



Land Designation & Leasing

CANDO Workshop

March 2017

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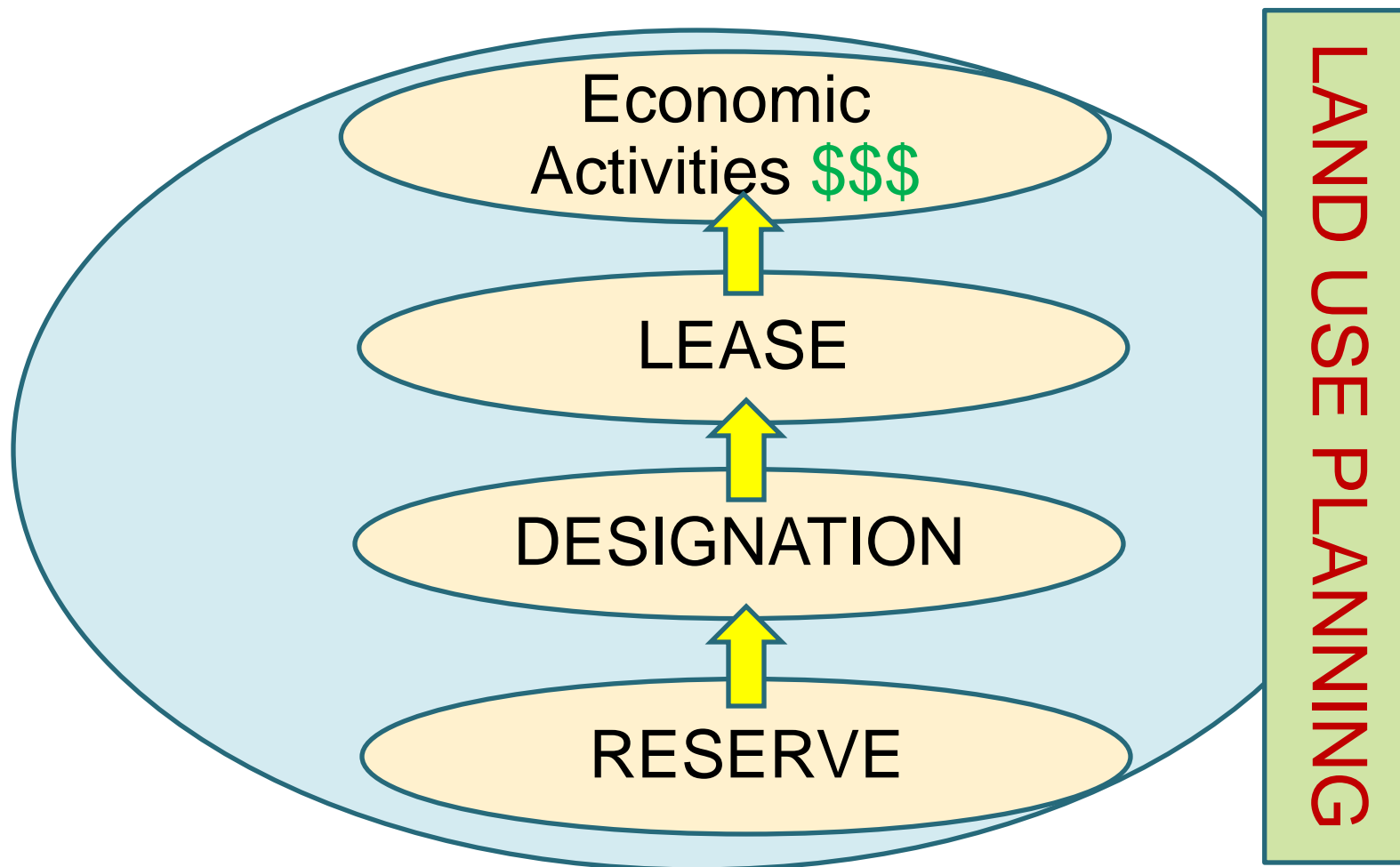


INAC·AANC





Overview





Economic Activities = \$\$\$

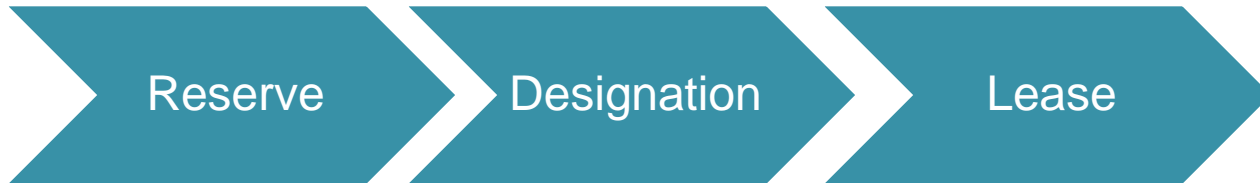
Types of Leases:

- Agriculture/Grazing
- Commercial (an office building, shopping centre, gas bar...)
- Recreational (a cottage)
- Residential
- Industrial (light, medium and heavy)
- Oil and gas exploration subject to *Indian Oil and Gas Act*

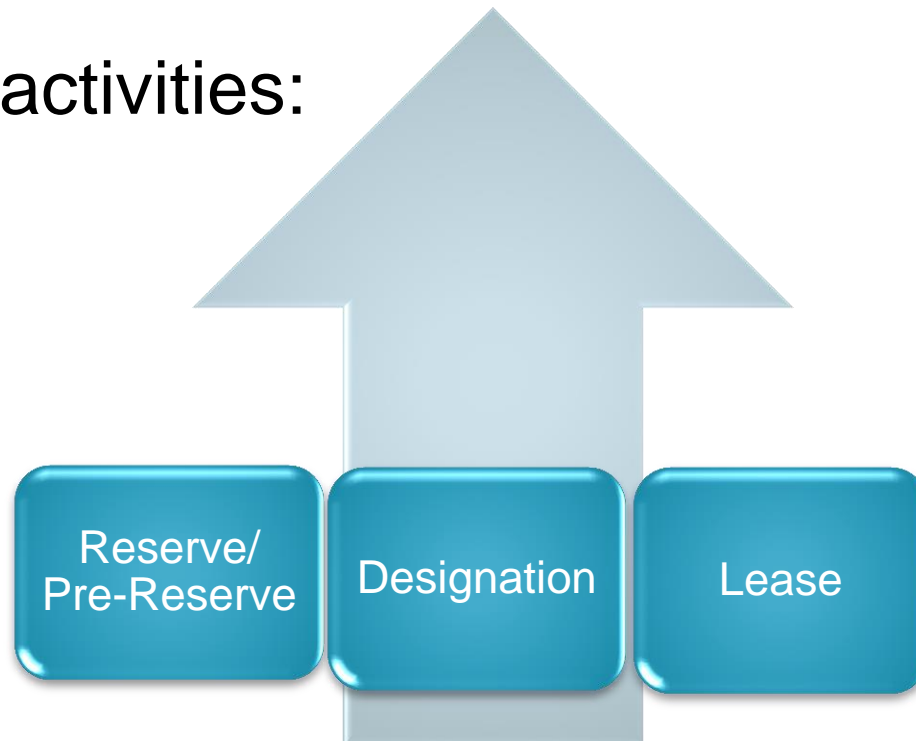


Process to Reserve Leasing

- Sequential activities:



- Concurrent activities:





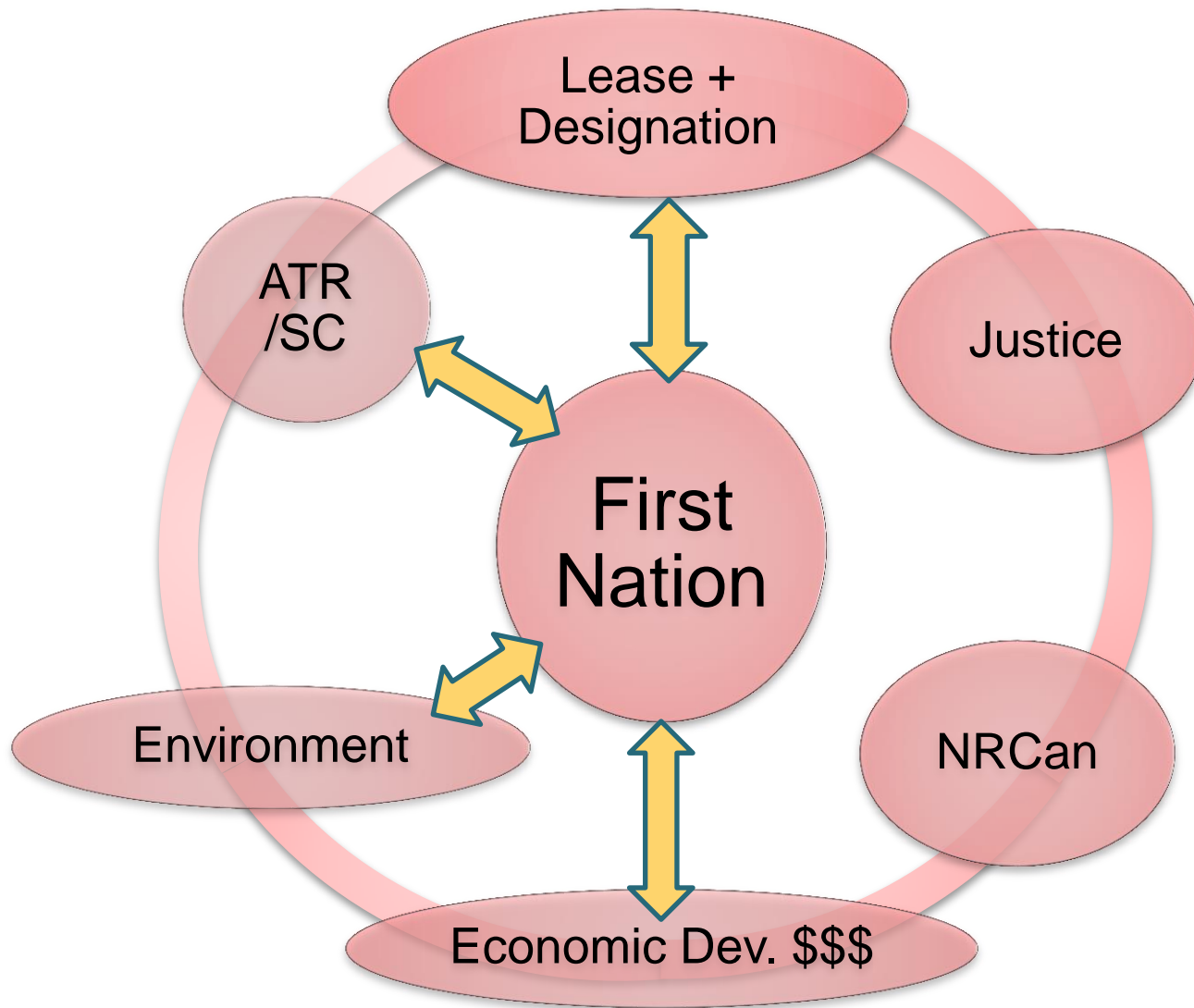
Why is a Lease important?

Lease = Legal Document = Enforceable

- Financing Available (loans against leasehold)
- Maintains the Environmental Integrity of the Reserve land base
- Provides for land tenure certainty for non First Nation businesses = More activities = + \$\$\$
- Possible Tax incentives



Federal Set up





Timing

- **Process driven by First Nation**
- INAC will support process & assist First Nation

- Minimum : 18 months
- Maximum : Highly Variable...
- Considerations:
 - Is there a designation in place?
 - Reserve creation process
 - Encumbrances to the Land
 - Consultant availability (ie: CLSR surveyors in SK)
 - Time of year (ie: ESA only conducted when there is no ground cover)



Parties involved

- First Nation & Dev. Corporation
- Federal: INAC, DOJ, NRCan...
- Province of Saskatchewan
- Municipalities
- Other First Nations
- Consultants
- Partners
- Third Parties: SaskTel, SaskPower, Companies, Railway, Oil & Gas companies, individuals, ...



Important Elements

- Land Use Plan & Vision
- Communication
- First Nation Champion
- Chief and Council
- Information Management
- Lawyer
- Consultants: Appraisal, EA, ESA, Surveyor, Land use planner...
- Funding sources
- Municipal Services Agreement



Barriers to consider

- Economic climate
- Geographic and Market
- Business opportunity change
- First Nation priority
 - First Nation Election
- Capacity Issues:
 - Lack \$\$\$
 - Lack of staff
 - Consultant availability
- Communication
- Timing
- Third Party Interests that encumber the land
- ...



Project Costs to consider

- Variable depending scope and scale of project
- Examples:
 - ESA / EA: \$2,000 to \$100,000 +
 - Appraisal: \$2,000 +
 - Land Survey: \$40,000 +
 - Legal Fees: \$15,000 +
 - Designation Voting: +/- \$22,000
 - Purchase of Land: \$\$\$...
 - Third Party Interest: Buy Out
 - Land Remediation ?



\$\$\$ Source for Project

- First Nation
- Business Partners
- Other Government Departments
 - Western Economic Diversification (WD)
 - Business Development Bank of Canada (BDC)
 - Saskatchewan Indian Equity Foundation (SIEF)
- INAC
 - Environmental Unit
 - ATR Unit
 - Economic Development Unit Programs:
 - CORP
 - LEDSP



INAC Funding available

- Proposal based funding

- Project Costs
 - Land Use Plan
 - Strategic Business Plan
 - Environmental Site Assessment (ESA)
 - Environmental Assessment (EA)
 - Land Survey
 - Designation process
 - Legal Fees for Lease development
 - ...



Reserve Land Legal Framework

- The legal framework underlying reserves is that:
 - The Constitution creates a **distinction** between Indian reserve lands and other lands in Canada.
 - **Section 91(24)** states that only the federal government can pass laws about “Indians and lands reserved for Indians.”
 - The underlying legal title to reserves belongs to the federal or provincial Crown, depending on various factors such as the province in which a reserve is found, and how the reserve was created.



Reserve Land

- Pursuant to Section 2 of the *Indian Act*, reserves are set apart by the Crown in Right of Canada **for the use and benefit of a First Nation and all their members;**
- Generally, only First Nations and their members occupy and use reserve land.
- However, pursuant to the *Indian Act*, a First Nation may ask the Crown to grant interests, such as **leases** or other rights, to non-members.



What is Designation?

- A surrender of land, which is not absolute, for multiple or specific purposes for a determined length of time.
- **Land maintains reserve status**
- A designation is done in accordance with s. 37-41 of the *Indian Act* and Indian Referendum Regulations
- A designation changes how the land can be administered under the *Indian Act*.
- In order to access the leasing provisions available under s. 53(1)(b), a First Nation must first pursue a designation



Types of Designations

- **Specific Designation - Lease attached**
 - Lands are identified for a specific purpose and/or to a specific lessee
- **General Designation - no Lease attached**
 - Lands are identified for specific and/or multiple purposes with no known lessee

- **Surface designation**
 - commercial
 - gravel
 - recreational
 - industrial
- **Sub-Surface designation**
 - mines and minerals (potash, uranium, graphite)
 - oil and gas



Designation Process

***Initiating BCR for designation vote

1. Legal Land Description
2. Voters list
3. Documents Preparation
4. Call the vote
5. Information Meetings

***Time Frame

6. Referendum
7. Ministerial Order (MO)



What is a Lease?

- A lease is a legal agreement between the **Federal Crown** and the **lessee** (the person or company who has use of the land).
- The lease grants **exclusive use** of the land to the lessee.
- The lease is **assignable**.
- **NOT subject to cancellation at will.**



Lease Process

1. Planning a Lease
 2. Designation by Ministerial Order & Initiation
 3. Negotiation and Drafting
 - Justice Approval
 - First Nation Approval
 4. Finalization and Execution
- *** Registration to Indian Lands Registry
- *** Administration and Monitoring



Planning a Lease

- Identify Land (Legal Land Description)
 - Survey (NRCan/CLSR)
- Encumbrance Check
 - Land Status Report (LSR)
 - By-Laws/development plans/zoning
- Lease/Interest Form
 - Direct Lease vs Head Lease/Sub-Lease
- INAC Environmental Review Process
 - Environment Site Assessment (ESA)
 - Environment Assessment (EA)



Negotiation and Drafting

- **Mandatory**
 - Reserve Name and Number
 - Designation Particulars
 - Rent/Compensation
 - Compliance with Law
 - Payment of Taxes
 - Cancellation
 - Indemnification
 - Inspection
 - General
 - Environmental
 - ESA & EA
- **Considerations**
 - Construction Requirements
 - Building Standards
 - Maintenance
 - Removal or Retention of Improvements
 - Insurance Requirements
 - Dispute Resolution
 - Rent clause
 - For everything else



Environmental Review Process

- **Environmental Site Assessment (ESA):**
 - For **all** land covered by lease
 - Must be a **Phase I** to Canadian Standards Association (CSA)
 - If contamination is found then the limits of that contamination must delineated or remediated

- **Environmental Assessment (EA):**
 - Completion of project description form by proponent
 - For a head lease the EA must cover any activities that happen at this level. Some head leases have no activities.
 - For a Sublease the EA must cover any activities that happen at this level.
 - Project description form is submitted to the Environment unit to determine the level of EA required



Resources

- *Indian Act*
- Indian Referendum Regulations
- Chapter 5 - Lands Management Manual:
Designation
- Chapter 7 - Lands Management Manual:
Leasing
- **NALMA Toolkit and Workshops**
- INAC employees



Contact Information

- Reserve Land - Robbin Lloyd, Manager of Lands and Environment
(306) 501-3561 or Robbin.Lloyd@aandc.gc.ca
- Pre-Reserve Land - Darcy Proulx, Manager of Additions to Reserve
(306) 536-9055 or Darcy.Proulx@aandc.gc.ca
- Designation & Leasing – Tara Acoose, Manager of Community Opportunities
(306) 501-4322 or Tara.Acoose@aandc.gc.ca
- Environmental Unit – Evan Shaw, Manager of Environment
(306) 501-4267 or Evan.Shaw@aandc.gc.ca



Questions?



DESIGNATION



What is a Designation?

- It is a surrender of land, which is not absolute, for multiple or specific purposes for a determined length of time
- **Under this process the Land always maintains its reserve status**
- A designation is done in accordance with Sections 37-41 of the *Indian Act* and Indian Referendum Regulations
- A designation changes how the land can be administered under the *Indian Act*.
- In order to access the leasing provisions available under Section 53(1)(b), a First Nation must first pursue a designation
- Once the land is designated, certain sections of the *Indian Act* no longer apply



Types of Designations

- **Specific Designation - Lease attached**
 - Lands are identified for a specific purpose and/or to a specific lessee
- **General Designation - no Lease attached**
 - Lands are identified for specific and/or multiple purposes with no known lessee

- **Surface designation**
 - commercial
 - gravel
 - recreational
 - industrial
- **Sub-Surface designation**
 - mines and minerals (potash, uranium, graphite)
 - oil and gas



Pre-Reserve Designation

- First Nation must opt into the *Claims Settlement (Alberta and Saskatchewan) Implementation Act* or any claim settlement must be subject to the that Act
 - To opt into the Bill C-37 Act, First Nation must submit a BCR to the ATR/Specific Claims unit or the First Nation has opted in through their settlement agreement
- Additionally, **all** Pre-reserve Lands must be **initiated** by BCR with the Additions to Reserve/Specific Claims unit
- The land identified for pre-reserve designation and land already initiated for reserve creation cannot exceed the total acres allowed in their settlement agreement
- ❖ **Pre-reserve designation does not take effect until the land actually acquires reserve status**



Designation Process

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1. Legal Land Description

Encumbrances on the Land

- These lands cannot be designated:
 - Lands that have a Certificate of Possession (CP) issued on them unless it has been transferred back to the First Nation
 - Lands that have been set apart under 18(2) of the Indian Act (unless they have been rescinded)
 - Third party interests need to be dealt with prior to designation vote, for example any prior leases, permits, etc...



1. Legal Land Description

Responsibility for Land Descriptions

- First Nation advises the department of land they wish to designate and they define the purpose of the designation
 - All LLDs are provided by the First Nation
- First Nation will work with their Lands Officer and/or Implementation Officer to prepare these land descriptions
- First Nation provides an Initiating BRC for the designation with the LLD attached in a schedule.
 - Schedules can consist of reserve land and/or pre-reserve land selections



1. Legal Land Description

Land Descriptions

- Land descriptions must be clear and concise
- Land Description (LLD)
 - The LLD will clearly define the land for example:
 - SW ¼ Sec 25 Twp 38 Rge 6 W2M or
 - Lands as described on CLSR Plan 2289
- Tools used to determine a land description are:
 - Reserve creation Ministerial Orders or Order-in-Councils
 - Survey plans
 - Natural Resources Canada mapping
 - SaskInteractive Website
 - Google Earth



1. Legal Land Description

Role of Natural Resources Canada

- Once the lists are finalized they are provided to NRCan
- Legal land descriptions in the Designation Document(s) are prepared by NRCan
- They also prepare mapping products to be used at the information meetings
- Chart A of The Interdepartmental Agreement between NRCan and INAC sets out the minimum requirements for any interest to be recorded in the Indian Lands Registry
- The minimum requirements for a designation is an Explanatory Plan



2. Voters List

- Calling the vote – the vote is officially called once the Minister or their delegate signs off the Order – see Indian Referendum Regulations’ Section 3(1).
- First Nation to provide a Voter’s List with mailing addresses for each eligible voter
- **Section 10** –
 - Band assumes control of their own membership;
 - band maintains list as they have their own membership code.
- **Section 11** –
 - Department maintains Band list of members (registry list).



3. Document Preparation

Designation Document

- Drafted by INAC, DOJ & First Nation's Legal Counsel
- This designation document contains:
 - The land(s) to be designated, the purpose of the designation and term of the designation
 - Who the lands can be leased to i.e. band owned corporation
 - Compensation i.e fair market rent or nominal rent
 - The terms and conditions of the lease
 - Environmental assessment clauses
 - Revocation clause
 - Other terms and conditions specified by the First Nation Band Council



3. Documents Preparation

Information Document

- Drafted by the First Nation's legal counsel
- The Information document should contain:
 - The purpose of the designation, the term of the designation and the land affected by the designation
 - Prospective lessee(s) and/or sub-lessee(s)
 - Compensation i.e. fair market rent or nominal rent, basis and frequency of rent reviews
 - The results of any environmental assessments
 - The nature and scope of Chief and Council's authority to request revocation or amendments to the designation
 - Contacts for additional information about the designation and any other information required for voters to make an informed decision
 - The extent of detail required in the information document is based on whether the designation is with or without a lease attached



3. Documents Preparation

Notice of Vote

- The Notice of Vote is drafted by INAC
- It contains:
 - Location, date and time of information meetings
 - Location, date and time of poll(s)
 - Contact names and numbers



4. Call the Vote

- Ministerial Order calling the referendum and appointing the Electoral officer is signed
- First Nation provides addresses for their off reserve membership who are eligible to vote to the department to prepare mailing labels
- INAC has all documentation printed
- INAC in cooperation with the First Nation assembles mail out packages which includes:
 - A letter from the Chief
 - The Designation document
 - The Information document
 - The Notice of Vote
 - Mail in ballot package
 - List of contacts for additional information



5. Information Meetings

- First Nation is required to hold at least one information meeting on reserve, but they may hold as many as they see fit
- The information meetings are attended by the Band's legal counsel, generally some if not all members of Chief and Council, and interpreters as arranged by the Band where required
- Minutes are recorded by a departmental representative
- The map products produced by NRCan are on display for membership visually depicting which land is being designated



*** Time Frame ***

- At least 6 weeks prior to posting the Notice of Vote, all documentation must be agreed upon and finalized
 - Ministerial Order calling the referendum with the appointment of the Electoral Officer
- At least 49 days prior to the vote:
 - For Section 10 bands, the First Nation will provide the Electoral Officer with a voters list
 - For Section 11 bands, INAC must provide the Electoral Officer with a voters list
- At least 49 days prior to the vote (earlier if possible) the First Nation must provide INAC with a list of addresses for their off reserve membership that is eligible to vote
- At least 14 days before the day on which an information meeting will be held and at least 42 days prior to the vote date, the Notice of Vote and Voters list will be posted on reserve
- Information packages must be mailed at least 42 days prior to the vote



6. Referendum Day

- Polls are open 9:00 am to 8:00 pm
- Successful Vote (means Simple Majority)
 - Example:
 - 150 members eligible to cast a ballot
 - 50 members vote on referendum day
 - 30 members vote in favour
 - = Simple Majority and successful vote
- If not assented to, First Nation can request another vote (same steps as 1st vote)
- A BCR is required accepting the results of the referendum vote and recommending that the Minister accept the results



7. Ministerial Order

- The designation is not valid until it's accepted by the Minister
- The following documents form the submission package sent to the Minister for review and acceptance:
 - Signed Designation Document(s)
 - Signed Statement of Voting results
 - Certifications by Chief or Councillor
 - Certifications by the Electoral Officer
 - BCR accepting the designation
 - Certificate of Independent Legal Advice (CILA)



LEASE



Reserve Land Legal Framework

- The legal framework underlying reserves is that:
 - The Constitution creates a **distinction** between Indian reserve lands and other lands in Canada.
 - **Section 91(24)** states that only the federal government can pass laws about “Indians and lands reserved for Indians.”
 - The underlying legal title to reserves belongs to the federal or provincial Crown, depending on various factors such as the province in which a reserve is found, and how the reserve was created.



Reserve Lands

- Pursuant to s. 2 of the *Indian Act*, reserves are set apart by the Crown in Right of Canada **for the use and benefit of a First Nation**;
- Generally, **only** First Nations and their members occupy and use reserve land.
- However, pursuant to the *Indian Act*, a First Nation may ask the Crown to grant interests, such as **leases** or other rights, to non-members.



Reserve Land Tenure

- The way the land is held or possessed
- Land Transaction – is simply the way land tenure is given.
 - Under the Indian Act, Land Transactions require **consent**.
 - The type of transaction determines the form of consent required.
- Consent is obtained from:
 - Chief and Council through **BCR**, or
 - From the Band Membership through **referendum**



Types of Land Transactions

- For Reserve Lands under the *Indian Act*, there are various authorities that allow for different types of activities or transactions from short and long term, license-type transactions, permits to leases all for various uses:
 - Agriculture – cropping, grazing,
 - Public Utilities
 - Road Rights of Way
 - Lawful possession
 - Set Aside
 - **Leasing** – commercial, cottage, industrial
 - Section 28(2)
 - Section 58(4)
 - Section 35
 - Section 20
 - Section 18
 - Section 53(1)(b) requires a designation
 - Etc..



What is a designation? (Consent)

- When a First Nation wants to lease out reserve land, the *Indian Act* requires the land to be set apart or designated for leasing.
- A designation identifies an area of **land** for a certain **use or purpose** (i.e., leasing) and for a certain **period of time**.
- A designation needs to include these important points:
 - Term (number of years)
 - Land Description (area of land)
 - Purpose (what the designation is for)
 - Any additional conditions required by the First Nation. (Information on nominal rent and what circumstances)



What is a Lease?

- A lease is a legal agreement between the **Federal Crown** and the **lessee** (the person or company who has use of the land).
- The lease grants **exclusive use** of the land to the lessee.
- The lease is **assignable**
- **NOT subject to cancellation at will**
- These are some common types of leases:
 - Agriculture
 - Commercial (an office building or shopping centre)
 - Recreational (a cottage)
 - Residential
 - Oil and gas exploration subject to *Indian Oil and Gas Act*



Lease Process

1. Planning a Lease
 2. Designation by Ministerial Order & Initiation
 3. Negotiation and Drafting
 - Justice Approval
 - First Nation Approval
 4. Finalization and Execution
- *** Registration to Indian Lands Registry
- *** Administration and Monitoring



1. Planning a Lease

- Geographic & Market Analysis (know your Neighbours)
- Review Designation and Land Use Plan
 - By-Laws, development plans, & zoning
- Identify Land (legal land description)
 - Survey (NRCan/CLSR)
- Encumbrance Check
 - Land Status Report
- Lease Structure/Interest Form
 - Direct Lease vs Head Lease/Sub-Lease
- INAC Environmental Review Process
 - Environment Site Assessment (ESA)
 - Environment Assessment (EA)



2. Designation by Ministerial Order & Initiation

- Designation Information
- Lessee Name and Contact Information
- Term (cannot be longer than the term of the designation)
- Purpose/Use (what the land can be used for)
- Land description (must be within the designation area)
- Rent (amount of money paid for using the land)
- Rent review (time specific)
 - The lessee should pay enough rent to ensure a fair price for use of the land.
 - Determination of **Fair Market Rent** is based on an appraisal.



3. Negotiation and Drafting

- **Mandatory**
 - Reserve Name and Number
 - Designation Particulars
 - Rent/Compensation
 - Compliance with Law
 - Payment of Taxes
 - Cancellation
 - Indemnification
 - Inspection
 - General
 - Environmental
 - ESA & EA
- **Considerations**
 - Construction Requirements
 - Building Standards
 - Maintenance
 - Removal or Retention of Improvements
 - Insurance Requirements
 - Dispute Resolution
 - Rent clause
 - For everything else



3. Environmental Review Process

- Environmental Site Assessment (ESA):
 - For **all** land covered by lease
 - Must be a **Phase I** to Canadian Standards Association (CSA)
 - If contamination is found then the limits of that contamination must delineated or remediated

- Environmental Assessment (EA):
 - Completion of project description form by proponent
 - For a head lease the EA must cover any activities that happen at this level. Some head leases have no activities.
 - For a Sublease the EA must cover any activities that happen at this level.
 - Project description form is submitted to the Environment unit to determine the level of EA required



4. Finalization & Execution

- For completion of Lease
 - Corporate Profile
 - From Information Services Corporation (ISC)
 - Determined by designation:
 - Nominal Rent
 - Fair Market Rent (FMR)
 - Area Development Plan
 - Construction Plan
 - Fire Inspections
- At the head lease or sublease level when **FMR** is required then an **appraisal** is required to determine rent.
- Up on Execution of Lease:
 - Insurance Requirements
 - Construction
 - Liability and Property
 - Security
 - performance bond



*** Consent Agreements ***

- Assignment(s)
 - Required by Section 54 of the Indian Act

- Sublease(s)
 - Required by policy

- Mortgage(s)
 - Required by policy



Leasing Structure

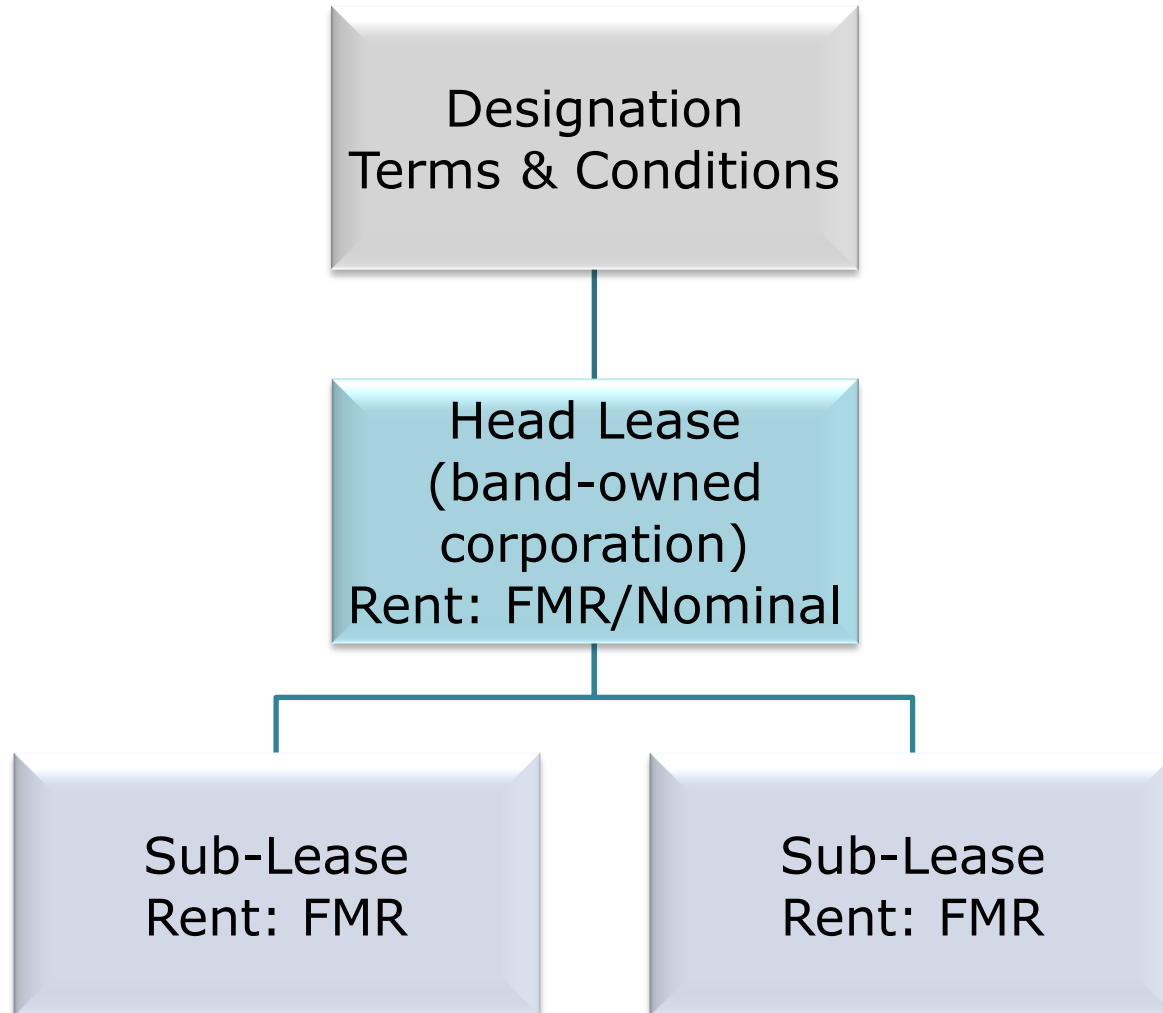
Direct Lease

Designation
Terms & Conditions

Lease
Between Federal
Crown and Lessee
Rent: FMR



Head Lease with Sub-lease





Head lease with Sub-lease & sub-sublease

