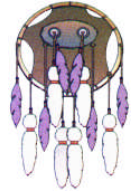


IMPLEMENTATION MONITORING COMMITTEE



BULLETIN NO. 2

SELECTIONS UNDER 1,000 ACRES IN AREA

JUNE 2009

Introduction:

This is the second Bulletin issued by the Implementation Monitoring Committee (“IMC”). Bulletins are a new initiative of the IMC, intended to serve as procedural and operational guidelines for the Parties to the 1997 Manitoba Framework Agreement on Treaty Land Entitlement (“MFA”), and to inform the Entitlement First Nations (“EFNs”) of policies or procedures affecting the Reserve creation process.

Bulletins will address a variety of subjects selected by the IMC or as proposed by the EFNs ranging from technical interpretations of the MFA to practical operational guidelines.

This Bulletin deals with the treatment of selections of Crown Land estimated to be less than 1,000 acres in area, a subject upon which there is considerable discussion in the MFA. The clarifications provided will hopefully be of assistance to EFNs in making decisions about Crown Land selections.

Background: Selection and Acquisition of Land in Accordance with Principles

Discussion of the Selection or Acquisition of land to be set apart as Reserve under the MFA begins with the recognition that the MFA does not supersede Treaty rights of EFNs. Rather, as stated below, the MFA provides guidelines to assist the parties to the MFA and the EFNs with the land selection/acquisition process in light of the complexity of doing so today, after more than a century of growth, development and land occupancy within Manitoba. In particular, the management of land and private interests in land has resulted in the creation of long-established public and private rights and interests in land held by Third Parties. The MFA provides guidance in Section 2.02 as follows:

“(1) During the Period of Selection and Period of Acquisition, an Entitlement First Nation shall Select and Acquire land which conforms to the Principles.

“(2) Land Selected or Acquired in accordance with the Principles shall be eligible to be set apart as Reserve subject to the provisions of this Agreement.”

The MFA then directs EFNs to Select and Acquire land in conformance with the Principles, and if the EFNs do so, land so selected or acquired **shall** be eligible to be set apart as Reserve subject to the other applicable terms of the MFA. Similarly, and equally then, Canada and Manitoba are obliged to proceed with Reserve creation if the EFNs in fact Select or Acquire land

in accordance with the guiding Principles. The MFA is then written in a positive manner providing directions to each party. In this Bulletin, the IMC is providing the parties and EFNs with a summary of the MFA guidelines regarding so called “smaller” selections or acquisitions, smaller being generally understood to be parcels of land of 1,000 acres or less in area.

In entering into the MFA, Canada acknowledged that it owed certain First Nations signatory to Treaties 1, 3, 4, 5, 6 and 10, additional lands for Reserve (referred to as Treaty land entitlement or TLE). Under those Treaties, Canada agreed to lay aside and reserve an amount of land for the use and benefit of the signatory First Nations. Historical practice has been that after consultation between Canada and the First Nation and the selection or identification of suitable available land by the First Nation, the land was surveyed and affirmed as Reserve.

During the MFA negotiations, the First Nations with acknowledged TLE asserted a Treaty right to the selection of land of any size and configuration throughout their respective Treaty areas and traditional territories to fulfill their outstanding TLE. Under paragraph 11 of the Constitution Act, 1930 (also known as the *Manitoba Natural Resources Transfer Agreement*), Manitoba is obliged to provide Crown land to Canada to enable Canada to meet its Treaty obligations to First Nations. The MNRTA further indicates that there must be agreement between Canada and Manitoba on those selections.

As stated by Manitoba in its Report of September 7, 2005 in relation to MFA on this subject:

“During the negotiation of the 1997 TLE Framework Agreement, Manitoba proposed a principle that land selections under the agreement should be large parcels of land, or contiguous to existing reserve parcels. This approach would have been consistent with the land transfers that occurred under the Northern Flood Agreement, and reflected a view that larger selections are beneficial from the perspective of land management, both for the First Nation, and for the province, which will retain responsibility for management of provincial Crown lands adjacent to the reserve lands created under TLE.

The proposal was not accepted, but a compromise was reached as outlined in Section 3.02 of the Framework Agreement dealing with the Principles for Land Selection and Acquisition. The relevant portions of the Agreement are reproduced below for ease of reference:

3.02 General Principles for Selection and Acquisition of Land

- (1) *An Entitlement First Nation may Select its Crown Land Amount from:*
 - (a) *the area comprising its Treaty Area or Traditional Territory in the Province of Manitoba; or*
 - (b) *the area outside its Treaty Area or Traditional Territory, but within the Province of Manitoba where, on a case by case basis:*

- (i) *the Entitlement First Nation can establish a reasonable social or economic development objective for the Selection;*
and
 - (ii) *Manitoba concurs in the Selection, which concurrence will not be unreasonably withheld.*
- (2) *An Entitlement First Nation identified in Schedule "B" may Acquire Other Land from within:*
 - (a) *the area comprising its Treaty Area or Traditional Territory in the Province of Manitoba; or*
 - (b) *the area outside its Treaty Area or Traditional Territory, but within the Province of Manitoba where, on a case by case basis, the Entitlement First Nation can establish a reasonable social or economic development objective for the Acquisition.*
- (3) *Subject to Subsection (4), an Entitlement First Nation may Select or Acquire parcels of land of such size and configuration as the Entitlement First Nation determines will reasonably contribute to the enhancement of its historical and cultural identity or provide economic or social benefit."*

The other provisions of the MFA applicable to the discussion of this matter are Subsections 3.02 (4) to (7) as follows:

- "(4) *Subject to Subsections (5) and (7), an Entitlement First Nation will generally Select parcels of land of 1,000 acres or more in area except where suitable Crown Land is not available in the location preferred by the Entitlement First Nation or where the purpose of a Selection for historical, cultural, economic or social reasons necessitates the Selection of a parcel of Crown Land of a less than 1,000 acres in area.*
- (5) *Subject to Subsection (7), where an Entitlement First Nation Selects a parcel of land of less than 1,000 acres in area, the Entitlement First Nation shall, upon receipt of a written request from Manitoba, provide to Manitoba a written statement outlining the reasons for the Selection of less than 1,000 acres in area.*
- (6) *Where, after considering the written statement referred to in Subsection (5), Manitoba identifies other reasonable competing considerations relating to the Selection not addressed by the Principles:*
 - (a) *Manitoba shall set out those competing considerations in writing to the Entitlement First Nation;*

- (b) *Manitoba and the Entitlement First Nation shall make a reasonable effort to address those considerations having appropriate regard to the right of the Entitlement First Nation to Select land in accordance with this Agreement; and*
 - (c) *where Manitoba and the Entitlement First Nation do not address those considerations to their satisfaction, the matter may be referred to the Implementation Monitoring Committee.*
- (7) *An Entitlement First Nation may Select a parcel of land of less than 1,000 acres in area where the land is located in reasonable proximity to a Reserve of that Entitlement First Nation.”*

From the EFN perspective, the protection of asserted Treaty rights to select land of any size for reserve for social, economic, cultural and historical reasons was significant -- these terms are found throughout the above provisions. From the provincial perspective (and perhaps federal perspective as well), ease of land management was equally significant, thus the provisions reflect an encouragement of the selection of land contiguous to or in the reasonable vicinity of existing reserves and, if that was not the case, the opportunity for discussion of other reasonable competing considerations, when the land selected is less than 1,000 acres in area in certain instances.

Subsection 3.02(3) contains the EFNs view of the scope of the applicable Treaty right stating that the right to Select or Acquire land pertains to parcels of land of “*such size and configuration as the EFN determines will reasonably contribute to the enhancement of its historical and cultural identity or provide economic or social benefit*”. In apparent recognition of the concerns expressed by Manitoba about the size and contiguity of new Reserve land, this provision is expressly stated as being “subject to” Subsection (4). Subsection (4) indicates the nature of the compromise on the question of the size of selections. It contains language **to encourage EFNs to select parcels of land greater than 1,000 acres in area**, but not without clear qualifications that reflect the EFNs view of the scope of the right of selection.

However, before discussing Subsection (4) and its own internal qualifications, it should be noted that Subsection (4) is itself qualified -- it is “*subject to*” both Subsections (5) and (7).

Since Subsection (5) is also “*subject to*” Subsection (7), a discussion of Subsection (7) is required before either Subsection 3.02 (3) or (4) can be understood.

Concept of Reasonable Proximity of Selections to an EFN Reserve:

Prior to the MFA, as a matter of policy and practice, in order to encourage the resolution of TLE and the selection of land in and around the reasonable vicinity of existing reserves, Manitoba provided notice of the proposed alienation of Crown land being considered by Manitoba within a 30 km radius of the primary Reserve of any First Nation with outstanding TLE in Manitoba, regardless of the size of the available Crown land or contiguity with an existing Reserve of the EFN. This practice was continued in Article 5 of the MFA with the establishment of Community Interest Zones.

In shaping the compromise reached, the EFNs fully reserved the ability to select land of any size when located in “reasonable proximity” to its Reserve. Subsection 3.02(7) states:

An Entitlement First Nation may select a parcel of land of less than 1,000 acres in area where the land is located in reasonable proximity to a Reserve of that Entitlement First Nation.

As written Subsection (7) stands on its own as a Principle, it is **not** qualified in any manner, unlike Subsections (3), (4) and (5). This Subsection indicates the parties agreed that:

- concerns about the size of a Selection would be resolved around parcels of 1,000 acres in area; and
- concerns about the location of the Selection near a Reserve of the EFN would be resolved around the concept of “reasonable proximity”.

Since “reasonable proximity” is not a defined term under the MFA, it is determined on a case by case basis.

In accordance with its plain meaning, “*reasonable proximity*” does not necessarily mean contiguous, adjoining or abutting. The phrase infers a right of Selection of parcels of land less than 1,000 acres in area a distance apart from the Reserve of an EFN. But what distance apart is reasonable? Reasonable is an “objective” standard, a view that would be held by a reasonable person, but with reference to what factors? Recall that Manitoba’s proposals with regard to these Principles were not accepted. Per Subsection 3.02(3), the EFN determines the social, economic, cultural or historical benefits for each selection, and expectations relative to those views would then be appropriate to consider in answering this question. Presumably, the EFN would “*look out from its community*”, its view being related to its long standing use of the land in the area of its Reserves. If so, reasonable proximity should have a local or EFN specific connotation, meaning that it would likely:

- encompass Selections within a modest distance of a Reserve of the EFN in active use by its Members, of evident cultural or historical significance, and
- take into account the location of the EFN, the area geography and land use patterns of the Members.

To do otherwise would arguably not reflect appropriate regard for the right of EFNs to select land under the MFA for social and economic development, environmental protection, security and use of its traditional land use areas and cultural sites, among other things, in the name of generalized concerns raised about efficiencies to be gained in land management.

Therefore, if the selection is in reasonable proximity to a Reserve of the selecting EFN, Subsection (4) has no application at all. In that case, Manitoba has no right under the MFA to request a written statement outlining the reasons for a Selection of less than 1,000 acres in area under Subsection (4), nor to assert reasonable competing considerations relating to a Selection

(under Subsection (6)). However, if the selection is *not* determined (by discussions among the EFN, Canada and Manitoba) to be in reasonable proximity to a Reserve of the EFN, Manitoba has the right under Subsection (4):

- to request a written statement outlining the reasons for the selection and
- after considering the written statement, to assert reasonable competing considerations (not otherwise addressed by the Principles) for discussion about the selection with the EFN under Subsection (6).

Finally, a balance is sought in that Manitoba is entitled to set out reasonable competing considerations for discussion in relation to a selection of less than 1,000 acres, not a veto. As mentioned above, the discussions must also have “*appropriate regard*” for the purpose of the MFA and the reasonable aspirations of the EFN in making its selection, failing which the matter may be referred to the IMC (Subsection (6)).

Size of a Selection:

It is clear from the MFA provisions that Manitoba is not entitled to a written statement outlining the reasons for a selection, nor to assert a competing consideration for discussion in relation to a Selection under Subsections (3) to (6), if the Selection is 1,000 acres *or more* in area.

An EFN is not required to, but is then *encouraged* by the MFA to Select land in parcels over 1,000 acres in area if the Selection is not in reasonable proximity to an existing Reserve of the EFN, as in doing so, the EFN may avoid the complications associated with smaller Selections set out in Subsections (3) to (6).

It is equally clear that the EFNs have an unqualified right to Select land of any size or configuration that is in *reasonable proximity* to an existing Reserve of the EFN, at least in the sense that the Selection need only satisfy any other applicable Principles.

Qualification of the Right of Selection of Land less than 1,000 acres in Area

As noted above, although Subsection 3.02(4) encourages the EFNs to generally Select land 1,000 acres or more in area, this general direction and understanding is also qualified by its own internal exceptions.

Subsection (4) indicates that the general encouragement of Selections of 1,000 acres or more is not an absolute requirement, that it does not apply if practical considerations dictate against the EFNs ability to make a larger Selection, when either of two circumstances exists:

- “suitable Crown Land is not available in the location preferred by the Entitlement First Nations; or
- the purpose of a Selection for historical, cultural, economic or social reasons necessitates the Selection of a parcel of Crown Land of less than 1,000 acres in area.” [Underline emphasis added]

Both exceptions dealing with sufficiency of suitable land in the Selection location and a purpose of necessity are consistent with the broadly accepted understanding of one of the primary purposes of land reservations in Treaties (economic self-sufficiency) and the assertion of the EFNs Treaty right found in Subsections (1), (2) and (3).

Under Subsection 3.02(5), if requested in writing to do so by Manitoba, the EFN must provide a written statement outlining the reasons for the Selection. The explanation required is not simply a bare statement of which of the above exceptions is being relied upon without any content, the exceptions indicate a more detailed explanation is required:

- In the case of a lack of suitable Crown Land in the area of the Selection, the EFN's explanation would be largely a matter of geography or topography, a verification or illustration of the fact that there is insufficient Crown land at the location of the Selection for the intended purpose; or in the case of a Selection necessary to achieve the purpose for which it was made, the EFN explanation should include a detailed statement outlining the purpose of the Selection and also why it is not necessary to Select a larger parcel to achieve the stated purpose. The focus here is the question of necessity, the purpose being a matter of determination by the EFN under Subsection (3), but subject to the explanation/discussion process of Subsection (5).

Manitoba may or may not accept the explanations given. If it does so, the Selection would proceed. If after considering the written statement from the EFN, Manitoba does not, it must, under Subsection 3.02(6), set out a reasonable competing consideration in writing to the EFN. The EFN and Manitoba must then make a reasonable effort to address those considerations with appropriate regard to the right of the EFN to make the selection in accordance with the Agreement. The consideration identified may not be in relation to a matter "*otherwise addressed in the Principles*". Manitoba must set out its views in a similarly sufficient written statement which explains why Manitoba has identified the matter or interest as a "competing consideration" and how its statement reflects appropriate regard for the right of selection of the EFN under the MFA. If those discussions do not resolve the matter, either more discussion would ensue, or the matter could be referred to the IMC by either party.

Summary:

Considered in this manner, the extent to which the parties balanced the competing interests of the EFNs and Manitoba by a set of rather complex interrelated provisions in the MFA can be understood and applied as a Principle, a guideline for future implementation purposes and perhaps to various Selections at hand.

Although the EFNs continued to be of the view that the Treaty right of Crown land selection of Reserve was unqualified, the EFNs accepted a degree of accommodation of Manitoba's view for the purposes of settlement and a compromise was reached. Other related practice directions are as follows:

A. *Identification of Selection:*

EFNs will be requested to provide a professionally drawn map locating the selection(s) of a scale larger than 1:50,000 if available, and if not, a larger scale hand drawn map of the Selection to assist in a more accurate calculation of the distance of the Selection from the closest point of a Reserve of the EFN.

B. *Reasonable Proximity:*

The question of "reasonable proximity" of Selections of less than 1,000 acres will be considered on a case by case basis, and determined by discussions among Canada, Manitoba and the EFN. The considerations should be guided by, but not limited to the following factors:

- whether the Selection is a moderate distance from a reserve of the EFN and in recent or active use by its Members, or of cultural or historical significance to the EFN;
- the location of the EFN, the area geography and land use patterns of the Members.

C. *Confirmation of Reasons for Selections Estimated to be Less than 1,000 Acres in Area:*

- TLEC will incorporate an explanation of the Principles which encourage Selections of at least 1,000 acres in area into implementation orientation materials and workshops;
- Each EFN is requested to confirm in the letter forwarding a Council Resolution setting out a Selection of uncertain smaller area whether or not the EFN intends the Selection to be at least 1,000 acres in area; and
- When not so confirmed and Manitoba is uncertain about the size of the Selection or EFN intentions, Manitoba will request confirmation from the EFN as to whether the EFN intends to make a Selection of less than 1,000 acres in area or would be willing to Select a parcel of at least 1,000 acres in area.

In practice, the EFNs have tended to Select many parcels of land less than 1,000 acres in area. Of the 82 selections that have now been set apart, in the form of 77 reserves, 30 of the new reserves have been less than 1,000 acres.

Questions regarding these smaller Selections as well as the interpretation and application of the MFA provisions have impeded progress in Reserve creation in a significant number of cases. By a diligent application of these practice improvements, the Parties can expect a positive change in the pace of Reserve creation in these instances.

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