



Assembly of First Nations

Additions to Reserve: Regional Dialogue Forums

Roll-up Report
FINAL

March 2012

OVERVIEW

Additions to Reserve (ATR) refers to the existing policy developed by Aboriginal Affairs and Northern Development Canada (AANDC - formerly Indian and Northern Affairs Canada) to convert land to reserve status.

The existing policy creates very distinct “categories” of proposals for adding land to existing reserves or to create new reserves. Based upon data provided by AANDC, from 2006 to 2009, 299 land selections were converted to reserve. Of these, 257 were “Category 1” additions that recognize Canada must fulfill an outstanding legal obligation. Forty one (41) were “Category 2” additions that added land to an existing reserve based upon “normal community growth”, natural geographic enhancements or return unsold surrendered land to an existing reserve. Only one (1) reserve was created based upon “Category 3”: to create a new reserve where it did not previously exist.

In the fall of 2009, the Assembly of First Nations (AFN) agreed to begin working with AANDC to jointly review the existing ATR policy. During 2011, the AFN had the opportunity to host a series of regional “dialogue” forums on ATR – in Winnipeg, Edmonton, Regina, Moncton, Toronto and Kelowna respectively – to receive input and learn about the challenges that First Nations working on ATRs are experiencing on the ground.

The issues and challenges identified by the participants at these forums are summarized in this report, along with a series of recommendations that are offered at the end of this report, in an effort to address these challenges at a joint technical table with Canada.

The AFN / AANDC Joint Working Group (JWG) is exploring policy, process and legislative options to improve the conversion of land to reserve status in all parts of Canada. AFN members of the JWG will continue to report to and receive direction from the Chiefs Committee on Claims (CCoC) and the Chiefs-in-Assembly as this work proceeds. A number of AFN resolutions have been passed in support of this initiative.

Introduction

The work of the Assembly of First Nations (AFN) / Canada Joint Working Group (JWG) concerning reform of Canada's ATR policy has been on-going, with intermittent lapses due to funding, since the fall of 2009. The National Aboriginal Land Managers Association (NALMA) is an observer to this JWG. As part of its own mandate and work toward professional development, NALMA has developed an "ATR Toolkit" as a practical aid for people charged with the responsibility of processing ATRs for First Nations. During 2011, NALMA organized delivery of six separate ATR training sessions from January through November.

The training sessions were attended by First Nation technical and political representatives who are involved in ATR. The AFN attended each of these training sessions as observers and upon completion of the formal training, led a roundtable discussion during each session to provide information and invite the participants to identify and discuss the issues and challenges experienced by the participants when seeking to add additional land to reserve.

Canada's ATR policy is implemented in three phases. Phase 1 of the ATR process begins with the First Nation, and the NALMA Toolkit was prepared with Phase 1 as its primary focus. Copies of this Toolkit may be obtained from NALMA.¹

What follows is a comprehensive summary of the issues and challenges identified by the participants during the sessions as a result of Canada's ATR policy and/or through Phase 1 of Canada's ATR process.

ATR Policy Issues

Canada's ATR policy creates very distinct "Categories" of proposals for additions to reserve or new reserves. A new Category is under development by the JWG to recognize those proposals that seek to re-acquire lands that were the subject of a Specific Claim before the Specific Claims Tribunal, however, at the time of NALMA's training the ATR categories were:

1. **Legal Obligation:** This category recognizes that Canada must fulfill its legal obligations to First Nations and it addresses proposals that seek reserve status for land based on specific claim settlement agreements, including Treaty Land Entitlement (TLE), court orders or legal reversions of former reserve land. This category also includes proposals for land that are being accepted in exchange for land being expropriated or transferred under s. 35 of the *Indian Act*. Often First Nations seek the return or replacement of lands in addition to financial compensation for the original

¹ National Aboriginal Land Manager Association, General Delivery, 1024 Mississauga Street, Curve Lake Ontario, K0L 1R0, (705) 657-7660.

From 2006 to 2009, 299 ATRs occurred. Of these, 257 were “category 1”; 41 were “category 2”; and 1 was “category 3 [data provided by AANDC to JWG by region]. The JWG is awaiting current data from AANDC on the status of ATR proposals in process today.

There is a difference in experience amongst First Nations seeking proposals under Category 1. The most crucial difference is whether the First Nation selected land during the negotiation process or deferred selection post settlement agreement. The timing of a land selection is critical to the efficient conversion of land to reserve.

First Nations and Canada should build upon the general experience of Alberta and include the selection of land during the negotiation of a final settlement agreement. The parties can then negotiate the site-specific criteria within the terms of the final settlement agreement. In the Joint Case Studies, the JWG should include an examination of a First Nation who has selected land during the course of negotiating a final settlement agreement.

Alternatively, the parties could negotiate the boundaries of the selection area and other site specific criteria for future proposals. This has been the approach taken in the Saskatchewan and Manitoba Framework Agreements.

Little to no regard is given to proposals for culturally significant sites that do not fit neatly within the current category 2. A new element needs to be created for this category.

A Directive should be created to eliminate conflicting interpretations amongst the regions of AANDC regarding “community economic projects” ATR proposals advanced under category 2.

breach of obligation. There is a difference in experience between First Nations as to how this has been achieved.

- 2. Community Additions:** This category recognizes proposals that seek to add land to an existing reserve based on normal community growth (eg. housing, schools, churches, recreational centres, community economic projects), natural geographic enhancements (eg. road right of way corrections or natural accretions to a reserve boundary adjacent to an ocean, lake, river or stream) and return of unsold surrendered land to the existing reserve land base.
- 3. New Reserves/Other:** This category recognizes proposals that seek to create a new reserve and the proposal does not fit within either of the first two categories. This category was not addressed during the NALMA training sessions and will be the subject of dedicated discussion by the Joint Working Group.

For each of the three policy categories, Canada has created “site-specific criteria” that must be satisfied for the proposal to proceed through all stages of its process. First Nations are of the view that once lands are purchased by them, they should be able to use the land for their intended purposes as reserve land and not as land held in fee simple.

In the provinces of Saskatchewan and Manitoba, some First Nations have joined together to resolve outstanding Treaty Land Entitlement (TLE) claims by negotiating comprehensive framework agreements with Canada for the settlement of these claims. Key aspects of these frameworks include provisions that specifically address the site specific criteria of Canada’s ATR policy.

A number of participants in the training sessions held in Manitoba and Saskatchewan were from communities who were advancing ATR proposals based upon these framework agreements which fall within Category 1 of Canada’s ATR policy.

Canada's policy clearly states that "where site-specific criteria are covered by claim settlement agreements, the provisions in such *agreements take precedence over any of the site-specific criteria.*" However, as the summary will reveal, this does not equate to a timely conversion of land to reserve status.

In the Atlantic, Quebec, Ontario and British Columbia regions, First Nations are advancing both Category 1 and Category 2 proposals but the participants in these training sessions were from communities advancing ATR proposals primarily within Category 2 of Canada's ATR policy.

Land Selection Area

The process of adding land to reserve begins with a First Nation's assessment of what land will be selected. This decision is informed by considerations such as the location of the land to be added and the intended use of the land. Land selection areas, however, vary in different parts of the country.

The policy restricts the land open for consideration by a First Nation. The policy limits a First Nation, in each category, to consider land that is within the "service area" of its existing reserve. Service area is defined in the policy to mean "the geographic area 'generally contiguous' to an existing reserve community within which existing on-reserve programs and community services can be delivered, infrastructure extended and installations shared, at little or no incremental cost." For First Nation signatories to the Manitoba (1997) and Saskatchewan (1992) TLE Framework Agreements, they have negotiated the geographical boundaries of their selection area which are far broader than the policy. These are the only two provinces with broad TLE Framework Agreements.

In Manitoba, a First Nation signatory to the TLE Framework Agreement can make selections of Crown land or other land from within their Treaty area or traditional territory. Selections must be at least 1,000 acres unless suitable Crown land is unavailable in a preferred location. First Nation signatories were required to make their Crown land selections within three years of the 1997 Framework Agreement coming into force (i.e., 2000) and acquisitions were required to be complete within fifteen years (i.e., 2012). The Framework Agreement sets out special rules for the selection and acquisition of land in an urban area, a municipality or northern community. Participants from Manitoba were of the view that Aboriginal Affairs and Northern Development Canada (AANDC – formerly INAC) limits selections to agricultural and residential purposes rather than supporting industrial/commercial development land selections. First Nations in Manitoba feel that AANDC is reluctant to move ahead with economic development selections by allowing potential environmental liabilities to overshadow potential economic gains.

The Saskatchewan TLE Framework Agreement relied upon an independent appraiser to assess fair market value of Crown land (expense of appraiser shared by the parties). In the northern region of the province, Crown land was attributed a base price of \$30/acre which could be “topped up” depending on the distance from a northern municipality and the value of productive forest.

Canada and First Nations would be wise to negotiate all funding issues – including any increase in the Department’s A Base funding – during negotiation of a final settlement agreement. Short and long term financial implications of proposed additions to reserves should be included in a final settlement agreement.

If the policy applies by default, then timelines should be defined. Timelines should be introduced into the ATR process at all levels but on a priority basis with the regional offices of AANDC to establish annual targets with the First Nations.

The definition of service area should be broadened in the policy to remove “contiguous” as a precondition to selection. If the definition of contiguous varies by province, then the broad policy position that no funding entitlement is associated with ATR must be revisited to ensure the costs of an ATR also reflect this varied interpretation.

In Saskatchewan, a First Nation signatory to the TLE Framework Agreement can make selections anywhere in the province of Saskatchewan and are required to use their best efforts to reach their “shortfall acres” before the first twelve years of the Agreement. If after fifteen years, the entitlement First Nations had not successfully converted all their shortfall acres to reserve, the parties could negotiate an extension of time.

In the majority of TLE selections in Alberta, the lands selected for the purposes of fulfilling an outstanding obligation of Canada have been negotiated by the parties during the course of reaching a final settlement agreement.

Unless negotiated by final settlement agreement and elsewhere in Canada, primarily in British Columbia, Ontario, Quebec, and the Atlantic provinces, the policy is applied to restrict First Nations to selecting land that is “generally contiguous” to their existing reserve and this can have a negative impact on those First Nations who cannot buy land on an open market either because land is not available, the market value is too inflated or no Crown land is available. The definition of “contiguous” is interpreted differently by the regional offices of AANDC. In the Atlantic region, for example, lands within 50 kilometers of a reserve are considered “contiguous”, yet no funding entitlement is associated with this definition. In British Columbia, lands within 70 kilometers of a reserve are considered “contiguous”.

Culturally Significant Lands

There is no current category for the acquisition of lands that have a cultural or traditional significance to the First Nation and are outside of category 1 of the policy.

Willing Seller / Willing Buyer

In all cases, the acquisition of land that is privately held property or property owned by the federal or provincial governments is governed by the fundamental principle of “willing seller / willing buyer”. In other words, even in respect of Crown lands, the governments have no obligation to sell. When governments are in a position

to put Crown lands on the market, First Nations were of the view that they should have a right of first refusal to these lands within their treaty and/or traditional territory (similar to the terms of the Saskatchewan TLE Framework Agreement).

Many First Nation representatives questioned the application of Treasury Board's "strategic land" designation as a tool to prohibit their acquisition of land. In addition, in British Columbia, the acquisition of land value at \$350,000.00 or more requires a Treasury Board submission, however, it is not clear whether this requirement is applied equally across all regions.

Fair Market Value

During NALMA's training session, participants from all regions shared their experience of inflated land values upon public awareness of claim settlement compensation coming to First Nations. The inflated land values had the negative consequence of depleting a First Nation's financial resources for remaining transaction costs and limiting future purchasing options.

Financial Implications and Funding Sources

There is no funding entitlement associated with the addition to reserve under the policy with respect to transaction costs, infrastructure, housing and other capital costs. If these are to be provided, then these costs must be identified and contained in a final settlement agreement. All parties must fairly assess the true costs associated with ATRs and while forecasting costs of a 2-3 year process appear reasonable, excessive delays increase costs.

Unless otherwise provided for in a final settlement agreement, on-going operational and program costs must be sourced from the Department's regional office operating budget. This has the consequence of First Nations working with their regional counterparts and the pressure to meet competing priorities.

Capacity

Fair market value should be independently appraised to mitigate inflated land values as much as possible. These appraised values should be fairly projected into the future particularly when First Nations use funds to buy reserve lands over a significant period of time (i.e. 20 years).

Timelines should be introduced into the ATR process at all levels but on a priority basis with the regional offices of AANDC to establish annual targets with the First Nations.

In resolving funding matters, representatives from the BC Region of AANDC clarified that this region does not separate "minor" (i.e. roads) and "major" (i.e. schools) capital planning for First Nations. This may or may not represent a unique approach to capital planning. Other regions of AANDC make a distinction for capital planning. The JWG case studies should examine the financial implications and funding sources in greater detail and set out best practices.

Ideally, First Nations would like to have within their offices a core team of ATR expertise from which to draw upon. However, they rarely if ever have this capacity. First Nations are often forced to approach every ATR on a case-by-case basis and must rely upon costly outside expertise. Many First Nations do not have dedicated personnel to move an ATR proposal through AANDC's process.

Where AANDC provides financial support for land management activities, this funding is simply not adequate to support the completion of an ATR.

Land Selections for Economic Purposes

Where the selection of land is deferred until after a final settlement agreement is signed, the processing of an ATR under Category 1 has not kept pace with the speed of business. Many First Nations have lost out on economic opportunities because the ATR process impedes their economic goals and creates uncertainty for investors.

Many First Nations view Canada's policy Categories as highly restrictive and find that proposals do not fall easily into separate and distinct categories. There is typically a fine line between economic ATR (job creation) and community development ATR (housing), yet these Categories are competitive rather than complementary under Canada's interpretation of its policy and its interpretation of Category 2. Going forward, many participants would like to see a better alignment between economic development and ATR proposals.

In many regions, the distinction between "urban" and "rural" selections is growing smaller as the boundaries of many municipalities expand. The current policy puts the onus on the First Nation to initiate negotiations with a municipality. Many participants wanted to see more proactive approaches from municipalities when it came to community planning, particularly where a municipality borders an existing reserve.

The Saskatchewan TLE Framework Agreement recognized that many First Nations wanted to acquire

There must be a better alignment must be created between economic development policies and programs of AANDC and the ATR policy particularly regarding proposals for economic development purposes.

In Saskatchewan, when the Framework Agreement was negotiated, two tax loss compensation funds were established to help offset the anticipated tax losses to municipalities. One fund was equivalent to 90% of 25 times the “municipal taxes” levied the previous year of signing. The other fund was equivalent to 70% of 25 times the “school taxes” levied the previous year of signing. This school fund has no effect on tuition agreements between school divisions, Canada and the First Nations. Outside of Saskatchewan, First Nations must negotiate tax losses directly with the municipality. There is no hard and fast rule and tax loss compensation is a negotiable issue. The policy may benefit by establishing relevant criteria to consider and a reasonable ceiling for such losses.

If a First Nation proceeds with a parcel and it has incurred the costs of annual tax levies, then Canada and the First Nation should negotiate the fair reimbursement of this cost, if they have not already done so. Alternatively, parties could build upon the experience in Saskatchewan and shift the burden to Canada after a certain period of time (75 days).

The practice in BC regarding MSAs appears to be not to pay a lump sum to the municipality but to include a portion, annually, in the MSAs negotiated by the First Nation. This should be explored further in the JWG case studies. There may be similarities with FNs “urban reserves” in Saskatchewan who have adopted a similar approach.

urban properties for economic development purposes. To create compatibility between new First Nations jurisdiction and municipalities upon lands being added to reserve, certain agreements were seen as pre-conditions. These agreements - such as compensation for tax losses, by law application and enforcement and municipal service agreements - were agreed upon requirements. These same agreements are referenced in the site specific criteria under Canada’s ATR policy.

These necessary agreements between the First Nation and municipality require both parties to negotiate in good faith. This requirement was not intended to provide municipalities with a veto with respect to reserve creation, particularly by simply refusing to negotiate. The ATR policy also recognizes that reserve creation proposals potentially impact municipal governments and therefore require that municipalities (and provinces) have an opportunity to express their interests. The policy similarly requires that the First Nation and municipality negotiate in areas such a joint land use planning / bylaw harmonization, tax considerations, service provision and future dispute resolution.

Taxation

Unless negotiated as a term of a final settlement agreement, First Nations will not be provided with additional money to pay the requisite taxes on land they hold in fee simple. This has the negative consequence of First Nations being forced to find money to pay the taxes due annually while their proposal proceeds through AANDC’s ATR process. Many First Nations cannot afford the slow pace of Canada’s process and some have been forced to sell potential ATR lands as a result.

There is also much uncertainty regarding what is fair compensation for municipal tax loss and school taxes. The payment of school taxes is sometimes viewed as “double-dipping” by municipalities since most First Nations have reserve based schools and do not rely upon municipalities for this service.

An AAANDC Directive should be developed to create consistency regarding when MSAs are necessary and the form and content of these agreements across all regions.

The ATR process would benefit from improved communications amongst all parties and all levels of government.

AANDC should create more formal arrangements with each province regarding ATRs where the onus is on the First Nation to approach the province on a case by case basis. The experience in BC with BC Hydro “blanket permits” being used as an instrument to avoid paying compensation to First Nations must be addressed by AANDC.

Further, the Agricultural Land Reserve (ALR) in BC operates to place unique and unduly onerous obligations on First Nations in that province. A provincial entity that, once designated, holds agricultural land in a static lands inventory means that planned use cannot conflict with agricultural protection. This sets the First Nation up to appear disingenuous with their planned use just to proceed through ATR. The JWG must explore ways to address this.

The Saskatchewan TLE Framework Agreement establishes a clear tax loss compensation formula and strict timelines, however, this systematic approach is not necessarily replicated at specific claims negotiation tables or for Category 2 applications.

Role of AANDC during negotiations with affected provinces and municipalities

While Canada can waive the need for a municipal service agreement (MSA) and proceed with an ATR, in practice these agreements are seen by Canada as a pre-condition to a proposal going forward. Canada is not required to be a party to any concluded First Nation / municipal agreement, however many participants, from all regions, identified the lack of involvement by Canada as conduct that is not supportive of their fiduciary relationship with First Nations. While the policy clearly does not give a municipality a veto over an ATR, they can often stall the advancement of an ATR, giving municipalities a *de facto* veto.

In discussing the experience of negotiating MSAs with the participants across the regions, it is clear that there is not a uniform interpretation amongst the regional offices of AANDC as to the form and content of these agreements. This lack of consistency creates significant frustration for First Nations.

Many participants felt that there was a double-standard where government expects a First Nation to undertake ATR consultations when there is no parallel or reciprocal requirement on municipalities.

Vague and Uncertain ATR Policy involving Economic Development

The inability of the ATR process to keep pace with the economic goals of First Nations has resulted in lost opportunities. Prior to a reserve’s “designation”, First Nations remain in limbo and this uncertainty detracts investors and financial partnerships.

Participants in Manitoba were of the view that once they are in possession of lands, pending reserve

During an ATR, First Nations have the onus of resolving 3rd party interests yet there is no reciprocal requirement on these parties to consult on issues that may impact a First Nation's plans to undertake an ATR. Many First Nations feel that Canada works more with non-Aboriginal residents and 3rd parties and are not on their side.

The lack of involvement by Canada in resolving outstanding interests raises the question of whether a fiduciary policy is needed.

First Nations and AANDC should combine their efforts to educate and inform rural municipalities regarding their respective roles and responsibilities regarding potential ATRs similar to the concerted outreach undertaken in Saskatchewan and Manitoba following the signing of the TLE Framework Agreements.

The Government of Canada must work more cooperatively with First Nations in implementing the terms of final settlement agreements.

The JWG should review AANDC's current claims negotiations guidelines. Where these guidelines can be strengthened to include site specific criteria at a negotiation table, this should be done.

designation, they can and should be able to begin development on the subject lands.

Participants in Alberta were frustrated by the inability of AANDC to link economic development programs with ATR proposals.

Participants in the Atlantic described the need to balance the social and economic needs of their communities in developing their proposals under Category 2 of Canada's policy, while participants in Quebec described that ATR proposals are provided mainly for social development and not for economic development purposes.

This variance in experience amongst First Nations across the regions suggests that AANDC has allowed too much discretion to fall to their regional offices in interpreting and applying its single ATR policy.

Role of the Provinces

Participants across all regions suggested that the bulk of the problems surrounding ATR and TLE in general lie with the reluctance of the provincial governments to successfully cooperate. Further, First Nations are caught in the middle of federal and provincial competing "legal obligations". Participants in Manitoba suggested that Canada and the province should coordinate their activities when they undertake an examination of 3rd party interests to create efficiency and to avoid revisiting issues previously discussed and/or resolved.

Further, timely disclosure on what services a province provides to the subject lands could enhance the ATR process dramatically.

Better coordination and joint discussion between the federal and provincial governments is needed to identify what crown land may be available for purchase.

Further, many participants questioned the role of AANDC in allowing negative provincial attitudes and positions to frustrate the timely conversion of land.

The ATR policy should clarify the meaning of “an interest in land”.

Surface access to sub-surface interests held by parties other than a First Nation must be resolved.

Third Parties

The ATR policy has been developed and interpreted to uphold a fundamental objective: prior legal interests in land must be maintained during the ATR process.

First Nations shoulder the burden of identifying and resolving 3rd party issues on selected lands. This requirement is the primary factor that delays the timely conversion of land to reserve. A significant challenge is identifying and resolving unregistered 3rd party interests.

Minerals

Sub-surface issues create numerous complexities for First Nations. The current legislative and regulatory environment over mines, gas and minerals does not include First Nations in any meaningful way. For example, provinces like Alberta will not break a mineral lease, thus the 3rd party interest will be allowed to operate throughout the life of the resource regardless of a First Nations’ expression of interest in an ATR. First Nations view the approval of permits by the province without their consent to be unfair and unjust. First Nations thereby question the value of creating surface-only reserves and negotiating surface access given the unwillingness of the province to deal fairly with 3rd party leasehold interests.

In Ontario, the acquisition of minerals rights is always requested in ATR proposals however, the province will often refuse this request if the mineral interest appears profitable. In rare cases, the Ministry of Northern Development, Mines and Forestry (MNDMF) has released mineral interests on ATR lands. Many participants view sub-surface rights as an outstanding issue for resolution.

Surface Access

Participants in Alberta acknowledge that certain regulatory gaps have emerged within the province regarding commercial resource development on reserve. Efforts to address these gaps using the *First Nations Commercial and Industrial Development Act*

(FNCIDA) and the *First Nations Certainty of Land Title Act* (FNCLTA) were abandoned by AANDC.

Similarly, provincial laws such as the *Surface Rights Act* (AB) do not apply to reserve lands so 3rd parties are reluctant to facilitate an ATR given the uncertainty of legal interests.

Resolving Overlapping First Nation Land Selections

The ATR policy requires a First Nation to consult with other First Nations when making a land selection. In British Columbia, this is interpreted by AANDC to mean consulting within a 70 km radius of a land selection for overlapping interests with other First Nations. Elsewhere in Canada, there is no defined radius that extends this far. In fact there is much regional disparity of the radius a First Nation must consult within.

In developing their own solutions, an approach undertaken in Saskatchewan and Alberta was the development of a Memorandum of Understanding between communities to share information and land use plans when available.

While it was generally acknowledged by the participants that it was best to consult with other First Nations at the front end rather than the back end of the ATR process, identifying and resolving other “Aboriginal” interests may be difficult, particularly if no prior claim to the same land selection has been previously made.

Environmental Issues and ATR

The slow pace of the ATR process often results in the stale-dating of Environmental Site Assessments which are valid for 5 years (an increase from the previous 2 year timeline). It is acknowledged that AANDC will not undertake an ESA based on speculation. On the other hand, First Nations conduct ESAs as a proactive measure and for due diligence to determine if there are any front-end issues that need to be addressed. At times, First Nations are burdened with the cost of conducting ESAs and have a hard time seeking

First Nations may want to develop their own consultation guidelines that accord with their own regional protocols. The JWG must explore ways to introduce respect for First Nations protocols in resolving overlapping land selections.

The funding for environmental site assessments (phase 1), environmental assessments (phase 2) and surveying comes from the annualized budgets of the regional offices of AANDC. The regional offices should be directed to review the activities of ATR proposals annually to strategically forecast budgetary need, particularly regarding ESAs, EAs and surveying costs.

If a First Nation proceeds with the development of a parcel for their intended purposes and the First Nation has incurred the costs of an ESA, then the ATR policy should require Canada to reimburse the First Nation for these costs – for all categories.

In 2009, AANDC's response to the Auditor General's Report to the House of Commons included a commitment, prior to the start of each fiscal year, for the regional offices to develop annual operational plans within their broader strategic plans that deal with the timing of land surveys and environmental assessments. To the extent possible, the Department stated "land surveys and environmental assessments will be planned so that they are carried out simultaneously, especially on land parcels in remote locations." (Report of the Auditor General, November 2005, Chapter 7, pg. 17)

Such strategic coordination may reduce and perhaps eliminate the current backlog of pending surveys, particularly in Manitoba.

In the same 2005 Auditor General Report, the Department committed to working with First Nation partners to develop long-term strategic plans that include various operational (annual) components. The plans will be subject to periodic review and adjustments and will include time targets and performance measures (Chapter 7, pg. 23).

reimbursement from AANDC. In Ontario, AANDC will not reimburse First Nations who undertake their own ESA. AANDC will however, review the ESA and check for compliance.

There is a disparity of experience between TLE First Nations where the costs of an ESA were included in the Framework Agreements and First Nations with specific claim settlements where none of these site-specific criteria were negotiated up front. Similarly, for Category 2 applications, First Nations confront their own financial challenges in paying for necessary ESAs and AANDC's budgetary constraints.

In Ontario, remediation costs associated with ATR lands are the responsibility of the First Nation. AANDC prefers that remediation activities take place before ATR lands are set aside as reserve.

Surveys

The expense of surveying requires that they be undertaken at a very determinative point in time in the ATR process. Currently, surveys are undertaken once all 3rd party issues are resolved. Yet, unreasonable conduct of 3rd parties can stall the process. Recognizing that a survey is an expensive but necessary step in the process, First Nations question whether a survey can be undertaken while they work collaboratively to resolve 3rd party issues (perhaps with the increased efforts of Canada).

Consistent Interpretation of the ATR Policy

Much discretion is left to the regional offices of AANDC as to how to interpret and apply the ATR policy. The definition of "service area", "reasonable efforts to negotiate a municipal service agreement", the consultation radius for overlapping claims and proposals for economic development purposes are just some examples of varying interpretation.

Timelines and Oversight

Both the Manitoba and Saskatchewan Framework Agreements contain clear timelines - for various stages

Greater recognition of First Nations' authority to manage their own lands in accordance with their own management regimes must be made.

Based upon prior experience, First Nations who are ready and who want greater autonomy over their land management have been limited in their potential to fully realize their capacity due to suspended funding and/or lack of program dollars from AANDC. This must change.

of an ATR – to guide the parties and yet there is a lack of progress in TLE settlements. Both Agreements create dispute resolution mechanisms, however, very little use has been made of these processes.

Participants across many regions experienced an ATR process that was more ad hoc than streamlined and more vulnerable to local politics than claims implementation.

AANDC and the Department of Justice (DOJ)

Participants expressed concern with the weight given by AANDC to DOJ's assessment of risk over an ATR. Strict adherence to DOJ's concerns must be balanced with the need to implement outstanding treaty obligations and category 1 proposals.

Participants further questioned the need for DOJ to review an ATR submission on two separate occasions. Similarly, participants questioned the recycling of reviews within AANDC. There must be more efficiency created between the regions and head quarters of AANDC.

Designation Process

Canada passed legislation to speed the implementation of ATRs in Manitoba, Saskatchewan and Alberta by creating a "pre-designation" mechanism to address 3rd party issues. This legislation was rarely if ever referred to by the participants.

The participants generally acknowledged that a Ministerial Order process may be more efficient than the Order in Council process for ATR however many were of the view that Ministerial discretion could take an ATR off track for political reasons.

There is a general recognition that the current designation process is lengthy and costly. More capacity is needed to undertake a designation or pre-designation process. Further, more effective use of technology should be undertaken to facilitate greater participation of on and off reserve residents.

Policy Review

Participants amongst the regions spoke in varying degrees about the desire for improvement and more specifically on the need to enhance First Nation management capacity over their own lands rather than just complying with AANDC's ATR policy and the *Indian Act*. They would like to see AANDC recognize their authority to manage lands in accordance with their own management regimes. ATR changes should not focus on providing First Nations with delegated authority but rather recognize and promote First Nations' authorities to manage their own lands.

RECOMMENDATIONS:

1. Little or no regard has been given to proposals for culturally significant sites that do not fit neatly within the current Category 2 – a new element needs to be created for this Category.
2. A Directive should be created to eliminate conflicting interpretations amongst the regions of AANDC regarding Category 2 “community economic projects” ATR proposals.
3. An examination (e.g., a case study) of a First Nation who has selected land during the course of negotiating a final settlement agreement should be carried out.
4. The definition of “service area” should be broadened in the policy to remove “contiguous” as a precondition to selection. If the definition of contiguous varies by province, then the broad policy position that no funding entitlement is associated with ATR must be revisited to ensure the costs of an ATR also reflect this varied interpretation.
5. If the policy applies by default (to a negotiated settlement agreement), then timelines should be defined.
6. Fair market value should be independently appraised to mitigate inflated land values as much as possible. These appraised values should be fairly projected into the future, particularly when First Nations use funds to buy reserve lands over a significant period of time (e.g., 20 years).
7. A centralized expertise should be developed – perhaps through NALMA – from which First Nations could draw upon to provide their capacity needs.
8. Increased land management training should be made available to all First Nations that are interested in developing this expertise internally.

- 9.** Building upon the experience of the Saskatchewan TLE Framework Agreement, should an agreement not be concluded with the municipality within 5 months following a request to negotiate by the First Nation, Canada may set apart the reserve where it has been determined that the First Nation is prepared to enter into a reasonable and adequate agreement with the municipality but the other party has been unwilling to respond to the request reasonably or in good faith.
- 10.** A review of existing policies that impact ATR proposals and an assessment of where new policy may be needed eg., “urban proposals”; “fiduciary policy”, Treasury Board policies for land appraisals and “strategic” designations) should be carried out.
- 11.** The ATR policy may benefit by establishing relevant criteria for (municipal) tax loss compensation with a reasonable ceiling for such losses.
- 12.** If a First Nation proceeds with a parcel and it has incurred the costs of annual tax levies, then Canada and the First Nation should negotiate the fair reimbursement of this cost (if they have not already done so). Alternatively, the parties could build upon the experience in Saskatchewan and shift the burden to Canada after a certain period of time (e.g., 75 days).
- 13.** The Government of Canada must work more cooperatively with First Nations in implementing the terms of final settlement agreements.
- 14.** First Nations and AANDC should combine their efforts to educate and inform rural municipalities regarding their respective roles and responsibilities with respect to potential ATRs, similar to the concerted outreach undertaken in Saskatchewan and Manitoba following the signing of the TLE Framework Agreements.
- 15.** AANDC should assist First Nations by encouraging municipalities to share their community plans wherever possible.
- 16.** An AANDC Directive should be developed to create consistency regarding when MSAs are necessary and the form and content of these arrangements across all regions.
- 17.** There should be better alignment between economic development policies and programs of AANDC and the ATR policy, particularly regarding proposals for economic development purposes.
- 18.** The ATR process would benefit from improved communications amongst all parties and all levels of government.

- 19.** AANDC should create more formal arrangements with each province regarding ATRs where the onus is on the First Nation to approach the province on a case by case basis.
- 20.** AANDC regional offices should be directed to review the activities of ATR proposals annually to strategically forecast budgetary need, particularly regarding ESAs, EAs and surveying costs.
- 21.** If a First Nation proceeds with the development of a parcel for their intended purposes and the First Nation has incurred the costs of an ESA, then the ATR policy should require Canada to reimburse the First Nation for these costs – for all categories.
- 22.** Greater deference must be created to respect First Nations consultation protocols when addressing overlapping land selections.
- 23.** The 2009 commitments of AANDC in response to the Auditor General's Report to the House of Commons regarding the development of annual operational plans within their broader strategic plans that deal with the timing of surveys and ESAs should be implemented.
- 24.** The 2009 commitment of AANDC in response to the Auditor General's Report to the House of Commons to work with First Nations to develop long-term strategic plans regarding ATRs, subject to periodic review and that includes time targets and performance measures, should be implemented.
- 25.** Greater recognition of First Nations' authority to manage their own lands in accordance with their own management regimes must be implemented.
- 26.** Based upon prior experience, First Nations who are ready and who want greater autonomy over their land management regime have been limited in their potential to fully realize their capacity due to suspended funding and/or lack of program dollars from AANDC. This must change.