve without permission, or for anyone to be in possession of any timber so removed.

5.3 Sections 103 of the *Indian Act* addresses, among other things, situations where timber may be seized if there are reasonable grounds to believe an offence has been committed under s.93.

5.4 Under s.3.1 of the *Indian Timber Regulations*, it is an offense to cut timber on reserve lands without a licence issued by the Minister.

5.5 Under s.26 of the *Indian Timber Regulations*, the Minister may seize timber where there are reasonable grounds to believe certain offences have been committed.

Annex A: Authorities for Timber Permits/Licenses

The relevant sections of the *Indian Act* are as follows:

Authorizing a permit or a licence

57 The governor in council may make regulations

(a) Authorizing the Minister to grant licenses to cut timber on surrendered lands, or, with the consent of the council of the band, on the reserve lands;

(b) Imposing terms, conditions and restrictions with respect to the exercise of rights conferred by licenses granted under paragraph(a);

(c) Providing for the disposition of surrendered mines and mineral underlying lands in a reserve;

(d) Prescribing the punishment, not exceeding one hundred dollars or imprisonment for a term not exceeding three months or both, that may be imposed on summary conviction for contravention of any regulation made under this section; and

(e) Providing for the seizure and forfeiture of any timber or minerals taken in the contravention of any regulation made under this section.

58(4) Notwithstanding anything in this act, the Minister may, without an absolute surrender or a designation

(a) dispose of wild grass or dead or fallen timber

Removal of material from reserve

93 A person who, without the written permission of the Minister or his duly authorized representative,

(a) removes or permits anyone to remove from a reserve (i) minerals, stone, sand, gravel, clay or soil, or(ii) trees, saplings, shrubs, underbrush, timber, cordwood or hay, or

(b) has in his possession anything removed from a reserve contrary to this section, is guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding three months or to both.

Relevant sections of the *Indian Timber Regulations* are as follows:

Section 4 - Permits to cut timber free of dues may be issued by the Minister to a band for band purposes, or to a member or group of members of a band, to cut timber and fuel wood for his or their individual use.

Section 5(1) - With the consent of the council of a band, permits to cut timber for sale may be issued by the Minister to a band or to a member or group of members of a band.

Section 5(2) - Dues shall be charged at prevailing rates for timber cut on band land, and for timber harvested from individual locations or holdings of Indians the rate of dues may be reduced to one-half of such prevailing rates, and the rate of the dues shall be stated in the permit.

Section 9 – Subject to section 10, the Minister may grant licences for the right to cut timber

(a) on surrendered lands; or
(b) with the consent of the council of the band, on reserve lands.

Section 10 – Where it is estimated that the dues payable pursuant to a licence will exceed $2,500, the Minister shall invite tenders for the licence by public advertisement.

Annex B: Relevant Case Law

At the time of publication of this policy there are no relevant cases on record.