

Parliamentary Research Branch

MR-125E

INDIAN RESERVES: PROCEDURE FOR ADDING LAND

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14 November 1994

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INTRODUCTION

These notes briefly discuss the current government policy and procedures for adding land to some Indian reserves and for creating others.

POLICY

Section 91 (24) of the *Constitution Act, 1867* provides the federal government with exclusive legislative jurisdiction over "Indians, and Lands reserved for the Indians." The federal Department of Indian Affairs and Northern Development (DIAND) has used this authority to implement a policy on adding land to existing Indian reserves and creating new ones. The policy states that a proposal to allow such an expansion will be approved only if it meets one or more of the following "policy justifications":

- to meet an outstanding treaty entitlement or specific land claim settlement obligation;
- where a province offers land to a band;
- the return of unsold surrendered land;
- in exchange for expropriated land;
- for social reasons;
- for economic reasons;
- for geographic reasons;
- relocations due to national disasters or restricted reserve development;
- to provide landless band or communities with a land base.

SITE-SPECIFIC CONSIDERATIONS

Each proposal to create or add to a reserve must also be evaluated according to several criteria identified by the Department as site-specific considerations. These include general considerations and inter-governmental considerations.

A. General

When possible, any additions to reserves should be contiguous and reserve boundaries should follow natural waterways.

New reserve land must undergo an environmental review as outlined in Part II of Chapter 9 of the Department's policy manual. Land to be acquired may present environmental hazards including "buried wastes, controlled substances, underground storage tanks, contaminated soil, surface and groundwater pollution, process effluent discharge, water accumulation, soil gas accumulation and toxic spills." Such environmental hazards, and the growing public awareness and concern over environmental issues, have forced the Department to establish environmental review procedures which must be followed before the Department acquires any land either to add to an existing reserve or to create a new one.

Funding for the new reserve land must come out of the existing approved departmental budget for the region in question. Proposals that require funding from outside of this budget may be approved, but only in exceptional cases.

A proposal for new reserve lands or the creation of a new reserve must be shown to be cost-effective in relation to the number of people who will benefit and in relation to the availability of suitable surplus federal Crown land, the acquisition of provincial Crown land or private land, and the exchange of existing reserve land for other, more suitable, land. The impact of the proposal on the economic well-being of the band must be considered using such criteria as the long-term business, employment and taxation potential.

Furthermore, the proposal must be examined to determine the effects it will have on other federal departments. DIAND must receive confirmation that any departments whose costs may be increased as a result of the new reserve lands are able to assume these additional costs.

The title to the land should be as free as possible of restrictions, restrictive covenants, reversionary rights and third party rights. In addition, bands should be informed of whether or not title to mines and minerals is included in the land added to a reserve.

The federal government must make arrangements for public access to the new reserve lands and for occupants' access to public utilities.

B. Inter-Governmental

The federal Crown, when converting non-reserve land into an Indian reserve, must consider whether or not it has the jurisdiction to transfer the land. While the federal Crown clearly has the authority to create Indian reserves on federal Crown land, it does not have the power to appropriate provincial Crown land for that purpose. In such cases the cooperation of the provincial government is essential.

Federal policy requires DIAND to consult with the government of the province in which a reserve is to be established or enlarged to assess the potential impact of the proposal on provincial programs and services. Furthermore, the local government should be consulted if the created or expanded reserve land is to be located within a municipality. These consultations would deal with the municipality's loss of tax revenues, arrangements for the provision of, and payment for, municipal services, the application and enforcement of municipal by-laws on the reserve, and the establishment of a joint consultation process and a dispute resolution mechanism.

PROCEDURE

The process of creating a new Indian reserve or adding to an existing one begins when the Indian band passes a Band Council Resolution making this request. The DIAND regional officials analyze this Resolution to ensure that it conforms with the policy justifications and site-specific considerations discussed above. An environmental review of the proposal is begun at this stage.

The regional officials then prepare a report and recommendations for the Regional Director General, who can reject the proposal, approve it in principle, or, in certain other cases, prepare a recommendation for the Assistant Deputy Minister of Lands, Revenue and Trusts. Such cases are those where (a) the Resolution is outside the region's authority or (b) the Regional Director General believes the proposal should be reviewed by the Deputy Minister. In these cases the region's report and recommendations go to the Headquarters Additions Committee for review in light of the departmental policy justifications and site-specific considerations. This committee formulates a recommendation for the Deputy Minister, who decides whether to reject the proposal or approve it in principle.

Any conditions to which the approval is subject (for example environmental steps such as clean-up of a contaminated site) must be met by the relevant party at this stage. If there are serious difficulties in implementing the conditions, the proposal may have to be returned to the Deputy Minister for a revised mandate. Only when these matters have been attended to can the acquisition proceed.

The band, with the assistance of departmental officials and the Department of Justice, can now enter into negotiations with the landowner for a conditional agreement to acquire the land. The agreement must include any relevant conditions imposed at the approval in principle stage as well as any terms and conditions related to the environmental review process.

If the cost of the property exceeds \$75,000, the approval of the Treasury Board is necessary before regional officials can proceed with acquiring title to the property and carrying out the necessary surveys. Following the completion of the acquisition, DIAND must prepare a submission to Cabinet in order that the Governor in Council can set the land apart as a reserve.