

INDEX TO CHAPTER 10 ADDITIONS TO RESERVE

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Directive 10 - 1

Additions to Reserves / New Reserves

1. Introduction

- 1.1 As part of the Federal Government's *Gathering Strength* response to the Royal Commission on Aboriginal Peoples (RCAP), the Lands and Trust Services (LTS) sector of Indian and Northern Affairs Canada (INAC) is working with the Assembly of First Nations (AFN) to review its business lines under the AFN/INAC Joint Initiative for Policy Development (the Joint Initiative). The Joint Initiative identified the 1991 Additions to Reserves/New Reserves (ATR) policy as an early priority under its work plan.
- 1.2 First Nations who participated in national ATR focus groups and regional involvement processes have identified a number of First Nation needs, including objectives that could be achieved in the short-term, as well as those that could be worked on in the future. Therefore, like all the Joint Initiative reviews, options for ATR are being structured in three stages; short-term improvements, medium-term transitional and long-term fundamental changes. Since it was a First Nations' priority, the substantive work on ATR under the Joint Initiative began well ahead of the other business lines being reviewed. As a result, the first Joint Initiative report to the AFN Annual General Assembly and INAC in 1999 recommended that short-term operational changes be made to facilitate the processing of more "straightforward (ATR) policy proposals" and that "INAC officials pursue the steps necessary to secure these changes through the INAC and Government of Canada approval mechanisms".
- 1.3 As a result, an ATR Joint Initiative Working Group was formed in the fall of 1999 to pursue these short-term improvements, while preparing policy options for longer term review. The result was two products. The first product is a short-term package, which includes this policy directive, along with a First Nations' ATR communications toolkit and process mapping improvements. These initiatives all seek to enhance First Nations' involvement in the ATR process. The second product is an ATR Discussion Paper on potential future policy directions prepared for initial First Nations' comments at the Joint Initiative National Gathering in Winnipeg in June 2000.

- 1.4 In keeping with the mandate for short-term improvement received in 1999, the objectives of this policy directive are to:
- a) clarify the existing (1991) ATR policy, as embodied in INAC's Land Management Manual, since the 1991 ATR policy, as written, was not viewed as setting out clear policy statements in a number of key areas and has therefore been subject to different interpretations; and,
 - b) clarify where the policy and practice should facilitate and allow for more routine reserve addition proposals, instead of the "one size fits all" approach in the 1991 policy for handling both routine and complicated proposals.
- 1.5 It should be noted that this directive does not change the basic, underlying framework of the 1991 policy or create new policy precedents. The reason for not changing the basic policy structure is that there is no mandate from INAC or the AFN at this point in time, due to the need for further consultations before such a mandate can be provided. Rather, this directive is intended to clarify the current policy to achieve consistent interpretation and implementation across the country, in accordance with the above short-term objectives.
- 1.6 As a result, this directive contains both the short-term improvements First Nations asked for (as directed by the AGA in July 1999) and the remaining elements of the 1991 policy (largely with respect to the treatment of new reserves - see Section E and Annex C). Full scale policy consultations on the remaining elements of the 1991 ATR policy which are not changed by this directive may evolve over the longer term as the Joint Initiative continues its work. Such consultations would need to involve a broader audience of both First Nations and third parties.
- 1.7 As noted above, the short-term improvements found in this directive were based on the views of First Nations expressed at national ATR focus groups. It also benefited from subsequent technical input from First Nation ATR practitioners in some regions (whose views were solicited by AFN Regional Coordinators and regional INAC officials) and from First Nation, provincial and municipal government representatives who attended national workshops on communications and process improvements in the area of ATR. The short-term improvements found in this directive also reflect a large number of the recommendations from First Nation participants at the Joint Initiative National Gathering in June 2000, e.g., with respect to community additions and the need to expand reserves for economic development purposes.

- 1.8 Since the environment policy with respect to ATR was not considered to require any significant revision at this time, it is not included in this policy directive. Therefore, references to environmental practices in each Annex contained in this directive must be read in conjunction with Chapter 12 of INAC's Land Management Manual, as amended from time to time.

2. Authorities

- 2.1 There is no statutory authority under the *Indian Act* or any other federal legislation to set aside land as a reserve. Instead, lands are granted reserve status by federal Order in Council (OIC) pursuant to the Royal Prerogative, exercised by the Governor in Council, which is a non-statutory authority.
- 2.2 The *Federal Real Property Act* and its regulations apply to the transfer of land into federal title, outlining relevant authorities and requirements governing this stage of the process. This legislation, however, does not deal with the actual granting of reserve status to land.
- 2.3 Before seeking reserve status from the Governor in Council, or Minister under Bill C-14 and other proposed Claims Implementation legislation, either the Regional Director General (RDG) or Deputy Minister (DM) must first grant an Approval in Principle (AIP) to a proposal. An AIP itself represents INAC's decision to recommend a proposal to the Minister for consideration of reserve status through a submission to the Governor in Council, or a Ministerial Order under the above-mentioned Claims legislation. An AIP can be granted with or without conditions, since land purchases and other steps may have to be subsequently completed before a final recommendation for OIC is made.
- 2.4 RDG's have delegated AIP authority for all Legal Obligations, and Community Additions proposals which meet the ATR policy and site specific criteria for those categories outlined in this directive. New Reserve/Other Policy proposals are not delegated to RDGs for AIP. Any New Reserve/Other Policy proposals which RDGs are prepared to recommend, require Deputy Minister (DM) AIP.
- 2.5 This policy directive is issued under the authority of the Minister, HQ INAC, and is effective as of **September 27, 2001**.
- 2.6 It forms part of INAC's *Land Management Manual*, Chapter 10, Additions to Reserves; and replaces Part 1, Sections 9.1 to 9.49 inclusive of the Additions to Reserves policy dated November, 1991 (previously Chapter 9, INAC's Land Management Manual.)
- 2.7 For this directive, references to environmental practices in each Annex must be read in conjunction with Chapter 12 of INAC's Land Management Manual, as amended from time to time, which remains in effect.

3. Definitions

- 3.1 "ATR" is a short-form generic term referring to proposals for additions to reserve or new reserves.
- 3.2 "Addition to reserve" or "reserve addition" means a proposal for the granting of reserve status to land which is within the service area of an existing reserve community (see definition of "service area" below);
- 3.3 "New reserve" means the granting of reserve status to land which is not within the "service area" of an existing reserve community;
- 3.4 "Reserve community" means the locality where the First Nation members reside on a reserve, comprised of physical infrastructure, community services and installations;
- 3.5 "Service area" means 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;
- 3.6 "Approval in Principle" (AIP) 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;
- 3.7 "Environmental Impact Assessment" (EIA) means a process to identify and evaluate all potential environmental impacts that may occur as a result of a planned project on land being proposed for an addition to reserve or a new reserve. These are conducted in accordance with the *Canadian Environmental Assessment Act* and its regulations;
- 3.8 "Environmental Site Assessment" (ESA) means an analysis of a property proposed for addition to reserve or new reserve with respect to past and present uses, as well as on-site and off-site activities that may have the potential to affect the property's environmental quality, including the health and safety of occupants/residents;
- 3.9 "First Nation" and "Band" can be used interchangeably for the purposes of this directive as a "Band" defined under the *Indian Act*.

- 3.10 "Lands reserved by notation" in the territories are not covered by this directive. However, where a proposal in the territories is for a formal reserve established by OIC as defined by the *Indian Act*, this directive applies;
- 3.11 "Municipality" means 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;
- 3.12 "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 aside reserves is one such power and it is exercised by the Governor in Council acting through an OIC at the request of the Minister of INAC, or by a Ministerial Order as permitted by Claims legislation.

4. ATR Process Overview

- 4.1 The following is a general overview of the review/approval process for ATR proposals (see Annex D of this directive for more detailed procedures):
- a) First Nation forwards a BCR to INAC regional office.
 - b) Based on the BCR request, confirm in which of the three categories a proposal belongs ("Legal Obligations", "Community Additions" or "New Reserves/Other Policy").
 - c) Review/apply the relevant site-specific criteria (outlined in Annexes A to C of this directive).
 - d) Consult province, municipality, other affected government departments.
 - e) Review and recommendation by Regional ATR Committee.
 - f) RDG AIP or rejection and in cases where the Deputy Minister's approval is required, review/recommendation by the HQ ATR committee followed by Deputy Minister AIP or rejection.
 - g) Ensure any conditions attached to the AIP/complete surveys and other land transaction requirements are satisfied.
 - h) Prepare and forward Order in Council recommendation and submission or Ministerial Order to the Minister.
 - i) Minister recommends draft Order in Council to Privy Council, or approves the Ministerial Order.
 - j) Order in Council is approved or rejected.

- k) Register transaction in the Indian Lands Registry.
- l) Notify First Nation and affected third parties.

5. ATR Policy Categories

5.1 The first step in reviewing an ATR proposal is to confirm in which of the following three categories a proposal belongs: “**Legal Obligations**”, “**Community Additions**” or “**New Reserves/Other Policy**”. Since the process and application of the ATR site-specific criteria depend on how proposals are categorized, this is an important step. Separate site-specific criteria are set out for proposals falling under each of the three ATR policy categories in Annexes A to C of this directive. An overview of the general principles underlying the site-specific criteria is provided in Section F of this directive.

A. Legal Obligations: This category recognizes that Canada must fulfill its legal obligations to First Nations. It addresses proposals that seek reserve status for land based on specific claim settlement agreements under Treaty Land Entitlement (TLE), Specific Claims, court orders or legal reversions of former reserve land. Unless stipulated in a claims settlement agreement or other legal document, there is no legal obligation to grant reserve status to a particular parcel of land. Once a legal obligation involving a reserve land component is identified as the basis for the reserve proposal, the next step is to apply the site-specific criteria set out in Annex A. Subject to satisfying the requirements in the applicable claim settlement agreement or other legal document, as well as the site-specific criteria in Annex A, INAC will normally recommend reserve status for proposals based on this category.

- i) **Claims Settlement Agreements:** When a reserve proposal is based on the provisions of a settlement agreement, the first step is to carefully review the agreement for those provisions directing how this obligation will be implemented. There may be specific provisions setting out requirements that must be met, such as references to geographic location, program costs, environmental conditions, etc. Where the criteria/requirements in Annex A are inconsistent with or conflict with the provisions in a settlement agreement, the provisions in the settlement, agreement override the criteria/requirements set out in Annex A to the extent of the inconsistency or conflict. It should be noted that claims settlement agreements may apply the ATR policy fixed in time (as of the date of the agreement), or apply the ATR policy as amended from time to time. This is important for purposes of reviewing a proposal.

Most claim agreements specify a specific parcel(s) of land or a general land selection area. They also contain specific reference to any potential capital funding entitlements associated with these selections, or clearly state there is no capital funding entitlement. In those fewer cases of already settled specific claims where the settlement agreement is silent on land selection, the ATR policy is that it must involve an addition to reserve rather than the creation of a new reserve, unless the region has determined, with Department of Justice advice, that the understanding of the parties at the time of the agreement was different. Where the agreement is silent on capital funding entitlement, the ATR policy is that there is no such entitlement.

- ii) **Court Orders:** Although uncommon and therefore not set out as a separate annex in this directive, INAC may have to process a reserve proposal based on a court order, directing that land be granted reserve status. Court orders normally do not provide much, if any, detail on how the proposal should be processed or how the ATR policy should apply. INAC regions must therefore consult with the Department of Justice on how to implement a court order.

Although extremely rare, there may be court orders which actually grant reserve status to a specific parcel or parcels of land which have been the subject of a legal dispute. Where a court order includes specific direction, these directions must be followed in close cooperation with the Department of Justice.

It should be noted that cases other than those decided by the Supreme Court of Canada can be appealed to the next level. INAC staff should therefore contact the Department of Justice litigator on a file to determine when to implement a court order which either directs that reserve status be granted or which actually grants reserve status to land.

- iii) **Legal Reversions:** This category covers non-discretionary reversions of former reserve land where the original expropriation/transfer documentation included a specific and express reversion clause providing for the return of the land to Canada for the purpose of granting reserve status when the land is no longer required for the stated purpose (e.g., for railways, roads, etc.). As a matter of policy, INAC also includes reversion clauses which provide for the return of land to Canada when no longer required for the original purpose (but which do not specify returning the land to reserve status).

Where there is no reversion clause at all, the proposal is treated as a proposal under either the "Community Additions" or "New

Reserves/Other Policy” category, depending on whether it would be an addition or a new reserve.

It should be noted that reversions resulting from the restrictions in the *Railway Act* will not fall under this “Legal Reversions” policy unless there was also an express reversionary provision in the order authorizing the taking for railway purposes. Where there is no such reversionary clause, such proposals may be considered under either the “Community Additions” or “New Reserves/Policy” category (depending on whether such proposals result in an addition to reserve or new reserves).

This “Legal Obligations” category also includes ATR proposals for land which is being accepted in exchange for lands being expropriated or transferred under s.35 of the *Indian Act*.

B. Community Additions: This category recognizes that there is a class of routine proposals seeking the addition of land to an existing reserve community (as opposed to the establishment of a new reserve). See “Definitions”, Section C of this directive for relevant definitions.

i) **Additions to reserve proposals under this category are based on:**

- a) normal growth of the reserve community through expanding the existing reserve land base;
- b) natural geographic enhancements of the existing reserve land base; or
- c) returns of unsold surrendered land to the existing reserve land base.

For consideration under this category there can be no incremental costs to INAC beyond the region’s existing, approved budget allocation.

Where a proposal falls under this category and satisfies the site-specific criteria set out in Annex B, INAC will normally recommend reserve status.

Community Additions (continued)

- ii) **Normal Community Growth Additions:** Community growth proposals to expand the existing reserve land base can be the result of the reserve community/capital planning process or result from the availability of land which would meet a reserve community's short or longer term requirements. These additions to reserve proposals are based on the normal growth of the existing reserve community (e.g., resulting from an increase in the on-reserve population). Examples of community growth purposes include housing, schools, churches, recreational areas, community buildings, community economic projects, etc..
- iii) **Geographic Additions:** This heading covers additions to reserve proposals based on geographic enhancements to the existing reserve community's land base. They can arise from small adjustments for road right-of-ways, land accretions, etc.

The most common are road right-of-way corrections (i.e., where the land was previously taken or surrendered for a road right-of-way but adjustments are needed after construction is finished); natural accretions of land to a reserve boundary (adjacent to an ocean, lakes, rivers or streams); or, a geographic in filling (within or adjacent to the existing reserve boundaries) where the addition would enhance the physical integrity of the reserve community.

Where natural accretions of land to a reserve boundary (adjacent to an ocean, lakes, rivers or streams) may be involved, INAC should consult the Department of Justice on how to proceed. (**It should be noted that not all accretions involve the ATR process, boundaries are constantly being adjusted along the banks of rivers and these adjusted boundaries are considered the reserve boundaries*).

- iv) **Unsold Surrendered Land Additions:** This category involves addition to reserve proposals for unsold surrendered land to be returned to reserve status. Where such proposals involve additions to reserves, i.e., within the service area of the existing reserve community (as opposed to the creation of new reserves) and they meet the site-specific criteria outlined in Annex B of this directive, INAC will normally recommend reserve status.

Where a proposal involves the return of unsold surrendered land which would create a new reserve, it would have to be considered under the "New Reserves/Other Policy" category of this directive, and would be subject to the site-specific criteria outlined in Annex C of this directive.

- C. New Reserves / Other Policy:** This category covers all proposals which are not “Legal Obligations” or “Community Additions ” proposals under this directive. Within this category, the 1991 ATR policy is highly restrictive and/or requires extensive analysis and “justification” of proposals under the site-specific criteria outlined in Annex C of this directive.

The types of proposals covered under this category therefore include:

- a) the establishment of new reserves for social (e.g., residential, institutional) or commercial purposes (where for example, the policy requires that First Nations demonstrate that the benefits of a proposal cannot be substantially achieved by some other means, i.e., under another form of land tenure);
- b) the establishment of new reserves resulting from provincial land offerings or new reserves resulting from unsold surrendered land not within the service area of an existing reserve community (where for example, the benefits would have to be matched against federal cost implications and other site-specific criteria);
- c) the establishment of new reserves for landless bands/communities or to relocate existing bands/communities outside existing reserve boundaries;
- d) additions to reserves or new reserves proposals resulting from legal obligations, (e.g., claims settlement agreements) where the proposal goes beyond the commitment in the relevant legal agreement (e.g., in terms of funding, land selection etc.); or
- e) community additions proposals with unresolved questions of community need, funding source, etc..

6. Principles for Site-Specific Criteria

- 6.1 For each of the three major policy categories in this directive, this directive includes an annex outlining the site-specific criteria applicable to each one. The following are the guiding principles underlying these criteria:

New Reserves / Other Policy (continued)

- 6.2 **Aboriginal and Treaty Rights** The ATR process must respect Aboriginal and Treaty rights. First Nations are encouraged to ensure that other affected First Nations' interests in an ATR proposal are considered. It is possible that other First Nations or Aboriginal groups may have an Aboriginal or Treaty right to land proposed for reserve by a First Nation under this policy. In the specific claims settlement context, these interests will normally have been identified and addressed during the land selection process. However, a First Nation or Aboriginal group may assert previously unidentified Aboriginal and Treaty rights when a First Nation proposes land for reserve status. These assertions must be addressed and in such cases departmental officials should consult the *LTS Lands and Environment Fiduciary Management Strategy*, as amended from time to time, to determine how to address that potential interest.
- 6.3 Where there are competing or overlapping claims on land by Aboriginal groups, the First Nation seeking reserve status must consult with all such groups, and INAC staff should consult with Specific Claims, Comprehensive Claims or the Federal Treaty Negotiation Offices, as appropriate. As soon as possible, therefore, Aboriginal groups who are either involved or potentially involved must be notified, so that these groups have the opportunity to discuss and clarify their respective interests and work together to resolve any potentially competing or overlapping interests.
- 6.4 **Community Relations** ATR proposals share the characteristics of community boundary adjustments of provincial municipalities (i.e., change in community authority), but also involves change in land title and jurisdiction (from provincial to federal). Therefore, the normal local communications and consultation requirements of municipal boundary adjustments are compounded in the case of ATR proposals, especially since the on-reserve regime is often unfamiliar to surrounding communities and other third parties who may be involved. These issues can be further complicated in existing urban or otherwise populated areas where commercial projects are involved.
- 6.5 All of this means that an early and healthy dialogue led by the First Nation is required between the First Nation, the public and affected individuals and interest groups to increase awareness and deal with potential issues.

- 6.6 **Provincial/Municipal Relations** Unless a land acquisition involves Federal Crown land, granting reserve status changes jurisdiction from provincial and municipal to federal. Provincial and municipal jurisdiction over the land generally disappears and the land becomes subject to the *Indian Act* and First Nation by-laws. Reserve proposals may therefore potentially impact on provincial and municipal governments and this requires that these levels of government have an opportunity to express their interests.
- 6.7 Provinces and municipalities must therefore be advised of an ATR proposal within their jurisdiction and must have the opportunity to express their views on the proposal.
- 6.8 In recognition that First Nation communities and non-First Nation communities live side by side, the federal government promotes a “good neighbour” approach. This involves First Nations and municipalities sitting down together to discuss issues of mutual interest and/or concern in the same way neighbouring municipalities must do in relation to one another. Where requested by the municipality in whose boundaries the reserve is proposed to be located, or by the First Nation, there is a requirement for the First Nation and the municipality to negotiate in areas such as joint land use planning/by-law harmonization, tax considerations, service provision and future dispute resolution. However, municipal governments do not have a general or unilateral veto over the granting of reserve status.
- 6.9 The requirement to negotiate means that both parties must engage in discussions based on good will, good faith and reasonableness.
- 6.10 The need for discussions may be with respect to ATR proposals within the boundaries of a municipality (in which case consultation/negotiation leading to agreement may be necessary); or with adjacent/abutting municipalities (where consultation alone may be necessary).
- 6.11 The First Nation making the ATR proposal has the primary role in leading discussions and negotiations, as the governing body seeking to extend its governance jurisdiction into that of the province or the municipality.
- 6.12 Upon a First Nation’s request, INAC may have a role in providing technical support to the First Nation during discussions/negotiations with affected provinces and municipalities. Canada is not a party to any concluded First Nation-municipal agreements.

- 6.13 **Good Title Transfer and Third Party Interests in Land** Appropriate surveys, proper land descriptions and title searches must be done for every ATR proposal.
- 6.14 Additionally, lessees, subsurface right holders and other third parties may have legal interests in the land proposed for ATR or have a legal right of access to the land or a legal right to use the land, e.g., through leases, licences, permits, easements, rights of way, etc.
- 6.15 The change in title and jurisdiction involved in granting reserve status to land is a complicating factor affecting third party interests which does not occur in otherwise similar municipal boundary expansions. Once the land becomes a reserve, these interests will be subject to federal jurisdiction and the statutory regime of the *Indian Act*. This often involves negotiating an agreement to purchase the interests outright or to ensure that the interests remain in force and effect on the land once it is granted reserve status.
- 6.16 These third party interests must therefore be dealt with prior to the acquisition of land by INAC or the granting of reserve status. In regions where claims implementation legislation applies, it may be possible for First Nations to conduct a referendum/designation vote addressing third party interests on land being proposed under a claim before the land is granted reserve status. Otherwise, the First Nation can only designate the land after the land becomes reserve.
- 6.17 **Financial Implications and Funding Sources** An ATR reserve proposal may potentially impact on INAC and other federal government programming. Additions to reserves and new reserves must be affordable and the funding sources for any anticipated costs must be identified before an AIP can be given.
- 6.18 INAC funding impacts may include increased requirements for investments in capital and maintenance funding to service the new or expanded reserve land base. (e.g., both core and non-core funding for construction of roads and road maintenance, new schools, extension of subdivisions, sewer and water, etc.), as well as ongoing program funding (to support social programs, health services, education, etc.), to serve any potential increase in the on-reserve population.

- 6.19 Therefore, unless the potential funding requirements are not immediate and/or the First Nation is willing to acknowledge that future requirements will only be met as funds become available through the normal budgetary process, funding requirements need to be forecasted and the source of funds identified. The funding source can be from the First Nation's available funding allocation from INAC, First Nation's own resources, or other (e.g., from a province offering land to a First Nation).
- 6.20 For Claims ATRs, incremental funding entitlements should be provided for in or at the time of the claim settlement. For Community Addition proposals, funding requirements must be met from the First Nation itself or the INAC regional office's budget. As a result, the ATR policy promotes good long-term community and financial planning in advance of specific ATR proposals.
- 6.21 **Good Environmental Practices** Once land becomes reserve, the First Nation and INAC take on a number of environmental responsibilities. This means that both parties need to ensure that land is not contaminated by its former or anticipated uses. Where there is any degree of contamination, it must be assessed and, if necessary, remediated according to the planned use of the land.
- 6.22 The requirement to assess the past and future environmental condition of proposed reserve land is based on concern for the health and safety of First Nation members who will reside on and/or use the land and on the budgetary concern that the clean-up of contaminated lands can be extremely expensive.
- 6.23 The environmental requirements outlined in each annex to this directive must be applied in accordance with Chapter 12 of the Land Management Manual, as amended from time to time.

7. References

- a) INAC's Land Management Manual, as amended from time to time. This directive forms part of Chapter 10 of this Manual and, along with Chapter 12 of this Manual, replaces Chapter 9 of the previous Manual in its entirety.
- b) "Additions to Reserve Policy": Criteria for proceeding in cases of disputes on tax loss" directive, dated November 17, 1997 (issued by: Director, Lands, INAC HQ).
- c) INAC's "Addition to Reserve Communications/Consultation Checklist", as amended from time to time;

- d) INAC's New Bands and Band Amalgamations Policy, 2003.
Contact: Registration Revenues and Band Governance Branch, INAC HQ.
- e) *Canadian Environmental Assessment Act* and regulations, as amended from time to time. See also *Environmental Assessment General Procedures (IIAP)*, October 1995, as amended from time to time;
- f) INAC's *Lands and Environment Fiduciary Management Strategy*, (dated January 2, 1994), as amended from time to time;
- g) Treasury Board Real Property Management Policy Manual, as amended from time to time.
- h) *Federal Real Property and Federal Immovables Act* and regulations, as amended from time to time.
- i) *Canada Lands Surveys Act* and regulations, as amended from time to time. See also *Framework Agreement between Lands and Trust Services, INAC and Legal Surveys Division, Natural Resources Canada, Feb 6, 1998*, registered in the Indian Land Registry under Instrument No. 258930, for the type of land description requirements for reserve land transactions, including additions/new reserves.
Contact: Manager, Surveys, LTS, INAC HQ. Tel: (819) 994-6743.
- j) INAC's *Indian Lands Registration Manual*, as amended from time to time.
Contact: Registrar, Indian Land Registry, INAC HQ. Tel: (819) 997-8123
- k) Geographical Names Board of Canada (formerly Canadian Permanent Committee on Geographic Names (CPCGN); *Principles and Procedures for Geographic Naming*, 1990; Ministry of Supply and Services, ISBN 0-662-57902-X. Also *CPCGN Strategic Plan*, November, 1993.

Contact: Project Manager, Geographical Names Board of Canada, Centre for Topographic Information, Natural Resources Canada HQ. Tel: (613) 992-3892.
- l) *Indian Taxation Advisory Board* for information on First Nation/municipal tax/service agreements and models.

Contact: Ottawa Office: Tel: (613) 954-9972;
Kamloops Office: Tel: (250) 828-9857

- m) For information on this directive or to obtain any of the above-noted references, please contact the following:

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Manager, Land Management Section, HQ Lands Directorate/LTS.
Tel: (819) 953-2920.

INAC Regions:

Atlantic Region: Manager, Lands, Environment and Natural Resources
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Quebec Region: Manager, Lands and Resources
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Annex A

Site-Specific Criteria for Legal Obligations Proposals (Treaty Land Entitlement, Specific Claims and Legal Reversions)

1. General

- 1.1 These criteria apply to proposals that seek reserve status under specific claim settlement agreements (Treaty Land Entitlement, Specific Claims), as well as to legal reversions of former reserve land (where the original expropriation/transfer included a specific reversion clause returning the land to Canada when the land is no longer required for the original purposes, e.g., railways, roads, etc.).
- 1.2 In order to implement a court order, INAC regions must consult with the Department of Justice.
- 1.3 Where site-specific criteria are covered by claim settlement agreements, the provisions in such agreements take precedence over any of the site-specific criteria in this annex.
- 1.4 Where settlement agreements are silent on land selection, the ATR policy is that proposal must involve additions to reserve (as opposed to new reserves).
- 1.5 Where settlement agreements are silent on funding entitlement, the ATR policy is that there is no such entitlement.
- 1.6 In cases of legal reversions, proposals can result in additions to reserves or new reserves. It should be noted that reversions resulting from the restrictions in the *Railway Act* will not fall under the “Legal Obligations/Legal Reversions” policy of this directive unless there was also an express reversionary provision in the order authorizing the taking for railway purposes. Where there is no such reversionary clause, such proposals may be considered under either the “Community Additions” or “New Reserves/Policy” category (depending on whether they result in additions to reserves or new reserves).
- 1.7 Regions, and, where applicable, specific claim negotiators, should ensure that any communications planning with the First Nation is addressed well in advance of land selections by the First Nation.

2. Environmental Site Assessment (ESA)

- 2.1 As directed by Treasury Board policy, an environmental site assessment shall be conducted for any land acquisition. Therefore, an environmental site assessment must be done for any ATR proposal in accordance with Chapter 12 of INAC's Land Management Manual, as amended from time to time, to determine the state of the existing site. The policy aims to determine what **past or present activities** might have adversely affected the site, and to have the previous/current user(s) correct these conditions prior INAC acquiring the land and setting it aside for the use and benefit of the First Nation(s).
- 2.2 Proposed ATR submissions should also include an estimate of the costs of an environmental site assessment, if INAC has determined it will pay for such costs.

3. Environmental Impact Assessment (EIA) for Any Project

- 3.1 Pursuant to the *Canadian Environmental Assessment Act* (CEAA), a federal authority must carry out an environmental impact assessment before it exercises any prescribed power or authority, duty or function, which would enable a project as defined under that Act to proceed either in whole or in part. Therefore, if there is a known project proposed on the land to be set aside as reserve which triggers the application of CEAA, CEAA requires that an environmental impact assessment (EIA) be carried out for these proposed activities. Note that it is the project proposed for the land under consideration for ATR that may trigger CEAA, not the Governor in Council or Ministerial Order creating the reserve. The EIA report will normally be prepared by the project proponent, under the direction of the First Nation and the department. Please note that this assessment is for **future proposed activities**, and is different from the environmental site assessment required under Section 2.1 above, which is for past or current activities which took place on the land and which may have contaminated the land.
- 3.2 Refer to Chapter 12 of INAC's Land Management Manual, as amended from time to time.

4. Financial Implications and Funding Sources

- 4.1 Proposals which require an increase to the department's A - base will generally not be approved, except in cases provided for in claim settlements or treaty/legal obligations. Funding issues cannot be used to frustrate a legal ATR once the legal commitment has been made. Therefore, increases that might be required to approved INAC budgets, and appropriate sources of funds to facilitate legal ATRs, should be identified prior to signing the relevant claim settlement agreement.
- 4.2 The short-term and long-term financial implications of proposed additions to reserves/new reserves should therefore be reviewed by the parties and appropriate provisions contained in the concluded claim settlement agreement. Provisions will vary depending on whether the land is already identified prior to claim agreement ratification or if the First Nation will proceed with land purchases after ratification, as well as on the potential lapse of time before the land is acquired.
- 4.3 Where a claim settlement agreement is silent on incremental costs, the ATR policy is that there is no funding entitlement associated with the addition to reserve or new reserve with respect to transaction costs, as well as infrastructure, housing, and other capital costs. These must be identified and addressed in the agreement.
- 4.4 Ongoing operational and program costs, unless otherwise provided for in the claim settlement agreement, must be sourced from the region's operating budget. Once this internal resourcing process has been completed to the satisfaction of all parties the First Nation's proposal can be given approval in principle.
- 4.5 Therefore, regions have the responsibility to forecast non-discretionary claims-related ATR pressures resulting from such agreements through INAC's financial management system so that they are in a position to respond to individual legal requests without delay.

5. Other Federal Government Departments/Agencies

- 5.1 The cost implications of ATR proposals for other federal government departments and agencies should also be provided for in the claim settlement agreement. Since these pressures cannot be used to frustrate a legal commitment to reserve creation, First Nations should be informing other federal departments and agencies of potential operational pressures in advance of potential reserve creation, i.e., preferably, before claim settlement agreements are concluded. Notice of proposed individual additions however should be given, as a courtesy, to other affected federal government departments or agencies, e.g., Health Canada, the RCMP, etc. Three months should be allowed for a response.

6. Existing Encumbrances

- 6.1 Land to be acquired under an ATR proposal may be subject to either existing legal interests in the land or existing rights to use the land. Examples of such encumbrances are leases, licences, permits, easements, rights of way, etc. The claim settlement agreement should provide how these interests will be treated.
- 6.2 In order to determine what, if any, encumbrances there are, INAC should ask the Department of Justice to arrange for a title search to be done against the land which is the subject of a proposal.
- 6.3 These encumbrances, which are legal interests in or rights to use the land, are distinct from the non-legal issues or concerns that a municipality or other third party may raise and should not be confused with such issues.
- 6.4 Where such encumbrances are not addressed in the settlement agreement, they should be minimized to the extent possible by the time the land is granted reserve status. This will allow the First Nation to enjoy the intended benefits from its proposed land use. If necessary, a limited degree of encumbrance is acceptable, as long as it does not affect the First Nation's proposed land use and does not conflict with the *Indian Act*, e.g. short-term licences granted under the *Federal Real Property and Federal Immovables Act* (FRPFIA) or provincial grants of subsurface mineral rights.

- 6.5 Existing encumbrances must be specifically identified and mechanisms for dealing with them must be determined in conjunction with the Department of Justice prior to the proposed acquisition by INAC. Encumbrances include both registered and unregistered interests/uses (where such unregistered interests are known).
- 6.6 Unless otherwise provided for in the claim settlement agreement, consistent with the objective of speeding up the ATR process, consideration should be given to taking title to the land subject to the existing interests/uses, as opposed to negotiating the revocation of such interests/uses and their conversion into an interest/use under the *Indian Act*. On this last point, if a third-party is concerned over the legality and/or certainty of its interest or right to use the land, another technical option is to create the interest/use under FRPFIA, set the land aside subject to the FRPFIA interest/use and then convert the interest/use into an *Indian Act* transaction once the land has reserve status.

7. Access

- 7.1 Where third party land would be "landlocked" by the addition to reserve or new reserve, legal access over the proposed reserve is to be negotiated, as a legal conveyancing requirement, by the First Nation before agreement in principle is granted. The need for access to utilities should also be negotiated with respect to the proposed reserve land. Upon First Nation request, INAC may lend technical assistance in support of the First Nation's negotiating lead.

8. Contiguity of Multiple Parcels

- 8.1 Where more than one parcel is proposed to be set aside as reserve, parcels should be contiguous/adjacent to one another.

9. Parcel Boundaries

- 9.1 Where relevant, the boundaries of additions/new reserves should follow natural water boundaries.
- 9.2 Parcel boundaries shall be described in accordance with the February 6, 1998 INAC/NRCan agreement on legal descriptions.

10. Mines and Minerals

- 10.1 Where the First Nation is not conducting the land purchase, INAC shall ensure that the First Nation Council is advised of any exclusions with respect to mine and mineral rights.
- 10.2 If a third party has subsurface rights for the parcel of land to be set aside as reserve, access over the reserve to exercise those rights, or a buy-out of those rights must be negotiated prior to the lands being granted reserve status. Upon a First Nation's request, INAC may provide technical assistance in support of the First Nation's lead in negotiations.

11. Provincial Considerations

- 11.1 The affected province must be consulted in writing on the potential impact of an ATR proposal on provincial programs and services. Any issues must be resolved and documented by written correspondence prior to finalization and ratification of the specific claim settlement agreement or other legal agreement, especially where the proposed reserve land has already been identified. However, if these consultations occur only at the time when the subsequent ATR proposals are being processed, or when a proposed land selection is made, then three months must be given to the province to express any views. Subsequent discussions however should not unreasonably delay the addition.
- 11.2 Where a First Nation selects land under a claim involving the return of unsold surrendered land, in Ontario, this requires the concurrence of Ontario, since the land is under provincial title under the provisions of the *Indian Lands Agreement* (1986).
- 11.3 While the First Nation has the lead role in discussions with provincial governments, upon request from the First Nation, INAC may have a role in providing technical assistance in support of that lead.

12. Municipal Considerations

12.1 General:

1. In recognition that First Nation communities and non-First Nation communities live side by side, the federal government promotes a “good neighbour” approach. This involves First Nations and municipalities sitting down together to discuss issues of mutual interest and/or concern. Where requested by a municipality or a First Nation, there is a requirement to negotiate arrangements in such areas as joint land use planning/by-law harmonization, tax considerations, service provision and future dispute resolution.
2. The potential requirement to negotiate in these areas means that both parties must engage in discussions based on good will, good faith and reasonableness. Note that the need for discussion may be with respect to ATR proposals within the boundaries of a municipality (where consultation/negotiations leading to an agreement may be necessary) or with adjacent/abutting municipalities (where consultations alone may be necessary).
3. While municipalities must be consulted in accordance with this policy, they have no general or unilateral veto with respect to reserve proposals.
4. While the First Nation has the lead role in discussions and/or negotiation with neighbouring municipalities, upon request from the First Nation, INAC may have a role in providing technical assistance in support of that lead. Canada is not a party to any concluded agreements between a First Nation and a municipality.

12.2 Municipal/First Nation Consultation:

1. Where the land to be set aside as reserve is within or adjacent/abutting a municipality, the First Nation must inform that municipality in writing of the proposal under consideration. Municipalities must be given three months to respond in writing with any issues. Subsequent discussions however should not unreasonably delay the addition.

2. Issues that might arise and which may need to be covered in a First Nation-municipal agreement are the provision of municipal services, by-law compatibility, a consultation and dispute resolution process for matters of mutual concern and potential net tax loss adjustments due to the loss of municipal jurisdiction over the land. The municipality and First Nation are entitled to formalize such an agreement in writing.
3. The First Nation can accelerate the proposal by preparing draft agreements in these areas. The Indian Taxation Advisory Board may be a good source for First Nations to consult, with respect to model agreements developed by other First Nations.

12.3 **Municipal Tax Considerations**

1. As noted above in sections 12.1 and 12.2, one of the issues which can arise in discussions with a municipality is net tax loss adjustment. Unless otherwise provided for in a claim settlement or other legally binding agreement, the First Nation is required to negotiate a net tax loss adjustment where requested by a municipality, with assistance of the region if requested. Again, unless provided for in a claim settlement or other legally binding document, the First Nation is responsible for paying any negotiated net tax loss sum.
2. The objective of such negotiations is to allow the municipality to adjust to the net effect of the combined reduction in municipal servicing costs and reduced tax base caused by an addition proposal. It is not to compensate the municipality 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. (The Indian Taxation Advisory Board has computer software which can support First Nations' analysis in these areas).
3. A reasonable compensation may be determined using the following guideline:
 - a) 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;

- b) any funds the municipality is receiving in provincial equalization payments;
- c) any savings which will result from a reduced delivery of services following the granting of reserve status; and
- d) the relative size of the loss in relation to the total tax revenues of the municipality.
- e) school boards do not need any compensation for tax loss adjustment given that they are already funded for tuition costs for on-reserve students and funding arrangements are available for subsidizing boards for the proportionate capital costs for reserve students. However, a First Nation may negotiate such a payment if it deems it to be appropriate. Upon a First Nation's request, INAC may have a role in providing technical assistance to support the First Nation's negotiating lead. Any such negotiations will not delay the ATR proposal.

13. Unresolved Provincial or Municipal Issues

13.1 If outstanding provincial issues:

If there are outstanding provincial issues and/or concerns but the First Nation and the RDG still wish to proceed, the region must forward the proposal, with options, to INAC HQ for consideration by the Deputy Minister and/or Minister.

13.2 If outstanding municipal issues:

- a) Where a settlement/legal agreement has not dealt with how to address municipal issues and there are outstanding municipal issues and/or concerns but the First Nation and RDG still wish to proceed, the proposal must be forwarded to INAC HQ for consideration by the Deputy Minister and/or Minister. In such circumstances, the proposal may be processed if the First Nation is prepared to enter into an agreement on the issues raised by the municipality and it is deemed by the RDG that the municipality is unwilling to respond in good faith.
- b) There is a reasonable expectation on both the municipality and the First Nation that the 'good neighbour' principle is used to negotiate in good faith throughout this process.

14. Aboriginal or Treaty Rights

- 14.1 Unless otherwise provided for in a claim settlement or other legally binding agreement, the First Nation must consult with other First Nations or Aboriginal groups who claim Aboriginal and/or Treaty Rights (as well as with other First Nations who could reasonably be expected to have such claims) in the area of the land selected for addition to reserve/new reserve. All groups should work together to resolve any competing interests.
- 14.2 Competing claims should be expressed in writing by the claimant group. The First Nation selecting land proposed for addition/new reserve must advise INAC where there are competing claims. Where there is continuing disagreement among competing First Nations or Aboriginal groups on a proposed selection, and the selecting First Nation advises INAC that it wishes to proceed, the proposed selection must be submitted, with options, to the Deputy Minister and/or Minister for decision.
- 14.3 While other competing First Nations or Aboriginal groups must be consulted and their views respected, they have no general veto with respect to ATR proposals.
- 14.4 INAC staff should consult the *LTS Lands and Environment Fiduciary Management Strategy* for guidance with respect to any departmental responsibilities in such cases and consult Specific Claims, Comprehensive Claims or the Federal Treaty Negotiation Offices, as appropriate.

Annex B

Site-Specific Criteria for Community Additions Proposals

1. General

- 1.1 Community additions proposals must be based on:
- a) meeting a reserve community's normal growth needs for additional land to service its members as a community (such community purposes may include housing, schools, churches, recreational areas, community buildings and community economic projects); or
 - b) natural geographical enhancements (e.g., accretions, in filling, etc.) which would improve the functioning of the existing reserve base; or
 - c) returns of unsold surrendered land (which, in Ontario, also require addressing the provisions of the *Indian Lands Agreement* (1986)).
- 1.2 INAC will normally recommend reserve status for these types of proposals, subject to site-specific considerations in this annex.
- 1.3 Community additions proposals involve additions to existing reserves (as opposed to the establishment of new reserves). Therefore, proposals under this category must involve land which is within the service area of the existing reserve community. See "Definitions", Section C of this directive, for relevant definitions.
- 1.4 Assessment under this category is generally based on whether or not proposals involve planned development and are affordable.
- 1.5 The return of unsold surrendered land which would effectively create a new reserve, or result in substantially increased program costs, is not contemplated by this annex and should be addressed as a new reserve proposal under "New Reserves/Other Policy", in accordance with Annex C of this directive.
- 1.6 Where a geographic additions proposal involves natural accretions of land to a reserve boundary (adjacent to oceans, lakes, rivers or streams), INAC should consult the Department of Justice on how to proceed.

2. Environmental Site Assessment (ESA)

- 2.1 As directed by Treasury Board policy, an environmental site assessment shall be conducted for any land acquisition. Therefore, an environmental site assessment must be conducted for any addition to reserve in accordance with Chapter 12 of INAC's Land Management Manual, as amended from time to time, to determine the environmental state of the existing site. The policy aims to determine what **past or present activities** might have adversely affected the site, and to have the previous/current user(s) correct these conditions prior to setting the land aside for the use and benefit of the First Nation(s).
- 2.2 Proposed ATR submissions should also include an estimate of the costs of an environmental site assessment, if INAC has determined it will pay for such costs.

3. Environmental Impact Assessment (EIA) for Any Project

- 3.1 Further to the *Canadian Environmental Assessment Act* (CEAA), a federal authority must carry out an environmental impact assessment before it exercises any prescribed power or authority, duty or function, which would enable a project as defined under that Act to proceed either in whole or in part. Therefore, if there is a known project proposed on the land to be set aside as reserve which triggers the application of CEAA, then CEAA requires that an environmental impact assessment (EIA) be carried out for these proposed activities.
- 3.2 Note that it is the project proposed for the land under consideration for ATR that may trigger CEAA, not the Governor in Council or Ministerial Order creating the reserve. The EIA report will normally be prepared by the project proponent, under the direction of the First Nation and the department.
- 3.3 Please note that this assessment is for **future proposed activities**, and is different from the environmental site assessment required under Section 2.1 above, which is for past or current activities which took place on the land and which may have contaminated the land.
- 3.4 Refer to Chapter 12 of INAC's Land Management Manual, as amended from time to time.

4. Financial Implications and Funding Sources

- 4.1 This criterion recognizes that First Nation communities need to grow and adjust their boundaries (as do non-First Nation communities across Canada), and that their growth requirements should be addressed in a reasonable way. It therefore contemplates the involvement of First Nations, INAC and other parties in early community and land use planning.
- 4.2 Therefore, under this category, proposals seeking the expansion of an existing reserve should be approached according to whether or not they involve short-term development.
- 4.3 **Short-term Development:** These are reserve addition proposals which in whole or in part involve short-term development, e.g., residential, institutional, economic, etc. They may therefore have immediate federal program funding requirements, (i.e., within the current regional planning cycle), involving capital/infrastructure, as well as ongoing program costs, such as operation and maintenance or education and other social programs. In these cases, a full, cross-program cost analysis must be done with input from interested sectors of INAC and the money must be available from either the region's budget and/or the First Nation (either directly or from a third party, e.g., a province).
- 4.4 Where the First Nation and INAC are involved in a good ongoing community planning relationship, this analysis is completed at the planning stage, long before the First Nation submits its BCR to INAC seeking the addition. The land component of the overall development project can then be processed quickly under this ATR category, since all issues, including community planning/needs assessment and costing would have already been addressed. Otherwise, the review process and the granting of reserve status are delayed, creating frustrations all around.
- 4.5 **No Short-term Development:** These are addition to reserve proposals involving land which becomes available to a First Nation and which can meet the reserve community's longer term growth requirements. Where an addition to the existing reserve can serve longer term community needs and there is no planned development of the land in the short-term, no assessment of financial implications and funding sources is required (other than the costs of land acquisition), which may come from the region, the First Nation or a third party (e.g., a province).

- 4.6 In these cases, the First Nation must formally document its recognition that there is no funding entitlement being sought with the addition and that longer term costs associated with any potential development of the land will have to be sourced from the First Nation's normal funding allocation. Incremental costs therefore are to be resourced over the longer-term through the normal regional capital planning process.
- 4.7 Note that in either short or long-term development cases, where the First Nation does not have a valid community plan, the community need for the land may still need to be demonstrated, normally by feasibility studies based on good community planning principles. The criteria to be used are those set out in Annex C, section 4, of this directive.

5. Other Federal Government Departments/Agencies

- 5.1 Other federal government departments and agencies, e.g., Health Canada, the RCMP, should be contacted by INAC regions and given the opportunity to assess the potential impact on their program delivery resulting from proposed community additions. This forecasting should be done as part of the normal community planning process. Where this has not already been done, INAC regions must notify relevant federal departments and agencies in writing and allow three months for any comments to be provided.

6. Existing Encumbrances

- 6.1 Land to be acquired under an additions proposal may have existing legal interests or be subject to rights to use the land. Examples of such encumbrances are leases, licences, permits, easements, rights of way, etc.
- 6.2 In order to determine what, if any, encumbrances there are, INAC should ask the Department of Justice to arrange for a title search to be done against the land which is the subject of a proposal.
- 6.3 These encumbrances, which are legal interests in or rights to use the land, are distinct from the non-legal issues or concerns that a municipality or other third party may raise and should not be confused with such issues.
- 6.4 Any existing encumbrances should be minimized to the extent possible by the time the land is granted reserve status. If necessary, a limited degree of encumbrance is acceptable, as long as it does not affect the First Nation's proposed land use and does not conflict with the *Indian Act*.
- 6.5 Existing encumbrances must be specifically identified and mechanisms for dealing with them must be determined in conjunction with the Department of

Justice prior to the proposed acquisition by INAC. Encumbrances include both registered and unregistered interests/uses (where such unregistered interests are known).

- 6.6 Consistent with the objective of speeding up the ATR process for the First Nation, consideration should be given to taking title to the land subject to the existing interests/uses, as opposed to negotiating the revocation of such interests/uses and their conversion into an interest/use under the *Indian Act*. On this last point, if a third party is concerned over the legality and/or certainty of its interest or right to use the land, another technical option is to create the interest/use under the FRPFIA, set the land aside subject to the FRPFIA interest/use and then convert the interest/use into an *Indian Act* transaction once the land has reserve status.

7. Access

- 7.1 Where third party land would be "landlocked" by the addition to reserve, legal access over the proposed reserve is to be negotiated, as a legal conveyancing requirement, by the First Nation before an AIP is granted. The need for access to utilities should also be negotiated with respect to the proposed reserve land. Upon the First Nation's request, INAC may provide technical assistance in support of the First Nation's negotiating lead.

8. Contiguity of Multiple Parcels

- 8.1 Where more than one parcel is proposed to be set aside as reserve, they should be contiguous/adjacent to one another.

9. Parcel Boundaries

- 9.1 Where relevant, the boundaries of reserve additions should follow natural water boundaries.
- 9.2 Parcel boundaries shall be described in accordance with the February 6, 1998 INAC/NRCan agreement on legal descriptions.

10. Mines and Minerals

- 10.1 Where the First Nation is not conducting the land purchase, the INAC lands officer shall ensure that the First Nation Council is advised of any exclusions with respect to mine and mineral rights.
- 10.2 If a third party has subsurface rights for the parcel of land to be set aside as reserve, the First Nation must negotiate either access over the reserve to exercise those rights or a buy-out of those rights.

Where requested by a First Nation, INAC may have a role in providing technical assistance in support of the First Nation lead in negotiations.

11. Provincial Considerations

- 11.1 The affected province must be notified of the proposal in writing and three months given to the province to express its views on the potential impact of the proposal on provincial programs and services. While issues must be resolved and documented by written correspondence, subsequent discussions should not unreasonably delay the addition.
- 11.2 The First Nation should also obtain the province's concurrence that, among other issues the Province may raise, there are no competing land use problems for the site in question, prior to submitting its proposal to INAC. Otherwise, there could be delays afterwards as the First Nation/INAC seek this determination.
- 11.3 Provincial concurrence will be required for returns of unsold surrendered lands for those provinces where the land is in provincial title, e.g., in Ontario pursuant to the *Indian Lands Agreement Act* (1986).
- 11.4 Upon a First Nation's request, INAC may have a role in providing technical assistance in support of the First Nation lead in discussions/negotiations with a province.

12. Municipal Considerations

12.1 General:

In recognition that First Nation communities and non-First Nation communities live side by side, the federal government promotes a “good neighbour” approach. This involves First Nations and municipalities sitting down together to discuss issues of mutual interest and/or concern. Where requested by a municipality or a First Nation, there is a requirement to negotiate arrangements in such areas as joint land use planning/by-law harmonization, tax considerations, service provision and future dispute resolution.

12.2 The potential requirement to negotiate in these areas means that both parties must engage in discussions based on good will, good faith and reasonableness. Note that the need for discussion may be with respect to ATR proposals within the boundaries of a municipality (where consultation/negotiations leading to an agreement may be necessary) or with adjacent/abutting municipalities (where consultations alone may be necessary).

12.3 While municipalities must be consulted in accordance with this policy, they have no general or unilateral veto with respect to reserve proposals.

12.4 While the First Nation has the lead role in discussions and/or negotiation with neighbouring municipalities, upon request from the First Nation, INAC may have a role in providing technical assistance in support of that lead. Canada is not a party to any concluded agreements between a First Nation and a municipality.

12.5 **Municipal/First Nation Consultation:** Where the land to be set aside as reserve is within or adjacent/abutting a municipality, the First Nation must inform that municipality in writing of the proposal under consideration. Municipalities must be given three months to respond in writing with any issues. However, subsequent discussions should not unreasonably delay the proposal.

12.6 The First Nation should ensure a neighbouring municipality does not have competing land use plans for the land in question, prior to submitting its proposal to INAC. Otherwise, there could be delays afterwards as the First Nation/INAC seek this determination.

- 12.7 Other issues that might arise and which may need to be covered in a First Nation-municipal agreement are the provision of municipal services, by-law compatibility, a consultation and dispute resolution process for matters of mutual concern and potential net tax loss adjustments due to the loss of municipal jurisdiction over the land. The municipality and First Nation are entitled to formalize such an agreement in writing.
- 12.8 The First Nation can accelerate the proposal by preparing draft agreements in these areas. The Indian Taxation Advisory Board may be a good source for First Nations to consult, with respect to model agreements developed by other First Nations.
- 12.9 **Municipal Tax Considerations:** As noted above in Sections 12.1 and 12.2, municipalities may raise the matter of tax loss in discussions with a First Nation. Unless already covered by a service or other agreement with the municipality, where requested by a municipality, the First Nation is responsible for paying any negotiated net tax loss adjustment and has the lead in negotiations with the municipality. Upon a First Nation's request, INAC may have a role in providing technical assistance in support of the First Nation's negotiations lead.
- 12.10 The objective of tax loss negotiations is to allow the municipality to adjust to the net effect of the combined reduction in municipal servicing costs and reduced tax base caused by removing land from the municipal tax base. It is not to compensate the municipality indefinitely for the gross level of lost taxes, given that servicing costs are also being reduced or are addressed in a separate municipal service agreement. The Indian Taxation Advisory Board has computer software which can support First Nations' analysis in these areas.
- 12.11 A reasonable compensation may be determined using the following information:
1. 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;
 2. any funds the municipality is receiving in provincial equalization payments (these are provincial funds provided to municipalities which for any reason suffer a loss to their tax base);
 3. any savings which will result from a reduced delivery of services following the granting of reserve status;
 4. the relative size of the loss in relation to the total tax revenues of the municipality;

- 12.12 School boards do not need any compensation for tax loss adjustment given that they are already funded for tuition costs for on-reserve students and funding arrangements are available for subsidizing boards for the proportionate capital costs for reserve students. However, First Nations may negotiate such a payment if they view it as appropriate. Upon the First Nation's request, INAC may have a role in providing technical support to the First Nation during negotiations.

13. Unresolved Provincial or Municipal Issues

- 13.1 **If outstanding provincial issues:** Where provincial consultations indicate that there are significant competing land use or other issues that cannot be resolved with the province and the First Nation/RDG wish the project to be considered, then the proposal will have to be forwarded, with options, to the Deputy Minister and/or Minister for review.
- 13.2 **If outstanding municipal issues:** Where the First Nation and the municipality cannot resolve competing land use or other issues, such as tax loss, by-law harmonization, etc., but the First Nation and the RDG still want to proceed, the proposal must be forwarded, along with the region's recommendation, for consideration by the Deputy Minister and/or Minister. A proposal may proceed in cases where the First Nation is prepared to enter into an agreement on the issues raised by the municipality and it is deemed by the RDG that the municipality is unwilling to respond in good faith.
- 13.3 There is a reasonable expectation on both the municipality and the First Nation that the 'good neighbour' principle is used to guide and underlie good faith negotiations throughout the process.

14. Aboriginal or Treaty Rights

- 14.1 Since community additions involve land that is within the service area of existing reserves, there are not normally any competing claims in the land from other First Nations. If there is any doubt, however, the First Nation must consult with other First Nations or Aboriginal groups who claim Aboriginal and/or Treaty Rights (as well as with other First Nations who could reasonably be expected to have such claims), in the area of the land selected for the addition to reserve. All groups should work together to resolve any competing interests.
- 14.2 Competing claims should be expressed in writing by the claimant group. The First Nation selecting land proposed for addition must advise INAC in cases where competing claims are asserted.

- 14.3 While other competing First Nations or Aboriginal groups therefore must be consulted and their views respected, they have no general veto with respect to reserve additions.
- 14.4 Where there is continuing disagreement among competing First Nations or Aboriginal groups on a proposed selection, and the selecting First Nation advises INAC that it wishes to proceed, the proposal must be submitted, with options, to the Deputy Minister and/or Minister for decision.
- 14.5 INAC staff should consult the *LTS Lands and Environment Fiduciary Management Strategy* for guidance with respect to any INAC responsibilities in such cases and consult Specific Claims, Comprehensive Claims or the Federal Treaty Negotiation Offices, as appropriate.

Annex C

Site-Specific Criteria for New Reserves/ Other Policy Proposals

1. General

- 1.1 ATR proposals which fall outside the “Legal Obligations” and “Community Additions” categories are included in the “New Reserves/Other Policy” category of this directive. They are therefore considered on an exceptional basis under this annex because they raise the following types of issues:
- 1.2 New reserve: a proposal seeks reserve status for a new reserve (which in the case of a claim, is not provided for in the claim settlement agreement); or,
- 1.3 Cost: a proposal raises cost issues (which cannot be sourced from the region’s budget, the First Nation or third party, e.g., a province):
 - a) in the case of a claim, the proposal goes beyond the provisions of a settlement agreement; or,
 - b) in the case of a community addition, the First Nation is not willing to formally acknowledge that there is no funding entitlement associated with the proposal.
- 1.4 Community need: the proposal raises basic questions of the community’s need for the land that have not been resolved through a previous/updated or current community plan. Therefore, the community’s need remains to be demonstrated via the application of accepted demographic and community planning principles in accordance with Section 4 of this annex.
- 1.5 The treatment of each of these issues on a site-specific basis has been maintained **as per the 1991 ATR policy** and is highlighted in section 2 below.

2. New Reserves

- 2.1 **Economic purposes:** Proposals to create new reserves for economic reasons will not be approved if the economic benefit could be substantially achieved under another form of land holding (i.e., non-reserve land owned by a First Nation corporation). The tax advantage associated with reserve status is not in itself considered to be sufficient justification for reserve status under this heading.
- 2.2. **Social Need:** In order to consider new reserve proposals based on social need (e.g., housing, schools, churches, recreational areas, community buildings), it must be demonstrated that the social need cannot be addressed through some other form of land holding (i.e., non-reserve land held by a First Nation owned corporation) or from the existing reserve community land base.
- 2.3. **Provincial Land Offerings:** There may be instances where a province has an interest in offering land to a First Nation and the First Nation wishes to have the land made into a new reserve. INAC may consider a new reserve proposal which involves the provision of land from a province to a First Nation under the following specific circumstances.
- 2.3.1 **Land Claims:** INAC may consider creating a new reserve to facilitate a land claim settlement between a province and a claimant First Nation. However, it should be consulted by the parties at the outset of negotiations on its position in view of the following considerations:
- i) reserve status should only be considered where other forms of land holding are either unfeasible or inappropriate;
 - ii) the question of offsetting claims or obtaining a release for a related claim the First Nation may have against Canada (this question should be put to Specific Claims for review); and
 - iii) the cost implications associated with the transfer of the land to reserve status, as well as those related to planned development, should normally be borne by the province.

2.3.2 **Social/Economic Purposes:** INAC may consider creating a new reserve from a provincial land offering for social or economic purposes where the following considerations are satisfied:

- i) existing INAC policy relating to social or economic need will be applied; and
- ii) the province has agreed to pay for the costs of infrastructure and related support once the lands are granted reserve status *or* INAC has agreed to cost share or pay for infrastructure and ongoing program costs.

2.3.3 Where a proposal is based on economic purposes, INAC should encourage the province and the First Nation to explore other arrangements, e.g., instead of reserve land, land held by a First Nation owned corporation or the execution of resource-sharing agreements with respect to the development of provincial Crown lands.

2.4 **Community Relocations:** New reserve proposals involving relocations of reserve communities to land added to a reserve or a new reserve land base derive from the occurrence of natural disasters such as flooding, or restrictive reserve development potential. The site-specific considerations relate to comparing the cost-benefit of the relocation against a variety of other options.

2.4.1 **Natural Disasters:** INAC will continue to provide the necessary assistance (including the provision of reserve land by adding to or creating a new reserve or by relocating a reserve community within an existing reserve) where a natural disaster (e.g., flooding) threatens the immediate safety of a community's residents, or where such a disaster has already occurred. When relocation is the most viable long-term option according to the criteria set out below, INAC will assist the First Nation in relocating the community on an urgent basis. INAC should, however, seek to mitigate the threat by taking preventive or remedial action before considering relocation.

2.4.2 A proposed relocation must be assessed according to other site-specific considerations as well as the following considerations which are unique to proposals resulting from a natural disaster:

- i) the risk involved if the community remains at the original site;
- ii) the nature and extent of future risk;
- iii) the extent of preventive or remedial action required;
- iv) the cost of undertaking preventive or remedial measures compared to the cost of relocation; and
- v) the overall benefits to the community for each option.

2.4.3 Where a natural disaster has occurred, INAC and the First Nation should immediately assess options available for re-establishing the community. If the possibility of a recurrence is high and on-site mitigation is limited, relocation should be seriously considered. INAC will assist the First Nation in re-establishing the community to its pre-disaster state as quickly as possible.

2.4.4 **Restricted Reserve Development:** INAC may consider proposals involving the relocation of a reserve community (by adding to or creating a new reserve or by relocating a reserve community within an existing reserve) where the following criteria are met:

- i) the normal physical development at the existing reserve location is restricted due to adverse topographic or soil conditions, or results from other exceptional circumstances related to health and safety; and
- ii) the development of the community at the proposed reserve site is the most cost effective option.

2.4.5 The cost effectiveness of a proposal should be determined by comparing a detailed analysis of the costs associated with relocating the community to the costs of meeting the community's needs at the existing reserve. A land exchange option should be considered in all proposals and a net increase in the reserve land base should only be considered where a specific rationale to justify the increase is provided and approved.

2.5 **Landless Bands/Indian Communities:** INAC will consider requests to provide a reserve land base for landless bands or landless Indian communities on a case-by-case basis in accordance with the criteria outlined below.

2.5.1 **Landless Bands:** A request for a reserve land base under this policy justification must meet the following criteria:

- i) the request should originate (by way of BCR) from *an officially recognized band* which does not have a land base (the request may also form part of a proposal to create a new band under INAC's New Bands policy, in which case the request will originate from a community which will only become an officially recognized band once the Ministerial Order creating the new band has been signed);
- ii) the requesting band must have an *existing, viable and ongoing community* located at the site of the proposed reserve *or* it must be able to justify a relocation from an *existing, viable and ongoing community* to a new site under the relocation provisions of this policy (long-term cost to INAC will be a major factor under a relocation justification).
- iii) where appropriate, a provincial contribution to the necessary capital and ongoing operation and maintenance (O & M) costs should be sought and negotiated by the band; and
- iv) all other options must have been diligently pursued and eliminated, e.g., the provision of land from an existing reserve which has been set aside for another band.

2.5.2 **Landless Indian Communities:** Proposals under this heading are divided into two categories: those involving a community which is contiguous/adjacent to an existing reserve and those where the community is physically separate from an existing reserve. Each proposal will be dealt with separately as outlined below.

a) Contiguous Communities

5. INAC will consider proposals for an addition to reserve in order to facilitate reserve residence for a landless community composed of mainly status Indians living off, but contiguous to, an existing reserve. In addition to satisfying the other site-specific considerations, the proposal must meet the following criteria:
 - vi) the proposal must originate (by way of BCR) from the band for whose benefit the existing reserve has been set aside;
 - ii) most of the residents of the off-reserve community must be status Indians comprising an *existing, viable and ongoing community* located at the site of the proposed reserve;
 - iii) there must be documented evidence that a majority of the residents of the off-reserve community support the proposal (such support may be indicated in a manner satisfactory to the members of the community in accordance with community customs);
 - iv) where appropriate, a provincial contribution to the necessary capital and ongoing O & M should be sought and negotiated by the band; and
 - v) all other options must have been diligently pursued and eliminated, e.g., the relocation of the contiguous community to the existing reserve.
2. It is recommended that the members of the off-reserve community undertake membership in the band for whose benefit the existing reserve has been set aside by the time the land is added to reserve. Otherwise, community residents should be advised that they will be treated as third parties and that their interests will be addressed accordingly.

- b) Non-Contiguous Communities
1. INAC will consider proposals to provide reserve land for a landless community which is physically separate from an existing reserve and which is composed mainly of status Indians who want to become affiliated with an existing band. This type of community generally does not wish to form a new band but does want security of tenure and to enjoy the advantages of reserve residency, e.g., taxation exemptions, access to federal programs and services and the extension of band administration and by-laws to the community.
 2. In addition to satisfying the site-specific considerations set out below, the proposal must meet the following criteria:
 - ii) the proposal must originate (by way of BCR) from the band for whose benefit the existing reserve has been set aside;
 - ii) most of the residents of the off-reserve community must be status Indians comprising an *existing, viable and ongoing community* located at the site of the proposed reserve;
 - iii) there must be documented evidence that a majority of the residents of the off-reserve community support the proposal (such support may be indicated in a manner satisfactory to the members of the community in accordance with community customs);
 - iv) where appropriate, a provincial contribution to the necessary capital and ongoing O & M should be sought and negotiated by the band; and
 - v) all other options must have been diligently pursued and eliminated, e.g., a release of land from the band to which most of the members of the off-reserve community belong.
 3. It is recommended that those community residents who are not members of the existing band undertake to obtain band membership by the time the reserve is created. Otherwise, community residents should be advised that they will be treated as third parties and that their interests will be addressed accordingly.”

3. Cost Issues:

- 3.1 For an ATR proposal with unresolved cost issues to be reviewed on an exceptional basis, a rigorous cost-benefit analysis is required to show that the associated costs are reasonable in terms of the benefits which will accrue. The benefits of a proposal must be demonstrated through a community land needs study/plan based on accepted demographic and community planning principles. (See Section 4 in this Annex).
- 3.2 The proposal must also be cost-effective in relation to the following options:
- i) the availability of suitable surplus federal Crown lands from Public Works and Government Services Canada, or other federal government departments;
 - ii) the possibility of an exchange of an unused or unsuitable portion of the reserve for other suitable land (e.g., provincial Crown land);
 - iii) the acquisition of provincial Crown land and a provincial contribution towards the capital and ongoing costs associated with the proposal (such contribution to be sought and negotiated by the First Nation, with technical support from INAC if requested by the First Nation);
 - iv) the acquisition of private land;
 - v) the use of other reserve land set aside for the First Nation;
 - vi) a First Nation owned corporation holding title to the land (as opposed to reserve status) or using other First Nation owned land already held in fee simple;
 - vii) a First Nation's ability to contribute to land purchase and any program costs;
 - viii) the acquisition of other land generally contiguous to or in the service area of the existing reserve;
 - ix) the long-term potential of the new reserve to foster a division of the existing First Nation requesting the new reserve, and the resulting long-term cost implications.

4. Community Need Issues

4.1 Questions of community need can only be effectively resolved through the use of sound community planning principles.

4.2 The following factors will be considered in determining band requirements:

- i) data on the future requirements of land for community purposes, based on a demographic analysis (future projections should cover at least 15 years but generally not more than 25 years);
- ii) where the proposal is based on housing requirements, a review of existing and projected housing density;
- iii) the potential of the existing reserve base to meet future land requirements, taking into account:
 - a) the topography of the reserve (size, location, soil, etc.);
 - b) existing land use;
 - c) existing land use plans or zoning by-laws *which are being actively implemented* (these should be considered in determining how much land is available for residential purposes); and
 - d) existing patterns of land holding on the reserve (where there are large areas of reserve land which are held by a few individuals and are suitable for community development purposes, an internal land reallocation may be required before INAC will consider adding land to the existing reserve land base, especially where this would be the least costly option);
- iv) the possibility of exchanging an unused or unsuitable portion of the reserve for other land.

Where a land reallocation is required by INAC and the First Nation and the locatee cannot agree on a voluntary sale of the land, the Minister may, pursuant to subsection 18(2) of the *Indian Act* and with the consent of the band council, authorize the "expropriation" of locatee land in accordance with INAC policy and procedures (set out in Chapter 4, INAC's Land Management Manual, as amended from time to time).

5. Environmental Site Assessment (ESA)

- 5.1 As directed by Treasury Board policy, an environmental site assessment shall be conducted for any land acquisition. Therefore, an environmental site assessment must be conducted for any addition to reserve in accordance with Chapter 12 of INAC's Land Management Manual, as amended from time to time, to determine the environmental state of the existing site. The policy aims to determine what **past or present activities** might have adversely affected the site, and to have the previous/current user(s) correct these conditions prior to setting the land aside for the use and benefit of the First Nation(s).
- 5.2 Proposed ATR submissions should also include an estimate of the costs of an environmental site assessment, if the department has determined it will pay for such costs.

6. Environmental Impact Assessment (EIA) for Any Project

- 6.1 Further to the *Canadian Environmental Assessment Act* (CEAA), a federal authority must carry out an environmental impact assessment before it exercises any prescribed power or authority, duty or function, which would enable a project as defined under that Act to proceed either in whole or in part. Therefore, if there is a known project proposed on the land to be set aside as reserve which triggers the application of CEAA, then CEAA requires that an environmental impact assessment (EIA) be carried out for these proposed activities.
- 6.2 Note that it is the project proposed for the land under consideration for ATR that may trigger CEAA, not the Governor in Council or Ministerial Order creating the reserve. The EIA report will normally be prepared by the project proponent, under the direction of the First Nation and the department.
- 6.3 This assessment is for **future proposed activities**, and is different from the environmental site assessment required under Paragraph 2 above, which is for past or current activities which took place on the land and which may have contaminated the land.
- 6.4 Refer to Chapter 12 of INAC's Land Management Manual, as amended from time to time.

7. Financial Implications and Funding Sources

- 7.1 As proposals which cannot be funded within INAC's A-base (current approved financial authorities), will not normally be approved (except in cases of

mandated claim settlements or treaty/legal obligations), all short-term and long-term financial implications must be defined and sourced prior to AIP. These include, but are not limited to, costs of land acquisition, environmental review and remediation, capital, band support, and ongoing and incremental operation and maintenance costs. Detailed assessment of such costs should be multi-sectoral at the regional level, particularly from the capital and finance programs.

- 7.2 On an exceptional basis, reserve proposals beyond a region's budget may be submitted, with regional recommendations, to the Deputy Minister of INAC for decision. Regions must demonstrate in a detailed costing assessment (see 3.1 above) how the proposal is beyond the region's and First Nation's financial capacity and how a detailed cost-benefit analysis warrants further consideration.

8. Long Term Site Potential

- 8.1 The long-term business, resource, employment and taxation and demographic/community needs potential of the proposed reserve site(s) must be considered in relation to its impact on the economic self-reliance of the First Nation.

9. Other Government Departments

- 9.1 Other federal government departments and agencies, e.g., Health Canada, the RCMP, should be contacted by INAC regions and given the opportunity to assess the potential impact on their program delivery resulting from ATR proposals. This forecasting should be done as part of the normal community planning process. Where this has not already been done, INAC regions must notify relevant federal departments and agencies in writing and allow three months for any comments to be provided.

10. Existing Encumbrances

- 10.1 Land to be acquired under an ATR proposal may have existing legal interests or be subject to rights to use the land. Examples of such encumbrances are leases, licences, permits, easements, rights of way, etc.
- 10.2 In order to determine what, if any, encumbrances there are, INAC should ask the Department of Justice to arrange for a title search to be done against the land which is the subject of a proposal.
- 10.3 These encumbrances, which are legal interests in or rights to use the land, are distinct from the non-legal issues or concerns that a municipality or other third party may raise and should not be confused with such issues.
- 10.4 Any existing encumbrances should be minimized to the extent possible by the time the land is granted reserve status. If necessary, a limited degree of encumbrance is acceptable, as long as it does not affect the First Nation's proposed land use and does not conflict with the *Indian Act*.
- 10.5 Existing encumbrances must be specifically identified and mechanisms for dealing with them must be determined in conjunction with the Department of Justice prior to the proposed acquisition by INAC. Encumbrances include both registered and unregistered interests/uses (where such unregistered interests are known).
- 10.6 Consistent with the objective of speeding up the ATR process for the First Nation, consideration should be given to taking title to the land subject to the existing interests/uses, as opposed to negotiating the revocation of such interests/uses and their conversion into an interest/use under the *Indian Act*. On this last point, if a third-party is concerned over the legality and/or certainty of its interest or right to use the land, another technical option is to create the interest/use under the *Federal Real Property and Federal Immovables Act* (FRPFIA), set the land aside subject to the FRPFIA interest/use and then convert the interest/use into an *Indian Act* transaction once the land has reserve status.

11. Access

- 11.1 Where third party land would be "landlocked" by the addition to reserve or new reserve, legal access over the proposed reserve is to be negotiated by the First Nation, as a legal conveyancing requirement, before agreement in principle is granted. In addition, the need for access to utilities should be negotiated with respect to the proposed reserve land. Upon the First Nation's request, INAC may provide technical assistance in support of the First Nation's negotiating lead.

12. Contiguity Of Multiple Parcels

- 12.1 Where more than one parcel is proposed to be set aside as reserve, they should be contiguous to one another.

13. Parcel Boundaries

- 13.1 Where relevant, the boundaries of additions/new reserves should follow natural water boundaries.
- 13.2 Parcel boundaries shall be described in accordance with the February 6, 1998 INAC/NRCan agreement on legal descriptions.

14. Mines and Minerals

- 14.1 Where the First Nation is not conducting the land purchase, INAC shall ensure that the First Nation Council is advised of any exclusions with respect to mine and mineral rights.
- 14.2 If a third party has subsurface rights for the parcel of land to be set aside as reserve, access over the reserve to exercise those rights, or a buy-out of those rights, is to be negotiated by the First Nation prior to the lands being granted reserve status. Upon the request of the First Nation, INAC may have a role in providing technical assistance in support of the First Nation's lead.

15. Provincial Considerations

- 15.1 The affected province must be notified by the First Nation of the ATR proposal in writing. Three months must be given to the province to set out any issues for discussion. Subsequent discussions however should not unreasonably delay the proposal.
- 15.2 The First Nation must ensure the province does not have competing land use plans for the land in question.
- 15.3 Provincial concurrence will be required for returns of unsold surrendered land in those provinces where the unsold surrendered land is under provincial title, e.g., in Ontario, pursuant to the *Indian Lands Agreement* (1986).
- 15.4 Upon the request of the First Nation, INAC may have a role in providing technical assistance in support of the First Nation's discussions/negotiations with a province.

16. Municipal Considerations

- 16.1 **General:** In recognition that First Nation communities and non-First Nation communities live side by side, the federal government promotes a "good neighbour" approach. This involves First Nations and municipalities sitting down together to discuss issues of mutual interest and/or concern. Where requested by a municipality or a First Nation, there is a requirement to negotiate arrangements in such areas as joint land use planning/by-law harmonization, tax considerations, service provision and future dispute resolution.
- 16.2 The potential requirement to negotiate in these areas means that both parties must engage in discussions based on good will, good faith and reasonableness. Note that the need for discussion may be with respect to ATR proposals within the boundaries of a municipality (where consultation/negotiations leading to an agreement may be necessary) or with adjacent/abutting municipalities (where consultations alone may be necessary).
- 16.3 While municipalities must be consulted in accordance with this policy, they have no general or unilateral veto with respect to reserve proposals.

- 16.4 While the First Nation has the lead role in discussions and/or negotiation with neighbouring municipalities, upon request from the First Nation, INAC may have a role in providing technical assistance in support of that lead. Canada is not a party to any concluded agreements between a First Nation and a municipality.
- 16.5 **Municipal/First Nation Consultation:** Where the land to be set aside as reserve is within or adjacent/abutting a municipality, the First Nation must inform that municipality in writing of the proposal under consideration. Municipalities must be given three months to respond in writing with any issues. Subsequent discussions however should not unreasonably delay the addition.
- 16.6 The First Nation must ensure a neighbouring municipality does not have competing land use plans for the land in question. Other issues that might arise and which may need to be covered in a First Nation-municipal agreement are the provision of municipal services, by-law compatibility, a consultation and dispute resolution process for matters of mutual concern and potential net tax loss adjustments due to the loss of municipal jurisdiction over the land. The municipality and First Nation are entitled to formalize such an agreement in writing.
- 16.7 The First Nation can accelerate the proposal by preparing draft agreements in these areas. The Indian Taxation Advisory Board may be a good source for First Nations to consult, with respect to model agreements developed by other First Nations.
- 16.8 **Municipal Tax Considerations:** Unless otherwise provided for in a claim settlement or legal agreement, the First Nation is required to negotiate a net tax loss adjustment where requested by a municipality, with assistance of the region if requested. The First Nation is responsible for paying for any negotiated net tax loss sum. The objective of such negotiations is to allow the municipality to adjust to the net effect of the combined reduction in municipal servicing costs and reduced tax base caused by an addition proposal. It is not to compensate in perpetuity for the gross level of lost taxes, given that servicing costs are also being reduced or are subject to a separate Municipal Service Agreement. (The Indian Taxation Advisory Board has computer software which can support First Nations' analysis in these areas).

- 16.9 A reasonable compensation may be determined using the following information:
1. 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;
 2. any funds the municipality is receiving in provincial equalization payments;
 3. any savings which will result from a reduced delivery of services following the granting of reserve status;
 4. the relative size of the loss in relation to the total tax revenues of the municipality;
- 16.10 School boards do not need any compensation for tax loss adjustment given that they are already funded for tuition costs for on-reserve students and funding arrangements are available for subsidizing boards for the proportionate capital costs for reserve students. However First Nations may negotiate such a payment if it is seen by them as appropriate. Upon a First Nation's request, INAC may have a role in providing technical assistance in support of the First Nation's negotiating lead.

17. Unresolved Provincial or Municipal Issues

- 17.1 **If outstanding provincial issues:** Where provincial consultations indicate that there are competing land use or other issues that cannot be resolved with the province, and the First Nation/RDG wish the project to be considered, then the proposal will have to be forwarded, with options, to the Deputy Minister and/or Minister for review.
- 17.2 **If outstanding municipal issues:** Where the First Nation and the municipality cannot resolve competing land use or other issues, such as tax loss, by-law harmonization, etc., but the First Nation and the RDG still want to proceed, the proposal must be forwarded, along with the region's recommendation, for consideration by the Deputy Minister and/or Minister. A proposal may proceed in cases where the First Nation is prepared to enter into an agreement on the issues raised by the municipality and it is deemed by the RDG that the municipality is unwilling to respond in good faith.
- 17.3 There is a reasonable expectation on both the municipality and the First Nation that the 'good neighbour' principle is used to guide and underlie good faith negotiations throughout the process.

18. Aboriginal or Treaty Rights.

- 18.1 Unless otherwise provided for in a claim settlement agreement, the First Nation must consult with other First Nations or Aboriginal groups who claim Aboriginal and/or Treaty Rights (as well as with other First Nations who could reasonably be expected to have such claims), in the area of the land selected for the addition to reserve or new reserve. All groups should work together to resolve any competing interests.
- 18.2 Competing claims should be expressed in writing by the claimant group. The First Nation selecting land proposed for reserve status must advise INAC in cases where competing claims are asserted.
- 18.3 While other competing First Nations or Aboriginal groups therefore must be consulted and their views respected, they have no general veto with respect to reserve additions.
- 18.4 Where there is continuing disagreement among competing First Nations or Aboriginal groups on a proposed selection, and the selecting First Nation advises INAC that it wishes to proceed, the proposal must be submitted, with options, to the Deputy Minister and/or Minister for decision.
- 18.5 INAC staff should consult the *LTS Lands and Environment Fiduciary Management Strategy* for guidance with respect to any INAC responsibilities in such cases and consult Specific Claims, Comprehensive Claims or the Federal Treaty Negotiation Offices, as appropriate.

Annex D

The ATR Process

1. This annex provides a fairly detailed overview of the review and approval process which guides a First Nation's ATR proposal. It includes some process improvements recommended by both First Nation and INAC land management technicians at an ATR Process Mapping Workshop held in February 2000 (sponsored by the Joint Initiative). While most recommendations involve follow-up at the regional level, there are some which require the involvement of INAC headquarters. Additional process improvements suggested at the workshop will be incorporated into the ATR process as this work continues.
2. The ATR process officially begins when the First Nation council submits a Band Council Resolution (BCR) containing the formal proposal seeking the addition to reserve or new reserve. If the proposal involves an addition to reserve, the name and number of the existing reserve should be stated in the BCR. If the proposal involves the creation of a new reserve, the name and number of the new reserve should be identified in the BCR. Naming should be guided by the principles set out by the Geographical Names Board of Canada.
3. Wherever possible, the First Nation should submit any pertinent documentation (that will either facilitate the process or be required) with the BCR. Some examples are conditions of TLE/Specific Claims Settlement Agreements (for a "Legal Obligations" proposal), a community plan showing the demographic need, information that the cost of any proposed development can be met within the First Nation's existing regional budget allocation (for a "Community Additions" proposal), etc..
3. INAC staff will discuss the applicable ATR policy category with the First Nation, along with the need for supporting documentation which the First Nation has not already provided.
4. Once the policy category and supporting documentation have been identified, all the relevant site-specific requirements should be identified with the First Nation, who together will determine their respective roles and responsibilities within the process, e.g., with respect to communications planning, environmental site assessments, surveys, community planning requirements, third parties, etc.

The ATR Process (continued)

5. The First Nation will contact the province, the municipality or other federal government departments/agencies as necessary and, where applicable, initiate discussions to resolve any areas of concern with respect to the proposal. Normally, municipal issues involve the provision of services, land use/zoning harmonization, net loss of municipal tax revenue, dispute resolution, etc. Every effort should be made to complete reasonable arrangements between the municipality and the First Nation bearing in mind that formal agreements are desirable but not necessarily essential. Third-party interests must be identified and dealt with before the proposal can proceed.
6. The regional ATR Committee will review the proposal to ensure that the requirements of the ATR policy have been satisfied. To ensure that the proposal receives speedy consideration, it is important that the First Nation and INAC staff provide all the information required for the committee to make an informed decision. The committee will then recommend the proposal to the Regional Director General (RDG) for approval in principle (AIP) or rejection.
7. If a proposal is outside the RDG's AIP authority but the RDG and the First Nation still wish to proceed, the RDG must forward the proposal to be considered by the headquarters ATR Committee and subsequent Deputy Minister AIP or rejection.
8. The RDG (or the Deputy Minister of INAC) will grant an AIP or reject the proposal. The approval may be subject to conditions which must be satisfied before the Minister will recommend the granting of reserve status to the lands under the proposal.
9. It is important that any conditions attached to the approval are capable of being readily satisfied. If it is unlikely that the condition can be met, the proposal should not be sent to the RDG or the Deputy Minister for approval.
10. Any conditions attached to the approval by the RDG or Deputy Minister must be satisfied before the proposal can proceed to the next step. The First Nation will be advised by letter if the proposal has been rejected, approved, or approved with conditions. In the event of a conditional approval, the conditions will be specified in the letter.
11. After the conditions have been met, the First Nation or INAC regional office can proceed with the acquisition of the lands.

The ATR Process (continued)

12. Regional INAC staff will prepare the Order in Council (OIC) recommendation and submission requesting that the lands be granted reserve status, or the Ministerial Order granting reserve status.
13. The OIC submission or the Ministerial Order is sent to the Minister who recommends its approval to the Privy Council, or signs the Ministerial Order.
14. The Privy Council either rejects or approves the OIC submission.
15. If the Ministerial Order or OIC submission has been approved, the Ministerial Order or OIC is registered in INAC's Indian Lands Registry. Regional Lands staff should arrange for the registration of all related land title documents in the Indian Land Registry to be attached to, or accompany, the registration of the Ministerial Order or OIC.
16. The First Nation and other relevant parties are notified of the granting of reserve status and are provided with the registration particulars as required.

Directive 10-2

Partial Subsurface Interest Additions

1. Purpose

- 1.1 The purpose of this directive is to inform users of the possibility of setting apart partial interests in mines and minerals as reserve under the conditions set out in section 4 of this Directive.

2. Background

- 2.1 The issue of setting apart partial interests in mines or minerals as reserve was raised when First Nations began purchasing partial interests in mines and minerals under specific claim settlements and/or treaty land entitlements.

3. Definitions

- 3.1 “**Partial interests in mines or minerals**” means that a First Nation would acquire only a part of an interest in mines and minerals. For example, if a 1/4 interest is purchased, only that 1/4 interest can be set apart as reserve providing that the conditions set out in section 4 of this Directive are met.

4. Policy

- 4.1 The following conditions will apply when partial interests in mines and minerals are being set apart as reserve:
- a) the surface of the land under which a partial interest in mines and minerals is proposed as reserve must have reserve status pursuant to the *Indian Act*;
 - b) title to the partial interest in the mines and minerals must be acquired by the First Nation and transferred to Canada before the lands are set apart as reserve;
 - c) the First Nation must be fully informed of the complexities of dealing with partial interests in mines and minerals;

- d) a partial interest in mines and minerals cannot be explored or exploited without the appropriate provincial instrument having been first obtained, and any such instrument for mineral exploration and exploitation will not be granted by the province without the proponent having first obtained the consent of each partial interest holder;
- e) all the owners of the partial subsurface interests must sign a Joint Agreement prior to Canada proceeding with setting apart the partial interest as reserve. This agreement must detail the conditions under which this interest would be held and how it would be managed for the group of owners; and
- f) the Additions to Reserve policy must be followed when partial interests are being proposed as reserve.

5. Implementation

- 5.1 This Directive takes effect immediately.

Directive 10-3

Accretion / Erosion

1. Purpose

- 1.1 The purpose of this Directive is to clarify the position of the Department concerning the natural movement of water boundaries on reserve land.

2. Definitions

- 2.1 **“Natural movement of water boundaries”** means change in the position of a water boundary due to accretion or erosion.
- 2.2 **“Accretion”** means the imperceptible and gradual addition to land by the slow action of water.
- 2.3 **“Erosion”** means the imperceptible and gradual loss of land by the slow action of water.
- 2.4 **“Artificial means”** means a structure that will slowly and gradually change the natural flow of a river or a stream and cause accretion or erosion.
- 2.5 **“Riparian”** means of, relating to, or living on the bank of a river, stream, etc.
- 2.6 **“Littoral”** means of, on or along the shore of the sea, a lake, etc.

3. Policy

- 3.1 The following general principles will apply when natural movement of water boundaries occurs on reserve lands:
- a) any lands accreting to a reserve would take on the characteristics of the reserve and any lands lost by erosion will lose the characteristics of the reserve. No order in council is required to rectify the boundary of the reserve unless there are exceptional or controversial circumstances such as litigation or contentious relations with parties. These exceptional or controversial circumstances will be determined on a case by case basis;

- b) the fact that accretion or erosion of the reserve land is caused in whole or in part by some artificial means does not prevent it from being true accretion or erosion as long as the artificial means was employed lawfully and not with the intention of producing accretion or erosion;
- c) reserve lands lost by erosion acquire the same legal characteristics as the waterbed of the water forming the boundary;
- d) accreted lands acquire the same legal characteristics as the lands being enhanced by the accretion and, as such, the accreted land will become a part of any individual interest or leasehold on the lands being enhanced;
- e) if an interest had been created on reserve lands adjacent to the accreted lands, the interest holder would obtain the benefit of the accretion, provided that the legal description of the lands over which the interest has been granted, has a riparian or littoral boundary as one of its boundaries;
- f) the right of accretion or erosion is one of the riparian or littoral rights naturally incident to lands bordering water, and any locatee or interest holder will derive the benefit from any accretion or suffer any loss due to erosion; and
- g) the person relying on the doctrine of accretion has the onus of establishing on a balance of probability that accretion did in fact occur rather than a sudden change attributable to storm, flood or human interference.

4. Implementation

- 4.1 This Directive takes effect immediately.

Directive 10-4

Small Mineral Additions

1. Purpose

- 1.1 This directive covers the limited circumstances in which reserve status will be granted to subsurface rights (i.e. mines and minerals) even though reserve status is not being granted to the surface. This situation normally arises where a province is excluding surface portions of the land from the transfer to Canada for the granting of reserve status. The common provincial exclusions to the surface title are public roads, highways, certain water bodies and water courses.

2. Background

- 2.1 There may be additions to reserve proposals where the subsurface rights are greater than the surface rights due to the exclusions by the province from the surface title. 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 holds the title to the surface while a private individual holds title to the subsurface. The province is willing to transfer its interest 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. This will result in a lesser amount of surface rights being granted reserve status than subsurface rights.
 - b) A private individual holds title to both the surface and subsurface and is willing to transfer this interest 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 has the option of reserving a portion of the surface title 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 a private individual has title to the surface and the province holds title to the subsurface. The province may, upon negotiated agreement, choose to transfer subsurface rights while reserving portions of the surface title 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.

3. Policy

- 3.1 This directive does not authorize the creation of a reserve which consists of subsurface rights only. This directive does authorize setting apart as reserve the specific portions of subsurface rights described in paragraph 2.1 of this Directive.
- 3.2 When land is being acquired for the purpose of setting it apart as reserve every effort should be made to acquire equal surface and subsurface rights. However, when the land being set apart as reserve is subject to a provincial exception in the surface title, 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.
- 3.3 A First Nation may negotiate with either the province or a private land owner for the acquisition of the subsurface rights and may request that these mines and minerals be granted reserve status.
- 3.4 Where an addition to reserve or new reserve proposal includes a “small mineral additions” issue, the Order In Council (OIC) must be reviewed with Regional Justice and the Department Headquarters during the drafting stage to ensure that it accurately and clearly achieves its objective.
- 3.5 Where provincial Crown land has been acquired and set apart as reserve by an OIC from Canada and it is unclear what surface or subsurface rights were set apart, an amending order from the province, followed by an amending OIC from Canada, is required to clarify the rights.
- 3.6 Where small amounts of mineral rights were purchased with the intention of setting them aside as reserve but this has not been done, an omnibus OIC from Canada may be used to set the minerals apart as reserve.

4. Implementation

- 4.1 This Directive takes effect immediately.

Directive 10-5

Small Surface Additions

1. Purpose

- 1.1 This Directive establishes the circumstances concerning an accelerated process (fast-track or reduced steps) to grant reserve status when the addition is very small and there are no contentious issues.
- 1.2 The intention of this Directive is to establish the circumstances whereby micro-pockets of land can be added to reserves so as to preserve the integrity of reserve boundaries by eliminating small pockets of land that do not have reserve status within those reserve boundaries.

2. Background

- 2.1 This Directive will only apply to small parcels of land which are additions to existing reserves.
- 2.2 This Directive will provide process instructions for granting reserve status in these specific situations.

3. Authority

- 3.1 Provincial order Grant to Canada from a municipality for transfer of land to the Federal Crown;
- 3.2 *Federal Real Property and Federal Immovables Act* (FRPFIA) to accept the land into the federal inventory;
- 3.3 Order in council, under the Crown's Royal Prerogative to grant reserve status to the lands.

4. Policy

4.1 This policy applies to small parcels of land which are usually related to lands which have been removed from reserve status through section 35 of the *Indian Act*, and which may not otherwise qualify as reversionary clause additions, such as:

- a) construction allowances - small parcels of land previously held and used for construction of roads, but that are no longer required by the province or municipality;
- b) alignment adjustments - small parcels of land which previously formed part of an existing road, but for construction or road alignment reasons are no longer required by the province or municipality (e.g. straightening of a dangerous curve).

Note: These lands may be within an urban community or municipality.

4.2 Provided there are no factors which would warrant a full review by the regional additions to reserve committee, these small additions may be approved in principle by the Regional Director of Lands and Trust Services or the equivalent position.

5. Process

5.1 Small surface additions do not follow the normal additions to reserve approval process.

5.2 A chronology of events/background, together with the site specific considerations is put together by the lands officer.

5.3 While small surface additions are not subject to the same requirements as normal additions to reserve, the following provides an overview of the major steps involved in the processing, approving and registering of these additions:

- a) **Title:** The lands officer must obtain title documentation from the province or municipality and should complete a Lands Status Report to verify the title of the lands.

- b) **Land Description:** The province or municipality must provide a registerable legal description for the lands to be reviewed and approved by the Regional Surveyor, Natural Resources Canada. A CLSR survey is required. The province or municipality should assume the survey costs.
- c) **Environmental Compliance:** Although only a small parcel of land, the lands officer must ensure that the lands are subjected to an environmental assessment. An environmental clean-up (such as an agreement to remove pavement from the lands), if required, should be done by the province or municipality prior to the transfer of the lands to Canada.
- d) **Land Value:** Given the nature and size/shape of the subject lands, they will typically be of little value. However, an attestation should be completed by the province or municipality to ensure that the appropriate delegated authority executes the FRPFIA acceptance document.
- e) **First Nation Consent:** Consent in the form of a Band Council Resolution.
- f) **Approval in Principle:** The lands officer either prepares a letter for the signature of the Regional Director, Lands and Trust Services (or equivalent position), or, if required by the Regional Director, prepares a full submission to the regional additions to reserve committee to obtain approval in principle.
- g) **Federal Acceptance of the Lands:** The Department of Justice will draft a FRPFIA acceptance document which is executed by the appropriate departmental authority. The FRPFIA acceptance document is then countersigned by the Department of Justice.
- h) **Order in Council Submission:** The lands officer prepares a submission recommending approval of the addition to reserve. The approval in principle letter and the FRPFIA acceptance document are included in the submission package which is forwarded to the Department HQ (see Chapter 13 of this Manual).
- i) **Registration:** Upon approval, the order in council and FRPFIA acceptance document are registered in the Indian Lands Registry and in the Department of Justice's federal real property document depository.

6. Implementation:

- 6.1 This Directive takes effect immediately.

Directive 10-6

Section 36 - Special Reserves

1. Purpose

- 1.1 The purpose of this Directive is to clarify the position of the Department concerning special reserves pursuant to Section 36 of the *Indian Act*.

2. Authority

- 2.1 Section 36 of the *Indian Act* states: *Where lands have been set apart for the use and benefit of a band and legal title thereto is not vested in her Majesty, this Act applies as though the lands were a reserve within the meaning of this Act.*

3. Policy

- 3.1 Section 36 of the *Indian Act* is of historical importance only, its predecessors having originally been enacted to bring within the authority of the *Indian Act* lands held by churches or charitable organizations in trust for Indian communities in pre-confederation days. Special Reserves were few in number and existed only in four of the original five provinces of Confederation (Quebec having none). Title to all of these lands have since been acquired by Canada and the lands have subsequently been “normalized” into ordinary reserves under the *Indian Act*.
- 3.2 While the continued existence of section 36 in the *Indian Act* points to the continued ability to create further special reserves, no special reserve may be created except with the agreement of the Federal Crown as reserve creation requires the exercise of the Royal Prerogative. A special reserve cannot be created by the unilateral act of a third party.
- 3.3 The Department’s policy is that no special reserves will be created.

4. Implementation

- 4.1 This Directive takes effect immediately.

Directive 10-7

Joint Reserves

1. Purpose

- 1.1 The purpose of this Directive is to set out the minimum requirements for the consideration of joint reserve proposals.

2. General

- 2.1 Even though there are currently many reserves which are held by more than one First Nation, our policy today remains one that discourages joint reserves, except under the most compelling circumstances.
- 2.2 The *Indian Act* has no provisions for the governance of a reserve set aside for two or more First Nations or the surrender of reserve land held for the benefit of two or more First Nations. Joint reserve proposals will be considered on case by case basis in light of potential cost implications and other factors associated with the management of a joint reserve .

3. Definitions

- 3.1 “**Department**” means Indian and Northern Affairs Canada or the Department of Indian Affairs and Northern Development.
- 3.2 “**Joint reserve**” means a reserve set aside for two or more First Nations.
- 3.3 “**Reserve**” has the meaning set out in the *Indian Act*.

4. Objectives

- 4.1 In setting out the policy on joint reserves, the Department’s objectives are to ensure that First Nations contemplating the sharing of a reserve have been made aware of the problems that the Department anticipates they will face with respect to managing that particular parcel of land.

5. Authorities

- 5.1 While the *Indian Act* defines a “Reserve”, it does not set out how reserves are created. Lands are granted reserve status under the Crown’s Royal Prerogative (a non-statutory power) by way of an Order in Council (OIC) exercised by the Governor in Council. New legislation for Manitoba, Saskatchewan and Alberta allows the Minister to create reserves in those provinces by Ministerial Order. In the case of a joint reserve, the OIC or Ministerial Order grants reserve status to the land in question and names the First Nations for whose use and benefit the reserve is being created.
- 5.2 The authority for administration of a reserve is derived from the *Indian Act* and regulations respecting activities on a reserve.

6. Policy - Approval Process

- 6.1 Proposals for joint reserves raise complex legal and administrative issues that must be addressed. Therefore, the Department must inform all First Nations involved:
- a) in writing, of the anticipated potential problems that may be associated with the proposal;
 - b) that the reserve will be set apart with each of the First Nations receiving an equal undivided interest in the reserve lands regardless of the size; and
 - c) that the First Nations must negotiate a co-management agreement among themselves.
- 6.2 The proposal to create a joint reserve must be put to a vote by the electors of each First Nation involved, with the question decided by a simple majority of the eligible electors of each First Nation.
- 6.3 **Information Session.** At a minimum, one information session must take place for the benefit of the electors of each First Nation before its vote is held. The information session should include all the details of the proposal including, but not limited to, the day-to-day administration, the requirement for unanimity for any decision affecting the use of the land and what that means, etc.
- 6.4 **Separate Votes.** While all the First Nations may vote at the same time, separate voting results must be tabulated for each. This requirement is to ensure that the membership of each First Nation actually supports the joint reserve.
- 6.5 **Failed Votes.** If one or more of the First Nations fail to consent to the joint reserve proposal, the joint reserve will not be created. A second vote must be

held following the same procedure as the first vote. If all of the First Nations do not vote in favour at the second vote, the proposal should be abandoned.

- 6.6 **Legal Obligation.** Where the joint reserve is proposed in partial or full satisfaction of the Department's legal obligations to one or more of the participating First Nations, the proposal must address how the obligation is being satisfied with respect to those First Nations. The end result must lead to the Department's release from any liability.
- 6.7 **Designation.** The Lands Officer should advise all the First Nations that leasing activity will normally require the lands to be designated in accordance with the *Indian Act* or the claims implementation legislation enacted for the prairie provinces. The electors of each First Nation should be advised that a vote in accordance with Chapter 5 of the Manual will be required in order to designate the land for leasing purposes. The First Nations should also be advised that any designation must be approved by every First Nation for whom the joint reserve was set apart and that the failure to obtain the approval of one First Nation will defeat the proposal for all First Nations.
- 6.8 **Indemnity.** The Department will require that all the First Nations agree to indemnify Canada from any claims by any of them or their members pertaining to the use of the land or the division of benefits or losses derived from the joint reserve.

7. Implementation

- 7.1 This Directive takes effect immediately.