

ESFNC Proposal for:
WORKING DRAFT #16

WITHOUT PREJUDICE

PROTOCOL OF AGREEMENT

BETWEEN

THE SIGNATORY FIRST NATION GOVERNMENTS
(Insert First Nations)
LOCATED WITHIN THE EAST SIDE PLANNING AREA

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

April 10, 2006

WHEREAS

- A. This Protocol is intended to confirm that the East Side First Nation Governments and their citizens and the Province of Manitoba have agreed to develop a new relationship based on government-to-government consultation and on co-management and revenue sharing;
- B. The First Nations that were the original occupants of the East Side Lake Winnipeg Planning Area now represent 96% of the population of that Area;
- C. The East Side Planning Area, described in the map attached as Appendix "A" to this Protocol, is located within the Area of Treaties 1,3 and 5 (including Adhesions);
- D. 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 Manitoba;
- E. On August 9, 2000 the Government of Manitoba announced that it would initiate an "East Side Planning Initiative", consisting of broad area planning on the east side of Lake Winnipeg as a pilot for broad area planning for the province;
- F. The East Side Planning Initiative was launched with the objective of bringing together local communities, First Nations, industry and environmental organizations to develop a vision for land use and resource use in the area that respects both the value of the boreal forest and the needs of the local communities;
- G. The Final Report of Phase 1 of the East Side Lake Winnipeg Broad Area Planning Initiative recommended that a Plan for the Planning Area recognize, affirm and be in compliance with Treaty rights and Aboriginal rights and be consistent with the consultation/protocol guideline recommendations of the *COSDI REPORT* respecting First Nation peoples and Aboriginal peoples;
- H. The East Side First Nations Council (now Wabanong Nakaygum Okimawin Council of Chiefs "WNO Council") was established to facilitate First Nations participation in the planning process;
- I. As a result of the participation of the East Side First Nations Council in a process with the Government of Manitoba, a Memorandum of Understanding was developed to guide and govern First Nations' participation in the East Side Planning Process. The participation of First Nations in the Planning process is called the "WNO process";
- J. Thirteen of the East Side First Nations signed the Memorandum of Understanding, but all sixteen East Side First Nations are participating in the WNO process;
- K. In November 2004, the East Side Planning Initiative Status Report "Promises to Keep . . . Towards a Broad Area Plan for the East Side of Lake Winnipeg" was presented to the Government of Manitoba for consideration;

- L. In December 2004, the Government of Manitoba agreed to begin implementation of the main recommendations in the report including the development of this Protocol;
- M. The Government of Manitoba and First Nation Governments are agreeing, in accordance with this Protocol, to work together with mutual recognition, respect and reconciliation towards Wabanong Nakaygum Okimawin (WNO) - East Side of the Lake Governance;

Manitoba and the WNO Council have developed this Protocol

1.0 DEFINITIONS

In this Protocol:

"Aboriginal and Treaty rights" is deemed to include any other constitutional rights that may pertain to First Nations including but not limited to any rights under the *Natural Resources Transfer Agreement*;

"Activity or Activities" means an activity described in paragraph 5.2.1 in the Planning Area;

"East Side First Nations" being Berens River First Nation, Bloodvein First Nation, Bunibonibee Cree Nation, Garden Hill First Nation, God's Lake First Nation, Hollow Water First Nation, Little Black River First Nation, Little Grand Rapids First Nation, Manto Sipi Cree Nation, Norway House Cree Nation, Pauingassi First Nation, Poplar River First Nation, Red Sucker Lake First Nation, Sagkeeng First Nation, St. Theresa Point First Nation and Wasagamack First Nation;

"First Nation Government" means the government of a Participating First Nation;

"Land" means the land, air, water, resources and everything that relates to and around the environment including the animals and people;

"Participating First Nation" means the First Nations that are bound by the terms of this Protocol. A First Nation that is not among the original signatories of this Protocol may become a Participating First Nation in accordance with the terms and conditions contained in an agreement negotiated with the Province, Participating First Nations and the non-Participating First Nation.

"Planning Area" means the East Side Planning Area depicted in the map attached as Schedule "A";

"Proponent" includes persons, federal, provincial and First Nation Governments, or an agency thereof;

"Province" means Her Majesty the Queen in Right of the Province of Manitoba;

"Unjustified infringement" has the meaning assigned to it in the case law concerning s. 35 of the *Constitution Act, 1982*;

"WNO Council" means the Wabanong Nakaygum Okimawin Council of Chiefs representing the sixteen First Nations located in the East Side Planning Area;

"WNO Activity Registry" means the central registry for all Activities proposed in the Planning Area. This registry will allow Proponents to electronically post their proposed Activities, and Participating First Nations to register their status as an affected First Nation. The registry will be maintained by the Ministry of Conservation, in consultation with the WNO Council.

2.0 PURPOSE OF PROTOCOL

- 2.1 This Protocol has been developed to recognize that the planning area is primarily intact, in its natural state as a boreal forest, primarily as a result of the stewardship of the East Side First Nations people who have protected this land since time immemorial.
- 2.2 This Protocol will serve as foundation and guide for First Nations Governments within the east side to be involved in decisions that will affect their communities and traditional territories that will lead to land use plans and resource management agreements between East Side First Nations and the Province of Manitoba.

3.0 GOVERNING PRINCIPLES

Manitoba and First Nation Governments recognize that the following principles will govern their activities:

- 3.1 First Nation Governments and their citizens relate to their lands in both traditional and contemporary ways and intend to continue that relationship regardless of and through this Protocol.
- 3.2 The Planning Area is largely untouched and contains intact boreal forest with eleven watersheds, consequently sustaining the land and water is a governing principle in decision-making.
- 3.3 Citizens of the First Nations, shall be substantially involved in all decision-making affecting land and resources within the traditional territories of that First Nation.
- 3.4 Land Use Planning will provide First Nations an opportunity to be directly involved in resource protection and management for the benefit of First Nations' Governments and their present and future citizens.
- 3.5 This Protocol and subsequent Land Use Plans and Resource Management Agreements will provide the basis for appropriate sustainable economic development and for capacity building.
- 3.6 Aboriginal and Treaty rights of First Nations will be respected and the parties will honour the spirit and intent of the treaties.
- 3.7 This Protocol is without prejudice to First Nation Governments' understanding of the scope and interpretation of Treaties 1, 3 and 5, including Adhesions thereto.
- 3.8 In their activities under this Protocol, the Province and First Nation Governments will seek to include understanding of the perspective of First Nations of the scope and meaning of Treaties 1, 3 and 5.
- 3.9 This Protocol will not discharge the Government of Canada of its obligations with respect to First Nations' Aboriginal and Treaty rights.

- 3.10 If agreement between First Nation Governments and the Province, regarding any item or issue addressed through the this Protocol, is not reached the Province will not claim that consultation and accommodation has taken place with the First Nation Governments that have been involved.
- 3.11 The Province will provide adequate funds to First Nation Governments, in accordance with paragraph 6.4 of the Protocol, to enable First Nations to engage as equal partners with the Province in the activities and processes contemplated under this Protocol.
- 3.12 Timelines will be agreed upon by the Province and First Nation Governments to ensure that First Nation Governments have sufficient time to prepare and then participate based upon adequate information.
- 3.13 The Province and First Nation Governments will share information to support and facilitate Land Use Planning and the development of Resource Management Agreements.
- 3.14 To maintain the Honour of the Crown, in the government-to-government relationship, Provincial Ministers and the WNO Council of Chiefs, representing First Nation Governments, commit to meet to conduct substantive discussions a minimum of two times per year.
- 3.15 First Nation Governments will not be required to use existing sources of federal government funding for engaging in the activities and processes contemplated under this Protocol, such as developing Land Use Plans, Resource Management Agreements, considering land or resource allocation and disposition applications, and participating in the appeal process.
- 3.16 The Province and First Nation Governments agree on the principle that residents in the Planning Area should have infrastructure, including all-season roads, that is reasonably comparable to rural areas in Manitoba. The Province and First Nations will participate jointly to seek resources to enhance the infrastructure of First Nation communities.
- 3.17 The Province and First Nation Governments agree that development in the Planning Area should ordinarily proceed only with the agreement [consent] [agreement] of affected First Nations.

4.0 LAND USE PLANNING

- 4.1 Land Use Plans are intended to be developed for areas within the Planning Area, with the objective of ensuring that First Nation Governments and their citizens are able to:
 - 4.1.1 have all the information that is needed to be substantially involved in making responsible land use decisions that affect their lives and land;

- 4.1.2 develop the capacity necessary to address the outcomes of land use plans and make decisions in accordance with those plans in the long-term;
 - 4.1.3 ensure that First Nation Governments and citizens benefit directly and indirectly from the land use plans and the resulting outcomes and decisions;
 - 4.1.4 inform other governments and people other than First Nations' citizens about how to act with respect on the land;
 - 4.1.5 become trained and employed to carry out resource management activities in accordance with traditional knowledge, land use plans and provincial legislation within their traditional territories.
- 4.2 Each First Nation Government may engage in a local land use planning process for the purpose of having those local plans become the Broad Area Plan.
- 4.3 More than one First Nation Government may work together within geographic and/or political arrangements to complete joint land use plans.
- 4.4 Land Use Planning will include, but not be limited to activities such as:
 - 4.4.1 collection and documentation of Traditional Anishinaabe/Ininew Scientific data and Western ecological data related to the land, including existing data;
 - 4.4.2 collecting archaeological data, existing and new;
 - 4.4.3 resolving conflicting uses of land;
 - 4.4.4 mapping;
 - 4.4.5 designating areas of ecological, cultural or historical significance to ensure their recognition and preservation;
 - 4.4.6 prescribing areas of land or bodies of waters for purposes of regulating use through zoning or other methods consistent with traditional ecological knowledge and provincial legislation;

4.4.7 capacity building.

- 4.5 The Province and First Nation Governments may, in accordance with paragraph 6.2, also develop and enter into Resource Management Agreements to address agreed resource management activities in agreed areas of the Planning Area.
- 4.6 The Province and First Nation Governments will cooperate in taking appropriate steps to ensure that the Land Use Plans and Resource Management Agreements contemplated under this Protocol, are given the force of law, and prevail, in case of conflict with other provincial laws.

5.0 DECISION MAKING PROCESS

First Nation [~~Agreement~~] [Consent] Requirement

- 5.1 The Province recognizes that the planning process being developed in accordance with this Protocol is not designed to constitute consultation with First Nations about any government decisions that might adversely affect the aboriginal or treaty rights of the First Nations or other Aboriginal peoples.
- 5.2 Until such time as applicable First Nations land use plans or resource management agreements are developed and adopted, a person who proposes to apply to the Province for an allocation or disposition of Manitoba Crown land or resources (being a lease, licence, permit or any other land tenure in the Planning Area) for an Activity described in paragraph 5.4 is to seek the [consent, agreement, support] of any First Nation Government that will be affected by the proposed Activity before submitting the application to the Province.
- 5.3 The Province will not itself undertake any Activity without first seeking the [consent, support] of any First Nation Government that will be affected by the proposed Activity.
- 5.4 The Activities are:
- Forestry;
 - Mining (excluding exploration which will be subject to the Manitoba Minerals Guidelines as recommended in the (East Side Status Report) "Promises to Keep" that will be implemented in consultation with First Nations recognizing the differences between exploration, and actual mining activity).
 - Establishing Parks, Protected areas or special land designations;

- Tourism and Recreation;
- Transportation;
- Cottage Lot Developments;
- Hydro-electric Transmission Corridor;
- Trap lines and Trappers' Cabins; and
- Wild Rice Propagation, production and harvesting.
[water]

5.5 The Province will not consider any application for land or resource allocation or disposition of Manitoba Crown lands required for an Activity until [consent] [support] for the Activity has been demonstrated by the affected First Nation Government.

5.6 A First Nation is deemed to be "affected" for the purposes of this Protocol where the Activity would:

5.6.1 take place on reserve land of that First Nation in the planning area or land that has been identified or set aside as reserve of that First Nation in the planning area or for possible selection as a reserve land of First Nation in the planning area;

5.6.2 take place on any other land owned by that First Nation pursuant to a treaty land entitlement agreement or other arrangement ancillary to a treaty;

5.6.3 take place in the traditional area of that First Nation, or in any area identified by the Province in an agreement or legislation as the resource area or resource management area of that First Nation;

5.6.4 have a significant adverse effect on the physical or social environment of that First Nation within its reserve lands or traditional areas, even if those effects are mitigated;

5.6.5 take place in an area that has been used, to a significant extent in the years preceding the proposed Activity by members of that First Nation for traditional activities such as hunting, fishing or trapping, and would affect such traditional uses by those members.

5.7 An affected First Nation Government may identify any conditions of its [consent][support] for an Activity.

5.8 An affected First Nation Government will confirm its support of an Activity and any conditions of [consent] [support] by a document signed by a quorum of the council of the First Nation Government.

5.9 Where an affected First Nation Government supports the Activity under this Article 5.0, the Province:

5.9.1 will give due consideration to the conditions of support when considering the application, including possible licensing conditions, where applicable; and

5.9.2 will not approve an application to authorize an Activity inconsistent with the conditions of support of the First Nation. Regulatory requirements under applicable laws will apply.

5.10 In the event that more than one First Nation Government is affected by a proposed Activity, the affected First Nation Governments will attempt to come to a consensus.

5.11 Where a First Nation Government does not [consent][support] a proposed Activity or the applicant does not agree with conditions of [consent][support], the applicant for a land or resource allocation or disposition or the First Nation Government may refer the matter to the East Side Planning Appeal Board in accordance with paragraphs 5.12 to 5.18.

5.12 The applicant and First Nation Governments may enter into agreements about proposed Activities, and:

5.12.1 the agreement will be enforceable between the First Nation Government and the applicant according to its terms; and

5.12.2 where provided by the agreement, the Province will consider the agreement to set out conditions of [consent][support] by the First Nation Government for the Activity.

East Side Planning Appeal Board

5.13 An Appeal mechanism called the East Side Planning Appeal Board ("the Board") shall be established consisting of one First Nation person appointed by the WNO Council of Chiefs, one person appointed by the Province and a chair agreed by the two other members.

5.14 The Board will consider all appeals and may determine whether it is just and reasonable that an activity should be of considered by the Province and any conditions to apply.

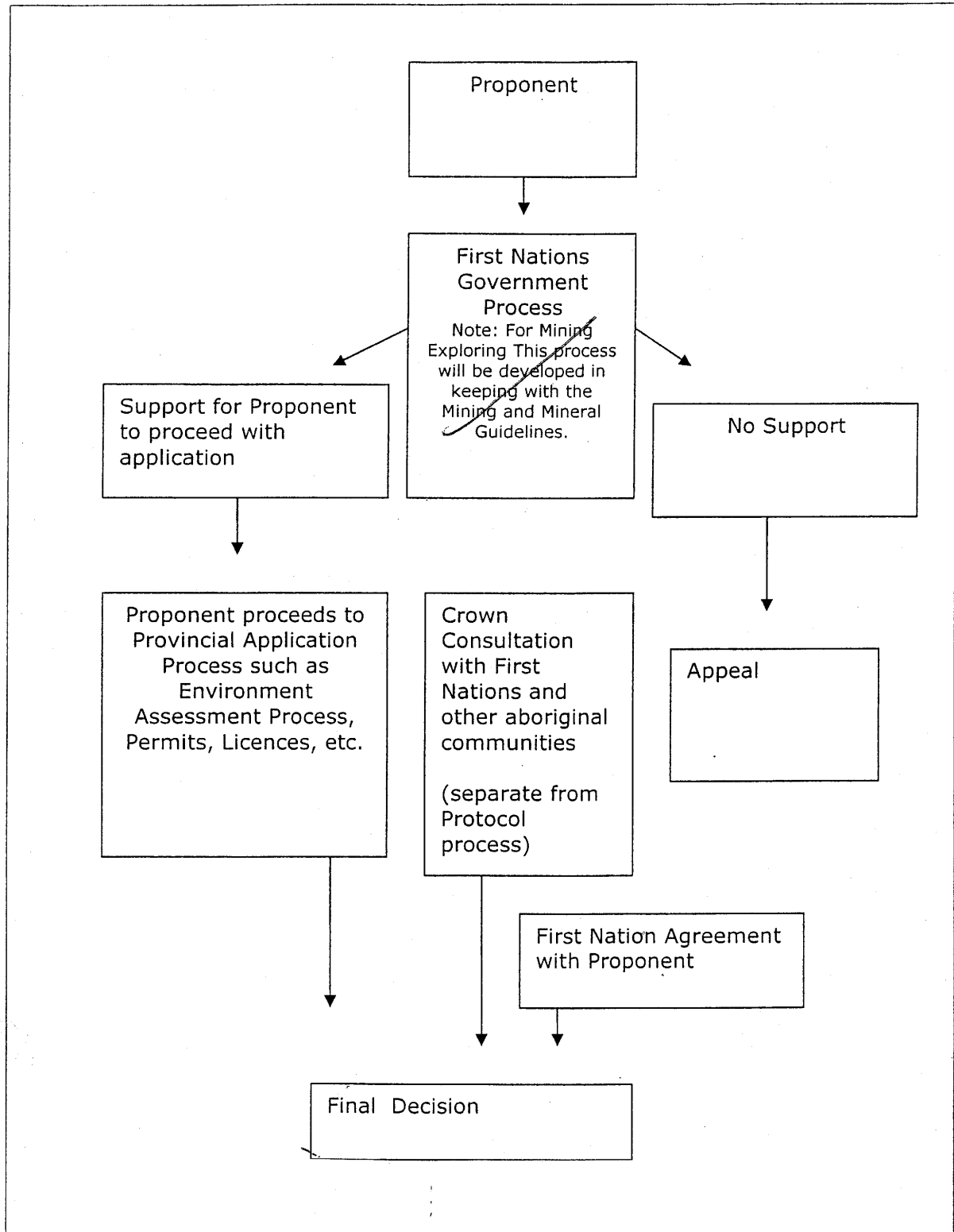
5.15 The Board may determine its own procedures subject to treating all parties fairly.

5.16 Where agreed by the applicant and the affected First Nation Government, the Board will adjourn consideration of an appeal to allow for the First Nation Government and the applicant to consider further or to allow any other relevant process to be completed. These other processes may include public hearings and mediation.

- 5.17 In considering an appeal, the Board shall take into account:
- 5.17.1 the nature and extent of any adverse effects of the proposed Activity on the affected First Nation, including any environmental or social effects;
 - 5.17.2 the nature and extent of any benefits to the affected First Nation of the proposed Activity, including any economic benefits including opportunities for revenue sharing, employment benefits or infrastructure benefits and opportunities to participate in co-management;
 - 5.17.3 the nature and extent of any benefits to any other First Nations, including any economic benefits including opportunities for revenue sharing, employment benefits or infrastructure benefits and opportunities to participate in co-management;
 - 5.17.4 the extent to which the affected First Nation has been consulted about the proposed Activity and the extent to which concerns of the First Nation have been addressed in the proposal;
 - 5.17.5 the extent to which the failure of the proposed Activity to proceed would cause hardship to the Proponent or other affected persons;
 - 5.17.6 evidence of best practices relating to the proposed Activity, including practices relating to involvement of First Nations and First Nation people in comparable activities in the Planning Area, Manitoba and Canada.
- 5.18 A decision of the Board will not affect the aboriginal or treaty rights of an affected First Nation.
- 5.19 The support of a First Nation Government for a proposed Activity or a decision of the Board does not affect the right of a First Nation to take any position it wishes in any regulatory process or to challenge any decision in a court of law on the basis that the decision or Activity infringes an aboriginal or treaty right.

A chart describing this decision making versus interim process is set out on the next page, to illustrate this process.

First Nations and Manitoba Government to Government Decision Making Process



Existing Approvals

- 5.20 The decision-making process in the Paragraph applies only to dispositions or allocations of Crown land that occur after the date of this Protocol. This process does not apply to any existing allocations or dispositions, including any renewals of existing allocations or dispositions.
- 5.21 The Province and First Nations Governments will consider the opportunities for First Nation Governments to negotiate arrangements for participation by the First Nations with proponents in existing activities, as opportunities arise.

Land Use Plans and Resource Management Agreements

- 5.22 The process set out in Article 5.0 is a process to apply in circumstances where Land Use Plans and Resource Management Agreements have not yet been developed and adopted under the planning process set out in Article 4.0. The Province and WNO Council contemplate that Land Use Plans and Resource Management Agreements will set out the processes to apply for applications for allocations or dispositions of Manitoba Crown land or resources for Activities referred to in paragraph 5.4.

(Note: Land Use Plans will be developed by First Nations Governments in cooperation with the Province in accordance with Article 4.0.)

6.0 IMPLEMENTATION

- 6.1 The Wabanong Nakaygum Okimawin Council of Chiefs will monitor implementation of this Protocol.
- 6.2 At the request of First Nation Governments, the Province will enter into discussions on the establishment of Resource Management Authorities for the different territories/regions of the east side to implement the land use planning and develop individual or collective First Nation Government Resource Management Agreements..
- 6.3 These agreements may deal with some or all of the following subjects:
- Activities as per paragraph 5.2;
 - First Nation Government Land Use Plans;
 - Traditional Pursuits;
 - First Nation Government Consultation Requirements;
 - First Nation Government Accommodation Agreements;
 - Resource, Royalty and Revenue Sharing, and Benefit Agreements;
 - Sustainable Economic Opportunities;
 - Funding Arrangements.
- 6.4 The Province commits to provide funding, that shall be adequate, to the WNO Council of Chiefs and First Nation Governments, in accordance with a budget

to be agreed to, for a minimum of five years. The funding will allow First Nation Governments to engage in the activities and processes contemplated under this Protocol, such as developing Land Use Plans, Resource Management Agreements, considering land or resource allocation and disposition applications, and participating in the appeal process.

- 6.5 The Province with First Nation Governments will work together to seek new additional funding from other sources such as federal and private funds.

7.0 TERM OF PROTOCOL AND AMENDMENT OF PROTOCOL

- 7.1 This Protocol applies to East Side First Nations who sign on, in accordance with its terms and conditions. These First Nations are "Participating First Nations".
- 7.2 An East Side First Nation that does not sign this Protocol may apply at a later date to become a Participating First Nation. The Province and Participating First Nations may grant the application on terms agreed to by the Province, Participating First Nations and the Applicant.
- 7.3 Subject to paragraph 7.2, this Protocol shall remain in effect for a period of five years from the date of signature.
- 7.4 The Province and First Nation Governments may amend this Protocol by a statement in writing at any time.
- 7.5 The Province and the WNO Council, representing First Nation Governments, will review this Protocol every two years. As a result of a review, the Province may agree to amend the Protocol under paragraph 7.4.
- 7.6 Unless either the Province or a First Nation Government provides notice in writing at least six months prior to the end of term of the Protocol under paragraph 7.3 stating that it does not wish the Protocol to continue, this Protocol will automatically renew for Participating First Nations for an additional period of five years.
- 7.7 The Province and First Nation Governments may agree in writing to extend the Protocol beyond the initial term under paragraph 7.3 and the extension under paragraph 7.4.
- 7.8 Where the Protocol is not renewed under paragraphs 7.3 or 7.7, the Province and the WNO Council will work together to consider how the Province and First Nation Governments will continue to work together.

8.0 ENFORCEABILITY

- 8.1 This Protocol is a legally binding agreement.
- 8.2 The Government of Manitoba will (consider) developing regulations to be applied with existing planning legislation within one year to give force of law

- to the principles of the protocol. Stand alone legislation to recognize the planning area will be an objective within five years.
- 8.3 Manitoba commits to working in close consultation with the WNO Council of Chiefs, with respect to the development of regulation and legislation, including regular consultation with the WNO Council of Chiefs, or its technical experts.
- 8.4 The Province will provide adequate funding to ensure that the WNO Council of Chiefs is able to participate in this process.
- 8.5 Legislation should include mechanisms for monitoring and compliance to ensure land use planning and resource management decisions made in accordance with this Protocol apply to public and private sector resource users.

9.0 ABORIGINAL AND TREATY RIGHTS

- 9.1 This Protocol shall not affect any Aboriginal or Treaty rights of the East Side First Nations.

10.0 SIGNATORIES

- 10.1 This agreement only affects and applies to the Signatories.

SIGNED IN THE PRESENCE OF:

**Her Majesty the Queen in Right of the
Province of Manitoba as represented
by the Minister of Conservation**

WITNESS

DATE:

**For [insert specific] First Nations as
represented by their Chiefs**

WITNESS

DATE:

Schedule "A"

Map of East Side Planning Area

