

Subject: FNLMA - Policy on researching roads for LDRs

Recommendations:

1. Given the nature of road-like strips on Indian Reserves (IR), SGB's boundary (and not title) expertise, and SGB's limited access to sources, use only five sources:
 - CLSR;
 - ILRS;
 - Land Sales System;
 - Stuff used in preparing the opinion on the jurisdictional (external) boundary;
 - CLU general knowledge.
2. Imbed one of the following opinions in the LDR for each road-like strip:
 - "There is sufficient evidence to exclude the road-like strip," accompanied by an opinion as to the boundaries of the public road; or
 - "There is insufficient evidence to exclude the road-like strip," accompanied by a recommendation that INAC investigate its status.

Principles:

1. The distinction between boundary (survey) and status (title) issues is critical because of the differing skill sets required to resolve them. SGB, as Canada's boundary experts, is ill-equipped to answer status issues. Moreover, access to relevant sources (such as INAC, provincial and municipal records) is restricted.
2. Neither SGB nor INAC seem clear on the distinction. The draft Interdepartmental Agreement¹ says that SGB will identify "to INAC problems regarding status and title issues." The LDR Guidelines are more overt: "Legal descriptions will not address 'status' issues although the background research for these issues will be included..."²
3. The absence of a policy has led LDR writers in different directions. Some have done extensive research into status issues for the purposes of giving recommendations to INAC to resolve the problem³. Others have merely flagged the issue to INAC for resolution⁴.
4. Consistency across all LDR writers (and thus all LDRs) will:
 - allow SGB to focus on its mandate - jurisdictional boundary issues;
 - eliminate the expectation that SGB has fully researched all road (title) issues;
 - reduce the reliance on CLSs and other contractors who have little expertise with roads;
 - fully convey to INAC the nature and scope of their responsibility.

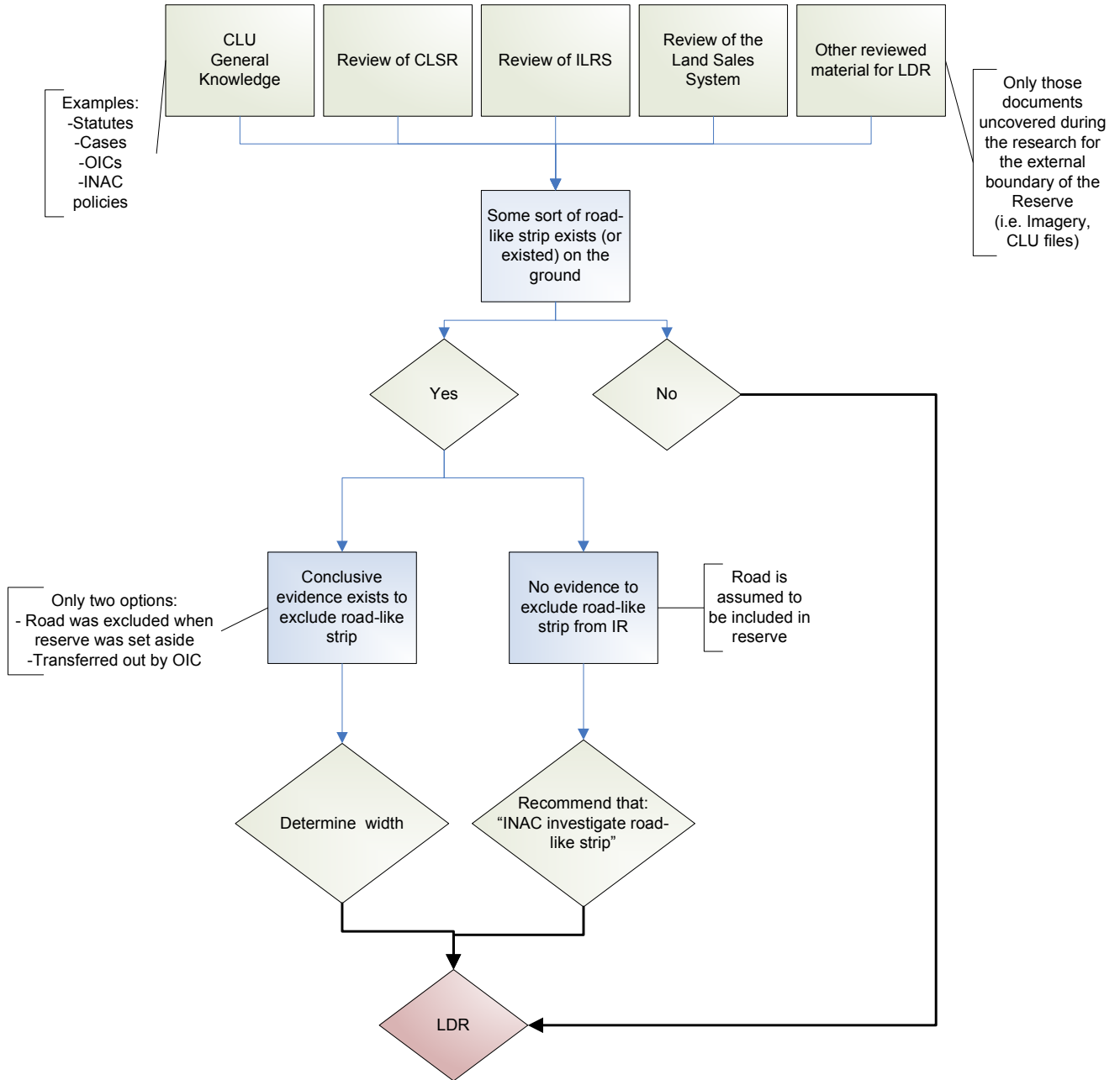
¹ INAC-NRCAN. 2009. *Draft Interdepartmental Letter of Agreement related to the preparation of legal description reports as part of First Nations Land Management and required by the First Nations Land Management Act during the 2009/2010 fiscal year.*

² Surveyor General Branch. *Guidelines for the preparation of Legal Description Reports for the Individual Transfer Agreements under the First Nations Land Management Act.*

³ Draft Legal Description Report for Alderville First Nation Reserve. Prepared on: December 5, 2008.

⁴ Legal Description Report for Capilano Indian Reserve No. 5. Prepared on: December 15, 2003.

IF-Then Algorithm:



Describing the If-Then Algorithm:

CLU general knowledge

This includes the four fundamental road principles that apply across Canada:

- The onus is on the Province (or a municipality – a creature of the Province) in asserting that a road is a public highway; the onus is neither on the First Nation nor on Canada.⁵
- A clear intention and cogent evidence must exist to remove a strip of land from an IR and make it a public highway. Canada has a duty to protect and preserve the IR from exploitation.⁶
- Neither conduct by Canada nor road maintenance by a province is sufficient to dedicate for public use a road across unsurrendered Indian land.⁷
- Although s.35 of the *Indian Act* does allow land to be taken from an IR for public purposes pursuant to the wishes of a province, it can only be taken by Order in Council. Absent such an OIC, IR roads are not public highways.⁸

CLU knowledge also includes regional knowledge of Provincial statutes (e.g. *New Brunswick Indian Reserves Agreement Act, 1959*); Provincial Orders in Council (e.g. British Columbia OIC 1938-1036); Regional INAC policies (e.g. Poupore's 1975 letter); correspondence between parties (e.g. Thistlethwaite's 1966 letter and Slessor's 1973 letter); First Nations' issues.

Review of CLSR

All records in the CLSR should be reviewed to flag potential road issues. This includes plans of survey, field notes, and diaries. It is important to note that pronouncements on CLSR plans and in letters referring to "public roads," "Provincial roads" and "reserve roads" mean little to status issues. The review of the CLSR should be considered as congruent research. That is, it may provide evidentiary support to a particular position, but is often not authoritative on its own.

Review of ILRS

The review of the ILRS should be limited to the documents in the Reserve General Abstract. Often there is conclusive evidence through this review to determine the status of the road-like strip. In such cases, the evidence can be included in the LDR and the road can be depicted and shown conclusively.

⁵ *Dunstan v. Hell's Gate Enterprises*, 1987 CarswellBC 375 (BCCA); *Brady v. Zirnhelt*, 1998 CarswellBC 1435 at para 23 (BCCA).

⁶ *Osoyoos Indian Band v. Oliver (Town)*, 2001 CarswellBC 2703 (SCC); *Roberts v. R*, 2002 CarswellNat 3439 (SCC).

⁷ *Hopton v. Pamajewon*, 1993 CarswellOnt 66 (Ont CA).

⁸ *Galligos v. Lewis*, 1986 (BCCA); *R v. Fox*, 1979 (Alta CA); *R v. Canute*, 1985 (BCCA).

Other reviewed material for LDR

Additional material can be incorporated only if:

- the document was uncovered during the jurisdictional (external) boundary research; and
- it already resides in an SGB file. A good example is historical air photos kept in the CLU's regional files. The photos are easy to access, SGB has the expertise to interpret them, and they provide excellent evidence for the existence of a road at a certain period. Other examples include: gazette notices, location surveys, grading widths, invoices and receipts (documentation of money spent), correspondence between parties, and so on.

Material/sources NOT TO BE USED when looking at a road-like strip:

- Canada, provincial and municipal archives
- Provincial and municipal records
- Provincial registry & land titles offices
- First Nation records
- Legislation pertaining to the specific IR
- Judgments pertaining to the specific IR (such as from Quarter-Session Courts)
- INAC records
- Journal articles and conference papers
- Imagery (such as in air-photo libraries)
- Local histories (and old-timers' recollections)

To be clear:

In examining a road-like strip on an IR, SGB is guided by only one question – Is it part of the IR (meaning that there are no jurisdictional boundaries) or is it excluded from the IR (meaning that there are two jurisdictional boundaries)? This policy allows only two opinions, based on a review of only that evidence found in the five boxes:

- “There is sufficient evidence to exclude the road-like strip” (and thus to provide an opinion as to the character and location of the jurisdictional boundaries on either side of the public highway), OR
- “There is insufficient evidence to exclude the road-like strip” (and thus INAC must be asked to investigate the status of the strip).

The relevant triggers can often not be answered by SGB. Two examples should suffice. In British Columbia, OIC 1036 set out that “all travelled streets, roads, trails, and other highways” existing over IR in 1938 remained with the province and did not become part of the IR. We might well have no evidence that the road-like strip was **travelled** in 1938. In New Brunswick, the *Act* of 1959 set out that roads and bridges “constructed for public use by and at the expense of the Province or any municipality” remained with the province and did not become part of the IR. We might well have no evidence as to who incurred the **expense** of constructing the road-like strip.

Appendix – Common road problems

If we examine the most commonly occurring problems associated with roads on LDRs, we can start to make some generalizations. Firstly, it becomes clear that road issues can be categorized as ‘status’ in the first instance and ‘boundary’ in the second instance. Examining the first example from the Appendix makes the distinction clearer. If a province attempts to take a road, but no formal documentation exists - there is an issue with the boundary. The issue, however, is a function of the unclear ownership by lack of a paper trail. There may be a land survey required to formalize the transfer of this hypothetical road, but this only arises once the two owners (Canada and the Province) have decided what will be the boundary, and thus what should be surveyed.

Issues
Attempted to take (but no formal documentation)
Never any attempt to formally take
Attempt to take land by filing Land registry plan under the land act (but after 1938) - BC
Only formal taking on widening and not original road
Taking new road, and closing old road (except where it crosses new road)
Taking new road, but no formal documentation, but informal may exist in INAC records (no access)
Widening and realignments don't match survey
Pieces of road not dealt with on return to reserve
Abandoned roads which were public
Road taking make no mention of mines and mineral status
Unsurveyed winter roads passes through reserve but not within defined ROW
Is authority to create road legit (statute, bylaw, gazette, etc...)?
Unclear date of creation
What is width of road (66ft or minimal impairment)?
Unclear location on the ground
Reservation of roads in original patents
Shows road as being formally taken (but no documentation)
Shows road as reserve where public and Province treat as a public road
Shows road as 66ft (not travelled width)
Unsurveyed or partially surveyed roads
Municipality issuing bylaws which attempt to create roads
Government road allowances excluded from reserve but not maintained or acknowledged that they belong to the rural municipality
First Nation challenges authority of blanket OIC to create roads
First Nation improvements encroach onto road parcels