

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

Table of Contents

1.0 Introduction.....	3
Lease Activities.....	3
Lease Precedents (Templates).....	5
2.0 Creating a Lease.....	5
Environment	5
Independent Legal Advice	5
Credit Investigations and Corporate Standing	6
Land Description (Survey)	6
Encumbrance or Charge Check	6
Access to the Premises and Landlocked Parcels	6
Service Agreements	7
Authorized Use of the Lands	7
Duration	7
Appraisal	7
Consideration	7
Adjustment to Fair Market Rent.....	8
Nominal Rent for Joint Ventures.....	8
Rent Review Periods	8
Insurance.....	9
Mortgage	9
3.0 Approval and Consent	9
Ministerial Approval	9
Band Council Consent.....	9
Conditions for Lease Approval Under <i>Indian Act</i> Section 53 Delegation	10
4.0 Assignment of a Lease	10
Consent Required.....	10
5.0 Subleases	11
Subleases on Designated Lands	11
Consent to Sublease	11
Non-disturbance Agreement — Subleases	12
Land description — Subleases.....	12

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

Environment — Subleases	12
Assignment of a Sublease — Subleases.....	12
Mortgage — Subleases	12
6.0 Rent Adjustments.....	12
7.0 Termination of a Lease	13
8.0 Registration in the Indian Lands Registry	13
Annex A: Authorities for Leasing Designated Lands.....	14
Lease on Designated Lands	14
Uncultivated or Unused Band Lands	14
Annex B: Relevant Leasing Case Law.....	15

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

1.0 Introduction

- 1.1 The purpose of a lease is to support economic development and provide for the exclusive use of reserve land for an agreed upon purpose and duration. Leases offer benefits such as:
- a) providing flexibility in managing reserve land by enabling the Band to retain long-term control over the land, subject to the terms and conditions of the lease, and
 - b) creating economic development opportunities by generating revenue and creating employment opportunities

For more information on lease transactions on locatee land, please see [Locatee Lease Policy and Directive, 2013](#).

- 1.2 Every lease involves a grant by the lessor (the department) to a lessee for the exclusive use of land. The lessor retains exclusive rights and control over the land while the lessee is entitled to exclusive use of the land during the term of the lease.
- 1.3 A lease made directly between the department and a lessee is called a head lease. A sublease is created when a lessee in turn leases all or part of their interest or right in the land under the head lease to a third party (the sublessee).
- 1.4 A sublease may be created only if terms of the designation allow for subleasing. Under a sublease, rather than stepping into the lessee's position, the sublessee becomes, in essence, the lessee's tenant, and makes rental payments to the lessee. The lessee continues to be bound by their obligations under the head lease.
- 1.5 Leases involving designated lands do not include subsurface rights to mines, minerals or other subsurface materials such as sand, gravel, potash, and petroleum. For information on Oil and Gas Leases, which are granted under the [Indian Oil and Gas Act](#), contact [Indian Oil and Gas Canada](#).

Lease Activities

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

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

Table 1: Types of Standard Leases

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

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

Lease Precedents (Templates)

- 1.7 Lease precedents (available from the department) provide the basis for all leases and include necessary policy and legal requirements to ensure consistency and accuracy when negotiating terms. The precedents simplify drafting, allow for a streamlined process, and can be tailored to meet the needs of specific projects.
- 1.8 First Nations, as represented by their Band Council, have the option of being a contracting party to the lease, as reflected in the lease precedents. The department and the Band Council will continue to be in a fiduciary relationship with respect to the lease and have certain fiduciary duties and remedies, respectively.
- 1.9 Leases contain provisions dealing with all aspects of the relationship between the lessor (the department) and the lessee (the proponent) to ensure they understand their obligations to each other. The lessor, lessee, and the Band Council must negotiate elements including consideration (rent), rent reviews, the proposed use of land, and duration of the lease as reflected in the Designation Document and the community's land use plan, if applicable. It is the responsibility of the department to ensure all non-negotiable terms such as all applicable laws, regulations and standards are included when preparing a lease.
- 1.10 If applicable provincial fire regulation requires regular fire inspections, based on the type of leasing activities, then the lease must include a clause requiring regular inspections of the premises with a copy of the inspection report to be provided to the department (lessor) and the Band Council.

2.0 Creating a Lease

Environment

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

Independent Legal Advice

- 2.2 The department recommends Band Councils seek independent legal advice in all circumstances. In some instances, this will be a requirement. In cases where a Band Council does not wish to obtain independent legal advice, a Band Council

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

Resolution stating that they have chosen not to obtain independent legal advice will be required.

Credit Investigations and Corporate Standing

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

Land Description (Survey)

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

Encumbrance or Charge Check

- 2.6 Before any lease can be issued, an encumbrance or charge check must be conducted to identify all surface and subsurface encumbrances or charges, locatee interests or rights, and Indian Oil and Gas Canada interests or rights registered in the [Indian Lands Registry System](#). After an encumbrance or charge check has been completed, a Land Status Report summarizing these third party interests or rights must be generated and provided to the Band Council. It is the Band Council's responsibility to review the Land Status Report and take appropriate steps to ensure the removal of any conflicting encumbrances or charges.
- 2.7 A lease will be subordinate to prior interests or rights such as distribution and access permits for utilities, easements, permits, or leases or permits for mineral or oil and gas extraction.

Access to the Premises and Landlocked Parcels

- 2.8 Access must be provided for any lands that become landlocked as a result of the lease.
- 2.9 The lessee is solely responsible for securing and maintaining legal access (by public or private road, water, air or otherwise) to and from the premises.

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

Service Agreements

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

Authorized Use of the Lands

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

Duration

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

Appraisal

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

Consideration

- 2.14 Monetary consideration, payable to the Receiver General for Canada in Canadian currency and accompanied by all applicable taxes, must be received in exchange for the granting of a head lease.
- 2.15 If a fair market rent lease is being proposed after the designation, and a previous fair market rent assessment is outdated or does not apply to the proposed development, then a new fair market rent assessment must be undertaken at the leasing stage.
- 2.16 Leases may be made to Band-owned corporations for nominal or reduced rent if provided for in the Designation Document. Otherwise, a minimum of fair market rent must be obtained for all leases.

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

- 2.17 Leases may provide for a deferred rent or non-standard payment arrangement if authorized in the Designation Document. The lease must specify the payment period and the interest to be charged on any deferred portion.

Adjustment to Fair Market Rent

- 2.18 If rent (including prepaid rent) is less than fair market rent, then the fair market rent, along with any taxes on that amount, will be due for the rest of the term when:
- a) less than 100% of the benefits flow to the Band;
 - b) a mortgagee or a receiver claims to assign any part of the lessee's interest or right in the lease or to sublease the premises; or
 - c) a court order absolutely forecloses the lessee's equity of redemption in the lease, authorizes the assignment of any of the lessee's interest or right in the lease, or authorizes a sublease of the premises.

Nominal Rent for Joint Ventures

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

Rent Review Periods

- 2.20 With the exception of prepaid, nominal or reduced rent, there must be a provision for periodic reviews of the rent based on an appraisal to determine fair market rent in every lease. The following aspects of the rent review process are open for negotiation but must be clearly stipulated within the lease:
- a) Review period (frequency): the standard rent review period is five years but a longer or shorter period may be negotiated.
 - b) Determination window: the designated time period in which the appraisal must be initiated, obtained and shared with the required parties.
 - c) Responsible party: the party (lessee or lessor) obligated by the terms and conditions of the lease to initiate and obtain the appraisal, and to notify the lessee(s) of the new fair market rent determination.

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

Insurance

- 2.21 The lessee must ensure appropriate insurance is maintained, at its sole cost and expense, during the duration of the lease, or when removing the improvements and trade fixtures from the premises at the end of the lease. The most common forms of insurance may include but are not limited to construction insurance, errors and omissions insurance, commercial general liability insurance, all risks property insurance including equipment breakdown and business interruption insurance, and environmental impairment (pollution) liability insurance.
- 2.22 Depending on the uses authorized under the lease, there may be additional requirements for other types of insurance.
- 2.23 The Band (if a contracting party to the lease) must be included on all policies as an Additional Named Insured and Loss Payee (as applicable). Policies are to include a Standard Mortgage Clause (as applicable). The Insureds will ensure any insurance proceeds are made payable to a trustee and the funds will be used for any repair or replacement as required.

Mortgage

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

3.0 Approval and Consent

Ministerial Approval

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

Band Council Consent

- 3.2 The department requires Band Council consent for every lease made directly between the department and a lessee. Consent to a lease prior to execution must occur at a council meeting that is duly convened as per s.2(3)(b) of the [Indian Act](#). The Band Council Resolution must be attached to the lease as a schedule. When consenting to a lease under a general designation, the Band

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

Council will be required to obtain consent through its own community approval process and the Band Council Resolution must state this requirement has been met.

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

- 3.3 Approval of leases is subject to the terms, conditions and restrictions contained in the ministerial letter delegating authority to the band land manager or person who holds the position to manage the reserve lands under s.53(1). At a minimum, before a lease may be executed, the department must approve the lease and any terms that differ from the lease precedent; the Band Council must also consent to the lease by way of Band Council Resolution.
- 3.4 Where a Band has delegated ministerial authority and wishes to lease to its own Band-owned corporation, the department must approve the lease as well as undertake the provisions for monitoring for compliance under the lease.

4.0 Assignment of a Lease

- 4.1 A lease that is in good standing may be assigned if the lease terms allow for assignments. An assignment occurs when a lessee transfers its leasehold interest or right to a third party, known as the assignee. The assignee becomes a new lessee by agreeing to perform the responsibilities of the former lessee under the terms of the lease. An assignment cannot be used as a means to change the terms of an existing lease. An assignment generally does not relieve the original lessee from its obligations under a lease, unless the lessee obtains an express release from the department.
- 4.2 The assignee must, at its own expense, undergo a credit check.
- 4.3 Where the assignee is a corporation, the assignee must, at its own expense, provide proof of its corporate standing and the names of its current signing officers.

Consent Required

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

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

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

5.0 Subleases

Subleases on Designated Lands

- 5.1 A sublease must:
- a) be consistent with the terms of the lease and bind the sublessee to all of the terms under the head lease;
 - b) clearly state it is subordinate to the head lease and that the sublease will automatically terminate if the head lease is cancelled or otherwise terminated unless there is a non-disturbance agreement in place; and,
 - c) end at least one day before the expiry of the lease (or end upon the early termination of the lease).
- 5.2 If the lease is for fair market rent, the sublease can be rented out for any rate unless fair market rent is required in the Designation Document. If the lease is nominal rent, the sublease must be for fair market rent.

Consent to Sublease

- 5.3 Most subleases on designated land will not require Ministerial consent. The department and the Band Council must consent to the issuance of a sublease on designated land in the following circumstances:
- a) where the Designation Document requires consent to subleases;
 - b) when the lease is for reduced or nominal rent; or,
 - c) when percentage rent is charged under the lease.
- 5.4 Where consent is required, a sublease will not be valid until the consent of the Minister and, if applicable, the Band Council has been obtained through the appropriate sublease consent agreement, sublease acknowledgement agreement or sublease non-disturbance agreement.

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

Non-disturbance Agreement — Subleases

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

Land description — Subleases

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

Environment — Subleases

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

Assignment of a Sublease — Subleases

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

Mortgage — Subleases

- 5.9 A mortgage of a interest or a right in a sublease (or sub-sublease) does not require the department or First Nation to enter into a mortgage acknowledgement agreement unless otherwise required by the lease.

6.0 Rent Adjustments

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

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

7.0 Termination of a Lease

- 7.1 Only the department has the authority to terminate a lease. Termination of a lease has important consequences. Legal advice must be obtained and the Band Council must be consulted prior to initiation of any steps for early termination.
- 7.2 Bands with s.53/60 delegation authority may not issue a termination of lease notice. Only the department has the authority to terminate a lease.

8.0 Registration in the Indian Lands Registry

- 8.1 Leases, subleases, assignments, mortgages, and any associated transaction, including forms and agreements, must be prepared in a form suitable for registration in the Indian Lands Registry and must, in accordance with sections 21 and 55 of the [Indian Act](#), be sent for registration in accordance with the requirements of the [Indian Lands Registration Manual](#). This also includes any land use transaction where the department is not a party.

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

Annex A: Authorities for Leasing Designated Lands

Lease on Designated Lands

The following provision of the [Indian Act](#) relates to the leasing of designated lands:

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

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

Uncultivated or Unused Band Lands

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

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

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

Land Management Manual

Chapter:

Leasing on Designated Reserve Land

Section:

Policy

Annex B: Relevant Leasing Case Law

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

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