

EAST SIDE LAKE WINNIPEG
BROAD AREA PLANNING INITIATIVE
MEMORANDUM OF UNDERSTANDING

BETWEEN

THE FIRST NATIONS LOCATED WITHIN THE EAST SIDE PLANNING AREA
AS REPRESENTED BY THE EAST SIDE FIRST NATION COUNCIL
(HEREINAFTER REFERRED TO AS "THE COUNCIL")

OF THE FIRST PART

AND

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA AS
REPRESENTED BY THE MINISTER OF CONSERVATION
(HEREINAFTER REFERRED TO AS "THE PROVINCE")

OF THE SECOND PART

WHEREAS in July 2000, the Province announced its acceptance of the *Consultation On Sustainable Development implementation (COSDI) Report* which recommended, among other things, that the implementation of sustainable development include the creation of broad area plans in the province;

WHEREAS on August 9, 2000 the Province announced that the government would initiate broad area planning on the east side of Lake Winnipeg as a pilot for broad area planning for the province;

WHEREAS it is the objective of east side planning process to bring together local communities, First Nations, industry and environmental organizations to develop a vision for land and resource use in the area that respects both the value of the boreal forest and the needs of the local communities;

WHEREAS the Final Report of Phase 1 of the East Side Lake Winnipeg Broad Area Planning Initiative recommends that the east side plan recognize, affirm and be in compliance with treaty obligations and aboriginal rights and be consistent with the consultation/protocol guideline recommendations of the *COSDI REPORT* respecting First Nation and Aboriginal peoples;

- WHEREAS East Side Round Table has established the East Side First Nation Council to facilitate First Nation participation in the planning process;
- WHEREAS the planning area is within Treaty 1, 3, 5 and First Nation traditional territories;
- WHEREAS the members of the Council have approved Terms of Reference to guide their participation;
- WHEREAS the Province desires the First Nations to participate in the planning process;
- THEREFORE the parties agree to work together in a spirit of mutual recognition, respect and reconciliation to achieve the objectives and goals of the East Side Large Area Land Use Planning Initiative in the following ways:

1. DEFINITIONS

"East Side Large Area Planning Initiative" means the planning process to be conducted respecting land use within the east side of Lake Winnipeg;

"east side planning area" means the area defined by watershed boundaries and outlined in Appendix "A";

"East Side Round Table" means the body established by the Minister composed of stakeholders, First Nations citizens, environmentalists and ordinary citizens of Manitoba;

"First Nation Council" means the Council established by the East Side Round Table comprising of Chiefs.

2. PRINCIPLES

The Parties commit to each other to abide by the following principles:

- 2.1 the relationship is on a government to government basis;
- 2.2 the First Nations peoples now living within the planning area are the original inhabitants of the area;
- 2.3 the planning area is within Treaty 1, Treaty 3 and Treaty 5 and therefore the Province is bound by the terms of those Treaties and principles of treaty interpretation;

- 2.4 according to the Elders, the First Nations by signing the Treaties agreed to share benefits from the land and share power on the land;
- 2.5 in addition to their treaty rights, the First Nations peoples living within the planning area still have aboriginal rights that are inherent in them as First Nations peoples and as the original inhabitants of the area;
- 2.6 the First Nations peoples living in the planning area have traditional territories;
- 2.7 treaty and aboriginal rights are protected in s.35 of the Constitution Act, 1982;
- 2.8 the Province has fiduciary obligations to First Nations peoples within their sphere of jurisdiction according to the Canadian constitutional framework;
- 2.9 the Province and third parties have a duty to consult First Nations peoples when their actions may affect their interests including the duty to accommodate reasonably the concerns of First Nations peoples;
- 2.10 by participating in this process, First Nations do not consent to future developments arising out of recommendations and that this participation is neither intended nor should it be used to fulfill any legal obligations of the Province now or in the future;
- 2.11 certain First Nations living in the planning area have traditional uses and other interests in land outside the planning area;

3. PURPOSE

The Parties agree to work together for the following purposes:

- 3.1 to implement the recommendations of the Final Report of Phase 1 of the East Side Lake Winnipeg Broad Area Planning Initiative respecting First Nations interests and participation;
- 3.2 to develop a process which would clarify Aboriginal and Treaty rights with respect to resource development within the planning area;
- 3.3 to set out the principles that the Parties will follow throughout the planning process and any implementation process that may result from the recommendations;
- 3.4 to agree on a consultation process that the Parties will follow throughout the planning process and any implementation process that may result from the recommendations;

- 3.5 to agree on a consultation process that the Parties will follow respecting existing stakeholder activity during the planning process;
- 3.6 to set out a clear and certain process for communication and information sharing between the Parties;
- 3.7 to ensure that economic benefits based on aboriginal and treaty rights enure to the First Nations as original inhabitants of the land.

4. FIRST NATION PARTICIPATION

The Parties agree that:

- 4.1 the First Nations will participate in accordance with the principles set out in section 2 and the consultation process set out in Appendix "B";
- 4.2 the Subject to section 4.3, the First Nations will participate in accordance with the overall budget and Work Plan of the planning process to which all participants have mutually agreed;
- 4.3 in order to give meaning to the principles set out in section 2 and in accordance with the Consultation Process, the Parties agree to negotiate a budget for First Nation participation and to that end the First Nations will identify what they need to participate effectively and meaningfully;
- 4.4 the First Nations communities will identify how they will participate in the planning process and any future process resulting from the recommendations;
- 4.5 the Terms of Reference duly adopted by the First Nation Council on March 17, 2003 appended hereto forms part of this Memorandum of Understanding;
- 4.6 this agreement will not prevent the members of the First Nation Council from communicating or meeting with the government on any issue that affects their interests;
- 4.7 the First Nation Council has the right to meet directly with the Minister on any issue or matter under discussion within the planning process that directly affects their interests;
- 4.8 any member of the First Nation Council reserves the right to withdraw from the planning process;
- 4.9 this agreement will not bind a First Nation that is not participating in the planning process;

5. CONSULTATION PROCESS

The Parties agree that:

- 5.1 the Consultation Process as outlined in Appendix "B" is based on:
 - the fiduciary obligation of the Province to the First Nations;
 - Treaty 1, Treaty 3 and Treaty 5 and rights pursuant thereto;
 - Aboriginal rights;
 - court decisions including the Supreme Court of Canada and the Federal Court;
 - s.35 Constitution Act, 1982.
- 5.2 Appendix "B" forms part of the Memorandum of Understanding.

6. DISPUTE RESOLUTION

The Parties agree:

- 6.1 to develop and adopt within ninety (90) calendar days of signing this MOU, a dispute resolution process to resolve disputes arising from this MOU and its implementation;
- 6.2 that once the Parties adopt a dispute resolution process, the MOU will be amended to incorporate that process;
- 6.3 that notwithstanding s.6.1, every attempt will be made to resolve disputes arising from this MOU through discussion and consultation between senior staff from the participating First Nation and the Secretariat and failure to reach a resolution will trigger the resolution dispute process.

7. TERM

- 7.1 The Parties agree that the term of this MOU commences upon the signing of the MOU by both Parties and unless terminated sooner, ends June 30, 2004.
- 7.2 The Province shall give three months notice to the First Nation Council of its intention not to renew the MOU.

8. TERMINATION

8.1 This MOU may be terminated by either Party by giving written notice ninety (90) calendar days before the effective date of termination.

8.2 The MOU will automatically terminate upon the Parties failing to resolve a dispute however the effective date of the termination will be thirty (30) days from the day of last meeting.

9. AMENDMENT

9.1 This MOU may be amended by written agreement of the Parties.

10. NOTICE

10.1 Any notice given pursuant to this MOU shall be made in writing to:

The Province:

Minister of Conservation

First Nation Council:

Signed this _____ day of _____, 2003.

FOR THE FIRST NATION COUNCIL:

CHIEF _____

WITNESS _____

CHIEF _____

FOR THE PROVINCE:

MINISTER OF CONSERVATION

WITNESS _____

APPENDIX "A"

STUDY AREA

APPENDIX "B"

CONSULTATION WITHIN THE EAST SIDE PLANNING INITIATIVE

INTRODUCTION

The Manitoba Government ("the Province") announced in August 9, 2000 that the province would initiate broad area planning on the east side of Lake Winnipeg as a pilot for broad area planning in the province. The objective is to bring together local communities, First Nations, industry and environmental organizations to develop a vision for land and resources use in the area that respects both the value of the boreal forest and the needs of the local communities.

In respect of First Nation peoples, the Final Report recommended that the east side plan recognize, affirm and be in compliance with treaty obligations and Aboriginal rights and be consistent with the consultation/protocol guideline recommendations of the *COSDI Report* respecting First Nations and Aboriginal peoples. It also recommended that the Round Table review the status of community plans for the purpose of meeting their needs and integrating them into the east side plan.

It also recommended the inclusion of traditional knowledge and that the Round Table address traditional activities within the planning area. The Final Report called for the Round Table to provide advice on mechanisms to ensure meaningful First Nation, Aboriginal, local public and community consultations in future land and resource allocations, consistent with the consultation/protocol guideline recommendations of the *COSDI Report*. Finally, existing land uses are to continue and uses that are minor and have a minimal effect on the environment will be approved through existing processes.

THE PLANNING AREA

The East Side Planning area is defined by watershed boundaries and includes the communities of Oxford House, God's River and God's Lake to the north, the north shore of Sagkeeng to the south, the east shore of Lake Winnipeg and the western boundary of Ontario. There are 16 First Nation communities within the planning area and First Nations peoples live in communities other nearby communities. The planning area is within Treaty One, Three and Five. Most First Nation communities have traditional use territories within the planning area and beyond the planning area boundaries. Individual First Nation peoples have trap lines within the area. Any action or recommendation will obviously have an impact on First Nations rights and interests.

DUTY TO CONSULT

Although the Final Report and the *COSDI Report* call for consultations with First Nations, the Courts have said that there is always a duty to consult on the part of the Crown and most recently industry. The duty arises when the an action of the Crown and now industry interferes with, infringes or potentially interferes with or infringes aboriginal rights or treaty rights of First Nations. The source of the duty can come from legislation however most recently the courts have said that the duty "is a free standing legal and equitable duty which does not arise simply on the basis of a *Sparrow* analysis, but is part of the Crown's broader fiduciary relationship with aboriginal peoples". (*Haida Nation*) The Crown in this instance is the Manitoba government. (The Crown Provincial) Where First Nations are part of a general public consultation process, because of their unique constitutional status, the First Nations are "at the very least entitled to a distinct process , if not a more extensive one". (*Mikisew*)

DUTY TO ACCOMMODATE

In addition to the duty to consult, the courts have also imposed on the Crown and industry the duty to accommodate the concerns of First Nations and Aboriginal peoples. The obligation extends to both 'the cultural and the economic interests" (*Haida Nation*) of the First Nations peoples. The duty requires that the Crown and industry seriously consider and integrate the concerns of the First Nations into their plans.

THE CONSULTATION PROCESS

1. NOTICE

It is the Province and industry that has to initiate the consultation. They must give notice to the First Nation of what they are about to do or is planning to do. They must do so at the earliest possible opportunity before the planning has gone far ahead.

2. ASSESSMENT

The Province and industry must conduct an assessment of the potential impact the plan will have on the First Nation or First Nations and territories. The nature and extent of the impact on the First Nation's rights and interest will determine the nature and scope of the consultation required. To this end they must inform themselves fully of the land and the views of the First Nation. In the assessment the Province and industry have to take into consideration traditional knowledge and uses.

3. INFORMATION

The Province and industry have to provide the First Nation with all the information at the earliest stage of the planning process and seek information from the First Nation about the impact of such a decision or action on the First Nation's rights or interest. They must give the First Nation ample time to assess and study the information. They must provide financial and technical assistance to the First Nation. The First Nation will have to conduct research of its own that is to conduct research on treaties to determine their rights. It has to conduct land use studies to determine what will be impacted.

Once First Nations have studied the information, they then have the obligation to inform the Province and industry of their concerns and interests.

Then the government and industry will have to assess the information they get back from the First Nation to determine the likelihood of the action infringing on the First Nation's rights and interests.

4. FUNDING

All of the above requires financial and technical assistance. Since it is the actions of the Province and industry that the First Nation has to protect its rights, it is therefore responsible for providing such resources. The First Nation has to determine its needs and inform the Province and industry. The Province and industry will have to negotiate such needs with the First Nation.

5. BUILDING A RELATIONSHIP (PROCESS)

The Province, industry and the First Nation will have to agree in writing on what constitutes consultation in a particular case such that it satisfies the Crown's and industry's legal duty.

6. GOOD FAITH

The Crown and industry have a duty to consult in good faith such that the consultation is meaningful and effective. They cannot just send or fax information to the community and wait for an answer or give an unreasonably short time for a response. They must consult with the intention of substantially accommodating the concerns of the First Nation or try to reach workable accommodations.

7. NATURE AND SCOPE OF CONSULTATION

This will vary with the circumstances ranging from mere discussion to consent. The assessment will determine the nature and scope of the duty. The Province, industry and First Nation will assess the circumstances based on all the information and agree in writing on the nature and scope of the consultation.

8. PUBLIC/FIRST NATION CONSULTATION

Because of the constitutional protection of Aboriginal and treaty rights of Aboriginal peoples, the First Nations are entitled to a process that is more extensive and comprehensive. The East Side planning process must be structured so that the participating First Nations have a distinct process or have an opportunity to discuss their concerns with the Minister directly. The Province and First Nation will negotiate a process that will accommodate rights and interest of the First Nation.

9. CONSENT

In cases where the infringement is considerable or the action will destroy First Nations rights, a decision may require consent of a First Nation. The Province and First Nation will negotiate the form the First Nation will give its consent.

10. JUSTIFICATION

The Province cannot justify its interference or infringement by economic forces alone. The Province and First Nation will negotiate the justification process and will include any agreement in the consultation process.

11. DUTY TO ACCOMMODATE

The Province and industry have to accommodate the concerns and interests of First Nations including cultural and economic interests. Recommendations arising from the planning process must reflect the rights and interests of the participating First Nations. The process by which the Province allocates a resource and the actual allocation has to reflect the prior interests of aboriginal and treaty right holders. The Province, industry and First Nation will negotiate agreements on resource allocation and management, benefits from developments and where there is a negative impact, compensation. The Province, industry and First Nation will negotiate on ways if any to avoid infringing the rights and interests of the First Nation.

12. IMPLEMENTATION, MONITORING AND EVALUATION

The Province, industry and First Nation will regularly evaluate the effectiveness of this process and agree on changes.

THE HISTORY OF THE UNITED STATES

The history of the United States is a story of growth and change. From the first settlers to the present day, the nation has evolved through various stages of development. The early years were marked by exploration and settlement, followed by a period of rapid expansion and industrialization. The American Revolution and the Civil War were pivotal moments in the nation's history, shaping its identity and values.

The American Revolution was a turning point in the nation's history. It was a struggle for independence from British rule, fought between 1775 and 1781. The revolution led to the creation of the United States as a sovereign nation. The Civil War, fought between 1861 and 1865, was a conflict over the issue of slavery. It resulted in the preservation of the Union and the abolition of slavery.

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