### INDEX TO CHAPTER 5
**DESIGNATION AND SURRENDER**

#### INDEX OF DIRECTIVES

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Directive 5-1
General Information

1. Purpose

1.1 This directive provides general information on surrenders and designations of reserve land.

2. Definitions

a) "designation" means the conditional or unconditional surrender that is not absolute by a First Nation to Her Majesty of any right or interest of the First Nation and its members in all or part of a reserve, for the purpose of the reserve land being leased or a right of interest therein being granted as permitted under subsection 38(2) of the Indian Act, subsection 12.(2) of the Manitoba Claim Settlements Implementation Act and subsection 6.(2) of the Claim Settlements (Alberta and Saskatchewan) Implementation Act.

b) "Referendum Regulations" means the Indian Referendum Regulations, C.R.C. 1978, c. 957;

c) "surrender" means the release, either absolutely or not and either conditionally or unconditionally by a First Nation and its members in all or part of a reserve. In this chapter unless otherwise indicated, "surrender" refers to an absolute surrender as provided for in subsection 38(1) of the Indian Act.

d) “Department” means, unless otherwise specified, Indian and Northern Affairs Canada or the Department of Indian Affairs and Northern Development;

e) “Minister” means, the Minister of the Department of Indian Affairs and Northern Development;
3. **General**

3.1 Subsection 12.(2) of the *Manitoba Claim Settlements Implementation Act* and subsection 6.(2) of the *Claim Settlements (Alberta and Saskatchewan) Implementation Act* state that sections 39, 40 and 41 of the *Indian Act* apply to subsections 12.(1) and 6.(1) respectively of those acts and references to the Governor in Council should read as references to the Minister.

3.2 Section 38 of the *Indian Act* allows a First Nation to either surrender or designate all or part of its rights and interests in all or part of a reserve.

3.3 With limited exceptions under the *Indian Act*, before reserve land may be sold or leased to non-Indians, it must be surrendered or designated to the Federal Crown under the strict provisions of sections 37 to 41 of the *Indian Act*. Sections 28, 35, and 58 of the *Indian Act* outline the limited exceptions in which interests in or rights to use reserve lands may be granted to non-Indians without the need for a surrender or designation.

3.4 The surrender or designation deals with the collective interest of the entire membership.

3.5 By virtue of section 39 of the *Indian Act*, a surrender or designation is void unless:

   a) it is made to the Federal Crown;

   b) a majority of electors of the First Nation have consented to the transaction; and,

   c) the Governor in Council has accepted the surrender or designation.

3.6 A First Nation must show consent to a proposed surrender or designation by a vote:

   a) requested by the First Nation Council; and,

   b) ordered by the Minister.

   It is recommended that all votes be conducted according to the *Referendum Regulations*.

3.7 Section 40 of the *Indian Act* requires the Department and the First Nation to certify the surrender or designation and submit the surrender or designation to the Governor in Council.
3.8 Pursuant to section 41 of the *Indian Act*, a surrender or designation is deemed to confer all the rights necessary for the Federal Crown to carry out the terms of the surrender or designation.

4. **Surrenders**

4.1 When reserve land is surrendered, the Indian interest in the land may be extinguished and the land loses its reserve status. This means that:

a) where a surrender is for the purposes of the sale of the land and subsequently the land is not sold, the Indian interest is still extinguished; and

b) the land will revert to those provinces which hold underlying legal title to the reserve lands, as happens with many reserves in Québec.

4.2 Surrender of reserve land for sale is extremely rare, given the irrevocable nature of the transaction.

4.3 Usually, First Nations will surrender reserve land when it is being exchanged for other lands to be added as reserve lands. Alternatively, surrenders of subsurface interests in reserve land are made when the First Nation wants only to dispose of subsurface interests such as mines or minerals.

4.4 The government passed the "Kamloops Amendment" (Bill C-115) in 1988 to amend subsection 38(2) of the *Indian Act*. The amendment distinguished between surrenders for sale (or exchange) and surrenders for leasing, by creating a “designation by way of a surrender” (known as a “designation”). The Kamloops Amendment ensures that designated reserve lands are still part of the reserve and subject to a First Nation’s by-laws.

5. **Designations**

5.1 A designation may or may not have a lease (or leases) attached.

5.2 A designation without a lease attached is generally used where a First Nation wishes to designate land for leasing purposes to prepare the land for future development. In these cases there must be a provision in the designation document providing for the approval of the eventual lease terms by the First Nation Council.
5.3 Although the *Indian Act* sets out some exceptions, most leases of reserve land must be granted under a designation. A surrender of subsurface interests may also require the designation of surface rights for leasing purposes to allow the third party access to the reserve. A designation may also be used to grant an easement or in other circumstances where less than absolute ownership is being transferred.

5.4 As stated in paragraph 4.4 of this Directive, a designation does not extinguish the Indian interest in the land nor does it cause the land to lose its reserve status.

5.5 Designated land retains reserve status, however, the following sections of the *Indian Act* do not apply to designated lands:

a) setting land aside under subsection 18(2);

b) allotting and transferring allotted land, etc. under subsections 20 - 25;

c) granting permits under subsection 28(2);

d) surrenders and designations under subsections 36 - 38 (a First Nation cannot surrender or designate previously designated land without first amending or revoking the existing designation);

e) Indian estate matters under sections 42, 44, 46, 48, 49 and 50;

f) mentally incompetent Indians under section 51;

g) granting leases of uncultivated land and locatee land under section 58;

h) adjustments of contracts under section 59; and,

i) delegations of management authority over reserve land under section 60.

5.6 Where a designation includes a project proposal, the lands officer must determine whether an environmental assessment under the *Canadian Environmental Assessment Act* is required. If an assessment is required, it must be done before the designation vote or the designation should make provision for the First Nation Council to approve the assessment.
6. **Authorities**

6.1 **Departmental policy for surrenders and designations requiring Governor in Council approval is governed by sections 37 to 41 of the *Indian Act*.**

37. (1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.

(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. (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

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

39. (1) An absolute surrender or designation is void unless

(a) it is made to her Majesty;

(b) it is assented to by a majority of the electors of the band

(i) at a general meeting of the band called by the council of the band,

(ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender or designation, or

(iii) by a referendum as provided in the regulations; and

(c) it is accepted by the Governor in Council.

(2) Where a majority of the electors of a band did not vote at a meeting or referendum called pursuant to subsection (1), the Minister may, if the proposed absolute surrender or designation was assented to by a majority of the electors who did vote, call another meeting by giving thirty days notice thereof or another referendum as provided in the regulations.

(3) Where a meeting is called pursuant to subsection (2) and the proposed absolute surrender or designation is assented to at the meeting or referendum by a majority of the electors voting, the surrender or designation shall be deemed, for the purposes of this section, to have been assented to by a majority of the electors of the band.

(4) The Minister may, at the request of the council of the band or whenever he considers it advisable, order that a vote at any meeting under this section shall be by secret ballot.

(5) Every Meeting under this section shall be held in the presence of the superintendent or some other officer of the Department designated by the Minister.
40. A proposed absolute surrender or designation that is assented to by the band in accordance with section 39 shall be certified on oath by the superintendent or other officer who attended the meeting and by the chief or a member of the council of the band, and then submitted to the Governor in Council for acceptance or refusal.

41. An absolute surrender or designation shall be deemed to confer all rights that are necessary to enable Her Majesty to carry out the terms of the surrender or designation.

6.2 Departmental policy for pre-reserve designations requiring the Minister’s approval is governed by the Manitoba Claim Settlements Implementation Act S.C., 2000, c. 33, section 12 and the Claim Settlements (Alberta and Saskatchewan) Implementation Act, S.C., 2002, c.3, section 6:

**Manitoba Claim Settlements Implementation Act**

12. (1) If the council of a first nation has, by resolution, requested that the Minister set apart certain lands as a reserve under an agreement to which this Part applies, the first nation may, either

(a) before the lands are transferred to Her Majesty in right of Canada by the first nation, by Her Majesty in right of Manitoba or by a third party, or

(b) before the lands are set apart as a reserve under section 11,

 designate conditionally or unconditionally, by way of a surrender to Her Majesty in right of Canada that is not absolute, any right or interest in the lands, including for the purpose of the replacement of an existing right or interest in those lands.

**Application of Indian Act**

(2) Sections 39, 40 and 41 of the Indian Act apply in respect of a designation under subsection (1), any references to the Governor in Council being read as references to the Minister.

**Power of the Minister**

(3) On the acceptance by the Minister of a designation under subsection (1), the Minister may grant the designated right or interest to a third party.

**Effect**

(4) If a designation under subsection (1) is accepted by the Minister, the designation and the granting of the right or interest by the Minister take effect at the time the lands are set apart as a reserve under section 11.

**Certain acts deemed to have been done under Indian Act**

(5) As of the time when the Minister sets apart any lands as a reserve under section 11, any right or interest in the lands that was designated by way of a surrender under subsection (1), and any resulting grant that was made under subsection (3), are deemed to have been designated or made, as the case may be, under the Indian Act.
Claim Settlements (Alberta and Saskatchewan) Implementation Act

6. (1) If the council of a first nation has, by resolution, requested that the Minister set apart certain lands as a reserve under an agreement to which this Act applies, the first nation may, either

(a) before the lands are transferred to Her Majesty in right of Canada by the first nation, by Her Majesty in right of Alberta, by Her Majesty in right of Saskatchewan or by a third party, or

(b) before the lands are set apart as a reserve under section 5,

designate conditionally or unconditionally, by way of a surrender to Her Majesty in right of Canada that is not absolute, any right or interest in the lands, including for the purpose of the replacement of an existing right or interest in those lands.

Application of Indian Act

(2) Sections 39, 40 and 41 of the Indian Act apply in respect of a designation under subsection (1), any references to the Governor in Council being read as references to the Minister.

Power of the Minister

(3) On the acceptance by the Minister of a designation under subsection (1), the Minister may grant the designated right or interest to a third party.

Effect

(4) If a designation under subsection (1) is accepted by the Minister, the designation and the granting of the right or interest by the Minister take effect at the time the lands are set apart as a reserve under section 5.

Certain acts deemed to have been done under Indian Act

(5) As of the time when the Minister sets apart any lands as a reserve under section 5, any right or interest in the lands that was designated by way of a surrender under subsection (1), and any resulting grant that was made under subsection (3), are deemed to have been designated or made, as the case may be, under the Indian Act.

7. Policy

7.1 The Department's chief objective is to ensure that reserve lands are surrendered or designated in a way that respects the rights and interests of the First Nation and other affected parties. Consequently, a surrender or designation will only be done where the relevant statutory provisions and departmental policy requirements are satisfied. This Chapter includes separate policy statements for each requirement.

8. Process

8.1 The different statutory and policy-based procedures must be followed correctly to ensure the validity of the transaction. The directives in this chapter will provide specific guidance in this respect.
9. **Implementation**

9.1 This chapter replaces previous policy directives, previous Land Management Manuals and Chapter 5 of the Land Management Manual, dated January 31, 1997, dealing with this subject matter. This Chapter will come into force upon distribution.

10. **References**

10.1 For more information you should refer to:

   a) Chapter 3 of this Manual for additional information on individual interests in reserve lands;

   b) Chapters 2 and 7 of this Manual for information on the exceptions to the designation requirement for leasing;

   c) Chapter 7 of this Manual for a review of the requirements for different types of leases, whether on designated or other reserve lands;

   d) the *Indian Referendum Regulations*, which came into effect November 20, 2000;

   e) Indian Lands Registration Manual;

   f) *Indian Act*;

   g) *Manitoba Claim Settlements Implementation Act*;

   h) *Claim Settlements (Alberta and Saskatchewan) Implementation Act*. 
Directive 5-2
Addressing Locatee and Third Party Interests

1. Purpose

1.1 This directive provides information on how to deal with locatee and other individual interests affected by a proposed surrender or designation.

2. General

2.1 Where an individual First Nation member is in lawful possession of lands and those lands are subsequently surrendered, the land is removed from reserve status and the individual's interest in the land is extinguished. However, in the case of a designation, the land retains reserve status although the individual's interest in the land is extinguished.

2.2 The interests of locatees and other individuals affected by a proposed surrender or designation must has addressed with before the surrender or designation vote is held.

3. Authorities

3.1 Some relevant statutory authorities include:


2. (1) In this Act, ...

"designated lands" means a tract of land or any interest therein the legal title to which remains vested in Her Majesty and in which the band for whose use and benefit it was set apart as a reserve has, otherwise than absolutely, released or surrendered its rights or interests, whether before or after the coming into force of this definition;

"reserve" ...

(a) means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band, and
(b) except in subsection 18(2), sections 20 to 25, 28, 36 to 38, 42, 44, 46, 48 to 51, 58 to 60 and the regulations made under any of those provisions, includes designated lands;...

"surrendered lands" means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit it was set apart.

23. An Indian who is lawfully removed from lands in a reserve upon which he has made permanent improvements may, if the Minister so directs, be paid compensation in respect thereof in an amount to be determined by the Minister, either from the person who goes into possession or from the funds of the band, at the discretion of the Minister.

24. An Indian who is lawfully in possession of lands in a reserve may transfer to the band or to another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.

4. **Policy - Locatee Interests**

4.1 Locatee interests should be extinguished prior to a referendum vote on a proposed surrender or designation.

4.2 Where a locatee is in lawful possession of lands to be surrendered or designated, the policy requires that:

a) the locatee be notified by the regional office that the First Nation Council has proposed a surrender or designation of land in which the locatee has an interest;

b) the First Nation Council make every reasonable effort to reach an agreement to secure voluntary transfer of the locatee's interest to the First Nation under section 24 of the *Indian Act* prior to the surrender or designation vote. A quit claim deed is not an acceptable means of extinguishing lawful possession; and

c) the First Nation Council deal with any custom interest holders (see paragraphs 4.4, 4.5 and 6.2 of this Directive).

4.3 Where the First Nation and a locatee cannot agree on a voluntary transfer pursuant to section 24 of the *Indian Act*, the situation will be considered on its particular facts.
4.4 Certain First Nations do not subscribe to the allotment provisions under the *Indian Act*. Instead, these First Nations grant individuals "occupational rights at the pleasure of the First Nation Council." Since these custom allotments are not authorized under the *Indian Act*, the lands officer is not responsible for informing any custom interest holders of a proposed surrender or designation. However, the Chief and Council of the First Nation should be advised to address the concerns of any custom land holder affected by any such proposal.

4.5 In addition, section 23 of the *Indian Act* (Compensation for Improvements) does not apply to traditional or custom holdings of reserve land.

4.6 The Department may, in limited cases, accept a development proposal which includes a combination of designated land leased under subsection 53(1) and locatee land leased under subsection 58(3) of the *Indian Act*. This type of arrangement is most practical where a locatee is also the project proponent.

5. **Policy - Third Party Interests**

5.1 The lands officer must identify all lawful third party interests acquired through permits, easements, locatee leases, etc. at the outset of a proposed surrender or designation.

5.2 If third party interests are incompatible with the terms of a proposed surrender or designation:

   a) they must be removed prior to the referendum vote; or,

   b) the land which is subject to these interests must be excluded from the proposed surrendered or designated area.

5.3 If third party interests are compatible with the terms of a proposed surrender or designation, the surrender or designation may be made subject to these interests.

6. **Process**

6.1 This section provides an overview of the process for addressing locatee and other interests in a surrender or designation.
6.2 When the First Nation notifies the lands officer of a proposed surrender or designation, the lands officer must search the Indian Lands Registry records to identify any locatee or other third party interest in the land to be surrendered or designated, and

a) inform the First Nation Council of any affected locatees or other third party interest and notify those parties of the proposed surrender or designation;

b) recommend to the First Nation and locatees to begin negotiations to secure a transfer of locatee interests to the First Nation, pursuant to section 24 of the Indian Act;

c) recommend to the First Nation Council to deal with any custom interest holders (see paragraphs 4.4 and 4.5 of this Directive);

d) recommend to the First Nation to begin negotiations to extinguish any other existing third party interests; and

e) refer any disputes with respect to locatee or the third party interests to the Department (HQ) for assistance.

7. References

7.1 For more information you should refer to:

a) Directive 3-7 of this Manual for more information on compensation for improvements pursuant to section 23 of the Indian Act;

b) Directive 3-4 of this Manual for more information on transfer of possession pursuant to section 24 of the Indian Act.
1. Purpose

1.1 This directive provides information on both the mandatory and discretionary terms and conditions of proposed surrenders and designations.

2. General

2.1 A First Nation Council usually sets the discretionary terms and conditions of a proposed surrender or designation.

2.2 The terms and conditions of a surrender are usually straightforward, since the land will be sold or exchanged.

2.3 The terms and conditions of a designation may be very complex as they will generally reflect both the type of development being considered and the interests of the First Nation.

2.4 Most surrenders and designations are conditional:

   a) a surrender will normally be conditional upon a receipt of compensation in the form of money and/or replacement land;

   b) a designation will usually contain specific requirements regarding land use, the term, licensing (where applicable), etc.

3. Authorities

3.1 Relevant statutory authorities include: Indian Act, R.S.C. 1985, c. I-5, section 38 (reproduced in Directive 5-1 of this Manual).
4. **Policy**

4.1 To help a First Nation Council determine appropriate terms and conditions for a surrender or designation, the lands officer must:

   a) disclose to the First Nation Council all relevant information in the Department’s knowledge and possession;

   b) discuss with the First Nation Council the details of the proposed transaction; and

   c) recommend to the First Nation Council that they seek independent legal advice and/or professional advice.

4.2 The surrender or designation document must clearly state the legal description, the proposed use (if known), the duration, and the consideration (i.e. money, replacement land) that the First Nation will receive, as appropriate. (See Appendix A to this Directive).

4.3 The *Indian Act* does not limit the proposed use of the land following a designation. A First Nation may therefore stipulate any proposed use in the designation document, if it is legally acceptable.

4.4 The lands officer must advise the First Nation that, where sufficient information to determine that an identifiable project will be the subject of the designation, an environmental assessment will be conducted following the Canadian Environmental Assessment Act.

4.5 A designation which has a lease attached must clearly state the proposed use or uses of the land to be designated, such as a shopping centre, trailer park, industrial complex, etc. It must also specify the principal conditions of the lease such as rent, payment details, rent reviews, term of the lease, insurance requirements, legal description of the property, etc.

4.6 A surrender or designation document should also specify any restrictions which the First Nation Council deems important.

4.7 Since a surrender involves a complete and final release of the entire Indian interest in the surrendered lands, the duration must be expressed as "forever" in the surrender document. Statements such as "... notwithstanding this surrender, title remains with Her Majesty ..." are not appropriate terms or conditions.
4.8 A designation should be for a fixed term, taking into consideration the proposed use of the land and the time required to make the proposal viable. Any leases issued for the designated land must terminate at least one day before the termination date of the designation.

4.9 A designation for an indeterminate period would only be appropriate in cases such as where a designation for access purposes is necessary to enable the extraction of resources, such as minerals, and oil or gas.

4.10 A First Nation should receive compensation which reflects fair market value. Where a surrender or designation proposes less than fair market value, it must also identify the benefits accruing to the First Nation in lieu of fair market value.

5. Policy - Terms and Conditions

5.1 The Department must ensure that, with a proposed surrender or designation, the First Nation will receive, at a minimum, fair market value or an equivalent alternative benefit for the interest being granted to a third party:

   a) where a First Nation corporation is the intended lessee and will pay nominal rent or receive other preferential treatment, the lands officer must ensure that third parties who are not members of the First Nation will not benefit from the proposed nominal rent (i.e., through share transfers, etc.);

   b) where the lands officer has any doubts about the value being proposed, he or she must advise the First Nation Council in writing; and

   c) the Information Document prepared for the electors must clearly show the proposed compensation as well as the fair market value and the surrender or designation document must clearly state the First Nation’s acceptance of both items.

5.2 A designation without an attached lease must at a minimum:

   a) indicate the general proposed land use (if known), e.g., commercial, industrial, residential, etc.;

   b) set out the principal terms and conditions of any proposed lease agreement, for example, whether rent will be set at fair market value, method of rent collection, proposed use of the land, term of the lease, etc.; and

   c) specify the powers of the First Nation Council to develop the land and to approve or reject future proposals, including the authority to review environmental assessments which are conducted after the vote and to approve the final lease document when it becomes available.
5.3 It is desirable that a designation without an attached lease be as specific about the proposed land use as is possible.

5.4 The inclusion of other terms and conditions will reflect the particular proposal under consideration, as well as the interests of the First Nation. However, the lands officer should advise the First Nation that:

   a) including only essential terms and conditions in the designation is preferable; and

   b) any amendment or revocation of the designation will require a vote by the electors of the First Nation, unless the original designation document contains a clause which allows for the correction of a clerical error or other minor amendment or for the revocation of the designation from all or part of the lands via a Band Council Resolution. A submission for official acceptance of the amendment or revocation would then be made without the need for a vote. (See Directive 5-5 of this manual for more information on this process.)

5.5 Further to paragraph 5.4 b) above, the lands officer should recommend that the First Nation Council consider including a clause in the designation document to allow the First Nation to revoke or make minor amendments to the designation without the requirement for a vote as described in Directive 5-5, paragraphs 4.3 to 4.6.

5.6 Where a clause as indicated in paragraph 5.5 above is proposed, the lands officer must ensure that the Information Document discloses the proposed authority of the First Nation Council to request the revocation or minor amendment of a designation for the membership, without a requirement for a vote and the consequences of such an authority.

5.7 The lands officer must appropriately document relevant discussions and meetings he or she has with a First Nation Council regarding the terms and conditions of a proposed surrender or designation.

6. Process

6.1 The lands officer must:

   a) disclose relevant information in the Department's knowledge and possession to the First Nation Council;

   b) discuss the general parameters of the proposed transaction with the First Nation Council;
c) inform the First Nation Council that an environmental assessment will be required when a project is identified for designated lands;

d) recommend that the First Nation Council seek independent legal or other professional advice;

e) review all proposed terms and conditions to ensure the proposal meets departmental policy and prepare the draft surrender or designation documents; and

f) review the Information Document and any information the First Nation may receive from developers and independent professional advisors to ensure that such information is fair, accurate and comprehensive or needs further study.

7. References

7.1 For related information you should refer to:

Chapter 10 of this Manual for information on how unsold surrendered land may be returned to reserve status.
Directive 5-4
How to Surrender or Designate Reserve Lands by Referendum

1. **Purpose**

1.1 This Directive explains how reserve lands may be validly surrendered or designated. You should read this Directive for information on:

   a) **Policy:** It states the principles and requirements governing a surrender or designation of reserve lands.

   b) **Procedures:** It outlines the steps required to make a valid surrender or designation.

2. **General**

2.1 A surrender or designation must meet all statutory and policy requirements to be recommended for acceptance by the Governor in Council or Minister.

2.2 The Department has developed policy requirements to ensure that a surrender or designation vote is acceptable under the *Indian Act* and that the First Nation is meeting the requirements of informed consent to the proposed surrender or designation.

2.3 The First Nation Council initiates the surrender or designation process by requesting a referendum. The purpose of the referendum is to determine if a majority of the electors of the First Nation are in favour of the proposed surrender or designation and the proposed transaction or intended use.

2.4 All First Nations must include off-reserve members of the First Nation when conducting a vote. It is recommended that the *Referendum Regulations* be followed in all cases.

2.5 An environmental assessment is commenced in accordance with the *Canadian Environmental Assessment Act*.

2.6 Prior to the referendum, an Information Document must be circulated to the electors and at least one information meeting must be held to give the electors as much information about the proposed surrender or designation as possible.
2.7 A departmental officer appointed by the Minister oversees the voting process and certifies the result.

2.8 If the surrender or designation is assented to by the electors, the Department will prepare a submission recommending acceptance of the proposed surrender or designation. If accepted, the transaction is registered in the Indian Lands Registry.

2.9 Although the term "First Nation" is used throughout this chapter, all required documents must refer to a "Band" where applicable, as this term has a particular meaning under the Indian Act.

3. Authorities

3.1 Relevant statutory authorities include: Indian Act, R.S.C., 1985, c. I-5, sections 39 and 40 (reproduced in Directive 5-1 of this Manual) and the Referendum Regulations.

4. Policy

4.1 The Department will not recommend a surrender or designation for acceptance until all statutory and policy requirements including those related to informed consent and certification, and any environmental assessment requirements have been satisfied.

4.2 Although the Minister has discretion under the Referendum Regulations to order a referendum anytime, he or she will normally issue such an order only upon request by a First Nation Council.

4.3 A Band Council Resolution (BCR) requesting a referendum should set out:

a) the date, time and place planned for the referendum vote;

b) the purpose of the proposed surrender or designation;

c) that the First Nation Council requests the Minister to order a referendum;

d) the legal description of the lands to be surrendered or designated;
e) the term;

f) the compensation; and

g) the request for the appointment of an electoral officer.

4.4 All referenda conducted under the Referendum Regulations require at least 42 days from posting and mail out of notices to the date of the referendum; consequently, early notice from the First Nation Council should be encouraged to give the Department sufficient time to:

a) check the land for encumbrances, including locatee interests;

b) give the First Nation any pertinent information in the Department's knowledge or possession;

c) prepare the surrender or designation documentation;

d) arrange for the electoral officer to attend the vote;

e) in consultation with the First Nation Council, arrange for an interpreter, who may be required to help in the translation of a ballot or other pertinent documents; and

f) otherwise provide any requested assistance to the First Nation Council.

5. Policy - Lands Officer

5.1 The lands officer must:

a) give the First Nation any relevant information in the Department's knowledge and possession;

b) inform the First Nation Council to post adequate notice of and hold at least one information meeting;

c) ensure the First Nation Council has prepared an Information Document;

d) prior to the posting or mailing of the Information Document, review the Information Document and information provided to the First Nation by the developer or the First Nation's independent advisors to ensure the information is complete and accurate;
e) with the assistance of the First Nation, arrange for an interpreter, if needed;
f) prepare the surrender or designation documentation;
g) attend the information meeting and prepare notes on the meeting for the file;
h) provide any other required assistance to the First Nation Council;
i) if the vote is successful, prepare a submission recommending acceptance of
the surrender or designation (see Chapter 13 of this Manual);
j) inform the First Nation Council of the acceptance or rejection of the
submission; and
k) if accepted, submit the surrender or designation and the accepting order for
registration in the Indian Lands Registry.

6. Policy - Electoral Officer

6.1 After receiving the BCR, the Minister appoints an electoral officer to oversee the
referendum. The Minister must make the appointment before the notice period
for the referendum begins.

6.2 The electoral officer appointed by the Minister must be a departmental employee
as specified in the Referendum Regulations.

6.3 Employees of a First Nation with delegated authorities under sections 53 and 60
of the Indian Act are not departmental employees. Therefore, they cannot be
appointed as electoral officers for a referendum vote.

6.4 The referendum's electoral officer may appoint a deputy electoral officer. The
deputy electoral officer can perform some, but not all, of the duties of the
electoral officer, as set out in the Referendum Regulations.

6.5 The deputy electoral officer does not have to be a departmental employee and
may be a member of a First Nation.

6.6 The electoral officer must:

a) prepare a list of electors where the Department is responsible for
preparation of the list (section 11 Band), or obtain a certified list of electors
where the the First Nation has control of its membership code (section 10
Band);

b) post the list of electors;
c) post the Notice of Referendum of Absolute Surrender or Designation;

d) for those electors who live off reserve and for whom a mailing address has been given or who cannot appear at the polling station (e.g. because of disabilities) prepare and mail out ballot packages, which include the Information Document, the designation or surrender document, the Notice of Referendum, the notice for any information meetings, postage paid return envelope pre-addressed to the electoral officer, a second inner envelope marked “Ballot” for insertion of the completed ballot, a ballot, a voter’s declaration form, and a letter of instruction regarding voting by mail-in ballot;

e) attend one information meeting;

f) prepare sufficient ballot papers for the day of the vote;

g) attend the referendum;

h) swear in any required interpreter;

i) examine the ballot boxes;

j) count the ballots;

k) certify the surrender or designation and other required documents; and

l) perform other miscellaneous duties set out in the Referendum Regulations.

7. Policy - Information Document

7.1 In order to ensure that informed consent of the First Nation has been given, an information document must be prepared and distributed or made available to First Nation electors for all proposed surrenders and designations.

7.2 At a minimum, the Information Document must contain the following information:

a) that a surrender or designation of reserve lands is being proposed;

b) the purpose of the proposal;

c) for a designation, its proposed term;
d) a legal description of the lands to be surrendered or designated and any available maps, sketches or plans, etc.;

e) the name of the prospective purchaser or lessee and any sublessees (if known);

f) the amount and/or form of compensation and whether or not this amount reflects fair market rent or nominal consideration;

g) if nominal consideration is intended, clear identification of the nature of the alternative benefit and of the fair market rent;

h) for a designation, the basis and frequency for reviewing rents (at a minimum, rent reviews must be done every five years - see Chapter 8 of this Manual);

i) for a designation, that the lessor may mortgage the leasehold interest, and the name of the prospective mortgagee (if known);

j) any other development opportunities which were rejected, and for what reasons, including any alternatives if the surrender or designation fails;

k) the results of an environmental assessment, including any appropriate consultants' reports, and whether there is a requirement for additional clauses in the lease to protect the First Nation’s interest;

l) any other appropriate conditions the First Nation Council would like to include;

m) for a designation without a lease attached, the specifics of the authority of the First Nation Council to carry out transactions under its terms;

n) for a designation with a lease attached, reference to and copies of any applicable leases;

o) the nature and scope of the First Nation Council's authority, if any, to request the revocation or amendment of a designation without a vote of its electors;

p) any other information needed for the electors to make an informed decision about the proposal; and,

q) who to contact for further information or discussion.
8. Policy - Information Meeting

8.1 The lands officer must advise the First Nation Council that they must hold at least one information meeting before the electors vote on a proposed surrender or designation.

8.2 As soon as possible, the First Nation Council should advise the lands officer of the date(s) planned for the information meeting(s) as the Notice of Referendum package must be posted at least 42 days prior to the day of the vote and at least 14 days prior to the meeting, and must include notice of the meeting.

8.3 For mail out ballots, the information package must include the notice of the information meeting and a copy of the Information Document to be discussed at the meeting, along with the other documents set out in paragraph 6.6 a) to 6.6 d) of this Directive.

8.4 Where the Information Document is not posted with the Notice of Referendum, it must be otherwise distributed or made available to the electorate (through either household mailings or at the First Nation Council office) before the information meeting.

8.5 An information meeting should be held sufficiently ahead of the vote to allow electors time to consider the information and ask any questions concerning the surrender or designation and its purpose, but must be at least 14 days after the notice of Referendum has been posted.

8.6 The First Nation Council may decide to hold more than one information meeting. They would likely hold a second information meeting:

a) where the First Nation electors are dispersed in a way that makes it practical to hold a second meeting to ensure that all electors have an opportunity to be briefed on the proposal;

b) where the proposed surrender or designation is particularly complicated, involves a major development for the area, or is expected to be controversial;

c) where significant issues or concerns are raised at the first information meeting; or

d) before they hold a second referendum under subsection 39(2) of the Indian Act.
8.7 The lands officer must also recommend to the First Nation Council that:

a) an interpreter be present at the information meeting, where this would be necessary to properly inform the electors;

b) the First Nation’s lawyers, accountants, marketing consultants, environmental consultants, etc. attend the meeting if they can help the First Nation Council to present the proposal and answer any questions; and

c) a departmental representative should attend the information meeting to explain the referendum process and take minutes, however, in rare cases, the Department could accept a certified copy of the minutes from the First Nation Council.

8.8 A departmental representative must attend the information meeting if it is expected that the proposed surrender or designation may be controversial, as a precaution to ensure that all the relevant information is impartially presented.

9. **Policy - Voting**

9.1 A referendum vote must be held by secret ballot for all surrenders and designations in accordance with the *Referendum Regulations*.

10. **Policy - Notice Requirements**

10.1 The electoral officer or the deputy electoral officer must post the Notice of Referendum at least 42 days before a referendum. In addition to the requirements under the *Referendum Regulations*, the Notice of Referendum package must:

a) give at least 14 days notice of the information meeting;

b) include a copy of the Absolute Surrender or Designation document as an attachment to the notice;

c) include a copy of the Information Document when mail out ballots are applicable; and,

d) either include a copy of the list of electors or say that the list will be posted at least 42 days before the date of the referendum.
11. Policy - List of Electors

11.1 a) The electoral officer must prepare a list of electors;
    
    b) The electoral officer and the Chief or member of the First Nation Council must sign the list of electors; and,
    
    c) The electoral officer or the deputy electoral officer must post the list of electors at least 42 days before the referendum in places the electoral officer deems are necessary.

11.2 The electoral officer or the deputy electoral officer should post the notice and the list of electors in locations where the general membership goes regularly.

11.3 The electoral officer may revise the elector’s list if an elector requests a revision because the list:
    
    a) omits an elector’s name;
    
    b) incorrectly sets out an elector’s name; or,
    
    c) includes the name of a person not qualified to vote.

11.4 An elector may apply to revise the list of electors according to the criteria set out in subsection 4 (5) of the Referendum Regulations.

11.5 Any revision of the list of electors must comply with the Referendum Regulations.

12. Policy - Voting Majority

12.1 Absolute Majority occurs when 50% of the eligible electors plus one consent to the proposal.

12.2 An absolute majority of eligible electors is not required to constitute valid consent at a referendum.

12.3 Majority of a Majority occurs when a majority of all eligible electors vote, and a majority of the ballots cast are in favour of the proposed surrender or designation.

12.4 At a first referendum, valid First Nation consent requires a "majority of a majority" vote in favour of the proposal.
12.5 **Vote Qualifying for Second Referendum** where less than a majority of eligible electors vote at the first referendum, but a majority of the electors who did vote supported the proposed surrender or designation, the vote fails. The First Nation Council may then ask the Minister to call a second vote under subsection 39(2) of the *Indian Act*.

12.6 **Simple Majority** occurs when, no matter how many electors are eligible to vote, a majority of those who actually cast a ballot vote in favour of the proposed surrender or designation.

12.7 At a second referendum, a simple majority is required to constitute valid consent.

12.8 Spoiled ballots are counted to determine the number of electors who actually voted. Spoiled ballots must not be counted as either votes in favour of or against a proposal. Note that spoiled ballots are not the same as ballots set aside under paragraphs 17.1(a) and 18.1 (a.1) of the *Referendum Regulations*. 
EXAMPLE 1
DETERMINING MAJORITY CONSENT

Example of an "Absolute Majority" (not required for valid consent to a surrender or designation)

100 electors are eligible to vote:

At least 51 eligible electors must vote in favour.

Example of a "Majority of a Majority" (required for valid consent at a first surrender or designation referendum)

100 electors are eligible to vote:

At least 51 eligible electors must vote (include spoiled ballots to count the total number who voted).

At least 26 electors out of the 51 must vote in favour.

Example of Voting Results which Qualify for a Second Referendum

100 electors are eligible to vote:

If 30 eligible electors vote (include spoiled ballots to count the number who voted), at least 16 electors out of the 30 must vote in favour.

Example of a "Simple Majority" (required for valid consent at a second referendum)

No matter how many electors are eligible to vote:

If 40 eligible electors vote, at least 21 of the electors must vote in favour.
13. Policy - Second Referendum

13.1 Where a first vote fails but meets the relevant criteria for holding a second referendum (less than a majority of electors voted at a referendum but a majority of these electors consented to the proposal), the Minister, usually at the request of the First Nation Council, may order a second referendum as provided in the Indian Act.

13.2 Where a first vote fails but does not meet the relevant criteria for holding a second referendum set out in the Indian Act and Referendum Regulations, or where a second vote fails to receive the support of a simple majority:
   a) the period for waiting to hold a subsequent "first" vote will be assessed on a case by case basis;
   b) the First Nation Council and the lands officer should consider factors such as limited resources, the chances for success, etc. before deciding to hold another vote.

13.3 Notice of a second referendum must refer to the proposal voted on at the first referendum, although extra information may be provided. The subject matter of the second vote and the question to be put to the electors must be identical to those in the first referendum.

13.4 Under subsection 39(3) of the Indian Act, a simple majority voting in favour of the proposal at the second referendum will be deemed to constitute consent by a majority of the electors of the First Nation.

EXAMPLE 2
SECOND REFERENDUM

A First Nation has 100 electors eligible to vote on a proposed designation. Only 49 electors vote at the first referendum but 25 electors consent to the proposal. Although the first vote fails, pursuant to subsection 39(2) of the Indian Act, the First Nation Council may ask the Minister to call a second referendum. At the second referendum, if 49 electors vote and 25 of those voters consent, a majority of electors will be deemed to have consented to the designation.
14. Policy - Documentation

14.1 The failure to submit any of the required documents may result in rejection of the proposed surrender or designation.

14.2 Precedent documents are available from regional offices.

14.3 Three sets of originals of the documents mentioned in paragraph 14.5 (l, m and p) below must be prepared and executed. The region and the First Nation Council each receive one set of documents. The other set is needed for registration in the Indian Lands Registry, following approval of the order accepting the surrender or designation.

14.4 Where a First Nation refuses to obtain legal or other professional advice with respect to a proposed surrender or designation, the lands officer should obtain a resolution from the First Nation Council waiving such advice and stating the reason for its refusal.

14.5 The Department requires the following documents:

   a) a copy of the BCR asking the Minister to order a referendum;

   b) where applicable, a copy of the BCR confirming the custom rules governing eligibility to vote for the Chief and Council of the First Nation;

   c) a copy of the Ministerial Order appointing the electoral officer;

   d) where applicable, a copy of the appointment of a deputy electoral officer by the electoral officer;

   e) a copy of the posted Notice of Referendum;

   f) a copy of the information meeting notice, where it is separate from the Notice of Referendum;

   g) a copy of the elector’s list which the electoral officer and either the Chief or a Councillor of the First Nation have certified;

   h) a copy of the Information Document;

   i) a copy of the minutes of the information meeting(s) (certified by a quorum of the First Nation Council if a departmental representative has not attended the meeting(s));
j) a copy of any other documents needed to show that the First Nation electors were fully informed;

k) an interpreter's oath, where applicable;

l) the Absolute Surrender or Designation document (also called the Instrument of Absolute Surrender or Instrument of Designation);

m) sworn certification of the Absolute Surrender or Designation document by the designated electoral officer and the Chief or a Councillor of the First Nation pursuant to section 40 of the Indian Act;

n) declaration of the examination of the ballot box under section 7 of the Referendum Regulations;

o) a polling statement under subsection 18(1)(d) of the Referendum Regulations, signed by the electoral officer and the Chief or a Councillor of the First Nation;

p) a statement of referendum results under subsection 19(a) of the Referendum Regulations signed by the electoral officer and the Chief or a Councillor of the First Nation;

q) a copy of the ballot used; and

r) a report of the results of the environmental assessment, if applicable.

14.6 An interpreter's oath and the certification of the Absolute Surrender or Designation document are affidavits. These sworn statements:

a) must be witnessed and stamped by a Commissioner of Oaths; and

b) must have each page initialled by the Commissioner of Oaths and stamped, if the affidavit is longer than one page.

14.7 Where a second referendum is held under subsection 39(2) of the Indian Act:

a) the Absolute Surrender or Designation document must be identical to the Absolute Surrender or Designation document for the first referendum; and,

b) the affidavits and statements for second votes must show that a first vote was held.
14.8 All of the documents outlined in this policy must be executed and kept on a regional file.

15. **When a First Nation does not consent**

15.1 If a First Nation does not consent to a proposed surrender or designation, the lands officer must still document the results of the vote and the reason(s) the surrender or designation failed.

15.2 Documents must be kept on the regional file but are not submitted for approval or registration.

16. **Process**

16.1 This section provides an overview of the process for the surrender or designation of reserve lands.

16.2 As early as possible, the First Nation Council forwards to the Department a BCR which meets the policy requirements in this Directive. This BCR notifies the Department of the proposed surrender or designation. In the BCR, the council should request the holding of a referendum.

16.3 The lands officer prepares the Ministerial Order calling a referendum and submits it for ministerial approval. This Ministerial Order will also include the appointment of the electoral officer who oversees the referendum or meeting.

16.4 If a change has to be made to the Ministerial Order for any reason, the lands officer will prepare a second Ministerial Order for approval. This must be completed before the applicable notice period begins.

16.5 The lands officer will:

a) discuss the general parameters of the proposal and the process in detail with the First Nation Council;

b) provide relevant information in the Department's knowledge and possession to the First Nation Council. This includes information about encumbrances, use, the results of any environmental assessment, and any development or investment proposals other than the one being considered;

c) recommend that the First Nation seek independent legal and other professional advice (such as financial, marketing, geological, etc.);
d) where a First Nation refuses to obtain such advice, obtain a BCR from the First Nation Council waiving the need for such advice and stating the reason(s) for refusal;

e) prepare the draft Absolute Surrender or Designation document and other documentation;

f) assist the First Nation Council in preparing an Information Document. The Information Document must contain sufficient detail to allow the First Nation electors to make an informed decision about the proposal;

g) review the Information Document and information provided to the First Nation by the developer or the First Nation's independent advisors. This review is to ensure that the document meets the minimum requirements and the information is complete and accurate;

h) inform the First Nation Council that at least one information meeting must take place before the surrender or designation vote and must be at least 14 days after the Notice of Referendum has been posted;

i) inform the First Nation Council that the Notice of Referendum must be posted at least 42 days before the day of the referendum;

j) arrange for any necessary interpreters; and

k) provide any other assistance requested by the First Nation.

16.6 The lands officer will revise documentation as necessary or suggest revisions to the First Nation.

16.7 The First Nation Council advises the Department of the date of the information meeting(s).

16.8 The electoral officer posts the Notice of Referendum at least 42 days before the referendum.

16.9 The electoral officer posts the following with the Notice of Referendum:

a) a copy of the Information Document, where possible, or notice of how and where copies will be made available to individual members, e.g. at the First Nation Council office or in household mailings; and

b) the signed list of electors.
16.10 The First Nation Council holds the information meeting(s), during which they discuss the Information Document with the electors. At the discretion of the First Nation Council, the lands officer or any of the First Nation’s independent advisors attend the meeting. The electoral officer must attend at least one meeting.

16.11 Either a departmental representative attends the information meeting and takes minutes, or the First Nation Council forwards a certified copy of the minutes to the lands officer.

16.12 The electoral officer carries out the vote and certifies the result according to the procedures set out in the *Referendum Regulations*.

16.13 If the vote has been successful, the Absolute Surrender or Designation document is signed by the Chief and Council of the First Nation. The electoral officer, and either the Chief or a Councillor of the First Nation, certify, according to section 40 of the *Indian Act*, that the First Nation has assented to the Absolute Surrender or Designation.

16.14 Where the First Nation electors do not consent to a proposed surrender or designation, the lands officer documents the result of the vote and the reason(s) that the surrender or designation proposal failed.

16.15 Where the vote fails because a majority of eligible electors did not vote, but a majority of those electors who did vote cast their ballot in favour of the proposed surrender or designation, and the First Nation Council wants to hold a second vote under the terms of subsection 39(2) of the *Indian Act* and subsection 30(1) of the *Referendum Regulations*, as applicable:

a) the First Nation Council submits a BCR requesting a second referendum;

b) the lands officer determines whether the terms for holding a second referendum have been met;

c) if the terms have been met, the Minister may, on the recommendation of the Regional Director General (or equivalent), order a second referendum; and,

 d) another information meeting may be held.
16.16 Where a vote at a first referendum fails but does not meet the criteria set out in subsection 39(2) of the Indian Act or subsection 30(1) of the Referendum Regulations for holding a second referendum, or where a second vote fails, the situation is reviewed to decide whether a subsequent "first" vote will be held (see Section 13 of this Directive).

16.17 Following a successful vote, the lands officer prepares a submission recommending acceptance of the surrender or designation. The submission must meet the policy requirements of this directive (see Section 14 of this Directive).

16.18 The lands officer ensures that all documents required by this directive are prepared and executed by the correct party.

16.19 The lands officer prepares a submission recommending acceptance of the surrender or designation and forwards the submission to the Department Headquarters (see chapter 13 of this Manual).

16.20 The lands officer advises the First Nation Council of the acceptance or rejection of the surrender or designation as soon as possible.

16.21 Where the surrender or designation is accepted, it is registered in the Indian Lands Registry.

16.22 The electoral officer ensures that the Referendum Regulations are followed in depositing and destroying ballots.

17. References

17.1 For more information you should refer to:

a) Chapter 13 of this Manual for information on preparing submissions recommending acceptance;

b) the Referendum Regulations for a comprehensive understanding of the process for holding a referendum;

c) Indian Lands Registration Manual.
Chapter 5

Directive 5 - 4

How to Surrender or Designate Reserve Lands by Referendum

Annex A: Sample Designation Document for Governor in Council Approval
DESIGNATION DOCUMENT
(with or without lease attached)

WHEREAS:

A. The ___________ Indian Reserve No. _______ (the “Reserve”) in the Province of ______________ is a reserve within the meaning of the Indian Act and has been set apart for the use and benefit of the ______________ First Nation Band (the “Band”); and

B. The Band desires that certain lands in the reserve be designated pursuant to subsection 38(2) of the Indian Act for the purposes of leasing or granting interests in the lands subject to the terms and conditions set out in this Designation; and

C. In accordance with the Indian Act, this Designation has been assented to by a majority of the electors of the Band.

WITNESS THAT, pursuant to subsection 38(2) of the Indian Act, the Band hereby designates all of the rights and interests of the Band and its members required to carry out the purposes of this Designation, in that part of the Reserve containing ___________ hectares ( ___________ acres), more particularly described as follows:

[add land description]

In the Province of ______________,

(the “Lands”)

Excepting thereout all mines and minerals, whether precious or base, solid, liquid, or gaseous.

TO HAVE AND TO HOLD the Lands unto Her Majesty in right of Canada (“Canada”) for the term of ___________ (____ ) years that begins upon the acceptance of this Designation by the Governor General in Council;
FOR THE FOLLOWING PURPOSES, namely:

[Describe the purposes and reasons for the Designation, including the nature and details of the lease, to the extent known.]

1. Identify the permitted uses of the lands for which an interest is being granted (i.e. commercial, residential development etc.).

2. Identify the parties to any headless(s), if known.

3. Identify the rent (market, nominal or specific) or fees to be charged for all of the leases contemplated. If rent is less than market or nominal then a release must appear in the Designation and be voted on by the electors.

(d) Specify all other terms, conditions and purposes relevant to the Designation.]

AND FOR THE FURTHER PURPOSES OF granting such easements, permits, rights-of-way, licences of occupation, covenants or other similar rights or interests and amendments of such interests as may be necessary or ancillary to the purposes set out above;

AND ON THE CONDITION that all leases are to be consented to by the Chief and Council of the Band. The Chief and Council of the Band will take reasonable steps to inform all band members of the terms and conditions of the lease(s) issued pursuant to this Designation;

NOTWITHSTANDING the term and purposes of this Designation, the Band authorizes the Band Council to revoke this Designation from all or part of the Lands, by way of resolution made in accordance with subsection 2(3)(b) of the Indian Act, on the Band’s behalf and subject to the approval of the Governor General in Council, provided there are no existing rights or interests, legal or equitable, vested or contingent, granted pursuant to this Designation then in existence on the affected Lands;

NOTWITHSTANDING the term and purposes of this Designation, the Band authorizes the Band Council, by way of resolution made in accordance with subsection 2(3)(b) of the Indian Act, on the Band’s behalf and subject to the approval of the Governor General in Council, to amend this designation for the purpose of correcting a clerical omission, mistake, or manifest error or other minor amendments all of which shall be determined by Canada.
AND ON THE CONDITION that all payments made to Canada, by virtue of any lease, permit, licence or disposition of any interest less than fee simple, be credited to the funds of the Band as Indian moneys.

IN WITNESS WHEREOF the undersigned Chief and Councillors have on behalf of the ____________ First Nation Band set their hands this ____ day of ____________, 200__.

SIGNED AND DELIVERED BY:

Chief ____________, the Chief of the ____________ First Nation Band ) (Signature of Chief)

and by:

Councillor _______________ ) (Signature of Councillor)

Councillor _______________ ) (Signature of Councillor)

Councillor _______________ ) (Signature of Councillor)

Councillor _______________ ) (Signature of Councillor)

Councillor _______________ ) (Signature of Councillor)

Councillors of the ____________ First Nation Band, in the presence of:

 ) (Signature of Witness as to all signatures)

Name of Witness (Print)
Directive 5-5
How to Terminate or Amend a Designation

1. Purpose

1.1 This Directive provides information on how to revoke or amend a designation.

2. General

2.1 An absolute surrender cannot be revoked or amended, since the First Nation’s interest in the land is extinguished when the Governor in Council accepts the surrender.

2.2 A designation may be terminated by operation of law (expiry of the term) or revocation. It may also be amended to change any of its terms.

2.3 While the Indian Act is silent on the revocation or amendment of designations:

a) the Governor in Council has the authority to repeal, amend or vary a regulation which it has enacted;

b) since an order of the Governor in Council accepting a designation is deemed to be a regulation, the Governor in Council may revoke, amend or vary the order;

c) to revoke or amend a designation accepted by the Governor in Council, a First Nation must use the voting process set out in the Referendum Regulations.

2.4 The revocation or amendment of a designation accepted by the Governor in Council, other than a termination by operation of law (expiry), must be submitted to the Governor in Council for acceptance.

3. Authorities

3.1 Relevant authorities include:

Indian Act, R.S.C. 1985, c. I-5, subsection 39(1) (which is reproduced in Directive 5-1 of this Manual);
31. (4) Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the same manner and subject to the same consent and conditions, if any, to repeal, amend or vary the regulations and make others.

4. Policy

4.1 A designation which expires at the end of its term terminates by operation of law. When this occurs:

a) the First Nation does not have to initiate the process or vote to terminate the designation, since the land automatically becomes available for its use and benefit;

b) the termination does not have to be accepted by the Governor in Council or Minister;

c) the Department should give the First Nation reasonable written notice of the termination to allow the First Nation to consider economic development or other land use opportunities.

4.2 While a designation which has been accepted by the Governor in Council is still in effect, it may be fully or partially revoked or amended to change any of its terms if:

a) in the case of a partial revocation or amendment, the lands have not been leased under the terms of the designation or, if they have been leased, the lease is modified as required ;

b) in the case of a full revocation, no existing rights were granted under the terms of the designation (the Department may consider an exception if the revocation can be made subject to the existing interests);

c) depending on the wording of the designation, either the First Nation Council or the eligible electors consent; and,

d) the Governor in Council accepts the revocation or amendment.
EXAMPLE 1
PARTIAL REVOCATION

A designation covers a number of parcels in a reserve. Some of these parcels have been leased under the designation, but several others remain unleased. The First Nation Council wishes to allot the unleased land to an individual member for development but cannot do so while the land remains designated. The First Nation Council may request an amendment of the designation to delete the desired parcels from the designation.

4.3 The following clause grants the First Nation Council the authority to revoke and/or amend a designation. Unless the precedent clause outlined in this section or its predecessor for previous designations, is in the designation being revoked or amended, the electors of a First Nation must vote on the proposal:

“NOTWITHSTANDING the term and purposes of this designation, the Band authorizes the Band Council to revoke this designation from all or part of the Lands by way of resolution made in accordance with subsection 2(3)(b) of the Indian Act, on the Band’s behalf and subject to the approval of the Governor General in Council provided there are no existing rights or interests, legal or equitable, vested or contingent, granted pursuant to this designation then in existence on the affected Lands”;

“NOTWITHSTANDING the term and purposes of this designation, the Band authorizes the Band Council, by way of resolution made in accordance with subsection 2(3)(b) of the Indian Act, on the Band’s behalf and subject to the approval of the Governor General in Council, to amend this designation for the purpose of curing or correcting a clerical omission, mistake or manifest error or other minor amendments, all of which shall be determined by Canada”.

4.4 A First Nation Council may wish to amend a designation which contains the clause set out in paragraph 4.3 of this Directive. Where this is planned, the Department:

a) must determine whether the proposed amendment modifies the designation in such a material way that the eligible electors who voted for the designation would not have reasonably contemplated such an amendment; and,
4.5 Since having a clause which allows a First Nation Council to request a revocation or amendment is beneficial, the lands officer must:

a) inform the First Nation Council that the designation may include the clause set out in paragraph 4.3 of this Directive;

b) inform the First Nation Council that, should they so wish, the clause may be worded to allow only for the revocation (either fully or partially), but not the amendment, of the terms of the designation;

c) inform the First Nation Council that where the clause set out in paragraph 4.3 of this Directive exists and the First Nation Council intends to amend any material term(s), the department will apply the policy set out in paragraph 4.4 of this Directive; and,

d) ensure that the Information Document for the designation clearly explains the scope of the First Nation Council's authority granted under the clause set out in paragraph 4.3 of this Directive.

4.6 Where a vote is necessary to revoke or amend a designation:

a) the lands officer must search the Indian Lands Registry to identify any outstanding rights (including oil and gas interests) in the land concerned;

b) the lands officer must reasonably determine whether any pending agreements affecting the land in question have not yet been registered in the Indian Lands Registry;

c) the First Nation will vote using the Referendum Regulations;

d) statutory and policy requirements must be strictly followed, such as the appointment of an electoral or designated departmental officer, proper notice, posting of an elector's list, preparation of an Information Document, holding of an information meeting, required consent of the electors, certification of the revocation or amendment, etc. (see Directive 5-4 of this Manual); and
e) the lands officer must ensure that the First Nation Council explains the nature of the revocation or amendment, including the reasons behind the proposal, in the Information Document.

4.7 The First Nation may vote on a revocation (either full or partial) and a new designation simultaneously. Where a simultaneous vote is planned, the lands officer must ensure that the First Nation Council outlines the dual purpose of the vote in the Information Document and that they will put two clearly distinguishable questions to the electors.

4.8 The documentation used in a designation is also used for the revocation or amendment of a designation, with necessary modifications (see Directive 5-4 of this Manual).

5. Process

5.1 This section provides an overview of the process to revoke or amend a designation of reserve lands.

5.2 Where a designation terminates by operation of law (expires), the lands officer gives the First Nation Council reasonable written notice of the termination. This written notice will ensure that the First Nation Council can consider economic development or other land use opportunities.

5.3 Where a vote is necessary to revoke or amend a designation:

a) the First Nation Council submits a Band Council Resolution (BCR) stating it wishes to revoke or amend a designation and requests a referendum;

b) the lands officer searches the Indian Lands Registry to identify any outstanding rights (including oil and gas interests) in the land concerned;

c) the lands officer reasonably determines whether any pending agreements affecting the land in question exist which have not yet been registered in the Indian Lands Registry;
d) the Department follows the statutory and policy requirements set out in the *Indian Act*, claims implementation acts, the *Referendum Regulations* and this Chapter, such as the appointment of an electoral officer, proper notice, posting of an electors list, preparation of an Information Document, holding an information meeting, required consent of the electors, certification of the revocation or amendment, preparation of various statements, etc. (see Directive 5-4);

e) the lands officer prepares and submits a submission recommending the revocation or amendment;

f) the lands officer notifies the First Nation about whether or not the revocation or amendment has been accepted; and

g) if the revocation or amendment is accepted, the lands officer submits the Revocation or Amendment of Designation document and the order accepting the revocation or amendment for registration in the Indian Lands Registry.

5.4 Where a First Nation Council is relying on the precedent clause set out in paragraph 4.3 of this Directive to request the revocation or amendment without a vote:

a) the First Nation Council submits a copy of the approved designation document containing the clause along with a BCR requesting the revocation or amendment;

b) the lands officer verifies that the required quorum of the First Nation Council has voted on and executed the BCR;

c) the lands officer ensures that the wording of the clause gives the First Nation Council the authority to request a revocation or amendment without a vote;

d) the lands officer reviews the amendment or revocation for any potential problems;

e) the lands officer searches the Indian Lands Registry to identify any outstanding rights (including oil and gas interests) in the land concerned;
f) the lands officer reasonably determines whether any pending agreements affecting the land in question exist which have not yet been registered in the Indian Lands Registry;

g) the lands officer prepares and submits a submission recommending acceptance of the revocation or amendment;

h) the lands officer notifies the First Nation about whether or not the revocation or amendment has been accepted; and

i) if the revocation or amendment is accepted, the lands officer registers the Revocation or Amendment of Designation document and the order accepting the revocation or amendment in the Indian Lands Registry.

6. References

6.1 For further information you should refer to:

a) Chapter 10 of this Manual for information on returning unsold surrendered land to reserve status under the Additions to Reserve policy;

b) Chapter 13 of this Manual for information on preparing submissions recommending acceptance;

c) Indian Lands Registration Manual.