



Designations under the Indian Act

Helpful Hints

Chris Lafleur A/Director Native Law Centre





Outline

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What is a Designation : Basic Principles

- ▶ Reserve land is vested in Her Majesty and set aside for the use and benefit of a band
- ▶ Before Reserve Land can be leased to third party, it must be designated to the Federal Crown
- ▶ A third party includes ALL corporations, including Band-owned corporations
- ▶ INAC must ensure that rights and interests of First Nation and other affected parties are respected
 - ▶ Individual Interests - Lands that have a CP (Certificate of Possession) issued on them (unless it has been rescinded)



SURRENDER v DESIGNATION

Surrender (extremely rare, usually land exchange)

When reserve land is surrendered for the purpose of transfer, the First Nation's interest in the land is extinguished

Voting Threshold is Majority of a Majority

Designation

Designation is usually for a fixed term and does not extinguish the First Nation's interest in the land nor does it cause the land to lose its reserve status.

Voting Threshold is Simple Majority



Why Designate the Lands

- ▶ Replace third party interests on title when doing Additions to Reserve pursuant to:
 - ▶ Settlement Agreement (eg Treaty Land Entitlement Final Agreement Article 8:01)
 - ▶ AANDC Addition to Reserve Policy
- ▶ Attract investment
 - ▶ Allows Her Majesty to grant an interest in Reserve Lands (eg. Lease) - Financing
 - ▶ Economic certainty (leasehold interest) vs.:
 - ▶ subsection 28(2) of *Indian Act*
 - ▶ Buckshee (28(1)) of *Indian Act*
 - ▶ interest in reserve land registered at the Indian Land Registry
- ▶ Mines and Mineral Development including oil and gas.
 - ▶ *Indian Mining Regulations* allows for automatic conversion from permit to lease.
 - ▶ FNLMA Bands designating for Oil and Gas before going under *First Nation Land Management Act* (see (39.(1))



Things to think about.....

- Once the land has been designated ...
 - First Nation will not be able to get a Ministerial Loan Guarantee on designated lands.
 - INAC policy that once the land is designated the loan guarantee can be supplied by the banking institutions.
 - Certain provisions of the Indian Act no longer apply on designated lands:
 - ▶ setting land aside under subsection 18(2);
 - ▶ allotting and transferring allotted land, etc. under subsections 20 - 25;
 - ▶ granting permits under subsection 28(2);
 - ▶ Indian estate matters under sections 42, 44, 46, 48, 49 and 50;
 - ▶ Gravel dispositions under 58(4)(b)
- Changes to the Indian Act (2012)
 - Simple majority (50% plus one of those who voted) (s.39.1)
 - Accepted by Minister (subsection 40.1(2) of Indian Act)



How To Designate the Land (Reserve, Pre-Reserve)

▶ Reserve Land

- ▶ 38(2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.
- ▶ **39.1** A designation is valid if it is made to Her Majesty,
 - ▶ is assented to by a majority of the electors of the band voting at a referendum held in accordance with the regulations,
 - ▶ is recommended to the Minister by the council of the band and is accepted by the Minister.
 - ▶ Accepted by Minister.

▶ Indian Referendum Regulations



Pre-Reserve Lands

- ▶ **Claim Settlements (Alberta and Saskatchewan) Implementation Act (S.C. 2002, c. 3)**
 - ▶ Subsection 6. (1) allows for pre-reserve designation of the lands, including for the purpose of the replacement of an existing right or interest in those lands.
 - ▶ Need BCR to opt in to legislation
 - ▶ Follows procedure under the *Indian Act and Referendum Regulations*
 - ▶ Once accepted by Minister, the Minister may grant the designated right or interest to a third party.
 - ▶ takes effect at the time the lands are set apart as a reserve.
 - ▶ Minister may also issue permits to take effect upon reserve creation
 - ▶ Section 35 Easement still require Governor in Council approval
- ▶ **Envious piece of Legislation**
 - ▶ Deal with third party interest on title.
 - ▶ Minister can replace existing interest (eg lease).
 - ▶ Allows Minister to create a new interest in the land unlike *Saskatchewan Treaty Land Entitlement Act (S.C. 1993, c. 11)*.



Designation Process (Referendum)

- ▶ Chapter 5 of the INAC Lands Management Manual
 - ▶ Basically:
 1. First Nation submit BCR
 2. Ministerial Order call for referendum and appointing electoral officer
 3. Document Preparation. These documents include:
 - ▶ Notice of vote
 - ▶ Ballots (mail out ballots at least 14 days before Information Meeting and 42 days before Referendum Vote)
 - ▶ Information Document
 - ▶ Chiefs open letter to Membership
 - ▶ Designation Document
 4. Post Notice of Vote (at least 49 days before Referendum Date)
 5. Hold Information Meetings
 6. Referendum (Vote) Day
 7. Certified by oath by an officer of the Department and by Chief or member of Council
 8. BCR asking minister to accept designation
 9. Ministerial Order accepting designation.



The Role of INAC

- To help a First Nation Council determine appropriate terms and conditions for a designation, the lands officer must:
 - disclose to the First Nation Council all relevant information in the Department's knowledge and possession;
 - discuss with the First Nation Council the details of the proposed transaction;
 - recommend to the First Nation Council that they seek independent legal advice and/or professional advice.
 - Set up meeting (include DOJ and First Nation Legal Counsel)
- Ensure compliance with Legislation (eg. Indian Act, Claims Implementation Settlements Act) and AANDC policy
 - Environmental Assessment or Determination under CEAA 2012



The Role of INAC (continued)

- ▶ Ensure First Nation receives Fair Market Value or equivalent benefit
 - ▶ Appraisal - usually paid by proponent (Bare Land, Improvements)
 - ▶ Nominal rent
 - ▶ 100% Band Owned Corporation
 - ▶ If Band owned Corporation because less than 100% owned by First Nation lease reverts to Fair Market Value
 - ▶ All subleases must be for Fair Market Value
 - ▶ No Nominal rent for gravel or Mines and Minerals,

- ▶ Ensure informed consent
 - ▶ Attach lease? Pros vs. Cons
 - ▶ If not, the terms and conditions must be in Information document
 - ▶ Second vote on Lease
 - ▶ Consent of Band Council - Authority from First Nation membership in Designation Document



Things to consider in the Process - BCR

- First Nation submits BCR -
- The BCR will provide the basis for the Designation Document and Information Document
- What should the BCR include:
 1. Request Minister to order referendum
 - Section 39.1 of Indian Act.
 2. Describe Purpose
 - commercial, retail, recreational, educational, institutional, light industrial and residential purposes
 - Information Document will have to spell out scenarios
 - Land Use Plan -
 - ▶ Having a good plan in place eliminates amendments or revocations to a designation.
 - ▶ Where should the business district be located? Residential? Educational?



BCR continued

3. Date, time and place of referendum vote (min. 42 days from posting and mailing of notice)
4. Legal description of lands
 - Some lands can not be designated:
 - ▶ Lands that have a CP (Certificate of Possession) issued on them (unless it has been rescinded)
 - ▶ Lands that have been set aside under 18(2) of the Indian Act (unless they have been rescinded)
 - Land descriptions must be clear and concise
 - ▶ Vague Land Description
 - ▶ All of IR No. 33
 - ▶ Fractional portion of SW ¼ Sec 35.....
 - ▶ Clear land Descriptions
 - ▶ SW ¼ Sec 25 Twp 38 Rge 6 W2M
 - ▶ Lands as described on CLSR Plan 2289
 - Tools that can be used to determine a land description are:
 - ▶ Survey Plans, Reserve Creation Orders, Natural Resources Canada Mapping



BCR continued

5. Term - a Designation should be for a fixed term
 - Surface designation - INAC policy up to 99 years
 - Subsurface designation, may be indeterminate
 - ▶ Indian Oil and Gas
 - ▶ Initial term of lease 5 years unless otherwise provided in lease
 - ▶ Indian Mining Regulations -
 - ▶ Term of lease, 10 yrs from date of issue but can be negotiated
 - ▶ 21 years in provincial system

6. Compensation
 - Lease, permits for Fair Market Value
 - Lease for Nominal Rent to a Band Owned Company

7. Request appointment of electoral officer



Designation Document

- ▶ This is the heart of the designation, usually attached to Ministerial Order
- ▶ Must be drafted with care and precision
- ▶ Contains:
 - ▶ The land to be designated
 - ▶ The purpose of the designation
 - ▶ The term of the designation
 - ▶ Who the lease can be issued to and for what value amount (fair market rent and/or nominal rent)
 - ▶ The terms and conditions of the lease if no lease attached
 - ▶ Amendment clause
 - ▶ Revocation clause
 - ▶ Other terms and conditions requested by the FN
 - ▶ Legal Name of Department (not Indigenous Affairs Northern Development Canada)



Designation Document - Things to think about

- Don't forget about "Gravel" -
 - 58(4)(b) no longer applies,
 - gravel treated as surface interest
- Permits for agricultural and signage (remember ss. 28(2) no longer applies)
- All terms and conditions of all leases, permits, easements, rights-of-way, licences be consented to by the Council of the First Nation
- The Minister may revoke or amend this designation by withdrawing from this designation the whole or any part of the Lands on receipt of a Band Council Resolution from the Council of the First Nation
 - No interests on land
- The Designation may be amended by way of Band Council Resolution on the First Nation's behalf and subject to the approval of the Minister, for the purpose of correcting a clerical omission, mistake, or manifest error or other minor amendments all of which shall be determined by the Minister.



Information Document

- ▶ Drafted by First Nation's Legal Counsel
- ▶ Should contain:
 - ▶ The purpose of the designation
 - ▶ The term of the designation
 - ▶ The land affected by the designation
 - ▶ Prospective lessee and/or sub-lessees
 - ▶ Amount and/or form of compensation (fair market rent or nominal rent)
 - ▶ The basis and frequency of rent reviews
 - ▶ The results of environmental assessments
 - ▶ The nature and scope of Chief and Councils authority to request revocation or amendments to the designation
 - ▶ Contacts for additional information
 - ▶ Any other information required for the membership to make an informed decision
- ▶ The extent of detail required in the information document is based on whether the designation is with or without a lease attached.



Things to think about...

- If nominal rent, information document should mention :
 - Appraisals
 - The First Nation Entity will not share many of the same legal or structural characteristics as the First Nation itself.
 - Should a First Nation Entity obtain mortgage or other related financing in relation to its leasehold interest in a Head Lease, the First Nation Entity would be responsible for complying with the terms and conditions associated with such financing.
 - Canada is not responsible for the establishment or administration of the First Nation Entity or its operations. Such responsibility will rest with the First Nation and its established entity.



Information document continued...

- ▶ If lease not attached the information document should address:
 - ▶ Terms and conditions
 - ▶ Rent (Nominal or Fair Market)
 - ▶ Assignment, mortgage etc.
 - ▶ Potential lessees and sub-lessees
 - ▶ Proposed use of the land (Land Use Plan) -
 - ▶ Maps
 - ▶ Business arrangements (i.e. Joint Ventures, etc.)

- ▶ If the information is not sufficient INAC officials may be requesting that the First Nation conduct a vote on the lease.



Information Meeting

- First Nation is required to hold at least one information meeting as per the Indian Referendum Regulations
- The First Nation Council may decide to hold more than one information meeting. Good idea to hold Second Information meeting:
 - where the First Nation electors are dispersed in a way that makes it practical that all electors have an opportunity to be briefed on the proposal;
 - where the proposed surrender or designation is particularly complicated;
 - involves a major development for the area, or is expected to be controversial; or
 - where significant issues or concerns are raised at the first information Meeting.
- Take good notes and Meeting Minutes
 - An INAC representative will probably attend



Timing

- ▶ At least 49 days prior to the vote:
 - ▶ For Section 10 bands, the First Nation will provide the Electoral Officer with a voters list
 - ▶ For Section 11 bands, INAC must provide the Electoral Officer with a voters list
- ▶ At least 49 days prior to the vote (earlier if possible) the First Nation must provide INAC with a list of addresses for their off reserve membership
 - ▶ Keep an updated address list



Timing

- ▶ At least 14 days before the day on which an information meeting will be held and at least 42 days prior to the vote date, the Notice of Vote and Voters list will be posted.
- ▶ Information packages must be mailed 42 days prior to the vote
- ▶ At least 6 weeks prior to posting the Notice of Vote, all documentation must be agreed upon and finalized
- ▶ Vote
- ▶ Appeal
 - ▶ Request for review - 7 days after vote
- ▶ Ministerial Order (submission)
 - ▶ Certificate of Independent Legal Advice
- ▶ Registration - Indian Lands Registry



Updating Designations

- ▶ Amending an older designation
 - ▶ Want Nominal rent added to designation
- ▶ Revocation and re-designate the Land

Questions?



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