

**INDEX TO CHAPTER 9**  
**LAND TRANSACTIONS UNDER SECTION 35**

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## Directive 9-1

# Transactions Under Section 35

### 1. Purpose

- 1.1 This document explains when and how reserve lands may be transferred or granted under section 35 of the *Indian Act*.

### 2. General

- 2.1 Definitions in this directive:

- a) **Exchange Lands**, means lands held by the expropriating authority that form part or all of the compensation to a First Nation for a Section 35 Transaction.
- b) **Expropriating authority**, means a provincial government, a municipal or local authority, or a corporation that federal or provincial law authorizes to take or to use lands or any interest in lands without the consent of the landowner.
- c) **Fact Letter**, means a letter from Canada sent both to a First Nation and to the expropriating authority setting out the substantive facts (including compensation, legal descriptions, the handling of third party interests and other requirements set out in the Federal Requirements List) of the Section 35 Transaction.
- d) **Fair Market Value**, means the most probable price that a property will bring in a competitive and open market under all conditions requisite to a fair transaction and not affected by undue stimulus, with the seller and purchaser each acting prudently and knowledgeably, and assuming that the property is held by the seller in fee simple (notwithstanding that the property may have been reserve lands and inalienable except to the Crown) and has no charges or encumbrances existing against title.
- e) **Federal Requirements List**, means the list of standard legal and policy requirements of Canada necessary to process a Section 35 Transaction, as set out in Annex C: Federal Requirements List.

- f) **Land Status Report**, means 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 Lands Registry, and appropriate departmental files. The report identifies existing registered interests such as leases, permits, easements, Certificates of Possession, or encumbrances such as cardex holdings or surrenders. It should also contain information on former reserve lands which the expropriating authority may be transferring to Canada; the Lands officer should determine whether there are reversionary interests attached to such former reserve lands.
- g) **Locatee Lands**, means reserve lands which have been validly allotted under section 20 of the *Indian Act*, to which lawful possession is generally evidenced by a Certificate of Possession. Lawful possession is also held under "No Evidence of Title Issued" (NETIs), location tickets, Notices of Entitlement (NEs), or cardex holdings.
- h) Official Plan or **CLSR Survey**, means 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 Surveys Act*.
- i) **Section 24 or 49 Transfer**, means a transfer of the right to possession of lands in a reserve by one or more locatees to the First Nation pursuant to sections 24 or 49 of the *Indian Act*, and approved by the Minister, to facilitate a Section 35 Transfer.
- j) **Section 35 Agreement**, means a final agreement between a First Nation Council and the expropriating authority, usually in the form of a letter or memorandum of understanding with respect to a Section 35 Transaction. This Section 35 Agreement must satisfy the requirements set out in **Annex C: Federal Requirements List**.
- k) **Section 35 Easement**, means the grant or transfer of less than a full interest in reserve lands to an expropriating authority for a specific purpose. When Canada grants or transfers less than a full interest under Section 35 of the *Indian Act*, the underlying interest remains with Canada and continues to have "reserve" status.
- l) **Section 35 Lands**, means reserve lands which are subject to either a proposed Section 35 Transfer or a proposed Section 35 Easement.

- m) **Section 35 Transaction**, is a generic term used to describe a Section 35 Transfer, or a Section 35 Easement, authorized pursuant to section 35 of the *Indian Act* and pursuant to the *Federal Real Property and Federal Immovables Act* ("FRPFIA").
  - n) **Section 35 Transfer**, means the grant or transfer of a full interest in reserve lands to an expropriating authority, in lieu of the expropriating authority acquiring the lands without the consent of the owner pursuant to its expropriation powers. The grant or transfer is usually made for a specific purpose and is subject to a requirement that the lands be returned to Canada when no longer needed for that purpose.
- 2.2 Various federal and provincial statutes allow the taking of private lands by provincial or municipal governments, a local authority and certain corporations. Such takings are known as expropriations. Normally, such powers of expropriation cannot be applied to reserve lands. However, under Section 35 of the *Indian Act* the Governor in Council may consent to the taking or using of reserve lands by an expropriating authority. After the Governor in Council consents to the taking or using of the lands, the lands may be taken or used under the expropriating legislation, or the Governor in Council may authorize a transfer or grant of the lands to the expropriating authority. The authorization of any Section 35 Transfer or Section 35 Easement is subject to any terms that the Governor in Council may prescribe.
- 2.3 Where the Governor in Council authorizes a Section 35 Transfer or Section 35 Easement, the actual grant or transfer is done under the FRPFIA.
- 2.4 A Section 35 Transaction triggers certain Crown responsibilities to the First Nation whose land is the subject of the transaction. In this respect, the Crown is obliged to ensure minimal impairment of the reserve lands by consenting to, granting or transferring only the minimum interest required in order to fulfill the public purpose for which the land is required. It should also be noted that the Governor in Council cannot consent to the taking or using of, nor authorize a grant or transfer of, a greater interest in land than the expropriating authority is authorized to take under its own expropriating legislation. The lands officer should determine (in accordance with any applicable policy or procedures or in consultation with the policy sector of the department and with DOJ) that sufficient evidence exists to support the conclusion that only a minimal interest in the reserve will be granted or transferred. In addition, departmental staff should carefully document all government dealings with the First Nation and the expropriating authority concerning the nature and extent of the interest to be granted under Section 35.

- 2.5 The policy set out in this Chapter is a national policy. However, departmental staff should be aware that it may be necessary for each region to address the specific needs of their respective province(s) in relation to Section 35 Transactions by a province.

### 3. General: Legal Interests Involved

- 3.1 The nature of the legal interests involved in Section 35 Transactions varies depending on the statutory power of the expropriating authority and the purpose for which the authority requires the land.
- 3.2 Legal title to reserve lands is vested in the federal Crown.
- 3.3 Under Section 35, if the statutory expropriation powers of the expropriating authority allow for the taking or using of a full interest, Canada may convey its full interest in the reserve land or it may convey a lesser interest, such as an easement.
- 3.4 The means used to convey Canada's interest depends on the nature of the expropriating authority. For example:
- a) When Canada conveys an interest in the reserve land to a municipal or local authority or a corporation, it "grants" that interest to the expropriating authority.
  - b) When Canada conveys an interest in reserve lands to a provincial government, it does not transfer the interest but "transfers the administration and control" of that interest in the lands.
- 3.5 When Canada grants its full interest to a municipal or local authority or a corporation, or when it transfers the administration and control **of its full interest** to a provincial authority, the granted or transferred lands lose their "reserve" status.
- 3.6 An easement is a right of use over the property of another. When Canada grants or transfers the administration and control of an easement under Section 35, the underlying interest remains with the Crown and continues to have "reserve" status.

- 3.7 As a matter of policy, when Canada grants or transfers the administration and control of any interest in reserve lands under Section 35, the Crown expressly retains a reversionary interest in those lands. The effect of this reversionary interest is that when the expropriating authority no longer requires the land for the purpose for which they acquired it, the interest granted or transferred is returned to Canada. This land is returned to Canada, but is not necessarily returned as reserve.

#### 4. General: Use of Section 35

- 4.1 While not a requirement of the *Indian Act*, Section 35 is usually used when an expropriating authority has negotiated an arrangement with the First Nation. The First Nation then asks Canada to grant or transfer the land or an interest in the land to the expropriating authority. If granting or transferring a less intrusive or destructive interest in the land can meet the expropriating authority's need for the land, it is the department's obligation to use the less intrusive option. At the very least, the best practice would be for the department to make the First Nation aware of the less intrusive option, if there is one.
- 4.2 Section 35 Easements are commonly used when a public utility requires land to run transmission lines through a reserve. Examples of such Section 35 Easements are aerial easements for high tension transmission lines and underground easements for pipelines, water lines and gas lines. However, following the *Opetchesaht* decision, many of these may be given by way of section 28(2).
- 4.3 The following example illustrates the range of uses which section 35 may satisfy. Remember that the expropriating authority's expropriation legislation must allow the proposed use and must allow for the expropriation of the interest proposed to be transferred; ie., the full or fee simple interest if that is the interest proposed to be transferred. Whenever possible, grant a less intrusive interest, such as a lease or permit, in any of the following situations.
- 4.4 When a grant or transfer of an interest in reserve land by the use of a Section 35 Transaction is proposed to be completed, the expropriating authority must provide the department with the following:
- a) evidence of its statutory power to expropriate the interest (tenure) it proposes be transferred to it;
  - b) a written rationale adequate to justify why such tenure is necessary for the use for which the land is proposed to be granted or transferred; and

- c) the methodology for assessing the value of the compensation proposed to be paid to the First Nation, which compensation should be shown to compensate for the full Fair Market Value and for the loss to the First Nation of the benefit of reserve status of the land to be granted or transferred. The First Nation's consent must acknowledge the granting or transferring of such an interest.

## 5. Authorities

### 5.1 Section 35 of the *Indian Act* states that:

- 35(1) *Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.*
- (2) *Unless the Governor in Council otherwise directs, all matters relating to compulsory taking or using of lands in a reserve under subsection (1) are governed by the statute by which the powers are conferred.*
- (3) *Whenever the Governor in Council has consented to the exercise by a province, a municipal or local authority or a corporation of the powers referred to in subsection (1), the Governor in Council may, in lieu of the province, authority or corporation taking or using the lands without the consent of the owner, authorize a transfer or grant of the lands to the province, authority or corporation, subject to any terms that may be prescribed by the Governor in Council.*
- (4) *Any amount that is agreed on or awarded in respect of the compulsory taking or using of land under this section or that is paid for a transfer or grant of land pursuant to this section shall be paid to the Receiver General for the use and benefit of the band or for the use and benefit of any Indian who is entitled to compensation or payment as a result of the exercise of the powers referred to in subsection (1).*

- 5.2 Section 35 creates a two-step process for the authorization of transfers or grants to expropriating authorities. The two steps are processed concurrently. First, consent to the taking or using of reserve lands is given under subsection 35(1) by Order-in-Council. Second, the transfer or grant of reserve lands is authorized under subsection 35(3) by Order-in-Council, or the lands are taken or used under the applicable expropriating legislation under subsection 35(2).

5.3 The provisions of FRPFIA govern the actual transfer or grant of an interest in reserve lands. The FRPFIA creates a mechanism for the conveyance of interests in federal lands. The following provisions are most relevant to section 35 grants or transfers:

2. *In this Act, ... "interest" means*
  - (a) *in relation to land in any province other than Quebec, any estate, right title or interest in or to the land, and includes an easement, a servitude and a lease ...*
4. *Subject to any other Act, no disposition or lease of federal real property or federal immovables shall be made and no licence shall be given in respect of any such property except in accordance with this Act.*
- 5.(1) *Federal real property may be granted and federal immovables may be conceded*
  - (a) *by letters patent under the Great Seal; or*
  - (b) *by an instrument of grant or an act of concession, in a form satisfactory to the Minister of Justice, stating that it has the same force and effect as if it were letters patent.*
- (2) *Federal real property and federal immovables within Canada may, at the discretion of the Minister of Justice, be granted or conceded, as the case may be, by any instrument or act by which, under the laws in force in the province in which the property is situated, real property and immovables may be transferred by a natural person.*
- 11.(1) *An instrument transferring administration and control of federal real property or an act transferring administration and control of federal immovables to Her Majesty in any right other than Canada pursuant to regulations made under paragraph 16(2)(e) shall be signed by the Minister having the administration of the property and countersigned by the Minister of Justice.*
- (2) *A grant, concession, vesting order or other conveyancing instrument or transfer act in favour of Her Majesty in respect of any real property or immovable belonging to Her Majesty in any right other than Canada results, on its acceptance, in Her Majesty having administration and control of the property.*

5.4 The regulations under FRPFIA further provide that:

- 5.(1) *A Minister may transfer to Her Majesty in right of a province, by instrument satisfactory to the Minister of Justice, the administration and control of the entire or any lesser interest of Her Majesty in any federal real property, either in perpetuity or for any lesser term.*
- (2) *A Minister may accept on behalf of Her Majesty a transfer of the administration and control satisfactory to the Minister of Justice of the entire or any lesser interest of Her Majesty in right of a province in any real property, including such transfers made by grant, vesting order or other conveyancing instrument, either in perpetuity or for any lesser term.*

- 11.(1) *The Minister of Justice shall establish and operate a document depository at the Department of Justice that shall contain copies of the following instruments:*
- (a) *grants of federal real property ...*
  - (b) *transfers of administration and control of real property and acceptances of such transfers;*

## 6. Policy

- 6.1 The expropriating authority must obtain First Nation Council's consent before seeking the Governor in Council's consent to the taking or using of reserve lands. The taking or using of reserve lands without First Nation consent must only be sought in exceptional circumstances, with the support of departmental headquarters and the Department of Justice ("DOJ").
- 6.2 The department will not assume an active role in negotiations between the expropriating authority and the First Nation unless requested by the First Nation, and/or a locatee. It is up to the First Nation and the locatees to retain their own expert advisors, including legal counsel. In most cases Canada's role is limited to the administration of the details set out in this Policy. The First Nation and all locatees must obtain independent legal advice whether or not Canada has consented to assist them.
- 6.3 The final **Section 35 Agreement** between the expropriating authority and the First Nation must address, at a minimum, the following points:
- a) **Purpose:** The purpose of the Section 35 Agreement is to clearly articulate the terms agreed to by the First Nation and the expropriating authority.
  - b) **Compensation:** The payment of compensation does not authorize the use or occupation of the lands. Compensation is paid to the Receiver General for Canada to be held in suspense until the Order-in-Council is passed, and the Section 35 Transaction is completed under FRPFIA.
  - c) **Minerals:** Canada retains all rights to mines and minerals and their extraction.
  - d) **Surveys and Land Descriptions:** The expropriating authority must provide a registerable legal description for both Section 35 Lands and any Exchange Lands to be reviewed and approved by the Regional Surveyor, Natural Resources Canada. A CLSR Survey is required. The expropriating authority should assume the survey costs.

- e) **Appraisals:** The expropriating authority must provide an estimate or one or more independent appraisal reports for Section 35 Lands or Exchange Lands depending on the value of the lands. The purpose of the estimate or appraisal report(s) is to confirm the adequacy of the compensation. The estimate or appraisal report(s) must be based on an assessment of the present day Fair Market Value, and may be reviewed by the Real Estate Division of Public Works and Government Services Canada ("PWGSC"). Refer to the "Treasury Board Open and Fair Real Property Transactions Policy" to find the required number and form of reports.
- f) **Environmental Protection:** Where the expropriating authority is a federal entity, either DIAND or the other federal authority must ensure that any environmental requirements under *CEAA* are met. Where the expropriating authority is not a federal entity (i.e. a provincial entity), DIAND must ensure that any environmental requirements under the *CEAA* are met. Where lands are exchanged, DIAND must ensure that an environmental assessment, and any required environmental clean-up, are done on the land that will become reserve land. The expropriating authority will fund the assessment and clean-up. Refer to Chapter 12 of this manual for further details about environmental assessments.
- g) **Individual Interests:** The expropriating authority must negotiate either directly with a locatee or through the First Nation. In those cases where a Section 35 Transfer is contemplated, the expropriating authority must obtain from the locatee(s) an executed form for the "Transfer of Land in an Indian Reserve" pursuant to section 24 of the *Indian Act*.
- h) **Encumbrances:** Any existing surrenders and interests of non-Indian third parties, such as registered leases or permits, must be dealt with to the satisfaction of Canada.

The expropriating authority is responsible for obtaining the consent of lessees or permittees. If the Section 35 Lands are encumbered by a leasehold or permit interest, then, subject to the expropriating authority obtaining the consent of the lessee or permittee, the department may cancel or amend such lease or permit, as the case may be, prior to the Section 35 Transaction. The expropriating authority is responsible for all costs to obtain such cancellation or amendment. DOJ should be consulted in cases where the lessee or the permittee does not provide its consent. If the Section 35 Lands are subject to a surrender (e.g. leasing, merchantable timber, etc.), then Canada may require an amendment or revocation of the surrender prior to processing the Section 35 Transaction. However, some surrenders or designations are not incompatible with, and may make provision for the granting of Section 35 Transfers.

- i) **Interim Use and Occupation:** Without a Section 28(2) or Section 53(1) interim use and occupation permit (see Directive 9-2), the expropriating authority cannot use or occupy the reserve land in question until the Section 35 Transaction is complete.
- 6.4 The department must obtain First Nation consent to the proposed grant or transfer by way of a valid **Band Council Resolution** ("BCR"). Accompanying, but not part of, the BCR must be the appropriate documentation reflected in **Annex C: Federal Requirements List**, which includes the following:
- a) a copy of the Section 35 Agreement between the First Nation and the expropriating authority;
  - b) any applicable executed locatee Section 24 Transfer documents;
  - c) A copy of the estimate or independent appraisal(s) of land value information;
  - d) A copy of the environmental assessment completed by the expropriating authority;
  - e) A copy of the CLSR Survey.
- 6.5 The **BCR** should be accompanied by the documentation referred to in **Annex C: Federal Requirements List**. The BCR must contain the following information:
- a) **Request:** The BCR must include a request that Canada's full interest in the lands be granted or transferred or that an easement be granted or transferred pursuant to section 35 of the *Indian Act*.
  - b) **Compensation:** The BCR must identify separately the total compensation package to be paid to the First Nation and any individual locatees.
  - c) **Locatee Interests (if applicable):** If the Section 35 Transaction deals with Locatee Lands only, then the BCR must specify the split, if any, of the compensation to be paid to the locatee and/or the First Nation.
  - d) **First Nation Support:** The BCR should preferably say whether the proposed grant or transfer has the support of the First Nation membership. If it is a contentious issue among the First Nation members, this should be indicated and details attached.

The BCR should also contain -

- e) **Legal Advice:** The First Nation Council should provide evidence satisfactory to Canada that it has obtained independent legal advice with respect to the execution of the Section 35 Agreement.

## 7. Policy: Individual Land Holders ("locatees")

- 7.1 The Lands Officer will complete a **Land Status Report** (see Annex B) to identify and inform the expropriating authority of any **individual locatee** whom the proposed grant or transfer may affect.
- 7.2 The expropriating authority should conduct all negotiations directly with individual locatees. However, the expropriating authority may also deal with a First Nation Council or the department, where locatees have asked the First Nation, or the department to act for them, and the Band Council or the Department has agreed. See Section 7.5 in respect of the requirement that the locatee obtain a certificate of independent legal advice. In cases of a grant or transfer of the full interest in the land, and not just an easement interest, the expropriating authority should deal with the First Nation Council to negotiate any additional payment designed to compensate the First Nation for the loss of reserve status of those lands.
- 7.3 The expropriating authority must compensate those locatees identified by the Land Status Report as being affected for their loss of the use of the land, in an amount agreed to by the locatee(s), based on an estimate or one or more independent appraisals of the present day Fair Market Value of the Locatee Lands.
- 7.4 Subject to section 6.1, the Lands Officer may not make a recommendation to proceed without the consent of a locatee unless the transaction has the support of the First Nation Council, and all germane locatee objections have been discussed and addressed internally, with the support of DOJ.
- 7.5 Locatee interests must be dealt with in the following manner:
  - a) The individual locatees' interests are to be considered as separate from the interests of the First Nation, for the purposes of compensation.
  - b) In the case of a Section 35 Transfer, upon acceptance of the offered compensation, locatees must execute a form for a Section 24 Transfer, or the executors/administrators of the estate for a Section 49 Transfer.
  - c) Locatees should provide evidence satisfactory to Canada that he or she has obtained independent legal advice.

## 8. Policy: Use of Land before a Section 35 Transaction

- 8.1 In some cases, an expropriating authority has used reserve lands without reaching a final Section 35 Agreement. The expropriating authority may have negotiated an agreement with a First Nation, but this agreement may not meet all the federal requirements for Canada to complete an Order-in-Council submission to the Governor in Council.
- 8.2 If the expropriating authority and the First Nation have never reached a Section 35 Agreement which addresses all the federal requirements, the Lands Officer must take the following steps:
- a) Complete a current **Land Status Report** to determine the current status of the lands and any possibly affected locatees and/or third parties;
  - b) Provide DOJ with the Land Status Report and discuss the outstanding issues as soon as possible;
  - c) In consultation with DOJ, draft a letter to the First Nation and the expropriating authority setting out the current status and substantive facts (including compensation, legal descriptions, the handling of third party interests and other requirements set out in the Federal Requirements List) of the Section 35 Transaction. This letter should clearly identify any outstanding requirements to be actioned by each of the parties to complete the transaction;
  - d) In consultation with DOJ, consider whether further information is required regarding compensation for the Section 35 Lands. The handling of the compensation for an outstanding Section 35 Transaction is often the most difficult issue to resolve. The expropriating authority's position may be that compensation should reflect the date of the "understanding or arrangement" with the First Nation to use the reserve land. However, many factors must be considered, including the fact that pursuant to subsection 28(1) of the *Indian Act*, an "...agreement of any kind,...by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve... is void," unless authorized by the Minister.

As is often the case in these types of situations, the Lands Officer, with the support of DOJ, must consider these files on a case-by-case basis, but, generally speaking, Canada requires compensation to reflect, at a minimum, the present day Fair Market Value of the lands. Therefore, files may require updates of existing estimates or appraisals to be completed and forwarded to PWGSC for review.

- e) Consider whether the situation warrants an interim use and occupation permit (refer to directive 09-02) until the federal requirements for a Section 35 Transaction have been met.
- 8.3 Sometimes a final Section 35 Agreement between the expropriating authority and the First Nation exists, but no Order-in-Council authorizing the Section 35 Transaction was ever obtained. In these circumstances, the Lands Officer shall:
- a) Complete a current **Land Status Report** to ensure no new encumbrances, interests or locatees have been created since the original Section 35 Agreement;
  - b) Provide DOJ upon request with the **Land Status Report** and confirm that all federal requirements have been addressed;
  - c) Proceed with a Fact Letter to the First Nation and the expropriating authority to ensure the department understands the terms of the Section 35 Agreement, and to clarify any possible issues.
- 8.4 If at any time after a Section 35 Agreement has been entered into the First Nation withdraws its consent to the transaction, DIAND and DOJ should review all the circumstances of the file before deciding whether or not to proceed.

## 9. Process

- 9.1 A brief outline of the Section 35 Transaction process is outlined in **Annex A: The Section 35 Transaction Process**.
- 9.2 Usually the process begins with an expropriating authority looking for a portion of a reserve for a specific purpose (usually highway purposes or other works of public utility), and therefore requesting a Section 35 Transaction for reserve land.
- 9.3 As soon as the Lands Officer is aware that initial discussions are underway between an expropriating authority and a First Nation, the Lands Officer should provide the parties with a current **Land Status Report**.
- a) The completed **Land Status Report** (see Annex B) will identify and inform the expropriating authority of any individual **locatee** or **third party** interests which the proposed Section 35 Transaction may affect.
  - b) The Land Status Report must identify existing registered interests such as locatees, leases, permits or easements, or potential encumbrances such as cardex holdings or surrenders.

- c) The Lands Officer should provide a copy of this Land Status Report, and supporting documentation to the expropriating authority and the First Nation as soon as possible.

9.4 The following section provides a detailed overview of the process, the major issues, and the steps the Lands Officer, in consultation with PWGSC and DOJ, must address prior to completing a Section 35 Transaction:

#### 9.4.1 Confirm Authority and Title

- a) The Lands Officer completes a Land Status Report to review the legal status of the lands which are subject to a particular Section 35 Transaction.
- b) The Lands Officer's Land Status Report should include those lands which are to be granted or transferred to the expropriating authority to determine any encumbrances and/or interests, as well as identification of former reserve lands which the expropriating authority may be transferring to Canada, and whether or not any reversionary interests may be applicable to lands to be transferred to Canada.
- c) The Lands Officer must confirm with the expropriating authority that it has the power to expropriate land for the stated purpose. The expropriating authority should also be asked to confirm the nature and extent of its statutory expropriation power, the purpose of the Section 35 Transaction, the area and location of the land proposed to be granted or transferred, and the reasons why the interest sought is necessary for its purposes rather than a lesser interest. (See section 4.4 above.)
- d) The expropriating authority must provide to the Lands Officer evidence of title satisfactory to Canada to all lands bordering the Section 35 Lands which the expropriating authority claims to hold, and to all lands which the expropriating authority wishes to transfer to Canada.

#### 9.4.2 Surveys

- a) All applicable surveys for a Section 35 Transaction are paid for by the expropriating authority;
- b) Canada requires all surveys to be Official Plans or CLSR Surveys;
- c) The expropriating authority must obtain survey instructions from Natural Resources Canada. To obtain instructions, the expropriating authority must obtain evidence of permission from the First Nation consenting to a survey of reserve land and allowing the surveyor on the reserve and a Land Status Report from the Lands Officer.

**Surveys (continued)**

- d) The Lands Officer should ensure that provisional survey plans identify each parcel that will be affected by the Section 35 Transaction, including remainders of Locatee Lands, and clearly define which lands are presently held by the expropriating authority and which lands are subject to the proposed transaction. These parcels should be clearly defined in the CLSR Survey book of reference.
- e) The Lands Officer should also review provisional survey plans against any applicable draft drawing or plans to verify encumbrances and possible variances.
- f) Natural Resources Canada will write the legal descriptions for the Section 35 Transaction once the CLSR Survey has been approved (to be used as the description in the Order-in-Council and the FRPFIA documents).

**NOTE:**

Of all the requirements for a Section 35 Transaction, a survey can take the longest to complete. Therefore, for pending transactions, pressing for completion of an outstanding survey or a survey that requires amendment should be one of the first priorities in terms of moving the file forward towards completion.

**9.4.3 Encumbrances**

- a) The expropriating authority should obtain the consent of any affected third parties, such as lessees or permittees, if amendments or cancellations of these interests are required. DOJ should be consulted in cases where the lessee or the permittee is not willing to provide its consent.
- b) The expropriating authority is responsible for all costs to obtain such cancellation or amendment.
- c) If the Section 35 Lands are encumbered by a leasehold or permit interest, then, subject to the expropriating authority obtaining the consent of the lessee or permittee, the Lands Officer may cancel or amend such lease or permit, as the case may be, prior to the Section 35 Transaction.
- d) If the Section 35 Lands are subject to a surrender (e.g. leasing, merchantable timber, etc.), then Canada may require an amendment or revocation of the surrender prior to processing the Section 35 Transaction, however, some surrenders or designations are not incompatible with, and may make provision for the granting of Section 35 Transfers.

#### 9.4.4 Environmental Compliance

- a) Under the *Canadian Environmental Assessment Act*, ("CEAA") environmental assessments are carried out as early as practicable in the planning stages of a project.
- b) The Lands Officer must ensure that the proposed Section 35 Transaction is subjected to an environmental assessment, which the expropriating authority funds. Based on the assessment, the departmental Environmental Specialist completes an environmental screening report. Where lands are exchanged, an environmental clean-up, if required, must be done by the expropriating authority on the land that is proposed to become reserve land. The addition to reserve of any Exchange Lands is subject to the Additions to Reserves/New Reserves Policy and the prerogative of the Crown and the department can provide no guarantee to the First Nation that Exchange Lands will become reserve. See Chapter 12 of this manual for further information on environmental assessments and Chapter 10 for further information on additions to reserve.
- c) Upon receipt of appropriate environmental reports from the expropriating authority, the Lands Officer should provide the reports to the departmental Environmental Specialist for review, comments and a CEAA Screening Decision.

#### 9.4.5 Locatee Interests

- a) The Lands Officer must complete a thorough Land Status Report with respect to any affected Locatee Lands.
- b) A locatee's interests are to be considered as separate from the interests of the First Nation, for the purposes of compensation.
- c) Surveys of any proposed Section 35 Lands must adequately deal with Locatee Lands to ensure proper updates of title. This includes, among other things, the proper surveys of cardex holdings, proper subdivisions of existing parcels, and adequate descriptions of parcels separating band lands from Locatee Lands. The Lands Officer should liaise with Natural Resources Canada with respect to these issues.
- d) The expropriating authority negotiates with the First Nation Council on band lands and directly with applicable locatees on those lands held by Certificate of Possession. The expropriating authority needs to obtain the consent of the locatees with respect to the proposed grant or transfer of Locatee Lands and the consent of the First Nation Council since the First Nation is affected by the proposed grant or transfer of Locatee Lands.

**Locatee Interests (continued)**

- e) In some cases, locatees and a First Nation agree to a percentage split of compensation for Locatee Lands (e.g., 90% for the locatee and 10% for the First Nation). This may be more prominent where a transaction involves only Locatee Lands, and no band land at all. In the normal case, the share for the Locatee should be at least Fair Market Value. However, the department is not a party to these negotiations and, therefore, the Lands Officer should not promote or discourage these internal First Nation decisions.
- f) Upon acceptance of the offered compensation for a Section 35 Transfer, locatees must execute a form for a Section 24 Transfer, or the executors/administrators of the estate for a Section 49 Transfer, pursuant to the *Indian Act*. (Note: a Section 24 or Section 49 Transfer is not required for a Section 35 Easement.)
- g) The executed form for a Section 24 Transfer must be attached to the Section 35 Agreement and the BCR requesting the Section 35 Transfer.
- h) Upon receipt of the Order-in-Council authorizing the Section 35 Transfer, the Lands Officer should have the executed form for the Section 24 or Section 49 Transfer approved by the Minister's delegated authority authorized by the *Delegation of Authority Under the Indian Act and Regulations* (refer to the relevant regional delegation instrument).
- i) Upon the completion of the FRPFIA grant or transfer of the land to the expropriating authority, the approved Section 24 or Section 49 Transfer should then be registered in the Indian Lands Registry.
- j) The Registrar of the Indian Lands Registry will then issue a new Certificate of Possession for the remaining lands held by the locatee.

**9.4.6 Appraisals**

- a) Every Section 35 Transaction requires at least one estimate or independent appraisal for Section 35 Lands or Exchange Lands, based on Treasury Board policies, and paid for by the expropriating authority. The estimate or appraisal(s) must be based on terms of reference approved by PWGSC, and must reflect the present day Fair Market Value of the lands.

**Appraisals (continued)**

- b) Upon receipt of the estimate or appraisal(s), the Lands Officer's Manager must (except in regions where there are other practices) forward a copy to PWGSC for review, to determine if the proposed compensation is fair and reasonable. Part of the determination of whether the proposed compensation is fair and reasonable will involve a determination of whether it includes reasonable compensation for loss of reserve status for any land for which a full interest is proposed to be granted or transferred and for which the expropriating authority is providing no equivalent Exchange Lands that might be eligible for reserve status.
- c) If the estimate or appraisal(s) is/are not current, ie. more than one year old, case by case decisions must be made by departmental management, PWGSC, and DOJ on how to proceed.

**9.4.7 Compensation**

- a) As early as possible in the discussions regarding a proposed Section 35 Transaction, the Lands Officer should notify the expropriating authority that the compensation is to be paid to the Receiver General for Canada, and not paid directly to a First Nation Council or locatees.
- b) Canada must be satisfied that the compensation for a Section 35 Transaction is fair and reasonable. In most cases, that means ensuring that at least present day Fair Market Value is paid for the Section 35 Transaction.
- c) Canada requires that compensation for Section 35 Lands be paid to the Receiver General for Canada prior to the passing of the Section 35 Order-in-Council. It is recommended that the Lands Officer receive the compensation at the Fact Letter stage, and deposit it into a departmental suspense account prior to processing an Order-in-Council submission.

**9.4.8 Interim Use and Occupation Permit**

- a) Although rarely allowed, the expropriating authority may request the issuance of a permit authorizing interim use and occupation of the Section 35 Lands in those cases where there is a **demonstrated urgency**. See Directive 9-2 for further information.

#### 9.4.9 Section 35 Agreement & BCR

- a) Once all required information has been obtained, the expropriating authority finalizes the negotiations and completes a final Section 35 Agreement with the First Nation and/or applicable locatees. While Canada is not a party to the Agreement, Canada requires that the Agreement include the terms on which the expropriating authority is requesting the Section 35 Transaction and the information included in the standard legal and policy requirements of Canada as set out in Annex C: Federal Requirements List, as confirmation that these matters have been considered and addressed by the parties to the Agreement. The Section 35 Agreement may also include terms that have been agreed to among the First Nation, the locatees and the expropriating authority but which are not part of the request for a Section 35 Transaction. The Agreement, or other written assurances satisfactory to Canada, should specify which terms are not part of the request for a Section 35 Transaction. The expropriating authority then delivers this Section 35 Agreement to DIAND for review and processing.
- b) The Lands Officer reviews the Section 35 Agreement and supporting documents to ensure that the information and documents required under the standard legal and policy requirements have been provided (see **Annex C: Federal Requirements List**).
- c) The First Nation's consent to the proposed Section 35 Transaction and Section 35 Agreement should be obtained to confirm that the First Nation has been consulted by the expropriating authority with respect to the proposed Section 35 Transaction and matters of concern to the First Nation. This consent must be obtained by way of a valid BCR. The BCR will confirm the terms of the Section 35 Agreement and provide the consent to the Section 35 Transaction and the allocation of compensation as between the First Nation and the locatees as set out in paragraph 6.5 of this Directive. If requested, the Lands Officer, with the support of DOJ, can provide the First Nation with sample wording for the BCR.
- d) The completed documentation (i.e. the Section 35 Agreement, the BCR, and supporting documentation) is forwarded to DOJ for review. Justice will identify and assist in the resolution of any outstanding legal issues.

- e) The Lands Officer should suggest to the expropriating authority that the Section 35 Agreement contain clauses that:
  - i) allow for amendment to such agreement to be made by way of confirmation of the Fact Letter by both the First Nation, by way of BCR, and the expropriating authority; and provide that,
  - ii) if there is an inconsistency between the Section 35 Agreement and the Fact Letter, the Fact Letter will govern.

#### 9.4.10 **Fact Letter**

- a) Upon review of the Section 35 Agreement between the expropriating authority and the First Nation, the Lands Officer drafts a Fact Letter.
- b) The Fact Letter should include:
  - 1) the nature of the transaction agreed to by the parties, ie. either a transfer or grant of Canada's full interest or an easement interest;
  - 2) that the interest will be transferred or granted by Canada to the expropriating authority for a specific public purpose and will be returned to Canada should that use cease; and
  - 3) that lands where the full interest has been granted or transferred by Canada which are returned to Canada will not have reserve status, and any proposal by the First Nation for reserve status for any returned lands will be subject to the Crown's royal prerogative, and Canada's policies on reserve creation or additions to reserve in effect upon the date of such proposal.
- c) The Lands Officer should provide opportunity for the expropriating authority and the First Nation to comment on the Fact Letter. There may be circumstances or Regions where this will have to be a confirmation by the expropriating authority and the First Nation that the Fact Letter reflects the agreement between those parties.

**9.4.11 Order-in-Council Submission**

- a) The Lands Officer, with the support of DOJ then drafts the Order-in-Council submission (commonly referred to as the Red Jacket).
- b) DOJ reviews the Red Jacket as to form and content, and provides the Lands Officer with a letter confirming its approval, or setting out its concerns.
- c) The Lands Officer then sends the completed Order-in-Council submission to departmental headquarters for the recommendation of the Minister, and the authorization of the Governor in Council.

**9.4.12 Federal Real Property and Federal Immovables Act Document**

- a) Once the Order-in-Council has been passed by the Governor in Council, it is returned to the regional office.
- b) DOJ or the Region will prepare four (4) original documents relating to the land interest under FRPFIA to be approved by the delegated authority authorized to grant or transfer federal lands. (Refer to the "Treasury Board Real Property Transactions Processes and Authorities Policy").
- c) The FRPFIA documents are forwarded to DOJ for countersignature.
- d) This step completes the process for Section 35 Transactions.

**9.4.13 Registration**

- a) The Lands Officer then sends an original of the Order-in-Council, the Section 24 or Section 49 Transfers, if any, and an original of the FRPFIA documents to the Indian Lands Registry for registration.
- b) DOJ will send a copy of the FRPFIA documents to the Federal Real Property Document Depository.
- c) A copy of the executed FRPFIA documents together with the Orders-in-Council are then distributed by the Lands Officer to the expropriating authority, the First Nation, Natural Resources Canada and locatees, and notices provided to the affected third parties.

#### 9.4.14 Release of Section 35 Compensation

- a) Once the Order-in-Council is passed and the FRPFIA documents are executed by the appropriate delegated authority and countersigned by DOJ, the compensation can be released by the Lands Officer as follows:

##### For band land:

- a) the principal of the monies which are compensation for band land (not locatee land) must be deposited to the First Nation's **Capital Account**;
- b) any accrued **interest** on these monies is paid to the First Nation's **Revenue Account**.

##### For locatee land:

In the case of a locatee, the department may pay the locatee directly from the departmental suspense account, all monies - **principal** and accrued **interest** - to which the locatee is entitled, pursuant to Section 35(4) of the Indian Act.

- 9.5 **Additions to Reserve:** Where a land exchange is proposed as part of the compensation, the additions to reserve policy as set out in Chapter 10 should be initiated concurrent with the Section 35. The department has precedent OIC documents for use in this exchange situation. The Crown can not guarantee that lands proposed in exchange will be eligible for or be granted reserve status.

## 10. References

10.1 Besides the *Indian Act*, you may want to consult:

- a) *Indian Lands Registration Manual*
- b) *Manual for the Administration of Band Moneys*
- c) The Real Property Management section of the Treasury Board Manual. The INTERNET URL is: [www.tbs-sct.gc.ca/pubpol\\_e.html](http://www.tbs-sct.gc.ca/pubpol_e.html)
- d) Any Federal/Provincial Protocol specific to roads

## **Chapter 9**

### **Directive 9-1: Transactions Under Section 35**

#### **Annex A: Section 35 Transaction Process**



## Annex A

### Section 35 Transaction Process

Generally speaking, here is how a Section 35 Transaction usually unfolds:

1. The expropriating authority wants a portion of a reserve for a specific purpose (usually highway purposes or other works of public utility), and therefore requests a Section 35 Transaction of federal reserve land.
2. The expropriating authority initiates discussions and negotiates a Section 35 Agreement with the First Nation and/or applicable locatees, addressing:
  - (1) Title
  - (2) Surveys
  - (3) Encumbrances
  - (4) Environmental Assessments
  - (5) Locatee Interests
  - (6) Appraisals
  - (7) Compensation.
3. The expropriating authority delivers a Section 35 Agreement to DIAND for review and processing.
4. The First Nation provides to Canada a BCR which consents to the proposed Section 35 Transaction, the Section 35 Agreement, the compensation and, where necessary, the allocation of the compensation between the First Nation and the locatees and directs Canada to pay the locatees from the compensation provided by the expropriating authority.
5. Canada (DIAND, DOJ & PWGSC) reviews the Section 35 Agreement and BCR to ensure legal and policy requirements have been met.
6. DIAND completes federal requirements which include:
  - (1) Land Status Report
  - (2) Environmental Screening
  - (3) Appraisal Review
  - (4) Compensation Review
  - (5) Applicable Interim Use and Occupation Permits
  - (6) Federal Fact Letter

- (7) Order-in-Council which authorizes the transaction to the expropriating authority
  - (8) Federal Real Property and Federal Immovables Act (FRPFIA) grant or transfer.
7. The Order-in-Council is effected by a FRPFIA grant or transfer executed by DIAND or PWGSC and countersigned by DOJ once the federal Order-in-Council is passed.
8. Compensation is paid to the First Nation and/or applicable locatee.
9. The Order-in-Council, any Section 24 or Section 49 Transfers, and FRPFIA documents are registered in the Indian Lands Registry.
10. FRPFIA documents are also registered in Federal Document Depository.
11. Copies of documentation are provided to the expropriating authority and First Nation.

**Chapter 9**

**Directive 9-1: Transactions Under Section 35**

**Annex B: Sample Land Status Report**



# Annex B LAND STATUS REPORT

Reserve Name: \_\_\_\_\_ No.: \_\_\_\_\_ First Nation: \_\_\_\_\_

**Proposed Purpose** (check box):

- Band land Lease
- Locatee land Lease
- Easement
- Permit
- Designation
- Section 35 Transfer

•• Other: (specify) \_\_\_\_\_

**Status of Land** (check box or boxes if the lands described below cover more than one type of land):

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

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

Lands: Lot \_\_\_\_\_ Block \_\_\_\_\_ Plan No. \_\_\_\_\_ (R/CLSR)

Textual Description: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

Number Order-in-Council: P.C. \_\_\_\_\_ - \_\_\_\_\_

Date of Order-in-Council: \_\_\_\_\_ (Month/day/year)

Term or Period of Designation or Surrender: From \_\_\_\_\_ (m/d/y) To \_\_\_\_\_ (m/d/y)

Purpose(s) of Designation or Surrender: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**If Locatee Land**, Complete the following:

Locatee: \_\_\_\_\_  
 Last name First name Band No.

Address: \_\_\_\_\_  
 Street City Postal Code

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

Lawfully Held by: (attach copy of documentation, including Parcel Abstract to Land Status Report): (check box)

- CP - ILR Registration No: \_\_\_\_\_ ; or,
- NE - ILR Registration No: \_\_\_\_\_ ; or,
- NETI - ILR Registration No: \_\_\_\_\_ ; or,
- Cardex - ILR Registration No: \_\_\_\_\_ ; or,







**Chapter 9**

**Directive 9-1: Transactions Under Section 35**

**Annex C: Federal Requirements List**



## Annex C Federal Requirements List

### Requirements of Canada for Section 35 Transactions:

1. The First Nation and expropriating authority must enter into an agreement with respect to a proposed Section 35 Transaction, (the "Section 35 Agreement").
2. The First Nation, by BCR, must formally accept the terms and conditions of the Section 35 Agreement and request that Canada grant a full interest or an easement or transfer administration and control of a full interest or of an easement in the lands to the expropriating authority.
3. The expropriating authority must submit a request in writing to take the lands pursuant to subsection 35(1) of the *Indian Act* and that, in lieu of such taking, Canada grant or transfer the lands pursuant to subsection 35(3) of the *Indian Act* and FRPFIA.
4. Evidence satisfactory to Canada must be provided to Canada of a justification for the type of tenure requested for any lands being granted or transferred by Canada to the expropriating authority and of the expropriating authority's statutory power to expropriate same.
5. All lands must be legally described by a CLSR Survey, in accordance with the requirements of Natural Resources Canada.
6. The Section 35 Agreement shall set out the legal description of the lands and any lands forming part of the compensation package.
7. In order to comply with subsection 35(4) of the *Indian Act*, monies paid solely as consideration for the Section 35 Transaction must be deposited in favour of the Receiver General for Canada for the use and benefit of the First Nation or any locatee who is entitled to compensation or payment. In implementing this legislative requirement the Section 35 Agreement should stipulate the compensation being provided for the lands (whether that compensation is in the form of money, land or other gratuity such as employment opportunities or material works), and Canada must satisfy itself as to the adequacy of the compensation.

*(The monies may be held by legal counsel for the First Nation or a locatee, as the case may be, before the monies are paid to Canada, but the Lands Officer should not recommend the Section 35 Transaction proceed to departmental headquarters prior to receipt of the monies in favour of the Receiver General. At the latest, the monies should be paid to the Receiver General upon confirmation of a Fact Letter, by the First Nation and the expropriating authority. Canada would like First Nations to be aware that it is usual for monies held by it in suspense to earn a higher rate of interest than monies held by legal counsel in a trust account.)*

8. If a locatee is in possession of any portion of the Section 35 Lands and the proposed Section 35 Transaction is the grant or transfer of a full interest in the lands, then the expropriating authority must obtain from the locatee an executed form for the "Transfer of Land in an Indian Reserve" pursuant to Section 24, or if the locatee is deceased, the executor or administrator transfer pursuant to Section 49 of the *Indian Act*.
9. If one or more locatees are involved, the First Nation must stipulate if and how the compensation is to be divided between the First Nation and the locatee(s) and direct Canada to pay the locatees directly from the compensation provided by the expropriating authority.
10. Evidence satisfactory to Canada must be provided to Canada of the value of any lands being transferred to Canada for the use and benefit of the First Nation and any lands being granted or transferred by Canada to the expropriating authority.

*(Although the amount of compensation provided by the expropriating authority for the lands is a matter to be negotiated between the expropriating authority and the First Nation, Canada must satisfy itself that adequate compensation has been provided for the lands. The First Nation should keep in mind during its negotiations the value of any merchantable timber or topsoil located on the lands and the loss to the First Nation of the value of the reserve status that is being lost in respect of land in which a full interest is intended to be granted or transferred.)*

11. The Section 35 Agreement must acknowledge in writing that any costs incurred in construction or otherwise by the expropriating authority, or on its behalf, prior to the grant or transfer of the lands, are incurred at its own risk, unless previously agreed to otherwise in an interim use permit or in some other agreement in writing with the First Nation and Canada.

12. The expropriating authority must acknowledge in the Section 35 Agreement that, unless otherwise agreed to in writing, it is solely responsible for any surveys, appraisals, and environmental assessments or audits.
13. The Section 35 Agreement must confirm that the expropriating authority shall transfer any Exchange Lands and reversionary lands to Canada.
14. The expropriating authority must comply with all environmental laws, regulations and policies of Canada in order for Canada to accept the transfer of the Exchange Lands and reversionary lands.
15. In order for the Minister to comply with the *Canadian Environmental Assessment Act*, the expropriating authority must provide the required documentation to the satisfaction of Canada for the project to be constructed on the lands.
16. The First Nation should provide evidence satisfactory to Canada that it has obtained independent legal advice with respect to the execution of the Section 35 Agreement.
17. Locatees, or executors/administrators whose land is affected should provide evidence satisfactory to Canada that they have obtained independent legal advice with respect to the execution of the Section 35 Agreement and the Section 24 or Section 49 Transfer.
18. All encumbrances on the Section 35 Lands and any lands being transferred to Canada must be dealt with to the satisfaction of Canada.

## Directive 9-2

### Interim Use and Occupation

#### 1. Purpose

- 1.1 This directive describes when and how to issue an interim use and occupation permit pursuant to subsection 28(2) of the *Indian Act*, or, in some cases, pursuant to subsection 53(1) of the *Indian Act*, before an expropriating authority takes lands under section 35.

#### 2. General

##### 2.1 What is an interim use and occupation permit?

- a) An interim use and occupation permit allows the expropriating authority to use and occupy reserve lands to carry out construction before those lands have been granted or transferred to the expropriating authority according to Section 35.
- b) The interim use and occupation permit authorizes the expropriating authority to go on specified reserve lands for a certain purpose. However, it must not give the expropriating authority any interest in reserve lands. This permit does not grant exclusive use or occupation and it must not be assignable to third parties.

##### 2.2 When are interim use and occupation permits used?

- a) The general rule is that an expropriating authority **cannot** use or occupy reserve lands until the issuance of an Order-in-Council authorizing the Section 35 Transaction, and the actual grant or transfer of the land to the expropriating authority pursuant to FRPFIA.
- b) However, construction may be authorized prior to the FRPFIA grant or transfer where there is a **demonstrated urgency**. In most cases, this urgency would be related to public health and safety issues, such as a washed out road due to flooding, or other natural disasters.

- c) It is the expropriating authority's responsibility to demonstrate to Canada that the situation is exceptional.
- 2.3 Refer to Chapter 06 for further information on the drafting, issuing and cancelling of permits generally.

### 3. Authorities

- 3.1 If the lands are not designated lands, the authority for issuing an interim use and occupation permit is subsection 28(2) of the *Indian Act*, which states that:

*28(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.*

If the lands are designated lands, the terms of the designation may, in some cases, allow the Minister to enter into permits. In such cases, the authority for issuing an interim use and occupation permit is the designation and paragraph 53(1)(b) of the *Indian Act*, which states that:

*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) ...*

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

The terms of the designation must be carefully examined in each case to ensure that it allows the issuance of an interim use and occupation permit for the purposes set out in the permit.

### 4. Policy

- 4.1 **As previously stated, an interim use and occupation permit is only appropriate in exceptional circumstances.** For example, a permit for interim use and occupation may be issued where, for legitimate reasons, construction cannot be delayed until the Order-in-Council is issued. In most cases, this urgency would be related to construction windows involving fish bearing streams, or obvious circumstances, such as a washed out road due to flooding, or other natural disasters.

- 4.2 Unless there are potential public health and safety concerns, an interim use and occupation permit will only be authorized after the expropriating authority and the First Nation have entered into a Section 35 Agreement setting out the terms and conditions of the Section 35 Transaction. For more details on the content of the Section 35 Agreement refer to Directive 09-01, paragraph 6.3.

**NOTE:**

It should be anticipated that in some circumstances, all the federal requirements of a Section 35 Agreement, such as a CLSR Survey, may not be completed at the time of the requirement of the permit.

- 4.3 See Chapter 6 for the policy applicable to subsection 28(2) permits generally. In addition, an interim use and occupation permit must address the following points:
- a) **Term:** In most cases the permit should be issued for a term not to exceed one year or such greater length of time as is required to complete the proposed construction and prepare the appropriate survey plan.
  - b) **Termination:** The permit should cease upon completion of the Section 35 Transaction and may be terminated at any time prior to the completion of the transaction, at the discretion of the Minister.
  - c) **Compensation:** Normally, as with most instruments, a permit requires at least one estimate and/or independent appraisal, and the permit fee must reflect the present day Fair Market Value of the lands. Deviations from this policy, such as a nominal permit fee, should be discussed with DOJ.
  - d) **Subsection 35(3):** The expropriating authority must acknowledge that the issuance of the permit is not to be construed as implying any right to the granting of an Order-in-Council pursuant to subsection 35(3) of the *Indian Act*. The permit should state that the department will not submit a recommendation to the Governor in Council for a final order authorizing the grant or transfer of the lands in question to the expropriating authority until a plan of survey is registered and all of the conditions set forth in the authorizing BCR have been met.
  - e) **Engineering design plans:** These should be incorporated in the permit.

- 4.4 The consent of the First Nation Council to the Section 28(2) interim use and occupation permit must be obtained in the form of a Band Council Resolution ("BCR"), which must, at a minimum, include the following terms:
- a) **Term:** The term must be specified.
  - b) **Land Description:** Where the term is for more than one year, the permit area should be identified by reference to an acceptable survey plan.
  - c) **Individual Locatees:** The BCR should confirm that any individual interests affected by the proposed use have been dealt with.
  - d) **Proposed Use:** This should be clearly identified in the BCR.
  - e) **Compensation:** The permit fee must be specified.
  - f) **Request for Permit:** The BCR must contain an express request that the Minister issue a permit pursuant to subsection 28(2) of the *Indian Act*, or, if applicable, pursuant to subsection 53(1) of the *Indian Act* and the associated designation.
  - g) **Agreement:** The executed Section 35 Agreement between the First Nation and the expropriating authority must be attached to the BCR.
  - h) **Permit:** Attach the draft permit to the BCR.

## 5. Process

- 5.1 Before initiating the permit process, the following procedural steps must be completed:
- a) **Section 35 Agreement:** The expropriating authority and the First Nation council must negotiate a Section 35 Agreement incorporating the terms and conditions upon which the lands will be transferred pursuant to section 35.
  - b) **Review of Agreement:** The Section 35 Agreement must be reviewed by the Lands Officer and DOJ.

- c) **Obtain BCR:** The First Nation Council must pass a BCR requesting that the Minister issue an interim use and occupation permit pursuant to subsection 28(2), or, if applicable, pursuant to subsection 53(1) and the associated designation.
- 5.2 Once these preconditions have been met, the procedure for obtaining an interim use and occupation permit is the same as that which is set out in Chapter 06, which contains a detailed process for the issuance of subsection 28(2) permits.

## 6. References

- 6.1 In addition to the *Indian Act*, you may want to consult:
- a) Indian Lands Registration Manual
  - b) The Real Property Management section of the *Treasury Board Manual*.  
The INTERNET URL is: [www.tbs-sct.gc.ca/pubpol\\_e.html](http://www.tbs-sct.gc.ca/pubpol_e.html)