



Indigenous and Northern Affairs Canada

Internal Audit Report

Audit of the Additions to Reserve Process

Prepared by:

Audit and Assurance Services Branch

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AANAC-INAC



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Acronyms

ADM	Assistant Deputy Minister
ATR	Additions to Reserve
LMM	Lands Management Manual
HQ	Headquarters
INAC	Indigenous and Northern Affairs Canada
LED	Lands and Economic Development
NATS	National ATR Tracking System
RO	Regional Operations

EXECUTIVE SUMMARY

Background

The Audit and Assurance Services Branch (AASB) of Indigenous and Northern Affairs Canada (hereon referred to as “INAC” or “the Department”) identified an Audit of the Additions to Reserve Process in the 2016-2017 to 2018-2019 Risk-Based Audit Plan. The audit was identified as a priority because the Additions to Reserve (ATR) process is complex and involves multiple considerations, including environmental, legal, communication, and consultation issues. The process also involves multiple stakeholders, including First Nations, other federal departments, and other levels of government. Furthermore, in 2012 significant changes to the ATR process were implemented that reduced the role of INAC Headquarters (HQ) and increased the responsibility of Regional Offices.

Audit Objectives and Scope

The objective of the audit was to assess the extent to which recent changes to the governance and control framework support efficient and effective management of the ATR portfolio. The specific audit objectives were to assess the extent to which:

- Recent redistribution of roles, responsibilities, and authorities is supporting the effective and efficient processing of ATR files and oversight of the ATR portfolio;
- ATR Support Centres are appropriately positioned and functioning to support effective, efficient, and timely processing of ATR files; and
- Processing of ATR files is continuously improved and/or streamlined through the identification, communication, and effective implementation of proven practices or approaches.

Statement of Conformance

This audit was conducted in conformance with the *International Standards for the Professional Practice of Internal Auditing*, as supported by results of the quality assurance and improvement program

Conclusion

Management has made improvements to the governance and control framework that are designed to better support efficient and effective management of the ATR portfolio. However, key elements necessary to support effective monitoring and risk-based planning/decision-making in connection with the ATR portfolio as well as support to First Nations during the process have been identified. In addition, there is a need for greater clarity around the Department’s ATR-related strategic objectives and roles and responsibilities of key internal and external stakeholders.

Recommendations

1. The Assistant Deputy Minister of the Lands and Economic Development Sector, in collaboration with the Senior Assistant Deputy Minister of Regional Operations Sector should develop and communicate strategic objectives related to Additions to Reserves.
2. The Assistant Deputy Minister of Lands and Economic Development Sector, in collaboration with the Senior Assistant Deputy Minister of Regional Operations Sector should ensure that a plan and a timetable are established to develop and implement governance elements for the Additions to Reserves portfolio related to:
 - Performance reporting that adequately supports the oversight of Additions to Reserves activities in terms of assessing results achieved and identifying challenges;
 - Resource plans for Additions to Reserves activities;
 - Monitoring bodies to assess the alignment of Additions to Reserves activities with objectives; and
 - Approaches to identify, assess, and manage risks associated with Additions to Reserves objectives.
3. The Assistant Deputy Minister of Lands and Economic Development Sector, in collaboration with the Senior Assistant Deputy Minister of Regional Operations Sector should ensure that:
 - Options are identified and assessed for providing national support on Additions to Reserves, and responsibilities are assigned accordingly; and
 - Expectations related to supporting First Nations during the Additions to Reserves process are clearly defined, communicated and implemented.

Management's Response

Management is in agreement with the findings, has accepted the recommendations included in the report, and has developed a management action plan to address them. The management action plan has been integrated in this report.

1. BACKGROUND

The Audit and Assurance Services Branch (AASB) of Indigenous and Northern Affairs Canada (hereon referred to as “INAC” or “the Department”) identified an Audit of the Additions to Reserve Process in the 2016-2017 to 2018-2019 Risk-Based Audit Plan. The audit was identified as a priority because the Additions to Reserve (ATR) process is complex and involves multiple considerations, including environmental, legal, communication, and consultation issues. The process also involves multiple stakeholders, including First Nations, other federal departments, and other levels of government. Furthermore, in 2012 significant changes to the ATR process were implemented that reduced the role of INAC Headquarters (HQ) and increased the responsibility of Regional Offices.

After initiating the audit in 2015-2016, program management noted that there had been considerable audit, evaluation, and review work done on the ATR process in the recent past, and that the program was looking to make some changes to the process and supporting policy/guidance documents. AASB with Program Management agreed that an internal audit would provide more value once some of these planned changes were implemented. It was agreed to complete the planning phase of the audit in 2015-2016, and to defer the conduct and reporting phases to the 2016-2017 fiscal year. The completion of the Audit of the Additions to Reserve Process was therefore included in the Department’s 2016-2017 to 2018-2019 Risk-Based Audit Plan.

1.1 Additions to Reserve – A Brief Description

An ATR is a proposal for the granting of reserve status to a parcel of land typically located within the traditional or treaty area of a First Nation. The *Indian Act* defines a reserve as a “tract of land, the legal title to which is vested in Her Majesty, which has been set apart by Her Majesty for the use and benefit of a band”. Since there is no statutory authority under the *Indian Act* to set aside land as reserve, lands that do not fall under Claims Settlement legislation¹ are granted reserve status pursuant to the Royal Prerogative. An ATR process has been developed in order to assist First Nations and the Department in completing the necessary steps to add land to reserve.

There are numerous reasons for land to be added to reserve, including the fulfillment of a legal obligation established by a specific claim and treaty settlement agreement; community additions; new reserve or economic development; advancement of reconciliation and improvements to treaty relationships; and improvements to the access of land and resources.

¹ The *Manitoba Claim Settlements Implementation Act* and the *Claim Settlements (Alberta and Saskatchewan) Implementation Act* provides the Minister authority to grant reserve status to land that fulfills Canada’s legal obligations under a Treaty Land Entitlement (TLE) Agreement within the provinces of Alberta, Saskatchewan, and Manitoba.

The following table provides a view of the number of open and completed ATR files by region. It highlights that the volume of ATR activity has historically been concentrated in provinces where Treaty Land Entitlements (TLE) Agreements exist². More specifically, files have been concentrated in the provinces of Saskatchewan (52% of current open files) and Manitoba (32% of current open files).

Open and Completed ATR Files by Region³

Region	Open Files	Completed Files		
	As of Feb 2017	2000-2005	2006-2010	2011-Present
Alberta	26	13	10	7
Atlantic	27	15	20	15
British Columbia	53	31	18	49
Manitoba	361	36	133	19
Ontario	89	14	9	6
Quebec	7	2	20	12
Saskatchewan	630	575	275	255
Total	1193	686	485	363

1.2 The INAC Additions to Reserve Policy Directive

The Department has developed formal guidance and direction on the steps associated with adding lands to reserve. These are set out in the INAC ATR Policy Directive within the Department's Land Management Manual (Chapter 10). On July 27, 2016, after considering feedback and comments from various stakeholders, INAC updated the ATR Policy Directive, with the intention of streamlining the process for reserve creation by providing policy direction, promoting consistent assessment, acceptance, and implementation of reserve creation proposals where possible, and encouraging collaboration among all parties involved. The new Policy Directive also introduced a change in the ATR process, as the Department now provides the First Nation with a Letter of Support early in the process to demonstrate the Department's commitment to undertaking the ATR initiative. This replaces an Approval in Principle under the previous Policy Directive, which was provided after all requirements were met. The new Policy Directive also includes improved environmental requirements, more flexible land selection criteria, and guidance materials for stakeholders.

The Policy Directive sets three distinct categories of reserve creation: legal obligations and agreements; community additions; and, tribunal decisions. A brief description of each category of reserve creation is included in Appendix A.

² Refer to **Appendix C** for a description of TLE Agreements.

³ Information was extracted from a February 2017 analysis prepared by LED Management.

1.3 The Additions to Reserve Process

The ATR process can be extremely complex and the steps involved vary depending on a number of factors including whether the land that is proposed to be added is federal or provincial Crown land, privately owned land, and whether the land includes or does not include subsurface rights.⁴ Depending on who owns the proposed land, various partners and stakeholders need to be involved in the ATR process along with the Department and the First Nation. Other levels of government (e.g. municipal, provincial), as well as third party participants (e.g. utilities, pipelines, forestry/energy companies, etc.) are often involved.

As stipulated in the ATR Policy Directive, the ATR process is divided into four distinct phases: Initiation; Assessment and Review; Proposal Completion; and, Approval. See Appendix B for a brief description of the phases involved in the ATR process.

INAC's responsibilities related to the ATR process are distributed among the following four groups:

- **Economic Research and Policy Development Branch (LED)** – are responsible for policy and process development;
- **Lands and Environmental Management Branch (LED)** – are responsible for policy and process guidance, and support;
- **Regional Offices** – lands management officers in regional offices are responsible for ensuring all process requirements are met, and supporting First Nations during the process; and
- **The ATR Support Centres** – are responsible for providing Regions with operational assistance and guidance related to ATR submissions (these responsibilities are discussed in more detail in subsection 1.4 below).

The Department's ability to administer the ATR process in a consistent way across regions is challenged by the presence of distinct legal requirements for treaty lands in some provinces (e.g. Manitoba and Saskatchewan), by a variety of provincial requirements for land transfer, and by the resulting expectations and practices of the Department's legal advisors and other parties involved in an ATR proposal.

1.4 Changes in ATR Process Responsibilities

As part of a significant streamlining initiative, a reorganization of the human and financial resources that support the ATR process was undertaken in 2012. The restructuring of responsibilities and efforts to streamline administration of ATRs resulted in the elimination of HQ's role in the ATR approval review process. As such, a number of ATR and land management responsibilities were shifted to regional offices.

⁴ Subsurface rights refer to the rights of a party to the minerals or other substances found below a parcel of land. These rights can be sold or transferred to another party, similar to land surface rights.

In order to support regional offices in assuming their new responsibilities, HQ established Regional Support Centres to provide them with operational assistance and guidance. One Support Centre was created in Regina to assist with Treaty Land Entitlement submissions and another was created in Toronto to assist with non-Treaty Land Entitlement submissions.

The two ATR Support Centres were mandated to provide support to Regions by maintaining submission templates and reference documents, conducting quality assurance activities on submissions prior to being sent for approval, training staff members involved in the submission of ATR proposals, providing advice to applicable Regions as required, reviewing translated documents as required, and liaising with HQ and applicable Regions.

2. AUDIT OBJECTIVE AND SCOPE

2.1 Audit Objective

The objective of the audit was to assess the extent to which recent changes to the governance and control framework support efficient and effective management of the ATR portfolio, including an assessment of the extent to which:

- Recent redistribution of roles, responsibilities, and authorities is supporting the effective and efficient processing of ATR files and oversight of the ATR portfolio;
- ATR Support Centres are appropriately positioned and functioning to support effective, efficient, and timely processing of ATR files; and
- Processing of ATR files is continuously improved and/or streamlined through the identification, communication, and effective implementation of proven practices or approaches.

2.2 Audit Scope

The scope of the audit included an assessment of those elements of the governance and control framework that were impacted by recent changes, including devolution of ATR responsibilities to Regions and the establishment of ATR Support Centres.

3. APPROACH AND METHODOLOGY

The Audit of the ATR Process was planned and conducted in accordance with the requirements of the Treasury Board *Policy on Internal Audit* and followed the Institute of Internal Auditors' *International Professional Practices Framework*. Sufficient and appropriate audit procedures have been conducted and evidence gathered to support the audit conclusions provided and contained in this report.

The audit was performed from October 2016 to April 2017 and consisted of three phases: planning, conduct and reporting. Based on information gathered during the initial planning phase performed in 2015-2016, a new risk assessment was completed to ensure that identified high risks were still relevant, and that recent developments (e.g. release of the new ATR Policy Directive in July 2016) were appropriately reflected in the audit. Audit criteria were developed to cover areas of highest priority and served as the basis for developing the detailed audit program for the conduct phase of the audit. Refer to Appendix D for the audit criteria developed for this audit, which were informed by relevant legislation, policies and directives listed in Appendix E.

The audit program details the activities that were undertaken during the conduct phase of the audit, which included:

- Interviews with key officials at HQ from the Lands and Economic Development Sector;
- Interviews with key officials in the regions visited, including officials from the ATR Support Centres;
- Review of relevant documentation related to the management and administration of the ATR portfolio, including tools and templates used by the regions visited;
- Review of a sample of ATR files from each of the regions visited;
- Review and analysis of ATR-related data (e.g. number of active file and completed files);
- Walkthrough of the National ATR Tracking System (NATS);
- Regional comparative analysis of the ATR process and other approaches employed in each of the regions visited; and
- Analysis of staff complements responsible for processing ATRs in the regions visited.

Four regions were visited during the audit: Ontario, Manitoba, Saskatchewan, and British Columbia. These regions were chosen because they traditionally have the highest volume of active ATR files. During the site visits, a total of 33 ATR files were reviewed to assess the extent to which the ATR process is applied consistently, and to identify any variances with requirements and/or evidence of particularly strong or innovative practices. The sample was selected from data maintained within NATS as of December 2016. A judgmental approach was used to select the sample with the following considerations to ensure a fair representation of the ATR files:

- Policy category (i.e. legal obligation, community addition, tribunal decision);
- Status of the file (i.e. open, closed);
- Phase in the process for open files (i.e. initiation, assessment and review, proposal completion, and approval);
- Length of time file has been open; and
- Geographic location of the respective parcel (i.e. urban, rural).

Based on the information gathered during the audit activities, observations and conclusions were developed against the audit criteria.

4. CONCLUSION

Management has made improvements to the governance and control framework that are designed to better support efficient and effective management of the ATR portfolio. However, key elements necessary to support effective monitoring and risk-based planning/decision-making in connection with the ATR portfolio as well as support to First Nations during the process have been identified. In addition, there is a need for greater clarity around the Department's ATR-related strategic objectives and roles and responsibilities of key internal and external stakeholders.

5. FINDINGS AND RECOMMENDATIONS

Based on the evidence gathered, the audit criteria (detailed in Appendix D) were assessed against observed practices. In instances where there was a difference between the audit criteria and the observed practice, the risk of the gap was evaluated and used to develop conclusions and corresponding recommendations to management.

5.1 *Strategic Direction*

The 2016 Mandate Letter to the Minister of INAC and the 2016-2107 Report on Plans and Priorities (RPP) set out the government's commitment to reconciliation and establishing a renewed relationship with Indigenous Peoples. The news release announcing the new ATR Policy Directive in July 2016 identified ATRs as a key mechanism in advancing reconciliation.

In light of these recent government commitments and expectations, there is a need for the Department to consider and plan for how ATRs can be leveraged (in coordination with other program areas) as an effort to renew relationships and promote reconciliation. As discussed earlier, there is no statutory authority to set aside land as reserve, and while the ATR Policy Directive provides guidance over the process, it does not set out the Department's objectives and priorities related to ATRs. As such, a strategic foundation (through stated objectives) needs to be established in order to guide departmental staff (and other stakeholders) to meet these expectations and to promote the importance of ATRs in advancing reconciliation.

The audit expected to find that strategic and operational objectives for the ATR portfolio are established through formal strategic planning activities, and are communicated to HQ and regional staff, and other relevant stakeholders. The audit found that strategic and operational objectives specific to ATRs have yet to be established at a national level. INAC's 2016-2017 RPP identified "supporting the completion of ATRs" as a planning commitment. However, it was listed as one of several planning commitments for the Department, and does not provide clear guidance on the overall objectives of the ATR portfolio or how it is intended to support reconciliation.

Without defined strategic and operational objectives, there is a risk that the regions will have differing interpretations of the expectations of the ATR portfolio, potentially leading to them establishing other priorities. Currently, regions are setting their own ATR-related priorities and

work plans based on the demands experienced and resources available within their unique regional environments. Various approaches and criteria are used to prioritize files across the regions including focusing on files with legal obligations, those that the community has identified as priorities, and those that have “momentum” (i.e. where the community has the capacity to make progress on the file). Nonetheless, priorities are determined on a file-by-file basis and rely on the judgement of regional management and staff.

A lack of strategic and operational objectives also hinders the Department’s ability to communicate and emphasize the importance of ATRs in advancing reconciliation vis-à-vis other activities. The ATR process can be lengthy with several delays, which can lead resources to shift its focus to other land activities (particularly in regions without a dedicated ATR group). A clear strategic direction will help enforce the importance of ATRs in supporting reconciliation within the broader lands and economic development agenda.

Recommendation

1. The Assistant Deputy Minister of the Lands and Economic Development Sector, in collaboration with the Senior Assistant Deputy Minister of Regional Operations Sector should develop and communicate strategic objectives related to Additions to Reserves.

5.2 Governance and Oversight

The purpose of the new ATR Policy Directive, introduced in July 2016, is to provide guidance with respect to the assessment, acceptance, and implementation of Reserve Creation Proposals. More specifically, the Policy Directive provides information related to the criteria that apply to all ATR proposals and provides guidance on the ATR process, including all requirements and responsibilities. The Policy Directive also raised the importance of working closely with First Nations to establish community-level priorities and to support them during the process. Along with the Policy Directive, LED Sector developed a suite of tools and templates to support implementation and ensure a consistent application of the ATR process across regions.

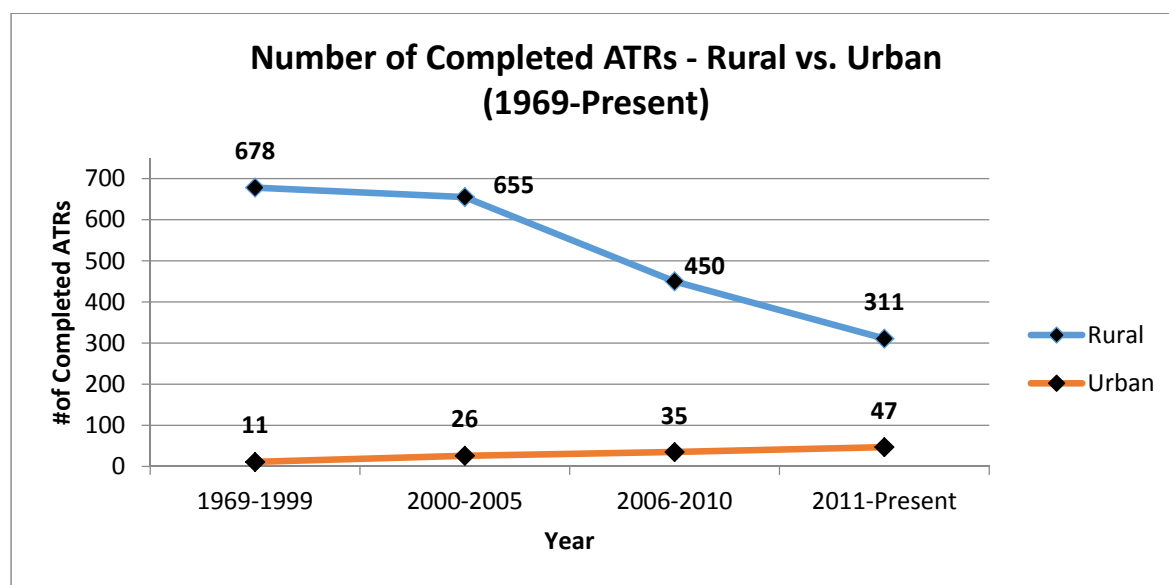
While the Policy Directive sets out the overall process and associated activities, it does not set out the overall objectives and priorities of the ATR portfolio (as discussed in subsection 5.1 above) or set out expectations regarding governance and oversight over ATR-related activities. An appropriate governance framework is required to ensure that the Policy Directive is applied as intended and that objectives are being met, and to fully realize its benefits.

The audit expected to observe a commensurately robust governance framework that would serve to support the new ATR Policy Directive, and related activities and objectives. However, the audit found that key governance and oversight elements were missing, as discussed below.

Performance Reporting

ATR-related data and associated performance reporting does not adequately support effective oversight. More specifically, reporting does not adequately inform management of the results

achieved or effectiveness of the ATR process. Given that strategic and operational objectives have not been established, performance is currently measured based on the number of parcels and acres converted to reserve, and each region annually establishes targets against these measures. However, these measures do not consider the complexity of the files (e.g. third party interests, negotiations with municipalities, etc.) or the impact the file has had on the community (e.g. housing, economic development, etc.). For example, a small parcel in an urban setting may have far more complexities associated with the file but with potentially significantly greater impacts (e.g. revenue generation through a commercial enterprise) to the community than a larger parcel in a rural setting. As demonstrated in the graph below, the number of urban ATRs has increased steadily since the 1960s. Without reporting that is aligned to defined strategic and operational objectives, management will be challenged to assess and determine the performance of the ATR portfolio.



Available information and reporting does not provide a complete understanding of the overall status of the ATR portfolio, or identify the key challenges to meeting defined objectives. NATS is the national system of record for the ATR portfolio. Limitations in the functionality of NATS do not enable an accurate picture of the status and challenges associated with a file. Generally, regional staff will only update NATS when a new ATR proposal is submitted and when an ATR file is completed. Instead, each region has established their own unique approach to monitoring the status of its ATR files internally (involving checklists, spreadsheets, and other methods). As such, it is challenging to obtain a complete and accurate national-level depiction of the status of the ATR portfolio and its key challenges.

During the conduct phase of the audit, the Lands and Environment Branch of the LED Sector began an initiative to collect information on the status of active ATR files and file-specific challenges from each region. The intention of this initiative is to identify the most prevalent challenges across regions and establish a plan to support the regions in resolving those challenges.

Resource Planning

Resource plans have not been established to help ensure that the Department has sufficient capacity and capability to effectively and efficiently undertake planned ATR activities, at both the regional and national levels. As described earlier, the ATR process is very complex and can involve tasks such as resolving third party interests, negotiating with municipalities and other stakeholders, working with Provinces and other government departments, consulting with Indigenous groups, among others. These tasks require a very specific set of skills and experience typically found in more senior-level personnel. Currently, the regions have a mix of resource levels actively working on ATR files. Interviewees expressed their concern with having lower level resources working on such complex files. Some believed in adopting a similar resource model to the Specific Claims Branch as many of their tasks are similar to those found in the ATR process.

Monitoring Bodies

Prior to 2012, LED Sector played a significant role in providing monitoring to the regions over their ATR activities. In 2012, this responsibility was transferred to the regions. Since that time, no formal monitoring bodies have been established with the responsibility to monitor and assess whether ATR activities continue to align with the Department's broad ATR objectives and/or expectations.

Some regions have established an Additions to Reserve Committee that meets as needed, while other regions discuss ATRs within their existing regional committees. However, these bodies' roles related to ATRs are largely to approve/recommend proposals to the Regional Director General (RDG) to provide a Letter of Support (or an Approval in Principle under the previous policy directive), more so than to provide oversight. Moreover, senior management in regions indicated that they largely rely on the manager responsible for ATRs to provide briefings and insight as needed (e.g. when a community has contacted the RDG with a complaint or concern related to an ATR).

Without a formal monitoring function in place, at the regional and/or HQ level, there is an increased risk that regional priorities and planned activities are not consistent with broader ATR objectives, or are not supporting departmental commitments such as reconciliation.

Risk Management

There is no defined approach to identify, assess, and monitor risks associated with ATR objectives, as well as to establish and monitor risk tolerances and mitigating strategies. As discussed earlier, strategic and operational objectives for the ATR portfolio have not been formally established. As such, regions have largely adopted a reactive approach to risk management. Specifically, regions are attempting to balance various file-related risks (e.g. relationship, legal, consultations), and allocate resources to mitigate these risks as they arise. Further, little consideration has been given to broader regional or national risk management. As

a result, additional risks or opportunities may not be identified promptly, and interpretations of acceptable risk tolerances may be inconsistent across the Department.

Recommendation

2. The Assistant Deputy Minister of Lands and Economic Development Sector, in collaboration with the Senior Assistant Deputy Minister of Regional Operations Sector should ensure that a plan and a timetable are established to develop and implement governance elements for the Additions to Reserves portfolio related to:
 - Performance reporting that adequately supports the oversight of Additions to Reserves activities in terms of assessing results achieved and identifying challenges;
 - Resource plans for Additions to Reserves activities;
 - Monitoring bodies to assess the alignment of Additions to Reserves activities with objectives; and
 - Approaches to identify, assess, and manage risks associated with Additions to Reserves objectives.

5.3 Roles and Responsibilities

The audit expected to observe that roles and responsibilities of all parties involved in the ATR process are defined and communicated to ensure there is a consistent understanding of expectations, and that each party is undertaking their respective responsibilities. This includes whether roles and responsibilities for the ATR Support Centres have been formally defined, and whether the Support Centres are providing consistent support for all regions.

Roles and responsibilities associated with the ATR process are clearly set out in the ATR Policy Directive and other supporting documentation. However, there are some gaps in the interpretation and implementation of these roles and responsibilities, as discussed below.

The Regional ATR Support Centres

As discussed in subsection 1.4 of this report, in 2012, a range of responsibilities related to ATRs (as well as other land management responsibilities) were shifted from LED Sector in HQ to the regions. Further, in support of the regions assuming these new responsibilities, regional ATR Support Centres were established to provide the regions with operational assistance and guidance. One Support Centre was created in Regina to assist with Treaty Land Entitlement (TLE) submissions and another was created in Toronto to assist with non-TLE submissions.

The two ATR Support Centres were mandated to provide support to regions by maintaining submission templates and reference documents, conducting quality assurance activities on submissions prior to being sent for approval, training staff members involved in the submission of ATR proposals, providing advice to applicable regions as required, reviewing translated documents as required, and liaising with HQ and applicable regions.

The roles and responsibilities of the ATR Support Centres were never fully implemented as originally intended. While these centres are continuing to maintain submission templates and other reference documents, neither Support Centre is receiving ATR submissions, for purposes of quality review, from regions other than their own (i.e. SK and ON respectively). Further, there appears to be limited contact between the Support Centres and other regions. Interviewees from other regions stated that they are generally unclear of the role of the Support Centres and have rarely contacted them for advice or assistance. However, Support Centre staff understand that their role is to provide support to other regions as requested, but are rarely called upon. In the absence of efforts required to support other regions, Support Centre staff are being used to assist in other ATR activities (e.g. preparing Ministerial Orders and/or Orders in Council) within their respective region. While this is permitted under the originally defined roles of the Support Centres, the level of effort diverted to non-support tasks is not consistent with the original intent of the Support Centres.

These findings suggests that the roles and responsibilities of the Regional ATR Support Centres have either not been adequately designed to be of value to other regions or are not being effectively communicated to other regions. In either case, in the absence of appropriately designed, implemented, and communicated roles and responsibilities for the ATR Support Centres, there is a risk that regions are not receiving adequate support to optimize progress on ATR files.

Advisory Support to the Regions

In support of the new ATR Policy Directive, recent efforts have been made through LED Sector to provide guidance and support ATR delivery. This included hosting a National ATR Workshop in November 2016 where regional ATR staff received information about the details of the new Policy Directive, discussed new requirements related to the Policy Directive, and networked with ATR staff from other regions. Further, LED Sector is holding ongoing engagements with other external parties to explore ways to improve the process and build regional and First Nations' capacity related to ATRs. These engagements involve groups such as the Assembly of First Nations, the National Aboriginal Land Managers Association, the Saskatchewan Federation of Sovereign Indigenous Nations, and the Federal of Canadian Municipalities, among others.

While these efforts appear to be making positive contributions in supporting regions in their ATR responsibilities, roles and responsibilities to provide ongoing advisory support to the regions on matters such as policy interpretation, clarification on the ATR process and its requirements, and on resolving common challenges or obstacles is not formalized. Prior to 2012, the LED Sector had a larger role in providing this advisory support. Regional staff indicated that since that time, they have been reaching out to more experienced colleagues in other regions for advice as needed. Despite evidence of cooperation among colleagues, there is no formal incentive or direction that would support regional staff from one region to assist staff from another region. This situation is particularly significant given the ongoing, and in many cases increasing, pressures on ATR resources in each region.

In addition to the challenge of working in a complex environment, regional ATR groups have experienced particularly high turnover in recent years, especially within more senior positions. Interviewees attributed this high turnover to the challenging nature of the work, the relatively slow progress of files, and difficulties in demonstrating results. Nevertheless, the lack of an advisory support function has created difficulties for new personnel to fully realize the complexities of ATRs, and the avenues and mechanisms available to them to resolve issues in a timely manner. Without an advisory function to support regions in ATR delivery, there is a risk that the complex and/or unique issues associated with many individual ATRs will not be addressed in a timely manner.

Support to First Nations

Interviewees stated that the lack of capacity in a First Nation is one of the leading causes for delays in progress within the ATR process. In general, regions appear to be committed to supporting the First Nations to the extent possible. However, the audit found that regions have significantly differing understandings of the level and nature of support that regional personnel are expected to provide to First Nations during the ATR process. Currently, regions may support First Nations through various activities including direct technical support from staff, engaging external parties to provide training and information sessions, and providing funding to First Nations (through the Lands and Economic Development Service Program) to meet requirements (e.g. for professional services, surveys, etc.).

The new Policy Directive states that INAC may provide facilitative or technical assistance where required. However, regional interviewees stated that there is a lack of clarity in the expected role of the region in providing this assistance. They also expressed that regions may not have the expertise and/or capacity to provide this assistance considering the range of ATR pressures facing the regions.

There is a need for consideration of the region's role in supporting First Nations capacity, particularly considering the role ATRs play in supporting reconciliation. Specifically, additional clarification regarding the level and nature of support expected from the regions is required to ensure that First Nations are receiving consistent and appropriate support, no matter their region, to ensure timely completion of ATR files.

Recommendation

3. The Assistant Deputy Minister of Lands and Economic Development Sector, in collaboration with the Senior Assistant Deputy Minister of Regional Operations Sector should ensure that:
 - Options are identified and assessed for providing national support on Additions to Reserves, and responsibilities are assigned accordingly; and
 - Expectations related to supporting First Nations during the Additions to Reserves process are clearly defined, communicated and implemented.

6. Management Action Plan

Recommendations	Management Response / Actions	Responsible Manager (Title)	Planned Implementation Date
<p>1. The Assistant Deputy Minister of the Lands and Economic Development Sector, in collaboration with the Senior Assistant Deputy Minister of Regional Operations Sector should develop and communicate strategic objectives related to Additions to Reserves.</p>	<ul style="list-style-type: none"> Strategic objectives will be developed and communicated in collaboration with First Nations that align with the Minister's mandate letter, United Nations Declaration on the Rights of Indigenous Peoples and Self-determination agenda of the Government of Canada. 	<p>Assistant Deputy Minister, Lands and Economic Development</p>	<p>December, 2017</p>
<p>2. The Assistant Deputy Minister of Lands and Economic Development Sector, in collaboration with the Senior Assistant Deputy Minister of Regional Operations Sector should ensure that a plan and a timetable are established to develop and implement governance elements for the Additions to Reserves portfolio related to:</p> <ul style="list-style-type: none"> Performance reporting that adequately supports the oversight of Additions to Reserves activities in terms of assessing results achieved and identifying challenges; Resource plans for Additions to Reserves activities; Oversight bodies to monitor and assess the alignment of Additions to Reserves activities with objectives; and Approaches to identify, assess, and manage risks associated with Additions 	<ul style="list-style-type: none"> Create a project management system to allow for accurate and responsive planning and reporting at the regional and national level. Develop a comprehensive inventory of outstanding Additions to Reserve; Assess Head Quarter /regional capacity and resources to address Additions to Reserve submission inventory. Establish Additions to Reserve as a regular standing agenda item at the Regional Operations Senior Management Committee to ensure that activities and strategic objectives are aligned. Create Multi-Stakeholder ATR Advisory Committee to meet at least semi-annually and provide 	<p>Assistant Deputy Minister, Lands and Economic Development</p>	<p>March, 2018</p>

<p>to Reserves objectives.</p>	<p>advice for ongoing Addition to Reserve reform.</p> <ul style="list-style-type: none"> • Through its national Addition to Reserve working group, Department of Justice will continue to provide advice on forms and other matters required to implement the new Addition to Reserve policy, and will assist in managing risks arising from the policy. Department of Justice will also seek to improve efficiencies with respect to addressing third party interests through template development. 		
<p>3. The Assistant Deputy Minister of Lands and Economic Development Sector, in collaboration with the Senior Assistant Deputy Minister of Regional Operations Sector should ensure that:</p> <ul style="list-style-type: none"> • Options are identified and assessed for providing national support on Additions to Reserves, and responsibilities are assigned accordingly; and • Expectations related to supporting First Nations during the Additions to Reserves process are clearly defined, communicated and implemented. 	<ul style="list-style-type: none"> • Options will be explored to establish a national Addition to Reserve unit with roles and responsibilities of contributing parties to be identified and clearly communicated amongst regions, Lands and Economic Development Head Quarter and the Corporate Secretariat. • Functional platform developed so that First Nations and INAC can work in sync to advance Additions to Reserves and reduce transaction costs and uncertainty over roles and responsibilities. • Continue to expand capacity building and training for First Nations through National Aboriginal Lands Managers 	<p>Assistant Deputy Minister, Lands and Economic Development</p>	<p>March, 2018</p>

	Association, as well as offering increased training opportunities for regional staff.		
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Appendix A: Categories of Reserve Creation

The following provides a brief description of the categories of reserve creation as set out in the ATR Policy Directive.

1. **Legal obligations and Agreements** – Where there is a legal obligation or a legal commitment by Canada that contemplates Reserve Creation contained within:
 - a. A settlement Agreement (such as Treaty Land Entitlement or other Specific Claims Agreement);
 - b. A Self-Government Agreement;
 - c. A land exchange Agreement;
 - d. A land transaction with a reversionary interest or right to Canada or the First Nation;
 - e. An Agreement for return of former Reserve land where there is no express reversionary interest or right;
 - f. An Agreement with a landless Band; or
 - g. An Agreement for the relocation of a community, the expansion of an existing reserve land base, or the establishment of a New Reserve.

2. **Community Additions** – Where a First Nation with an existing Reserve needs additional Reserve land for any of the following purposes:
 - a. Residential, institutional, recreational uses, to accommodate community growth;
 - b. Use or protection of culturally significant sites (such as burial grounds, archaeological, or ceremonial);
 - c. Economic development;
 - d. Geographic enhancements to improve the functioning of existing Reserve base;
or
 - e. Where the First Nation has entered into a legally binding agreement with the province, territory, Local Government or a corporation that is empowered by law to take or to use lands, and Canada is not a party to the agreement but agrees to implement those provisions of the agreement. This may include transactions under section 35 of the *Indian Act*.

3. **Tribunal Decisions** – Where a First Nation seeks to acquire lands with compensation awarded by the Specific Claims Tribunal for:
 - a. A failure to fulfill a legal obligation of the Crown to provide lands under a treaty or another Agreement;
 - b. A breach of a legal obligation arising from the Crown's provision or non-provision of Reserve lands; or
 - c. An illegal disposition by the Crown of Reserve lands.

Appendix B: Phases of the ATR Process

The following provides a brief description of the ATR process as per the ATR Policy Directive.

- Phase I. Initiation:** is led by the First Nation, who submits a Band Council Resolution and a Reserve Creation Proposal to an INAC regional office.
- Phase II. Assessment and Review:** starts upon the receipt of the Reserve Creation Proposal by the INAC regional office. The regional office provides a written acknowledgement of receipt to the First Nation, and reviews the proposal to determine if it meets the requirements set out in the policy directive. The regional office then advises the First Nation of any deficiencies required to be addressed. Due diligence is then completed by the regional office to identify and consult with potentially impacted parties (e.g. other First Nations and/or Indigenous organizations), and to notify the Province and any impacted municipalities. The proposal is also reviewed, in this phase, by the Department of Justice. Once the minimum requirements are met, the regional office undertakes additional assessment activities prior to issuing a Letter of Support to the First Nation. If a Letter of Support is to be issued, the regional office identifies criteria that must be satisfied before the Department will recommend reserve creation. The department will provide a written explanation for any Reserve Creation Proposal that will not be supported.
- Phase III. Proposal Completion:** starts with the issue of a Letter of Support. The First Nation and the regional office then work together to identify the requirements to meet the Reserve Creation Proposal criteria through the development of a joint work plan. The regional office verifies that the Reserve Creation Proposal is complete, confirms the number and name of the proposed reserve, and notifies the First Nation that the Reserve Creation Proposal will be submitted to the Minister.
- Phase IV. Approval:** An Order in Council (OIC) or a Ministerial Order submission is prepared by regional staff requesting reserve creation and sent to the Minister.⁵ The Minister may recommend the approval of the OIC to the Privy Council, or reject it, or approve the Ministerial Order. The Governor in Council either rejects or approves the OIC submission. If the OIC or Ministerial Order is granted, it is registered in INAC's Indian Lands Registry and in any other relevant land registries. The regional office will notify the First Nation and other relevant parties of the reserve creation and provide them with the registration particulars as required.

⁵ Typically, lands must be acquired or a transfer of administration and control accepted by Canada under the *Federal Real Property and Federal Immovables Act*, and then granted Reserve status by federal Order in Council. However, other authorities to set apart land as Reserve are found in the *Manitoba Claim Settlements Implementation Act* and the *Claim Settlements (Alberta and Saskatchewan) Implementation Act*. These allow for reserve creation in fulfillment of Treaty Land Entitlement Agreements in the provinces of Alberta, Saskatchewan and Manitoba by Ministerial Order.

Appendix C: Treaty Land Entitlement Agreements

Treaty Land Entitlement (TLE) Agreements are intended to settle the land debt owed to First Nations who did not receive all the land they were entitled to under historical treaties signed by the Crown and the First Nations.⁶ These agreements set out the legal obligations of the Crown in terms of a specified amount of acreage the First Nations are entitled to either via selection of existing Crown land or acquisition, and/or a cash settlement to be provided to the First Nation to be used to acquire land to settle the land debt.

The existing ATR Policy Directive allows for Additions to Reserves to be proposed to fulfill a legal obligation. As such, land that has been selected or purchased under a TLE Agreement can be added to the First Nations' reserve land base under the Additions to Reserve process.

The 2016 ATR Policy Directive states: "Where the criteria or requirements in this Policy are inconsistent or conflict with the provisions in an Agreement (including but not limited to a Treaty Land Entitlement, other Specific Claim, or Self-government Agreement), the provisions of the Agreement will prevail to the extent of the inconsistency or conflict." Relative to the Policy Directive, existing TLE Agreements generally include more prescriptive guidance on dealing with specific scenarios and elements associated with the ATR process (i.e. guidance on surface rights, minerals, replacement agreements, service agreements with municipalities, tax loss compensation, school boards, and responsibilities for INAC, the provinces and First Nations).

Currently, the most substantive TLE Framework Agreements have been established in Saskatchewan and Manitoba and a majority of ATR proposals received in these regions are subject to the respective agreements. These agreements are also subject to Claims Settlement legislation, specifically the *Claim Settlements (Alberta and Saskatchewan) Implementation Act* and the *Manitoba Claim Settlements Implementation Act*. This legislation attempts to streamline the ATR process by enabling First Nations to undertake a pre-reserve designation process prior to land being added as reserve, and enabling the Department to add land to reserve through a Ministerial Order submission rather than an Order in Council. It should be noted that not all TLEs agreements are under Claims Settlement legislation. Rather, only specific agreements identified in the legislation within the Provinces of Alberta, Saskatchewan, and Manitoba. As such, parties to TLE agreements within other regions are not provided with the same authorities (i.e. pre-reserve designations and submission through Ministerial Orders) as those under the Claims Settlement legislation.

TLE History – A Brief Synopsis/Overview

The following provides a brief overview of the history of the TLE Framework Agreements in Saskatchewan and Manitoba.

⁶ INAC Website – Treaty Land Entitlement; Retrieved March 2017 from: <https://www.aadnc-aandc.gc.ca/eng/1100100034822/1100100034823>

Saskatchewan Treaty Land Entitlement

In 1992, the Saskatchewan TLE Framework Agreement was signed by Canada, Saskatchewan, and 25 First Nations to settle outstanding commitments by the Crown from previously negotiated treaties. Under this agreement, Canada and the Province have committed to providing the signatory First Nations with a total of \$440M over 12 years to acquire land in fee simple.⁷

Subsequently, additional TLE settlements were signed with eight other First Nations based on the principles established within the TLE Framework Agreement. Overall, funding commitments have been made to enable the First Nations signatories to acquire up to 2.7 million acres of land.

Manitoba Treaty Land Entitlement

Between 1994 and 2009, Canada, Manitoba and 29 First Nations established a TLE Framework Agreement and individual TLE Settlement agreements to settle the outstanding/shortfall of land allocations to be provided to these First Nations under their respective treaties. Under these agreements, Canada and Manitoba committed to provide more than \$190 million in compensation and 1.4 million acres to reserve lands from unoccupied Crown land and private land owners.⁸

Key Characteristics of Saskatchewan and Manitoba TLE Agreements

Many Saskatchewan Regional staff indicated that Saskatchewan TLE Framework Agreement “sets them up for success” and that the provisions in the agreement help them in the process of converting land to reserve status. Since the establishment of its TLE Framework Agreement, the Region has added over 1,000,000 acres to reserve. Regional interviewees pointed to two distinct advantages.

1. *Tax Loss Compensation Funds* – When land in a rural municipality attains reserve status, Canada and the Province pay the municipality an amount totaling 22.5% a year for the tax loss after reserve creation. For urban municipalities, tax compensation is equivalent to what the municipality has always been receiving through tax from the land.
2. *Negotiated Utilities Templates* – Saskatchewan has made efforts to streamline their process by developing/negotiating utilities templates, with the consent of the TLE First Nations and the Province.

In comparison to Saskatchewan, while the Manitoba TLE Framework Agreement allows them to make Crown land available for reserve creation, it does not include provisions regarding tax

⁷ Ibid

⁸ Ibid

loss compensation or pre-negotiated utilities templates. In Manitoba, when a First Nation undergoes the ATR process, they need to negotiate settlements with each utility and is responsible for negotiating tax loss compensations with municipalities. This can cause additional delays.

To date more than 850,000 acres of land have been either selected from provincial Crown land or purchased from willing sellers in Manitoba. Aside from the advantages discussed above, regional interviewees from Manitoba pointed to two other distinctions between their process and that in Saskatchewan and Manitoba, with one being a characteristic of the Agreement and one being a regional approach.

1. *TLE Committee (TLEC)* – TLEC is responsible for assisting First Nations during the ATR process and in providing technical and professional support as needed. Providing this technical support can be challenging and time consuming, and at times the roles and responsibilities between TLEC and the Region have somewhat lacked clarity. However, recent efforts have been made to mutually establish accountabilities and prioritize files with TLEC to ensure that TLE First Nations are receiving adequate technical support and to move ATRs forward.
2. *Duty to Consult* - In 2013, the Supreme Court ruled in favour of the Manitoba Metis Federation (MMF) that the federal government had not fulfilled its obligation as set out in the Manitoba Act of 1870. This had stopped the progress of ATR files for some time. Since the Supreme Court ruling, the Region has established an agreement with the MMF, which provides them with funding to establish a consultations unit for ATRs and sets out an approach for future consultations with the MMF. The Region now undertakes a pre-consultation analysis for each proposed ATR to identify any Indigenous groups that may be impacted, and develops a consultation plan as needed.

As discussed earlier, both Saskatchewan and Manitoba TLE Agreements have provisions related to the use of pre-reserve designations via the Claims Settlement legislation. A pre-reserve designation takes place before lands are granted reserve status. It was identified that this is not addressed in the ATR Policy Directive. Furthermore, the Claims Settlement Legislation allows for Reserve Creation of Saskatchewan and Manitoba TLE submissions to be approved by Ministerial Orders and do not require an Order in Council.

Implications of TLEs on ATRs Moving Forward

Settling claims is one of many steps on the journey of healing and reconciliation with Indigenous peoples and helps create a better future for everyone.⁹ As part of this effort, Canada, Ontario and the Chapleau Cree First Nation have established the Ontario Region's first TLE Claim Settlement. Under the settlement, the Chapleau Cree First Nation is provided approximately \$21.5 million in financial compensation from Canada and about 4,000 square hectares of

⁹ INAC Website- Canada, Ontario and Chapleau Cree First Nation Celebrate Settlement of Land Claim

provincial Crown land from Ontario.

Various factors and implications need to be considered when assessing the use of TLE Agreements. It was indicated that the influx of ATR files has been increasing and will continue to increase over the next few years, and that many First Nations are beginning to pursue urban reserves and economic development opportunities. The increase in the volume of files, the complexity of files, and the increased need for consultation will have implications on the workloads of Regional staff. If Regions do not have the capability or capacity to demonstrate progress in fulfilling the legal obligations set out in the TLE Agreements, the Department runs the risk of alienating and/or damaging the relationship with the TLE First Nations.

The following are good practices and lessons learned from Regions with substantive TLE Agreements that should be considered when negotiating/entering a new TLE Agreement:

- The use of pre-negotiated utility templates and agreements helps expedite the process as agreements do not need to be negotiated every time a First Nation wants to transfer land to reserve.
- Having access to a Tax Loss Compensation fund (and associated provisions/guidance in the Agreement) helps in negotiations with municipalities.
- TLE Agreements should be supported by legislation that expedites the process including provisions such as pre-reserve designations, ministerial approvals, and potentially others.
- It was indicated that TLE Agreements are often set out without understanding what 3rd party issues exist. While the TLE Framework Agreements provides guidance on how to deal with certain scenarios, it lacks guidance on mechanisms to accommodate and/or replace 3rd party interests.
- Implementation of the TLE Agreements may ultimately place greater strain on regional staff to manage the increasing reserve land base (i.e. increase in permits, leases, environment, etc.), and could cause significant strain on relationships.

Appendix D: Audit Criteria

To ensure an appropriate level of assurance to meet the audit objective, the following criteria were developed to address the objective as follows:

Audit Criteria and Control Objectives	
1. Governance and Oversight	
1.1	The ATR portfolio has clearly defined strategic and operational objectives.
1.2	Oversight bodies have been defined and established to provide guidance and monitoring over the ATR portfolio.
2. Policies and Procedures	
2.1	Appropriate policies, procedures, and roles and responsibilities have been developed and been communicated to all staff involved in the ATR process.
2.2	Appropriate training, tools, resources, and other information has been developed and provided to regional staff to support them in the discharge of their responsibilities related to the ATR process.
3. Risk Management	
3.1	A documented approach to risk management has been established for the ATR portfolio.
4. Capacity and Capability	
4.1	Resource and capacity requirements are adequate to complete ATR activities in a timely manner.
4.2	There are effective means to identify, assess and respond to the needs of First Nations for facilitative or technical assistance during the ATR process.
4.3	The mandate of the ATR Regional Support Centres is adequate to effectively support the completion of ATR files.
5. Results and Performance	
5.1	Planned results and associated performance measures have been established and are clearly communicated for the ATR portfolio.
5.2	Sufficient, complete, timely, and accurate information on the ATR portfolio is captured and used to monitor performance and support decision-making.

Appendix E: Relevant Legislation, Policies, and Directives

The following authoritative sources were examined and used as a basis for this audit:

- Additions to Reserve “Policy Directive”– Chapter 10 of the INAC Lands Management Manual – (October 2003 and July 2017)
- *Claims Settlements (Saskatchewan and Alberta) Implementation Act*
- *Manitoba Claims Settlement Implementation Act*
- Treaty Land Entitlement Framework Agreements – Saskatchewan and Manitoba
- INAC Duty to Consult Guidelines
- *Federal Real Property and Federal Immovables Act*