## INDEX TO CHAPTER 7

**LEASES: DRAFTING, ISSUING AND CANCELLING**

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1. Purpose

1.1 This directive provides general information about leases on reserve lands. It offers an overview of how to lease land, and outlines the types of leases commonly used. Refer to the specific directives within this chapter for detailed information on these issues.

2. General

2.1 Before reading this chapter, review Chapter 2, which explains how different sections of the Indian Act are intended to accomplish different purposes.

Throughout this directive, the phrase "lease document" includes the basic lease agreement itself, and, as appropriate, all other supporting documents and related agreements. The words "must", "shall" or "will" refer to actions that are mandatory. The word "should" refers to actions that are strongly recommended, and the word "may" to actions that are optional.

2.2 Definitions for the purposes of this chapter:

a) **Allotted Land** or **"locatee lands"**, are reserve lands which the First Nation (FN) Council has validly allotted under the Indian Act, the title to which is generally evidenced by a Certificate of Possession (CP). Although the word "locatee" does not appear in the Indian Act, it has departmental acceptance to denote the holder of lawful possession.

b) **"Development Plans"** means the compete and detailed conceptual plans, development plans, as-built plans, design briefs, construction specifications, and cost estimates prepared by an Architect or Engineer, including (without limitation) all site plans drawn to scale and showing the following required features with appropriate dimensions:

   a. boundary lines with dimension and acreage;
   b. natural and artificial features of subject property and adjacent property, including Improvements;
   c. "North" arrow;
   d. title block, including drawing scale, date, developer's name and address and reference numbers;
Development Plans (continued)

e. location, dimension, size and construction of roads;
f. location, dimension, size and construction specifications of buildings (including number of units, storeys, floor area, number of rooms) as well as dimensions of front, side and back yards;
g. location, dimension, size and construction specifications of on-site sanitary sewer connections; and
h. location, dimension, size and construction specifications of existing and/or proposed water mains, and any other documents that we reasonably need.

c) **Land Status Report**, is a report that contains all the pertinent information regarding the encumbrances and/or interests on a particular parcel of reserve land. The report contains information from the Indian Land Registry, if available, and appropriate departmental files. The report identifies existing registered interests such as leases, permits, easements, CPs, or potential encumbrances such as cardex holdings or designations.

d) **Official Plan or “CLSR Plan”**, is a graphical description of the boundaries of land prepared from field notes of a survey, confirmed pursuant to Section 29, 39, 42, 43, or 44 of the *Canada Lands Survey Act*.

e) **Registration Plan**, is a graphical description of the boundaries of land prepared from information contained in existing documents, field notes of a survey, controlled aerial photographs or maps, etc. and confirmed pursuant to Section 31 of the *Canada Lands Survey Act*.

f) **Region** refers to the appropriate regional office, and includes “District” offices;

g) **Unallotted** “band lands” are reserve lands which the Band Council has not allotted to a locatee. Unallotted land is also known as “common band land.”

2.3 The leasing of reserve land offers First Nations several important benefits. Among these benefits are:

a) **Increased flexibility in dealing with reserve land**: Unlike an absolute surrender and sale of reserve land, a leasing arrangement allows the First Nation to retain long-term control over the land, subject to the terms and conditions of the lease. This gives the First Nation the flexibility to change or adapt the use of the land over time, according to their needs.
b) **Maintaining land as part of the reserve:** Because leased land is legally still part of the reserve, the benefits which attach to reserve land are not lost during the term of the lease. For example, First Nation members do not have to pay sales tax on purchases made on the land. As well, First Nation bylaws affecting the leased land will apply to non-Indians.

2.4 **The Legal Framework of Leases:** Leases possess certain legal characteristics which govern the relationship between the lessor (landlord) and the lessee (tenant). Every lease involves:

a) A grant by the lessor of the **exclusive possession** of land. While the lessor retains the underlying ownership of the land - known as the freehold interest - the lessee is entitled to exclusively occupy the land during the term of the lease. Exclusive occupation is known as the right of possession, which is one right attached to ownership. In essence, the lessor is **temporarily giving to the lessee a part of the rights of ownership** of their land.

b) A **fixed period of time**, known as the **term**, during which the exclusive possession runs. In the interest of certainty, a lease must include definite commencement and termination dates. A lease that lasts for an uncertain term, or perpetually, could in certain circumstances amount to a grant of the ownership of the land rather than a lease. For example, a lease with a term said to last "for as long as required" is not certain, and the lease therefore, may not be valid.

2.5 A lease made directly between the owner of the land and a lessee is called a **headlease**. A **sub-lease** is created when a lessee in turn leases all or part of their interest in land to a third party. Refer to Directive 7-6: Assignments, Sub-leases and Mortgages for more information on headleases and sub-leases.

2.6 **Specific Types of Leases:** Besides being categorized as a **headlease** or a **sub-lease**, a lease is classified by the type of activity it covers. Every lease includes a variety of provisions which determine the rights and obligations of the parties. While many of these provisions contain standard terms that will be found in every lease, other provisions will vary depending on how the land will be used. For example, a lease of land for use as a cottage property may contain a clause dealing with hunting rights, while one leasing land for use as a shopping centre will not. The three types of standard leases commonly encountered, based on the different uses of land, are:

a) **Agricultural Lease:** This type of lease is appropriate for the grazing of livestock and the growing of agricultural crops. However, most grazing and cash crop arrangements are now dealt with through the use of s. 28(2) permits. Note that the cutting of timber on reserve land is not
Agricultural Lease (continued)

dealt with through leasing, but by means of permits and licenses, issued by the department’s Natural Resources officers. Refer to the Forestry Management Manual for guidance on timber permits and licenses.

b) **Commercial Lease**: This type of lease is used when the leased property is intended for commercial or industrial ventures. Commercial activity would include use of the land for a shopping centre, manufacturing facility, restaurant, water or theme park, gas station, retail sales outlet, hotel facility, or mobile home park. The commercial lease is also appropriate for major, multi-family residential projects, such as a condominium, apartment building or subdivision development.

c) **Residential and Cottage Lease**: This type of lease is designed to reflect the special requirements attached to leasing land for single family use, or for seasonal or year-round cottage recreation.

2.7 **Mandatory provisions**: Most leases contain many provisions dealing with every aspect of the landlord and tenant relationship, because it is in the interest of both parties to know precisely what their obligations are. However, at the very least, every agreement for the leasing of land must include the following elements:

a) **a lessor (landlord) and lessee (tenant)**. Because legal title to all reserve lands is vested in the Crown, Her Majesty the Queen in Right of Canada must be the “lessor” in every lease of reserve land, except in the case of a sub-lease. This provision applies even when the Crown has delegated control and management of lands to a particular First Nation under sections 53 or 60 of the Indian Act. In these cases, the delegated authority must sign the lease on behalf of the Minister, who represents the Crown. A sub-lease, by its nature, is made between the head lease lessee and a third party sub-lessee and consequently, the Crown is not a party to the sub-lease instrument;

b) **a legal description of the land or premises (eg. Registration Plan or a CLSR Plan) being leased**;

c) **the rent to be paid, to whom it is paid, when it is payable and how and when it is to be reviewed**;

d) **the term of the lease**, stating the date the lease commences and when it terminates; and

e) **the authorized uses of the land**.
2.8 **Implied Covenants**: Beyond these minimum requirements, certain obligations, or covenants, are implied by law to form part of a lease unless the parties have chosen to expressly deal with these obligations in the lease document. If the parties do not deal with these obligations in the lease, then the covenants will bind the parties as if they had agreed to them.

2.9 For the landlord, there are three principal implied covenants:

a) **The tenant's right of quiet enjoyment of the leased premises.** The tenant has the right to be protected against any interference by the landlord with the tenant's use and enjoyment of the premises for the stated purposes.

b) **The obligation not to derogate (take away usefulness) from the lease.** The landlord may not use other property in any way that makes the leased premises substantially less fit for the purposes for which they were leased.

c) **The obligation to supply premises fit for habitation.** This covenant only applies to a lease of furnished premises.

2.10 For the tenant, there are four significant implied covenants:

a) **To pay rent**: Failure to do so may result in forfeiture of possession by the tenant.

b) **To act in a tenant-like manner**: In essence, this obligates the tenant to take the action necessary to preserve the state of the property. It does not, however, require the tenant to repair damage caused by wear and tear, or lapse of time.

c) **To allow the lessor to enter and view the state of repair of the property; and**

d) **To pay all taxes required by law.**

2.11 **Joint Tenants and Tenants in Common**: When a lease involves more than one tenant, a joint tenancy or a tenancy in common is created.

a) **A joint tenancy** is one in which all the tenants hold an equal, undivided, interest in the whole of the lease, and in case of the death of a tenant, the remaining tenants automatically receive the deceased tenant's interest. This is referred to as “right of survivorship”. Joint tenancy is not permitted in the Province of Quebec.
Joint Tenants and Tenants in Common (continued)

b) A tenancy in common involves two or more tenants, but each tenant may hold a different share of the lease, and there is no right of survivorship. On death, the interest of a tenant in common would pass to his or her estate, not automatically to the other tenants.

2.12 Leasing Reserve Land. The leasing of reserve land involves certain basic steps which must be followed to ensure that all leases comply with legal requirements, and also reflect departmental policy. The general framework for leasing is summarized below, with a more detailed guidance on the procedures which must be followed indicated throughout this chapter.

2.13 Statutory Authority for Leasing Land Under the Indian Act. The provisions which allow leasing of reserve land are found under subsections 53(1)(b), 58(1)(b), 58 (1)(c), and 58(3) of the Indian Act. The choice of the appropriate statutory provision will depend on whether the land to be leased is allotted to an individual, whether it is unallotted and the proposed use. Theoretically, lands may also be leased pursuant to subsection 35(3), although this is so rare that it is not dealt with in the Manual.

2.14 Band Land may be leased in two ways:

a) Pursuant to ss. 53(1) of the Indian Act, land designated under ss. 38(2) may be leased for any purpose that is specified in the designation document. Designated lands include lands designated for the leasing of minerals or oil and gas rights. These leases are issued and monitored by Indian Oil and Gas Canada. The designation of land is most commonly used to facilitate the leasing of reserve land to non-members of the First Nation or a First Nation corporation, for commercial, recreational and residential development. Refer to Directive 7-2: Leasing Reserve Lands Using Designation, for more information on leasing pursuant to ss. 53(1).

b) Uncultivated or unused, band land may be leased for agricultural or grazing purposes, for the benefit of the First Nation pursuant to ss. 58(1)(c), although permits under ss. 28(2) are more commonly used for such purposes today. That being said, the use of a lease under ss. 58(1)(c) will be necessary in some circumstances. An example, would be where the agricultural use contemplated required significant capital input for permanent improvements. Consequently, the use of a permit is inappropriate, and a lease arrangement under ss. 58(1)(c) would be more appropriate.
2.15 **Locatee land** may be leased through several mechanisms:

a) **On the application of the locatee**, land may be leased without being designated, pursuant to ss. 58(3). This is referred to as a **locatee lease**. Refer to Directive 7-3: Locatee Leases, for more information on leasing pursuant to ss. 58(3).

b) **Uncultivated or unused locatee land** may be leased, with the consent of the Band Council, for **agricultural or grazing purposes**, or for **any purpose that benefits the locatee** (ss. 58(1)(b)). Designation of the land is not required, although the locatee’s consent should be obtained. With the increasing use of ss. 28(2) permits, a lease under ss. 58(1)(b) is not commonly used for agricultural purposes.

2.16 **Using ss. 58(1)(c) to Lease Band Land:**

a) The land to be leased must be either **uncultivated or unused**. At the time the lease is entered into, therefore, the land should be vacant, and not being used for farming, grazing, habitation or other purposes.

b) The land must be leased for **agricultural or grazing purposes only**;

c) The **First Nation Council must consent** to the lease. A Band Council Resolution (BCR) or some other form of council consent must be obtained.

d) The lease must be **for the benefit of the First Nation**.

e) If the Minister’s authority has not been delegated to the First Nation under s. 60, an agricultural or grazing lease **must be approved by the officer who has delegated authority** pursuant to the **Delegation of Authority Instrument** under the **Indian Act** and related Regulations (refer to the relevant regional delegation instrument).

2.17 **Using ss. 58(1)(b) to Lease Locatee Land:**

a) **Statutory Scheme**: ss. 37(2) of the **Indian Act** states that, “except where otherwise provided for in the **Indian Act**, land in a reserve may not be leased until it has been designated pursuant to ss. 38(2)”.

  Subsection 58(1)(b) allows for the leasing of **uncultivated or unused** locatee land for agricultural and grazing purposes, or for any purpose that is for the benefit of the person in lawful possession. **Designation of the land is not required, but the consent of the Band Council is necessary.**
Statutory Scheme (continued)

b) **Division of Proceeds**: ss. 58(2) provides for the division of the proceeds derived from the improvement or cultivation of land under a ss. 58(1)(b) lease. A rent agreed upon between the two parties is to be paid to the individual in possession. The remainder of the proceeds, if any, are to be paid to the credit of the First Nation. Because the *Indian Act* does not specify how the proceeds of locatee leases pursuant to ss. 58(3) are to be divided, the department should advise the locatee of the implications of proceeding by way of a ss. 58(1)(b) lease. Refer to Directive 7-3: Locatee Leases.

c) **Improvements During the Lease**: If the lessee makes improvements to the land during the term of the lease, it is possible that the value of the improvements may be deducted from the rent paid to the locatee. This recognizes that the locatee will retain the benefits of the improvements after the lease has ended.

d) **Consent of the First Nation and Locatee**: The *Indian Act* requires that a lease of land under ss. 58(1)(b) must have the consent of the Band Council, and ss 58(2) provides that the First Nation receive a share of the proceeds of the lease. A BCR approving a lease under ss. 58(1)(b) should be obtained from the Band Council prior to execution of the lease. Although not specifically required by the *Indian Act*, the locatee’s consent should be obtained in writing.

**Note**: Changes to executed leases must be done by way of an executed modification of lease agreement and must include the locatee’s consent in writing.

e) **Approval by the Department**: If the Minister’s authority has not been delegated to the First Nation under s. 60, leases authorized by ss. 58(1)(b) must be approved by the departmental officials authorized by the *Delegation of Authority Instrument* under the *Indian Act* and related Regulations (refer to the relevant regional delegation instrument).

2.18 **The Use of Standard Documents**: Approved standard documents, available regionally or from headquarters, are the basis of all leases. Standard documents simplify drafting, allow a faster approval process, help national training programs and produce standardized lease documents for registration purposes. Approved standard documents can subsequently be tailored to the needs of specific situations. Any significant changes should be brought to the attention of Headquarters policy advisors. However, the control of the drafting of these documents rests with the Lands Officer. Changes should always be made in redline and strikeout so that all parties are clear on the language and are clear on the changes from the precedent.
2.19 Negotiating Leases

2.19.1 What is Negotiable: Following basic guidelines, the parties must negotiate key elements in every lease. These elements include the name of the lessee, the rent, the term of the lease, and the proposed use of the land.

2.19.2 Mandatory Terms: Besides the negotiable items such as rent and term, legislation and departmental policy impose many terms and conditions to be contained in leases of reserve land. These mandatory terms which are contained within approved standard lease forms, deal with most of the standard terms such as insurance, tenant improvements, and construction standards, and are therefore usually not negotiable. Some terms, however, may be unique to each lease, and therefore should be discussed internally before the best course of action can be chosen.

2.19.3 Role of the Lands Officer: It is the obligation of the Lands Officer to ensure that the department's policy requirements for preparing, executing and registering leases are met.

The First Nation may call upon the Lands Officer to assist in the negotiations with the proposed lessee on the non-mandatory terms of leases. In the interests of fair negotiation, the proposed lessee and any other interested parties should be advised at an early date that the applicable standard lease document will form the basis for the lease. Therefore, the basic terms and conditions of the lease should be conditionally negotiated and inserted into the precedent lease by the Lands Officer. Any changes proposed by a potential lessee or First Nation should be highlighted with redline/strike-out for clarity of the negotiations. Among the terms which should be negotiated at an early stage are:

a) The **proposed use of the land** (such as commercial, residential, recreational or agricultural) and the specific development or activity planned, should be **clearly** agreed upon. For example, the commercial uses of the land might encompass a retail store, a gas station or a hot dog wagon, and the particular use should be clearly explained.

b) the proposed **term of the lease**.

c) the **legal description of the land** to be leased: See Schedule A of 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* as amended from time to time.
Role of the Lands Officer (continued)

d) the **proposed rent** (based on an independent appraisal provided by the proposed lessee and reviewed by Public Works & Government Services Canada if required).

**Notes:**

1. Where a s. 53/60 delegation has been made, the First Nation’s land manager, employed by the First Nation, handles lease negotiations.

2. The originator of a lease document is always the Lands Officer, or a First Nation with section 53/60 delegation. The Lands Officer should never accept a draft lease from a proponent as a precedent, or starting point of negotiations. Further, any amendments during negotiations must be done by the Lands Officer and **NOT** the proponent or their legal counsel.

2.20 **Transferring the Interest in a Lease:** Unless prohibited by the lease or the terms of a designation, lessees may, with ministerial approval, mortgage, assign, or sublet their leasehold interest. To effectively control the management of reserve land, it is in the interest of First Nations to be able to restrict the transfer of leases, particularly long-term leases to commercial operators. Because they will govern the rights of transfer of a leasehold interest, the lease terms relating to transfer should be carefully reviewed. Where appropriate, amendments to existing leases should be considered. Refer to Directive 7-5: Assignments, Sub-leases and Mortgages for more information on the policies and procedures involved in transferring leases.

2.21 **Cancelling a Lease:** There are circumstances in which cancelling a lease before the end of its term becomes necessary, such as failure by a lessee to remedy a default of the lease, including the non-payment of rent. Refer to Directive 7-6: Cancelling Leases, for information on the policies and procedures involved in cancelling leases. Also, refer to Chapter 8 - Administering Leases and Permits.
3. **Authorities**

3.1 The following provisions of the *Indian Act* are used for the leasing of reserve land:

37.(2) *Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been surrendered to Her Majesty pursuant to subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.*

38.(2) *A band may, conditionally or unconditionally, designate by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.*

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

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

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

(b) *where the land is in the lawful possession of any individual, grant a lease of that land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession of the land;*

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

58.(2) *Out of the proceeds derived from the improvement or cultivation of lands pursuant to paragraph (1)(b), a reasonable rent shall be paid to the individual in lawful possession of the lands or any part thereof, and the remainder of the proceeds shall be placed to the credit of the band, but if improvements are made on the lands occupied by an individual, the Minister may deduct the value of the improvements from the rent payable to the individual under this subsection.*

58.(3) *The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.*
59. The Minister may, with the consent of the council of a band, 

(a) reduce or adjust the amount payable to Her Majesty in respect of a transaction affecting absolutely surrendered lands, designated lands or other lands in a reserve or the rate of interest payable thereon; ...

4. References

4.1 For more information, refer to:

a) Chapter 12 of this Manual for environmental considerations.

b) Indian Lands Registration Manual

c) Schedule A of 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 as amended from time to time.

d) Forestry Management Manual

e) Delegation of Authority Instrument for your Region

f) Canada Lands Survey Act
Directive 7-2
Leasing Reserve Lands Using Designation

1. Purpose

1.1 This directive explains how to lease unallotted reserve lands that have been designated. The authority for leasing designated land can be found in ss. 53(1) of the Indian Act. This directive gives information and guidance about:

a) Policy: The principles and requirements which underlie the use of ss. 53(1).

b) Process: The steps and procedures involved in using ss. 53(1) to lease unallotted band land.

2. General

2.1 Before Reading This Directive: Review Directive 7-1: Leasing Reserve Land-An Overview, which will serve as a roadmap for navigating within Chapter 7. Directive 7-1 discusses the legal framework underlying leases, and offers an overview of the leasing mechanisms under the Indian Act. Refer also to Chapter 2 - Transaction Guide and to Chapter 5 - Designations and Surrenders.

2.2 How the Indian Act Works: Three key sections of the Indian Act authorize the designation and leasing of reserve lands. Sub-section 37(2) states that, except where otherwise provided for in the Indian Act, lands in a reserve may not be leased until they have been designated pursuant to ss. 38(2). Sub-section 38(2) permits a First Nation to designate its rights or interest in reserve lands for leasing purposes. Lastly, ss. 53(1)(b) authorizes the actual leasing of reserve lands.

2.3 Effect of Designation: A designation is deemed to confer all the rights that are necessary to carry out its terms. Because reserve land which has been designated remains part of the reserve, the First Nation’s interest in that land survives throughout the term of the designation.
2.4 Negotiating Leases

2.4.1 What is Negotiable: Following basic guidelines, the parties must negotiate key elements in every lease. These elements include the name of the lessee, the rent, the term of the lease, and the proposed use of the land.

2.4.2 Mandatory Terms: Besides the negotiable items such as rent and term, legislation and departmental policy impose many terms and conditions to be contained in leases of reserve land. These mandatory terms are contained within our precedent lease forms which deal with most of the standard terms such as insurance, tenant improvements, and construction standards, which are usually not negotiable. Some terms, however, may be unique to each lease, and therefore should be discussed internally before the best course of action can be chosen.

2.4.3 Role of the Lands Officer: It is the obligation of Lands Officers to ensure that the department’s policy requirements for preparing, executing and registering leases are met.

The First Nation may call upon the Lands Officer to assist in the negotiations with the proposed lessee on the non-mandatory terms of leases. In the interests of fair negotiation, the proposed lessee and any other interested parties should be advised at an early date that the applicable standard lease document will form the basis for the lease. Therefore, the basic terms and conditions of the lease should be conditionally negotiated and inserted into the standard lease by the Lands Officer. Any proposed changes by a potential lessee or First Nation should be highlighted with redline/strike-out for clarity of the negotiations. Among the terms which should be negotiated at an early stage are:

a) The proposed use of the land (such as commercial, residential, recreational or agricultural) and the specific development or activity planned, should be clearly agreed upon. For example, the commercial uses of the land might encompass a retail store, a gas station or a hot dog wagon, and the particular use should be clearly explained.

b) the proposed term of the lease.

c) the legal description of the land to be leased Note: a Registration Plan or CLSR Survey is required for most leases. (see Schedule A of 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 as amended from time to time).
d) the **proposed rent** (based on an independent appraisal provided by the proposed lessee and reviewed by Public Works & Government Services Canada when required).

**Note:** Where a ss. 53(1) delegation has been made, the First Nation’s Land Manager, employed by the First Nation, handles lease negotiations.

2.4.4 **Guidelines for Commercial, Recreational and Agricultural Leases:** For information on the form, content and negotiation of commercial, recreational and agricultural leases, refer to Directive 7-4: General Guidelines for Drafting Leases and to the specific guidelines attached to Directive 7-4 as Annexes A through D.

3. **Authorities**

3.1 The following provisions of the *Indian Act* are used for the leasing of designated land:

- **37.(2)** Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been surrendered to Her Majesty pursuant to subsection 38(2) by the band for whose use and benefit in common the reserve was set apart. ...

- **38.(2)** A band may, conditionally or unconditionally, designate by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted. ...

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

  (a) manage or sell absolutely surrendered lands; or

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

4.1 When to Choose a Designation: Use a designation to lease unallotted reserve land to non-members of the First Nation, for commercial and residential development. In this context, "non-member" would include a corporation owned and beneficially controlled by a First Nation, which is not legally considered to have First Nation status, even if all of its shareholders are First Nation members. However, a First Nation member can lease designated land.

4.2 When a Designation Is Not Appropriate: Usually, a designation will offer the best route to setting up an effective leasing scheme for unallotted land. In some situations the designation and leasing of land are not recommended. The process of designating land is time-consuming and often complex. If the leasing objective can be as effectively achieved through a less complicated procedure, use that procedure. For example, if uncultivated or unused land is to be used for short term agricultural purposes, a permit under ss. 28(2) or a lease under ss. 58(1)(c) offer simpler, and equally effective approaches. In such a situation, use ss. 28(2) or ss. 58(1)(c) instead of the more cumbersome ss. 53(1). Also, if the land to be leased is allotted, and if it is intended that it should remain so, leasing by way of designation should not be used, as the designation will extinguish the individual interest. In that situation, use a locatee lease (see Directive 7-3).

4.3 Leasing Guidelines for Designated Land: Specific policy guidelines apply to all leases of designated land, whether those leases are for agricultural, commercial or residential/recreational purposes. Those policies are set out below, and following these guidelines is very important. For information on the form, content and negotiation of commercial, residential/recreational and agricultural leases, refer to Directive 7-4: General Guidelines for Drafting Leases, and the annexes attached to that directive. The policy guidelines applicable to all leases of designated land are:

4.3.1 Application for Use of Land: An "Application for Use of Land within an Indian Reserve" must be completed in detail for every lease proposal. This form must include all the information necessary to successfully draft the lease, and all the special terms which the parties have agreed upon.

4.3.2 The Status of Designated Land Must be Clear: In the interest of good land management practice, the Lands Officer must complete a Land Status Report to clearly determine the status of the land being designated well before any leasing agreement is finalized, and certainly before it is executed. While the land may be in the process of being designated for this lease, it should not be in the process of being designated for another purpose, or be in the process of being surrendered or allotted.
4.3.3 **The Lease Must Comply with the terms of the Designation:** Most modern day designations provide specific terms relating to how the land must be used, and may set out conditions which will apply to the lease. Any lease of designated land must strictly follow the terms of the designation. It is recommended that existing out-dated surrenders for general leasing purposes (ie. no specific purpose) be revoked and then re-designated to ensure informed community consent of a proposed lease. The qualification is that no interests must have been granted pursuant to the surrender for lease, and the First Nation council must be willing to replace the surrender.

4.3.4 **Length of the Lease:** A lease of designated lands cannot extend beyond the date of termination of the designation. If the term of the lease extends to the last day of the term of the designation, the lease must state that it will lapse on the last day of the term of the lease, without any further notice by the lessor.

4.3.5 **Rent:** As a rule, the leasing of designated land is intended to produce an appropriate economic return to the First Nation. Every designation requires that a fair market rent be obtained from the lessee whether or not stated, and if the First Nation has requested less than fair market rent, the designation must explicitly reflect that request. **Fair market rent must therefore be charged in every lease unless the terms of the designation specifically provide otherwise.** The designation must also clearly specify if the lessee will be permitted to pay less than fair market rent. There must be a provision for a review of the rent at least every five years.

4.3.6 **Rent Charged to First Nation Corporations:** Sometimes, a First Nation corporation that is leasing designated land may receive special terms as part of an overall economic strategy that benefits the First Nation. An example of such a benefit is reduced or nominal rent.

4.3.7 **Reduced Rent:** Where reduced rent is to be charged, the designation should specify the First Nation corporation and provide for the reduced rent. The designation documentation should include the following:

1. approval of the reduced rent by the band membership and acknowledgment as to what the fair market rent should be.

2. acknowledgement that the profits and/or benefits from the enterprise will accrue to First Nation members, either through the First Nation corporation’s Articles of Incorporation, or through the lease terms.

3. a provision in the lease for fair market rent to kick in should the First Nation corporation lose their controlling interest.
4.4 The Department of Justice must be consulted when a reduced rent lease is proposed to a First Nation corporation. As well, the First Nation corporation and the First Nation council, as lessee, should each seek independent legal advice with respect to the lease.

**Lease Recitals:** The recitals (the introductory portion appearing before the main body) of every lease of designated land must contain certain information about the designation which authorizes it. At a minimum, the recitals should state:

a) The date and Privy Council number of the designation Order-in-Council.

b) The Indian Land Registry Number of the designation Order-in-Council, if available.

c) The expiry date of the designation.

4.5 **Environmental Assessment:** Whenever parties enter into a lease, an environmental assessment must be conducted according to the requirements of the Canadian Environmental Assessment Act. Refer to Chapter 12 of this manual for the policy and procedures for environmental assessments.

4.6 **Authorizing the Lease of Designated Land:** Reserve band land must be designated **before** it can be leased pursuant to ss. 53(1)(b). Once a designation has been made, the lease of that designated land may be authorized by the appropriate departmental officials or by the First Nation members who have been appointed under ss. 53(1). Consult the current Delegation of Authority Instrument under the Indian Act and Related Regulations (refer to the appropriate regional delegation instrument) to determine which departmental officers are authorized to approve and sign leases of designated land.

4.7 **Delegation to the First Nation:** Under ss. 53(1), the Minister may delegate to anyone, including First Nations, the power to manage or lease designated lands. Technically, the word "person" in ss. 53(1) prevents the delegation of this authority to a First Nation as such, because it is not a person. The appointment must therefore refer by name to specific individuals or to positions such as the "Chief and Councillors from time to time." Where the Minister has made this delegation, the First Nation approves leases affecting designated land, subject to certain conditions and the terms of the delegation instrument. For more information on delegation under ss. 53(1), and the general requirements that must be met, refer to Chapter 11 - Land Management Devolution.
4.8 **Conditions of Approval:** The approval of leases of designated land under delegated ss. 53(1) authority is subject to the following minimum conditions:

a) **Band Council:** Before a lease may be executed, the Band Council must consent to the lease by way of BCR or some other form of written council consent.

b) **Approval of the Form of Lease:** The department must approve the form of the lease, and any unusual terms. Leases more than five years in duration, including those providing for nominal rent, must contain a rent review clause. Regions have several standard lease agreements, such as a commercial lease and a cottage lease, which will help in this regard.

c) **Section 53 Delegations:** Approval of leases by the First Nation is subject to the terms, conditions and restrictions contained in the ministerial letter delegating authority to the Band Council under s. 53(1).

5. **Process**

5.1 This section summarizes the process for leasing band reserve land under ss. 53(1) of the *Indian Act*. This directive includes a comprehensive checklist which is attached as Annex A.

5.2 First Nations exercising delegated authority under ss. 53(1) are responsible for following the same steps taken by the Lands Officer, as identified in the checklist.

5.3 **Application for Use of Land:** At the earliest opportunity, an "Application for Use of Land Within an Indian Reserve" must be fully completed and placed on file. The steps to take to complete the application are set out below. A copy of the application is attached to this directive as Annex B.

5.4 **Obtain Information from the Proposed Lessee:** The proposed lessee must complete Part 1 of the "Application for Use of Land Within an Indian Reserve," This will provide basic information on the lessee, identify the land to be leased, set out its proposed use, and authorize a credit investigation if required.

5.5 **Determine Best Mechanism for the Purpose:** If the intended use is short term agricultural or grazing, and the land has not been already designated, issue a permit under ss. 28(2) or a lease under ss. 58(1)(c). If the intended use is commercial, residential, or long-term agricultural - ie: for a term more than 10 years - issue a lease of designated land under ss. 53(1). Refer to Directive 2-2: Transactions and Choosing Authorities, for further guidelines on choosing the best authorities.
5.6 **Prepare an Environmental Screening Report:** The appropriate departmental/First Nation officer must prepare an environmental screening report setting out the results of the environmental assessment. Refer to Chapter 12 of this manual for information on the policy and procedures for conducting the environmental assessment and preparing the screening report.

5.7 **Verify the Status of Land:** Confirm that the land to be leased is in fact band reserve land (unallotted), and not otherwise encumbered. Complete a Land Status Report (see Annex B), which requires a thorough search in the Indian Lands Registry to determine: the status of the land; whether the land has been designated under ss. 38(2); and whether any encumbrances affect the land.

5.8 **Confirm the Legal Description and Arrange for a Survey, if required:** The Lands Officer should confirm that an adequate legal description of the land exists that identifies it beyond any reasonable doubt. Refer to Schedule A of the *Framework Agreement between the Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada* as amended from time to time. If the lease is for a term greater than 10 years, a survey may be required, providing that a survey does not already exist. The preparation of any survey required in this regard and all associated costs are the responsibility of the lessee (proponent).

5.9 **Conduct a Credit Investigation if required:** A thorough credit investigation of the proposed lessee should be conducted following regional guidelines, at the lessee’s expense. It should be confirmed that the lessee has sufficient means to pay the agreed upon rent, and any related guarantees. Credit checks can be obtained through the local Credit Bureau. The lessee’s name, address, and other available information are provided to the credit agency, which will search its records for information on the lessee’s financial status and credit history. Refer to regional guidelines for further assistance in determining how to carry out the credit check.

5.10 **Check corporate status:** Where the lessee is a corporation, verify its corporate standing and the names of its current signing officers by searching the relevant corporate registry. The lessee must pay any costs associated with this investigation.
5.11 **Negotiate the Lease Terms:** The basic terms and conditions of the lease, except those which are mandated by legislation or departmental policy, or dictated by the terms of the designation, should be conditionally negotiated by or for the Band Council, with the assistance of the Lands Officer. The lessee should be provided with a copy of the standard lease or the departmentally approved equivalent applicable to the proposed use which incorporates clauses that would protect the Crown and First Nation during the term of the lease.

5.12 **Site Inspection of the Land:** The appropriate departmental office, or the appropriate First Nation lands staff, should inspect the land, and report the results in Part 2 of the "Application for Use of Land Within an Indian Reserve." The inspection should address matters such as:

a) Access to the land by road or other means, and the services (such as water, sewer and power) available.

b) General land description and topography, confirming that the proposed site will accommodate the proposed use.

5.13 **Designation:** If the land is to be leased under ss. 53(1)(b), and it has not yet been designated, then designation of the land must take place before any lease agreement is executed. For large, complex leases, or where the lease includes special terms, those terms must be negotiated in advance and provided for in the designation. If available, attach a draft of the lease to the designation for large developments. Refer to Chapter 5 - Designations and Surrenders, for further guidance.

5.14 **Assess the Lease:** The Lands Officer should conduct an assessment of the proposed lease. Following the assessment of the lease, the Lands Officer should forward any concerns relating to the proposed lease to the Band Council. The assessment should consider, among other matters:

a) the adequacy of the rent (based on an independent appraisal, provided by the proposed lessee, and reviewed if necessary by Public Works and Government Services Canada).

b) the term (refer to Directive 7-4: General Guidelines for Drafting Leases).

c) the proposed use of the land (taking into consideration the “Part 2: Land Inspection” of the "Application for Use of Land Within an Indian Reserve").

d) whether all terms and conditions required by departmental policy have been included.
Assess the Lease (continued)

e) the suitability of all **non-standard clauses** appearing in the lease. If necessary, the opinion of the Department of Justice respecting specific non-standard clauses must be obtained and in consultation with the Lands Officer, the departmental position will be determined.

f) the potential **environmental impact** of the lease (Pursuant to CEAA, have the departmental Environmental Specialist officer review an environmental assessment provided by the proposed lessee and prepare the environmental screening report).

g) The review of the **Development Plan**, for leases which require significant improvements and/or construction (based on a review by Public Works and Government Services Canada).

5.15 **Address Identified Problems:** The Lands Officer should promptly address any problems or shortcomings in the lease identified by the assessment, or by the Band Council, and should request, if appropriate, that changes be made to the lease. If necessary, the Lands Officer should seek the guidance of departmental representatives in the regional office or at headquarters.

5.16 **Execution of the Lease:** It is suggested that 4 original leases are executed - one for the Indian Land Registry, the lessee, the First Nation, and the departmental file. The Lease should be executed in the following order:

a) First, the First Nation **consents** (BCR).

b) Second, the **Lessee** executes.

c) Finally, the **Minister’s delegated authority** executes.

**Note:**
If the First Nation is exercising delegated powers pursuant to ss. 53(1), consult the current **Delegation of Authority Instrument** under the **Indian Act and Related Regulations** (refer to the relevant regional delegation instrument).

5.17 **Registration of the Lease:** The Lands Officer sends the fully executed lease, with supporting documentation, to the Indian Lands Registry in Ottawa for registration. Refer to the **Indian Lands Registration Manual** to ensure that the lease document meets all the requirements for registration.
6. **References**

6.1 For more information, refer to:

   a) Chapter 12 of this manual for more information on Environmental considerations.

   b) Indian Lands Registration Manual

   c) Schedule A of 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*, as amended from time to time.
Chapter 7

Directive 7-2: Leasing Reserve Lands Using Designation

Annex A: Checklist for Leases on Designated Land
### Checklist for Leases on Designated Land

The Lands Officer, or, for ss. 53(1) First Nations, the delegated authority, should take the following steps:

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Obtain a fully completed &quot;Application for Use of Land Within an Indian Reserve&quot; from the proposed lessee.</td>
</tr>
<tr>
<td>2</td>
<td>Ensure the proposed lessee has fully completed Part I of &quot;Application for Use of Land Within an Indian Reserve&quot; and has authorized credit investigation;</td>
</tr>
<tr>
<td>3</td>
<td>Confirm that designation and lease under ss. 53(1) is the appropriate mechanism.</td>
</tr>
<tr>
<td>4</td>
<td>Pursuant to CEAA, have the departmental Environmental Specialist officer review environmental assessment provided by the proposed lessee and prepare the environmental screening report.</td>
</tr>
<tr>
<td>5</td>
<td>Verify land status and complete a Land Status Report, to determine:</td>
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<tr>
<td></td>
<td>i) the status of the land.</td>
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<td></td>
<td>ii) whether the land has been designated pursuant to ss. 38(2).</td>
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<td></td>
<td>iii) whether there are any encumbrances affecting the land.</td>
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## Confirm that an adequate legal description exists:

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<tbody>
<tr>
<td>6</td>
<td>Confirm that an adequate legal description exists:</td>
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<tr>
<td></td>
<td>i) if lease is for a term of 10 years or less, it can be described as a textual reference, however a Registration Plan is recommended. Refer to Schedule A of the <em>Framework Agreement between Lands and Trust Services Department of Indian Affairs and Northern Development and Legal Surveys Division, Earth Sciences Sector Natural Resources Canada</em> as amended from time to time.</td>
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<tr>
<td></td>
<td>ii) if lease is for a term of between 10 to 25 years, is there a Registration Plan?</td>
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<td>iii) if lease is for a term of between 25 to 49 years, is there a Registration Plan or a CLSR Plan?</td>
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<td></td>
<td>iv) if lease is for a term in excess of 49 years, is there a CLSR Plan?</td>
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</table>

| 7 | Conduct credit investigation. |
| 8 | Conduct corporate status check. |

<p>| 9 | Negotiate the basic terms of the lease and incorporate these clauses into the standard lease or departmentally approved equivalent: |
|   | i) provide lessee with draft copy of the lease; and, |
|   | ii) with the assistance of Public Works and Government Services Canada, if required, determine whether personal guarantees or performance bonds are required. |</p>
<table>
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<th>Process Checklist</th>
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<tr>
<td><strong>10</strong></td>
<td>Arrange for conduct of site inspection of land. Confirm:</td>
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<tr>
<td></td>
<td>i) access to the land by road or other mean.</td>
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<td></td>
<td>ii) the services (water, sewer and power) available.</td>
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<td></td>
<td>iii) general land description and topography, confirming that the proposed site matches the land description.</td>
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<td></td>
<td>iv) See Item 14 - Assessment of lease.</td>
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<tr>
<td><strong>11</strong></td>
<td>Complete Land Inspection portion (i.e. Part 2) of the &quot;Application for Use of Land Within an Indian Reserve&quot;.</td>
</tr>
<tr>
<td><strong>12</strong></td>
<td>Ensure proper designation is in place, or complete the designation (see Chapter 5 for details).</td>
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<tr>
<td><strong>13</strong></td>
<td>Confirm lease terms are consistent with the terms of designation.</td>
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</table>
### 14 Conduct an assessment of the lease, including:

- **a)** the adequacy of the **rent** (based on an independent appraisal, provided by the proposed lessee, and reviewed if necessary by Public Works and Government Services Canada);
- **b)** the **term** (refer to Directive 7-4: General Guidelines for Drafting Leases);
- **c)** the proposed **use of the land** (taking into consideration “Part 2: Land Inspection” of the "Application for Use of Land Within an Indian Reserve");
- **d)** whether all terms and conditions required by the designation and/or the **departmental policy** have been included (based on standard lease document);
- **e)** the suitability of all **non-standard clauses** appearing in the lease. If necessary, the opinion of the Department of Justice respecting specific non-standard clauses must be obtained and in consultation with the Lands Officer, the departmental position will be determined;
- **f)** the potential **environmental impact** of the lease (Pursuant to CEAA, have the departmental Environmental Specialist officer review an environmental assessment provided by the proposed lessee and prepare the environmental screening report)
- **g)** Review the **Development Plan**, on leases which require significant improvements and/or construction (based on a review by Public Works and Government Services Canada).
15 | Review the lease before execution to ensure that all standard terms and requirements are present, including the following terms and conditions:

   | i) The full formal name and address of the lessee and if the lease is a company, the following statement:
   |   - the name of the company, stated as in the Certificate of Incorporation/Letters Patent
   |   - the jurisdiction of incorporation
   |   - the address of the head office
   |   - authorization to enter into land transactions
   | ii) Specify the applicable authority under the *Indian Act*;
   | iii) A full and identifiable land description, including identification of any existing easements or other encumbrances;
   | iv) The amount and period of rental payments, including:
   |   a) the date on which payment is due;
   |   b) if rent is to be a percentage of another quantity, the agreed method of calculation;
   |   c) whether the rent is it to be reviewed at least every five years;
   |   d) a mechanism for determining the rent in the event the parties fail to agree; and
   |   e) a mechanism for adjusting a nominal rent to fair market rent upon the assignment of a band corporation lease to non-band lessee.
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<td>15</td>
<td>v) Clearly defined acceptable uses of the demised lands;</td>
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<td>vi) The standards to be followed specifically in respect of:</td>
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<td></td>
<td>a) construction and safety;</td>
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<td></td>
<td>b) health; and</td>
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<td></td>
<td>c) property maintenance.</td>
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<td>vii) Any performance requirements;</td>
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<td>viii) Any fencing requirements;</td>
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<td>ix) Environmental provisions, such as waste or rubbish contamination, compliance with environmental standards, environmental assessments and mitigation, environmental protection, no contaminants or hazardous substances, mitigation of environmental impacts, etc.;</td>
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<td>x) Whether issues of dangerous objects, noxious weeds, etc. have been addressed;</td>
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<td>xi) Any provisions for cancellation of the lease for specified reasons;</td>
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<td>xii) Provision for ownership of improvements at the end of the lease, and who is to decide or quantify;</td>
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<td></td>
<td>xiii) Provision of insurance at lessee's expense for:</td>
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<td>a) fire;</td>
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<td>b) public liability; and</td>
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<td></td>
<td>c) crops.</td>
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<td>xiv) Indemnification of Her Majesty from all claims, damages, costs, etc.</td>
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<td></td>
<td>xv) Whether lessee undertakes to pay all taxes, levies, or other charges;</td>
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<td></td>
<td>xvi) Whether lessee covenanted to comply with all applicable laws, including First Nation bylaws;</td>
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<td>xvii) Whether the Crown reserved the mineral rights in, upon or under the demised lands;</td>
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<td>xviii) Whether the lessee is given the right to hold, use and occupy the premises without interference so long as rents are paid and covenants complied with;</td>
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<td>xix) Whether the lease has been duly executed by the lessee and Affidavits of Execution or corporate seals have been provided;</td>
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<td>xx) If the lease is in the nature of a headlease,</td>
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<td></td>
<td>a) whether it is mandatory to register all sub-leases in the Indian Lands Registry.</td>
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<td></td>
<td>b) whether the sub-lessee is responsible for a CEAA assessment.</td>
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<td>xxi) If the lease is assignable,</td>
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<td></td>
<td>a) provision for the payment of a fee upon assignment of the lease;</td>
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<td></td>
<td>b) whether the provision stipulates that the fee must be a true reflection of expenses incurred in connection with the assignment; and</td>
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<td>c) provision that the lessee may not assign or transfer the lease without Her Majesty's consent.</td>
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<tr>
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<td>xxii) Provision that upon bankruptcy or receivership of lessee, Her Majesty may terminate;</td>
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<tr>
<td></td>
<td>xxiii) Provision that Her Majesty’s or other applicable authorities’ representative may enter to view and inspect premises;</td>
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<tr>
<td>xxiv) Where, in Her Majesty’s opinion, a nuisance exists, the lessee may be ordered to abate and pay costs thereof;</td>
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<tr>
<td>xxv) Upon expiry of the lease, the lessee shall peaceably surrender possession to Her Majesty;</td>
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</tr>
<tr>
<td>xxvi) Where the lease contemplates major commercial, industrial or residential development, the following terms should appear:</td>
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<tr>
<td>a) Improvements will revert to the lessor, or if not, evidence on file that this condition has been expressly waived.</td>
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<tr>
<td>b) An acceptable development plan has been submitted to the Minister prior to granting of lease.</td>
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<tr>
<td>c) Security, in the form of a performance bond, should be obtained to guarantee completion of the development.</td>
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<tr>
<td>xxvii) Arrange for 4 original lease documents to be executed. One each for the Indian Land Registry, the lessee, the First Nation, and the departmental file.</td>
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<tr>
<td>The Lease should be executed in the following order:</td>
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</tr>
<tr>
<td>a) First, the First Nation <strong>consents</strong> (BCR);</td>
<td></td>
</tr>
<tr>
<td>b) Second, the <strong>Lessee</strong> executes;</td>
<td></td>
</tr>
<tr>
<td>c) Finally, the <strong>Minister’s delegated authority</strong> executes.</td>
<td></td>
</tr>
<tr>
<td><strong>Note:</strong> If the First Nation is exercising delegated powers pursuant to ss. 53(1), consult the current <strong>Delegation of Authority Instrument under the Indian Act and Related Regulations</strong> (refer to the relevant regional delegation instrument); and</td>
<td></td>
</tr>
<tr>
<td>xxix) Register the lease in the Indian Lands Registry.</td>
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Chapter 7

Directive 7-2:
Leasing Reserve Land
using Designation

Annex B:
Application for Use of Land
within an Indian Reserve
Annex B
Example of an Application for Use of Land within an Indian Reserve

PART 1  (To be completed by the Applicant)

1. Name in full: ______________________________________
2. Company name: ______________________________________
3. Address: ______________________________________
4. Company Number: ____________________________
5. Telephone Number: (Res.)________________________ (Bus.)________________________
6. Directors & officers of the company: __________________________
7. Applicant’s occupation: __________________________
8. Employer’s name: __________________________
   Address: ______________________________________
9. Number of years with employer: __________________________

Property applied for (to be completed by applicant)

1. Band: ______________________________________
   Reserve: ______________________________________
2. Purpose(s) (Residential, cottage, commercial, industrial, agricultural, R/W, etc.)
3. Description of Land: __________________________
   ______________________________________
   __________________________________________________________________________
   (Attach appropriate plan or survey. Provide sufficient detail to identify location.)
Basic Proposed Terms of Lease (to be completed by applicant)

1. Proposed Commencement Date:

2. Proposed Duration:

3. Independent Appraisal completed by: 

   Pending □

4. Proposed Rent Offered:

WE HEREBY CONSENT TO HAVING THE DEPARTMENT OF INDIAN AFFAIRS
CONDUCT OR CAUSE TO BE CONDUCTED A PERSONAL CREDIT
INVESTIGATION.

Dated at __________________________ this __________________________
day of __________________________ 20__.

WITNESS __________________________ APPLICANT ________________

WITNESS __________________________ CO-APPLICANT ________________
PART 2  LAND INSPECTION

(To be completed by the appropriate departmental officer)

1. Description of site: ________________________________

   (General location, proximity to water frontage, river, etc.)

2. Topography: ________________________________

   (Soil, ground cover, etc.)

3. Access to public road: ________________________________

4. Distance to nearest community: ________________________________

5. Available services:
   Water
   Sewer
   Power
   Natural gas
   Telephone
   Garbage collection
   Other (specify)
   ________________________________

6. Present use: ________________________________

7. Comments: ________________________________

   ________________________________
   ________________________________
   ________________________________

_________________________  ___________________________  __________
Name, Title  Signature  Date
PART 3  LAND STATUS REPORT

Reserve Name: __________________________ No.: __ First Nation: ________________

Proposed Purpose (check box):

☐ Band land Lease
☐ Locatee land Lease
☐ Permit
☐ Designation
☐ Easement
☐ Section 35 Transfer
☐ Other: (specify) __________________________

Legal Description (attach copy of plan and/or NRCAN letter of description to Land Status Report):

Lands: Lot______ Block _____ Plan No. __________ (RS/CLSR)

Textual Description: __________________________________________

________________________________________

Status of Land (check box (es) if applicable):

☐ Band Land (not designated or Surrendered); or,
☐ Designated Land; or
☐ Locatee Land.

If Designated Land, Complete the following (attach copy of designation to Land Status Report):

Number Order-in-Council: P.C ______ - _______

Date of Order-in-Council: _________________________

ILR Registration No: ___________________________

Term or Period of Designation: From ___________ (m/d/y) To ___________ (m/d/y)

Purpose(s) of Designation: ________________________________

Conditions of Designation: ________________________________
If Locatee Land, Complete the following: (attach copy of documentation, including Parcel Abstract to Land Status Report):

Locatee: ___________________________  ___________________________  ___ ___

Last name  First name  Band No.

Address: ___________________________________________________________________

Street  City  Postal Code

Locatee's phone no.: _________ (h)  _________ (w)  _________ (cell)

Lawfully Held by: (check box)

☐ CP  - ILR Registration No: _______________; or,
☐ NE - ILR Registration No: _______________; or,
☐ NETI - ILR Registration No: _______________; or,
☐ Cardex - ILR Registration No: _______________; or,

Encumbrances (attach documentation, including Reserve General Abstract, to Land Status Report):

List of registered instruments which may affect this parcel: (check box)

☐ Lease - ILR Registration No: _______________; or,
☐ Permit - ILR Registration No: _______________; or,
☐ Surrender - ILR Registration No: _______________; or,
☐ Easement - ILR Registration No: _______________; or,
☐ Section 35 - ILR Registration No: _______________; or,
☐ Cardex: - ILR Registration No: _______________; or,
☐ __________ - ILR Registration No: _______________; or,
☐ __________ - ILR Registration No: _______________; or,

Comments and/or matters to be dealt with:

______________________________________________________________________________

I have reviewed the proposed land transaction and have searched the Indian Lands Registry records relating to the parcels affected by this transaction. According to these records, the proposed transaction: (check box)

☐ will not cause a conflict with existing registered interests;
☐ will cause a conflict with existing registered interest as identified herein, and must be dealt with as per comments above.

Name, Title  Signature  Date

January 2003  43
Band Council RESOLUTION AND CONSENT

(Sample wording)

The Council of the ______________________ Band do hereby resolve and consent to the granting of a _______ (lease, permit) _______ by the Minister of Indian Affairs and Northern Development of the lands as described in Schedule "A" attached, for a term of _____ years, for the benefit of _______ (band, locatee) _______ under terms and conditions as described in Schedule "A" attached.

________________________________________

(Chief)

________________________________________

(Councillor)                               (Councillor)

________________________________________

(Councillor)                               (Councillor)

________________________________________

(Councillor)                               (Councillor)

A quorum for this band consists of __________________________________

Dated at ______________________ this _________

day of ______________________   20____.

________________________________________
Directive 7-3
Locatee Leases

1. Purpose

1.1 This directive explains how to lease allotted (“locatee lands”) reserve lands under ss. 58(3) of the Indian Act, at the request of the locatee. This directive gives information and guidance with respect to:

a) Policy: The principles and requirements which underlie the use of ss. 58(3);

b) Process: The steps and procedures involved in using ss. 58(3) to lease Locatee land.

2. General

2.1 Before Reading This Directive: Review Directive 7-1: Leasing Reserve Land - An Overview, which will serve as a roadmap for navigating within Chapter 7. Directive 7-1 discusses the legal framework underlying leases, and offers an overview of the leasing mechanisms under the Indian Act. It also contains helpful definitions of terminology that will be found throughout this chapter.

2.2 Leasing Locatee Land Generally: Locatee lands are reserve lands which the Band Council has validly allotted under the Indian Act, possession of which is generally evidenced by a Certificate of Possession (CP). The authority for the leasing of locatee land is found in the following sections of the Indian Act:

a) Under ss. 58(1)(b) of the Act, uncultivated or unused land in the possession of an individual may be leased, with the consent of the Band Council, for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession. This mechanism is rarely used today, and Lands Officers should consider, where appropriate, the use of ss. 58(3) leases or ss. 28(2) permits. Refer to Directive 7-1, paragraphs 16 and 18, for further information on leasing allotted land under ss. 58(1)(b).
b) Under ss. 58(3) a locatee can apply to the Minister to lease all or part of the land in the locatee's possession without the land being designated. This type of lease is commonly called a "locatee lease", and it is the most common method used to lease allotted land.

2.3 **How the Indian Act Works:** Through the lease, the Crown grants to a lessee the locatee's right to exclusive use of the land for a specified period. The *Indian Act* does not require a designation. The *Indian Act* does not suggest how the proceeds of the lease are to be divided, if at all. However, departmental policies on these issues should be followed, as explained in the policy section of this directive.

2.4 **Using ss. 58(3):** Locatee leases are the most common way to lease allotted land, for several reasons. Because the time-consuming process of designation is not required, ss. 58(3) offers a convenient vehicle to develop reserve lands occupied by locatees. Provided that there are no band bylaws prohibiting certain locatee lease arrangements, there is also no limit on the kind of use that the land may be leased for, and no requirement that the lands be uncultivated or unused. As well, unlike a designation, the lease does not extinguish a locatee's interest in the land.

2.5 **Who Can Lease Locatee Land:** Although ss. 58(3) leases are usually used to lease locatee land to non-First Nation members, a locatee may also use ss. 58(3) to lease locatee land to another First Nation member.

2.6 **Negotiating ss. 58(3) Leases**

2.6.1 **Role of the Lands Officer:** It is the obligation of Lands Officers to ensure that the department's policy requirements for preparing, executing and registering leases are met. The locatee may call upon the Lands Officer to assist in the negotiations with the lessee of the non-mandatory terms of leases. In the interests of fair negotiation, the proposed lessee and any other interested parties should be advised at an early date that our applicable standard lease terms and document will form the basis for the lease. Therefore, the basic terms and conditions of the lease should be conditionally negotiated by, or for the locatee, and inserted into the standard lease by the Lands Officer, and the entire document should be provided to the lessee. Any proposed changes by a potential lessee or First Nation should be highlighted with redline/strike-out for clarity of negotiations.
2.6.2 **What is Negotiable:** Following basic guidelines, the parties must negotiate key elements in every lease. These elements include the name of the lessee, the rent, the term of the lease, the proposed use of the land. Among the terms which should be negotiated at an early stage are:

a) **The proposed use of the land** (such as commercial, residential, recreational or agricultural) and the specific development or activity planned, should be clearly agreed upon. For example, the commercial uses of the land might encompass a retail store, a gas station or a hot dog wagon, and the particular use should be unambiguously explained;

b) **the proposed term of the lease**;

c) **the legal description of the land** to be leased Note: a Registration Plan or CLSR Survey is required for most leases. (see Schedule A of 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 as amended from time to time);

d) **the proposed rent** (based on an independent appraisal provided by the proposed lessee and approved by Public Works & Government Services Canada).

**Notes:**

1. Where a ss. 53(1) delegation has been made, the First Nation’s Land Manager, employed by the First Nation, or the delegated authority handles lease negotiations.

2. The originator of a lease document is always the Lands Officer, or a First Nation with ss. 53(1) delegation. The Lands Officer should never accept a draft lease from a proponent as a precedent.

2.6.3 **Mandatory Terms:** Besides the negotiable items such as rent and term, legislation and departmental policy impose many terms and conditions to be contained in leases of reserve land. These mandatory terms cover most of our standard terms; such as insurance, tenant improvements, and construction standards, which are not usually negotiable. Some terms, however, are unique to each lease, and must be discussed internally before the best course of action can be chosen.
2.7 **Guidelines for Commercial, Recreational and Agricultural Leases:** For information on the form, content and negotiation of commercial, recreational and agricultural leases, refer to Directive 7-4: General Guidelines for Drafting Leases, and to the specific guidelines attached to Directive 7-4 as Annexes A through D.

3. **Authorities**

3.1 The following provisions of the *Indian Act* are used to lease allotted land:

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

(b) where the land is in the lawful possession of any individual, grant a lease of such land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession; . . .

58.(3) The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

4. **Policy**

4.1 The terms of a locatee lease must comply with all existing bylaws of the First Nation.

4.2 **First Nation Interest in Leases of Locatee Land:** The role of the First Nation in leasing locatee land is a function of the requirements of the *Indian Act*, case law, and departmental policy. Even when the *Indian Act* does not provide for First Nation involvement, policy requires that First Nations be given input into the decision-making process.

4.3 **The Indian Act does not specifically provide for any First Nation input into locatee leases.** However, the department recognizes that First Nations have an important interest in the use and development of reserve land, including those lands that the First Nations have allotted to their members. The department must seek input from the Band Council, but an objection by the Band Council does not amount to a veto of the lease. However, it is departmental policy to give Band Councils an opportunity to express their views on all proposed locatee leases.
4.4 This legal duty to seek input from the Band Council can pose significant difficulty where a First Nation which has received delegated authority from the Minister under s. 60 objects to the lease. In such a situation the duty of the Band Council, as the Minister's representative, is not toward the First Nation which elected it, but toward the locatee. In such situations, the First Nation may need to consult with DIAND to clarify its legal obligations.

5. Approving Locatee Leases With Terms Less than 49 Years

5.1 Council Feedback: The Band Council must be requested to express their views as to conformity with First Nation land use policies, zoning or development plans on all locatee leases with terms of 49 years or less, including all renewal terms. In seeking Council feedback, the following points should be kept in mind:

a) Time Deadlines: The Lands Officer should advise the Council that any comments with respect to the lease must be received within a reasonable time. As a rule, three to four weeks is a reasonable response time. The Council should be advised in writing of the deadline for responding, and informed that if the department receives no response within the time specified, then the First Nation will be presumed to have no comment to make;

b) Bylaws: The Band Council should be asked to confirm that the proposed lease does not contravene approved reserve land use plans or zoning bylaws;

c) Objections: Land officers must carefully consider any objections to a proposed lease that the Band Council may raise, and ensure that the objections are relevant and valid.

5.2 Delegation to the First Nation: Under s. 60, the Minister may delegate to First Nations the power to manage or lease non-designated lands in the reserve occupied by the First Nation. Where a s. 60 delegation has been made, that First Nation approves leases made under ss. 58(3), subject to the conditions attached to the delegation. For more information on delegation under s. 60, refer to Chapter 11 - Land Management Devolution.
6. Approving Locatee Leases with Terms More than 49 Years

6.1 For practical purposes, a locatee lease with a very long term could be considered a way of bypassing the surrender or designation provisions of the Indian Act. This would be especially true if the entire rent is payable in advance. In recognition of this, consent of the membership by way of a band vote for leases more than 49 years is required.

6.2 Issues to be Considered: When First Nation electors are approving a lease with a term in excess of 49 years, several key issues should be considered before the vote takes place:

   a) the social and cultural influence of the lease;

   b) the economic impact of the lease on the First Nation;

   c) the environmental consequences of the proposed transaction;

   d) the compatibility of the lease with First Nation bylaws.

6.3 Approval by Electors: All leases with terms of more than 49 years must be approved by a majority of the eligible electors of a First Nation called to vote on the proposed lease. Both on/off-reserve electors must be consulted.

6.4 Informed Decision-making: It is important that all eligible electors make an informed decision.

   a) Notice: The notice should include the locatee’s name, the location of the land, the lease term, the proposed use of the property, and the rent. The department must ensure that all information concerning the decision, which the department knows is available, is made available to the electors;

   b) Copies of the Lease: Copies of the proposed lease should be made available for review by the First Nation electors prior to the meeting.
6.5 **Ministerial Approval of a long term Locatee lease**: Before the Minister will approve a locatee lease in excess of 49 years, the First Nation must assent to the lease by way of a band vote. Region should receive from the First Nation:

a) a copy of the notice of the meeting;

b) a BCR which sets out: (a) the number of eligible voters who voted, and (b) the number of votes which were cast in favour and against the lease, and the number which were spoiled;

6.6 **Modifying Long-term Leases**: Holding a new vote of First Nation electors to confirm amendments or modifications to an approved long-term locatee lease is not usually necessary. However, **a vote is required** where the amendment or modification involves:

a) an extension of the lease term, including an extension of a lease with a term less than 49 years that extends the term to more than 49 years;

b) an extension of the area covered by the lease;

c) a substantial change in the proposed use of the leased land;

**Note**: Further to Clauses 6.1 and 6.5, proposals from a lessee and/or a locatee to extend the term of a lease once several years of the given lease have passed (ie. 20 years of a 49 year lease have passed and the lessee wishes to "top up" the lease to another 49 year term) should **not** be supported. This would be in direct contravention of departmental policy to not allow the long term alienation of reserve land without the consent of the First Nation membership.

6.7 **Delegation of the Approval Process**: The electors of a First Nation may delegate to the Band Council their right to approve leases in excess of 49 years, subject to the following conditions:

a) The delegation must be by a majority vote of those First Nation electors both on/off-reserve;

b) Written **notice of the above meeting must be publicly posted** at least 15 days before the meeting date;
Delegation of the Approval Process (continued)

c) At the request of any elector, the vote must be taken by secret ballot;

d) **A record of the vote must be tabulated**, and made available, upon request, to First Nation members. The record will include a tally of: the number of electors eligible to vote; the number voting in favour of the delegation; and the number voting against the delegation; the number of ballots spoiled, if any;

e) A copy of the notice advising of the vote, together with the record of the vote, must be forwarded to DIAND headquarters;

f) Delegations are valid only for the term of the Band Council in office at the time of the vote. After a new Council has been elected, a new vote must be held to confirm a new delegation, even if the same Council is returned to office; and

g) A delegation made pursuant to this policy **may be revoked at any time by a new vote or by way of petition** signed by the lesser of:

i) the same number of electors who originally voted in favour of the delegation; or,

ii) 50% + one of the electors of the First Nation.

7. Dividing Locatee Rent Revenues

7.1 Although ss. 58(2) of the *Indian Act* provides a mechanism for allocating rent received from ss. 58(1)(b) leases, the *Indian Act* does not set out a scheme for distributing rental revenues obtained from locatee leases. However, reserve lands are ultimately held for the benefit of First Nations members as a whole. It is therefore departmental policy to provide First Nations with an opportunity to express their views on how to divide locatee lease rentals. This is particularly important for long-term leases. The department should also advise the locatee of the implications of proceeding by way of a ss. 58(1)(b) lease.
7.2 **Leases for Terms Less than 49 Years:** The locatee and the Band Council will negotiate how to divide rental revenue from short-term locatee leases, if at all. If no written First Nation policy exists on revenue sharing, and where the term is less than 49 years, note the following:

a) Any agreement reached with respect to the sharing of lease revenues **must be in writing** and signed by the locatee and the Band Council;

b) The department will recognize the manner in which locatees and the Band Council divide the revenues from existing leases until the end of the lease terms, or until the leases are otherwise terminated.

7.3 Where an overall revenue sharing policy has been, or will be considered, any such revenue sharing **policy should be approved by a** majority of First Nation electors in a manner to be determined by the First Nation council. Once a policy has been approved, a BCR setting out the particulars should be forwarded to Ottawa and deposited in the Indian Lands Registry.

7.4 If a First Nation does not have an established policy on the division of locatee lease revenues from leases more than 49 years, then the electors voting to approve the lease should consider the issue.

8. **Process**

8.1 This section summarizes the process for leasing locatee land under ss. 58(3) of the *Indian Act*. A detailed checklist for the procedures for a locatee lease is included as Annex A to this directive. The following paragraphs outline the major steps that should be followed when allotted land is leased. **Note that some of these steps will take place simultaneously.**

8.2 **Inform the Locatee of Relevant Leasing Policies:** Before taking any other actions, the locatee should be fully advised about all applicable policies relating to the leasing of locatee lands.

8.3 **Application for Use of Land:** At the earliest opportunity, an "Application for Use of Land within an Indian Reserve" must be fully completed and placed on file. The steps to complete the Application are set out below. A copy of the application is attached to Directive 7-3 as Annex B.
8.4 **Obtain Information from the Lessee:** The proposed lessee must complete the appropriate sections of the "Application for Use of Land within an Indian Reserve." This will provide basic information on the lessee, identify the land to be leased and set out its proposed use, and authorize a credit investigation.

8.5 **Obtain Locatee Consent to Lease:** The locatee should sign the "Application for Use of Land within an Indian Reserve" to confirm that he or she consents to the lease. Where the First Nation has allotted the land to more than one locatee, the signatures of all locatees are required before the transition can proceed.

8.6 **Verify the Status of the Land:** Complete “Part 3: Lands Status Report” of the “Application for the Use of Land within an Indian Reserve”, which will include a search in the Indian Lands Registry to confirm that the legal description of the land and that it is in the lawful possession of the locatee seeking to lease it, and to identify any encumbrances registered against it.

8.7 **Confirm the Legal Description and Arrange for a Survey, if Required:** The Lands Officer should confirm adequacy of the legal description of the land. Note: a Registration Plan or CLSR Survey is required for most leases (see Schedule A of 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). If the lease is for a term greater than 10 years, the Indian Lands Registry will require a survey of the land, if a survey does not already exist. The preparation of any survey and all associated costs are the responsibility of the lessee. The Lands Officer will simply advise the lessee of this requirement and ensure that the survey is completed prior to the signing of the lease.

8.8 **Prepare an Environmental Screening Report:** The Lands Officer must ensure that the environmental screening report setting out the results of the environmental assessment is reviewed by the regional environment officer. Refer to Chapter 12 of the manual for information on the policy and procedures for conducting the environmental assessment and preparing the screening report.
8.9 **Conduct a Credit Investigation:** A thorough credit investigation of the proposed lessee should be conducted at the lessee’s expense when required. It should be confirmed that the lessee has sufficient means to pay the agreed upon rent, and any related guarantees. Credit checks can be obtained through the local Credit Bureau. The lessee’s name, address, and other available information are provided to the credit agency, which will search its records for information on the lessee’s financial status and credit history. Refer to regional guidelines for further assistance in determining how to carry out the credit check.

8.10 **Check corporate status:** Where the lessee is a corporation, verify its corporate standing and the names of its current signing officers by means of a search in the relevant corporate registry. The lessee should pay the cost of this investigation.

8.11 **Inspect the Land:** The determination of whether the land can be used for the purposes intended by the lease is the responsibility of the lessee. The Lands Officer arranges for an inspection of the land by the appropriate First Nations land staff and reports the results in Part 2 of the "Application for Use of Land Within an Indian Reserve.” The inspection, which is intended to confirm the location and description of the land, should address matters such as:

a) Access to the land by road or other means, and the services (such as water, sewer and power) available;

b) General land description and topography, confirming that the proposed site matches the land description;

8.12 **Negotiate the Lease Terms:** Refer to Clause 2.6 “Negotiating ss.58(3) Leases” in this directive. As well, the requirement for a personal guarantee or performance bonds if required should be addressed with the proposed lessee at this stage.

8.13 **Assess the Lease:** The Lands Officer should conduct an assessment of the proposed lease. Following the assessment of the lease, the Lands Officer should forward any concerns relating to the proposed lease to the locatee. The assessment should consider, among other matters:

a) the adequacy of the rent (based on an independent appraisal, provided by the proposed lessee, and reviewed by Public Works and Government Services Canada if required);
b) the **term** (refer to Directive 7-4: General Guidelines for Drafting Leases);

c) the proposed **use of the land** (taking into consideration the “Part 2: Land Inspection” of the “Application for Use of Land Within an Indian Reserve”);

d) whether all terms and conditions required by **departmental policy** have been included (based on standard lease document);

e) the suitability of all **non-standard clauses** appearing in the lease. If necessary, the advice of the Department of Justice respecting specific non-standard clauses must be obtained;

f) the potential **environmental impact** of the lease (Pursuant to CEAA, have the departmental Environmental Specialist officer review an environmental assessment provided by the proposed lessee and prepare the environmental screening report)

g) The review of the **Development Plan**, on leases which require significant improvements and/or construction (based on a review by Public Works and Government Services Canada if necessary).

8.14 **Address Identified Problems:** The Lands Officer should promptly address any problems or shortcomings in the lease identified by the assessment, or by the Band Council, and should request, if appropriate, that changes be made to the lease. If necessary, the Lands Officer should seek the guidance of departmental representatives in the regional office or at headquarters.

8.15 **Allocate the Proceeds of the Lease:** Where the lease term is 49 years or less, and the First Nation has a policy on the division of revenue, revenues collected must be divided according to the First Nation’s policy on revenue division. If the First Nation and the locatee agree to divide lease revenues, a written agreement should be signed by the locatee and the Band Council and placed on file.

8.16 The division of revenues from leases with terms greater than 49 years must follow the First Nation’s policy on division of revenues. If such a policy does not exist, then the vote called to approve the lease should consider the issue.

8.17 **Request Band Council Feedback for Short Term Leases:** For leases with terms of 49 years or less, the Lands Officer should request in writing any comments of the Band Council with respect to the lease, and give the Council a deadline for responding. The Lands Officer should specifically ask whether the lease contravenes any existing First Nation bylaws or land use policies.
8.18 **BCR for Short Term Leases:** If the Band Council has comments about the lease, the comments should be expressed in a BCR passed within the time frame requested by the Lands Officer. The Lands Officer should carefully consider the validity and relevance of any concerns expressed by the Band Council, while being mindful that the Council does not exercise a veto over a locatee lease. Comments that relate, for example, to First Nation bylaws or concerns over pollution should be considered valid and relevant, while a comment that there has been too much leasing activity on the reserve should not. The Lands Officer is entitled to continue with the leasing process if no valid comments are received within the time frame requested.

8.19 **Approval of Long-term Leases:** If electors have not delegated to the Band Council the right to approve long-term leases (see section 6.7), the electors must vote to approve all leases with terms in excess of 49 years. Appropriate notice of the meeting should be posted at publicly accessible locations at least 15 days before the meeting date.

8.20 **Information from Meeting:** Following the vote, the Band Council should give the department the following information:

   a) a copy of the notice of the meeting; and

   b) a BCR setting out the number of eligible voters, the number of votes cast for and against the lease, and the number of spoiled ballots.

8.21 **BCR when Delegation Made:** If a delegation of the electors’ approval of long-term leases has been made to the Band Council, the Council should pass a BCR formally approving the lease. Such a BCR may also set out the First Nation’s revenue sharing policy, or other policies relevant to the circumstances.
8.22 **Execution of the Lease:** It is suggested that 4 original leases are executed - one for the Indian Land Registry, the lessee, the locatee/First Nation, and the departmental file. The Lease should be executed in the following order:

a) First, the Locatee **consents** (and the First Nation by way of BCR);
b) Second, the **Lessee** executes;
c) Finally, the **Minister's delegated authority** executes.

**Note:** If the First Nation is exercising delegated powers pursuant to s. 60, the authorized individual executes the lease. Consult the current *Delegation of Authority Instrument under the Indian Act and Related Regulations* (refer to the relevant regional delegation instrument) to determine which departmental officers are authorized to approve and sign locatee leases.

8.23 **Registration of the Lease:** The Lands Officer distributes the executed originals to the parties and sends the fully executed lease to the Indian Lands Registry in Ottawa for registration. Refer to the *Indian Lands Registration Manual* to ensure that the lease document meets all the requirements for registration.

9. **References**

9.1 For more information, refer to:

a) Refer to Chapter 12 of this manual for Environmental considerations.

b) *Indian Lands Registration Manual*

c) Schedule A of 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.*
Chapter 7

Directive 7-3:
Locatee Leases

Annex A:

Checklist for Locatee Lease
Checklist for Locatee Lease

The Lands Officer, or for Section 60 First Nations, the First Nations Land Manager, should take the following steps:

<table>
<thead>
<tr>
<th></th>
<th>Step Description</th>
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<tbody>
<tr>
<td>1</td>
<td>Inform locatee of all leasing policies used for the leasing of locatee land.</td>
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<tr>
<td>2</td>
<td>Obtain a fully completed &quot;Application for Use of Land Within an Indian Reserve.&quot;</td>
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<tr>
<td>3</td>
<td>Ensure that the proposed lessee has fully completed Part I of &quot;Application for Use of Land within an Indian Reserve&quot; and has authorized credit investigation.</td>
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<tr>
<td>4</td>
<td>Pursuant to CEAA, have the departmental Environmental Specialist officer review environmental assessment provided by the proposed lessee and prepare the environmental screening report.</td>
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<tr>
<td>5</td>
<td>Obtain locatee’s written consent to lease by having locatee sign the &quot;Application for Use of Land within an Indian Reserve.&quot; Where the First Nation has allotted the land to more than one locatee, the signatures of all locatees are required.</td>
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<tr>
<td>6</td>
<td>Verify status of land and conduct a search in Indian Lands Registry to learn: Complete a Land Status Report to determine:</td>
<td></td>
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<tr>
<td></td>
<td>a) the status of the land;</td>
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<td></td>
<td>b) whether the land is in the lawful possession of the locatee and so registered in the Indian Lands Registry;</td>
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<td></td>
<td>c) whether any encumbrances affect the land.</td>
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<td></td>
<td>Confirm that an adequate legal description exists:</td>
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<tr>
<td>7</td>
<td>i) if lease is for a term of 10 years or less, it can be described as a textual reference, however a Registration Plan is recommended. Refer to Schedule A of 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 as amended from time to time.</td>
<td></td>
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<tr>
<td></td>
<td>ii) if lease is for a term of between 10 to 25 years, is there a Registration Plan?</td>
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<td></td>
<td>iii) if lease is for a term of between 25 to 49 years, is there a Registration Plan or a CLSR Plan?</td>
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<td></td>
<td>iv) if lease is for a term in excess of 49 years, is there a CLSR Plan?</td>
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<tr>
<td>8</td>
<td>Initiate credit investigation.</td>
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<td>9</td>
<td>Conduct corporate status check.</td>
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<td>10</td>
<td>Arrange for conduct of site inspection of land and complete the Land Inspection portion of the &quot;Application for Use of Land Within an Indian Reserve.&quot; Confirm:</td>
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<td></td>
<td>a) access to the land by road or other means.</td>
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<td></td>
<td>b) the services (water, sewer and power) available.</td>
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<td></td>
<td>c) general land description and topography, confirming that the proposed site matches the land description.</td>
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<td>11</td>
<td>Negotiate the basic terms of the lease and incorporate these clauses into the standard lease, and then:</td>
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<td></td>
<td>i) provide lessee with draft copy of the lease; and,</td>
<td></td>
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<td></td>
<td>ii) with the assistance of Public Works and Government Services Canada, determine whether personal guarantees or performance bonds are required.</td>
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<td>12</td>
<td>Conduct an assessment of the lease, including:</td>
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<td>-----------------------------------------------</td>
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<tr>
<td>a)</td>
<td>the adequacy of the rent (based on PWGSC review of an independent appraisal provided by the proposed Lessee, if required).</td>
<td></td>
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<tr>
<td>b)</td>
<td>the term (based on a review of departmental policies contained in the directive relating to the terms locatee leases).</td>
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<tr>
<td>c)</td>
<td>the proposed use of the land (taking into consideration the requirements of “Part 2: Land Inspection” of the &quot;Application for Use of Land Within an Indian Reserve&quot;).</td>
<td></td>
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<tr>
<td>d)</td>
<td>whether all terms and conditions required by departmental policy have been included (based on standard lease document).</td>
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<td>e)</td>
<td>the suitability of all nonstandard clauses appearing in the lease. If necessary, obtain the advice of the Department of Justice respecting specific nonstandard clauses.</td>
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<tr>
<td>f)</td>
<td>the potential environmental impact of the lease (based on information provided by the review by the departmental Environmental Specialist).</td>
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</table>
Review the lease before execution to ensure that all standard terms and requirements are present, including the following terms and conditions:

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<tr>
<td>13</td>
<td>Review the lease before execution to ensure that all standard terms and requirements are present, including the following terms and conditions:</td>
</tr>
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</table>

a) The full formal name and address of the lessee;

If the lessee is a company, do the following appear:

i) the name of the company, as stated in the Certificate of Incorporation/Letters Patent;
ii) the jurisdiction of incorporation;
iii) the address of the head office;
iv) authorization to enter into land transactions.

b) Specify the applicable authority under the *Indian Act*;

c) A full and identifiable land description, including identification of any existing easements or other encumbrances;

d) The amount and period of rental payments, including:

i) the date on which payment is due;

ii) if rent is to be a percentage of another quantity, the agreed method of calculation;

iii) where the term exceeds five years, specification that the rent is to be reviewed at least every five years; and

iv) whether the lease provides a mechanism for determining the rent if the parties fail to agree.
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<td></td>
<td>e) Clearly defined acceptable uses of the demised lands;</td>
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<td>f) The standards to follow specifically in respect of:</td>
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<td></td>
<td>(i) construction and safety;</td>
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<td>(ii) health; and</td>
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<td>(iii) property maintenance.</td>
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<td></td>
<td>g) Any performance requirements,</td>
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<td></td>
<td>h) Environmental provisions, such as waste or rubbish contamination, compliance with environmental standards, environmental assessments and mitigation, environmental protection, no contaminants or hazardous substances, mitigation of environmental impacts, etc.;</td>
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<td></td>
<td>i) Any fencing requirements;</td>
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<td>j) Whether the issues of dangerous objects, noxious weeds, etc. have been addressed;</td>
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<td>k) Provision for cancellation of the lease for specified reasons;</td>
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<td>l) Provision for the ownership of improvements at the end of lease, and who is to decide;</td>
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<td>m) Provision of insurance at lessee’s expense:</td>
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<td>(i) fire;</td>
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<td>(ii) public liability; and</td>
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<td></td>
<td>(iii) crops.</td>
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<td>n)</td>
<td>Indemnification of Her Majesty from all claims, damages, costs, etc.</td>
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<tr>
<td>o)</td>
<td>The lessee’s undertaking to pay all taxes, levies, or other charges;</td>
</tr>
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<td>p)</td>
<td>The lessee’s covenant to comply with all applicable laws, including First Nation bylaws;</td>
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<td>q)</td>
<td>Whether the Crown has reserved the mineral rights in, upon or under the demised lands;</td>
</tr>
<tr>
<td>r)</td>
<td>That the lessee is given the right to hold, use and occupy the premises without interference, if the lessee pays the rent and complies with all covenants;</td>
</tr>
<tr>
<td>s)</td>
<td>That the lessee has duly executed the lease and provided Affidavits of Execution or corporate seals;</td>
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<td>t)</td>
<td>Whether all sub-leases must be registered in the Indian Lands Registry if the lease is a headlease;</td>
</tr>
<tr>
<td>u)</td>
<td>Regarding Assignments:</td>
</tr>
<tr>
<td>i)</td>
<td>whether a fee is to be paid upon assignment of the lease;</td>
</tr>
<tr>
<td>ii)</td>
<td>stipulation that the fee must be a true reflection of expenses incurred concerning the assignment;</td>
</tr>
<tr>
<td>iii)</td>
<td>provision that the lessee may not assign or transfer the lease without Her Majesty’s consent.</td>
</tr>
<tr>
<td>v)</td>
<td>That upon bankruptcy or receivership of the lessee, Her Majesty may terminate;</td>
</tr>
<tr>
<td>w)</td>
<td>That Her Majesty’s representative and any other applicable authority may enter to view and inspect premises;</td>
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</tbody>
</table>
x) That where, in Her Majesty's opinion, a nuisance exists, the lessee may be ordered to stop the nuisance and pay costs thereof;

y) Upon expiry, the lessee will peaceably surrender possession to Her Majesty;

z) Where the lease contemplates major commercial, industrial or residential development, the following terms appear:

i) Improvements are to revert to the lessor, or if not, evidence on file that the lessor has waived this condition;

ii) The Lessee has submitted an acceptable development plan to the Minister prior to granting of the lease; and

iii) The Lessee will obtain security (i.e. a performance bond) to guarantee completion of the development if required.

14 Confirm that the First Nation and the locatee have executed a revenue allocation agreement, and that the agreement is on file.

15 For leases with terms greater than 49 years, where First Nation electors have not delegated approval, confirm that the following has taken place:

a) First Nation electors voted to consider and approve the proposed lease;

b) the vote also considered and approved the lease revenue allocation;

c) a copy of the notice of the meeting is on file showing that it was posted 15 days before the meeting;

d) a BCR setting out the number of eligible voters, the number of votes cast for and against the lease, and the number of spoiled ballots is on file.
<p>| | |</p>
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<tr>
<td><strong>16</strong></td>
<td>For leases with terms greater than 49 years, where a First Nation electorate has delegated approval to the Band Council, confirm that the Council has passed a BCR formally approving the lease.</td>
</tr>
</tbody>
</table>
| **17** | Review and where necessary address any concerns of the First Nation electors, or where delegation has been made, the Band Council, with respect to the following:  
  (i) adequacy of rent;  
  (ii) division of rental proceeds;  
  (iii) the term;  
  (iv) compliance with any reserve land use planning and valid bylaws;  
  (v) possible adverse impact of the lease on the reserve in social, cultural, or economic terms; and  
  (vi) concerns of the department, if any. |
| **18** | Where the Band Council and/or the First Nation electors have raised objections, have they done so within a reasonable time? |
| **19** | Where the term of the lease is 49 years or less, confirm that a BCR is on file, which expresses the Band Council's view on the proposed lease, particularly any potential social, economic or cultural impacts on reserve and addressing compliance with approved land use plans or zoning bylaws. |
| **20** | The Lands Officer should arrange for the execution of the lease in the following order:  
  a) First, the locatee(s) to sign the schedule to the lease, showing that they consent to the lease;  
  b) Second, the lessee should execute the lease;  
  c) Finally, the lease should be executed by the appropriate official under delegated authority from the Minister or by the First Nation members identified in the delegation under section 60. |
| **21** | Register the lease in the Indian Lands Registry. |
Chapter 7

Directive 7-3: Locatee Leases

Annex B:
Application for Use of Land within an Indian Reserve
Annex B
Example of an Application for Use of Land within an Indian Reserve

PART 1 (To be completed by the Applicant)

1. Name in full: __________________________
2. Company name: __________________________
3. Address: __________________________
4. Company Number __________________________
5. Telephone Number: (Res.)____________________ (Bus.)____________________
6. Directors & officers of the company: __________________________
7. Applicant’s occupation: __________________________
8. Employer’s name: __________________________
   Address: __________________________
9. Number of years with employer: __________________________

Property applied for (to be completed by applicant)

1. Band: __________________________
   Reserve: __________________________
2. Purpose(s) (Residential, cottage, commercial, industrial, agricultural, R/W, etc.)
3. Description of Land: __________________________
   (Attach appropriate plan or survey. Provide sufficient detail to identify location.)
Basic Proposed Terms of Lease (to be completed by applicant)

1. Proposed Commencement Date: ___________________________
2. Proposed Duration: ___________________________
3. Independent Appraisal completed by: ___________________________
   Pending ☐
4. Proposed Rent Offered: ___________________________

WE HEREBY CONSENT TO HAVING THE DEPARTMENT OF INDIAN AFFAIRS
CONDUCT OR CAUSE TO BE CONDUCTED A PERSONAL CREDIT
INVESTIGATION.

Dated at ___________________________ this ___________________________.
   day of ___________________________ 20 ___.

WITNESS ___________________________ APPLICANT ____________________

WITNESS ___________________________ CO-APPLICANT ____________________
PART 2  LAND INSPECTION

(To be completed by the appropriate departmental officer)

1. Description of site: ____________________________________________
   (General location, proximity to water frontage, river, etc.)

2. Topography: _________________________________________________
   (Soil, ground cover, etc.)

3. Access to public road: _________________________________________

4. Distance to nearest community: ________________________________

5. Available services:
   Water
   Sewer
   Power
   Natural gas
   Telephone
   Garbage collection
   Other (specify)

6. Present use: _________________________________________________

7. Comments: _________________________________________________
   _____________________________________________________________
   _____________________________________________________________
   _____________________________________________________________

Name, Title  Signature  Date

January 2003
PART 3  LAND STATUS REPORT

<table>
<thead>
<tr>
<th>Reserve Name: __________________</th>
<th>No.: ___</th>
<th>First Nation: __________________</th>
</tr>
</thead>
</table>

**Proposed Purpose (check box):**
- [x] Band land Lease
- [x] Permit
- [x] Locatee land Lease
- [x] Designation
- [ ] Easement
- [ ] Section 35 Transfer
- [ ] Other: (specify) ____________________________

**Legal Description** *(attach copy of plan and/or NRCAN letter of description to Land Status Report):*

Lands: Lot ______ Block _____ Plan No. ____________ (RS/CLSR)

Textual Description:

__________________________
__________________________
__________________________

**Status of Land** *(check box(es) if applicable):*  
- [x] Band Land (not designated or Surrendered); or,
- [ ] Designated Land; or
- [ ] Locatee Land.

If **Designated Land**, Complete the following *(attach copy of designation to Land Status Report):*

Number Order-in-Council: P.C _____ - ______

Date of Order-in-Council: ________________

ILR Registration No: __________________

Term or Period of Designation: From _________ (m/d/y) To _________ (m/d/y)

Purpose(s) of Designation:

__________________________
__________________________

Conditions of Designation:

__________________________
__________________________
If **Locatee Land**, Complete the following: (attach copy of documentation, including *Parcel Abstract* to Land Status Report):

**Locatee:** ______________________  ______________________  __________

Last name  First name  Band No.

**Address:**

______________________________  ______________________  __________

Street  City  Postal Code

**Locatee's phone no.:** _________ (h)  _________ (w)  _________ (cell)

Lawfully Held by: (check box)

- [ ] CP  - ILR Registration No: ___________ ; or,
- [ ] NE  - ILR Registration No: ___________ ; or,
- [ ] NETI  - ILR Registration No: ___________ ; or,
- [ ] Cardex  - ILR Registration No: ___________ ; or,

**Encumbrances** (attach documentation, including *Reserve General Abstract*, to Land Status Report):

List of registered instruments which may affect this parcel: (check box)

- [ ] Lease  - ILR Registration No: ___________ ; or,
- [ ] Permit  - ILR Registration No: ___________ ; or,
- [ ] Surrender  - ILR Registration No: ___________ ; or,
- [ ] Easement  - ILR Registration No: ___________ ; or,
- [ ] Section 35  - ILR Registration No: ___________ ; or,
- [ ] Cardex:  - ILR Registration No: ___________ ; or,
- [ ] __________  - ILR Registration No: ___________ ; or,
- [ ] __________  - ILR Registration No: ___________ ; or,

**Comments and/or matters to be dealt with:**

________________________________________________________________________

I have reviewed the proposed land transaction and have searched the Indian Lands Registry records relating to the parcels affected by this transaction. According to these records the proposed transaction: (check box)

- [ ] will **not** cause a conflict with existing registered interests;
- [ ] will cause a conflict with existing registered interest as identified herein, and must be dealt with as per comments above.

Name, Title  ______________________  Signature  ______________________  Date  __________

January 2003  75
Band Council RESOLUTION AND CONSENT

(Sample wording)

The Council of the _______________ Band do hereby resolve and consent to the granting of a ______ (lease, permit) ______ by the Minister of Indian Affairs and Northern Development of the lands as described in Schedule "A" attached, for a term of _____ years, for the benefit of ___ (band, locatee) ___ under terms and conditions as described in Schedule "A" attached.

______________________________
(Chief)

______________________________ (Councillor) ______________________
______________________________ (Councillor) ______________________
______________________________ (Councillor) ______________________
______________________________ (Councillor) ______________________

A quorum for this band consists of

______________________________

Dated at ______________________ this ______ day of ______________________ 20___.
LOCATEE APPLICATION

I, ____________________________, No. ______________, of the _______ _________ Band state:

1. I am now in lawful possession of the lands described in Schedule "A" attached and hold a (Certificate of Possession, Notice of Entitlement) ____, which is registered in the Indian Land Registry under number: ________.

2. I now apply to the Minister of Indian Affairs and Northern Development pursuant to ss ____ of the Indian Act, to grant a (lease, permit) ____ for these lands for a term of ______ years for my benefit, under terms and conditions described in Schedule "A" attached.

3. I hereby undertake to vacate such lands to enable the Lessee to take possession of them prior to the execution of the (Lease/Permit).

4. (other applicable clauses).

__________________________  ____________________________  ______
Witness                        Signature                        Date

__________________________  ____________________________  ______
Locatee                        Signature                        Date
1. **Purpose**

1.1 This directive discusses the general policy and procedures for negotiating and drafting leases of reserve land. General drafting guidelines are set out in Annex A to this directive. Specific drafting guidelines for particular kinds of leases are found in: Annex B (Commercial/Industrial Leases), Annex C (Residential and Cottage Leases), and Annex D (Agricultural Leases).

2. **General**

2.1 **Before Reading This Directive:** Review Directive 7-1: Leasing Reserve Land - An Overview, which will serve as a roadmap for navigating within Chapter 7. Directive 7-1 discusses the legal framework underlying leases, and offers an overview of the leasing mechanisms under the *Indian Act*. It also contains helpful definitions of terminology that will be found throughout this chapter.

2.2 **Leases of Designated Land and Locatee Leases:** For specific policy and process considerations about the leasing of designated land and locatee leases, refer to Directive 7-2: Leasing Reserve Lands Using Designation, and Directive 7-3: Locatee Leases.

2.3 **Terminology:** Throughout this directive, the phrase "lease document" includes the basic lease agreement itself, and, as appropriate, all other supporting documents and related agreements. The words "must", "shall" or "will" refer to actions that are mandatory. The word "should" refers to actions that are strongly recommended, and the word "may" to actions that are optional.

2.4 **Definitions**

a) **Capital Improvement Investment** refers to the amount that a lessee is required to invest in the leased premises to create or improve capital items such as buildings, fences and roads.
Definitions (continued)

b) **Capital Recapture Period** is, for commercial leases, the length of time the lessee will require to repay, from revenues, the capital improvement investment made in the leased property. For non-commercial leases, this should be considered as the period during which the lessee’s investment in improvements to the property is deemed to be repaid, either by loan repayment or through enjoyment of the use of the capital item.

c) **Discount Rate** means the rate by which prepaid rent payments are reduced to reflect their present value.

---

**Discount Rate Example**

If:
- Rent = $10,000 per year
- Rent is prepaid for 2 years
- Market interest rate for investors is 10%,

The value today of the rent that is due in the second year is equal to $10,000 less the 10% investment rate (the “discount rate”), which equals $9,090.91.

This means that if you invest $9,090.91 today at a return of 10%, that investment will be worth $10,000 in one year (which is the date that the rent for the second year is payable).

$10,000 = $9,090.91 + $909.09 (which is 10% of $9,090.91)

Therefore, at the beginning of the first year the lessee would prepay the rent of $10,000 per year for two years by prepaying a total of $19,090.91

---

d) **Gross revenue** is the total revenue earned before deduction of taxes and expenses.

e) **Lessee revenues** are revenues generated by the lessee from commercial activity on the leased premises

f) **Rental Yield** is the rental return generated by the lease.

---

g) **Right of Renewal** means the right to obtain an extension of the lease term, at a specified rent, generally under the same terms and conditions as set out in the original lease.
Definitions (continued)

h) **Seasonal Recreational Lease** refers to a recreational/cottage lease which specifies that the leased land can only be used for part of the year. For example, such a lease might restrict use of the leased land to only the winter months.

3. **Policy**

3.1 **Objectives of Leasing Guidelines**: The leasing guidelines set out in this Directive and its annexes are designed to accomplish several objectives, and following these guidelines wherever possible is therefore important. If deviations from the guidelines are required, Headquarters should be consulted. Among the objectives which the guidelines are designed to achieve are:

a) the protection of the interests of the First Nation, a locatee, and/or the department.

b) prevention of abuses by the lessee.

c) facilitation of economic development and revenue generation by the First Nation and locatee.

d) use of procedures that reflect current legal trends, case law and applicable legislation.

4. **Process**

4.1 **Use the Correct Lease Form**: Every lease is classified by the type of activity the land will be used for, and contains specific clauses that take into account the special needs of that activity. It is therefore very important to ensure that an appropriate, departmentally approved, standard lease form is used as the basis for negotiating the lease.
Based on the different activities the land can be used for, the three types of standard leases commonly encountered are:

a) **Commercial Leases:** This type of lease is used when the leased property is intended for commercial or industrial ventures. Commercial activity would include use of the land for a shopping centre, manufacturing facility, restaurant, water or theme park, gas station, retail sales outlet, or mobile home park. The commercial lease is also appropriate for major multi-family residential projects, such as a condominium, apartment building or subdivision development;

b) **Residential and Cottage Leases:** This type of lease reflects the special requirements attached to leasing land for single family use, or for seasonal or year-round cottage recreation; and

c) **Agricultural Leases:** This type of lease is appropriate for leasing land to graze livestock and to grow agricultural crops. Remember that most grazing and cash crop arrangements are now dealt with by using ss. 28(2) permits.

4.2 **Signing the Lease Document:** The Lands Officer must ensure that the execution of the lease meets registry requirements. The following guidelines must be followed to ensure valid execution of the lease document:

a) **Signature** - All signatures on a lease document must be signed in permanent ink. The lessee must sign the contract using his or her normal signature, although this signature does not have to be identical to the lessee's full name, as recited as a Party at the beginning of the contract. Where applicable, it should be stated that an original or notarial true copy of the signing authority of any individual signing on behalf of another is attached;

b) **Signing with a "mark"** - If a lessee signs with a mark, such as an "X", two witnesses must witness that mark. One witness must complete an affidavit that states that the lease was read to the lessee, that the lessee appeared to understand its contents, and that the witness saw the lessee make the mark;
Signing the Lease Document (continued)

c) **Execution by Department or First Nation** - All lease documents must be executed on behalf of the Crown by the authorized signing officer. If there has been no delegation under sections 53 and 60 of the *Indian Act*, this will be the departmental officer who has received the proper delegated authority as set out in the *Delegation of Authority Instrument under the Indian Act and Related Regulations* (refer to the appropriate regional delegation instrument). If there has been a delegation under sections 53 and 60 to the First Nation, the lease will be signed by the individual authorized to do so under the terms of the delegation;

d) **Execution by Corporation** - The corporation’s officer(s) signing the lease document must indicate his or her name and position and attach a copy of the authorizing corporate minutes or bylaw, to be registered with the lease. The seal of the company should be affixed, failing which the appropriate “Acknowledgement of an Officer” form should be completed and attached to the lease;

e) **Execution by Partnership** - The lease document should, if possible, be signed by all partners, although the signature of one partner is sufficient to bind the partnership unless the partnership gives notice to the contrary;

f) **Execution by Trustee, Guardian or Administrator** - A guardian, trustee or the administrator of an estate must sign the lease document using his or her normal signature and must identify the capacity in which he or she is signing;

g) **Execution by Individual in Different Capacities** - When a person is acting in two or more different capacities, the lease document must be separately executed by that person in those different capacities;

h) **Witnesses** - All signatures for the Lessee should be witnessed;

i) **Changes** - All changes made to a lease document, whether by correction, addition, deletion or otherwise, must be initialled by all parties at the time of execution. Any changes made after the execution of the lease document are amendments, and must be made by means of an amending agreement.
Signing the Lease Document (continued)

j) **Order of Execution** - The Lands Officer should arrange for the execution of the lease in the following order:

a) First, if this is a locatee lease, the locatee(s) to sign the schedule to the lease, showing that they consent to the lease;

b) Second, the lessee should execute the lease;

c) Finally, the lease should be executed by the appropriate official under delegated authority from the Minister or by the First Nation members identified in the delegation under Section 53 or 60.
Chapter 7

Directive 7-4:
General Guidelines for Drafting Leases

Annex A:

General Guidelines for Drafting Leases
Annex A
General Guidelines for Drafting Leases

1. General Format Guidelines: Follow these general format guidelines when drafting any type of lease:

   a) **Paper** - All leases and related documents must meet Indian Lands Registry guidelines, and be no smaller than 21.6 mm x 27.95 mm (8.5" x 11") in size.

   b) **Printing and Different Prints** - All lease documents should be word-processed, typewritten or in printed form. The originator of a lease document is always the Lands Officer, or a First Nation with section 53/60 delegation. The Lands Officer should never accept a draft lease from a proponent as a precedent. Any proposed changes by a potential lessee or First Nation should be incorporated into the standard lease and highlighted with redline/strike-out for clarity of negotiations and internal discussions.

   c) **Grammar** - All lease documents should be grammatically correct and should contain neither spelling nor typographical errors, nor ambiguous or conflicting statements;

   d) **Blank Pages and Spaces** - The parties should rule off and initial all blank pages or unusual spaces;

   e) **Execution of the Lease** - It is suggested that 4 original leases be executed - one each for the Indian Land Registry, the lessee, the locatee/First Nation, and the departmental file. The lease should be executed in the following order:

      i) First, if a locatee lease, the Locatee **consents** (First Nation consents by way of BCR);

      ii) Second, the **Lessee** executes;

      iii) Finally, the **Minister’s delegated authority** executes.
2. **Parties to the Lease**: The following requirements and information relating to parties should be considered when drafting the lease document:

   a) **Referring to the Crown** - Identify the Crown as "Her Majesty the Queen in right of Canada, hereinafter called “Her Majesty”." The Crown may also be called the "Lessor" or "Grantor." The lease should contain a statement that Her Majesty is represented by the Minister of Indian Affairs and Northern Development or his authorized representative;

   b) **Number of Parties** - Although a lease generally involves two parties - the lessor and the lessee - there may on occasion be additional parties, such as a guarantor;

   c) **Identifying Parties** - Identify parties to a contract by their full legal names and their postal addresses. Parties must be identified in exactly the same manner throughout the document. The first party listed is the lessor, and the second party is generally the lessee.

   d) **Joint Tenants and Tenants in Common** - Where there is more than one lessee, the lessees can hold their interest in the land as joint tenants or as tenants in common (see Directive 7-1, paragraph 12 for more information). Whether the lessees will hold the land as “joint tenants” or as “tenants in common” must be stated in the lease document. If the lease contains no such statement, a tenancy in common is created. Joint tenancy is not permitted in the Province of Quebec;

   e) **Changes** - Any changes in the status of a party, such as his or her name, address or capacity, should be immediately conveyed to the other parties to the lease. If a second, related lease document is drafted (i.e. a mortgage), the second document must refer to the change of name, and a statutory declaration may be required. Before recognizing a change in the name of a corporation, the corporation must give the department a copy of the name change certificate. The appropriate federal or provincial registrar issues the name change certificate under the relevant companies legislation.

   f) **Corporations** - As set out in our standard leases, the following information should be provided with respect to a corporate party: the registered name of the company as it appears in the Certificate of Incorporation or Letters Patent; the province in which it is incorporated; and the full postal address. In addition, the corporation's Articles of Incorporation must authorize the corporation to carry on business in the province where the land to be leased is found, and to enter transactions involving land;
Parties to the Lease (continued)

g) **Partnerships** - The lease must state the partners’ surnames, given names, business name and business postal address in full. The business name must be preceded by the words "Operating under the firm name and style of . . . ";

h) **Agents** - Following the full name and a postal address, the words "as Agent for ...[the full name of the party for whom the agent is acting]..." should appear. Anyone signing for another individual should attach an original or notarized true copy of the document which authorizes them to do so;

i) **Trustees** - Following the full name and a postal address, the words "as trustee for . . . [the full name of the party for whom the trustee is appearing] . . . " should appear. The lease should also include a statement concerning the reason for the trust. A notarized copy of the trust document should be attached;

j) **Guardians** - Following the full name and a postal address, the words "as lawful guardian of . . . [the minor or mentally incompetent party] . . . " should appear. An original or notarized copy of the guardianship document should be attached;

k) **Administrators and Executors** - Following the full name and a postal address, the words ". . . [the administrator or executor] of the estate of . . . [the party for whom the agent is acting] . . . " should appear. An original or notarized copy of the Letters of Probate or Letters of Administration should be attached; and

l) **Age of the Parties** - Except where otherwise required by the *Indian Act* or regulations, the age of majority is determined by reference to the prevailing provincial age of majority where the person resides.

3. **The Lease Recitals:** The lease recitals are statements of relevant facts concerning the land or the circumstances, appearing after the identification of the parties and before the clauses of the lease. Where relevant to the particular lease, the following items *must* appear in every preamble:

a) **Statement as to Reserve Lands** - A statement, saying that the lands to be leased are reserve lands or designated lands, as may be, which have been set apart for the use and benefit of the First Nation;
Lease Recitals (continued)

b) **First Nation Consent** - The number and date of the Band Council resolution (BCR) approving the lease, as applicable;

c) **Designated Land** - The date of the designation and the date and number of the Order-in-Council accepting the designation;

d) **Locatee Information and Consent** - To acknowledge his or her agreement with the terms of the lease, the locatee must either sign a schedule to the lease, or put his or her signature on the back of the lease, with a statement in the recitals that the locatee is signing the back;

e) **Chain of Events** - Where a lease has been assigned, mortgaged, amended, an addendum added, or the legal description has changed: a recitation of the complete chain of events leading up to the present transaction and containing the dates of previous contracts, Indian Lands Registry registration numbers, the parties involved, and a complete legal description of the land; and

f) **Indian Act Authorization** - The lease recitals should always state the section of the Indian Act or regulations which authorizes the lease. For example, for a locatee lease, the recital should refer to ss. 58(3).

4. **Supporting Documentation**: Beyond the lease contract itself, the leasing process can involve several supporting documents, such as affidavits, BCRs, schedules and applications. With respect to supporting documents the following should be kept in mind:

a) **Documents Referred to in the Lease** - Attach to the lease any supporting documents referred to in the lease;

b) **Compatibility with Designation and BCRs** - The lease must follow verbatim the terms of any designation or BCR related to the lease. Therefore, no ambiguity or contradiction will exist between any supporting documents and the lease, the designation and the BCR. If following the terms of the designation or BCR is legally impossible, then a new designation or BCR should be obtained;
Supporting Documentation (continued)

c) **Locatee Application and Consent** - To lease locatee land, a locatee must, pursuant to ss. 58(3) of the *Indian Act*, apply to the department to have his or her land leased. This requirement can be satisfied by a schedule to the lease or by having the locatee signify his or her consent to the lease by signing the "Application for Use of Land within an Indian Reserve" and attaching that application to the lease. The locatee's signature must be witnessed, and the witness's signature must appear on the consent document. If the locatee is deceased, mentally incompetent or a minor, then the locatee's legal representative must consent on behalf of the locatee. Attach an original or notarial true copy of the document appointing the legal representative to the lease as well. Refer to Directive 7-3: Locatee Leases, for more information on the completion of the Application;

d) **Mortgagee's Consent** - The mortgagee's consent must be obtained to any transfer or amendment of the lease's land description or use. Refer to Directive 7-5: Assignments, Sub-leases and Mortgages;

e) **Power of Attorney** - A Power of Attorney granted by a party to a lease must be registered in the Indian Lands Registry. It can be registered either in its own right or against any lands that it affects. A copy of the Power of Attorney should be attached to the lease;

f) **Death of a Lessee** - To transfer the leasehold interests of a deceased lessee, Letters of Probate or Letters of Administration are required before the administrator or executor can assign the lease to the heirs. The administrator or executor can then assign the lease. Where one lessee in a joint tenancy dies, the department only requires the Death Certificate to transfer the lease to the surviving lessee(s). These documents should then be registered in the Indian Lands Registry. Joint tenancy is not permitted in the Province of Quebec;

g) **Dating Documents** - All supporting documents must be dated; and

h) **Signatures** - Where signatures are required, supporting documents should be signed. BCRs made in support of a lease must bear the original signatures of a quorum of the Band Council.
5. Content of Leases

5.1 General: Departmentally approved standard leases will provide the specific wording for lease clauses to be used in commercial, residential/cottage and agricultural leases. In negotiating leases, remember that clauses are not subject to change without consultation with regional Lands Policy, and/or departmental Headquarters in Ottawa. The variable or negotiable elements of a lease, such as legal description, term and rent, are discussed in Annex A. The following paragraphs outline the basic terms, conditions and content requirements of those general elements which must be set out in the lease. Indications of any special considerations unique to the type of lease used are also discussed.

5.2 Land Description

5.2.1 Generally: The description of the land is a very important part of the lease, as accurately identifying the parcel of land is crucial, both for registration purposes and to ensure that the lessee is in fact using the correct land. The description of the lands should also identify any existing easements or encumbrances which affect the land. However, it is the lessee’s responsibility to pay for and verify the accuracy of the description.

5.3 Types of Descriptions: The description of the land set out in the lease must meet the requirements contained in Schedule A of 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. In the preliminary stages of the project, refer to the Interdepartmental Agreement in effect at the time to identify the survey product required to register the transaction in the Indian Lands Registry. In most cases, leases must be described by either Registration Plan or CLSR survey.
5.4 **Access to Landlocked Parcels:** Access must be provided for any lands that may become landlocked as the result of a lease. “Landlocked” describes land belonging to one person, which is surrounded by land belonging to other people. The land cannot be approached except over the other person’s land. If the landlocked parcel is locatee land, the Land Officer should obtain the locatee’s written consent to the method of access. If the landlocked parcel is First Nation land, then a BCR consenting to the method of access should be obtained. The lease must identify the access route, which may be done in a recital following the description, such as:

```
Sample Wording for Access to Landlocked Parcel

... reserving a right of way 3 metres (9.75 feet) on either side of a centre line between point A on [the landlocked parcel] to point B on [the public access] . . .
```

The agreement for access, such as a locatee right of way agreement, Band Council Resolution, or Section 28(2) Permit, must be registered with the lease, and against the landlocked parcel as well.

5.5 **Subsequent Transactions:** Subsequent transactions such as a modification of lease agreement, must refer to the land in exactly the same wording as was used in the original contract unless the same land is redefined on an official plan of survey. If the land is redefined, then the original description, with reference to the new description, should be used. For example:

```
Sample Wording Where Description has Changed

... formerly Lot 6 Plan 12345 CLRS, now known as Lot 6-1 Plan 1234R
```

5.6 **Transfers** - A lease document subletting part of the lands held under a headlease, must refer to the headlease. That reference must include the description of land held under the headlease. The portion to be sublet must be accurately and clearly defined by a Registration Plan or a CLSR survey.
6. **The Term of the Lease**

6.1 **Commencement Date**: The term of a lease must state the date of commencement by reciting the day, month and year.

6.2 **Termination Date or Duration**: The date of termination of a lease must be clearly set out by reciting the day, month and year of termination or the duration of the lease.

6.3 **Designated Land**: A lease of designated lands cannot extend beyond the date of termination of the designation. If the term of the lease extends to the last day of the term of the designation, the lease must state that it will lapse on the last day of the term of the lease, without any further notice by the lessor.

7. **Right of Renewal**

a) If a right of renewal is granted, it must be exercised before the expiry of the lease and must be exercised strictly in the manner provided for in the lease, or the right will lapse.

b) A renewal may never extend beyond the date of the termination of the designation.

c) A renewal must not extend the total term of a locatee lease beyond 49 years, because a locatee lease cannot extend beyond 49 years without a First Nation vote.

d) The Department of Justice should be consulted on any renewal clause.

8. **Rent and Other Consideration**

8.1 **General**: Consideration is the benefit that the lessor receives in exchange for the granting of a lease. Consideration must appear in every lease, and it can be monetary, “in kind,” “in service” or any of the preceding in combination. “In kind” consideration gives the lessor the same benefit received by the lessee, such as the lease of one parcel in exchange for the lease of a second parcel. Consideration “in service” involves the provision of a service in exchange for granting the lease. Monetary consideration must be payable in legal tender of Canada. Non-monetary consideration should be clearly specified, setting out, for example, the exact percentage of a crop to be received, and when and where it is to be delivered.
8.2 **Fair Market Rent:** All consideration should be based upon the fair market value of the land, and unless explicitly stated, every designation must require that a fair market rent be obtained from the lessee. A First Nation corporation that is leasing designated land may receive special terms as part of an overall economic strategy that benefits the First Nation. Where the lessor gives this type of benefit to the lessee, it must be set out in the designation (or where the lease involves locatee lands, the locatee must give written consent in the consent document). A locatee corporation which leases locatee land may also receive special terms. The locatee must specifically consent to the special terms in the locatee’s consent document.

8.3 Charging reduced or nominal rent is an example of a special term which may be given to a First Nation corporation. In such a case, the designation must specify the First Nation corporation and provide for the reduced rent. If the intention to charge reduced or nominal rent is considered before the designation referendum, the First Nation must be informed of that intention at an information meeting.

8.4 **Deviations from Fair Market Rent:** Any departure from fair market rent should be justified by the proposed lessee, approved in writing by the locatee or the Band Council (as may be), and recommended for approval by the Lands Officer. The Band Council or locatee should also be advised to seek independent legal or financial advice before accepting less than fair market rent. When land is conveyed for commercial purposes by way of a headlease, with the intention of allowing sub-leases, less than fair market rent may be charged on the headlease. This will allow the head lessee, usually a development corporation, to finance its operations out of the fair market rent charged to the sub-lessees.

8.5 **Participation Rent:** Participation rent is rent based upon the revenue earned by the lessee. The matter of participation rent should always be referred to the Department of Justice for advice, as in certain circumstances such an arrangement could categorize the Crown as a joint venturer with the lessee, and expose the Crown to future liability. By way of illustration only, the following is a sample participation rent clause that might be contained in a shopping centre lease:

**Sample Clause for Participation Rent (Not approved for use)**

...The lessee will pay, on the 15th day of each month in advance for the following month, a sum equal to 6% of the gross sales in dollars of all merchandise sold by the lessee on the premises during the preceding calendar month . . .
8.6 **Rent Reviews:** A lease may, and a lease more than five years must, provide for a review and adjustment of the rental payable which **must be repeated at a minimum every five years for the term of the lease**, but can take place more frequently. If the term of a lease exceeds five years, the first rent review must take place within five years of the commencement of the lease. Refer to departmentally approved standard lease forms for the criteria used in rent reviews.

8.7 When providing for rent review, **using what is called a ratchet clause is permissible**, subject to the comments that follow. A ratchet clause provides that during subsequent rent reviews, the rent to be charged may be higher than the current rent should fair market values rise, but may never be lower than the current rent, even if fair market values fall. The following is a sample clause:

**Sample Ratchet Clause for Rent Review**

The Lessee will pay as Rent the following amounts in advance annually on the 1st day of March during the term, except that the first such payment is to be made before the signing of this lease by the parties:

- a) during the “first period” the Lessee will pay the sum of one thousand ($1,000.00) dollars per annum;
- b) for the second and each subsequent Period commencing in 1997, the rent will be the greater of:
  - i) the annual Rent which the Minister determines to be the Fair Market Rent for the respective Period; and,
  - ii) the same annual Rent as due in the last year of the immediately preceding period
8.8 Other Terms and Conditions

8.8.1 Improvements: A lease must always state whether improvements become the property of Her Majesty or the lessee upon expiration or termination of the lease. As a rule, improvements made under a lease, such as buildings, should revert to the Crown. This is one benefit to the lessor of leasing, and is usually provided for by the lessee’s accounting method. If the lessee must remove improvements at the expiration of the lease, the lease should clearly state that the lessee must remove the improvements by a certain time, failing which the improvements will revert to the Crown, and may be removed at the lessee’s expense.

8.8.2 Confirming Boundaries Before Commencing Improvements: A lessee is responsible for determining and marking the boundaries of the leased lands before adding any improvements. This is so even if the land was fully monumented for an official survey under the Canada Land Surveys Act.

8.8.3 Insurance: The lessee will be called upon to maintain full replacement value insurance for fire and other perils, plus appropriate levels of public liability insurance. How much liability insurance to carry depends on the nature of the activity that will take place on the leased land. A commercial lease should require a minimum of $3,000,000 (three million dollars), while $1,000,000 is sufficient for a residential/cottage lease or agricultural lease. The onus is always on the lessee to show why liability insurance should be below these levels.

8.8.4 Development Plans and Performance Bonds: For projects involving the construction of a building or other significant development, a development plan must be obtained. A performance bond may be required where the project costs are greater than $50,000. (Consult with Public Works and Government Services Canada if necessary)

8.8.5 Guarantors: Generally, where the lessee is a corporation created specifically to lease a particular parcel of land, or has limited assets, standard business practice requires that the principal shareholders of the corporation become parties to the agreement as guarantors. In other cases, a guarantee may be required where the corporate lessee: is in financial difficulty; is heavily financed; has a poor track record; has recently changed its structure or ownership; or has made excessive use of bankruptcy legislation.

8.8.6 Mineral Rights: Leasing the surface of reserve lands does not impact the rights relating to mines, minerals and subsurface materials. These rights are reserved to the federal or provincial Crown, and accordingly the lease must state that the Crown reserves the right to drill for, remove and dispose of the materials found in or under the leased lands.
8.8.7 **GST:** The Lease must state that the Lessee is required to pay all applicable taxes, including GST. Refer to departmental guidelines on the structure and payment of the federal Goods and Services Tax.
Chapter 7

Directive 7-4:
General Guidelines for Drafting Leases

Annex B:
Guidelines for Commercial/Industrial Leases
Annex B
Guidelines for
Commercial/Industrial Leases

1. Term

1.1 Length: The recommended term for major commercial or multi-family residential developments, such as an apartment, row house, townhouse or condominium development, is 49 to 99 years. To determine what constitutes a major development, refer to local market conditions and industry standards.

1.2 Considerations: A number of considerations will impact on the length of the term that should be granted in a commercial lease. Among these considerations are the following:

a) The capital improvement investment by the lessee - As the investment increases, so too should the term of the lease;

b) The lessee's capital recapture period - As the capital recapture period increases, so too should the lease term;

c) The availability of similar sites off-reserve - If similar sites are available off-reserve, a longer term may be appropriate;

d) The future potential of the site - If the site has significant future potential, perhaps with a different use, the term should be limited to increase flexibility; and

e) The type of development - Some kinds of developments will require a longer term to facilitate economic success.

2. Rent

2.1 Timing of Payments: The guidelines for the timing of payments for commercial leases should be as follows:

a) Basic rent is payable annually in advance;

b) Percentage participation rent, if any, is generally payable at the end of the fiscal year of the operation;
2.2 **Rental Yield**: The amount of rent to be charged should be based upon the following considerations, which are usually assessed by the First Nation's independent financial advisor and PWGSC if required, in complex lease situations:

a) The yield should reflect a **percentage return** on the market value of privately owned land with similar characteristics, as if it were held by the First Nation or locatee, and zoned for the appropriate use. The percentage return should be based on indices such as the Chartered Bank's prime lending rate or the first mortgage rate;

b) In leases for revenue producing developments, the lease should provide for, in addition to annual land rental based on market value, a **percentage participation** in the revenues generated by the head-lessee. Ideally, for control reasons, this percentage will be based on gross revenues; and

c) If **prepayment of the entire lease term** is undertaken, this amount should estimate the current market value of the land plus an additional amount which represents a bonus for the privilege of pre-paying the lease and avoiding future increases in rent. Prepayment should be used with caution, however, as there is a risk that the amount prepaid may not reflect the full value of the lease over the specified term. The Lands Officer should consult with the Department of Justice, and obtain a waiver or Certificate of Independent Legal Advice from affected locatees, or the First Nation, if pre-paid rent is accepted for long-term leases.

2.3 **Rent Review**: The following guidelines should be followed when scheduling rent reviews:

a) rent reviews are required every five years as a minimum, and can occur more frequently;

b) If capital improvement investment is high, and the capital recapture period is over 35 years, then a review period of less than five years will not be appropriate during the period of construction.

c) If the rent at review is to be based upon unimproved lands, a photograph must be taken of the unimproved site, dated and filed for use by future appraisers. It should be remembered that, under the terms of the standard lease or the departmentally approved equivalent, the lessee generally has a right of appeal to the Federal Court if he/she does not agree to the fixed rent at review.
2.4 **Use Clause**: The permitted use, form, size and density of the development should be clearly set out in the lease. Items such as floor area ratio, rentable area, the number of buildings, number of units, etc., should be dealt with.

3. **Special Terms and Conditions**

3.1 **Development Plan**: Where the lease proposal involves a major development, the lessee, including a First Nation corporation, should provide a Development Plan acceptable to the department prior to execution of the lease. The Plan must show the type of development contemplated, the timing and phasing of the stages of the development, a schedule of construction, and the investment for each phase. This Plan should be reviewed by Public Works and Government Services Canada if necessary, and should be annexed to the lease to become part of it.

3.2 **Performance Bond**: Where a development plan is required, the lessee, including a First Nation corporation, should provide the Minister with a performance bond to guarantee completion of the project. This will ensure that the lessee has the necessary resources to complete the project. Refer to regional guidelines on the use of performance bonds, which have been created with local standards in mind.

3.3 **Insurance**: The lessee should maintain suitable fire insurance, as required by the standard lease or the departmentally approved equivalent, and a minimum of $3,000,000 public liability insurance.

3.4 **Major Industrial Leases**: These are leases which will have a major environmental impact on the reserve and may create regulatory gap issues. These leases must be approved by Senior Policy Committee at Headquarters prior to approval. See Chapter 5 for further details.
Chapter 7

Directive 7-4:  
General Guidelines for  
Drafting Leases

Annex C:  
Guidelines for  
Residential and Cottage Leases
Annex C
Guidelines for Residential and Cottage Leases

1. **General:** The Lands Officer should apply the following guidelines with discretion, as dictated by local markets and standard practices.

1.1 **Term/Length:**

a) **Cottage (Seasonal Recreational):** Terms of five to twenty years, including all options and renewals;

b) **Cottage (Year Round Recreational):** Terms of twenty to forty nine years, including all options and renewals;

c) **Single Family Principal Residence:** Terms of thirty to forty nine years, including all options and renewals, for residential subdivision lots;

2. **Considerations - Seasonal Cottage:**

a) **Shorter terms Leases:** Leases of up to five years will generally produce lower quality subdivision and minimize income. However, the land will be available for changes in use;

b) **Longer Term Leases:** A twenty year lease will produce a higher quality of subdivision due to the longer tenure, and will attract higher capital investment. That higher investment should be a condition of a long-term lease. While dollar return may be maximized by the longer term, there is less flexibility afforded in the long-term use of the land.
2.1 Considerations - Year Round Cottage:

a) Considerations - Single Family Principal Residence:

i) The capital improvement investment should be set at a minimum of $30,000. This figure should be amended from time to time to reflect changes in conditions, market or otherwise;

ii) A Capital Recapture period of at least 25 years is recommended.

3. Rent

3.1 Timing of Payments: Rental payments should be paid annually, in advance, with the possibility of prepayment to a maximum of five years. However, if the rent is sufficiently low to be prepaid every 5 years, it should be reviewed as to whether the rent reflects fair market value, based on an independent appraisal.

3.2 Prepayment: Prepayment, while acceptable for year round recreational and single family principal residence, is often not desirable, for the following reasons:

a) While the lessor receives the revenues at the outset, it incurs continuing administrative responsibility;

b) The prepayment amount will be discounted from what the First Nation would have received if annual payments were in force for the term;

c) Rental review is prevented, as is the ability to maintain a current return on the basis of current land capital value.

3.3 Rental Yield: The amount of rent to be charged should be based on an independent appraisal, and considering the following:
3.4 **Seasonal and Year-Round Cottage Leases**

a) The yield should reflect a **percentage return** on the market value of freehold land with comparable characteristics, as if full title was held by the First Nation or locatee, and zoned for the proposed use. For example, if a reserve lot could be purchased for $10,000, that is the value to which the percentage return should be applied. The percentage return will vary in different areas of the province.

3.5 **Single Family Principal Residence**

a) **Annual Payments**: The yield should reflect a **percentage return** on the market value of freehold land with comparable characteristics, as if full title was held by the First Nation or locatee, and zoned for the proposed use, provided that the annual lump sum payments are made in advance with five-year rental reviews.

b) **Prepayment**: If prepayment of five years is made, the discount rate for the prepayment should be based upon the average yield of long-term Canadian Government securities. If the entire term is prepaid, then the rental amount should reflect the current market value of the rent based on an independent appraisal provided by the proposed lessee, plus a bonus for the privilege of prepaying.

3.6 **Rent Review**:

a) A five year review interval is appropriate for long-term leases;

b) The rent is to be fixed by the Minister in accordance with yield guidelines for "vacant lands", being the market value of land less the value of the structures erected thereon by the lessee. If the rent at review is to be based upon unimproved lands, a photograph must be taken of the unimproved site, dated and filed for use by future appraisers. It should be remembered that, under the sample lease or the departmentally approved equivalent, the lessee generally has a right of appeal to the Federal Court if the lessee disagrees with the new rent.
3.7 Special Terms and Conditions

3.7.1 Use Clause: The use should be clearly defined. For example, "seasonal recreational cottage use and not for year round use."

3.7.2 Renewals: A right to renew the lease should be avoided wherever possible.

3.7.3 Insurance: The lessee should maintain suitable fire insurance for full replacement value and a minimum of $1,000,000 public liability insurance.

3.7.4 Improvements: Commonly, the lessee is required to remove improvements within a specific period after expiration or termination of the lease. If the lessee fails to remove them, they may become the property of the Crown or the Crown may charge the lessee for their removal. Refer to departmentally approved lease standards for sample clauses.

3.8 Other Considerations:

Development: The starting date for construction should be established locally, within the first year of the lease and the development shall be completed within the first three years of the lease. The lessee may be called upon to submit plans for approval by the Band Council. The Lands Officer may consult with Public Works and Government Services Canada, if required.
Chapter 7

Directive 7-4:
General Guidelines for Drafting Leases

Annex D:
Guidelines for Agricultural Leases
Annex D
Guidelines for Agricultural Leases

1. Term

1.1 Length: The following considerations will help determine the best length for the term of an agricultural lease:

a) whether the lands are in close proximity to urban areas;

b) if the lease is for ordinary agricultural grazing or a cash crop, the recommended term is five years or less;

c) if the lease involves major agricultural development, such as a dairy, where security of tenure is required, longer periods, to a maximum term of 25 years, may be considered. Longer terms may be appropriate where undeveloped land is involved, and clearing or extensive irrigation may be required.

2. Rent

2.1 Timing of Payments:

a) Grazing Leases - Rent should be paid annually in advance (e.g. on April 1, 1996 for the period covering April 1, 1996 through March 31, 1997).

b) Crop Sharing - Crop sharing can provide a desirable alternative, and can provide healthy returns to the First Nation, and are currently exempt from GST. Ensuring that the lessee is maximizing crop returns is important, although difficult. The lessee must give a statutory declaration as to the crop share. There are several methods to verify a crop share, such as checking the permit book, grain elevator receipts, or crop insurance.
2.2 **Rental Yield:** Rent should be based upon the capacity of the land, whether on a per acre yield per crop, or per animal per month of grazing basis. Where special crops are to be grown, such as vegetables or produce, and the market return is not readily assessable, a market rent of a percentage of the market value of the land may be appropriate.

2.3 **Rent review:** If the term is longer than five years, the lease must provide for a rent review set at five years.

3. **Special Terms and Conditions**

3.1 **Use Clause:** The use should be specific, and should specify the crops to be used or the animals to be grazed, and the time periods involved. Grazing leases should be seasonal, although tenure should be year round, to allow the lessee to carry out support work when the pastures are unused.

3.2 **Renewals:** There should be no right of renewal specified in the lease.

3.3 **Insurance:** Liability and Fire insurance as required. Generally, liability insurance should be for a minimum of $1,000,000.

3.4 **Other Considerations:**

   a) **Inspections:** Grazing leases should provide for range inspection after a herd has been removed in the Fall or before turnout in the Spring;

   b) **Agricultural Practices:** Agricultural practices specified by the Minister, shall be followed in order to protect the land resource;

   c) **Improvements:** Fixed improvements, such as buried irrigation lines, hay sheds and fences, are to remain with the land.
1. **Purpose**

1.1 This directive provides information on headleases, sub-leases, mortgages and assignments of leasehold interests. Read this directive for guidance on:

   a) **Policy**: The special considerations which apply to assigning, subleasing and mortgaging leasehold interests; and

   b) **Process**: The steps required to ensure that the proper procedures for carrying out these transactions are followed.

2. **General**

2.1 **Before Reading This Directive**: Review Directive 7-1: Leasing Reserve Land - An Overview, which will serve as a roadmap for navigating within Chapter 7. Directive 7-1 discusses the legal framework underlying leases, and offers an overview of the leasing mechanisms under the Indian Act. It also contains helpful definitions of terminology that will be found throughout this chapter. Refer also to Chapter 8 - Administering Leases and Permits.

2.2 **Transferring Interests in Leases**: Assignments, mortgages and sub-leases involve the transfer of all or part of a lessee's interest in a lease. The basic elements of each of these transfers are as follows:

   a) **Assignment**: An assignment entails the full transfer of a lessee's interest in a lease to a third party, known as the assignee. The assignee in effect "steps into the shoes" of the lessee, and agrees to perform the lessee's responsibilities under the lease. The assignee pays rent directly to the Receiver General for Canada. However, **despite a commonly held belief of many individuals, an assignment generally does not relieve the original lessee from his or her obligations under a lease**. Refer to 3.5.2 and 3.5.3, below, for more guidance on this point;
Transferring Interests in Leases (continued)

b) **Sub-lease**: A sub-lease is created when the lessee, after entering a lease with the Minister, known as a headlease, in turn leases his or her leasehold interest to a third party, known as the sub-lessee. Rather than stepping into the lessee's position, the sub-lessee becomes, in essence, the lessee's tenant, and makes rental payments to the lessee. The lessee continues to perform the obligations imposed by the headlease;

c) **Mortgage**: A mortgage involves pledging the lessee's interest in the land as security for the repayment of a loan made to the lessee by the mortgagee. Should the lessee fail to repay the loan as required, the mortgagee is generally entitled to sell or assume the lessee's interest to satisfy the debt. Because a mortgagee's security is tied to the value of the leasehold interest, a mortgagee is acknowledged to have a special role in the cancellation and amendment of a lease. It should be noted that if the designation stipulates a specific lessee, that lessee may have difficulty in obtaining a mortgage as the mortgagee may not then have the ability to assume the lessee's interests in the event of a default.

3. Policy - General

3.1 **Consent of Minister**: It is important that all transfers of leasehold interests be in the best interests of the First Nation or, where relevant, the locatee. Therefore, the lease should provide that the lessee will not assign, sub-lease or mortgage the lease without the prior written consent of the Minister or the Minister's delegate. Note that:

a) For sub-leases, mortgages, and assignments the lease should provide that the consent of the Minister will not be unreasonably withheld;

b) where agreed by the parties, the headlease will provide that the Minister will pre-approve an attached standard sub-lease, and when sub-leases under that headlease conform with the standard, additional consent by the Minister will not be required. This pre-approval will not apply to further sub-leases provided they conform to the pre-approved form. For example, a lessee leasing an office complex would use conforming sub-leases to sublet three different floors to three separate sub-lessees. If one of those sub-lessees subsequently sought to sublet their interest, the preapproval would not apply to this subsequent sub-lease.
3.2 **Assignment Fees:** The lessee should only be charged an assignment fee if the lease specifically provides for such a fee. It is improper for a First Nation or locatee to make their consent to a transfer conditional upon payment by a lessee of any sums to the First Nation or any individual, unless authorized in the lease agreement.

3.3 **Lease Not in Default:** To approve for a transfer, the lease must be in good standing, and the lessee cannot be in default under any of its terms or conditions.

3.4 **Registration:** Every assignment, sub-lease or mortgage must be registered in the Indian Lands Registry. The assignment, sub-lease or mortgage must be drafted in a form suitable for registration.

4. **Policy - Assignments**

4.1 **Assignee's Obligations:** An assignment cannot be used as a means to change the terms of an existing lease. Therefore, before the Minister consents to an assignment, the assignee must agree in writing to perform and observe all of the lessee's covenants and obligations under the lease.

4.2 **Lessee's Obligations:** Despite a common misconception to the contrary, although a lessee has, with the Minister's consent, assigned his or her interest in a lease to a third party, the lessee is still legally bound by his or her commitments under the lease, unless the lessee obtains an express release from the Crown. If the assignee fails to perform his or her lease obligations, then the lessee will be held responsible for those obligations.

4.3 **Releasing the Lessee from their Obligations:** to release the original lessee (assignor) from his or her obligations under the lease, the following steps must be completed:

    a) the original lessee (assignor) must execute a valid assignment agreement (assignor) with the assignee;

    b) in a separate written agreement, the Crown must release the assignor from his or her obligations under the lease.
Releasing the Lessee from their Obligations (continued)

c) the Crown and the assignee must execute an agreement in which the assignee agrees that the Crown may pursue all remedies under the lease directly against the assignee. Without such an agreement, there is no contractual connection between the Crown and the assignee.

4.4 First Nation Consent: As a matter of policy, the department will seek the written consent of the First Nation and/or locatee to the assignment. The Minister may only refuse consent to an assignment without a valid reason if the lease makes provision for such an action. Valid grounds for refusing the assignment should be submitted to the Minister or the Minister's delegate for consideration. The First Nation or locatee should be asked to provide their concurrence or concerns within a reasonable period.

5. Policy - Sub-leases

5.1 Origin of Sub-leases: The headlease is the lease between the Crown and the lessee, and it creates the leasehold interest that a lessee can then sublet. The sub-lease must therefore always be subordinate to the headlease. The headlease will contain specific requirements governing the sub-lease, and set out contingencies if the headlease is cancelled.

5.2 Sub-lease Terms: Several special terms should appear in every sub-lease, and the headlease binds the lessee to include them when negotiating with sub-lessees. These terms include:

a) Term of Sub-lease: While a sub-lease can be for any shorter period, its term must expire at least one day before the headlease ends;

b) Land to be leased: A sub-lease may be for the entire area covered by the headlease, but it usually covers only part of that land. If this is the case, a proper legal description of the sub-lease area is required, ie. a Registration Plan or CLSR survey (see Schedule A of 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 amended from time to time). The sub-lease must convey something less than the headlease conveys: either a shorter term, a smaller portion of land, or both;
Sub-lease Terms (continued)

c) **Dependency on Headlease**: The sub-lease must clearly state that it is subordinate to the headlease, and that the sub-lease will automatically terminate if the headlease is cancelled or otherwise terminated;

d) **Headlease Terms are Binding**: It is departmental policy to require that the sub-lease will bind the sub-lessee to all the terms of the headlease.

6. **Policy - Mortgages**

6.1 **Terms of the Minister's Consent**: Although the Minister will not arbitrarily withhold his or her consent to the mortgage of a leasehold interest, a mortgagee must meet several conditions to obtain that consent:

a) **Performance of Lessee's Obligations**: If the mortgagee takes possession of the premises or acquires the lessee's interest, the mortgagee must agree to perform all covenants and obligations under the lease;

b) **No Assignment or Sale**: The mortgagee cannot assign or sell a lease, as a mortgage remedy, without the consent of the Minister. If the Minister gives consent, the assignee must also agree to perform the lessee's obligations under the lease;

c) **Insurance Proceeds**: The mortgage must provide that the proceeds of all insurance policies on the leased premises will be used solely for rebuilding or repairing the premises.
6.2 Once the lessee has mortgaged a leasehold interest, the mortgagee should be advised of any intention to assign the lease or substantially amend the lease's land description, rent or use. Before completing the assignment or amendment, the Lands Officer should obtain either the written consent of the mortgagee, or a valid discharge of the mortgage.

6.3 Cancellation of a Mortgaged Lease: If the lessee has mortgaged his or her interest in a lease, the standard lease generally requires the department to fulfill certain obligations to the mortgagee before cancellation of the lease can take place:

a) Notice to Mortgagee: The region must notify the mortgagee before the proposed cancellation, and give the mortgagee the opportunity to assume or sell the leasehold interest, subject to the Minister's consent, or cure the lessee's default;

b) Curing of Default by Mortgagee: When a mortgagee, after receiving notice of a default by the lessee, cures the default within the required time frame, that curing will be interpreted as a curing of the default by the lessee. In that case, the cancellation of the lease will not continue, and the lease will be again in good standing.

Note: The Mortgagee may have little recourse or remedy in the event of default if the designation named a specific lessee.

7. Process

7.1 This section summarizes the process for overseeing the assignment, sub-lease or mortgage of a lease of reserve land. Comprehensive checklists for assignments, sub-leases and mortgages are included at the end of this directive (Annexes A, B and C). The following paragraphs outline the major steps to follow when transferring leasehold interests.

7.2 Confirm the Lease is in Good Standing: The Lands Officer should confirm that the lease in question is in good standing, that no covenants or obligations are in default, and that if the lease is made pursuant to a designation, the designation has not expired.
7.3 **Ensure the completion of an Environmental Assessment of the Sub-lease when required:** Under the *Canadian Environmental Assessment Act* (CEAA), environmental assessments are carried out as early as practicable in the planning stages of a project. DIAND must ensure that the proposed project is subjected to an environmental assessment, which the proposed sub-lessee funds. See Chapter 12 of this manual for further information.

7.4 **Conduct a Credit Check of Assignee:** For assignments, a credit check should be conducted on assignees of the lease.

7.5 **Check Lease or Designation:** Review the provisions of the lease and the terms of the designation for any special conditions relating to assignments, mortgages or sub-leases.

7.6 **Confirm the Legal Description:** A proper legal description of the sub-lease area is required, i.e. a Registration Plan or CLSR survey. (see Schedule A of 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* as amended from time to time).

7.7 **Request First Nation and Locatee Concurrence:** The region should request the written concurrence of the First Nation, and the locatee, if applicable, to the transaction. Where the First Nation or locatee does not provide their consent within a reasonable time, a letter signed by the Manager, Lands should be sent to the Band Council and locatee. The letter should say that the lease terms do not allow the Minister to arbitrarily refuse to approve a sub-lease or mortgage, and that if no response is received, the First Nation, or the locatee where applicable, will be deemed to have consented to the transaction.

7.8 **Obtain Minister's Consent:** After confirming that the required conditions have been met, the region should obtain the consent of the Minister, or his or her delegate to the assignment, sub-lease or mortgage of the lease.

7.9 **Register the Transfer:** The assignment, sub-lease or mortgage should be sent to the Indian Lands Registry for registration, following the requirements of the *Indian Lands Registration Manual*, and, where applicable, s. 55 of the *Indian Act*. 

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7.10 **Notify Mortgagee as Required:** If the lessee assigns, sublets or mortgages the lease, or if the lessee defaults, the mortgagee must be notified. The terms of the head lease and consent to the mortgage by the Minister will establish whether or not written consent of the mortgagee is required for the sublease or assignment. For a default, the lessor should give the mortgagee an opportunity to remedy the situation.

8. **References**

8.1 For more information, refer to:

   a) *Indian Lands Registration Manual*

   b) See Chapter 12 of this manual for provisions concerning environmental considerations.
Chapter 7

Directive 7-5:
Assignments, Sub-leases and Mortgages

Annex A:
Assignment Checklist
Annex A
Assignment Checklist

The Lands Officer or, for 53/60 First Nations, the First Nation Land Manager, should take the following steps:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td><strong>Confirm that the lease allows the lessee to assign his or her leasehold interest.</strong></td>
</tr>
<tr>
<td>2</td>
<td><strong>Review the terms of the designation to confirm that an assignment is not prohibited.</strong></td>
</tr>
</tbody>
</table>
| 3 | **Confirm that the lease is in good standing, and that the lessee is not in default with respect to:**  
  (a) payment of rent; or  
  (b) the performance of any covenants. |
| 4 | **Verify the legal competence of the assignee.** |
| 5 | **Conduct a credit check on the assignee.** |
| 6 | **Collect an assignment fee if the lease provides for such a fee.** |
| 7 | **Obtain the Minister’s written consent to the assignment.** |
| 8 | **Obtain the concurrence of:**  
  (a) the First Nation; and,  
  (b) the locatee, where applicable. |
<p>| 9 | <strong>If the lease is mortgaged, notify the mortgagee of the assignment and request the mortgagee’s written consent.</strong> |</p>
<table>
<thead>
<tr>
<th></th>
<th>Determine whether the lessee is to be released from his or her obligations under the lease. If yes:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(a) confirm that the original lessee (assignor) and the assignee have executed a valid assignment agreement;</td>
</tr>
<tr>
<td></td>
<td>(b) arrange for the execution of an agreement between the Crown and the assignee, in which the assignee agrees that the Crown may pursue all remedies under the lease directly against the assignee;</td>
</tr>
<tr>
<td></td>
<td>(c) arrange for the Crown’s execution of a release document, which releases the assignor (original lessee) from all obligations under the lease.</td>
</tr>
<tr>
<td>11</td>
<td>Register the assignment in the Indian Lands Registry.</td>
</tr>
</tbody>
</table>
Chapter 7

Directive 7-5: Assignments, Sub-leases and Mortgages

Annex B:

Sub-lease Checklist
Annex B
Sub-lease Checklist

The Lands Officer or, for s. 53/60 First Nations, the First Nation Land Manager, should take the following steps:

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Review the terms of the headlease and confirm that a sub-lease is authorized.</td>
</tr>
<tr>
<td>2</td>
<td>Review the terms of the designation to confirm that a sub-lease is not prohibited.</td>
</tr>
</tbody>
</table>
| 3 | Confirm that the headlease is in good standing, and that the lessee is not in default with respect to:  
(a) payment of rent;  
(b) the performance of any covenants. |
| 4 | Confirm that the sub-lease document is a departmentally approved equivalent. Note that it must conform to any pre-approved sub-lease which is appended to the headlease. |
| 5 | Obtain the concurrence of:  
(a) the First Nation; and,  
(b) the locatee, where applicable. |
| 6 | Have the sub-lessee and lessee execute the sub-lease. |
| 7 | Obtain the Minister’s written consent (approved by the departmental officials authorized by the Delegation of Authority Instrument under the Indian Act and related Regulations - refer to the relevant regional delegation instrument) to the sub-lease. |
| 8 | Register the sub-lease in the Indian Lands Registry. |
Chapter 7

Directive 7-5:
Assignments, Sub-leases and Mortgages

Annex C:

Mortgage Checklist
### Annex C

**Mortgage Checklist**

The Lands Officer or, for s. 53/60 First Nations, the First Nation land manager, should take the following steps:

<table>
<thead>
<tr>
<th></th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Confirm that the lease permits lessee to mortgage his or her leasehold interest.</td>
</tr>
<tr>
<td>2</td>
<td>Review terms of designation to confirm that mortgage is not prohibited.</td>
</tr>
<tr>
<td>3</td>
<td>Confirm that the lease is in good standing, and that the lessee is not in default with:</td>
</tr>
<tr>
<td></td>
<td>(a) payment of rent;</td>
</tr>
<tr>
<td></td>
<td>(b) the performance of any covenants.</td>
</tr>
<tr>
<td>4</td>
<td>Obtain written agreement from the mortgagee:</td>
</tr>
<tr>
<td></td>
<td>(a) to perform and observe all of the lessee's covenants and obligations under the lease if the mortgagee takes possession of the premises or acquires the lessee's interest.</td>
</tr>
<tr>
<td></td>
<td>(b) not to assign or sell the mortgage without consent of the Minister.</td>
</tr>
<tr>
<td>5</td>
<td>Confirm that the mortgage provides that insurance proceeds will be used solely for rebuilding or repairing the leased premises.</td>
</tr>
<tr>
<td></td>
<td>Obtained the concurrence of:</td>
</tr>
<tr>
<td>---</td>
<td>-------------------------------</td>
</tr>
<tr>
<td></td>
<td>(a) the First Nation; and,</td>
</tr>
<tr>
<td></td>
<td>(b) the locatee, where applicable.</td>
</tr>
</tbody>
</table>

7 Obtain the Minister’s written consent (approved by the departmental officials authorized by the *Delegation of Authority Instrument* under the *Indian Act* and related Regulations - refer to the relevant regional delegation instrument) to the mortgage.

8 Register the mortgage in the Indian Lands Registry.

9 If the lease is to be cancelled, notify the mortgagee in writing and give the mortgagee an opportunity to remedy the situation.
Directive 7-6
Cancelling Leases

1. Purpose

1.1 This directive explains how to cancel leases of reserve land. This directive gives information and guidance about:

a) **Policy:** The circumstances which trigger review of an existing lease, and the guidelines for cancellation; and

b) **Process:** The steps and procedures involved in cancelling a lease.

2. General

2.1 **Before Reading This Directive:** Review Directive 7-1: Leasing Reserve Land - An Overview, which will serve as a roadmap for navigating within Chapter 7. Directive 7-1 discusses the legal framework underlying leases, and offers an overview of the leasing mechanisms under the *Indian Act*. It also contains helpful definitions of terminology that will be found throughout this chapter. Refer also to Chapter 8 - Administering Leases and Permits.

2.2 **Cancellation:** "Cancellation" refers to the process for ending a lease before the conclusion of its stated term, because the lessee fails to comply with their obligations under the lease. In this directive, the terms "cancellation" and "termination" are used interchangeably.

2.3 **Authority for Cancellation:** The *Indian Act* contains no specific provision to cancel leases. The framework for cancelling leases is included as part of the mandatory terms and conditions contained in every standard lease agreement or the departmentally approved equivalent.

2.4 The cancellation of a lease will be directed for the Minister by the appropriate regional office of the department (approved by the departmental officials authorized by the *Delegation of Authority Instrument* under the *Indian Act* and related Regulations - refer to the relevant regional delegation instrument).
2.5 **Consultation with Justice:** Cancelling a lease is a significant step, with important legal consequences. The cancellation must be managed very carefully, and, where there is any uncertainty, the regional office of the Department of Justice should be consulted on every step to be taken.

2.6 **When Cancellation May be Triggered:** Several circumstances will trigger the right of the Minister to cancel a lease of reserve land:

a) **Failure to pay rent or other sums due under the lease:** The lease requires the lessee to pay rent in a timely manner. If the lessee fails to do so, the Minister may, after following the proper procedures, terminate the lease;

b) **Failure to perform or observe any covenants set out in the lease:** Every lease sets out a variety of covenants, or obligations, which the lessee agrees to perform. Failure by the lessee to perform any of these covenants can, in the appropriate circumstances, be grounds for cancelling the lease, although cancellation is not automatic. The standard form lease, for example, gives the lessee a specified time to correct any defaults in performance;

c) **Change in Corporate Control of the Lessee:** When a lessee is a corporation, and, without the department's consent, it changes their control or ownership through the sale or disposition of its shares, the Minister may terminate the lease. This trigger generally applies only to a lessee in a commercial lease.

Refer also to Chapter 8 - Administering Leases and Permits.

2.7 **Alternatives to Cancellation:** Cancellation is not automatically the appropriate response to a lessee's failure to perform their obligations under a lease. The region and the First Nation should determine the appropriate course of action, and alternative remedies should always be considered. For example, depending on the circumstances, the department may elect to re-let the land as agent for the lessee, or to perform covenants for, and at the expense of, the lessee.
3. Policy

3.1 Independent Confirmation: Before commencing cancellation proceedings, the region must independently verify the circumstances surrounding the lessee’s failure to perform their obligations. The region cannot simply rely on information provided by the First Nation. Verification can take many forms, and discretion should be used. At the least, a letter should be sent to the lessee outlining the alleged circumstances and requesting confirmation that a default has in fact occurred. Where default of payment is involved, confirmation may be sought from the Receiver-General, or the appropriate bank, with the First Nation’s consent, if required.

3.2 Consultation with First Nation and Locatee: If the region finds valid grounds to cancel a lease, it should discuss this with the First Nation to learn their views, objectives and best interests. For a locatee lease, the region should obtain the views of the locatee. These views should be confirmed in writing.

3.3 Consultation with Justice: In determining what course of action is in the best interest of the First Nation, the region must consult with the Department of Justice.

3.4 Notice of Default: If, after discussions with the First Nation and consultation with the Department of Justice, the decision is made to cancel a lease, the region should deliver to the lessee notice of the default. The notice should require the lessee to correct the default within the time frame set out in the lease. If the lease does not contain such a time frame, the notice must allow the lessee a reasonable time to cure the default.

Note:

Pursuant to the notice provisions of standard lease documents, the Notice of Default must be signed by the departmental official who is authorized by the Delegation of Authority Instrument under the Indian Act and related Regulations (refer to the relevant regional delegation instrument) to sign on behalf of the Minister. Therefore, a Notice of Default may not be valid if signed by a Lands Officer.
3.5 **Reasonable Time to Cure the Default:** The lease will generally specify how much time a lessee will be given to cure a default. Where the lease does not specify, the question of what is a reasonable time will depend on the specific circumstances. The following sets out some guidelines which should be followed where the lease has not provided specific time periods:

a) **Failure to Pay Rent:** If the lessee has failed to pay rent as and when required by the lease, then 30 days should be considered a **reasonable time** to remedy the problem;

b) **Other Types of Defaults:** If the default is one that the lessee can remedy easily, then 30 days may be considered a reasonable time to remedy the problem. If the nature of the default is such that the lessee cannot cure it within 30 days, the lessee should be required to begin curing the default when the lessee receives the notice, and to complete it as quickly as possible with all due diligence. Any disagreement about whether the lessee has acted promptly and with due diligence may generally be referred to the Federal Court.

3.6 **Notice of Cancellation:** If the lessee's default has not been corrected within the time limit required by the department, or by the terms of the lease, the region must deliver a notice of cancellation to the lessee. The notice should be drafted in close consultation with the Department of Justice. The notice must:

a) include the particulars of the lease being cancelled;

b) provide the reason for the cancellation and set out the covenants breached;

c) advise the lessee that all rent due is still payable, and that the lessee is obligated to pay all outstanding amounts;

d) advise the lessee that the cancellation does not prejudice Her Majesty's rights under the lease; and

e) be executed by the departmental official who is authorized by the Delegation of Authority Instrument under the Indian Act and related Regulations to sign on behalf of the Minister.
3.7 **Change in Control of Lessee:** When the default concerns a change in the control of a corporate lessee, the regional departmental representatives must act promptly to cancel the lease, if termination is considered the appropriate course of action. The standard commercial lease provides that the Minister must give notice of termination within 60 days of becoming aware of the change. The termination is effective a further 60 days following that notice of termination.

3.8 **Mortgagee’s Rights:** If the lessee has mortgaged his or her interest in a lease, the department has certain obligations to the holder of the mortgage (the "mortgagee") which it must fulfill before cancellation of the lease can take place:

   a) **Notice to Mortgagee:** The region must notify the mortgagee before the proposed cancellation, and give the mortgagee the opportunity to assume or sell the leasehold interest, subject to the Minister’s consent, or to cure the lessee’s default;

   b) **Curing of Default by Mortgagee:** When a mortgagee, after receiving notice of the lessee’s default, cures the default within the required time frame, that curing will be interpreted as a curing of the default by the lessee. Then, the cancellation of the lease will not continue, and the lease will again be in good standing.

3.9 **First Nation Not to Commence Proceedings:** All lease cancellations must be initiated and conducted by DIAND. Where a First Nation has delegated authority under s. 53 or s. 60, actions to recover overdue rent may not be started without prior consultation with the department. A First Nation may send a letter advising the lessee that the rent is in arrears, and requesting payment of overdue amounts. However, the department must send the Notice of Cancellation to initiate the cancellation proceedings.

3.10 **Relinquishment of Interests:** If a lessee wishes to give up an interest or right it has obtained under a lease, the Minister must consent to that relinquishment for it to be effective and binding on Her Majesty, unless the lease provides that a lessee can unilaterally relinquish an interest. Before consenting to a relinquishment, the Minister will normally seek the consent of the First Nation, and where applicable, the locatee.
3.11 **Improvements:** The lease will state whether improvements become the property of Her Majesty or the lessee upon expiration or termination of the lease. As a rule, improvements made under a lease, such as buildings, should revert to the Crown. This is one benefit to the lessor for leasing, and is usually provided for by the lessee's accounting method. If the lessee is to remove improvements at the expiration or cancellation of the lease, the lease should clearly state that the lessee must remove the improvements by a certain time, failing which they will revert to the Crown, and the Crown may remove them at the lessee's expense.

4. **Process**

4.1 This section summarizes the process for cancelling a lease of reserve land. A checklist is included at the end of this directive as Annex A. The following paragraphs outline the major steps to follow when leases are cancelled. Unless otherwise indicated, the regional office of DIAND conducts all actions.

4.2 **Verify the Facts:** Independently verify the lessee’s default.

4.3 **Trigger for Cancellation:** Review the lease and confirm that the default is a trigger for cancellation of the lease, such as a failure to pay rent, or a breach of a covenant.

4.4 **Discuss with First Nation or Locatee:** Consult with the First Nation or locatee concerning their views, wishes and best interests about the cancellation of the lease. Request confirmation of those views in writing.

4.5 **Consult with Justice:** Consult with the Department of Justice concerning the circumstances of the default, and the best interests of the First Nation.

4.6 **Search for Mortgagees:** A search of the Reserve Lands Register or, where the land is designated land, the Surrendered and Designated Lands Register should be conducted to confirm whether the lessee has mortgaged his or her leasehold interest in the land.
4.7 **Execution of the Notice:** The notice of default must be executed by the departmental official who is authorized by the *Delegation of Authority Instrument* under the *Indian Act* and related Regulations to sign on behalf of the Minister.

4.8 **Send the Lessee Notice:** Send the notice of the default to the lessee. The letter must set out the specific elements of the default, and give the lessee a deadline within which to remedy the situation. The letter should be sent by registered mail.

4.9 **Give the Mortgagee Notice:** If the lessee has mortgaged the leasehold, send a copy of the notice of default to the mortgagee by registered mail. Advise the mortgagee that it may remedy the lessee’s breach prior to cancellation of the lease, or may assume or sell the leasehold interest, subject to the Minister’s consent. This is a right given to the mortgagee by law, not only by policy, and should be strictly complied with.

4.10 **Verify whether the lessee cured the default by the given deadline,** or whether the mortgagee cured the default or assumed or sold the leasehold interest with the Minister’s consent.

4.11 **Send Cancellation Notice:** If the lessee or, where applicable, the mortgagee has not cured the default, a notice of cancellation should be drafted in consultation with the Department of Justice. The notice should be sent to the lessee and any mortgagee by registered mail.

4.12 **Execution of a Cancellation Notice:** The notice of Cancellation must be executed by the departmental official who is authorized by the *Delegation of Authority Instrument* under the *Indian Act* and related Regulations to sign on behalf of the Minister.

4.13 **Follow Up:** As an example, ensure that the lessee has vacated the land following cancellation. Or, if the lease is a headlease, ensure that the sub-lessee does not continue to make payments to the head lessee. If rent is in default, take steps to collect the unpaid rent for the Crown. Issues such as eviction proceedings, responsibility for abandoned chattels, procedures for changing locks and related legal issues should be referred to the Department of Justice for guidance.
4.14 **Register Notice of Cancellation**: Register a notice of cancellation of the lease in the Indian Lands Registry in which the lease was originally registered.

5. **References**

5.1 For more information, refer to the *Indian Lands Registration Manual*. 
Chapter 7

Directive 7-6: Cancelling Leases

Annex A:

Lease Cancellation Checklist
## Annex A

### Lease Cancellation Checklist

The Lands Officer or appropriate departmental official should take the following steps:

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
</tr>
</thead>
</table>
| 1    | Verify a default by the lessee, independently of any allegations by the First Nation, by:  
|      |   (a) confirming in writing the facts with the lessee;  
|      |   (b) confirming a rent payment default with the Receiver General; and  
|      |   (c) obtaining other third-party confirmation. |
| 2    | Review the terms of the lease to confirm that a default is a trigger for cancellation, such as:  
|      |   (a) a failure to pay rent or other sums due under the lease;  
|      |   (b) a failure to perform or observe any covenants set out in the lease;  
<p>|      |   (c) a change of control of the corporate lessee. |
| 3    | Discuss with the First Nation, and where applicable the locatee, about their best interest and wishes with respect to the default. |
| 4    | Consult the Department of Justice about the circumstances of the default, and the best interests of the First Nation. |
| 5    | Conduct a search of the Indian Land Registry. |
| 6    | Determine whether cancellation is the preferred option. |</p>
<table>
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<tr>
<th>Step</th>
<th>Description</th>
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</table>
| 7    | **If cancellation is not appropriate:** Consider other options, including:  
  (a) re-letting of lands as agent for the lessee;  
  (b) performing the lessee's covenants under the lease for and at the expense of the lessee. |
| 8    | **If cancellation is appropriate:** Draft a notice of default by:  
  (a) setting out the specific elements of the default;  
  (b) giving the lessee a deadline within which to remedy the default. |
| 9    | Deliver the notice of default to the lessee by registered mail. |
| 10   | Where the lessee has mortgaged the lease, deliver a copy of the notice of default to the mortgagee by registered mail, and advise the mortgagee that they may remedy the breach for the lessee prior to cancellation of the lease. |
| 11   | Verify whether the lessee or the mortgagee has remedied the default by the deadline, or whether the mortgagee has assigned or sold the leasehold interest with the Minister's consent. |
| 12   | If the lessee or the mortgagee has not remedied the default:  
  (a) draft a notice of cancellation in close consultation with the Department of Justice;  
  (b) send the notice of cancellation to the lessee by registered mail;  
  (c) where the lease is mortgaged, send the notice of cancellation to the mortgagee by double registered mail. |
<table>
<thead>
<tr>
<th>13</th>
<th>Determine follow-up steps to be taken, including:</th>
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<tbody>
<tr>
<td></td>
<td>(a) eviction procedures, if required;</td>
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<tr>
<td></td>
<td>(b) removal of chattels;</td>
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<td></td>
<td>(c) collection of unpaid rent;</td>
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<td>(d) collection of any sub-lease payments;</td>
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<td>(e) changing of locks.</td>
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