City of Richmond

Report to Committee

To:	General Purposes Committee	**Date:**	October 2, 2013
From:	Amarjeet S. Rattan Director, Intergovernmental Relations & Protocol Unit	**File:**	01-0010-00/Vol 01
Re:	**Draft Federal Policy - Additions To Reserve/Reserve Creation**		

Staff Recommendation

1. That Council endorse Metro Vancouver's comments with respect to the Draft Federal Policy on Additions to Reserve/Reserve Creation, as outlined in their September 2013 review prepared by the Metro Vancouver Aboriginal Relations Committee. **(Attachment 2)**

2. That Council write to the Minister of Aboriginal Affairs and Northern Development Canada expressing the City's strong concerns with the Draft Federal Policy on Additions-to-Reserve/Reserve Creation, and copies be sent to MP Kerry- Lynne Findlay, MP Alice Wong, FCM and UBCM.

A. Rattan

Amarjeet S. Rattan
Director, Intergovernmental Relations & Protocol Unit
(604-247-4686)
Att. 4

REPORT CONCURRENCE		
ROUTED TO:	CONCURRENCE	CONCURRENCE OF GENERAL MANAGER
Economic Development	☑	
Finance Division	☑	
Real Estate Services	☑	
Parks Services	☑	
Engineering	☑	
Fire Rescue	☑	
Policy Planning	☑	
Transportation	☑	
Community Social Development	☑	
REVIEWED BY DIRECTORS	INITIALS: DW	APPROVED BY CAO

Staff Report

Origin

The Federal Government recently released draft amendments to their Additions to Reserve Policy and asked for public comment by September 30, 2013. This public comment period has now been extended to October 31, 2013.

During the public comment period, Aboriginal Affairs and Northern Development Canada will be gathering input on the revised policy using an online comment box as provided on the AANDC website (http://www.aadnc-aandc.gc.ca/), or more detailed submissions can be sent directly to the federal government by regular mail.

Analysis

The purpose of this report is to brief Council on the 2013 Draft Additions to Reserve/Reserve Creation Policy and to identify local government issues related to the proposed policy changes.

An Addition to Reserve (ATR) is a parcel of land that is added to the existing land base of a First Nation. The federal Additions to Reserve Policy (Additions to Reserve Policy PDF, 149 Kb, 73 pp.) was created by the Government of Canada in 1972 and was last updated in 2001. The ATR policy sets out the conditions and issues to be addressed before land can become reserve. The policy was created to fill a legislative gap, as ATRs are not addressed in the *Indian Act* or other federal legislation.

Proposed ATR Changes

The federal government states that its objectives in proposing the Draft 2013 ATR Policy (**Attachment 1**) are to improve First Nations access to lands and resources by speeding up the ATR process, as the expansion of the reserve land base through ATR is an important mechanism by which First Nations can foster economic development in their communities.

One of the most significant changes being proposed is the move from ATR's being near and 'generally contiguous' to an existing reserve to now being 'non-contiguous'. With the proposed ATR changes, any First Nation with the majority of their Reserve lands in BC could potentially purchase land within Richmond and apply to have this land included as part of their Reserve.

This policy change could result in a large increase in the number of ATR applications in the Lower Mainland, where First Nations from across British Columbia could potentially purchase and add lands to Reserves for the purpose of pursuing economic development opportunities 'close to highways and urban centers'. As well, it is unclear if lands currently within the Agricultural Land Reserve could be removed from the ALR, as part of the ATR process.

Other ATR changes being proposed could have significant impact for local government, including jurisdictional fragmentation, loss of land base, land use planning, bylaw harmonization, tax loss, service provision and lack of dispute resolution mechanism.

As well, the proposed ATR policy includes very little reference to consultation with local government as part of the ATR process. Under the policy, a local government could review an ATR proposal and would have the ability to try and negotiate for lost property tax revenue and use of services (e.g., local roads, libraries, recreation facilities, parks, community facilitates). However, the federal government could approve an ATR regardless of whether a revenue agreement or service agreements were reached between the local government and the First Nation.

The Metro Vancouver Aboriginal Relations Committee has conducted a detailed analysis of the draft ATR Policy and its implications for local government **(Attachment 2).** The following is a summary of key policy changes of interest to local government, as noted by Metro Vancouver:

- **Economic Development**
  - The proposed policy changes are intended to facilitate economic development on Indian Reserves. The new 2013 policy states that lands can be added to reserve for economic development purposes under the Community Additions category.
  - The revised policy expands selection area to the entire province but within a traditional territory. Proposed ATR lands can also be outside the First Nation's traditional territory, provided they are within the province or territory where the majority of the First Nation's existing Reserve land is located.
  - This policy change may lead to a patchwork of jurisdictions across the region, particularly if the applicant First Nation proposes land use for the ATR lands that is incompatible with neighbouring municipal land use planning.
  - **Metro Vancouver recognizes the potential for market development on First Nations' lands to be mutually beneficial for Aboriginal communities and their neighbouring local governments. However, First Nations applying for ATR need to be made aware of multiple barriers local governments face in providing services to Indian Reserves, including feasibility, capacity (legal, physical, fiscal) and political concerns. Regional and municipal interests must be recognized in the ATR approval process to ensure that the applicant First Nation receives utility services it requires in a timely manner.**
  - **First Nation economic development projects in urban areas often involve multi-unit residential housing targeted at the non-aboriginal market which creates servicing demands that are much broader than basic utility services. As a consequence, regional interests must include local transporation authorities such as 'TransLink' and its requisite transporation strategies, services, property taxes and other levies that are integral to economic development within the region.**
- **Non-Contiguous Lands:**
  - The new policy promotes a non-contiguous lands approach with respect to ATR proposals allowing First Nations to access lands non-adjacent to the existing reserves for economic development, such as lands close to highways and urban centers.
  - Servicing non-contiguous reserve lands may be challenging and costly.

  - **The *Local Government Act* requires that all works and services provided by the regional district be consistent with the *Regional Growth Strategy* (Section 865(1)). Metro Vancouver may, therefore, be precluded from providing services to lands that are not currently serviced because, pursuant to the Local Government Act, the GVRD must conform to the *Regional Growth Strategy*.**

- **Servicing Agreements/Financial Impacts/Land Use Planning:**
  - A requirement to negotiate agreements related to joint land use planning/bylaw harmonization, tax considerations, service provision and future dispute resolution contained in the 2001 policy is no longer clearly stated in the revised policy.
  - The word "an agreement" is now replaced with "a Municipal Service Agreement" in the revised "Outstanding Local Government Issues" section. The definition of "a Municipal Service Agreement" needs to be expanded to include regional transportation services such as those provided by 'TransLink'. The revised Federal policy does not lay out specific formulas for compensation, nor does the Federal policy require the First Nation to pay compensation in all circumstances; the local government may not seek compensation or the tax loss may not be considered significant.
  - The revised Federal policy does not lay out specific formulas for compensation, nor does the Federal policy require the First Nation to pay compensation in all circumstances; the local government may not seek compensation or the tax loss may not be considered significant.
  - Local governments are required to recover the full costs of all local services, including the costs of regional services and regional transportation services ('TransLink'). The provisions of the *Regional Growth Strategy* limit the exposure to develop and ensure that the regional tax payers do not end up paying for the costs of projects that are not contemplated in the *Regional Growth Strategy*. Regional servicing issues, including the collection and remittance of all requisite Metro Vancouver property taxes and develop cost charges clearly need to be addressed under the revised ATR policy.
- **Third Party Interests:**
  - The 2013 policy includes very few references to local governments and the need for consultation as part of the review/approval process for ATR proposals.
  - **The specifics of dealing with a third party are not clear. Problems of access may arise if lands are already held by third party interests.**
  - **Moreover, the absence of dispute resolution mechanisms between First Nations and local governments has not been addressed in the 2013 policy.**
- **Consultation Timeline**:
  - The 2013 policy no longer refers to the **90-day review period**; instead, the applicant First Nation is required to notify the affected local government in writing of the Reserve Creation Proposal to give the local government an opportunity to assess any potential impacts of the Proposal on their existing land use plans and service delivery.
  - Since no specific timeline for the review process is provided, this may prove to be problematic for when it is time to provide a response and a deadline date is unknown or unclear to potential respondents.

  - **Regional districts and municipalities require sufficient time to consider a proposal for ATR that takes into consideration the various processes required for Board and Council reports and public consultation.**
- **Local Government Approval:**
  - Local governments have no general or unilateral veto with respect to a Reserve Creation Proposal.
  - **Local governments need to be consulted and engaged in the ATR process to effectively assess any potential impacts of the ATR proposal on their existing land use plans and service delivery.**

Richmond Context

On September 16, 2010 the City received a request for comments from AANDC in relation to an ATR application by the Musqueam Indian Band to add a water lot consisting of filled foreshore (District Lot 8015) to Musqueam Indian Reserve No. 2. While the water lot is located almost entirely within the City of Vancouver, a small part (approximately one hectare) of the proposed addition projects into the Fraser River far enough to cross into Richmond's boundary. The City agreed to this ATR on the condition that the City would not be expected to provide any services to the site.

The only other reserve land within the City boundary is the Musqueam IR Reserve Number 3, a 6.5 hectare site located at the North West corner of Sea Island, adjacent to YVR. (**Map Attachment 3**)

In addition to these reserve lands, the Province and the Musqueam Band also concluded a *Reconciliation Settlement* agreement in March, 2008 through which the Musqueam Band were given what is called the Bridgepoint Lands in Richmond. (**Map Attachment 3**) The Bridgepoint Lands comprise three adjoining parcels which include the current location of the River Rock Resort Casino. The provincial Ministry of Aboriginal Relations and Reconciliation has advised City staff that the Province has not agreed to support any ATR applications with respect to the Bridgpoint Lands.

Several City departments across the organization have also provided the following initial feedback on the Draft ATR Policy changes:

Richmond Fire Rescue - The primary issue concerns the authority for jurisdiction and what codes and bylaws would be applicable to the reserve lands in the City. The other issue is level of service and negotiating the expected level of service to be delivered to the reserve lands.

Economic Development - Development along the major highways in Richmond (Provincial jurisdiction) needs to align with the City's policy (OCP) to be Western Canada's Gateway City to Asia-Pacific – e.g. goods movement East-West and North-South. Development within or near the City Centre would need to align with the vision of the City Centre Area Plan for a complete urban community.

Community Social Development - The need for increased partnerships such as those being pursues by Richmond Youth Services and Pathways Aboriginal Centre in Richmond. Pathways Aboriginal Centre, part of the Richmond Youth Services Agency, is a community organization serving First Nations, especially those new to Richmond. Richmond Youth Services Agency also runs an in-school program that works with First Nations children and youth in the Richmond school system.

Engineering- Concerns with access to land for building infrastructure, especially when the land is part of an existing infrastructure plan or is required to be a thoroughfare.

Transportation - The issue of servicing costs to provide access, if none currently exists, as the added ATR land no longer has to be contiguous with an existing Reserve and the uncertainties of who would bear the costs, given the First Nations are exempt from various taxes.

Finance - The creation of an ATR within the City could potentially lead to a municipal tax loss or a tax shift to other taxpayers if the City is unable to negotiate an appropriate agreement with a First Nation.

Policy Planning- Recommends that the City request the Minister of Aboriginal Affairs and Northern Development Canada to give municipalities the ability to protect their community planning interests by requiring that First Nation enter into land use, servicing and other agreements with municipalities when Additions To Reserve/Reserve Creation are being undertaken. The City's community planning interests are already included in Richmond's 2041 OCP and Metro Vancouver's 2040 Regional Growth Strategy (RGS), For example, Metro Vancouver 's 2040 Regional Growth Strategy (RGS), states:

> *If and when First Nations develop land management plans, Metro Vancouver and the respective First Nations and adjacent municipalities should endeavour to coordinate with each other to ensure, to the extent possible, that the Regional Growth Strategy, municipal Official Community Plans, and First Nations' land management plans are respectful and supportive of each other.*

Financial Impact

There are no financial implications associated with the adoption of this report.

Conclusion

The Federal Government is proposing changes to the Addition to Reserves/Reserve Creation Policy which may have potential implications for local governments. These have been summarized for Council's information.

With the proposed ATR changes, any First Nation with the majority of their Reserve lands in BC could potentially purchase land within Richmond and apply to have this land included as part of their Reserve.

This report recommends that the Council endorse the Metro Vancouver comments with respect to the Draft 2013 ATR Policy and express, to the federal government, its concerns for the potential of jurisdictional fragmentation, loss of land base, land use planning impact, bylaw harmonization, tax loss, service provision and lack of dispute resolution mechanism issues arising from these ATR changes.

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Aboriginal Affairs and Northern Development Canada

Land Management Manual, Chapter 10

Additions to Reserve/Reserve Creation

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Contents Page

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

1.0 Effective Date

1.1 This Policy on Additions to Reserve/Reserve Creation (the "Policy" or the "Additions to Reserve/Reserve Creation Policy") is issued under the authority of the Minister of Indian Affairs and Northern Development (hereinafter called "the Minister of Aboriginal Affairs and Northern Development Canada" or "the Minister"). This Policy shall be administered by the Department of Indian Affairs and Northern Development (hereinafter called "Aboriginal Affairs and Northern Development Canada" or "AANDC"). This Policy received approval on XXXX, and is effective as of XXXX.

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

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

2.0 Application (Purpose)

This Policy applies to employees of AANDC and provides guidance to First Nations with respect to the assessment, acceptance and implementation of Reserve Creation Proposals, including First Nations operating under the *First Nations Land Management Act*.

3.0 Interpretation

3.1 Definitions used in this Policy are found in Annex C.

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

3.3 Any reference to a policy, directive, standard, procedure or guideline includes any amendment to that policy, directive, standard, procedure or guideline made from time to time.

4.0 Context

4.1 Orders in Council

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

4.2 Ministerial Orders

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

5.0 Policy Statement

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

6.0 Objectives

This Policy is intended to:

a) Provide clear policy direction for Reserve Creation.

b) Promote consistent assessment, acceptance and implementation of Reserve Creation Proposals where possible.

c) Consider the interests of all parties and find opportunities for collaboration where possible.

d) Streamline the process for Reserve Creation Proposals.

7.0 Principles

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

a) Nothing in this Policy constitutes a guarantee that any Reserve Creation Proposal will ultimately result in a particular parcel of land being set apart as Reserve. The final decision to set apart land as Reserve rests with the Governor in Council or the Minister. See clause 4.0 (Context).

b) AANDC will consider the potential or established Aboriginal or Treaty rights of First Nation, Métis and Inuit peoples before setting apart lands as Reserve.

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

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

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

f) The environmental condition of land proposed for Reserve Creation will be acceptable for its intended use, and will comply with applicable federal requirements, including requirements for land acquisition as defined by Treasury Board policy.

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

8.0 Categories of Reserve Creation

To be eligible under this Policy, a Reserve Creation Proposal must fit within one of the following three categories:

8.1 Legal Obligations and Agreements - Where there is a legal obligation or an Agreement that contemplates Reserve Creation including:

a) Settlement Agreements;
b) Land exchange Agreements;
c) Land transactions with a reversionary interest to the First Nation;
d) Agreements for returns of former Reserve land where there is no express reversionary interest;
e) Agreements with landless Bands;
f) Agreements for the relocation of communities or the establishment of new Reserves.

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

a) Residential, institutional, recreational uses, to accommodate community growth;
b) Use or protection of culturally significant sites;
c) Economic development;
d) Geographic enhancements to improve the functioning of existing Reserve base;
e) Where the First Nation has entered into a legally binding agreement with the Province or a Local Government or a corporation that is empowered by law to take or to use lands, and Canada is not a party to the agreement but agrees to implement those provisions of the agreement. This may include transactions under section 35 of the *Indian Act*.

8.3 Tribunal Decisions - Where a First Nation seeks to re-acquire or replace lands that were the subject of a Specific Claim. The specific claims tribunal under the *Specific Claims Tribunal Act* only has the authority to award compensation to First Nations. Reserve Creation Proposals will be considered where lands will be acquired with compensation awarded by the specific claims tribunal for decisions that establish a failure to fulfill a legal obligation of the Crown to provide lands under a treaty or another Agreement, or a breach of a legal obligation arising from the Crown's provision or non-provision of Reserve lands, or an illegal disposition by the Crown of Reserve lands.

9.0 Selection Area

9.1 The Proposed Reserve Land should normally be located within a First Nation's treaty or traditional territory.

9.2 Proposed Reserve Land may be outside the First Nation's treaty or traditional territory, provided the Proposed Reserve Land is within the Province or territory where the majority of the First Nation's existing Reserve land is located.

10.0 Reserve Creation Proposals

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

10.2 Before submitting a Reserve Creation Proposal to the Governor-in-Council or the Minister for acceptance, all relevant Reserve Creation Proposal criteria set out in Annex A and all relevant special circumstances requirements set out in Annex B, all as identified in a Letter of Support, must be met.

11.0 Proposal Assessment

11.1 AANDC will review the Reserve Creation Proposal in accordance with Directive 10-2: Reserve Creation Process.

11.2 If a proposal will be supported, AANDC will identify in the Letter of Support the relevant criteria that must be satisfied before AANDC will recommend that the Proposed Reserve Lands be set apart as a Reserve.

11.3 AANDC will provide a written explanation for any Reserve Creation Proposal that will not be supported.

12.0 Financial Implications

12.1 In the absence of an Agreement or other arrangement providing funding, AANDC is not obligated by this Policy to provide funding for Reserve Creation activities, including:

a) Land acquisition,
b) Surveys,
c) Environmental costs including but not limited to assessment activities, remediation and monitoring/mitigation activities,
d) Transactional costs associated with land acquisition,
e) Incremental costs resulting from negotiations with Local Governments, and
f) Any additional funding for infrastructure, housing, or other capital costs.

12.2 AANDC must identify any foreseeable financial implications for Canada, as well as potential sources of funding before a Letter of Support is issued.

13.0 Community Consent

13.1 Where community consent is required for Reserve Creation the following applies:

a) A Band Council Resolution (BCR) is required for all Reserve Creation Proposals,

b) In the limited circumstances where a Band vote is required under this policy, a vote will be held in accordance with the *Indian Referendum Regulations*, and will be decided by a majority of those eligible electors of each participating First Nation who voted (simple majority), and

c) A First Nation may choose to establish a higher threshold for community consent for the conduct of these votes.

14.0 Roles and Responsibilities

14.1 The Minister is responsible for:

a) The decision to approve Reserve Creation through the issuance of a MO, or

b) The decision to recommend Reserve Creation where the Reserve will be created by OIC.

14.2 The Deputy Minister is responsible for the administration of the Additions to Reserve/Reserve Creation Policy.

14.3 The role of the Regional Director General is to review and consider whether to issue a Letter of Support.

15.0 Policy Assessment and Review

15.1 Within five years from the effective date of this Policy, AANDC Headquarters, Lands and Economic Development, Lands and Environmental Monitoring Branch (LEMB) will conduct a review of the effectiveness of this Policy.

15.2 The effectiveness of the Policy will be examined by AANDC using the results of assessment activities undertaken for the Policy directives and other instruments that flow from it. LEMB will identify and undertake any additional monitoring and assessment activities as necessary to undertake an effective policy review.

16.0 Legislation and Related Policy Instruments

The following lists some of the legislation and policy instruments applicable to the Additions to Reserve/Reserve Creation Policy. The list is not exhaustive. Other legislation and policy instruments may apply.

16.1 Legislation

a) The *Indian Act;*

b) The *Constitution Acts;*

c) *Manitoba Claim Settlements Implementation Act* and the *Claim Settlements (Alberta and Saskatchewan) Implementation Act;*

d) The *Federal Real Property and Federal Immovables Act*, and regulations;

e) *Canadian Environmental Assessment Act 2012 (CEAA 2012)* and regulations;

f) The *Species at Risk Act;*

g) *Canada Lands Surveys Act and regulations*;

h) *Indian Lands Agreement (1986) Confirmation Act, 2010* (Statutes of Ontario);

i) *Indian Lands Agreement Act (1986);*

j) *Specific Claims Tribunal Act;*

k) *First Nation Statistical and Financial Management Act*;

l) *First Nations Commercial and Industrial Development Act;*

m) *Canadian Environmental Protection Act.*

16.2 Related Policy Instruments

a) AANDC's *Land Management Manual*;

b) AANDC's *New Bands and Band Amalgamations Policy* ;

c) Chapter 12 of AANDC's *Land Management Manual* (Environmental Obligations);

d) Treasury Board Secretariat *Policy on Management of Real Property*;

e) AANDC's *Indian Lands Registration Manual*;

f) AANDC's *Specific Claims Policy*;

g) Geographical Names Board of Canada; *Principles and Procedures for Geographic Naming*, 2011; Public Works and Government Services Canada, ISBN 978-1-100-52417-7;

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

i) *Framework Agreement between Lands and Trust Services, AANDC and Legal Surveys Division, Natural Resources Canada, February 25, 2009*, registered in the Indian Land Registry under Instrument No. 258930, for the type of land description requirements for Reserve land transactions, including additions/new Reserves.

17.0 Enquiries

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

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

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

Directive 10 – 1: Annex A
Reserve Creation Proposal Criteria

The criteria that apply to all Reserve Creation Proposals within the categories set out in clause 8.0 of Directive 10-1 of the Policy include, but are not limited to:

1.0 Duty to Consult - Aboriginal or Treaty Rights

1.1 As provided in clause 7.0(b) of the Policy, AANDC will consider the potential or established Aboriginal or Treaty rights of First Nation, Métis and Inuit peoples before setting apart lands as Reserve.

1.2 Before Reserve Creation, AANDC will assess whether the Crown has met its duty to consult (where the duty exists) with First Nation, Métis and Inuit peoples, as applicable, whose Aboriginal or treaty rights may be adversely impacted by Crown action related to the Reserve Creation. AANDC will follow the applicable policies and guidelines of the Government of Canada relating to consultation as they exist from time to time when considering a Reserve Creation Proposal.

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

2.0 Environmental Management (see Chapter 12 of the Manual)

2.1 Definitions

In this clause,

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

b) "Indemnification Agreement" means an Agreement that sets out terms satisfactory to AANDC on the following matters: a release of Canada from liability for any existing and future claims relating to the environmental condition of the Proposed Reserve Land; an indemnity by the First Nation against such claims; agreement by the First Nation to impose appropriate

land use restrictions through land use plans and by-laws; provision of funds or security for remediation; any necessary ongoing monitoring or future remediation requirements; and any other conditions deemed necessary by AANDC in the circumstances.

2.2 General Policy

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

2.3 Environmental Site Assessment

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

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

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

   i. in the case of industrial or commercial use, a lease will be put in place containing environmental terms and a federal regulatory regime is in place to govern the use following Reserve Creation;

   ii. the First Nation is fully apprised of the condition of the Proposed Reserve Land and has received independent expert advice;

   iii. the First Nation has, by Band Council Resolution and (if requested by AANDC) Band vote, approved the acquisition of such Land on an "as is" basis; and

iv. if requested by AANDC, the First Nation has entered into an Indemnification Agreement on terms satisfactory to AANDC.

d) Where the Environmental Site Assessment determines that the environmental condition of the Proposed Reserve Land does not meet the Applicable Environmental Standard for the intended use following Reserve Creation, AANDC will reject the Reserve Creation Proposal but may reconsider it at a later date if the land is remediated to the Applicable Environmental Standard. Where either the vendor of the land or the First Nation undertakes the remediation, the First Nation must provide satisfactory evidence to AANDC of the remediation to the Applicable Environmental Standard, supported by an environmental consultant's report. Where, in rare cases, AANDC is responsible for remediation, the Department must ensure that satisfactory remediation has been completed. In all cases, the remediation should be well documented and the documentation retained on file by AANDC.

2.4 Environmental Assessment of a Proposed Project

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

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

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

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

3.0 Improvements to Proposed Reserve Land

a) Any improvements made by the First Nation to the Proposed Reserve Land before Reserve Creation must be in compliance with applicable

federal legislative requirements that will apply once the Reserve is created.

b) Any improvement on Proposed Reserve Land may delay or prevent Reserve Creation due to environmental issues or other matters. For example, improvements on Proposed Reserve Land may require an additional ESA and a designation vote in accordance with the *Indian Act*.

4.0 Other Federal Departments and Agencies

Following issuance of a Letter of Support, AANDC's regional office will contact other federal departments and agencies (e.g., Health Canada and the RCMP) and give them the opportunity to assess any potential impact of the Reserve Creation Proposal on their program delivery.

5.0 Existing Encumbrances

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

b) Following receipt of the Reserve Creation Proposal and prior to issuing the Letter of Support, a title review must be conducted by DOJ and all encumbrances identified and confirmed.

c) Following issuance of the Letter of Support, existing encumbrances should be extinguished, or replaced, or minimized.

d) In certain circumstances, taking title to Proposed Reserve Land subject to an encumbrance may be considered.

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

6.0 Third Party Access

a) Before Reserve Creation, in conjunction with AANDC, the First Nation

must address:

i. access to any third-party land that would be "landlocked" by the Reserve Creation; and
ii. access to utilities for that third-party land.

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

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

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

7.0 Land Descriptions

a) Before recommending Reserve Creation, parcel boundaries will be described in accordance with the Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector, Natural Resources Canada, from Chapter B1-2 - General Instructions for Surveys (http://clss.nrcan.gc.ca/standards-normes/b1-2-v3-eng.asp), and such description must be reviewed by DOJ before being finalized.

b) A land description may include a survey.

8.0 Provincial Considerations

a) The First Nation must notify the Province in writing of the Reserve Creation Proposal and give them the opportunity to assess the potential impact on their existing land use plans and program delivery. Three months must be given to the Province to express any views in writing and set out any issues for discussion. Any issues must be addressed and documented by written correspondence between the First Nation and the Province.

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

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

d) Where there are outstanding issues or concerns arising from provincial consultations, and the First Nation and the RDG agree to proceed, the Reserve Creation Proposal will be forwarded, with options, to the Deputy Minister or Minister for review.

e) The First Nation is responsible for discussions with provincial governments. Where requested by a First Nation, AANDC may provide facilitative or technical assistance in support of the discussions.

9.0 Local Governments

General:

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

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

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

d) The First Nation is responsible for the negotiation of any agreements with Local Governments. Where requested by a First Nation, AANDC may provide facilitative or technical assistance in support of the negotiations.

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

Consultation:

f) Where the Proposed Reserve Land is within or adjacent/abutting a Local Government, the First Nation will notify the Local Government in writing of the Reserve Creation Proposal in order to give the Local Government an opportunity to assess any potential impact of the Reserve Creation Proposal on their existing land use plans and service delivery.

g) A First Nation-Local Government agreement may be necessary to address the provision of services, by-law compatibility, a consultation and dispute resolution process for matters of mutual concern, or potential net tax loss adjustments due to the loss of Local Government jurisdiction over the Proposed Reserve Land. The Local Government and First Nation should formalize such an agreement in writing.

Local Government Tax Considerations:

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

i) Negotiations concerning net tax loss adjustments are intended to allow the Local Government to adjust to the net effect of the combined reduction in Local Government servicing costs and reduced tax base caused by a Reserve Creation Proposal. It is not intended to compensate indefinitely for the gross level of lost taxes.

j) The First Nation is responsible for negotiation of agreements with Local Governments, including agreements for municipal services or net tax loss adjustment. Where requested by a First Nation, AANDC may provide facilitative or technical assistance in support of the negotiations.

k) AANDC is not a party to any agreement for municipal services or net tax loss compensation.

Outstanding Local Government issues:

l) The RDG may agree to support the Reserve Creation Proposal where the First Nation is prepared to enter into an agreement on the issues raised by the Local Government and the RDG determines that the Local Government is unwilling to respond in good faith.

m) Similarly, the RDG may choose to withdraw support for a Reserve Creation Proposal in cases where a First Nation has demonstrated an unwillingness to negotiate in good faith with a Local Government or where

a Municipal Service Agreement is required to provide essential services to a Reserve, but has not been concluded.

Directive 10 – 1: Annex B
Special Circumstances Policy Requirements

1.0 Accretion/Erosion

1.1 In this clause,

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

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

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

a) Any locatee or interest holder benefits from any accretion or suffers any loss due to erosion;

b) Any lands accreting to a Reserve takes on the characteristics of the Reserve and any lands lost by erosion lose the characteristics of the Reserve; and

c) No OIC or MO is required to change the boundary of the Reserve unless there are exceptional or controversial circumstances such as litigation or contentious relations between parties. These exceptional or controversial circumstances will be determined on a case by case basis.

1.3 For greater certainty, accretion and erosion do not apply to flooding.

2.0 Natural Disasters

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

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

a) The risk involved if the community remains at the original site;

b) The nature and extent of future risk;

c) Extent of preventative or remedial action required;

d) The cost of undertaking preventative or remedial measures compared to the cost of relocation, and

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

3.0 Subsurface Rights

3.1 This Policy does not authorize Reserve Creation which consists of subsurface rights only. This Policy does authorize Reserve Creation for specific portions of subsurface rights described in clauses 3.0 and 4.0 of this Annex.

3.2 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.

4.0 Partial Subsurface Interest Additions

4.1 In this clause,

"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 ¼ interest is purchased, only that ¼ interest can be set apart as reserve providing that the conditions set out in this clause are met.

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

a) The surface of the land described in the Reserve Creation Proposal must be Reserve;

b) Title to the Partial Interest in the Mines and Minerals must be acquired by the First Nation and transferred to Canada before Reserve Creation;

c) The First Nation must be fully informed of the complexities of dealing with Partial Interests in Mines and Minerals;

d) A Partial Interest in Mines and Minerals cannot be explored or exploited without obtaining the appropriate provincial instrument including the written consent of each partial interest holder;

e) All the owners of the partial subsurface interests must sign a joint agreement before Canada proceeds with Reserve Creation. This agreement must detail the conditions under which this partial interest would be held and how it would be managed for the group of owners.

5.0 Small Mineral Additions

5.1 In limited circumstances Reserve Creation may be considered for subsurface rights (i.e. Mines and Minerals) where the surface land is not Reserve. This may arise where a Province excludes the surface land from the transfer to Canada for Reserve Creation. The common provincial exclusions to the surface title are public roads, highways, certain water bodies and water courses.

5.2 Reserve Creation Proposals for subsurface interests may be 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 or Local Government 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.

6.0 Correcting a Reserve Creation OIC or MO

6.1 Where provincial Crown Land has been acquired and set apart as a Reserve by an OIC or MO and the surface or subsurface rights are unclear, both an amending order in council from the Province and an amending OIC or MO from Canada are required to clarify the rights.

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

7.0 Special Reserves under Section 36 of the *Indian Act*

7.1 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.*

7.2 While section 36 of the *Indian Act* allows for the creation of special Reserves, Reserve Creation requires the exercise of the Royal Prerogative and therefore no Reserve may be created except with the agreement of Canada. A special Reserve, therefore, cannot be created by the unilateral act of a third party.

7.3 No special Reserves will be created using section 36 of the *Indian Act*.

8.0 Joint Reserves

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

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

i. Cost implications for the creation and management of the Joint Reserve.

ii. The requirement for unanimity of all First Nations involved for decisions requiring consent of the band council or membership (surrenders, designations, permits, leases, certificates of possession, etc).
iii. Applicability of a First Nation Land Management ("FNLM") land code.
iv. Treaty – generally speaking, in the Province of British Columbia, joint reserve lands will not be eligible for conversion to treaty settlement lands through the implementation of a treaty under the British Columbia Treaty Process unless all First Nations for whom the reserve was set aside were party to the same modern treaty.
v. By-laws – for a band by-law to apply to joint reserve lands, the same by-law would need to be passed by each of the First Nations involved.
vi. Interest - each First Nation will have an equal undivided interest in the Joint Reserve lands regardless of the size of the lands.

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

8.4 Information Session. At a minimum, one information session is held for the benefit of the electors of each participating First Nation prior to a vote. The information session should include all the details of the Reserve Creation Proposal for a Joint Reserve including, but not limited to, details of the co-management agreement, complexities associated with designation requirements, the day-to-day administration, the requirement for unanimity for any decision affecting the use of the Joint Reserve and what that means, etc.

8.5 Separate Votes. While all participating First Nations may vote at the same time, separate voting results must be tabulated for each to confirm that the membership of each participating First Nation supports the Joint Reserve.

8.6 Failed Votes. If one or more of the participating First Nations fail to consent to the Reserve Creation Proposal for a Joint Reserve, those First Nations that did not vote in favour may hold a second vote following the same procedure as the first vote. If all of the First Nations do not vote in favour, the Reserve Creation Proposal for a Joint Reserve will not normally be considered further, unless the participating First Nations have previously agreed that the Joint Reserve may proceed without the First Nations who did not hold a successful vote.

8.7 Legal Obligation. Where the Reserve Creation Proposal for a Joint Reserve is in partial or full satisfaction of legal obligations, to one or more of the participating First Nations, the Reserve Creation Proposal for a Joint Reserve must address how the obligation is being satisfied with respect to those First Nations and include a release of Canada from any liability.

8.8 Indemnity. The Department will require that all participating First Nations indemnify Canada in writing from any claims by any of them or their members

pertaining to the use of the Joint Reserve or the division of benefits or losses derived from the Joint Reserve.

Directive 10 – 1: Annex C - Definitions

"AANDC" has the meaning given in sub-clause 1.1 of Directive 10-1;

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

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

"Canada" means Her Majesty the Queen in Right of Canada;

"Contamination" means the introduction into soil, air, or water of a chemical, organic or radioactive material or live organism that will adversely affect the quality of that medium;

"DOJ" means the Department of Justice;

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

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

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

"Letter of Support" or "LOS" means a letter from AANDC to the First Nation that states that the First Nation's Reserve Creation Proposal will be supported by AANDC to the extent indicated in this Policy and identifies the criteria that must be satisfied before AANDC will recommend the Proposed Reserve Land for Reserve Creation;

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

"Manual" has the meaning given in sub-clause 1.2 of Directive 10-1;

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

"Minister" has the meaning given in sub-clause 1.1 of Directive10-1;

"MO" means Ministerial Order;

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

"OIC" means Order in Council;

"Policy" or "Additions to Reserve/Reserve Creation Policy" has the meaning given in section 1.1 of Directive 10-1;

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

"Province" means a province of Canada, and includes Yukon, the Northwest Territories and Nunavut;

"RDG" means Regional Director General;

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

"Reserve Creation" means the act of adding land to an existing Reserve or creating a new Reserve for a First Nation by OIC or MO;

"Reserve Creation Proposal" means the formal proposal by a First Nation to add land to an existing Reserve or to create a new Reserve by OIC or MO;

"Reserve Creation Proposal Criteria" means the relevant criteria set out in Annex A of Directive 10-1 of the Policy and any other criteria as determined by AANDC;

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

"Selection Area" has the meaning given in clause 9.0 of Directive 10-1.

Directive 10 – 2:
Reserve Creation Process

1.0 Effective Date

1.1 This Directive on the Reserve Creation Process is effective as of XXXX.

1.2 This Directive forms part of AANDC's *Land Management Manual*, Chapter 10, Reserve Creation.

2.0 Application

2.1 This Directive applies to employees of AANDC and provides guidance to First Nations with respect to Reserve Creation Proposals, including First Nations operating under the *First Nation Land Management Act.*

2.2 This Directive sets out the process to be followed for Reserve Creation.

2.3 Definitions used in this Directive are found in Annex C of Directive 10-1 of Chapter 10 of the Manual.

3.0 References

3.1 Legislation and related policy instruments relevant to this Directive are set out in Directive 10-1, clause 16.0 (Legislation and Related Policy Instruments) of the Policy.

4.0 Objectives

4.1 The objectives of this Directive are set out in Directive 10-1, clause 6.0 (Objectives) of the Policy.

5.0 Requirements and Responsibilities

5.1 Phase 1 – Reserve Creation Proposal Development

5.1.1 The Reserve Creation Process begins when the First Nation submits a Band Council Resolution (BCR) and the Reserve Creation Proposal to the AANDC Region seeking Reserve Creation. At a minimum, the Reserve Creation Proposal must include:

i. The applicable Policy category;
ii. Selection Area;
iii. Land Use – Unless otherwise stated in an Agreement, the First Nation must describe the current and intended use of the Proposed Reserve Land;
iv. Where available, the offer to purchase, title search including, the registered owner(s), and a general description of Proposed Reserve Land sufficient to identify location;
v. Proximity of the Proposed Reserve Land to a Local Government;
vi. Whether mineral rights are to be included and, if so, the registered owner(s);
vii. Although an Environmental Site Assessment is not required at this stage, any environmental information of the historical, current and intended use of the Proposed Reserve Land;
viii. Transaction costs applicable under the Policy (and the potential source of funds);
ix. Other net benefits of Proposed Reserve Land use;
x. Results of investigations identifying existing encumbrances normally achieved by a title search, provincial canvass, and/or site visit, and including supporting documentation if applicable;
xi. Any known provincial, municipal, Aboriginal, or other interests; and
xii. Whether services are required. If services are required, enumerate what services and the plan to provide for or acquire them.

5.1.2 If the Reserve Creation Proposal adds to an existing Reserve, the BCR should set out the name and number of the existing Reserve. If the Reserve Creation Proposal involves the creation of a new Reserve, the proposed name and number of the new Reserve should be identified in the BCR. Naming should be in accordance with the Geographical Names Board of Canada.

5.1.3 Reserve Creation Proposals must be submitted to the AANDC Region within which the majority of the First Nation's land is located, regardless of the Selection Area.

5.2 Phase 2 - Letter of Support

5.2.1 AANDC staff may discuss the Reserve Creation Proposal with the First Nation before the determination contemplated by 5.2.3, and assist the First Nation in the preparation of the Reserve Creation Proposal where appropriate.

5.2.2 Upon receipt of a Reserve Creation Proposal, a written acknowledgement of receipt will be provided by AANDC Region to the First Nation.

5.2.3 Following receipt, AANDC will determine whether or not the proposal meets the minimum requirements set out in 5.1.1 of this Directive. When that review is complete, AANDC will advise the First Nation in writing of the results of the determination. If the Reserve Creation Proposal has not met the minimum requirements, the Region will advise the First Nation of the deficiencies to be addressed before the proposal will be considered further.

5.2.4 If the Reserve Creation Proposal has met the minimum requirements, AANDC will review the Reserve Creation Proposal for the purposes of determining whether a Letter of Support will be issued.

5.2.5 If a Reserve Creation Proposal is outside the RDG's authority but the RDG and the First Nation still wish to proceed, the RDG will forward the Reserve Creation Proposal to the Deputy Minister for review and consideration.

5.2.6 The RDG (or the Deputy Minister) may issue a Letter of Support or reject the Reserve Creation Proposal. If a Letter of Support is to be issued, AANDC will identify in the Letter of Support the Reserve Creation Proposal Criteria that must be satisfied before AANDC will recommend Reserve Creation.

5.2.7 AANDC will provide a written explanation for any Reserve Creation Proposal that will not be supported. Such explanation may include but is not limited to:

a) Reserve Creation Proposal Criteria not able to be readily satisfied
b) Minister's discretion not to recommend Reserve Creation
c) AANDC Reserve Creation Proposal implementation planning

5.3 Phase 3 – Reserve Creation Proposal Completion

5.3.1 Where a Letter of Support is issued, Regional AANDC and the First Nation will work together to develop a work plan identifying the requirements to meet the Reserve Creation Proposal Criteria identified. AANDC and the First Nation will clarify their respective roles and responsibilities within the process, e.g., with respect to communications planning, environmental site assessments, surveys, community planning requirements, mechanisms to address third party interests, etc.

5.3.2 AANDC will initiate an annual review of each Reserve Creation Proposal with the First Nation to determine whether work plan objectives have been met. Where objectives have not been met, the work plan requirements may be revised.

5.3.3 Once all of the Reserve Creation Proposal Criteria have been satisfied, the First Nation will ensure that all of the required information has been forwarded to the AANDC Region and will advise AANDC that the Reserve Creation Proposal has been completed.

5.3.4 Transfer of administration and control from a Province or acquisition of the fee simple title is to be completed in accordance with the *Federal Real Property and Federal Immovables Act* and its regulations.

5.3.5 AANDC Region will verify that the Reserve Creation Proposal is complete, confirm the number and name of the proposed Reserve, and notify the First Nation that the Reserve Creation Proposal will be submitted to the Minister.

5.4 Phase 4 – Reserve Creation Recommendation

5.4.1 Regional AANDC staff will prepare the OIC or MO submission requesting Reserve Creation.

5.4.2 The OIC or MO submission is sent to the Minister who may in the case of an OIC submission recommend its approval to the Privy Council, or reject or approve the MO.

5.4.3 The Governor in Council either rejects or approves the OIC submission.

5.4.4 If the MO or OIC is granted, the MO or OIC is registered in AANDC's Indian Lands Registry. Regional Lands staff should arrange for the registration of all related land title documents in the Indian Lands Registry to be attached to, or accompany, the registration of the MO or OIC, as applicable.

5.4.5 AANDC Region will notify the First Nation and other relevant parties of the Reserve Creation and provide each with the registration particulars as required.

6.0 Directive Assessment and review

6.1 AANDC Headquarters, Lands and Economic Development, Lands and Environmental Monitoring Branch (LEMB) is responsible for any scheduled review of this Directive, as well as for any ad hoc reviews as necessary.

6.2 The effectiveness of the Directive will be examined using the results of assessment activities undertaken for the Policy, Directives and other instruments that flow from them. LEMB may identify and undertake any additional monitoring and assessment activities necessary.

7.0 Enquiries

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

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

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

8.0 Annexes (for templates, checklists)

Metro Vancouver's Comments on the 2013 Revised Draft Federal Policy on Additions-to-Reserve/Reserve Creation (September 2013)

Policy Objectives

- The objectives of the ATR policy are broad in scope and speak to Canada's fiduciary obligations to Aboriginal peoples. The ATR policy is intended to:
  - a) provide clear policy direction for Reserve Creation;
  - b) promote consistent assessment, acceptance and implementation of Reserve Creation Proposals where possible;
  - **c) consider the interests of all parties and find opportunities for collaboration where possible; and**
  - d) streamline the process for Reserve Creation Proposals.

AANDC Objectives for the Proposed Revisions

- **Streamline the ATR proposal and remove duplication:**
  - **Minimum proposal standards**: proposals will meet minimum requirements before an official ATR process will be initiated;
  - **Earlier Letter of Support;**
  - **Improved Service Standards**: processing times will be improved thanks to clear service standard guidelines that will establish for both Canada and First Nations requirements to complete Reserve Creation;
  - **Updated Policy Categories**: landless First Nations will be required to negotiate a lands agreement with AANDC before submitting a proposal under the ATR policy;
  - **Consistent Criteria for all Policy Categories;**
  - **Required Environmental Remediation;**
  - Ensuring that the federal government has consulted with all affected Aboriginal groups;
  - **Improved Tools for Resolving Third Party Interests:** AANDC will provide a facilitative role to assist in negotiations, where requested, and subject to resource constraints.
- **Clarify roles and responsibilities:**
  - **Joint Work Plan**: First Nations and AANDC will be required to complete a Joint Work Plan that sets out the steps required to complete the ATR.
- **Facilitate economic development:**
  - **Identify Economic Development ATRs:** The 2001 policy allowed for "community development" under the Community Additions category and "economic development" under the New Reserve category. The new 2013 policy states that lands can be added to reserve for economic development purposes under the Community Additions category.
  - **More Flexible Locations for ATR**: the 2001 policy required that a proposed ATR be near the existing reserve to deliver services at little or no cost. The new policy expands the selection area to within a First Nation's traditional territory, and applies throughout the entire province.

Key Policy Changes of Interest to Local Government:

- **Economic Development**
  - The proposed policy changes are intended to facilitate economic development on Indian Reserves. The new 2013 policy states that lands can be added to reserve for economic development purposes under the Community Additions category.

- The revised policy expands selection area to the entire province but within a traditional territory. Proposed ATR lands can also be outside the First Nation's traditional territory, provided they are within the province or territory where the majority of the First Nation's existing Reserve land is located.
- This policy change may lead to a patchwork of jurisdictions across the region, particularly if the applicant First Nation proposes land use for the ATR lands that is incompatible with neighbouring municipal land use planning.
- **Metro Vancouver recognizes the potential for market development on First Nations' lands to be mutually beneficial for Aboriginal communities and their neighbouring local governments. However, First Nations applying for ATR need to be made aware of multiple barriers local governments face in providing services to Indian Reserves, including feasibility, capacity (legal, physical, fiscal) and political concerns. Regional and municipal interests must be recognized in the ATR approval process to ensure that the applicant First Nation receives utility services it requires in a timely manner.**
- **First Nation economic development projects in urban areas often involve multi-unit residential housing targeted at the non-aboriginal market which creates servicing demands that are much broader than basic utility services. As a consequence, regional interests must include local transporation authorities such as 'TransLink' and its requisite transporation strategies, services, property taxes and other levies that are integral to economic development within the region.**

- Non-Contiguous Lands:
  - The new policy promotes a non-contiguous lands approach with respect to ATR proposals allowing First Nations to access lands non-adjacent to the existing reserves for economic development, such as lands close to highways and urban centers.
  - Servicing non-contiguous reserve lands may be challenging and costly.
  - **The *Local Government Act* requires that all works and services provided by the regional district be consistent with the *Regional Growth Strategy* (Section 865(1)). Metro Vancouver may, therefore, be precluded from providing services to lands that are not currently serviced because, pursuant to the Local Government Act, the GVRD must conform to the *Regional Growth Strategy*.**
- Servicing Agreements/Financial Impacts/Land Use Planning:
  - A requirement to negotiate agreements related to joint land use planning/bylaw harmonization, tax considerations, service provision and future dispute resolution contained in the 2001 policy is no longer clearly stated in the revised policy.
  - The word "an agreement" is now replaced with "a Municipal Service Agreement" in the revised "Outstanding Local Government Issues" section. The definition of "a Municipal Service Agreement" needs to be expanded to include regional transportation services such as those provided by 'TransLink'. The revised Federal policy does not lay out specific formulas for compensation, nor does the Federal policy require the First Nation to pay compensation in all circumstances; the local government may not seek compensation or the tax loss may not be considered significant.
  - The revised Federal policy does not lay out specific formulas for compensation, nor does the Federal policy require the First Nation to pay compensation in all circumstances; the local government may not seek compensation or the tax loss may not be considered significant.
  - Local governments are required to recover the full costs of all local services, including the costs of regional services and regional transportation services

('TransLink'). The provisions of the *Regional Growth Strategy* limit the exposure to develop and ensure that the regional tax payers do not end up paying for the costs of projects that are not contemplated in the *Regional Growth Strategy*. Regional servicing issues, including the collection and remittance of all requisite Metro Vancouver property taxes and develop cost charges clearly need to be addressed under the revised ATR policy.

- Third Party Interests:
  - The 2013 policy includes very few references to local governments and the need for consultation as part of the review/approval process for ATR proposals.
  - **The specifics of dealing with a third party are not clear. Problems of access may arise if lands are already held by third party interests.**
  - **Moreover, the absence of dispute resolution mechanisms between First Nations and local governments has not been addressed in the 2013 policy.**
- Consultation Timeline:
  - The 2013 policy no longer refers to the **90-day review period**; instead, the applicant First Nation is required to notify the affected local government in writing of the Reserve Creation Proposal to give the local government an opportunity to assess any potential impacts of the Proposal on their existing land use plans and service delivery.
  - Since no specific timeline for the review process is provided, this may prove to be problematic for when it is time to provide a response and a deadline date is unknown or unclear to potential respondents.
  - **Regional districts and municipalities require sufficient time to consider a proposal for ATR that takes into consideration the various processes required for Board and Council reports and public consultation.**
- Local Government Approval:
  - Local governments have no general or unilateral veto with respect to a Reserve Creation Proposal.
  - **Local governments need to be consulted and engaged in the ATR process to effectively assess any potential impacts of the ATR proposal on their existing land use plans and service delivery.**
- Regional Districts
  - Even though the 2013 policy does not explicitly recognize regional districts, it now includes the broader term "Local Governments "replacing the term "Municipalities" that was used throughout the 2001 policy.
  - **Consideration could be given in the revised draft ATR policy to replacing the term "other authorities" with the term "regional authorities" so that the revised definition for 'Local Government' would read: *"a city, town, village or other built-up area with municipal or regional authorities and includes a rural or urban municipality, or regional transportation authority, as defined in relevant provincial legislation."***

General Observations:

- The ATR policy applies only to Reserve lands and Indian Bands, including First Nations operating under the *First Nations Land Management Act.*
- The ATR policy review is technical in nature as changes are not intended to address substantive policy questions. However, it should also be noted that the revised policy is a work in progress and requires federal department approvals prior to it being officially released.

- The 2013 policy is much more succinct; the number of pages has been reduced from 73 to 31. Also, a number of sections have been removed from the 2001 policy.
- While the revised policy does not remove the obligation for First Nations to consult with local governments on ATR proposals, the language utilized in the 2013 policy is less forthright. Local governments continue to not have a general veto power, although local government concerns are to be solicited and addressed by First Nations during the ATR process. The wording in some sections of relevance to local government seems vague and ambiguous, especially in relation to consultation timelines and a requirement to negotiate agreements with local governments to address specific issues and concerns regarding land use and servicing arrangements.
- The policy document refers to "Reserve Creation" more often than "Additions-to-Reserve". This appears to signal a change in focus or intent of ATR applications (i.e. not adding to existing Reserve lands, but rather creating additional Reserves).

Based on a review of a draft version of a revised Additions-to-Reserve policy, the following issues of concern for local government have been identified below and summarized in the table titled: "A Comparative Analysis of Metro Vancouver's Position Paper on the Additions to Reserve (ATR) Policy, the Standing Senate Committee Report, and the 2013 Revised ATR Policy" (Attachment).

This analysis focuses on the following key areas of interest for municipalities and regional districts regarding the ATR policy: engagement process, communications, servicing, land use planning, budgetary stability, approval process, time required for public processes, and jurisdictional uncertainty.

1) Managing the Process of Additions-to-Reserve

Local Government Engagement:

- The federal ATR policy was developed in 1972 to allow First Nation to add land to existing reserves or to create new reserves. The policy was first revised in 1991 then again in 2001 and most recently in 2013.

- In the 1990s, AANDC (former INAC) and the Assembly of First Nations undertook joint review of the addition to reserve policy. During the review period, many First Nations were critical of the policy indicating that the policy was too restrictive and treated all proposals in the same way, regardless of whether they were routine or complicated. According to some First Nations, the 'one-size fits all' approach to conducting site-specific reviews of addition proposals resulted in a lengthy and inefficient process.

- In 2010, the former Lower Mainland Treaty Advisory Committee (LMTAC) was invited to participate in an AANDC evaluation of the 2001 ATR policy to provide comments and recommendations from a local government perspective. Further to this request, LMTAC compiled comments from its membership and conveyed them directly to the federal government for consideration. Since 2010, local governments have not received any specific updates as to how the feedback provided had informed AANDC's evaluation process of the ATR policy.

- In May 2013, Metro Vancouver drafted a report that examined the report of the Standing Senate Committee on Aboriginal Peoples titled: "Additions to Reserve: Expediting the Process". The federal report on ATR was analyzed in relation to local government interests, as presented

in Metro Vancouver's position paper entitled: "A Metro Vancouver Position Paper on the Federal Additions-to-Reserve (ATR) Process and the First Nations Commercial and Industrial Development Act (FNCIDA)".

- In response to multiple requests for reforming the existing ATR policy that First Nation witnesses brought to the attention of the Standing Senate Committee in 2012, AANDC has brought forward the proposed revisions to the Policy on ATR/Reserve Creation. In July 2013, the federal government communicated its request for feedback to all First Nation communities across Canada, as well as provincial governments and other stakeholders, including local governments.

- AANDC has advised Metro Vancouver of the opportunity to submit feedback on a draft version of the revised ATR policy. AANDC launched an online feedback form process on the revised policy with the deadline for input on **September 30, 2013.** This deadline provides local governments with a very short timeline to review the policy and relay local government comments to the federal government.

- On August 1, 2013, Metro Vancouver staff informed MTAC of the revised ATR policy and the federal public comment period. MTAC members were encouraged to share their perspectives on the policy changes and to respond with comments to Metro Vancouver or directly to the federal government by the September 30, 2013 deadline.

- One of the guiding principles for the application process under the new ATR policy states that *"the views and interests of provincial, territorial and local governments will be considered, and collaboration between the First Nations and those governments will be encouraged on issues of mutual interest and concern"* (2013 ATR, p. 5). It is further stated that *"options to address third party interests or rights on lands will be identified when considering Reserve Creation Proposals"*.

- A similar discussion on municipal relations already exists in the 2001 policy under **Section 6 Principles for Site-Specific Criteria** (2001 ATR, p. 14). In this section, AANDC recognizes that ATR proposals may impact on municipal governments and this requires that they be advised of ATR proposals within their jurisdictions and have an opportunity to express their interests.

- The need for discussions and negotiations between applicant First Nations and affected local governments with respect to ATR proposals within municipal boundaries is also stressed in the 2001 policy (2001 ATR, p. 16). The 2013 policy, on the other hand, includes very few references to local governments and the need for consultation as part of the review/approval process for ATR proposals.

<u>Expedited Process</u>

- The Standing Senate Committee report on ATR identifies the lack of dispute resolution mechanisms and inadequate resources on the part of First Nations and AANDC as the main reasons for delays in the processing of ATR requests. Although expediting the ATR process was the main focus for the Committee in the context of reforming the ATR process, these two key issues are not addressed in the revised policy.

  Resources

- The new 2013 policy does not deal with First Nations' concern about inadequate resources to initiate and successfully complete an ATR application process. AANDC is not obligated by the policy to provide funding for Reserve Creation activities, including land acquisition, surveys, environmental costs, transactional costs, incremental costs, and any additional funding for infrastructure, housing, or other capital costs.

- Unless already provided for in an Agreement or in a service agreement between the First Nation and the local government, the First Nation is responsible for paying any negotiated net tax loss adjustment.

- The ATR application process expends time, human, technical and financial resources, particularly for First Nations and third parties. Local governments can be financially impacted in a negative way by potential ATR proposals; thus, capacity funding from the Crown is essential for ensuring that First Nations and third parties are properly engaged in the ATR process.

Dispute Resolution

- The absence of dispute resolution mechanisms to assist First Nations in their negotiations with local governments has not been addressed in the 2013 policy.

- The new policy does not identify specific steps that need to be taken to ensure effective communication planning in the early stages of every ATR proposal so that local and regional communities and First Nation communities are kept informed. Local governments are faced with uncertainty whether AANDC and First Nations fully understand municipal and regional governments - their role, functions, plans, policies and practices.

- The policy states that AANDC promotes a "good neighbour" approach, which means that any discussions between First Nations and local government would be conducted with good will, good faith and reasonableness. However, this approach alone may not be the most effective tool for resolving disputes that may arise between the First Nations and local governments.

Overlapping Claims and Shared Territories

- Under the 2013 policy, AANDC will consider potential or established Aboriginal and Treaty rights of Aboriginal peoples and will assess whether the Crown has met its duty to consult before setting apart lands as Reserve.

Regional Districts

- Even though the 2013 policy does not explicitly mention regional districts, it now includes the broader term "**Local Governments**" which replaced the term "Municipalities" that was extensively used throughout the 2001 policy. The use of this broader term encompassing both municipalities and regional districts addresses a past local government concern related to the lack of a formal recognition of regional governments in the ATR process.

- A closer look at the definition section of the revised policy reveals that the term "Local Government" is defined as *"a city, town, village or other built-up area with municipal or other authorities and includes a rural or urban municipality, as defined in relevant provincial legislation"*(2013 ATR, p. 25). It should be noted that the ATR policy is a national policy that applies to all provinces in Canada. Regional governments, on the other hand, are specific to the

province of British Columbia. As such, regional districts may be intended to fall under the term "other authorities".

- However, for greater clarity, consideration could be given in the draft 2013 ATR policy to replacing the term "other authorities" with the term "regional authorities" so that the revised definition for 'Local Government' would read: *"a city, town, village or other built-up area with municipal or **regional authorities** and includes a rural or urban municipality, as defined in relevant provincial legislation."*

Consultation (p. 17)

- Once a proposal for an addition has been assessed as satisfying one or more of the policy justifications, the second element of decision-making involves site-specific considerations; a proposal is considered in light of a number of factors including, but not limited to: the results of an environmental review, existing encumbrances, third party access, and land descriptions.

- In addition to these general considerations, consultations must take place to address the concerns of the relevant province and the affected local government (s).

- In contrast to the Province, local governments are no longer provided with three months to express their views about the Reserve Creation Proposal. The new policy no longer refers to the **90-day review period** for responding to a First Nation's ATR proposal; instead, the applicant First Nation needs to notify the local government in writing of the Reserve Creation Proposal to give the local government **an opportunity to assess** any potential impacts of the Proposal on their existing land use plans and service delivery. No specific timeline for the review process is provided.

- This statement is ambiguous as the duration of the review period remains unclear. Local governments, unaware of specific federal timelines for ATR approval processes, may be faced with a situation where their responses are received too late to be considered by the federal department. For instance, the time required for municipal councils to revise an Official Community Plan or approve a boundary extension may range from six months to one year. The more contentious the issue, the more time is required for public consultation. There appears to be no reciprocal obligation for AANDC and the First Nation to respond to any issues raised by local government.

- It is not clear how exactly the new policy will facilitate effective consultation and promote discussions between First Nations and local governments on issues of mutual interest and concern beyond the requirement for the applicant First Nation to notify the affected local government of its application to add reserve lands located within or adjacent to the local government.

- The 2013 policy does not offer any improvements to the already existing requirement under the 2001 policy for consultation with affected local governments. Successful negotiations and dialogue between First Nation and local communities will require meaningful consultation and consideration of local government interests that go beyond mere notification.

2) Dealing with Municipal and Third-Party Interests

- The Standing Senate Committee report identifies several ways in which the ATR process will be improved. Many First Nation witnesses requested that the federal government better support negotiations between First Nations and local governments through improved guidelines, resources and dispute resolution mechanisms under the ATR policy. Those have not been provided.

- Local governments have also expressed concerns about the many implications of the policy for municipalities and regional districts, ranging from tax loss, incompatible land use, and the lack of consultation mechanisms.

- The ATR process generally includes three stages: 1) land acquisition, 2) stakeholder negotiations and 3) approval of addition to reserve by the Minister or the Governor in Council; however, a review of the revised policy shows that very little attention is given to the second stage. In particular, the 2013 policy includes hardly any references to local government and the need for consultation as part of the policy review and ATR proposal assessment.

Financial Impacts

- The First Nation is responsible for negotiation of agreements with local governments, including agreements for municipal services or net tax loss adjustment. AANDC is not a party to any agreement for municipal services or net tax loss compensation.

- A requirement to negotiate arrangements related to joint land use planning/bylaw harmonization, tax considerations, service provision and future dispute resolution contained in the 2001 policy is no longer clearly stated in the revised policy (2013 ATR p. 16; 2001 ATR p. 27). The requirement to negotiate meant that First Nations and local governments had to engage in discussions based on good will, good faith and reasonableness.

- For instance, under the 2001 ATR policy, municipalities could ask to negotiate a formal agreement with the First Nation before the reserve was created. In situations where affected municipalities had requested such formalized agreements to be signed, lands were not granted reserve status until an agreement was reached with the applicant First Nation. The only exception was where AANDC had a legal obligation to proceed with an addition or where municipalities have not been bargaining in good faith.

- The issues to be negotiated included: measures to compensate for tax loss, arrangements for the provision of and payment for municipal services, bylaw application and enforcement, joint consultative process for matters of mutual concern such as land use planning, and dispute resolution. However, despite this existing requirement, many local governments were not aware that they could require a negotiated formal agreement before the reserve was created within their boundaries and, in fact, such written agreements negotiated between First Nations and affected municipalities were not common in British Columbia.

- The ambiguity around the requirement to negotiate arrangements related to joint land use planning/bylaw harmonization, tax considerations, service provision and future dispute

resolution needs to be clarified as the lack of this prerequisite may have serious implications for those local governments faced with ATR proposals adjacent to or within their boundaries.

- The new language is much softer: what used to be a requirement is now a suggested course of action/recommendation. It is stated that First Nations and local governments will discuss issues of mutual interest and concern (joint land-use planning/bylaw harmonization, tax considerations, service provision or dispute resolution); a First Nation-Local Government agreement may be necessary to address issues of concern such as the provision of services and potential net tax loss adjustments due to the loss of local government jurisdiction over the proposed Reserve Land; and the local government and First Nation should formalize such an agreement in writing (the 2001 policy: *"The municipality and First Nation are entitled to formalize such an agreement in writing"*).

- The "tax adjustment" provisions in the policy are not intended to provide for a municipality's long term tax loss. Rather the provisions establish the goal of creating a time period during which municipalities can "adjust" the loss of tax revenue. Any such payments are to be made by the First Nation and are not guaranteed by either the federal government or the ministry.

Servicing Agreements

- The federal government retains the discretion to approve the addition where it considers the First Nation has made reasonable efforts to respond to the issues identified by the municipality. Under the new 2013 policy, AANDC will continue addressing outstanding local government issues. The Regional Director General (RDG) may choose not to support a Reserve Creation Proposal in cases where a First Nation has demonstrated an unwillingness to negotiate in good faith with a local government or where a Municipal Service Agreement is required to provide essential services to a Reserve, but has not been concluded. Similarly, RDG may agree to support an ATR proposal where the First Nation is prepared to enter into an agreement on the issues raised by the Local Government and AANDC determines that the Local Government is unwilling to respond in good faith. It is not clear how the federal government will resolve the issue of the absence of services.

- The word "an agreement" is now replaced with "a Municipal Service Agreement" in the revised "Outstanding Local Government Issues" section (2013 ATR, p. 18).
- The 2013 policy (section 16.2 Related Policy Instruments) refers First Nations to the *Federation of Canadian Municipalities* (FCM) for information on municipal tax and service agreements.

Non-Contiguous Reserve Lands

- **"Reserve Creation"** is a term frequently used in the new policy. The distinction needs to be made between the terms "**Reserve Creation**" and "**Addition to Reserve**".
- "**Reserve Creation**" is defined as the act of adding land to an existing Reserve or creating a new Reserve for a First Nation by Order in Council or Ministerial Order; whereas, "**Addition to Reserve**" means the act of adding land to an existing Reserve land base of a First Nation.
- It is also important to note that the term "**Addition to Reserve**" has been revised to exclude a reference to "**Service area**". Under the 2001 policy, the term is defined as "*a proposal for the granting of reserve status to land which is within the service area of an existing reserve community.*" (2001 ATR, p. 8)

- "**Service area**" (2001 ATR, p. 8) is defined as "*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.*" This amendment to the "Addition to Reserve" definition may potentially have implications for local governments faced with servicing 'non-contiguous' Reserve lands.

- The "Continuity of Multiple Parcels" section is no longer included in the revised policy. The 2001 policy contained the following statement: "*8.1 Where more than one parcel is proposed to be set aside as reserve, parcels should be contiguous/adjacent to one another.*" (2001 ATR, p. 25)

- Non-contiguous lands were not generally granted reserve status under the 2001 policy unless it was a new band or a new reserve. However, the 2013 policy provides First Nations with greater flexibility in terms of land selection for future additions. Therefore, it is anticipated that, under the revised policy, there will be an increase in the number of ATR applications for non-adjacent parcels. Adding non-contiguous lands to reserve may lead to a patchwork of jurisdictions across the region creating islands of reserve lands operating under the federal authority. Given the high costs of servicing non-continuous lands, it may also be impractical for First Nations to apply for such additions.

<u>Land Use Planning:</u>

- First Nations are encouraged to develop land use planning tools in planning for an addition to reserve and to facilitate land management after Reserve Creation.
- "Indemnification Agreement" is an Agreement that sets out terms satisfactory to AANDC on a number of matters, including agreement by the First Nation to impose appropriate land use restrictions through land use plans and by-laws (2013 ATR, p. 11)
- It is AANDC's policy to avoid the acquisition of contaminated land for Reserve Creation.
- Local government land use bylaws, zoning and related enforcement is no longer applicable once the land is added to Reserve lands. As a result, there could be the potential for incompatible land uses and land use conflicts.

<u>Third Party Interests:</u>

- Language related to policy assessment and review and local government consultation is vague.
- The "Policy Assessment and Review" and "Proposal Assessment" sections do not include any references to local government. The section only states that AANDC will review the Reserve Creation Proposal in accordance with Directive 10-2: Reserve Creation Process (2013 ATR, p. 7).
- Under the 2001 policy, on the other hand, consultation with "province, municipality, other affected government department" is listed as part of the review/approval process for ATR proposals (2001 ATR, p. 9).
- The revised "Existing Encumbrances" section (2013 ATR, p. 14) no longer includes a reference to "a municipality" in the context of discussing existing third party interests.
- The 2001 (p. 24) policy includes the following statement that has been removed from the revised policy: "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".
- The new 2013 policy reiterates the **absence of local government veto** with respect to a Reserve Creation Proposal. New wording appears in the revised policy in relation to "Provincial Considerations". The new 2013 policy clearly states that provincial Governments do not have a veto with respect to a Reserve Creation Proposal. The Deputy Minister or Minister may be asked

to review an ATR Proposal should there be any outstanding issues or concerns arising from provincial consultations:

- **2001 Policy:** *"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."*
- **2013 Policy:** *"c) While provincial Governments must be consulted, they have no general or unilateral veto with respect to a Reserve Creation Proposal. Where AANDC is satisfied that concerns arising from these consultations have been addressed, a Reserve Creation Proposal may proceed in accordance with the Policy"* (2013 ATR, p. 16).

Economic Development Category:

- The revised Policy Statement indicates that Reserve Creation may serve a broader public interest by supporting the community, social and economic objectives of First Nations by expanding a First Nation's land base (2013 ATR, p. 4). Similar to the 2001 policy, the new policy includes three key policy categories used to review ATR proposals: 1) legal obligations and agreements, 2) community additions, and 3) tribunal decisions. The third ATR policy category has been modified to focus on 'Tribunal Decisions' as opposed to 'New Reserves/Other Policy'.

- The revised third category of Reserve Creation relates to situations where lands are awarded to First Nations by the specific claims tribunal for decisions failing to fulfill a legal obligation of the Crown to provide lands under a treaty or another Agreement, or a breach of a legal obligations arising from the Crown's provision or non-provision of Reserve land, or an illegal disposition by the Crown of Reserve lands. The establishment of new Reserves is now covered under the Legal Obligations and Agreements category.

- Economic development is now listed as one of the reasons for adding Reserve lands under the Community Additions category of Reserve Creation (2013 ATR, p. 6). Adding economic development as one of the criteria for additions signifies a considerable policy change as contrasted with the 2001 lands selection policy direction. In fact, economic development has become the main focus for many First Nation organizations across Canada in the context of reforming the ATR policy. First Nation witnesses who appeared before the Standing Senate Committee emphasized the need to make the ATR process less restrictive and allow ATR for economic development purposes.

First Nations Commercial and Industrial Development Act (FNCIDA)

- The First Nations Commercial and Industrial Development Act (FNCIDA) is listed as one of the key pieces of legislation applicable to the ATR/Reserve Creation policy. The inclusion of the FNCIDA in the ATR policy closely relates to the local government concerns that the former LMTAC has articulated in its discussion paper titled: "Local Government Issues and Interests on the First Nations Commercial and Industrial Development Act and the First Nations Certainty of Land Tile Act".

- The point stressed in the paper is that the FNCIDA legislation may lead to an increase in ATR applications as new lands added to Reserve could become FNCIDA designated projects. The revised policy further reaffirms the existing linkages between the ATR process and FNCIDA. Given that the new policy lists economic development as one of the Reserve Creation categories, the applicant First Nation proposing to create new reserve for economic reasons is

no longer obliged to demonstrate that the economic benefits could not be substantially achieved under another form of land holding/tenure and that the tax advantage associated with Reserve status is not in itself sufficient justification for Reserve status under the community additions category.

- On the AANDC website, under the "Process, Roles and Responsibilities" section of the FNCIDA process, applicant First Nations are informed that confirmation has to be included in the FNCIDA project proposal if the land is reserve land or if it is proposed as an ATR. It appears that, under the new policy regime, First Nations will be able to use the ATR process for market development, including commercial and industrial development under FNCIDA. The use of the ATR process for economic development purposes signifies a major policy shift.

Local Government Perspective

- The proposed changes to the ATR policy reaffirm Canada's commitment to improving the economic and social conditions of First Nations living on Indian Reserves. The federal government and First Nations view expanding the Reserve land base through ATR as an important mechanism for fostering economic development:

    - **2007: Standing Senate Committee on Aboriginal Peoples' report**: "Sharing Canada's Prosperity – A Hand Up, Not a Hand Out" on the special study of the involvement of Aboriginal communities in economic development activities; the report concluded that limited access to lands and resources is a principle barrier to Aboriginal economic development that must be addressed as an urgent priority.

    - **2011: Canada-First Nations Joint Action Plan** intended to enable strong, sustainable and self-sufficient First Nation communities. The Joint Action Plan between AANDC and AFN included a Joint Working Group on ATR reform to explore options to improve the ATR process to enable First Nation to pursue economic opportunities.

    - **2012: Federal Framework for Aboriginal Economic Development** recognizes that faster processes for additions to reserves are essential to economic progress.

    - **2012: Standing Senate Committee on Aboriginal Peoples' report**: "Additions-to-Reserve - Expediting the Process". Multiple witnesses argued that the requirement of negotiating agreements with local governments on lost municipal taxes prior to land conversion puts financial pressure on First Nation communities and thereby impedes their economic and social development. The committee concluded that potential benefits resulting from economic developments on First Nations' land may outweigh any tax loss for municipalities.

- Metro Vancouver recognizes the potential for market development on First Nations' lands to be mutually beneficial for Aboriginal communities and their neighbouring local governments. Local governments, as potential providers of services to neighbouring Reserves, also have a role to play in unlocking the economic potential of reserve lands. By providing essential services such as water and sewer to on-Reserve development projects, local governments take active part in supporting on-Reserve economic development.

- However, in order to assist First Nations in fulfilling their economic development aspirations by expanding their land base, local governments need to be consulted and engaged in the ATR process to effectively assess any potential impacts of the ATR Proposal on their existing land use plans and service delivery.

- First Nations applying for ATR need to be made aware of multiple barriers local governments face in providing services to Indian Reserves, including feasibility, capacity (legal, physical, fiscal) and political concerns. Regional and municipal interests must be recognized in the ATR approval process to ensure that the applicant First Nation receives utility services it requires in a timely manner.

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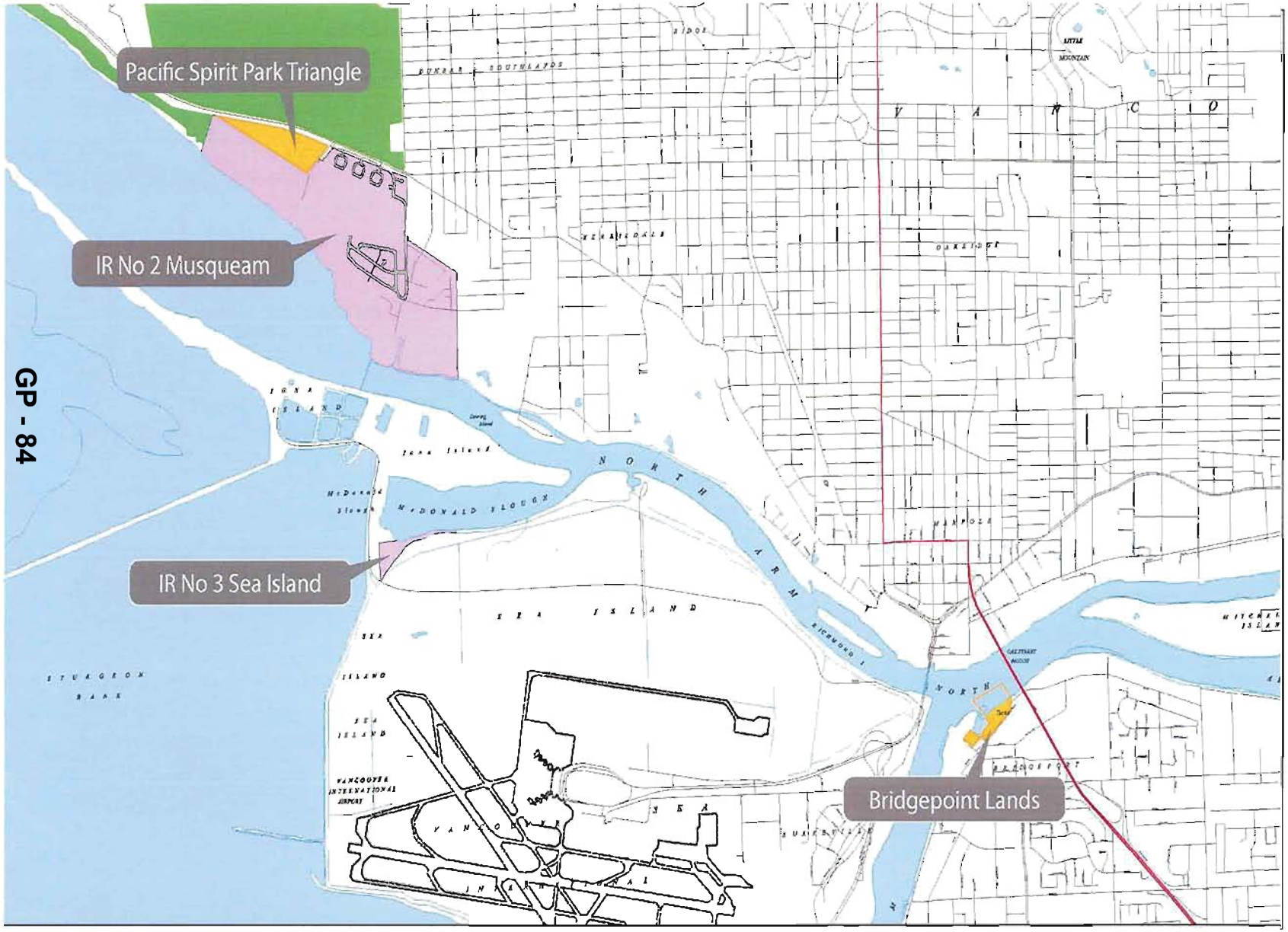
Attachment 3



Musqueam Indian Band
And
Province of British Columbia
Reconciliation, Settlement
and Benefits Agreement
Agreement in Principal

Overview of Land Settlement Parcels

This map is for discussion purposes only.
It is a representation of the area and is not to scale.

Legend

- Land Settlement Parcels
- Indian Reserves
- New Park Lands
- Pacific Spirit Park
- Roads
- Highway Route

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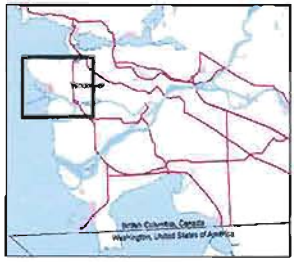
Key Map



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