NORTHERN FLOOD AGREEMENT
CASE STUDY IN A TREATY AREA

PHASE II REPORT
CONTEMPORARY ABORIGINAL
LAND, RESOURCE AND ENVIRONMENTAL REGIMES
ORIGINS, PROBLEMS AND PROSPECTS

Prepared For:

THE ROYAL COMMISSION ON ABORIGINAL PEOPLES

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EXECUTIVE SUMMARY

In 1993, The Royal Commission on Aboriginal Peoples commissioned a research program to document the origins and success/failure of implementation of contemporary Treaties, with a view to developing recommendations for future like agreements. One aspect of the research program involved case studies of existing modern day land claims agreements. The 1977 Northern Flood Agreement (NFA) was one of a number of Agreements identified for case study.

The purpose of the case study was to document the origin and nature of rights and benefits provided for under the NFA, document intended implementation versus actual implementation, identify key problems with its implementation, and develop recommendations for future like agreements. The case study paid particular attention to the land, resource and environmental provisions of the Agreement.

The NFA, ratified in 1978, is an agreement between Canada, the Province of Manitoba, Manitoba Hydro (a crown corporation) and the Northern Flood Committee, an organization representing the interests of then approximately 8,000 Treaty persons from five Cree First Nations. This northern Manitoba agreement, negotiated during the period 1974-1977, was created in response to a hydroelectric mega-project which affected and continues to affect Treaty and Aboriginal lands and rights.

The Lake Winnipeg, Churchill and Nelson Rivers Project, completed in 1977/78, diverts most of the Churchill River flow into the Nelson River and regulates Lake Winnipeg to manipulate the water regime primarily for winter energy production. The Project at the time the NFA was signed included five generating stations with a winter rating capacity of approximately 3,700 Mw, along three control structures and the creation of various channel alterations. Total construction costs at the time were in the order of $2.8 billion.

Reserve land, traditional harvesting areas and activities, water transportation routes and access, and wildlife resources utilized by the five Cree First Nations who are the beneficiaries of the NFA, have been adversely impacted by the Project. In terms of the geographic size of the area impacted, the quantity of energy produced, and the number of First Nations people adversely affected, the Project is of similar magnitude to the first phase of the James Bay Project in Quebec.

Negotiation of the Agreement, the conduct of an environmental impact assessment, which by modern day standards and to some extent standards of the day, would be considered lacking, and the construction of the Project were all carried out simultaneously. Despite the fact the Project would impinge upon Treaty and Aboriginal rights, ultimately the only reason the NFA First Nations were able to force the Parties to the negotiating table was because the Project was going to directly impact Reserve lands.

The NFA was signed without the First Nations surrendering any Reserve land, or Treaty or Aboriginal rights, and without releasing the Parties to the Agreement from any past or future damages. Unlike the James Bay and Northern Quebec Agreement, no front-end or annualized

compensatory payments were included, nor were royalty payments a part of the terms of the NFA. Key aspects of the NFA include a built-in dispute mechanism (arbitration agreement), the lack of a sun-set clause or termination date, recognition of possible unforseen or unanticipated adverse impacts, and a provision that any and all adverse impacts of the Project, whether on resource harvesting activities, community economic well being, or community infrastructure, must be addressed through either compensation and/or mitigation. The importance of resource harvesting activities is acknowledged through provisions which provide for priority use to wildlife resources and a promise to encouragement the continuation of such activities.

Essentially, the NFA represents an agreement-in-principle where the Parties agreed or undertook to perform certain tasks and negotiate on others. Lacking any implementation framework or funding, it appears the NFA was to be implemented by sheer good faith. In reality, since about 1980, the NFA has been implemented on the basis of legal claims filed by the NFC and NFA First Nations under the arbitration mechanism. As of February, 1993, a total of 173 claims have been filed, 92% of which have been filed by the beneficiaries of the Agreement. Of the claims filed by the beneficiaries, approximately 35% have been filed by individual First Nation members and the balance have been filed either by community based resource harvesting organizations, individual First Nations on behalf of their general membership, or by the five First Nations collectively.

There is no formal record documenting what obligations/actions have or have not been fulfilled and why or why not, when or by whom. Nor has an evaluation been conducted on whether remedial or mitigation measures implemented to date have been effective. The exact number of claims which have been resolved is not easily discerned with any degree of accuracy. However, it is roughly estimated that less than 50% of the claims have been resolved, the majority of which have been individual claims for loss of equipment, injury and death. In addition to the aforementioned claims, Manitoba Hydro has processed in excess of 3,000 personal claims for equipment and infrastructure loss or damage. In 1990, Canada, Manitoba and Manitoba Hydro claimed they had spent $130 million on NFA implementation.

The NFA addressed the "taking" of Reserve lands in two ways. Manitoba undertook to compensate the First Nations by agreeing to provide four new acres of full Reserve status land for every acre of land required by Manitoba Hydro. In return, Canada authorized the use of Reserve land by granting Manitoba Hydro an easement. Of the total area of Reserve land held by the NFA First Nations in the 1970's, Manitoba Hydro acquired an easement on approximately 5,000 hectares of Reserve land (20% of the total) and the First Nations were granted the right to select approximately 20,000 new hectares of Reserve land. In addition to acquiring new Reserve lands, the First Nations were also allowed under the Agreement to select (from hold areas) and maintain exclusive use of other provincial crown lands within their traditional use territories (resource areas).

The land selection and transfer process should have been accomplished within a couple of years of the Agreement being signed. However, none of the lands selected by the First Nations in 1983 for Reserve status or exclusive use have been transferred. Problems have centred upon disagreements over interpretation of the relevant provisions of the Agreement, delays in the survey

of Manitoba Hydro's easements which were necessary to determine the total quantum of new Reserve land, disputes over the size of hold areas, and differences of opinion about the meaning of unallocated, unencumbered, or unoccupied crown land.

Under the terms of the Agreement the First Nations were granted first priority to wildlife resources within their Resource Areas, subject to certain grandfather rights to non-NFA persons. Apart from trapping, NFA First Nation residents traditionally carried out most of their harvesting activities close to the Reserve; areas which were subsequently most heavily impacted by the Project. Prior to the Project non-NFA persons were primarily licensed to harvest wildlife and fish in areas away from the Reserve which were not impacted by the Project. Only recently have priority and allocation issues been raised as mitigation programs sought by First Nations involve access to non-impacted, but allocated resources. Implementation of relevant mitigation/ remedial works/compensation clauses of the Agreement in respect of resource harvesting matters has been driven by the arbitration process; many claims have not been resolved and as time passes it becomes increasingly more difficult for the First Nations to prove damages.

Also under the terms of the NFA, the Parties were to develop and implement a long term coordinated ecological monitoring program, as well as, monitor social and economic impacts of the Project. Five-year ecological monitoring programs were unilaterally implemented by Manitoba/Manitoba Hydro and Canada beginning in 1985. The unavailability of pre-Project baseline data has severely restricted determination of biophysical impacts. To date, socio-economic impact monitoring has not occurred.

Key problems involved with implementing the NFA include: vaguely worded clauses resulting in wide ranging interpretations of obligations by the Parties; lack of an implementation framework; lack of defined implementation funding arrangements; lack of baseline data and documentation of impacts; ineffective institutions; and adversarial and unilateral positions which have created an atmosphere of frustration and distrust.

Future like agreements should be entered into at the earliest stages of project planning and involve meaningful consultation and participation by Aboriginal people in the environmental impact assessment process. To the maximum extent feasible, potential adverse impacts should be identified and obligations and strategies to mitigate or compensate for damages should be clearly reflected in the agreement. The agreement should recognize that unforseen or unknown impacts may arise. A rigorous environmental monitoring program, implemented by a joint party entity with authority and specified funding arrangements should form part of the agreement. The agreement should include a framework to address implementation, management, execution, monitoring and evaluation and a concrete commitment to fund all aspects of implementation. The agreement should clearly recognize the role of the Aboriginal party in implementation and include a clear commitment to equitable, adequate, long-term funding for this party to fulfil its role and obligations. Finally, a built-in dispute mechanism as a first level of recourse is considered advantageous over use of the courts exclusively.

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1.0 INTRODUCTION

The Royal Commission on Aboriginal Peoples, established by Federal Order in Council dated August 26, 1991, was mandated to investigate the evolution of the relationship among Aboriginal peoples, the Canadian government, and Canadian society as a whole, and to propose specific solutions to the problems which have plagued those relationships and which confront aboriginal peoples today. The Commission's terms of reference called for, among other things, investigation into the legal status, implementation and future evolution of aboriginal treaties, including modern-day agreements (Royal Commission on Aboriginal Peoples 1991).

In partial fulfilment of its terms of reference, the Royal Commission on Aboriginal Peoples commissioned a research program, under the direction of Dr. P.J. Usher, of Contemporary Aboriginal Lands, Resources, and Environmental Regimes - Origins, Problems and Prospects. This research program was organized into four phases as follows:

Phase I: Conceptual paper - preliminary inventory of regimes and outline of origin, functions and institutional arrangements, consideration of the problems the regimes were intended to address, and problems and issues arising from implementation.

Phase II: Case study of particular regimes, or classes of arrangements.

Phase III: Workshop with Phase I and Phase II researchers.

Phase IV: Final report integrating findings of case studies, deliberations of the workshop, and additional research and analysis.

This research report on the Northern Flood Agreement represents one of the case studies under Phase's II and III of the research program.

The Northern Flood Agreement is representative of a contemporary land based agreement situated in a Treaty Area. Chief Justice Hamilton and Chief Judge Sinclair, who sat on The Public Inquiry into the Administration and Justice and Aboriginal People, reported (Report of the Aboriginal Justice Inquiry of Manitoba 1991:174):

> ***"We believe the Northern Flood Agreement is a "land claims agreement" within section 35(3) of the Constitution Act, 1982, and that the rights within the NFA are treaty rights within section 35(1). As a treaty, the Northern Flood Agreement must be interpreted liberally from the Indian perspective so that its true spirit and intent are honoured."***

This northern Manitoba agreement, negotiated in 1977, was created in response to a hydroelectric mega-project which affected Treaty lands and rights. Canada, Manitoba, Manitoba Hydro and the Northern Flood Committee, Inc. (NFC) are parties to the Agreement. The NFC is an organization representing the beneficiaries of the Agreement, they being five Treaty 5 First Nation

communities and the individual members of those communities.[1]

1.1 Purpose of Paper

The purpose of this paper is to report on the Northern Flood Agreement, with particular attention to land, resource and environmental provisions, in terms of:

≅its origin and the nature of rights, benefits and protection afforded by it;

≅its purpose and how it was intended to be implemented versus how it has been implemented in practice; and,

≅key problems with implementation and recommendations for future like agreements.

It should be noted that the NFC submitted a written report to the Royal Commission on Aboriginal Peoples under the intervenor funding program entitled "The Northern Flood Agreement, History of Negotiation and Implementation and Recommendations for Improvement, September 29, 1993." This report provides a general chronological history of NFA implementation and focusses on the implementation record of some key NFA provisions not addressed in this report.

1.2 Approach

The quality of information available about NFA implementation is generally poor. For example, there is no master list describing the nature of claims settled to date, nor is there a common or agreed upon record of implementation activities.

The research approach has primarily involved a review of available literature and personal communication with various individuals. Most research conducted by other authors in regard to the Northern Flood Agreement (NFA) has focused upon environmental changes or impacts associated with the hydroelectric project. Very little is formally published about either the negotiation[2] or implementation of the Agreement. Research for this report has involved examination of "grey literature" and documents available in the Northern Flood Committee, Inc. (NFC) library. This library contains most of the correspondence between the NFA signatories during the period 1972-1993, as well as internal position papers and reviews, and minutes of meetings.

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[1] The NFC was established in 1974 and incorporated in 1975. Originally the NFC represented Cross Lake, Nelson House, Norway House, Split Lake and York Landing First Nations. In 1991, Split Lake First Nation terminated its affiliation with the NFC.

[2] James Waldram in his book As Long as the Rivers Run (1988) devotes an entire chapter to the history of negotiations in respect of the Churchill River Diversion (one component of the NFA related hydro project). His primary focus was on the non-Reserve community of South Indian Lake, however, he does examine the history of events leading to the signing of the NFA.

Evidence and information cited in this report has been referenced in two ways. Where material is drawn from published sources, the reference is cited directly in the text with the full reference documented at the end of the report in the reference list. Material drawn from correspondence or unpublished reports is cited by way of footnote. Quoted material appears in ***italicized font typeface*** and wording directly from the NFA appears in **bold san serif typeface.**

The author of this report has spent a substantial amount of time working for certain of the NFA First Nations, as well as the NFC, over the past six years. In some cases, information or evidence in respect of a particular point on NFA implementation is known by the author by virtue of her presence at negotiating meetings and/or participation in the drafting of settlement agreements. Opinions formed and information gathered during the course of this work is sometimes brought to this report. Where such information is presented in the report it is specifically sourced to the author in footnote form. The author acknowledges that as a result of working for only one of the NFA signatories the research may tend to highlight the positions and perspectives of the First Nations. The opinions and views of the other NFA signatories, as well as independent sources, are quoted through out the report to provide balance.

1.3 Organization of Report

The balance of this report is organized into eight chapters. Chapter 2, entitled Northern Development, provides a brief historical description of the First Nation communities, northern development in the Treaty 5 area, the nature of the hydro project and an overview of its environmental and social impact. The historic context in which the NFA was negotiated is addressed in Chapter 3, followed by a description of the land, resource and environmental provisions contained in the Agreement. Chapter 5, Implementation in Theory, examines how these provisions were to have been implemented and Chapter 6, Implementation in Practice, describes how they were or were not actually implemented. Key implementation problems are identified and examined in Chapter 7. Strengths and limitations of the Agreement and recommendations for improvement in future like agreements are presented in Chapter 8. Articles 3, 4, 5, 15, 17, 19 and 24 of the Northern Flood Agreement are attached in Appendix A.

2.0 NORTHERN DEVELOPMENT

2.1 Crees of Rat/Burntwood and Nelson Rivers

A vast area extending north from approximately the 52nd degree parallel to the northerly boundary of Manitoba was surrendered under the terms of Treaty 5 (Figure 1). In terms of land area, Treaty 5 covers approximately 80% of the Province of Manitoba, with extensions into both provinces of Saskatchewan and Ontario.

Treaty 5, known as the Lake Winnipeg Treaty, was signed in 1875, with Adhesions in 1908-1910 (Morris 1991). Of the 62 First Nation communities in Manitoba, 32 or 52% are located within the boundaries of Treaty 5. In terms of Reserve communities, Cree are the most predominant group with 22 First Nations communities, followed by Ojibway in 9 First Nation communities and Dene in 2 First Nation communities.

Apart from the typical patterns of contact with outsiders brought about by the fur trade, as late as 1970, the Cree communities located along the Rat and Nelson Rivers, namely Cross Lake, Nelson House, Norway House, Split Lake and York Landing[3], were remote communities relatively untouched by northern development (Figure 2). They were remote access communities with economies primarily revolving around subsistence and commercial use of the aquatic and terrestrial resources. Virtually their entire lifestyle and livelihood was derived directly from the resources available in and along the Nelson, Rat and Burntwood rivers and lakes and the access afforded by these waterways to inland areas. The traditional use area of the five communities, as defined by the outermost boundaries of individual traplines, was 102,656 square kilometers.[4]

2.2 Intrusion into Treaty 5 Territory

The Pas, one of the earliest communities in western Canada, began as a trading centre in the 1700's and was linked by rail from Saskatchewan in 1907. In this century The Pas has evolved into a forestry and agricultural based town. Since the 1960's a pulp mill has been in operation (Northern Manitoba Economic Development Commission 1992).

The Province of Manitoba was formed in 1870 although its boundaries were not extended north into Treaty 5 territory until 1912. Industrialization of northern Manitoba began with the discovery of ore at Flin Flon and Snow Lake in the early 1900's and the Hudson's Bay Railroad in 1929. This was a branch line originating at The Pas and terminating at the town of Churchill. The initial purpose of the line was to transport grain from the prairies to the port of Churchill

[3] York Landing was originally located where the Nelson River empties into Hudson Bay and was known as York Factory. The community was relocated to its present location near Split Lake in 1957.

[4] Ian McKay, Wild Fur Manager, Manitoba Department of Natural Resources. Personal Communication. August 19, 1993.

figure 1

figure 2

for marine shipment to export markets. Branch lines also allowed transport of minerals. With the railroad came small "divisional point" settlements.

Historically, with the exception of Opaskwayak Cree First Nation located adjacent to The Pas, forestry operations in the vicinity of First Nation communities was minimal. More recently, however, logging operations in northern Manitoba has accelerated owing to the demand for pulp products.

Further ore and nickel discoveries resulted in the establishment of mining towns at Sherridon (1929), Lynn Lake (1953), Thompson (mid 1950's) and later Leaf Rapids (1970's). Lynn Lake and Thompson were linked by branch rail lines in the early 1950's and 1960's, respectively. Thompson has since evolved into a regional service centre for northern Manitoba (Northern Manitoba Economic Development Commission 1992).

Hydroelectric development began in the 1930's. Regulation of the Churchill and Laurie Rivers resulted in wide-scale flooding affecting a number of First Nation communities in northwestern Manitoba. Manitoba Hydro's Grand Rapids Forebay Project at the terminus of the Saskatchewan River in the mid-1960's caused wide-scale flooding, heavily impacting five First Nation communities, included the forced relocation of Chemawawin First Nation. On the Nelson River, the Kelsey generating station was completed by 1960 to serve the community of Thompson and the nickel mine. Kelsey caused wide-scale flooding of the Nelson River and Sipiwesk Lake, adversely affecting the traditional resource areas of both Split Lake and Cross Lake First Nations. Kettle generating station further downstream within the Split Lake First Nation traditional use area was constructed in the mid-1960's and in operation by 1970. The town of Gillam, originally a divisional point on the rail line, became a hydro work town (The Commission of Inquiry into Manitoba Hydro 1979; Northern Manitoba Economic Development Commission 1992).

Construction of all weather roads into central northern Manitoba did not occur until the 1960's. Initially, roads were built to serve the mining towns and later extended as a result of hydroelectric development. Prior to this, winter ice roads and barge, and by the 1960's air, were the only forms of transport (Northern Manitoba Economic Development Commission 1992).

With the exception of the Kelsey Dam, pre 1970 industrial development in the traditional use area of the five NFA First Nation communities was relatively unintrusive. Mining activity and accompanying towns were geographically remote (with the exception of Nelson House First Nation), and in-migration to the divisional point rail communities of Wabowden, Pikwitonei, Thicket Portage, Ilford, Gillam and Bird was minimal. The road network was geographically remote from the communities and competition for resources associated with mining, agriculture, forestry and tourism was relatively undeveloped.

2.3 Hydroelectric Potential Explored

The Churchill and Nelson Rivers (see Figure 2), both of which flow through the Treaty 5 area, are two of the largest rivers in western Canada. They drain almost all of Manitoba and Saskatchewan and about one third of Alberta. They also drain a sizable area of northwestern Ontario and a considerable area of North Dakota and Minnesota. Together with their other main tributaries, the Saskatchewan, Red, Winnipeg, Assiniboine, Qu'Appelle, English and Rainy rivers, the Churchill/Nelson system drains in excess of 1.2 million square kilometers of the interior of North America (Environment Canada 1992b).

Investigation of the hydro-electric potential of the Churchill and Nelson rivers began in the early 1940's. By the mid 1950's, the concept of diverting the Churchill River into the Nelson had been conceived. By 1964, Manitoba and Canada had jointly investigated the feasibility of generating and transmitting energy to southern Manitoba and the northern United States (The Commission of Inquiry into Manitoba Hydro 1979).

It was proposed that the remote generating sites be tied to the southern system by means of high voltage direct current transmission, a technology untested at that time in North America or western Europe. To underwrite the financial risks and the costs of developing this technology, Canada, through the agency of Atomic Energy of Canada Limited (AECL), became a financial partner of Manitoba Hydro and provided loans and guarantees to cover the cost of the transmission facility.[5] Canada and Manitoba formally agreed, in 1966, to share in the costs of engineering design, and the costs of constructing and operating the facilities (An Agreement Between The Government of Canada and the Government of the Province of Manitoba, dated February 15, 1966).

The 1966 Agreement recognized that Manitoba and Canada had co-operated in studying the feasibility of the project, that development was now considered appropriate, and provided for Canada, through the Agency of AECL, to finance the first direct current transmission line. It also provided that Manitoba Hydro would repay Canada through AECL from revenues earned from sale of energy in Manitoba and, if possible, in export markets. Canada and Manitoba, in effect, became partners in the first phases of the development of the Project. Canada thus became the regulator of a project in which it was a development partner and which affected its fiduciary responsibilities for Aboriginal communities, lands and interests.

In 1970, the Federal and Provincial governments jointly undertook to construct and operate

[5] The partnership of Canada and Manitoba had its origins in a proposal by the Honourable Alvin Hamilton to create a national power grid which would link all regions of Canada to northern hydro electric sites and southern nuclear fuelled generators by means of long distance transmission lines. High voltage direct current transmission was widely used in the USSR but not in western nations. The Churchill-Nelson project offered a significant surplus of energy and an ideal site for the first long distance DC transmission facility. Joint studies of the potential began in the early sixties. By 1966 interest in a national grid had waned, but interest in HVDC technology remained. In practice, the technology was developed with fewer problems and at less cost than might have been expected.

the Lake Winnipeg, Churchill and Nelson Rivers hydroelectric project - a project which would heavily impact upon the livelihood and way of life of some 8,000 Cree persons residing in five First Nation communities. Licenses were issued and funds provided by the Provincial and Federal Governments to allow construction and operation of a Project which, in direct contravention of the Aboriginal and Treaty rights guaranteed and protected in Treaty 5, the Manitoba Natural Resources Transfer Act of 1930, and the Indian Act of 1951, would:

≅ impinge upon Aboriginal and Treaty rights respecting "trespass" and unauthorized use of Reserve land through flooding, dewatering and erosion;

≅ interrupt the rights of free navigation of all lakes and rivers and to the shores;

≅ interfere with the right to pursue resource harvesting activities throughout the surrendered lands.

2.4 Churchill/Nelson Rivers Hydro-electric Project

2.4.1 The Project

The Lake Winnipeg, Churchill and Nelson Rivers Hydro-electric Project (the Project) involves manipulation of two river systems as follows:

Churchill River Diversion

The natural flow of the Churchill River entered Southern Indian Lake at its south end and was discharged at Missi Falls at the northern end into the Lower Churchill River which continues in a north-easterly direction, reaching Hudson Bay at the town of Churchill.

The Churchill River Diversion (CRD) restricts the flow of the Churchill River at Missi Falls, the natural outlet of Southern Indian Lake, and diverts 85% of the flow south and east into the Nelson River via the Rat and Burntwood River systems. Control and storage of the Churchill flow is affected by a control structure 90 kilometers downstream at Notigi Lake on the Rat River (see Figure 2). Presently there are no generating facilities on the CRD, its sole function being to increase flows to feed power dams on the lower Nelson. Manitoba Hydro has, however, identified four sites on the Rat/Burntwood system for future power dams.

Damming of the natural outlet of Southern Indian Lake raised the lake level approximately 3 meters flooding an area of 295 square kilometers. The Notigi structure created a 15 meter headpond backflooding a number of upstream lakes and 551 square kilometers of land. On average the flow of the Burntwood River has been increased 9.5 times. Conversely, the flow of the Churchill River below Southern Indian Lake has been substantially reduced resulting in substantial dewatering of downstream lakes. For example, larger lakes such as Partridge Breast, Northern

Indian and Fidler, have been reduced in area by some 39% to 76% (Environment Canada 1992b).

The Cree communities most dramatically affected by the CRD are South Indian Lake[6] and Nelson House and, downstream on the Nelson, Split Lake and York Landing (see Figure 2).

Lake Winnipeg Regulation

Prior to regulation, Lake Winnipeg drained into the Nelson River via a single channel at Warrens Landing. From the outlet of Lake Winnipeg, the Nelson flows in a northeasterly direction through a series of riverine lakes and empties into Hudson Bay at York Factory. The purpose of Lake Winnipeg Regulation (LWR) is to manipulate the seasonal discharge pattern of Lake Winnipeg outflow to maximize winter flow to power plants downstream on the Nelson. In essence, peak flows are delayed from late spring until mid-winter when energy requirements are greatest.

Regulation of the Nelson River is accomplished primarily by increasing the outflow capacity of Lake Winnipeg through a series of man-made channels and operation of the Jenpeg control structure/power dam located 80 kilometers downstream at the outlet of Playgreen Lake (see Figure 2).

Water is held back behind Jenpeg throughout the summer months for release in winter. Upstream flooding has not been substantial given the large storage capacity of both Playgreen Lake and Lake Winnipeg and the fact that Jenpeg has only a 7.5 meter head. Seasonal flow patterns, however, have been dramatically changed. Directly downstream of Jenpeg, Cross Lake suffers from a complete reversal of flow pattern. In summer some 300 square kilometers of lake bed are exposed, while winter discharges are approximately twice as large as in nature (Environment Canada 1992b).

Four generating stations are in operation on the lower Nelson. Kelsey generating station[7] is located on the Nelson where it enters Split Lake and the remaining three, Kettle, Long Spruce and Limestone, are located downstream of Split Lake where they receive the combined flows of the Nelson and CRD. Electrical energy from these plants is transmitted some 800 kilometers through High Voltage Direct Current lines to converter stations in southern Manitoba. These stations are integrated into a transmission grid which distributes energy to Manitoba and to other distribution systems in the United States, Ontario and Saskatchewan. When completed, the Churchill Nelson

[6] Many of the people residing in this community were and continue to be Treaty members of Nelson House First Nation. The number with Treaty status increased dramatically after Bill C-31 was passed into legislation. For some time now, the community has attempted to have lands set aside under Reserve status and for the community to be formally recognized by DIAND as an independent First Nation.

[7] Kelsey GS (160 Mw) was constructed in the early 1960's to serve the community of Thompson and the local INCO nickel mine. In 1968 the plant was connected to the southern transmission grid and capacity was increased to 224 Mw. (The Public Inquiry into Manitoba Hydro 1979). Storage behind Kelsey resulted in a 16 meter rise in the Nelson and extensive flooding (1-2 meters) at Sipiwesk Lake located 150 kilometres upstream (Environment Canada 1992b).

Project will have the capacity to generate some 8,400 MW. of electric energy.[8]

Hydrological changes resulting from LWR severely affect the Cree communities of Cross Lake and Norway House, and contribute to cumulative impacts on the downstream communities of Split Lake and York Landing.

2.4.2 Construction Costs

A Commission of Inquiry (Commission of Inquiry into Manitoba Hydro 1979:44)[9] reporting at the end of 1979, found that the cost of the hydro project by 1979 was in the order of $1.36 billion;

Kettle generating station[10]	$324 million
Lake Winnipeg Regulation and the Jenpeg generating station	$315 million
Churchill River Diversion	$223 million
Long Spruce generating Station	$502 million

Construction of the Limestone generating station was begun in 1976, suspended in 1978, and restarted several years later and completed in 1991 at a cost of $1.45 billion (Manitoba Hydro-Electric Board 1992). The total, nominal dollar[11], cost of these facilities was about $2.8 billion. All of the costs quoted are exclusive of transmission and conversion facilities. The Utility reports that its transmission and substation facilities are currently valued at an additional $1.4 billion (Manitoba Hydro-Electric Board 1992).

2.4.3 Energy Produced

The Manitoba Hydro system relies on hydraulic resources for more than 90% of the electrical energy it produces. Consequently, energy output varies with fluctuations in weather and

[8] This is a very large project by world standards. For perspective, only 40 nations among more than 200 in the world have installed capacity in excess of 8,400 MW. The Project would exceed the size of the entire system supplying New Zealand and would be almost twice as large as generating capacities serving such nations as Ireland, Israel and Chile. (Comparative data are drawn from PC Globe 5.0, PC Globe Inc, 1992.

[9] The "Commission of Inquiry into Manitoba Hydro" was created under Part V of The Manitoba Evidence Act under Order-in-Council 1328/77 and 767/78. The report of the Commission is also known as the Tritschler Report, named after Commissioner Honourable G.E. Tritschler.

[10] Construction of Kettle Generating Station was commenced in 1966 with the first turbine units in operation by 1970.

[11] Values cited are at the time of construction. Costs are not adjusted to a common base year.

climate. About 75% of energy produced is harnessed by the five plants on the Churchill Nelson System.[12] The Churchill-Nelson plants have a total nameplate capacity of 3,666 MW. the capacity factor for facilities on these rivers is about 59%, and theoretical output is therefore about 18.9 billion kilowatt hours per year. In 1991-92, for example, with the Limestone facility on stream, the Churchill-Nelson stations generated 18.6 billion kwh. (74.4% of a system total of 25 billion kilowatt hours) (Manitoba Hydro-Electric Board 1992).

[12] Plants on the Winnipeg River system consistently produce about 15%; Grand Rapids produces 4.5 to 5%, and the remainder comes from a variety of sources including diversity exchanges and other imports.

2.4.4 Revenues to Hydro and the Province

Manitoba Hydro reported total revenues of $756.7 million in 1991/92 and revenues for the current year are informally reported to be about $855 million (Manitoba Hydro-Electric Board, 1992 and 1993). By the simplest analysis, energy generated by the Churchill-Nelson facilities was sold by the utility for about $563 million in 1991/92 and for about $636 million in the most recent year.

Direct revenue to the Province from the production of electrical energy is limited to a water rental charged to the Utility. In 1991/92, water rentals paid to the Province of Manitoba totalled $37.7 million or slightly less than 5% of revenues to the utility from sale of energy (Manitoba Hydro-Electric Board 1992).

2.5 OVERVIEW OF PROJECT IMPACTS

A fair amount has been written about the ecological changes and impacts associated with the Project; however, most of the research to date has focussed upon Southern Indian Lake and the non-Reserve Cree community of South Indian Lake.[13] Substantially less has been written about social, cultural and economic impacts, and most of this information is of a qualitative rather than quantitative nature. Again, most of the research to date has focussed upon the community of South Indian Lake.[14] It is not the purpose of this report to synthesize such information. However, an overview of Project impacts provides an indication of the nature of changes and damages faced by the NFA First Nations and a context in which to understand the rationale for, and implementation history of the NFA.

The Project has caused physical and biological changes which have directly and indirectly adversely affected the social, cultural and economic welfare of the NFA communities.[15] While there has been some agreement by the signatories regarding biophysical impacts, the existence, nature, magnitude, duration and value of social, cultural and economic impacts are widely disputed. Some of these impacts and damages have been recognized by project proponents, regulators, arbitrators and courts. Some have yet to be put forward for evaluation. Several remain the subject of dispute.

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[13] See for example Gaboury and Patalas (1982); Nelson River Group (1986); Bodaly, et.al (1984a,b); Canada-Manitoba Agreement on the Study and Monitoring of Mercury in the Churchill River Diversion (1987); and Environment Canada (1992a,b,c).

[14] See for example Waldram (1983, 1988) and Wagner (1984).

[15] Unless otherwise cited, information in this section of the report is drawn from a variety of internal reports prepared by the authors firm, Symbion Consultants, and the Winnipeg based engineering firm, Unies Ltd.

2.5.1 Physical Changes

Physical changes to waterways and land have had a direct impact on biological resources and a direct and indirect impact on human activity. Regulation of the rivers has caused a variety of changes, some of which are common and some of which are unique to particular segments of the rivers.[16] The four primary physical changes to the water regime are:

1) changes in pattern and seasonal distribution of flow and water level;

2) change in the range of flow and water level;

3) change in the rate at which flows and levels fluctuate;

4) diversion of water from one river to another.

Diversion of Churchill River flow into the Rat and Burntwood Rivers increased the minimum flow of the Burntwood by a factor of sixty-six and the maximum flow by a factor of two. Mean flow has been increased by a factor of seven. In nature, Burntwood River flow usually peaked in June and declined through the fall and winter. While flows and levels are now constantly higher than in nature, peak flows occur in late fall and through out the winter. Introduction of Churchill River water has permanently changed the water quality of both the Rat and Burntwood river systems. All sites tested along the diversion route have shown an increase in hardness and alkalinity (Environment Canada 1992a).

Lake Winnipeg regulation has not increased the flow of the Nelson River but has changed the seasonal pattern of flow. At Playgreen Lake peak flow of the Nelson has been delayed by one month and winter flows have increased. The level of Playgreen Lake is now consistently an average of about 2.5 cm. higher throughout the year than it was in nature. The rate of fluctuation of lake level has increased partially due to short and long term operation of the Jenpeg control structure and partially because of increased susceptibility to wind set up from Lake Winnipeg due to the creation of Two-Mile channel.

At Cross Lake, directly downstream of the Jenpeg control structure, the pattern and seasonal distribution of flows and levels has been completely reversed from the state of nature. Lake levels are now low in the spring and summer and high in the fall and winter. Short term rates and ranges of flow and level fluctuations have been increased.[17]

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[16] See for example G. McCullough, Appendix I, "Flow and Level Effects of Lake Winnipeg Regulation and Churchill River Diversion on northern Manitoba rivers." Map 1 in: Usher and Weinstein (1991).

[17] In 1991 a weir was built by Manitoba Hydro at the outlet of Cross Lake. Summer water levels are now kept higher, although high winter flows and levels continue to cause ice problems.

Split Lake now receives the diverted flow of the Churchill River, and this combined with Nelson River seasonal flow alteration, has resulted in a permanent increase in the level of Split Lake, a reversal of natural seasonal flow pattern, and an increase in the rate and range of level fluctuation. Diversion of Churchill River flow into Split Lake has caused a permanent change in water quality.

Primary changes to the water regime in turn affect secondary changes. Changes in seasonal distribution of flows and levels has changed the energy balance between air and water. Ice formation patterns have changed resulting in ice forming earlier and/or later during the year, thinner ice formation, and increased incidence of slush ice.

Flooding and increased rates and/or ranges of flow and level fluctuation have also contributed to accelerated erosion of shoreline areas. For example, it is estimated that 50% of the total shoreline on the Burntwood River between Threepoint and Wuskwatim Lakes is actively eroding. At Wuskwatim Lake the shoreline is characterized as eroded with trees littering the near shore area and high turbid water conditions along the foreshore (Environment Canada 1992b). The cause of elevated mercury levels in fish tested along the Rat and Burntwood Rivers has been definitively linked to Project related flooding of terrain (Bodaly et.al. 1984b; Ramsey 1992).

Erosion has caused increases in water turbidity and debris. For example, all sites tested along the Churchill Diversion route have higher turbidity levels (Environment Canada 1992a). In 1985, over 80% of the shorelines at Threepoint and Footprint Lakes still had inundated standing vegetation (Environment Canada 1992b). There has been an increase in the quantity of sediment and debris in Playgreen Lake caused by inflow of Lake Winnipeg through the Two Mile channel (Environment Canada 1992c).

2.5.2 Biological Changes

Permanent and transitional physical changes in turn trigger changes in biological processes. Major components of change to flora and fauna can be expected to include:

≅ changes in the abundance and composition of micro-biota including phytoplankton, zooplankton, benthic species, crustacea, insecta, etc. in soils, in vegetation, and in submerged or dewatered areas.

≅ changes in abundance and composition of terrestrial and aquatic vegetation, including changes on forest, meadow and wetland vegetation, and on algae, floating, emergent and submergent vegetation.

≅ changes in abundance and composition of aquatic and terrestrial habitat of fish, mammals and birds, on their nutrition, reproduction, population levels and behaviour.

Surveys of benthic invertebrates, an important food source at the lower tropic level, have been conducted since the Project has been in operation. The Churchill Diversion lakes exhibited the

typical trophic surge phenomena. Standing stocks of benthic organisms substantially increased in response to increased lake area which provided drowned vegetative food matter, followed by a trophic depression once the organic matter was exhausted or rendered unavailable by siltation (Environment Canada 1992a). Benthic surveys conducted at Playgreen Lake indicate an increase in standing stock at the south end and a decrease in the north end of the lake (Environment Canada 1992c).

Shorelines and river banks not affected by artificial controls have achieved a degree of stability since the deglaciation of the region. As in any natural system, susceptible water-land interfaces are subject to continuous erosion and deposition and have adjusted to normal process rates in terms of erosion, deposition and vegetation (Penner 1974:67).

Penner (1974:102) says of restricted flooding (up to 2 feet) that aquatic vegetation such as grasses and sedges may re-establish within 5 years and shrub recolonization may be well underway within 20 years after flooding. Re-stabilization of shoreline ecosystems can be expected to occur within a fifty year time frame. In areas flooded by up to 10 feet of water, shoreline stabilization may take in the order of hundreds of years. Regardless of the extent of the original flooding the shoreline ecosystem may not return to its original state at all. In water
regimes regulated for either daily or seasonal peaking energy production shoreline stabilization is made impossible due to constant water level and flow fluctuations.

Active shoreline erosion continues along the Churchill River diversion route and to some extent in the upper Nelson River area. Stabilization of shorelines along the diversion route will likely take many more decades. Long term impacts to shorelines along the Nelson River can be expected due to the year-to-year pattern of regulation which causes a seasonal redistribution of water levels whereby flow is held back during the summer and water levels increase during the fall and winter. Until the weir was built at the outlet of Cross Lake in 1991, this lake was dewatered every summer and flooded during the fall and winter.

Post project studies of the Cross Lake fishery found that winter draw down has contributed to an absolute decrease in fish abundance caused by winterkill and reduced egg hatching success through dewatering of spawning areas and egg desiccation. Low spring water levels prevent walleye and pike from reaching spawning areas and low summer levels reduce the available habitat for plankton, benthic organisms and fish (Gaboury and Patalas 1982).

Experimental gill net testing in respect of fish populations and composition along the Churchill Diversion route indicates a general increase in whitefish and a significant decline in walleye numbers. Conversely, tests done at Sipiwesk Lake suggests a decline in whitefish numbers (Derksen 1986).

Playgreen Lake fishermen claim that the spatial distribution and seasonal movements of separate stocks of whitefish have changed because of the Project. Thus far, studies by the Department of Fisheries and Oceans have been in-conclusive (Environment Canada 1992b).

Recent studies of waterfowl usage of the Burntwood River and Playgreen Lake have indicated significant declines in numbers of ducks which do not appear to be related to long term regional trends (Environment Canada 1992b and 1992c).

The impact of flooded terrain, increased water levels, seasonal redistribution of flow patterns, and water level fluctuation on aquatic furbearers has not been examined. However, studies in other geographic locations have shown that water systems regulated for winter power generation contributes heavily to muskrat mortality due to den drowning and/or freeze out. An increase of 6-12 inches in water level after freeze-up can drown muskrat in their dens. Conversely, winter draw down causing water levels to drop a foot or so can prevent access to water under the ice causing mortality by starving or freezing or both (Slaney 1974). Beaver are adversely affected as well, although to a lessor degree. Muskrat are an important component in the diet of mink, and thus declines in muskrat population can reduce mink populations as well (Novak et.al. 1987).

2.5.3 Social, Cultural and Economic Impacts

Adverse impacts resulting directly from physical changes and indirectly from changes in health and abundance of the resource base have not been well documented.[18] The following discussion provides a qualitative description of the nature of adverse impacts experienced by the NFA communities.[19]

Many of the categories of damage mentioned in the following section tend to be disputed by the proponents who sometimes claim either that the alleged damages have not occurred or that they would have occurred without the impact of the Project or that cause and effect have not been proved.

Direct Physical Impacts

Physical changes such as ice formation and stability, dewatering and flooding, increased debris, water level fluctuations have all adversely affected the activities of NFA community members. Residents no longer believe the ice is safe to travel on and have damaged skidoos travelling through slush ice. Several people have drowned in the winter by falling through the ice. Debris has caused significant problems with net damage and efficiency. Many residents have damaged or destroyed boats and motors on rocks which were previously submerged or emerged.

[18] No social impact assessment of Project impacts has ever been undertaken. Most information about Project impacts is scattered in consultant reports prepared for the First Nations in respect of arbitration claims.

[19] This discussion is based upon information gathered by the author and/or her firm during the course of working with the NFA communities over the past sixteen years.

Impacts on the Uses of Flora and Fauna

Prior to the Project, the five NFA communities were remote access communities heavily reliant upon resource harvesting activities (both commercial and subsistence). Economic, cultural and social activities centred primarily around hunting, trapping and fishing.

At least three sub-categories of impacts on the uses of flora and fauna have been caused by the Project. Impacts which have affected the people, people who earned all or part of their income from the natural resources of the river basins, include impacts on income-in-kind, on cash income and on what may be described as aesthetic and psychic values. Each of these sub-categories, in turn, includes a number of groups of impacts.

Impacts on Income-in-Kind

The availability, the quality, the quantity, and the cost of harvesting commodities for traditional uses has been affected. Some of the main commodities affected are:

≅ Fuelwood, lumber, logs and other building materials

≅ Fish, including sturgeon

≅ Ducks, geese and swans, and the eggs of these species

≅ Beaver, muskrat, mink & otter

≅ Ungulates, rabbits and other upland game animals

≅ Berries, other food and medicinal plants

Impacts on Cash Income

Trapping, commercial fishing and tourism have been affected by changes in the availability of materials to harvest, by changes in the quality of materials available for harvest, and by the cost of harvesting (including the cost of access or travel). Products and services affected include:

≅ Wild fur (trapping)[20]

[20] see for example Hilderman et.al. (1982) and Symbion Consultants (1989b).

≅ Commercial fishing, including sturgeon fishing[21]

≅ Tourist facilities, fishing and hunting lodges

Aesthetics and Psychic Values

People living on and near the banks and shorelines of rivers and lakes affected by the Project live amid the evidence of change, deterioration and destruction caused by changing water levels and water regimes. Such changes have adversely affected the landscape and the appearance of places familiar and important to community members. Some of these undesirable changes include:

≅ Changes in the community landscape, and the landscape views from the homes of residents

≅ Changes in the hinterland landscape

≅ Changes in recreational aesthetics of near shore waters/ice, shorelines and river banks

≅ Changes in water quality, appearance and odour

≅ Changes in animal habitat and behaviour

≅ Changes in familiar places and revered places

Loss of Artifacts and Infrastructure

This is a class of external costs which derives from damage to the works of man and damage to certain components of the environment used to facilitate transportation or other human activity. Some of the artifacts, such as graveyards, are very old. Some of the artifacts, such as Aboriginal spiritual sites, are valued in part as beliefs and in part as natural phenomena. Some, such as natural water courses, have served for a very long time as an alternative to expensive capital works. Some of the types of artifact and infrastructure which have been damaged include:

≅ Summer transportation infrastructure including docks, landing places, navigable water courses, navigable lakes and ponds, natural causeways, paths, portages and trails

[21] see for example Hilderman et.al. (1983) and Symbion Consultants (1989a).

etc.[22]

≅ Winter transportation infrastructure including ice bridges, river, lake, pond and bog surfaces, and shoreline and river bank access.[23]

≅ Graveyards, spiritual sites, archaeological sites, etc.

Disruption of Persons, Households and Communities

Systemic disruption of the lives of persons, households and communities derives from multiple impacts affecting individuals and larger groups. The combination of disruptions and damages may sometimes be synergistic, and the impact on individuals in turn affects households and whole communities. Many manifestations of systemic impact have been identified by members of affected communities and by other observers.

Some of the identified classes of impact within this category are:

≅ Loss of household budget balance, loss of personal financial independence, loss of ability of a person or a household to continue to support themselves, loss of capital goods or family assets

≅ Loss of physiological health deriving from stress, dietary change or other life style change, loss of mental health

≅ Disruption of community aesthetics deriving from destruction of components of the landscape and/or the environment

≅ Loss of personal self esteem, loss of family self esteem

≅ Increased alcohol, drug or substance abuse

≅ Forced migration of persons or households in search of income or financial support

≅ Loss of control of community budget as a result of rising costs or declining sources of revenue or both

≅ Loss of community leaders or key members of the community labour force as a result of migration or the acceptance of temporary or permanent wage or salary income,

[22] see for example Symbion Consultants (1987, 1988a, 1988b, 1989a, 1989b, 1990).

[23] Ibid.

failure of community or private enterprises as a result of the loss of key persons

Loss of Community Economy

Destruction or partial destruction of traditional harvests disrupts the subtle and complicated economy of the communities. The Project has destroyed or damaged some of the resources which supported the local economy and has also disrupted transportation and communication links. It has disrupted finely balanced labour markets and created shortages of labour essential to the functioning of the community. Inundation and/or changed water regimes reduce or otherwise effect populations of fish, birds or animals and inundate transport routes or make them dangerous at all times or at critically important times. Traditional harvests, finely balanced with each other and with community needs, are disrupted. Animals or fish may be available for harvest but unreachable, or changes make it more difficult to locate them, or their quality has diminished.

New systems of transport or other industrial employment means some vital members of the traditional work force are unavailable at critical times. Old systems of transport or communication are disrupted and the new forms are beyond the financial reach of many community members. New services, such as electrical grid power, sewer and water systems, and roads require cash outlays which the traditional economy cannot provide. Some households have adapted by finding wage income, but many are cash short, and these households which are cash short are also the households which suffer the most from loss of traditional harvest of food, fuel and other goods.

The result is a systematic degradation of the local economy. Almost every household suffers economic loss and most suffer losses in several ways; loss of cash income, loss of non-monetized goods (food) or services (care of elderly persons), and loss of use of community infrastructure and disruption of essential services. Systemic losses are probably best measured on a macro scale; individual components often have no price, or have not commonly been priced, or in many instances the Project has adversely affected communal resources resulting in communal, not individual, losses.

The household loses income-in-kind with no compensating gain in cash income. Many persons or households find themselves incapable of coping with economic and social disruption. Loss of key sources of income in cash or kind combined with disruption of social relationships destroys the economic viability of the household and forces recourse to outside help ("welfare") or to some drastic reorganization. Blame for disruptions is typically directed at the utility and at government, and the resulting hostility does not dissipate quickly.

3.0 NEGOTIATION OF THE NFA

A period of twelve years, 1966-1978, passed between the time the governments of Canada and Manitoba agreed to develop the Churchill and Nelson Rivers and the NFA was ratified. In 1966 the nature of the Project was unclear. Originally, Manitoba Hydro planned to develop the Churchill River Diversion (CRD) first and delay Lake Winnipeg Regulation (LWR) into the future. Initial plans called for a high level CRD which would have raised the level of Southern Indian Lake by some 10.7 meters thereby entirely inundating the Cree community of South Indian Lake and causing widespread flooding along the Rat and Burntwood Rivers and at Nelson House (The Commission of Inquiry into Manitoba Hydro 1979).

Mass opposition from the community of South Indian Lake, church organizations and the academic community led to public hearings in 1969. The high level diversion scheme became a major issue in the 1969 Provincial election campaign. When the New Democratic Party defeated the Progressive Conservative Party it initiated a complete review of Manitoba Hydro's plans. The following year, 1970, the Premier of Manitoba announced a lower level CRD combined with LWR. With the addition of LWR, Lake Winnipeg and upper Nelson River communities joined South Indian Lake and Nelson House in their concerns about the overall impact of the Project.

At the time the Project was conceived little attention was paid to the short or long term environmental changes which would result from manipulation of the water regime. Even less attention was paid to the impact the Project would have on the people residing along the rivers. In broad contrast to modern day policy and law, examination of impacts came after the Project was licensed and designed.[24]

During the period between 1970 and 1974, Aboriginal communities were hampered in their attempts to negotiate any form of mitigation or compensation by a sheer lack of information. Studies commenced in 1972 were not made available until late 1974. In the meantime, Manitoba Hydro had commenced construction of LWR works in 1972, the Long Spruce station in 1973, and CRD works in 1974 (The Commission of Inquiry into Manitoba Hydro 1979).

By 1975, fearing the Project would be completed and in operation without any regard to Treaty rights, the First Nation communities located along the diversion route and the Nelson River organized themselves into the Northern Flood Committee (NFC). Over the next few years the NFC attempted to force negotiations on the basis of Treaty rights. Serious negotiations began in mid 1977 under the framework of a mediation agreement.

[24] Licences for LWR and CRD were issued in September, 1970, and December, 1972, respectively. The licences were issued prior to finalization of the Project designs.

3.1 Players in the Negotiations

When Manitoba Hydro proposed its original high level CRD scheme in 1967, public opposition was voiced first by the non-Reserve Cree community of South Indian Lake and then supported by various church and academic organizations. When LWR was announced in 1970, the Upper Nelson River First Nations formed the Norway House/Cross Lake Planning and Development Committee (1971) and requested that the Minister of Indian Affairs and Northern Development (IAND) act on their behalf in negotiations with Manitoba Hydro (Hickling-Johnston 1979:13). By 1972, a committee represented by the Chiefs of the five First Nations who eventually signed the NFA, plus Chiefs and mayors of other communities located along Lake Winnipeg and the Nelson River, formed to obtain information from Manitoba and Manitoba Hydro about the impacts the Project was going to have on their respective communities.[25]

In May of 1974, the Northern Flood Committee formed to represent the collective interests of Treaty and non-status communities located along the Churchill, Rat, Burntwood and Nelson Rivers (Cross Lake, Nelson House, Norway House, Split Lake, York Landing and South Indian Lake). The initial purpose of the Committee was to obtain information about the Project schedule and impacts.

By early 1975, the Committee felt that the only leverage to force the governments and Utility to the negotiating table was the issue of Reserve land. The fact that the community of South Indian Lake was not a Reserve created a problem for the Committee in accessing financing from the Department of Indian Affairs and Northern Development (DIAND) and eventually the Committee evolved to represent only the interests of Reserve communities.[26] In February, 1975, the Northern Flood Committee, Inc., representing the interests of Treaty residents exclusively[27], was created by letters patent.[28] The stated objective of the Committee was;

> ***"To represent, organize, negotiate on behalf of, obtain information bearing upon, and take whatever further and other steps as may be necessary to protect the rights, interests and property (both real and personal) of communities and individuals affected by the hydro-electric development in Northern Manitoba commonly known as the Churchill-Nelson River Diversion project."***[29]

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[25] K.B. Young, legal counsel for the NFC. Personal Communication. July 23, 1993.

[26] Ibid.

[27] Many of the residents of South Indian Lake were Band members of Nelson House First Nation. Although, South Indian Lake as a collective entity was no longer a member of the NFC, the rights and interests of Treaty members residing at that community were considered the responsibility of Nelson House First Nation.

[28] Initially the NFC Board of Directors included the Chiefs of Cross Lake, Nelson House, Norway House and Split Lake. York Landing joined the NFC Inc. several months later.

[29] Letters Patent. Northern Flood Committee Inc. February 12, 1975.

The provincial government created a special Cabinet Committee on the Churchill-Nelson Development in April of 1974, consisting of the Premier, the Minister of Northern Affairs and the Minister of Mines, Resources, and Environmental Management. This committee was formed to coordinate the activities of relevant government departments and to define basic principles relating to compensation and community development. This Cabinet Committee created a Senior Advisory Committee with representatives from Manitoba Hydro, the provincial departments of Northern Affairs and Mines, Resources and Environmental Management, and the senior coordinator of the 1971 Canada-Manitoba Agreement (The Commission of Inquiry into Manitoba Hydro 1979).

Federal responsibility for entering discussions or negotiations regarding the Project was not identified by either the head office or regional offices of DIAND until about 1974. Throughout subsequent negotiations Canada was represented by the Minister of IAND and his designates in the Manitoba Regional DIAND office (Hickling-Johnston 1979).

3.2 Context of NFA Negotiation

Interim licenses for LWR and CRD were granted to Manitoba Hydro in the absence of any environmental impact assessment or any recognition and/or admission that the lifestyles and properties of five First Nations and other Aboriginal communities would be adversely affected.

The early high level diversion plan proposed by Manitoba and Manitoba Hydro in the late 1960's had spawned significant public opposition by the community of South Indian Lake, church groups, the academic community and the public at large. The enormous pressure exerted by these groups to have the government examine the environmental impact of the Project carried over to 1970 when the revised low level CRD in combination with LWR was announced.

A year after the announcement of the Project, both levels of government proceeded in 1971 to carry out a joint study to ***"determine the effects which the regulation and diversion projects (were) likely to have on other water and related resource users, to indicate ways in which the projects (might) prove beneficial to such other uses, to recommend modifications in the design and operation of the works, and to recommend remedial measures where considered necessary to lessen undesirable effects."*** (Lake Winnipeg, Churchill and Nelson Rivers Study Board, 1975).

The 1971 Canada-Manitoba Agreement was conducted by an entity known as the Lake Winnipeg, Churchill and Nelson Rivers Study Board (the Study Board). By the time the Study Board released its final report in 1975, most of the Project was built. However, of primary relevance to the eventual negotiation of the NFA, the Study Board recommended:

- ***That Manitoba Hydro and other resource developers provide just compensation or mitigation for all damages resulting directly from the developments.***

- ***That a special appeal mechanism be established to which unresolved compensation issues can be referred for adjudication.***

≅ ***That a mechanism be established to deal with social and related economic issues including (a) information and communication problems related to hydroelectric development with particular emphasis on the alleviation of social and psychological stress, (b) mitigation and compensation issues, and (c) monitoring and analysis on ongoing social and economic changes related to hydro-electric development and, more generally, northern development.*** (Lake Winnipeg, Churchill and Nelson Rivers Study Board, 1975 - recommendations 3, 4, and 5).

There is no mention of either Aboriginal or Treaty rights in either the findings or recommendations of the Study Board. The Study Board recommended that the proponents develop a mechanism for compensating "persons" adversely affected by the Project. Armed with this recommendation, the NFC introduced and fought for protection of Aboriginal and Treaty rights both on and off-Reserve.

3.3 Political Climate

The Project was conceived and planned as an economic development project at a time when primary industry mega-projects were considered progressive. The Project was seen to be a technological advance and a progressive economic venture effecting large scale development of northern resources to meet domestic and export demand.

It was the view of Governments in the early 1970's that the natural resource based economy that had sustained Aboriginal communities in northern Manitoba for hundreds of years would not be viable over the long term, resource harvesting activities contributed little to the overall economy of the north, and the social and cultural values of the communities were transforming to those of the more prevalent industrial society (Lake Winnipeg, Churchill and Nelson Rivers Study Board 1975). Because of this perspective, studies were performed from a position of ignorance and misunderstanding and findings minimized the negative impacts of the Project and focused upon unrealistic benefits such as job creation.

At the inception of the Project, Progressive Conservative governments were in office in both Manitoba and Ottawa. Conflict with affected communities first became focused in 1968, and potential impacts were a factor in the 1969 Provincial election. Within a short time the NDP government of Manitoba was insisting that the federal Liberal Government live up to what Manitoba considered to be federal obligations under the Canada-Manitoba Agreement. It was Manitoba's position, until late in 1977, that Canada should somehow subdue the affected communities, and Manitoba did not sign the NFA until the NDP government had fallen and been replaced by the Progressive Conservatives.

3.4 Different Attitudes Towards Land and Resources

A culturally biased concept of the relationship of the human species to the rest of the environment forms a *leitmotif* woven through the negotiations leading to the NFA and through the Agreement itself. The concept reflects the attitude of mainstream institutions, (including the management of Manitoba Hydro and the governments of Manitoba and Canada), and aggravates the conflict between these institutions and the First Nations. The belief that the untamed Nelson and Churchill rivers flowing unharnessed to the sea constituted a wasting asset and unused resource is entrenched in the Agreement. Established conventional wisdom saw, (and sees) the environment as existing for the use of man, and describes all non-human components of the environment as "resources", i.e., as natural sources of wealth or revenue. It is an established and generally accepted corollary of this view that failure to develop and use such resources would be improvident and foolish, and in the view of some, a waste of assets proffered by a benevolent providence.

Manitoba and Manitoba Hydro held to the notion that environmental damage could be mitigated in some measure and that, beyond mitigation, monetary compensation would equate with environmental damage. They also held the view that money paid to adversely affected persons (singly or in communities) would compensate for insults to the environment. The prevailing view was that environmental damage is transactional and that it can be mitigated or compensated by tendering money; the symbol and cipher for all things of material value.

The Cree view of environment stands in strong contrast to that of the Project proponents. Impacts to the environment are seen as defilement rather than damage. Neither compensation nor mitigation are always acceptable forms of redress. This view is based upon concepts of interspecific equality and reciprocal behaviour. Moreover, man has no exclusive claim to proprietary right to the environment and consequently, compensation paid to humans does not necessarily balance insults to the environment or insults to other species.

There were many persons in the NFA communities who believed that adverse impacts could never be balanced and any Agreement would prove to be inadequate. There were those who believed that Hydro should be somehow punished for what they had done. Mr. George Paupanekis of Cross Lake once said;

> ***"If I took a saw and cut down the poles of Hydro, then I would have to pay for them. But I suppose that I would also have to pay a fine or go to jail. I would also be punished. They should be punished for what they have done."***[30]

The importance of Reserve land to Cree people is exemplified in their language where Reserve is called "iskunikun" which literally translated means "the part that is left", the implication being that a only small portion of land remains of the vast territory which was "shared" under Treaty. The insignia on NFC letterhead reads "OUR LAND AND WATER IS OUR LIFE".

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[30] Mr. George Paupanekis, Cross Lake First Nation. Statement made at a public meeting in Cross Lake in 1985 (David Young, Symbion Consultants, personal communication. August 17, 1993).

The Cree view of environment and concepts of mitigation and compensation are illustrated in the following excerpts of speeches delivered to the Conawapa Environmental Review Panel in 1992.[31]

> ***"But further aggravation to this continued trauma involved the violation of the great law of nature resulting in the breaking of our spirit and our relationship to this sacred land. In 1977, water rights to our ancestral land were granted to Manitoba Hydro and we have been faced with a devastating threat to our lives."*** (Darcy Linklater, Nelson House, May 27, 1992 in Conawapa Environmental Review Panel, June 1992).

> ***"Our world view is wholistic (sic). Order and balance are two basic and fundamental principles inherent to the Cree cosmology. A lack of order or balance invites chaos and sickness. When you dam and quiet the voice of yet another river system, you have pronounced the death sentence upon ten thousand people. When you transfer, move, re-arrange and change the face of shorelines and the delicate balance of eco-systems, you are playing god; and yet you are not god. First there are four elements which sustain life: earth, water, air and fire for cosmological order and physical existence to prevail. In the Indian world there is a fifth and more important order of consideration, that of the spiritual dimension. We the human being, consider our place upon mother earth of equal value and importance as these trees you would see standing raped and naked out in the water. We are a people whose lives are inter-woven to the waters and forests of these lakes, of these lands. My ancestors did not consider themselves sophisticated or superior over any other living species."*** (Chief Norman Linklater, May 27, 1992 in Conawapa Environmental Review Panel, June 1992).

> ***"It is hard to separate the issues of hunting, fishing and trapping because these issues are our livelihood which are a fundamental part of our land and water. Our land and our water is our way of life. There is no dollar value to the loss of livelihood ..."*** (Cross Lake Elders Group, May 29, in Conawapa Environmental Review Panel, June 1992).

> ***"Ever since Manitoba Hydro started constructing along the Nelson River, we have experienced nothing but devastation and destruction. Manitoba Hydro could have dropped an atomic bomb here in the North, just like what I seen in Hiroshima in 1952. The destruction is the same, loss of land, loss of livelihood and loss of dignity. At least Hiroshima was rebuilt. This land and rivers and lakes can never be rebuilt. They have forever been damaged. No amount of money will replace our losses."*** (Donald McKay, Cross Lake First Nation, May 29, 1992 in Conawapa Environmental Review Panel, June 1992).

[31] As part of its scoping exercise, the Conawapa Environmental Review Panel travelled across Manitoba to hear the concerns people had about the generating station Manitoba Hydro was proposing to build and to hear the views of communities and individuals who had experienced changes brought about by past hydro projects.

> ***"The land has been provider of our people; a mother. Our people have always been dependent on the land to survive; like a baby depends on its mother to survive. If you continuously change and deplete the resources of the mother, the baby will die. The same people will lose their traditions and will cease to exist as they had once before. We would lose our identity as a people ..."*** (Rusty Beardy, York Landing First Nation, May 30, 1992 in Conawapa Environmental Review Panel, June 1992).

3.5 Bargaining Positions

3.5.1 The NFC's Position

As soon as the Project was announced in 1970 the First Nation communities located on the Nelson and Rat/Burntwood Rivers believed (correctly) that their Reserve lands would be affected. Further-more, the communities were aware that the Project would adversely affect the waterways, lands, and resources which they had the legal right to enjoy and use.

The initial position of the NFC was to bring the Project to a halt permanently, and failing that, to ensure that no Reserve land was taken, legally or otherwise. As construction of the Project progressed and as the magnitude of damage the Project would cause became more and more apparent, the NFC sought to ensure that Treaty rights would not be violated and that the Cree residents would be adequately compensated for any and all forms of damage.

Under the terms of Treaty 5 (1875), some 65,000 acres of Reserve land were granted to the five First Nations of Cross Lake, Nelson House, Norway House, Split Lake, and York Landing. In addition to Reserve land, Treaty 5 also promised ***"free navigation of all lakes and rivers, and free access to the shores thereof"*** and, subject to certain conditions, the ***"right to pursue"*** the ***"avocations of hunting and fishing throughout the tract surrendered".*** Further, Treaty 5 stated ***"that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained."*** (emphasis added).

Although Manitoba became a province in 1870, ownership of Crown lands and natural resources was retained by the Federal Government until 1930. Under the Natural Resources Transfer Act of 1930, Treaty 5 rights to harvest resources were protected as follows (in McNeil, 1983:20);

> ***"In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."*** (Constitution Act,

1930).[32]

Unauthorized use or taking of Reserve lands is addressed under Sections 28(2), 31 and 35 of the Indian Act which state;

> ***"The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve"*** (Indian Act, section 28(2)).

> ***"Without prejudice to section 30*** (i.e. trespass on Reserves), ***where an Indian or a band alleges that persons other than Indians are or have been (a) unlawfully in occupation or possession of, (b) claiming adversely the right to occupation or possession of, or (c) trespassing upon a reserve or part of a reserve, the Attorney General of Canada may exhibit an information in the Federal Court of Canada claiming, on behalf of the Indian or band, the relief or remedy sought"*** (Indian Act, section 31(1)).

Section 35 provides that Her Majesty in right of a province or a corporation may take or use Reserve lands for public purposes without the consent of the owner but only with the consent of the Governor in Council. Section 35(4) states that any amount of Reserve land which is agreed upon or awarded in respect to the compulsory taking or using of land shall be transferred to the Receiver General for the use and benefit of the band.

Protection of Treaty rights was of the utmost importance to the NFC as evident in a speech delivered to the Deputy Minister of IAND in September of 1974;

> ***"If the Manitoba Hydro or any other provincial agent is to proceed with the course they have chosen to take, then no Indian lands in Canada will be safe from the provincial exploitation without any regard to Indian rights...We realize that no one can stand in the way of progress. We too welcome progress but not to the extent that such progress will ignore our rights as Indian people. We believe that any and all government intervention of Northern Development should be done on a cooperative basis with the first residents of our rich northlands. We believe any misguided development of our natural resources will not only lead to ultimate irreversible destruction of man's own environment and also drastically effect Indian claims on the land."***[33]

On the face of it, The Indian Act provided the necessary legal ground work to prevent unauthorized use of Reserve land. However, the NFC's fight to force a legal instrument was not an easily won battle.

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[32] Wording in Constitution Act, 1930 is identical to wording in paragraph 13 of the Manitoba Natural Resources Transfer Agreement, 1930.

[33] Presentation to Mr. Peter Lesaux, Deputy Minister of IAND. Northern Flood Committee. September 17, 1974.

3.5.2 Manitoba and Manitoba Hydro's Position

Manitoba Hydro absolutely required the use of Reserve land in order for the Project to be economical. The hammer which forced the negotiation of the NFA was that Canada and the NFC had indisputable legal grounds to prevent Manitoba Hydro from trespassing on Reserve lands. Thus, although the Project would, and by the time the Agreement was signed, had, impinged upon off-Reserve Treaty rights, it was the need to legitimize Manitoba Hydro's use of Reserve land that ultimately provided the foundation for the NFA.

The initial position of the Manitoba government and one which they maintained for years was somewhat disingenuous. The Premier repeatedly stated that the Project would not result in any Reserve flooding. For example, the Premier's office told the Minister of IAND in 1975 that the flooding of Nelson House Reserve land ***"would occur only under abnormal conditions, the probabilities of which appear to be highly remote."***[34] Ultimately, Manitoba Hydro required an easement 14 feet above the natural water level. By the time the NFA was signed and severance lines surveyed for Manitoba Hydro's easements, it was determined that the Project flooded and/or adversely effected 20% of the five communities' Reserve land.

While stating that no Reserve land would be flooded, the Province for years argued strenuously that the 1966 Federal-Provincial Agreement provided the legal basis for the taking of Reserve land. The Premier of Manitoba was told as early as 1974 by the Minister of Indian Affairs and Northern Development (IAND) that ***"there will be no commitment of lands on the Nelson House Reserve or any other reserve, without the agreement of the Band concerned."***[35]

In response, the government of Manitoba contended that Canada, by virtue of signing the 1966 Federal-Provincial Agreement, had granted Manitoba and Manitoba Hydro the right to flood Reserve land. This position is clearly stated in a 1974 letter written by Mr. Green, Provincial Minister of Mines, Resources and Environmental Management to Mr. Martin, a special advisor to Premier Schreyer;

> ***"It is our position that in spite of the above (i.e. that no flooding of Reserve lands will occur) we have the legal right to proceed with the diversion, since governments having full jurisdiction in the area, namely the federal and provincial governments, agreed some eight years ago to so proceed."***[36]

Despite the fact that the Province represented to the First Nations that no Reserve land flooding would occur, the Premier of Manitoba personally travelled to Ottawa in August, 1974,

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[34] W.S. Martin, Special Advisor to Premier Schreyer, to The Honourable Judd Buchanan, Minister of IAND. Dated July 30, 1975.

[35] The Honourable John Chretien, Minister of DIAND to Premier E.R. Schreyer, Province of Manitoba, dated May 29, 1974.

[36] Mr. Green, Provincial Minister of Mines, Resources and Environmental Management to Mr. Martin, special advisor to Premier Schreyer, dated July 17, 1974. In Commission of Inquiry into Manitoba Hydro, 1979:211.

to meet with the Minister of IAND requesting that Canada pass the necessary Order in Council enabling Manitoba to flood Reserve land.[37] (i.e. pursuant to Section 35 of the Indian Act).

The Premier's request was declined. However the Provincial contradictory position that it had the right to flood Reserve land was maintained well into mid 1975 as evidenced in a letter from the Manitoba Premier's office to the Minister of IAND;

> ***"by virtue of the 1966 agreement with the Government of Canada, that the (sic) Manitoba Hydro has every legal right to operate the diversion project at its maximum potential, even if so doing results in the flooding of reservation lands. It is the legal obligation of the Federal Government to facilitate for the Government of Manitoba, the required lands under federal control, so that the joint commitments under the 1966 contract can be implemented to facilitate maximum economic utilization."***[38]

Upon receipt of the above correspondence, the Minister of IAND informed Premier Schreyer in person on a stop-over in Winnipeg that his department, jointly with the NFC, intended on commencing legal action within two weeks if Manitoba and Hydro did not provide information which had been continually requested and unless assurance was given by Manitoba that there would be no taking of Reserve land without approval of the Federal government.[39] (i.e. pursuant to Section 31(1) of the Indian Act). Canada and the NFC's position was finally accepted by the government of Manitoba, however, two years of protracted negotiations were required before the NFA was drafted.

Manitoba's position that they already had a legal right to flood Reserve land was maintained even during the weeks before the NFA was initialled, as evidenced in a letter sent by the Premier of Manitoba to the Prime Minister on June 22, 1977;

> ***"The reasons that Manitoba is prepared to implement this recommendation (a draft of the settlement agreement) should be clearly understood: a) It is our opinion that the Government of Canada is wrongfully in breach of its agreement with the government of Manitoba. b) It is our opinion that the Government of Canada is using the public purse to initiate and finance proceedings against the government of Manitoba which would substantially delay, at considerable cost to us, due implementation of the Nelson River Development program. c) It is our opinion that engaging in costly and lengthy proceedings with the Government of Canada would incur more costs to the Government of Manitoba and would result in great uncertainty. Such uncertainty and costs would be considerably more expensive for the people of Manitoba than***

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[37] C.R. Huband, legal counsel to NFC, to H. Spence, Chairman, NFC. Dated January 21, 1975.

[38] W.S. Martin, special advisor to Premier Schreyer, to Honourable Judd Buchanan, Minister of IAND. Dated July 30, 1975.

[39] Dr. Collin Gillespie, former technical advisor to the NFC. Personal Communication. July 7, 1993 and letter written by S.G. Sigurdson, legal counsel to the NFC, to Mr. Leon Mitchell, mediator appointed in 1976. Dated January 13, 1977.

compliance with the recommendations."[40]

The necessity to compensate for damages was never disputed by Manitoba or Manitoba Hydro. However, their strategy and desire was to deal directly with individuals. This position was publically justified on the grounds that ***"The government believed that individuals or communities might wish to deal with the Government directly and it was the Premier's view that Government would be abrogating its responsibility if it refused to deal directly in such cases."*** (The Commission of Inquiry into Manitoba Hydro 1979:213). One possible explanation for the intense opposition to the NFC is that Manitoba was no doubt acutely aware of the then recent negotiations and signing of the James Bay and Northern Quebec Agreement, and wished to avoid getting involved in a similar Treaty rights based "collective" agreement.

The Utility's position throughout negotiations was that the social and environmental consequences of its undertakings would be minimal and its responsibility was limited to repair or replacement of real property such as docks, buildings etc. which might be directly affected by the diversion. Compensation for any indirect affects of the Project was to be the responsibility of the Government (The Commission of Inquiry into Manitoba Hydro 1979). At the time Manitoba and Manitoba Hydro were negotiating the NFA they understood that the total cost of Project impacts might be in the order of $16-$20 million (Underwood McLellan & Associates Ltd. 1970; Manitoba Hydro Task Force 1970).

The Commission of Inquiry into Manitoba Hydro (1979:219) found that the Advisory Committee to Cabinet, whose membership included both Ministers of the Provincial Government and the Chairman and Chief Executive Officer of Manitoba Hydro, ***"... rendered indistinguishable the positions of Government and Hydro."*** And in the case of the NFA they found that ***"... Government became the advocate for Hydro and thus was unable to fulfil a meaningful role on behalf of the citizens of Northern Manitoba affected by the activities of Hydro."***

3.5.3 Canada's Position

The Federal Government's position, consistently maintained but never aggressively pursued, was that Manitoba had no legal authority to use Reserve land. Initially the NFC was successful in influencing the Honourable John Chretien, Minister of IAND, to take a strong stand on the issue of unlawful use of Reserve land. However, Mr. Chretien's strong assertion in 1974 that Reserve land would not be taken without federal consent was severely undermined by the Premier of Manitoba who directly notified the Prime Minister that if Canada assisted the NFC in legal action to veto the Project it would be the Province's ***"legal position to hold the federal government responsible for any damages suffered by the people of Manitoba as a result of federal actions inconsistent with their contractual obligations"*** (i.e. the 1966 Federal-Provincial Agreement).[41]

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[40] Premier E. Schreyer to Prime Minister Trudeau. Dated June 22, 1977. (In The Commission of Inquiry into Manitoba Hydro 1979:217).

[41] Premier Edward Schreyer to The Right Honourable Pierre Trudeau. Dated July 31, 1974.

Such a strong stand by Canada was not taken again until a year later, June 1975, when the Honourable Judd Buchanan threatened the Premier with court action. Again, the Province pointed out that legal action by the Federal government would breach the 1966 Agreement.[42] Coincidently, several months later the Minister wrote the NFC and suggested that because Manitoba Hydro had announced a delay in their construction schedule ***"any court action that might be taken by the federal government at present time would have an unacceptable risk of failure and could result in a settlement falling short of the reasonable expectation of your people."***[43]

In response to the NFC's proposal that it would independently take court action the Minister responded ***"If that is the course of action that you prefer, and you plan to use federal funds for that purpose, I invite you to send me in writing a proposal of the exact course that you have in mind. I cannot give my approval without receiving precise information about what you may be planning"***[44] In the same letter, the Minister also commented that because the NFC had struck out a standard clause[45] in the 1975/76 funding agreement which called for mandatory disclosure of any pending court action ***"I cannot sign the agreement without that clause."***[46]

DIAND's, though not necessarily Canada's, bargaining position was that federal permission was required by Manitoba Hydro to use Reserve land. The fact of the matter is the Minister of IAND never pursued court action to stop the unauthorized use of Reserve land which began as early as 1976. Throughout the negotiating years, the Minister of IAND exercised his fiduciary responsibilities primarily by ensuring that the NFC was funded and that the NFC negotiated, rather than litigated, an Agreement.

3.6 Problems in Negotiations

Difficulties in negotiating an agreement appear to have fallen into three categories: lack of information and/or withholding of information of Project impacts; refusal of Manitoba to recognize the NFC as the negotiating agency of the First Nations; and refusal on the part of Manitoba to recognize Treaty rights.

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[42] W.S. Martin, Special Advisor to Premier Schreyer, to the Honourable Judd Buchanan, Minister of IAND. Dated July 30, 1975.

[43] The Honourable Judd Buchanan, Minister of IAND, to Chief Walter Monias, President, NFC. Dated September 16, 1975.

[44] Ibid.

[45] The funding arrangement for the period September 1974 through March, 1975 was conditional upon the NFC holding off court action for a period of 60-90 days. All funding agreements between the NFC and Canada since 1974 have been conditional upon the understanding that no court action could be brought forward without the prior permission of the Minister of IAND (Department of Indian Affairs and Northern Development 1979:17).

[46] Op.Cit.

3.6.1 Information on Project Impacts

Both intuitively and through discussions with the Cree communities impacted in the mid 1960's by the Grand Rapids forebay project, the First Nation communities knew that the Project was going to have an enormous impact on their lands and lifestyle.[47] However, virtually no scientific or technical information was made available to the First Nation communities during the period 1970-1975.[48]

Although interim reports were prepared under the direction of the Study Board during the period 1972-1974, this information was kept confidential from both the NFC and DIAND until late 1974 (Hickling-Johnston, 1979:14).

By April of 1975, the NFC had in its possession the interim Study Board reports, brief packages prepared by Manitoba known as the "Lime Green Brochures", and the Final Report of the Study Board.

Both the quality and credibility of the information provided by Manitoba were questioned by the NFC. The Committee's response to the Lime Green Brochures was ***"the environmental impact evidence disclosed by the Provincial Government to the communities impacted by the project is so superficial in scope and content as to be largely meaningless as well as misleading."***[49]

In respect of the Study Board reports, The Commission of Inquiry into Manitoba Hydro (1979:213) found that the ***"report was of little assistance to the NFC in terms of providing information about the effects of the Project, primarily because Hydro had been unable to provide the Study Board with the necessary detailed information."***

The drafting of the Study Board's terms of reference, the scoping and design of component studies and review of findings, all occurred without consultation with the First Nations. Although input from DIAND had been requested in the early stages of study design, DIAND was not a member of the Study Board[50]. There was no Aboriginal representation on the Study Board either. Of the total $2 million study cost, only 9% was spent on the study of social impacts (Lake Winnipeg, Churchill and Nelson Rivers Study Board, 1975).

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[47] K.B. Young, legal counsel for the NFC. Personal Communication. July 23, 1993.

[48] In spite of what was known at the time about the impacts associated with the Grand Rapids Hydro Project (early 1960's) just to the south of Norway House at the outlet of the Saskatchewan River. See for example historic information presented in the Special Forebay Committee Research Study (1986).

[49] Response to the Lime Green Brochures. Prepared by Overview Planning Institute for the Northern Flood Committee. Dated January 21, 1975.

[50] Frank Quinn, Water Planning and Operations, Department of Energy, Mines and Resource, Canada to R.M. Connally, Regional Director, Manitoba Regional Headquarters, Indian Affairs and Northern Development. Dated October 1, 1970.

A review of the Study Board's Final Report conducted by the NFC concluded that;

> ***"the environmental assessment of the proposed Hydro Development has not been competently performed. Indeed, the assessment is not even based on, nor does it contain, a proper description of the enterprise, the lands required, and the lands to be inundated for that purpose. As a consequence, many foreseeable physical impacts have been insufficiently detailed or ignored altogether. Social impacts, to say the least, are remote and superficially stated and possible mitigating measures have been treated in a fly-over perspective. The assessment is also deficient to the degree that the underlying Cree cultural base of the communities has been ignored and with it the role of such a base in mediating change. The attempt to analyze the impacts solely in terms of quantifiable terms has led to the absence of a detailed examination of the impact on the cultural base and of possible far-reaching changes that could occur, having a serious and lasting effect on daily life."***[51]

The results of the Study Board were considered so inadequate by the NFC that it approached the Federal Minister of Environment in May, 1975, to request an environmental impact assessment of the Project be undertaken on the grounds that the Project would affect areas of federal jurisdiction, namely Federal lands, fisheries, and navigation.[52] The Federal Minister of Environment responded that the Study Board work constituted an environmental impact assessment and that he was uncertain that initiation of an Environmental Assessment and Review Process on the grounds that federal property was involved would work because ***"there are unresolved questions as to whether Indian Reserve lands are indeed federal property in this context."***[53]

On the issue of Reserve land flooding, Manitoba maintained well into 1976 that no flooding would occur. Ultimately, the Project flooded or adversely impacted some 5,000 hectares of Reserve land and approximately 132,750 hectares of off-Reserve land traditionally used by the communities for fishing, trapping, and hunting (Minister of Indian Affairs and Northern Development, 1984:9).

The nature, magnitude and duration of Project impacts were still not known at the time the NFA was signed. Two years after the NFA was signed, The Commission of Inquiry into Manitoba Hydro (1979:208, 220) found that;

> ***"there was a serious failure within Hydro and Government to understand the nature and complexity of the problems that would be created along the Burntwood River system and to undertake appropriate and timely studies to resolve these problems. Engineering investigations and studies of the effects of CRD were inadequate and fell short of what the public is entitled to expect from its Utility." "Government and Hydro adopted a stance toward the native communities and the NFC of confrontation, hostility and procrastination with, on more than one occasion, a lack of frankness."***

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[51] Review prepared by Overview Planning Institute for the NFC in July, 1975.

[52] S.G. Sigurdson, legal counsel to NFC to Honourable Jeanne Sauve, Minister of Environment Canada. Dated May 22, 1975.

[53] Honourable Jeanne Sauve, Minister of Environment Canada to S.G. Sigurdson, legal counsel to the NFC. Dated June 27, 1975.

3.6.2 Refusal to Recognize the NFC

From its inception in 1974 the NFC fought a long battle for recognition. The First Nations had given the NFC in 1975 a strong mandate to represent their interests and negotiate with the other Parties. On two separate occasions the NFC threatened to seek a court injunction to stop the Project. Their first attempt was in 1974, when counsel for the NFC wrote the Premier of Manitoba informing him that the Committee was taking appropriate court action at the earliest date to obtain an injunction restraining Manitoba Hydro from proceeding with its Project. (in Commission of Inquiry into Manitoba Hydro 1979:211). The second threat was issued in mid-1975, this time with the full support of the Minister of IAND.[54]

Strong opposition to the NFC was dramatically expressed by the Premier in an open letter to the residents of Northern Manitoba in May, 1975;

> ***"The Province takes the position that legislative power in Canada is totally subsumed by the federal government and the provincial governments and that there is no other group having sovereign status and thereby entitled to claim political representative status or jurisdiction of peoples and territories in this Country."***[55]

This position was addressed directly to the NFC in a letter from the Premier's office which stated;

> ***"The Advisory Committee to Cabinet[56] is led to the conclusion that the Northern Flood Committee is attempting to usurp the role of Government for the native people of Northern Manitoba. The Northern Flood Committee appears to conceive itself as a sovereign power having jurisdictional rights over a certain segment of the people of Manitoba."***[57]

Efforts to negotiate any form of compensation or mitigation during the period 1974-1976 were thwarted by the NFC's refusal to allow Manitoba or Manitoba Hydro to deal directly with individuals or communities and Manitoba's refusal to acknowledge and deal with the Committee. It

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[54] S.G. Sigurdson, legal counsel to the NFC, to Mr. Leon Mitchell, Mediator. Dated January 13, 1977 (Sigurdson responding to Mediators request for background information on negotiations prior to his appointment). Also, Dr. Collin Gillespie, former technical advisor to the NFC. Personal Communication. July 7, 1993.

[55] Premier E. Schreyer. Open Letter to the Residents of Northern Manitoba. May 13, 1975.

[56] In April, 1974, the provincial government created a special Cabinet Committee on the Churchill-Nelson Development consisting of the Premier, the Minister of Northern Affairs and the Minister of Mines, Resources, Environment Management. This committee was formed to coordinate the activities of relevant government departments and to define basic principles relating to compensation and community development. This Cabinet Committee created a Senior Advisory Committee with representatives from Manitoba Hydro, the provincial departments of Northern Affairs and Mines, Resources and Environmental Management, and the senior coordinator of the 1971 Canada-Manitoba

[57] W.S. Martin, special advisor to Premier Schreyer to D. McCaffrey, senior legal counsel to the NFC. Dated May 12, 1975.

was not until 1977, when a mediator was hired by all of the Parties, that Manitoba agreed to deal effectively with the NFC.

3.6.3 Refusal to Recognize Treaty Rights

During the period 1974-1977 Canada and Manitoba argued bitterly over whether the 1966 Federal-Provincial Agreement to finance the Project gave Manitoba the right to flood Reserve lands. In the meantime, the environment in which the NFC was attempting to negotiate was somewhat tenuous given Manitoba's agenda;

> ***"the whole project can be completed and can be operational without Manitoba Hydro coming to terms with the Indian people at Nelson House ... I would recommend the following: a) Manitoba Hydro takes the bargaining position that time is on their side and that we do not bargain in panic in order to acquire the Nelson House land immediately; ... "Thus, instead of putting all our eggs in one basket and being dependent upon the Department of Indian Affairs, and/or the Northern Flood Committee, as the operative vehicle to attain results, we hopefully can move behind them and get direct community support."***[58] (cited in The Commission of Inquiry into Manitoba Hydro, 1979:216).

3.7 Resolution by Mediation

Towards the end of 1975, negotiations were at a stand still. The NFC had rejected an arbitration proposal suggested by the provincial government, the provincial government refused to recognize the NFC as the negotiating agent of the affected communities, Manitoba Hydro was carrying on with its Project-related construction activities, and the Project was to be operational by the following year. Although Canada had suggested the use of mediation as a means of promoting constructive negotiation in early 1975, it was not until February of 1976 that all the Parties agreed to this process.

On February 13, 1976, the NFC was finally recognized as the sole negotiating agent for the First Nations through the four party signing of a mediation agreement.[59] Mr. Leon Mitchell, a member of the Public Service Staff Relations Board of Canada, was appointed to mediate negotiations;

> ***"related to the questions of damages, monetary and/or other forms of compensation, and remedial measures which may be taken relating to the raising or lowering of water***

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[58] "Position Paper Regarding Strategy for Negotiations with Department of Indian and Northern Affairs. August 1, 1975. Prepared by W.S. Martin.

[59] The NFC's costs (community, legal and technical) to participate in the mediation process were funded solely by Canada.

by virtue of the said project, insofar as these are relevant to Indians registered under the Indian Act and resident in northern Manitoba. The parties hereto undertake to negotiate in good faith the issues specified above, and to seek a negotiated settlement on or before April 30, 1976."[60]

Manitoba and Manitoba Hydro took the unusual position early in the mediation process that it was the responsibility of the NFC to indicate the nature and magnitude of the damages which would result from the Project and define appropriate measures for remedy.[61] Canada also took this position. ***"In June, 1976, the Minister of DIAND requested that substantive proposals for compensation, mitigation and remedial measures for Nelson House be provided by September 15, 1976, as a condition of further loan funding to the NFC."*** (Hickling-Johnston 1979:19).

The NFC responded by tabling a "model" Nelson House proposal[62] by the imposed deadline.[63] A period of seven months lapsed and having received no response from either Canada, Manitoba or Manitoba Hydro to the Nelson House proposal, the Mediator began drafting his own proposals. Between February and June of 1977 several drafts were circulated amongst the parties for comment.

Lack of progress prompted the mediator to address the parties on June 27, 1977 as follows;

"If the parties do not reach agreement by July 8, 1977, I shall begin to prepare my report as contemplated by Article 8 of the Mediation Agreement which reads in part as follows: ... the mediator is empowered at his discretion to make public a report presenting his analysis of the outstanding issues; and the reasons for failing to reach a settlement thereon."[64]

A combination of the Mediator's threat to publicize a negotiation "failure" and Manitoba Hydro's requirement for additional energy from the CRD due to a drought in 1976, forced intensive negotiations (The Commission of Inquiry into Manitoba Hydro 1979:216). A formal draft of the NFA, differing little from the document which was ultimately signed, was initialled by all four parties on July 31, 1977, after a week-long negotiating session.

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[60] Mediation Agreement, February 13, 1976, paragraphs 1, 6 and 7.

[61] Position statement by Manitoba Hydro and the Government of Manitoba for Presentation to Mr. Leon Mitchell, Mediator per J.F. Funnell and W.S. Martin. Dated March 17, 1976.

[62] Nelson House was utilized as model for development of the proposal because information available at the time suggested that this community would be the most severely impacted.

[63] "Detailed Summary of NFC Proposal for Nelson House", NFC files dated September, 1976.

[64] Mr. Leon Mitchell, Mediator to All Parties to Mediation. Dated June 27, 1977.

3.8 Compromises

The NFC and constituent First Nations were not entirely pleased with the draft agreement. Many of the concerns they raised with the mediator were not addressed. The Agreement was signed by the Chiefs of the day under duress; they did not want to condone the Project. However, given that the project was completed and in partial operation, that Reserve lands and resource areas were already flooded, that Canada was telling them if they didn't negotiate something before the Project was in full operation they'd get nothing, and that the people in the communities were anxious for an agreement, the NFC Chiefs felt that they had accomplished as much as possible on their own.[65]

The Chiefs felt the Agreement was simple enough to be implemented. It was believed that if the impacts of the Project were severe, revenue generated through sale of electricity would ensure that Manitoba Hydro would have enough money to compensate for damages. It was hoped that the NFA represented a new form of partnership.[66]

Manitoba was even less pleased with the document. As expressed by Waldram (1988:161);

> ***"As soon as the draft agreement had been initialled, dissension arose within the Manitoba government. Sidney Green, Minister of Mines and Natural Resources, objected specifically to the arbitration procedure, under which the government could be ordered to execute remedial measures or pay compensation to affected individuals. To Green, the government had been 'sold down the river' by chief Negotiator Leonard Bateman, and he hoped to uncover 'a procedure whereby with integrity we could repudiate this entire process.'[67] Green was supported in his concerns by the Manitoba government, and when Canada and the NFC officially signed the Northern Flood Agreement the Province refused. The Provincial government's position on the Northern Flood Agreement did not change until after the provincial election in September 1977. The NDP government was defeated, and along with the other parties the new Progressive Conservative government led by Sterling Lyon signed a revised version of the draft agreement on December 16, 1977."***

An internal DIAND document trenchantly reveals Canada's view of the Agreement;

> ***"File review indicates that the Federal negotiators viewed the Agreement as having considerable political merit. In their view it required a "minimum of contractual obligations" on Canada, encompassing: "several desirable, but discretionary, activities ... in both agreements ... most, in not all, of the (department's) roles under the following articles are entirely discretionary, article 5, 9, 12, 15, 18, 19, 20, and 21, and that reductions: "in governmental expenditures ... will result from the ... agreement. As a prime example ... Article 6 ... confers a benefit on the Department***

[65] Mr. K.B. Young, current legal counsel to the NFC and Dr. C. Gillespie, both advisors to the NFC during the mediation process. Personal communication, March 24, 1993.

[66] Ibid.

[67] Waldram quoting from Commission of Inquiry into Manitoba Hydro, 1979:218.

since 50% of the costs can be recovered from Manitoba Hydro ... Another prime example .. occurs under Article 21 on remedial works."[68] (emphasis added)

3.9 Product of Negotiations

The NFA was agreed to in-principle by Canada, Manitoba, Manitoba Hydro and the NFC on July 31, 1977[69], but not formally signed until December 16, 1977 and ratified by the NFA communities on March 15, 1978.[70] It was intended that the beneficiaries of the NFA would include only the NFA First Nations and their membership, however, other individuals and organizations have been subsequently recognized. For example, in 1989 the NFA Arbitrator ruled that because certain members of Nelson House First Nation reside at the community of South Indian Lake, the collective group of residents are deemed to be a "person" under the NFA. While the Arbitrator did not rule that the community of South Indian Lake was a beneficiary of the NFA, he did rule that he had jurisdiction to deal with their claims for Project related impacts (Arbitration Award, March 23, 1989). Other non-NFA individuals or groups who have been dealt with under the Agreement include non-treaty fishermen and trappers both in communities adjacent to the NFA Reserves and from communities such as Wabowden and Pikwitonei.

No joint or independent agency to effect implementation was created by the NFA. It does, however, have a built-in dispute resolution mechanism in the form of an arbitration agreement.

Front-end or annualized compensatory or royalty payments were not provided under the Agreement. The only monetary payments included $3.2 million payable to a development corporation for purposes of financing the creation of 1,000 jobs and $1.8 million payable to the communities of Cross Lake and Nelson House for specific remedial works. Implementation costs were neither identified nor addressed. First Nation costs in respect of utilizing the Arbitration process are paid by one or more of the other signatories.

The NFA was signed without the First Nations surrendering any Reserve land or releasing the Parties for any past or future damages. Provisions of the Agreement apply to the Project as it existed in 1977 as well as any re-development or future works; the Agreement has no sun-set clause and exists as long the Project is in operation.

Despite the fact that Treaty rights provided the leverage for the NFC to force the Parties to

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[68] Status and Issues Respecting Implementation of the Manitoba Northern Flood Agreements. Manitoba Resource Development Impacts Office, Indian and Inuit Affairs. No date. Quote is taken verbatim from this report.

[69] Federal Order-In-Council. P.C. 1977-2276, August 6, 1977.

[70] Province of Manitoba (Order-In-Council No. 1286/77, December 14, 1977); Manitoba Hydro (signing of NFA on December 17, 1977); Federal Government - (Order-In-Council P.C. 1978-594, March 2, 1978); and NFC First Nations (referendum, overall majority of 65%, March 15, 1978 as per Report of the Steering Committee. Official count of results of referendum. March 16, 1978.).

negotiate an agreement, Aboriginal and Treaty rights are not explicitly referred to in the NFA. The purpose of the NFA as stated in its preamble paragraphs reads;

> **As a result of the modification of the water regime, adverse effects have occurred, and may continue to occur, on the lands, pursuits, activities and lifestyles, of the residents, individually and collectively, of the Reserves of Cross Lake, Nelson House, Norway House, Split Lake and York Landing. The parties wish to ensure that all persons as defined herein, who may be, or have been, directly or indirectly, adversely impacted by the Project shall be dealt with fairly and equitably.** (Northern Flood Agreement, 1977, Preamble paragraphs C and D).

The NFA addressed the taking and use of Reserve lands by Manitoba and Hydro in two ways. First, the First Nations were compensated for lands the utility required by provision of new and additional Reserve land on the basis of four acres for one. Secondly, Canada authorized the use of Reserve lands by way of granting Hydro an easement. Of the total acreage of Reserve land held by the five First Nations in the 1970's, Manitoba Hydro required an easement on approximately 20% (5,000 hectares) of Reserve shoreline property.[71]

In addition to legitimizing the use of Reserve land, the NFA contractually obligates the signatories to ensure that any and all Project related damages or losses incurred by the five NFA First Nations are rectified by mitigation, and if mitigation is not feasible or successful, by compensation.

Beyond matters of land, mitigation and compensation, the Parties also made the following commitments to:

≅ protect and encourage traditional resource harvesting activities;

≅ improve the social and economic conditions in the communities;

≅ ensure the communities received maximum Project related training and employment opportunities;

≅ involve the First Nations in resource management decisions; and,

≅ monitor the environmental and social ramifications of the Project.

[71] "Proposed Basis of Settlement of Outstanding Claims and Obligations". Presented by Senior Negotiators for Manitoba Hydro, Canada, Manitoba, and the NFC. October, 1990.

4.0 NFA LAND, RESOURCE AND ENVIRONMENT PROVISIONS

Thus far this paper has examined the nature of the Project and the context under which the Agreement was negotiated and signed. The next three chapters focus specifically on the Land, Resource and Environmental regimes created by the NFA, beginning in this chapter with a description of the nature of those regimes. Chapter 5 examines the implementation process from the perspective of what should have happened (Implementation in Theory) and Chapter 6 describes what actually happened (Implementation in Practice).

4.1 Land Provisions

Land provisions of the NFA are set out in Articles 3 and 4 of the NFA (see Appendix A). Article 3 specifies the means by which Manitoba Hydro acquired a legal right (albeit, after the fact) to utilize Reserve land and how Manitoba was to compensate the First Nations for consenting to use of their Reserve land.

4.1.1 Conveyance of Easements to Hydro

Legal grounds for Manitoba Hydro's use of Reserve land was achieved by Canada, acting in the capacity of trustee to the First Nations, granting easements to the Utility.

> **Each Band shall facilitate, and Canada shall grant to Hydro the easement in the following Reserve lands: (all lands below specified elevations at each Reserve). The plans and easements shall be filed in the Indian Lands Registry in Ottawa and at the option of Manitoba, in the appropriate Land Titles Office in Manitoba.** (Articles 3.6 and 3.12.4)

The easements are granted to Hydro in perpetuity and allow the Utility to inundate and store water on specified Reserve land without being liable for any loss or damage to any person or property and the right of ingress and egress to the land to do bank protection, maintenance and other related work (Article 1.7).

Manitoba Hydro was to acquire an easement on what are termed "easement lands" which are defined as **Reserve land between the severance line[72] and the boundary of the Reserve adjacent to the shoreline[73].** (Article 1.8).

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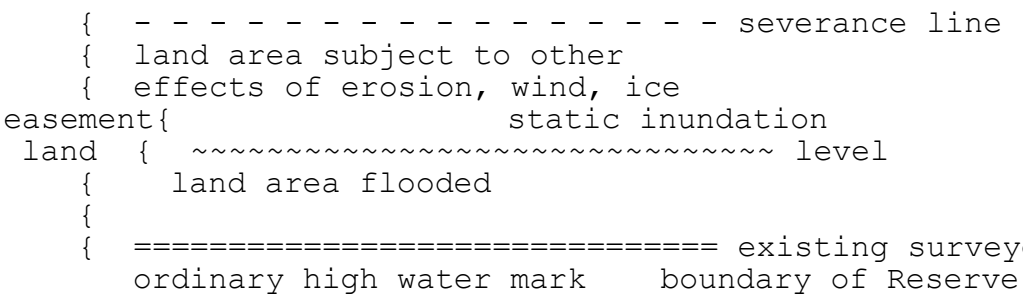
[72] Severance line means the upland boundary of the easement land and is set at an elevation higher than actually required for storage to account for the effects of erosion, ice conditions, wind setup, and wave up-rush (Article 3.12.1).

[73] At the land/water interface, the legal boundary of the Reserve was measured at the ordinary high water mark.

The location of Reserve boundary, static inundation level, severance line, and easement lands is illustrated as follows:



Easements were granted subject to certain conditions set out in Article 3.9, namely:

1) that Manitoba Hydro would, to the extent possible, control the flow of water so as to ensure that the water levels at each Reserve would not exceed specified elevations ("static inundation level"). Static inundation levels range from 0.5 to 14 feet below the severance line, depending on the community;

2) that Hydro would use all practical means, including adjustment of flows through control structures, to prevent any inundation of Reserve lands lying between the static inundation level and the severance line; and,

3) apart from direct Project use no other rights were implied.

At the time the NFA was signed, the total amount of land to be granted in easement was unknown. It has subsequently been determined to be 4,914 hectares (12,143 acres).

4.1.2 Land Quantum and Selection

In return for consenting to the easements, each First Nation was to be compensated by Manitoba;

> **granting to Her Majesty the Queen in right of Canada, for the use and benefit of the affected Band, an area of land equal to not less than four acres for every acre of affected lands, free and clear of encumbrances except any such easements in favour of Hydro as are provided in Article 3.5.**[74] (Article 3.1)

[74] The communities could select land along the regulated waterways with the understanding that Hydro would be granted easements on these lands as well. The 4:1 land exchange provision was not to apply to these additional easements.

Since the quantity of land to be granted in easement to Hydro was unknown in 1977, the First Nations did not know the total amount of land they were to receive in compensation. Subsequent surveys have shown that the total quantum of land available for selection by the five NFA First Nations is approximately 20,235 hectares (50,000 acres).

4.1.3 Title and Tenure

New lands selected pursuant to Article 3.1 were to be transferred by Manitoba to Canada in trust for the First Nations as Reserve land. Article 3.3 states;

> **Manitoba shall transfer such lands so that the said lands will constitute a Reserve, with all the rights appurtenant to Reserves occupied by the Bands or any of them at the date of this Agreement, including but without limitation, all mineral rights.**

4.1.4 Second Form of Land Rights

Over and above the provision of Reserve lands at the 4:1 ratio, Manitoba agreed to make available to the First Nation's exclusive use of additional provincial crown lands. Articles 4.1 and 4.3 state;

> **Manitoba agrees to withhold from any other use and to set aside for each Band a substantial area of land (the "hold area"). A Band or any of its Members may use any one or more parcels of land within its hold area ... that will contribute towards the viability of the community including the well-being of any of its members. Manitoba undertakes to permit the Band or any resident(s) to have exclusive use of each parcel of land thus selected, without fee of any kind, for as long as any resident continues prudently to use that parcel for the foregoing purpose.**

4.3 Resource Provisions

Woven throughout the NFA are two parallel, though not necessarily complementary, perspectives regarding resource matters. On the one hand the Cree were most concerned about preserving and protecting their traditional way of life, and on the other hand, the proponents believed Project benefits (jobs, mitigation, and compensation) would offset any losses incurred by the communities. These perspectives derive from the differing views held in 1977 by the NFA signatories regarding:

1) the importance of the resource base to the viability of the First Nation communities;

≅ The Cree view was (and still is) the essence of and social and economic viability of the culture, as expressed through the exercise of traditional resource harvesting activities, is dependent upon a healthy environment.

≅ The proponents view was (and in some respects still is) that resource harvesting activities carried out the by the First Nations contributed little to the local or provincial economies. Further, it was believed that the Cree traditional way of life would decline and disappear with or without the Project.

2) understanding of the impacts the Project would have on the environment and communities;

≅ The Cree believed the Project would permanently upset the balance of the environment and thereby destroy their culture.

≅ The Proponents believed that while the Project might adversely affect the resource base, the ecological and socio-economic impacts would either be minimal or short term.

3) the ability of mankind to repair and/or address environmental damage through mitigative or compensatory actions;

≅ The Cree view was that mankind could not repair the environment and that no amount of money could compensate a society for the loss of a way of life.

≅ The proponents believed that some impacts could be mitigated, and that where this was impossible, monetary compensation would constitute adequate redress.

Obviously the NFA was a product of negotiation and compromise. The following excerpts of the Agreement illustrate the entwining of these differing perspectives;

Cree:The Project affects the activities and traditional lifestyles of the communities and anxieties have developed regarding the viability of the communities, the free and safe use of the waterways, and the continued opportunity to carry on traditional activities, particularly as they relate to wildlife resources as a source of food, income-in-kind and income (Article 18.4).

Proponent:These anxieties may be allayed by Hydro, Manitoba and Canada using their best efforts to ensure that potential benefits of the project are made available in a practical manner to the residents of each Reserve. It is in the public interest to employ, to the

maximum extent possible, residents of the subject Reserves in all works and operations related to the Project (Article 18). It is the public interest to ensure that any damage to the interests, opportunities, lifestyles and assets of those adversely affected be compensated appropriately and justly (Article 18.2).

Cree: Residents of the Reserves shall be encouraged to achieve the maximum degree of self sustenance in food supplies and be provided maximum opportunity to earn income and income-in-kind from the wildlife resources (Article 15.3). Use of the community trapline areas will be encouraged because of the important contribution they provide in respect of food supply and income supplement for elderly or infirm residents, opportunities for younger residents to learn, and elder residents to teach, skills pertaining to the harvesting of wildlife resources, and recreational opportunities (Article 15.8)

Trappers and fishermen in each community shall be encouraged to continue to trap and fish, by appropriate means including income assistance and support payments and through resource and habitat rehabilitation and improvement (Article 19).

Local plans will be developed to which will enable the communities to have the continued opportunity to carry out their traditional lifestyles to the maximum extent possible (Article 16).

Proponent: Manitoba and/or Hydro agree to fund and implement, a program to provide for equitable compensation for all adverse effects on fishing activities (Article 19.4). Free and normal navigation of the waterways will be assured through clearing of flooding lands and shorelines and removal of debris of any kind (Article 5).

Both the Cree and the Proponents view of acceptable forms of redress are incorporated into the Arbitration instrument;

Cree: In fashioning a remedy the Arbitrator may recommend compensation either in the form of real or personal property, employment opportunities, programs and public works, funding of a development corporation, or payment of certain municipal services. Mitigatory and/or remedial measures shall be preferred over cash compensation (Article 24.8 and 24.24).

Proponent: In determining a remedy the Arbitrator may direct that financial payments be made, that mitigatory or remedial works be undertaken (Article 24.24).

The resource provisions of the NFA fall into two categories: 1) issues of rights, allocation

and resource management; and 2) issues of mitigation and compensation.

4.2.1 Rights, Allocation and Management

A) Rights:

Treaty 5 promised "*free navigation of all lakes and rivers and free access to the shores thereof* and *the right to pursue the avocations of hunting and fishing throughout the tract surrendered*" (Morris, 1991:347). The NFA recognizes and reaffirms these "off-Reserve" Aboriginal and Treaty rights as follows;

> **Residents of the Reserves have a right to free and normal navigation of the waterways.** (Article 5.1)

> **Manitoba agrees to grant to the residents of the Reserves first priority to all the wildlife resources within their Trapline Zones, and in the rivers and lakes which were traditionally available to and used by them as a source of food supply, income-in-kind and income.** (Article 15.1)

B) Allocation

NFA First Nations are granted priority use - not exclusive use - of wildlife resources within their Resource Areas (RA's) (Figure 3).[75] Other non-Reserve residents may continue to harvest wildlife resources so long the resource base continues to meet the needs of all users. Although "priority use" is not explicitly defined, intent can be drawn from Article 15.3 which states;

> **Manitoba has encouraged and will continue to encourage the residents of the Reserves to achieve the maximum degree of self sustenance in food supplies and to maximize the opportunity to earn income and income-in-kind.**

C) Resource Management

Under the NFA, Manitoba agrees to protect and perpetuate wildlife resources within the RA's, independently (Article 15.3) and through the auspices of a Wildlife Advisory and Planning Board (WAPB). The purpose of the Board is to consider and recommend on all matters affecting wildlife within the RA's (Articles 15.5 and 15.6).

[75] Under the NFA, Resource Areas are coterminous with the boundaries of the Registered Trapline Blocks. Registered Trapline Blocks were established in the 1940's by the Provincial Government and represent the collective outer boundary of individual traplines held at the time by residents of the Reserves and adjacent non-status communities.

figure 3

4.2.2 Compensation and Mitigation

Under the NFA the proponents agreed to undertake and pay for mitigation and remedial works to ensure continued free and normal navigation of the waterways and to ensure continuance of resource harvesting activities. Where mitigation or remedial works were not feasible or were unsuccessful, the proponents agreed to compensate for any and all direct or indirect damages or losses.

4.3 Environmental Provisions

Reference to environmental protection or minimization of Project damages within the NFA is restricted to clauses contained in Article 10;

> **Manitoba shall have regard to minimizing the destruction of wildlife by controlling the water levels and flows to the extent that it is practical to do so** (Article 10.1). **Without limitation, for the purpose of avoiding many adverse effects on the community of Cross Lake, it is contemplated that it may be appropriate for Hydro to construct a control structure at or near the outlet of Cross Lake and to operate this structure so as to prevent the occurrence of low water levels which adversely affect the community and to restore, to the extent practical, the natural pattern of seasonal fluctuation in lake levels** (Article 10.2).

The Proponents, including Canada, were to monitor any and all environmental, social and economic changes related to the Project and for purposes of identifying adverse effects. Articles 17.1 and 17.3 state;

> **Hydro and Canada and Manitoba, severally and jointly, undertake to implement such recommendations of the Lake Winnipeg, Churchill and Nelson Rivers Study Board Report which affect the communities and which fall within their respective or joint jurisdictions. In particular but without limitation, monitoring of adverse effects of the Project ... shall be planned and implemented so as to provide such information as may be necessary to give effect to this Agreement.**

The recommendations referred to in Article 17.1 derive from the 1975 Final Report of the Lake Winnipeg, Churchill and Nelson Rivers Study Board. As noted earlier, this Board was mandated to study Project impacts under the 1971 Canada/Manitoba Agreement. In their final summary report (1975), the Board presented 47 recommendations[76] relating to compensation, mitigation, and on-going environmental and socio-economic monitoring (Appendix B). Many of

[76] Of the 47 recommendations made in the final report, 36 are directly pertinent to the five NFA communities.

the recommendations pertaining to compensation and mitigation were addressed by the signing of the NFA.[77] However, because of uncertainty as to the nature, magnitude and duration of impacts, the recommendations were entrenched in Article 17 of the NFA.

5.0 IMPLEMENTATION IN THEORY

5.1 Implementation in General

The NFA contains no specific provisions addressing the matter of implementation. It seldom designates the means by which provisions should be implemented, the time by which they must be achieved, and does not always assign responsibility for implementation.

The Parties responsible for implementing the Agreement are simply named as Canada, Manitoba, Manitoba Hydro, and the NFC. There is no delegation or provision for delegation of responsibility for effecting implementation either to an independent or joint party implementation agency or to respective governmental or corporate departments, nor does the NFA speak to how implementation is to be financed. Apart from specific timeframes mentioned in Articles 2 (ratification), 3.7, 3.11, and 3.13 (land exchange) and 5.2 (navigation), there are no other deadlines or timeframes within which implementation of any provision must be initiated or completed.

5.1.1 "The Parties Agree"

Essentially the NFA represents an agreement-in-principle where the Parties "agree" or "undertake" to perform certain activities and "negotiate" on others. Lacking any implementation framework or funding, it appears that the NFA was to be implemented by sheer good faith.

5.1.2 Responsibilities of the Parties

As a signatory to the NFA, the NFC is a "Party" to the Agreement and has a primary role on behalf of its constituent First Nations to ensure the Agreement is implemented.

Specific responsibilities of the NFC under the NFA include:

a) To ensure that all persons directly or indirectly adversely affected by the Project are dealt with fairly and equitably (Preamble D).

b) To participate in an annual review of the adequacy of a capitalized fund to cover maintenance, depreciation, operation, repair and replacement costs related to any remedial, mitigatory or

[77] For example, Recommendations 12-15 called for mitigation measures to ensure safe navigation of the waterways. These recommendations are addressed in Article 5 of the NFA. NFA Article 15 addresses the mitigation measures called for in Recommendation 17. NFA Article 24, Arbitration, addresses Recommendation 4 which called for the establishment of an appeal mechanism.

other permanent works undertaken or funded by Manitoba and/or Hydro by reason of the Project (Article 12.6).

c) To facilitate and encourage each First Nation to continue to use their respective community trapline areas (Article 15.8).

d) To encourage and provide opportunities for First Nation residents to benefit from Project related employment opportunities (Article 18.5).

e) To negotiate programs which will provide equitable compensation for all adverse effects on fishing activities and to encourage fishermen in each community to continue to fish (Article 19.4).

f) To establish and participate in an Employment Task Force (Article 21).

Primary legal responsibility for implementation of the NFA is vested with Canada and Manitoba as directed under Article 2.1 which states;

Upon ratification, Canada and Manitoba shall take such steps as are necessary to give effect to all of the provisions of this Agreement.

With respect to the land, resource and environmental regimes created by the NFA, responsibility for implementation is as follows:

Land (Article 3 & 4):- Manitoba/First Nations

Resources:
Navigation (Article 5)- Manitoba/Hydro
Wildlife Policy (Article 15)- All Signatories
Remedial Works (Articles 12&22)- Hydro
Trapping/Fishing Programs (Article 19)- All Signatories

Environment:
Minimization of Damage (Article 10)- Manitoba/Hydro
Environmental Monitoring (Article 17)- Canada/Manitoba/Hydro

With regard to liability, Manitoba Hydro has sole and exclusive responsibility to compensate persons adversely effected by the Project, while responsibility for remedial actions is

the responsibility of all or any one of Canada, Manitoba and/or Manitoba Hydro (Article 24.10). The Agreement states that in the event a claim is filed by any of the Parties, the onus or burden of proof that the Project did not cause or contribute to an adverse effect rests with Manitoba Hydro (Article 23.2). While a potentially important clause, this reverse onus provision has not worked in practice (see Section 7.2.3).

5.1.3 Dispute Resolution - Arbitration Instrument

In 1977, it was recognized and acknowledged by the NFA Parties that the full magnitude, nature and extent of existing and future impacts was unknown. Preamble paragraph E states;

> **Uncertainty as the to effects of the Project, with respect not only to the Project as it exists at the date of this Agreement but also as it may develop in the future, is such that it is not possible to foresee all the adverse results of the Project nor to determine all those persons who may be affected by it, and, therefore it is desirable to establish through the offices of a single arbitrator a continuing arbitration instrument, to which any person adversely affected may submit a claim, and as well as to fully empower such arbitrator to fashion a just and appropriate remedy.**

Under the arbitration instrument (see Appendix A), the Arbitrator is granted **broad authority and power to make awards capable of implementation and to fashion an appropriate and just remedy in respect of any and all adverse effects of the Project on any person.**

The Arbitrator has the power and authority to hear any claim or matter in dispute whether it is based upon an alleged adverse effect deriving directly or indirectly from the Project or based upon an alleged failure on the part of one or any Party to comply or give effect to any provision of the Agreement (Article 24.7). All expenses related to the Arbitration office and the Arbitrator are paid for by Canada and Manitoba.[78] The Arbitration instrument remains in effect as long as any one Party so desires.

Any "person" can file a claim and be heard by the Arbitrator. "Person" is defined as any individual who is a member of a First Nation; a group, unincorporated association, or corporation comprised wholly or substantially by individuals from a First Nation; or the First Nation council or the First Nation collectively (Article 1.12 and 24.5).

Claims must be filed within four years of the date the alleged cause of the claim became

[78] In recent years the annual cost of the Arbitrators office and fees has averaged between $75,000 and $150,000. G. Trichard, Manitoba Department of Northern Affairs. Personal Communication. July 13, 1993.

evident or five years from the date of the Agreement, which ever is later. As noted earlier, the date of the Agreement is formally accepted as being March 15, 1978 and the five year filing deadline was extended from March, 1983 to April, 1984. Up until March of 1982, the Arbitrator had authority to review any claim which was settled prior to March of 1978 (Article 24.12). The Arbitrator may, upon request, review any claim settled after March, 1978 as long as the review is requested within four years of the date of the settlement (Article 24.11).

In hearing a claim, the Arbitrator has authority to set rules of conduct and rules about the admissibility of evidence (Article 24.16) and order that one or more Parties pay the legal and consulting costs of the claimant (Article 24.35).

In making an award the Arbitrator has authority to determine if there is a liability under the NFA, designate the party or parties liable, and determine an appropriate remedy (Article 24.23). In fashioning a remedy the Arbitrator can:

- direct that financial payments be made to compensate for damages or losses or as a penalty to the Party for failure to comply or give effect to any NFA provision;

- recommend that mitigatory or remedial measures be undertaken to reduce or eliminate the damage; or

- recommend alternative non-monetary compensation such as provision of real or personal property or employment opportunities, or funding of programs and/or public works projects in the communities (Article 24.24).

In making an award, the Arbitrator is guided by the following principles:

- the remedy shall at a minimum place the person, group, or First Nation in no worse position than they would have been in the absence of the adverse effect (Article 24.6);

- mitigation or remediation is the preferred remedy and only when such measures fail or are not feasible will monetary compensation be ordered (Article 24.8);

- in dealing with matters of compensation and mitigation for adverse effects, Manitoba Hydro is exclusively responsible for compensation and any or all Parties are responsible for mitigation or remediation (Article 24.10).

Appeal from a ruling or order of the Arbitrator is restricted to one level of court - the Manitoba Court of Appeal. Grounds for appeal are limited to either error in law or jurisdiction, or both, by the Arbitrator (Article 24.34).

5.2 Land Provisions

5.2.1 Procedure for Defining Easements

Preliminary location of severance lines in each Reserve were to have been determined by Manitoba and shown on maps by August 31, 1977 (Article 3.7).[79] Manitoba, at its sole expense, was to determine the final location of severance lines in all NFA communities; present their location on large scale photo maps; and legally survey the severance lines within 18 months of the NFA being ratified (Articles 3.7, 3.8, 3.12, 3.13).

5.2.2 Procedure for Selection of Exchange Lands

A) Lands Available for Selection

First Nations were granted the right to select new Reserve lands from Provincial crown land located in the area commonly used and enjoyed by the community in the exercise of its traditional pursuits (Article 3.2).

Any Provincial crown land was available as long as it was unallocated, unencumbered and/or unoccupied. Selections were not to be restricted by reason of (Article 3.2):

≅ designation as a "water power reserve" - crown lands adjacent to the regulated waterways could be selected.

≅ Existing or future timber assignments - only lands actively logged or occupied in connection with active logging camps in 1977 were deemed allocated, encumbered, or occupied.

≅ not being contiguous with existing Reserve boundaries - selections could be made anywhere in the traditional use area.

B) Quantity of Land

Entitlement was unknown at the time the Agreement was signed and wouldn't been known until Manitoba had surveyed the easement lands (a period of 18 months after ratification). However, Manitoba was to make every reasonable effort to estimate the approximate quantum of land entitlement so that each First Nation could immediately begin the selection process. Final selections would be made once Manitoba had filed the easement plans (Article 3.13).

[79] The deadline in the NFA was one month following agreement in principle of the Agreement. As discussed in Chapter 4, the NFA was not actually signed by all four parties until December 17, 1977.

C) Selection Process

Article 3.3 states each Band Council shall be entitled to identify the parcel or parcels of land it is prepared to accept. Manitoba is to be notified of the selections by way of a Band Council Resolution (Article 3.11).

Article 3.4 provides the NFA First Nations with significant flexibility with regard to land selection. It states The Band Council may, at any time within five years following the date of this Agreement, notify Manitoba by Band Council Resolution that it wishes to exchange the land received pursuant to Article 3.1, or part thereof, for any other equal area of land owned by Her Majesty the Queen in right of the Province of Manitoba in the vicinity of the community affected, and such lands shall be transferred to the use and benefit of the Band as provided for in Article 3.3.

Article 3.11 clearly states that Manitoba is financially responsible for all costs associated with surveying of easement and exchange lands. Due to the ambiguous wording of the clause, it is unclear whether Manitoba is obligated to pay costs associated with the selection process.

D) Acceptance and Transfer of Exchange Lands

Once notified of the First Nation selections, Manitoba had a three month period in which to accept or reject any parcel(s). Agreed upon selections were to be surveyed by Manitoba within 12 months. In the case of rejection, Manitoba was to notify the First Nation by providing a map showing the area of the parcel(s) rejected (in whole or part) and a letter describing the basis for the rejection. The only allowable basis for rejection was that the land was required for public purposes (Article 3.3). In the absence of agreement between the parties on any parcel selected, the provisions of Article 24 were to apply. (Article 3.2).

5.2.3 Procedure for Hold Area Selection

A) Purpose

Manitoba agreed in Article 4 to grant exclusive use and jurisdictional rights to the First Nations in respect of certain provincial crown lands so that use of said lands would contribute towards the viability of the community or well-being on any of its members (Articles 4.1 and 4.3).

B) Lands Available for Selection and Quantity

Manitoba agreed to withhold from any other use and to set aside for each Band a substantial area of land known as the "hold area", for a 5 year period after the Agreement was signed (Article 4.1). Hold areas were conceived as means of placing a temporary freeze on new land uses to give the First Nations Band time to select exclusive use parcels. The size of the hold area and the

quantity of land which could be selected for exclusive use are not defined in the Agreement. The land provisions of Article 4 are distinct from Article 3 Reserve lands. Article 4 grants to the First Nations exclusive use of other crown lands without the necessity for these lands having Reserve status.

Within the five year selection period, First Nations were allowed to relinquish any exclusive use parcel and select another of equal size within the hold area. The 5 year period could be extended if necessary to ensure that the First Nations had opportunity to investigate, consider, obtain funding or implement the development or use (Article 4.2). Once the First Nations had made their final selections the hold area would cease to exist.

Article 4.1 states that maps and legal descriptions of the hold areas are attached as Schedule H. However, Schedule H only contains a map and legal description for the community of Nelson House. In the absence of defined hold areas for the remaining four communities, the only guidance the NFA offers to define hold areas is in the wording **"a substantial area of land"** (Article 4.1).

Each Band Council was entitled to select parcels on provincial crown lands located within the boundary of the hold area. Selections had to be from unallocated, unencumbered, or unoccupied lands. As with Article 3, parcels designated as "water power reserves" or parcels within which Manitoba had set aside, granted or assigned timber rights were not deemed to be unavailable for selection.

Article 4 land selections do not require surveying. On the question of costs associated with the selection process the Article is silent.

C) Acceptance or Rejection of Selections

If Manitoba agreed to the First Nation selections, then it was to issue a permit, without fee of any kind, granting the First Nation and/or individual community member the exclusive use of said parcel. Regulation of the permitted use was the exclusive responsibility of the First Nation council.

Within the 5 year selection period, the First Nations were entitled to relinquish a parcel and permit and select another parcel of the same size (Article 4.5). If the First Nation was not utilizing a particular parcel prudently, Manitoba held the right to revoke the permit. Upon being served notice of intent to revoke a permit, the First Nation must show cause that it is using the parcel prudently and may take the matter to the Arbitrator. In any event, if the First Nation does not show cause within six months of the original notice, Manitoba has the right to cancel the permit and the First Nation loses the right to replace the parcel with another of equal size (Article 4.6).

Article 4 does not define the nature of the permit, nor does it address procedure in the event of disagreement or rejection of the parcel(s) selected.

5.3 Resource Provisions

5.3.1 Priority Use and Allocation

First Nations are granted - not by law or by contractual obligation under the NFA but as a matter of policy[80] - first priority to all wildlife resources within their Trapline Zones (the Trapline Zones are sometimes described as Resource Areas), and in the rivers and lakes traditionally available and used by the community (Article 15.1). To affect first priority, Manitoba agreed to prohibit hunting, trapping and fishing by non-Reserve residents with the following exceptions (Article 15.3);

≅ the interests of non-Reserve residents residing in or near a Resource Area[81] are to be taken into account. This clause is commonly understood by the Parties to refer to individual non-status Aboriginal licensed commercial trappers and fishermen and non-status Aboriginal and white sports fishermen and hunters.

≅ a "grandfather" clause exists for non-Reserve residents who had a right at law in 1977 to harvest wildlife which allows them to continue to carry on harvesting activities. This clause is commonly understood to refer to more to business enterprises such as commercial fishing operations with quotas on specific lakes or owners of existing sport fishing lodges/outfitting operations.

≅ in the event that there is an over abundance of a particular wildlife species, Manitoba through meaningful consultation with the First Nations, may initiate a controlled season if such will be in the interests of perpetuating the species.

Under the terms of Article 15, all non-Treaty existing and future wildlife users are recognized. The Article is silent on what Manitoba will do if there is a shortage of species.

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[80] Articles 15-18 are considered "policy provisions" because they involve implementation of government policy. In drafting the NFA the Parties recognized that it was "inappropriate to empower an Arbitrator to order implementation or to inhibit government from changing its policy ..." (Article 14.1). Thus, under the terms of the Agreement the Arbitrator can not order the governments to affect policy which would implement the Articles, but the Arbitrator does have authority to fix damages in the event a policy provision is not implemented, implemented only in part, or if a dispute arises concerning implementation or the timeliness thereof (Article 14.2). Policy articles under the NFA include: right of first priority of NFA First Nations to wildlife resources, existence of the Wildlife Advisory and Planning Board, community trapline programs, community planning, environmental impact monitoring and implementation of the Study Board recommendations, employment and training.

[81] The current population of non-Reserve residents residing in or near the NFA Resource Areas is in excess of 20,000. The population of the industrial communities of Thompson, Gillam, and Leaf Rapids alone is reported at 18,600 (1986 census data). Other "Northern Affairs" communities (primarily non-status aboriginal) in or near the NFA resource areas include Norway House, Cross Lake, Thicket Portage, Pikwitonei, and Wabowden (Northern Manitoba Economic Development Commission. 1992. Technical Report #1).

5.3.2 Wildlife Management

For purposes of protecting wildlife uses, Manitoba agreed, as a matter of policy, to create a Wildlife Advisory and Planning Board (Article 15.5). Manitoba is responsible for appointing and paying the expenses of the Board. Board membership must reflect majority representation by First Nation residents (Article 15.6). Beyond stating the Manitoba will pay the costs of the Board members and that the Board must have majority First Nation membership, the Agreement does not specify who else may be a Board member, how often the Board will meet, or how costs other than those involved with the actual meetings (travel, accommodation, etc.) will be met.

The purpose of the Board is to consider and recommend on all matters affecting wildlife in the Resource Areas, including (Article 15.5): resource monitoring; advising on overabundance of species; advising on the numbers of species that may be harvested; encouraging the harvest of species; and formulating and recommending implementation measures in respect of wildlife protection or perpetuation.

Manitoba also undertook to train and employ First Nation members as Conservation Officers (Article 15.7).

5.3.3 Encouragement to Harvest

In the 1940's when the Registered Trapline system was conceived at least one area within each Trapline Zone was designated as a "community trapline". Typically located in close proximity to the Reserve, community traplines were set aside as a "free zone" where elders and youth could trap and all community residents could fish and hunt.

The NFA acknowledges and affirms the important function served by the community trapline as a place where elderly or infirm residents could obtain food supplies, a place where elders could pass on bush and harvesting skills to youth, and a place where the community pursued most of its recreational activities. Canada, Manitoba, Manitoba Hydro and the NFC all agreed - again not by reason of contractual obligation but as a matter of policy - to facilitate and encourage the functions served by the community traplines in each community (Article 15.8).

Definition of specific actions to encourage use of the community traplines was left to further negotiation between Manitoba and/or Hydro and representatives from each community. These parties were to formulate and implement a program which would encourage use of the community traplines. The NFA is silent on the issue of allocating costs to the negotiations or funding of such programs.

In addition to encouraging harvesting activities on the community traplines, the Parties also agreed - this time as a matter of contractual obligation - to encourage the trappers and fishermen in each community to continue to trap and fish (Articles 19.2 and 19.4).

The meaning of the term "encourage" has greater substance in the Article 19 clauses than found in Article 15. Continuance of fishing and trapping activities is to be encouraged **by appropriate means including income assistance and support payments and trapline/fishing rehabilitation and improvement.**

In the case of trapping, a pre-NFA agreement between Manitoba Hydro and the NFC was signed in 1975. This was a five-year program, known as the Registered Trapline Program, where Manitoba Hydro made direct financial payments to individual trappers for fur and cabin losses. When the NFA was negotiated, this existing program was embodied in Article 19 and Schedule D with the understanding that when its term expired, it would be reviewed and continued.

Article 19.2 says that the program shall be reviewed and amended if necessary, it does not however say how, when or who will undertake the review. With respect to fishing, Article 19.4 says that the Parties agree to negotiate and Manitoba and/or Manitoba Hydro agree to fund and implement a program which will encourage the fishermen to fish. Again, the issue of when the negotiations would begin or who would pay for the negotiations is not addressed.

5.3.4 Mitigation and Compensation

The Project proponents (Manitoba and Manitoba Hydro) are contractually obligated to undertake mitigation and remediation measures to address adverse effects caused by the Project. Mitigation is defined as **any work, program or measure which is designed or intended to diminish, prevent or ameliorate any adverse effect** (Article 1.9). Remedial measure is defined as **any work, program or measure designed or intended to enhance, preserve, restore or replace in kind, wholly or in part, any property, land, land use interest or activity of any person, which has been or may be adversely affected by the Project** (Article 1.14)

Manitoba and/or Manitoba Hydro contractually agreed to undertake specifically identified mitigation or remedial measures, as well as less defined measures. Specific measures included:

≅ removal of existing Project related obstructions, specifically causeways at Nelson House and near Cross Lake within two months of Ratification (Article 5.2);

≅ construction of a portage facility at the Notigi control structure site (Article 5.6);

≅ road reconstruction, cemetery reconstruction, clearing of Footprint River, new houses, relocation of existing services, sewage disposal, and miscellaneous works including construction of a laundromat, coffee shop and emerging road upgrading (Schedule F) and bank protection, creation of a beach, construction of docks, new water intakes and pumphouse, landing facilities and docks, portages on the Burntwood river downstream of Notigi control structure at Nelson House (Schedule G);

≅ provision of water supply system, relocation of buildings, roads, walkways, shoreline protection and dock improvement at Cross Lake (Schedule G);

≅ construction of a weir at the outlet of Cross Lake to prevent low water levels and minimize water level fluctuations (Article 10.2).

More general measures included:

≅ clearance of flooded land areas, removal of standing trees along inundated shorelines, and removal of debris from the waterways (Article 5.3, 12.5.5, and 13);

≅ shoreline protection and restoration, construction of new beaches and swimming areas, dock replacement (Article 12.5.1-12.5.5);

≅ Provision of alternate recreational opportunities or facilities (Article 12.5.7);

≅ measures to protect or restore community infrastructure, shorelines and property (Article 12.1);

≅ measures to maximize free and normal use of navigable waters (Article 5.3)

≅ provision of alternate transportation facilities (Article 12.5.8)

≅ protection of remaining cemeteries and preservation and/or relocation of objects of cultural significance.

≅ rehabilitation and improvement of aquatic species stocks and/or habitat (Article 19).

With respect to compensation, throughout the Agreement there are general statements about the need to compensate the communities for adverse effects. Article 19 contains the only clauses which specifically spell out a contractual obligation to compensate the communities for adverse effects on fishing and trapping. Compensation is to be paid in respect of damages or losses arising directly or indirectly from the Project whether they occurred prior to the signing of the NFA or after. The does not clearly define who shall negotiate the issue of compensation for trapping losses. All Parties are to be involved in negotiating compensation in respect of fishing.

5.4 Environment Provisions

Obligations in respect of environmental and social monitoring are contained in Article 17 entitled "Environmental Impact Policy". Canada, Manitoba and Manitoba Hydro - as a matter of policy, not contractual obligation - agreed to implement the 1975 Study Board recommendations (Article 17.1). The Parties were to monitor the adverse effects of the Project in a manner which would produce information which would give effect to the NFA.

Canada and Manitoba were to immediately identify which recommendations they would unilaterally or jointly implement and report their conclusions to the First Nation governments (Article 17.2). The First Nations were to be informed of any agreements between Canada and Manitoba in respect of joint undertakings (Article 17.4). Each year Canada, Manitoba and Manitoba Hydro were to provide the First Nations with a written report describing which recommendations were going to be implemented, when implementation would occur, or if any recommendation was not going to implemented, the reasons for the decision (Article 17.3).

Some of the relevant Study Board recommendations which were to have been implemented by the Parties included:

≅ creation of a body with broad representation to advise on management of the waters affected by the Project with a view to ensuring the optimum utilization of resources within the area influenced. The function of the body would be to advise on patterns of water regime regulation and development and implementation of a comprehensive resource management plan.

≅ creation of a mechanism to monitor and analyze ongoing social and economic changes related to the Project.

≅ appropriate government departments and agencies were to develop and implement a long-term coordinated ecological monitoring and research program to allow impact evaluation and to assist in the ongoing management of the affected area.

≅ development and implementation of debris control and ice monitoring programs.

≅ additional cultural centres and museums be established in northern Manitoba to preserve native cultural heritage.

The Agreement did not specify when the recommendations should be implemented or how implementation would be funded.

6.0 IMPLEMENTATION IN PRACTICE

Before examining how the land, resource and environmental provisions have been implemented, it is necessary to have a general understanding of the evolution of NFA process and procedure. The first part of this chapter describes the evolutionary transition of implementation from the time when the NFA was signed to the time when a modicum of action was forced by the Arbitrator. It describes how the claims driven process afforded by the arbitration instrument works in practice.

6.1 Two Years Pass and Nothing Happens

Virtually nothing was accomplished during the first two years of the NFA.[82] By 1980 the only significant provisions of the Agreement which had been implemented were ratification by the five First Nations (Article 2.3), appointment of an Arbitrator in March, 1980 (Article 24.1), and formation of the Wildlife Advisory and Planning Board (Article 15.5).

"*Throughout 1977-1980, the communities sought implementation of the NFA through discussions. Because little or no perceived implementation, particularly of those sections considered to be the most important, the communities became increasingly sceptical and disillusioned respecting the intentions of the signatories. The communities increased (their) efforts to have the parties agree upon and appoint an Arbitrator."*[83]

In April, 1980, the NFC wrote the Federal Minister of Indian Affairs and Northern Development (IAND) complaining about the lack of implementation. The NFC summarized their concerns as follows;

"i) The Parties obligated to provide benefits under the Agreement had achieved unchallenged control over the implementation process and thus had been able to set their own standards of compliance and performance;

ii) Canada had consistently failed to demonstrate its understanding of the technical, financial and other requirements associated with the implementation of the Agreement; and,

iii) The Minister of DIAND virtually abandoned the Agreement after its ratification rather than piloting it through the implementation phases."[84]

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[82] A more complete chronology of NFA implementation is found in the Northern Flood Committee's submission to the Royal Commission on Aboriginal Peoples entitled "The Northern Flood Agreement, History of Negotiation, Implementation, and Recommendations for Improvement, September 29, 1993."

[83] Status and Issues Respecting Implementation of the Manitoba Northern Flood Agreements. Draft Internal Document. Manitoba Resource Development Impacts Office, Indian and Inuit Affairs, DIAND. No Date.

[84] Chief Rodney Spence, Chairman of the NFC, to The Honourable H.J. Munroe, Minister of IAND. Dated April 25,

6.2 Role of NFC Curtailed

Initial drafts of the NFA addressed the need for ongoing financial support to the NFC in order that it could fulfil its obligations and role in implementation of the Agreement. This provision was, however, deleted in the latter drafts of the NFA and is absent from the signed version. Apparently, there was an understanding among the NFC, Canada and Manitoba that a separate Federal-Provincial agreement to fund the NFC would be negotiated. Such an agreement, however, never came to fruition.[85]

As soon as the Agreement was ratified in 1978, Canada attempted to terminate NFC funding. Opposition from the Chiefs led to a compromise whereby Canada agreed to directly fund the NFA First Nations who in turn passed the money onto the NFC. This situation existed during the period 1978-1982. The NFC's need for greater certainty about core funds and assertion that the NFA did obligate the Parties to fund the organization on an on-going basis was the subject of a significant appeal to the Arbitrator. In 1983 the Arbitrator ruled that the NFA inherently required funding of the NFC and ruled that Canada, Manitoba, and Manitoba Hydro jointly and equally had an obligation to provide core funding. In the Arbitrators words;

> ***"I am satisfied without any reservations whatsoever, on all of the evidence presented in this matter, that without the existence of the N.F.C., the objects of the Northern Flood Agreement would be completely frustrated, and the Agreement would not be implemented with any degree of expedience, if at all. Experience to date has shown that a properly funded and functioning N.F.C., as the agency, not only for the Bands, but for the individual claimants, is an absolute necessity."***[86]

An application that same year by Canada, Manitoba and Manitoba Hydro to the Manitoba Court of Appeal to have the Arbitrators decision overruled was successful. In its appeal Canada argued that the NFA did not obligate any of the Parties to fund the NFC, but if it did the proponents should pay. Canada further argued that the Arbitrator could not order Canada to do anything, he could only recommend and that such recommendations would not be binding on Canada.[87] Since 1983, Canada has provided limited funds to the NFC not by reason of NFA obligation but as a matter of policy only.

Once arbitration became the dominant approach to NFA implementation the NFC's capacity to play an active role in the advancement of claims was severely limited. For one thing, the very

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1980.

[85] Final Award on Claim #28 by Patrick D. Ferg, NFA Arbitrator. Dated September 6, 1983.

[86] Ibid.

[87] Manitoba Court of Appeal. Factum of the Appellant (#79/84). Federal Department of Justice.

nature of the arbitration process requires definition of the claimant. The majority of claims have been filed by the First Nations jointly or independently, or in association with resource harvesting organizations or individuals. These claims are filed in association with - not

on behalf of - the NFC. Thus, with a few exceptions, attempts to effect implementation via the arbitration process has been pursued by the First Nations jointly or independently.

Secondly, the only avenue available under the NFA for the communities to access monies to resolve disputes or negotiate implementation is through the arbitration instrument. As will be described in greater detail in Section 6.4.3, claimants are able to retain legal and technical experts to advance claims at the respondent's expense. Because of a 1984 Manitoba Court of Appeal decision which found that the NFA does not obligate the signatories to fund the NFC, Canada, Manitoba and Manitoba Hydro have refused to pay NFC costs associated with the claims process.

For the first eight years of the Agreement the only financing available for the NFA communities to participate in the implementation process came from the operating budget of the NFC. In 1986 Canada committed funds for a five-year period to allow each First Nation to employ a NFA Implementation Manager.

Also, a claim filed by the five NFA First Nations in 1984 alleging Manitoba and Manitoba Hydro failed to sufficiently support and participate in the Community Liaison Committee pursuant to Article 20 resulted in a negotiated agreement in 1987 providing funds for each community to employ a Key Communicator. During the period 1987-1993 the NFC negotiated year to year funding. Funds are not handled by the NFC, rather the Parties issue trust cheques to the lawyer of record on the claim who in turn distributes the funds to each First Nation. In 1993, the NFC was successful in negotiating a three-year agreement.[88]

6.3 Arbitration Becomes the Approach to Implementation

After several unsuccessful attempts by the NFC to involve the Parties in implementation, the NFC began filing claims in October, 1981 under the Arbitration provisions of the NFA. The first claims were filed directly by the NFC and were based on alleged financial performance failures in regard to monies specifically provided for in the Agreement[89] (Department of Indian and

[88] Rhonda Howse, Acting Director of the NFC. Personal Communication. August 24, 1993.

[89] For example: Claim #2 - Article 2.3.2 states that a Steering Committee shall submit a budget for the conduct of the referendum (ratification vote) and that all costs of the referendum shall be shared equally by Canada and Manitoba. The actual cost of the referendum exceeded the budget by $32,000. It was only after the NFC filed their claim to recoup the additional expense that Canada and Manitoba agreed to negotiate payment. Four years later the NFC was finally paid. Claim #3 - Under the terms of Article 22 a lump sum of money was to have been paid by Manitoba Hydro by April 1, 1978 in order for Cross Lake and Nelson House First Nations to undertake specified remedial works. Manitoba Hydro forwarded the $1.7 million a year late in April of 1979. The NFC sought and won their arbitration case and the Arbitrator ordered Manitoba Hydro to pay a late payment penalty of over $124,000.

Northern Affairs Canada 1989). By the end of 1981 a total of 18 claims had been filed: 3 by the NFC alone and 15 in association with the NFC. Three claims were resolved, 1 was dismissed, 1 was discontinued, and 13 remained outstanding.

As a signatory to the NFA, the NFC is always named as a claimant. However, only four claims have been filed by the NFC alone. All other NFA claims have been filed by the NFC in association with: a) one or all five NFA First Nations; b) community based commercial fishing co-op's or trapping associations; or c) NFA First Nation residents, either as individuals or unorganized groups of individuals, or families. For the sake of brevity, any and all claims filed by NFA First Nations singly or collectively, or by organizations or individuals are referred to as NFC claims.

NFC legal costs in preparing and advancing early claims were financed primarily from its' core funds. For the most part the arbitration process was used sparingly by the NFC during the period 1980 and 1981. However, by 1982 several factors contributed to heavier reliance on the arbitration process as a means of affecting implementation.

First, Articles 24.11 and 24.12 set out time limitations for review of prior claims and filing of new claims at four and five years, respectively, from the date of the Agreement.[90] By the fall of 1982, the time limitation for filing new claims for known adverse affects was only six months away. In October, 1982, the NFC requested that Canada negotiate with Manitoba and Hydro for an extension of the filing period to March, 1988. Informal discussions resulted in a compromised extension to April of 1984.[91]

In order to meet the revised time limitation for filing claims, the NFC spent the better part of 1983 and 1984 preparing 58 claims on behalf of individuals who had lost or had equipment damaged, had lost business income, had been injured, or killed. Another 37 claims were filed by the NFC in association with one or more NFA First Nations or with community based commercial fishing and trapping organizations. The community of South Indian Lake filed 5 claims. In addition, a group of commercial trappers from the community of Pikwitonei filed a claim. Also by March of 1984, Canada filed 6 claims and Manitoba and Manitoba Hydro each filed a single claim. In total, by March of 1984, 145 claims had been filed in the Arbitrators office.

Arbitration seemed to be the only way to get the attention of the other Parties. The NFA First Nations had met some measure of success particularly in regard to two major claims, one being a claim by Cross Lake First Nation for loss of recreational opportunity and the second being a claim by the five First Nations for compensation and mitigation for methylmercury contamination.

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[90] The NFC filed a claim against the Parties on December 9, 1982 seeking an interpretation of the phrase "date of this Agreement" which appears in numerous NFA Articles. As a result of the claim all four Parties agreed that the "date of the Agreement" would be March 16, 1978, the date the First Nations ratified the NFA, as apposed to December 16, 1977, the date the NFA was signed.

[91] Status and Issues Respecting Implementation of the Manitoba Northern Flood Agreements. Manitoba Resource Development Impacts Office, Indian and Inuit Affairs, DIAND. No Date.

In the recreation claim, the NFC was successful in persuading the Arbitrator to order an environmental impact assessment of Project effects at Cross Lake and to order that Manitoba and Manitoba Hydro fund the construction, operation and maintenance of an ice skating arena as an interim mitigation measure. In the mercury claim, the NFC was successful in persuading the Arbitrator to order Canada to conduct research on the cause and effect of mercury in the environment, levels of mercury in human and fish populations, and to evaluate possible remedial measures (Department of Indian and Northern Affairs Canada 1989).

6.4 Number and Nature of NFA Claims

Lack of implementation and consequent use of the Arbitration process as an attempt to affect NFA implementation is evidenced by the 173 arbitration claims filed as of February, 1993. Table 1 below, details the number of claims filed by claimant(s) and by respondent(s).

TABLE 1: SUMMARY OF NFA CLAIMS

	RESPONDENT(S)						
CLAIMANT	Canada	Manitoba	Mb.Hydro	Can&Mb. or Can.& MH	Canada, Mb.& MH	TOTAL	
NFC/Bands	3	9	19	2	23	31	87
Individual	0	1	66	0	2	3	72
Canada	0	1	1	0	4	0	6
Manitoba	1	0	0	0	0	0	1
Mb. Hydro	1	0	0	0	0	0	1
Other	0	0	2	0	2	2	6
	5	11	88	2	31	36	173

As can be seen, the largest proportion of claims (92%) have been filed by the NFC or through the NFC by First Nations and/or commercial harvesting groups (50%) or by individual First Nation residents (42%) for loss of resource harvesting equipment and/or personal injury/death. The balance of claims (8%) have been filed as follows: by Canada (3%); Manitoba (< 1%); Manitoba Hydro (< 1%); and, the Community of South Indian Lake and other non-NFA Aboriginal organizations (3%).[92]

[92] Claims were filed by Canada, Manitoba, Manitoba Hydro against each other to meet the 1984 filing deadline. These claims generally allege performance failures in respect of NFA implementation.

Manitoba Hydro has been named sole respondent on 50% of claims filed. The balance of claims have been filed against all three Parties (21%), a combination of Canada and Manitoba or Canada and Manitoba Hydro (18%), Manitoba and Manitoba Hydro (6%), Canada alone (3%) and Canada and Manitoba jointly (<2%). Canada has been named as a third party by either Manitoba or Manitoba Hydro, or both, on 24 claims.

In addition to the "numbered" claims filed through the offices of the Arbitrator, Manitoba Hydro has processed in excess of 3,000 claims filed by individuals for loss or damage to equipment, docks, cabins, etc. As of March, 1992, Manitoba Hydro has paid out in excess of $2 million on these unnumbered claims (Manitoba Hydro 1992).

The nature of claims filed by the NFC are summarized below in Table 2. Claims filed by individuals regarding equipment damage to boats, motors, skidoos, fishing nets, etc. represent the largest proportion of claims filed (35%). A majority of these claims were filed during a period when Article 19 programs for fishing and trapping remained outstanding. Claims relating to impacts on resource harvesting activities, loss of income and income-in-kind, priority access to resources and allocation of resource issues (non-performance on the Parties in respect of Article 15 and 19 obligations) are the next most numerous form of claim.

Many of the claims considered most important to the NFC (the mega claims), such as performance failures in respect of environmental monitoring, land exchange, community planning, domestic fishing and trapping, were filed as a single claim by all five NFA communities and the NFC jointly.[93] Thus, the relative importance of claim type, as reflected in total number of claims by category, should not be read into Table 2.

TABLE 2: NATURE OF CLAIMS FILED BY NFA COMMUNITIES

Area of Alleged Non-Performance or Losses	# Claims Filed
Individual claims for equipment/business loss	56
Resource harvesting and allocation issues	22
NFA general implementation/costs/penalties	14
Individual claims for personal injury/death	12
Recreation and Culture	10
Navigation and/or transportation	8
Remedial and mitigation measures	8
Land exchange/hold areas	6
Employment/economic development/planning	5

[93] For example, each NFA First Nation filed separate claims for loss of recreational opportunity (5 claims). Whereas, all five NFA First Nations filed a single claim against Manitoba for failure to transfer Article 3 exchange lands (1 claim).

Consultation, access to information	5
Environmental Monitoring	4
Water quality/mercury	3
Other Miscellaneous	6
Total	**59**

Of the 159 claims filed by the NFC and/or NFA communities, 35% have been filed by individuals or groups of individuals, 30% have been filed by the First Nations on behalf of their respective membership, 20% have been filed collectively by all five NFA First Nations, and less than 2% have been filed by the NFC on its own behalf.

6.4.1 Cost of NFA Implementation

In 1990, Canada, Manitoba and Manitoba Hydro reported NFA expenditures in the order of $130.5 million. Although unsubstantiated by the NFC, figures below in Table 5.3 provide an indication of the magnitude of expenditures:

TABLE 3: NFA EXPENDITURES[94]
(expressed in $000,000)

Area of Implementation	Canada	Manitoba Hydro	Total
Land	.260	.950	.038	1.248
Resource Compensation	.026	2.553	14.447	17.026
Economic Development	6.165	3.025	1.140	10.330
Remedial/Mitigatory Works	46.424	4.650	26.069	77.143
Implementation/Environment	19.056	3.661	2.064	24.781
	71.931	14.839	43.758	130.528

The above expenditures include direct compensation payments to individuals and communities; remedial works/mitigatory measures provided for under the Agreement and dating back to 1977 (including bridges and roads which are of benefit to all Manitoban's); all party expenses related to NFA institutions[95]. They also include fees and expenses for NFC and/or NFC community consultants and lawyers, fees and expenses for Canada, Manitoba and Manitoba

[94] Figures reported in "Proposed Basis of Settlement of Outstanding Claims and Obligations" presented by negotiators for Manitoba Hydro, Canada, Manitoba, and Northern Flood Committee. April 17, 1990. The NFC has not substantiated the expenditures claimed by the other three Parties.

[95] i.e. Employment Task Force, Community Liaison Committees, and Wildlife Advisory Board.

Hydro's outside consulting and legal expenses[96]; the on-going costs of the Arbitrators office[97]; the total to date cost of sewer and water projects; funding to communities to retain consultants to prepare community plans; core funding to the NFC; all environmental studies by Canada, Manitoba and Manitoba Hydro, for example Federal Provincial Mercury Monitoring Agreement and the Federal Ecological Monitoring Program; the one-time payment of $3.2 million ($1978) to Neyanun Corporation; and the total cost of three bridges made necessary by the hydro project by reason of flooding existing access, improperly constructing access roads developed by Manitoba Hydro for purposes of Project development, or impeding river navigation.

More recently, 1992, Canada reports to have spent $115 million on NFA implementation (Report of the Auditor General of Canada, 1992). The only infusion of "new" federal money above and beyond "normal program funding" under the NFA relates to the $88.5 million for the Article 6 sewer and water program, $2.5 million for environmental monitoring studies, and NFC core funding during the period 1985/86 through 1989/90. Canada's reported expenditures as of 1992 may also include the value of loans provided to the NFC in respect of global negotiations and cash payments in respect of the resolution of a global settlement with Split Lake First Nation.

The balance of expenditures has come from regular regional budgets, and been spent on core funding of the NFC prior to 1986 and beyond 1990, on-going costs of the Arbitrators office, legal and consulting costs of both Canada and the NFC or First Nations related to claim negotiation/arbitration. In addition, the NFC is of the opinion that Canada's representation of expenditures under the NFA includes funding to NFA communities from regular programs which are provided to all Manitoba First Nations.

6.5 The Claims Approach

6.5.1 Adversarial and Legal Process

Use of the arbitration process radically changed the nature and approach to NFA implementation from its intended goodwill, voluntary approach to meeting obligations and negotiating approaches to implementation of the various Articles to one involving legal and technical discussions about liability and settling claims. Claims were filed by the First Nations both to protect their interests within the time limitations and to formally express their dissatisfaction with the Parties performance in respect of implementation.

Whereas early discussions about implementation had involved the NFC Chiefs,

[96] The NFC believes the figures provided by the Parties may also include internal departmental/corporate salaries and expenses related to DIAND's Northern Flood Office, Manitoba's Northern Flood Office, and Manitoba Hydro's mitigation department.

[97] In recent years expenses related to the Arbitrators office has average between $75,000 and $150,000 per annum.

Councillors, elders and key harvesters, the claims driven process necessarily demanded the assistance of lawyers and technical consultants. This legalistic approach to NFA implementation has been and remains highly adversarial. Generally speaking, resolution of each NFC claim[98] has involved years of protracted and adversarial negotiation involving representatives of each claimant and respondent, each armed with legal and technical experts. The NFA claims-driven arbitration process is the only means by which significant implementation of the NFA has been achieved but this process has been monopolized by lawyers and consultants.

6.5.2 Protocol

Arbitrator Pat Ferg set out rules of conduct and procedure under the NFA in October, 1983. Under his protocol, all claims filed must include points of claim containing the name and address of the claimant, a brief concise statement of the facts upon which the claimant relies, the particular provisions of the NFA upon which the claimant relies, the names of the party or parties against whom the claimant advances the claim, and the particulars of remedy and relief sought. Respondents have one month in which to file a defense.[99]

NFC costs in implementing the NFA through the arbitration process are addressed in Article 24.35 which states;

> **The Arbitrator shall have the discretion to make an order that counsel of the claimant's choice be made available at the expense of one or more of the parties to assist the claimant in preparing and advancing his claim, and to award other costs on any reference that is brought before him for determination, subject to the following provisions: The Arbitrator may award costs in favour of any person as he deems may be fair and equitable in the circumstances; any award of costs may include legal fees or the cost of consultants or experts retained in order to deal with the dispute brought to arbitration to the extent such fees and costs are reasonable; any award of costs may include travelling allowance, and ancillary expenses for the parties to a dispute, their legal counsel, consultants or necessary witnesses.**

Acceptance of a claim by the Arbitrator and awarding of a cost order are subject to "tests of reasonableness" set out by Arbitrator Pat Ferg in 1981 as follows;

"In exercising that discretion (awarding a cost order) ***I deem it necessary to impose some***

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[98] With the exception of individual claims filed against Manitoba Hydro dealing with real property (nets, motors etc.) which tend to be resolved more expeditiously.

[99] "Practice Direction - Northern Flood Agreement" October 24, 1983. Contained in a package provided by the Arbitrators office to the writer in July, 1993.

> ***criteria before exercising my jurisdiction in favour of a claimant seeking counsel at the expense of another party. Common sense and reasonableness would dictate that firstly I must be satisfied that the claim is meritorious. Secondly, I must be satisfied that the claim asserted, on the face of it, is apparently (not conclusively) within the terms of reference as outlined in the Agreement. And thirdly, I ought to be satisfied that the claimant is impecunious, or without means to retain and pay counsel at the time the claimant seeks to prepare and advance a claim."***[100]

Thus, each claim filed by the NFC includes points of claim and what is known as a "cost order". The cost order names the respondent(s) responsible for financing the claimants legal and consulting costs in advancing the claim. Points of claim and the cost order for the NFA First Nations domestic fishing claim, attached as Appendix C, illustrate the typical format of NFA claims.

Although Article 24.35 speaks to the retention of lawyers and consultants in respect of matters before the Arbitrator, in practice cost orders cover all reasonable costs involved with preparation of evidence and implementation strategies, negotiations, and arbitration hearings.

A Memorandum of Understanding Re: Retaining of Experts by Counsel was signed by all Parties before the Arbitrator on October 14, 1986. The memorandum set out a protocol for retaining consultants which essentially stated that counsel for the NFC was to notify the respondent of their intent in writing and the respondent was to notify the NFC if they consented or objected to the expert. If the respondent objected, then the NFC could appear before the Arbitrator to state their case. Since approximately 1989, the protocol has become more elaborate. Consultants are now required to submit detailed work programs and budgets.

Until recently, the Parties rarely objected to the NFC's choice of consultants or the nature of work proposed. Since early in 1992 the process has run less smoothly. Current difficulties experienced by the NFC and/or NFA First Nations are illustrated in the following examples;

Canadian Wildlife Services released a preliminary report in late 1991 which suggested that the Project had a significant adverse effect on waterfowl use of Playgreen Lake. Norway House First Nation filed Claim #161 on January 28, 1992. A cost order was agreed to by Manitoba Hydro on March 31, 1992. Legal counsel to the First Nation requested a consultant to prepare a work program and budget which was submitted on May 6, 1992. The work program included examination of both biophysical and socio-economic impacts and proposed a budget of $275,000. Manitoba Hydro objected to the work program by letter of June 30, 1992 and proposed that they would hire consultants to conduct a biophysical study to determine if the Project had indeed adversely affected waterfowl habitat. The cost of the study proposed by Hydro was also $275,000. Manitoba Hydro has been conducting research on waterfowl for the past two summers and expects to table their findings in September, 1993. In the meantime, Norway House First Nation has been denied financing under their cost order to collect any evidence in support of their claim.

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[100] Final Orders on Claims 1, 11 and 12. Arbitrator Pat Ferg. June 30, 1981.

In April 1991, the NFC retained legal counsel to advance Claim #38B in respect of the failure of the Parties to implement and give effect to Article 16 and Schedule E. During a period of approximately one year legal counsel developed an argument in anticipation of an arbitration hearing where the Arbitrator was being asked to determine the scope of the Parties' obligations under the Article in question. Part of legal counsel's case was that the NFA is a treaty and therefore liberal interpretation is necessary. Because the wording in the article is ambiguous, legal counsel proposed calling both community witnesses and outside experts to give evidence. Canada refused to pay for the expert witnesses the NFC wished to call and the matter was heard before the Arbitrator.[101] Despite the fact that the Arbitrator ruled in favour of the NFC[102], Canada made application to the Manitoba Court of Appeal to overturn the Arbitrators' decision.[103]

6.5.3 Procedure

Throughout the history of the NFA, the other Parties have rarely, if ever, responded in a pro-active manner to the filing of claim. That is to say, notification by the NFC of "performance dissatisfaction" or "claim for damage or loss" by way of a claim has rarely prompted the Parties to initiate discussions or negotiations to resolve the problem or affect implementation. On the contrary, the NFC claimant typically must "activate" the claim by bringing forth evidence of impact or non-performance before discussions occur.

The process by which claims are used by the NFC to bring about implementation has evolved over time. During the period from about 1984 through 1989 the approach used by the NFC to advance claims typically involved 5 steps as follows:

Step 1: Because of the legalized protocol of the arbitration process, NFC claimants must seek legal assistance in drafting the points of claim and making application for a cost order. Often a written affidavit is prepared by the Chief or a Councillor describing the nature of the Project-related damage or loss, or the failure of the Respondent to effect implementation of a particular provision of the NFA. The document accompanies the points of claim which are filed with the Arbitrator. At this stage the Respondent(s) may file a defense denying all or part of the allegations, but usually they do not. Once a claim has been filed, accepted, and a cost order has been issued, the claimant is able to retain legal and technical assistance to "advance" the claim. The time involved from filing a claim to obtaining a cost order typically ranged from two to six months.

Step 2: lawyers and consultants retained to assist the claimants engage in assembling evidence about the nature of the impact (eg. no fish left in lake because of dewatering), to quantify the impact

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[101] Myers, Weinberg, Kussin, Weinstein Bryk, counsel to the NFC on Claim #38B. Claim #38B - Brief of the Claimants. June 26, 1992.

[102] NFA Arbitrator Award in the Matter of Claim #38B and the Retaining of Experts. Arbitrator Cam McLean. October 26, 1992.

[103] Notice of Appeal (Suit No. A1 92-30-00968), Appellant Her Majesty the Queen in Right of Canada as represented by The Minister of Indian Affairs and Northern Development. November 6, 1992.

(eg. loss of 100,000 lbs. of fish), to estimate the value of compensation for past damages (eg. $1 million for loss of fish), and to prepare a mitigation program (eg. fishing at other unaffected lakes). While the claimants are preparing evidence, the Respondents have either conducted their own studies or done nothing, the latter being most common. Preparation of evidence typically required six months to a year to complete.

Step 3: NFC claimant report submitted to the Respondent(s) including all the information assembled in Step 2. Respondents may then retain technical advice and commission a review of the matter.

Step 4: Claimant and Respondent(s) discuss the contents of the Claimants report and Respondents report, if any. Protracted, and often adversarial technical discussions occur between the claimants experts and the respondents experts on matters first of whether or not the Project caused the damage, followed by whether the method of quantifying and valuing the damage was appropriate and/or whether the mitigation program was appropriate, etc. On a parallel basis, lawyers for each of the Parties typically discussed issues of liability, interpretation of the relevant NFA Articles, and the nature and magnitude of obligations and entitlements. Discussions usually occurred over a period of six to eighteen months.

Step 5: Discussions led to either a negotiated agreement on the quantum of retroactive compensation and the nature, duration and costs of mitigation programs or discussions stalled due to difference of opinion on obligations and/or the cause, magnitude or value of damage and the NFC would threaten to "take the matter to arbitration" resulting in renewed attempts to negotiate or the Parties simply could not agree and the NFC would make application to have the matter resolved by the Arbitrator.

Step 6: If a negotiated agreement was reached on a particular claim, the Parties would sign an "Agreement-in-Principle" document or the Respondent would table a formal offer. A "settlement" document would then be drafted by the lawyers for signature by all the Parties, and once signed, the lawyers would make application to the Arbitrator for a final or interim award. Payment of compensation monies and/or program funds are paid by the respondents upon issuance of the Arbitrators consent order.[104] Settlement documents typically include:

- a description of the quantum of monies allocated to retroactive compensation and/or description of the program to be implemented and its cost;

- release and indemnity clauses, the claimant releases the respondent from any and all further claims in respect of past damages and for the duration of the program (except for death, injury, or unknown or unforseen adverse effects);

[104] In some cases, particularly with respect to resource harvesting claims, in recognition of the lengthy time required to draft legal settlement documents, the respondent(s) has/have advanced retroactive compensation monies upon signing of the agreement-in-principle and obtaining all the necessary signatures on release forms. The balance of program funds were issued upon finalization of legal documents and acquisition of all signatures.

- a standard clause that the settlement does not constitute a precedent or admission of liability;

- signature requirements in respect of all persons to receive retroactive monies and/or who will benefit from the programs, the claimants (Chief and Council and resource harvesting organization executive or individual).[105]

If a negotiated agreement could not be reached, then the NFC's lawyer would make an application to the Arbitrator for a hearing date. Hearings might be held in the communities where pre-selected residents, often elders, would give evidence about the nature of impacts relevant to the particular claim in question. To date, few claims have been brought to hearing before the Arbitrator[106], and even fewer have been resolved by a direct order of the Arbitrator.[107]

Since approximately mid-1989, the Parties have attempted to resolve some claims through a "collaborative approach". Essentially the process is the same as described above with the exception that less emphasis is placed on evidence (Step 2) and more emphasis is placed on discussion towards mutual understanding of impacts and solutions (Step 4). The collaborative process seems to work efficiently when the Respondents accept a priori that the Project has caused damage or loss for which they are obligated to address. This approach has not worked well in respect of Norway House claims because the position of the Parties is that impacts on this community are minimal. Nor has it worked well on less tangible claims such as those filed in respect of stress and anxiety or cultural losses where the Parties feel their obligations are less clear.

6.6 Comprehensive Negotiation Process

In 1984, Canada announced a five-year plan to implement its legal obligations under the NFA. Major provisions of the five-year plan included commitments to provide operating funds for the NFC and a mandate for other departments of the federal government to undertake specific implementation activities. Examples of the policy included provision of potable water (Article 6), provision of funds for the employment of community planners (Article 16), and environmental

[105] For example, with the commercial trapping and fishing claims signatures were required by each and every fishermen or trapper, or estate or trustee, to acknowledge receipt of compensation monies to release the Respondent from any further liability for past losses and acknowledgement of program funds. Additionally, the co-op's or associations had to agree by majority vote, and finally the signatures of a quorum of Chief and Council and the organization executive were required.

[106] In the early 1980's, after hearing community testimony concerning recreational damages and losses at Cross Lake First Nation the NFA Arbitrator ordered the Parties to pay for the construction of an indoor ice skating arena as an interim measure until the full extent of damages could be identified and assessed.

[107] Several arbitration hearings over the past few years (eg. sturgeon losses at Cross Lake, recreational losses at Norway House) have not resulted in a definitive decision by the Arbitrator.

monitoring (Article 17).[108] Also in 1984, Manitoba and Manitoba Hydro presented an offer to the NFA First Nations which would resolve, in perpetuity, all resource and remedial works related claims.[109]

The NFC viewed these initiatives by the Parties as an indication that they were finally serious about NFA implementation. Political negotiation of NFA implementation was contemplated by the NFC Chiefs in 1984 as an alternate to the slow moving claim-by-claim efforts of the past. At a meeting in December, 1984, the NFC Board asked the Minister of IAND to help them achieve more effective implementation. DIAND provided funding for meetings and workshops at the Band level. The result of these community meetings was a decision by the Bands to approach the political leaders with a plan for more effective implementation.[110]

Canada, too, had given careful consideration to the NFA in 1984. As evidenced in the following excerpt of an internal DIAND report, Canada was looking at options for settlement of the NFA;

> ***"In examining the strategy options it is relevant to consider the extent to which each option tends to a conclusive settlement of the NFA issues and the degree to which each provides a predictable deployment of resources. The "open-ended" nature of some of the obligations, the vagueness of some NFA articles, and the relatively high cost of even the most modest action proposed in this memorandum, makes it evident that Canada's preference must be for those options which provide a final settlement which is (as far as is possible) conclusive, controllable, and planned."*** (Minister of Indian Affairs and Northern Development, 1984:47)

The following year, 1985, the potential cost for all NFA parties to implement the Agreement was estimated at $340-$550 million, with Canada' share estimated at $50-$160 million (The Task Force on Program Review, 1985:243-244). The Task Force on Program Review (1985:244) recommended that the government consider;

> ***"The feasibility and cost of achieving a comprehensive settlement with Indian bands or, if a comprehensive settlement is not feasible in the short term, rapid implementation of specific commitments under the agreement."***

In January, 1985, the NFC formally requested the Minister to;

> ***"take the lead role in proposing negotiations with the other parties in order to make the implementation of the Northern Flood Agreement effective without giving away***

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[108] Government of Canada News Release. Speaking Notes: The Honourable Lloyd Axworthy. July 11, 1984.

[109] Manitoba/Manitoba Hydro Proposal for Settlement of all Resource Related Claims under the Northern Flood Agreement. September, 1984.

[110] J. Keeper, NFC Executive Director's Report. February 4, 1987.

(their) rights under that Agreement."[111]

In February, 1986, the NFC convened a general meeting of chiefs, councillors, elders and advisors in Thompson, Manitoba. The two day meeting was addressed by many local people, and by Chief Billy Diamond of the James Bay Cree. This meeting was organized by and attended by a consulting firm owned by E.E. Hobbs, former Director of Economic Development, DIAND, and a representative for Mr. Jean Chretien, who had been invited by the NFC. The purpose of the meeting was to revitalize or activate a political negotiation process to effect a comprehensive approach to NFA implementation.[112]

At the conclusion of the Thompson meeting, after much debate, the assembly voted to attempt to effect implementation by obtaining from the other NFA Parties a substantial amount of money to be deployed by the NFC to negotiate an implementation framework. It was proposed that each party would be asked to name a senior negotiator, and that Jean Chretien and his colleges in the Ottawa based law firm of Lang, Michener, Lash, Johnston would organize the NFC approach. This entire effort did not really get underway until well into 1987 when negotiating funding was secured for the NFC.[113] However, by April, 1986, working with existing funds, the NFC had developed negotiating principles, a structure for negotiations,

financing requirements, and a specific agenda outlining key implementation requirements. Effective implementation was to;

"provide for the reaffirmation and further definition of Band entitlements flowing from this historic, binding contract among the NFC, Canada, Manitoba, and Hydro."[114]

Limited progress was made in the Comprehensive Negotiation Process global negotiations until 1988 when each of the four NFA parties named senior negotiators. The NFC received $2.4 million in negotiating funding from DIAND by way of repayable contribution agreements. The NFC was to pay Canada back out of monies anticipated to be included in a comprehensive implementation package. Negotiating costs incurred by the NFC over the period 1986-1990 were in excess of $5 million, of which at least $4 million was paid out to the senior negotiator and consultants.[115]

Intense negotiations between the senior negotiators continued over the period 1988 through

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[111] Speech to Honourable D. Crombie, Minister of IAND delivered by the NFC. Dated January 21, 1985.

[112] per David Young, Hildebrandt Young and Associates, Ltd. Winnipeg. Personal communication on July 21, 1993. Mr. Young was one of the advisors present at the Thompson meeting.

[113] Ibid.

[114] Letter from Five NFA Chiefs and NFC to Honourable D.Crombie, Minister of IAND. Dated April 15, 1986.

[115] R. Howse, Acting Director, NFC. Personal Communication. August, 1993.

1990[116] culminating in a draft proposal presented by the negotiators entitled Proposed Basis of Settlement of Outstanding Claims and Obligations (PBS), dated October 25, 1990. The stated purpose of the document read;

> ***"to outline to the ... parties a proposed basis for addressing all claims and obligations arising under the NFA of 1977."*** The proposal is conditioned by the statement that the PBS ***"includes amounts of money and quanta of land which go beyond the respective understanding of Hydro, Manitoba and Canada of their obligations under the NFA. It should be clearly understood that the proposal is not an estimate of the NFA liabilities of each of Canada, Manitoba, and Manitoba Hydro by their respective negotiators, nor is it an estimate of the Band's NFA entitlements by the NFC negotiator."***

The primary features of the PBS package included:

≅ an alternative land package to replace Articles 3 and 4 of the NFA providing a larger quantity of land;

≅ an economic and social development trust fund ($77.5 million) to replace Articles 16 and 18 and Schedule E of the NFA;

≅ a cash settlement ($74 million) in respect of remedial and mitigatory works relating to Articles 5, 12 and 22 of the NFA;

≅ a cash settlement ($57 million) in respect of past and future resource damages or losses (Articles 15 and 19) and provision for joint resource management;

≅ an implementation agency funded ($30 million) to administer all PBS trust funds and implement environmental monitoring.

The PBS included some $242 million in cash and bonds to be paid out over a period of twenty-five years. The amounts of money offered were to resolve almost all of the claims filed to that date and to affect a full and final discharge of most of the parties' NFA obligations.

After considerable decision and review, four of the five NFA Bands chose not to accept the PBS on the grounds that it represented a "buy-out" of the NFA. Split Lake First Nation decided to negotiate finalization of comprehensive settlement and subsequently withdrew from the NFC.

In November of 1990 the Chairman of the NFC addressed the Chairman of Manitoba

[116] During this time a number of resource harvesting claims were negotiated, NFA committees such as the Wildlife Advisory Board and Program Advisory Board continued to meet, however, global negotiations confused on-going discussions particularly regarding land exchange. Senior global negotiators attempted, but failed, to gain agreement from the NFC for a moratorium of claims and use of the arbitration process.

Hydro, The Manitoba Minister of Northern Affairs, and the Minister of DIAND as follows;

> ***"Initially, we take the position that the Northern Flood Agreement (NFA) is a Treaty within the meaning of the Constitution of Canada. It must be respected in that light and accorded the protection and recognition Aboriginal and Treaty rights must be given in Canada's Constitution. We have carefully considered and reviewed the PBS and the process that resulted in its development and have respectfully concluded the PBS and the process used will not constitute and result in a reasonable basis for implementing the NFA in a more comprehensive manner. We firmly believe that acceptance of the PBS, as proposed, will result in a partial or complete termination of our contractual arrangement with Canada, Manitoba and Manitoba Hydro under the NFA. In entering into a "global negotiation" process, it was our firm position that the fundamental principle underlying this negotiation process would be that the NFA would not be altered or put in jeopardy of being "bought out" or expropriated."***[117]

The position of the four First Nations who rejected the PBS was communicated in a speech in late 1990 as follows;

> ***"After years of ... neglect our only recourse was to protect ourselves through the filing of claims. That we were forced to this extreme is a sad commentary on either the honour or political will of the parties. Why was it necessary for us to rely upon a judicial process? When we proposed comprehensive negotiations in the mid 1980's our objective was quite simple. We wanted to accelerate the implementation of the NFA. In our view there was nothing wrong with the Agreement, only with the pace at which it was being implemented.***
>
> ***Somewhere along the way, for reasons we still don't understand, the focus for negotiations changed from implementing the Agreement to replacing it. It seems now, to have been foolish of us to enter into a process which resulted in the "Proposed Basis of Settlement" (PBS). Our agenda, to secure our entitlements in a timely manner, has been abandoned. Instead, you have proposed to possibly legislate our NFA right out of existence.***
>
> ***Ongoing implementation of the NFA has been slowed over the past two years pending resolution of the global negotiations. We have never agreed to this. We can no longer accept the status quo, or watch precious resources squandered in a flawed negotiation process. We have learned through experience in the remedial works and resource sectors, that it is possible to undertake community based negotiations and program development. The results have been professional and effective at addressing our peoples needs. We wish not only to resume such processes, but to see them accelerated as we move forward to a more complete implementation of the NFA.***
>
> ***In closing, we want to repeat our view that there is not much future regarding the PBS. You may see it as a plan to implement the NFA, but we do not. For us the bottom line is***

[117] Chief S. Garrioch, Chairman, NFC, to Honourable James Downey, Minister of Northern and Native Affairs; Mr. Brian Ransom, Chairman, Manitoba Hydro; Honourable Tom Siddon, Minister of Indian Affairs; and Mr. Donald Goodwin, Assistant Deputy Minister, Lands, Revenue and Trust, DIAND. Dated November 5, 1990.

the implementation of the Northern Flood Agreement."[118]

Since 1990, three other NFA First Nations have entered into comprehensive negotiation processes.[119] Only one community is currently utilizing the arbitration process as a means of effecting implementation.

6.7 Implementation of Land Provisions

Under the terms of the NFA the five First Nations should have received a total of some 20,000 hectares of new Reserve land and held exclusive rights on additional Provincial crown lands. Sixteen years have passed since the Agreement was signed and only a single parcel 20 hectares in size has been transferred as Reserve land under the Agreement. Primary difficulties in effecting implementation, in chronological order, have included different interpretations of the meaning of the hold areas; delayed progress in determining Article 3 land entitlement quantum; and, different interpretations of what constitutes "unallocated, unencumbered, or unoccupied crown land.

6.7.1 Definition of Land Selection and Hold Areas

On May 29, 1979 the NFC Chiefs held a workshop to work out criteria and guidelines for land exchange and hold areas. At this workshop the Chiefs interpreted Article 3 to mean that the area within which the Bands would select land exchange (defined as 'the area commonly used and enjoyed by the community in the exercise of its traditional pursuits' in Article 3.2 of the NFA) was at least, a description of all the land within the boundaries of their present Registered Trapline Block (RTB). As mentioned previously, only one hold area was defined in the NFA. The Chiefs took the position that Article 4 hold areas should be the entire Resource Area, this position was formalized in a Board resolution dated June 7, 1979. These positions

and the resolution were conveyed to Mr. R.W. Winstone, Chief of Manitoba Crown Lands in mid-1979.[120]

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[118] Excerpts of a speech delivered by S. Garrioch, Chairman of the NFC, to the Honourable James Downey, Minister of Northern and Native Affairs; Mr. Brian Ransom, Chairman, Manitoba Hydro; Honourable Tom Siddon, Minister of Indian Affairs; and Mr. Donald Goodwin, Assistant Deputy Minister, Lands, Revenue and Trust, DIAND. (No date - approximately early December, 1990).

[119] Nelson House First Nation has been negotiating a final settlement for the past eighteen months. In the past six months York Land and Cross Lake First Nations have begun similar negotiations with Canada, Manitoba and Manitoba Hydro. Cross Lake, Nelson House, and York Landing, along with Norway House, are still members of the NFC.

[120] "Cross Lake Claim 43, Retroactive Compensation, DRAFT." Prepared by Hilderman Witty Crosby Hanna & Associates. July, 1993.

An entirely different interpretation of Article 3 and 4 was taken by Mr. Winstone as evidenced in his response to the NFC. Manitoba interpreted that the hold area shown in Schedule H of the NFA pertaining to Nelson House represented the area in which exchange lands could be selected. Furthermore, he disagreed that the RTB for each First Nation was the hold area. It was his position that hold areas for the other four communities had to of a comparable size to that of Nelson House. Mr. Winstone tabled criteria for identifying hold areas which included: the size of the hold area was not to exceed ten times the estimated area of exchange lands; the configuration of hold areas would be such that the length shall not be greater than two times its width; boundaries of hold areas would be described using existing control points where possible and natural boundaries that exist. No ground surveys would be carried out; and finally, the First Nations would be encouraged to identify only one hold area, preferably adjacent to the existing Reserve.[121]

The NFC responded to Mr. Winstone that;

> ***"the relationship between exchange lands and hold areas put forward in (his) letter did not exist in the NFA and that the Agreement does not limit the size or configuration of hold areas. The NFC also pointed out that, in their resolution, the NFC Chiefs did not request exclusive use to the RTB but rather proposed that the boundaries of the RTB be considered the land area within which they can select land exchange and exclusive use parcels. On October 4, 1979, R.W. Winstone responded that his interpretation of Article 3 and 4 in respect of the relationship between land exchange and hold areas had been incorrect."***[122]

6.7.2 Determination of Exchange Land Quantum

Manitoba was to have provided, as soon as was reasonably possible, a preliminary estimate of the quantum of exchange land the First Nations were entitled to, and to have completed the legal surveys of the severance lines, which would precisely determine the quantum of exchange land, with 18 months of NFA ratification. The NFA was ratified in March, 1978, thus it was expected that Manitoba would have completed the surveys by September, 1980.

The severance line surveys were started but not completed on time, and in fact Manitoba Hydro rather than Manitoba had initiated the survey work. Manitoba Hydro completed some, but not all, of the work by 1981. The NFC on behalf of all five NFA First Nations filed Claim #23 in May, 1982 alleging breach of Article 3 provisions and in particular alleging the surveys done to date were prejudicial and that the First Nations had still not been told the quantum of land they were entitled in exchange.[123] The Arbitrator ordered Manitoba to complete the severance line surveys by

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[121] R.W. Winstone, Chief, Provincial Crown Lands, to Mr. J. Keeper, Executive Assistant, NFC. Dated June 15, 1979.

[122] Op.Cit.

[123] Claim #23 "Points of Claim". Dated May 11, 1982.

December 31, 1983.[124] Thus, it wasn't until six years after the Agreement was signed that land exchange entitlement were precisely known.

6.7.3 Selection Process

Despite the fact that the total quantum of land available for exchange was not precisely known, beginning in 1979 the First Nations began making preliminary land selections and pursuant to Article 3.3 submitted Band Council Resolutions (BCR's) describing the location of land selected. The period from 1979 through 1983 was particularly procedurally frustrating and no Reserve land was transferred under the provisions of Article 3.

A historical account of Cross Lake First Nation's attempts to acquire exchange lands has recently been researched pending claim negotiation/arbitration and provides a general description of events common to all NFA First Nations in the early years following NFA ratification.[125]

In late 1979 and January of 1980 Cross Lake First Nation sent maps and BCR's to Manitoba in respect of three parcels of land they wished to have transferred as Reserve land. In January of 1980 Manitoba responded that one of the parcels selected was a borrow pit located within the Lake Winnipeg Interim Water Power License area and since Manitoba Hydro paid the Province an annual license fee for the use of the borrow pit, and requested that Manitoba not transfer this parcel to the First Nation. Other reasons included that Provincial Highways Branch wanted Rights of Way and borrow pits, Manitoba Forest Resources Ltd. complained the parcel was within their cutting area, Manitoba telephone noted the existence of a microwave tower, and Manitoba Surveys Branch commented that the area would be difficult to survey.[126]

Cross Lake First Nation then revised the boundaries of their three selections and resubmitted their request in February, 1980. Three months later, on May 15, 1980, Mr. Winstone replied by letter;

> ***"The three areas your Band identified have since been circulated to all Departments and Agencies of Government for clearance. Whereas we have made a concerted effort to meet the time requirements set out in Article 3.3 of the Northern Flood Agreement, it is not possible to resolve all the land related problems within the three month deadline. Therefore, in order to comply with the terms of the Agreement, we must advise that the areas identified by the Band at ... are either partially or totally required for public purpose..."***[127]

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[124] Pat Ferg, NFA Arbitrator. Claim #23, Interim Orders 23-2 through 23-6.

[125] The Winnipeg based firm of Hilderman, Witty, Crosby, Hanna and Associates retained by legal counsel to Cross Lake First Nation has recently prepared a historical account of Articles 3 and 4 in respect of Cross Lake First Nation.

[126] R.W. Winstone, Chief of Crown Lands, Manitoba Department of Mines, Natural Resources and Environmental Management, to Chief Ross, Cross Lake Band of Indians. Dated January 28, 1980.

[127] "Cross Lake Claim 43, Retroactive Compensation, DRAFT." Prepared by Hilderman Witty Crosby Hanna & Associates. July, 1993.

Some twelve months later, July 15, 1981, Mr. Winstone wrote to the Chief of Cross Lake regarding the status of the Bands land exchange requests as follows;

> ***"With regard to land requests made under Article 3 at ... it is true that these have yet to be fully resolved. However, it should be recognized that there are several existing commitments on the lands identified by your Band. Clarification of certain land dispositions requires Cabinet review and approval which this office will continue to seek."***[128]

Again on September 1, 1982, Cross Lake First Nation requested by BCR that Manitoba survey these land exchange parcels. This time the BCR was sent to DIAND for transmittal to the Provincial Attorney General. On November 15, 1982, Mr. Winstone wrote to DIAND expressing some concerns about one of the sites and reported that he would be seeking Cabinet approval to have another site surveyed.[129]

In the fall of 1982, with funding negotiated from Canada, the NFC commissioned a Land Exchange and Land Use Study for all five NFA First Nations. The purpose of the study was to determine suitable land exchange areas and recommend hold areas. Mid way through this research, March 1983, Manitoba notified Cross Lake First Nation that they had seriously underestimated the quantum of easement land and as a result the land exchange entitlement increased from 11,720 to 35,321 acres. Following twelve months of community consultation and intensive study, both exchange lands and hold areas were identified, only subject to final ground inspection. The final report for all five communities was transmitted to Manitoba and Canada on October 12, 1983.

[128] Ibid.

[129] Ibid.

6.7.4 Claim #43

Some six years had passed since the NFA was ratified, the NFC had identified all exchange lands and hold areas, no exchange lands had been transferred to any First Nation, and the NFC had waited five months for a response to its October 12, 1983 study. Consequently the NFC and all five NFA First Nations filed claim #43 on March 6, 1984. The basis for Claim #43 includes the following assertions:[130]

≅ Manitoba failed and refused to respond to the land exchange and hold area proposal;

≅ Manitoba failed and refused to contribute towards the cost of the NFC Land Exchange and Land Use Study;

≅ As a result, the First Nations have been disabled and delayed in selecting exchange lands pursuant to Article 3.3, in an effective manner or at all;

≅ Manitoba failed to provide estimates of land exchange entitlements and to complete the survey of shoreline easements on the Reserves;

≅ Manitoba provided misleading and inaccurate estimates of the quantum of Cross Lake's Article 3 entitlement which resulted in additional expense and delay to the NFC and Cross Lake First Nation;

≅ Manitoba imposed restrictions to the selection of exchange lands which are not permitted by the terms of the Agreement which caused difficulty, delay and confusion in the selection of exchange lands;

≅ Manitoba failed and refused to transfer certain selected lands in breach of the provisions of Article 3.3 of the Agreement;

≅ Manitoba failed to undertake legal surveys of Reserve lands and land exchange parcels;

≅ Manitoba failed to establish Hold Areas pursuant to Article 4 of the NFA.

A period of two years passed before any further Article 3 and 4 discussions took place between the NFC, Canada and Manitoba. In April 1986, the Province presented a draft discussion paper to the NFC which included general principles regarding the selection, survey and transfer of Reserve lands and comments and conditions in respect of the land selections identified in the NFC's October, 1983 Land Exchange and Land Use Study.

Of the 112 sites selected by the five First Nations, the Province indicated that 94% of the sites representing 91% of the total acreage selected were available for transfer. Seven sites were not

[130] Claim #43 "Points of Claim" March 6, 1984.

available primarily for reasons concerning requests by the licensed timber company for access roads, transmission line corridor rights of way, and land requirements of Manitoba

Hydro. Manitoba also recommended consolidation of some parcels and realignment of boundaries to accommodate existing and future rights of way.[131]

Joint NFC/Manitoba on-site inspections of land selections occurred in the fall of 1986. Following this, progress was negligible. Several more years passed without progress when in October, 1988, an "Article 3 Land Transfer Working Committee" with representatives from the NFC, DIAND, and Manitoba was formed to work towards implementation of Articles 3 and 4. Once again the NFA First Nations prepared BCR's requesting transfer of specified land exchange parcels. For example, on October 18, 1988, Cross Lake First Nation requested by BCR the transfer of 21 parcels totalling approximately 11,445 acres. A letter was received three months later on February 10, 1989, from Mr. Rolf Zimmer, an officer of DIAND's Native Land Claims branch, responding on behalf of Manitoba. Manitoba, he indicated was prepared to transfer 17 of the land selections; 5 free and clear of encumbrances; 8 requiring designation of shoreline hydro easements; and 4 sites with other encumbrances and exclusions for public purposes. Four sites were not considered suitable at all for transfer.[132]

During the period 1988-1990, the Comprehensive Negotiation Process was ongoing. The PBS dated October 25, 1990, included a "new" land offer which would replace the provisions of Articles 3 and 4. Further, it proposed replacing the land exchange and hold areas identified in the 1983 Land Exchange Study with a combination of several large blocks of new Reserve land, primarily in the vicinity of the existing Reserves.

The PBS offer stated: ***"Manitoba proposes an alternative approach to land transfer and land use comprising: (a) blocks of Reserve status land near existing Reserves larger than those previously selected or available under the NFA. (2) other parcels selected by the Bands to be available on a permit or fee simple basis at the Band's option; and (3) negotiation of joint resource management regimes for traditional resource use areas including establishment of wildlife harvesting priorities, forest harvesting and renewal, and accommodations on mineral developments (an alternative for NFA Article 15)."***[133]

With respect to the more remote exchange land selections that the NFA First Nations had strategically selected for their resource and or cultural importance, the offer stated;

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[131] D. Witty, Hilderman Witty Crosby Hanna & Associates, Winnipeg, to Mr. C. Gillespie, Taylor Brazell McCaffrey. Dated April 22, 1986.

[132] "Cross Lake Claim 43, Retroactive Compensation, DRAFT." Prepared by Hilderman Witty Crosby Hanna & Associates. July, 1993.

[133] "Proposed Basis of Settlement of Outstanding Claims and Obligations". Presented by Negotiators for Manitoba Hydro, Canada, Manitoba and the Northern Flood Committee. October 25, 1989.

"Manitoba will make available most of the Bands' earlier selection, but as lands under permit with transfer to fee simple, rather than as reserve lands." "Concurrent with the transfer of fee simple titles to Band controlled corporations, Manitoba will undertake to replace any land expropriated in the future with other similar lands as an option of the Band in lieu of financial compensation."[134]

The entire PBS offer was rejected by Cross Lake, Nelson House, Norway House and York Landing First Nations in late summer of 1990. Some seven years had passed since the NFA First Nations had made their 1983 land selections. Once again, by way of example, Cross Lake First Nation undertook a review of their original selections and found that several sites had been affected by forest fire and a few sites had been affected by various land use activities (eg. tree cutting and gravel extraction). On February 15, 1993, a new BCR was adopted which requested the immediate transfer of 19 parcels and established priorities for survey of selected sites.[135]

In late 1991 negotiations between the NFC, Manitoba and Manitoba Hydro on land related issues occurred. It was the position of the NFC that because exchange lands provided for in Article 3 had never been received, Manitoba Hydro in effect illegally been using Reserve land since on or about December 16, 1977 and perhaps before that date. The NFC attempted to negotiate monetary compensation for past use of Reserve land and failure by the Parties to transfer the exchange lands. The Parties could not agree on the quantum for settling the Article 3 issue and negotiations were abandoned shortly into the new year.

At the time of writing, sixteen years have passed and Manitoba has not yet transferred the exchange lands pursuant to Article 3, nor have any Article 4 exclusive use permits been issued.

6.8 Resource Management and Harvesting

6.8.1 Wildlife Advisory Planning Board

Establishment of the Wildlife Advisory and Planning Board (WAPB) pursuant to Article 15.5 occurred quickly after NFA ratification. By November of 1979 ten First Nation members and a member each from the Thompson Wildlife Association, the Manitoba Metis Federation, and the Norman Regional Development Corporation had been appointed to the Board. Total WAPB membership included 13 voting Board members and a number of non-voting members including 3 Provincial representatives in an advisory capacity and DIAND with observer status.[136] Initially the NFC had requested membership on the Board but was told by Manitoba that it could attend

[134] Ibid.

[135] "Cross Lake Claim 43, Retroactive Compensation, DRAFT." Prepared by Hilderman Witty Crosby Hanna & Associates. July, 1993.

[136] D.G. Tomasson, Assistant Director, Agreements Management and Coordination Division, Manitoba Department of Northern Affairs, to Chief N. Scribe, President, NFC. Dated October 15, 1979.

meetings as an observer but it would have to pay its own expenses.[137] Thus, Manitoba met its obligations to establish a WAPB with majority First Nation representation.

Pursuant to the NFA, the mandate of the WAPB is to consider and recommend on all matters affecting wildlife within the Resource Areas. Specific examples of the WAPB mandate included monitoring wildlife resources, advising as to overabundance of any species, advising as to maximum kill of overabundant species, encouraging the annual harvest of resources and formulating and recommending works and programs consistent with protection and perpetuation of wildlife resources. These provisions suggest that the WAPB would jointly assist in the management of wildlife resources.

Attempts by the WAPB to Define its Role

The WAPB held its first meeting on December 4, 1979.[138] During the course of the following seven years the Board met every six to eight weeks. During this time there was continuing disagreement about the appropriate role of the Board. It was the position of the NFC as early as 1978 that the NFA effectively transferred ***"to the W.A.B. (sic) the management of wildlife resources in the Resource Area."***[139]

On March 20, 1980 at a WAPB meeting, the Province advised that the function of the Board was to make sure the Province, trappers and fishermen were all involved in resource management by discussing, negotiating and dealing with problems in a joint fashion. In the Provinces opinion, however, it had no obligation to follow advice provided by the WAPB.[140]

During the period from 1979 through to about 1984, the WAPB provided a forum for discussion about Project impacts, for the First Nation members to inform the Province that outside tourists were hunting and fishing in their Resource Areas, and for discussion about relevant wildlife harvesting regulations and policies. Although outside its prescribed mandate, the WAPB pursued and was eventually successful in pushing Manitoba to train and employ local First Nation persons as Wildlife Conservation Officers. By 1983 seven local people were trained and employed by the Department of Natural Resources.[141] The WAPB recommended and then passed by resolution a

[137] D.G. Tomasson, Assistant Director, Agreements Management and Coordination Division, Manitoba Department of Northern Affairs, to J. Keeper, Executive Director, NFC. Dated September 20, 1979.

[138] WAPB Meeting Minutes. December 4, 1979.

[139] Status Report on the Wildlife Advisory and Planning Board. Prepared by Lang, Michener, Lash, Johnston Law Office, for the NFC. Dated June, 1989.

[140] WAPB Minutes of March 20, 1980.

[141] WAPB Minutes of July 7, 1983 Meeting.

request that Manitoba carry out wildlife monitoring studies on a variety of species.[142] The only wildlife monitoring studies carried out by Manitoba pursuant to recommendations of the WAPB have been moose surveys.

Minutes of WAPB meeting held April 29, 1982, indicate an NFC consultant pointed out that the WAPB had no legally enforceable rights, other than for funding and expected that the WAPB would have adopted a clear definition of Article 15. It was noted that both Manitoba and Hydro lacked implementation procedures for dealing with recommendations of the WAPB. Beginning in mid-1984 the WAPB began expressing frustration that its recommendations and resolutions were not being taken seriously or acted upon.[143] In 1986 the Board passed the following resolution;

> ***"Whereas the Northern Flood Agreement has established a Wildlife Advisory Board Section 15-5 to consider and recommend on all matters affecting wildlife in the resource area and whereas the Province has failed to meet the requirements of Section 15-3-2 to establish meaningful consultation with the Wildlife Advisory Board and Whereas the Wildlife Advisory Board is required to exercise its mandate under Section 15-5 of the Agreement and work towards joint management, Therefore be it resolved that the Province of Manitoba instruct the Minister responsible to involve the Wildlife Advisory and Planning Board in all matters affecting wildlife in the resource areas defined in the N.F.A."***[144]

On January 9, 1986, the WAPB passed a resolution requesting access to a facilitator at Manitoba's expenses to assist the Board in developing an action plan. At their May 15, 1986 meeting the Board passed another resolution requesting Manitoba commission a study to clarify the mandate of the Board. File review indicates that Manitoba did not respond to any of the Board requests or resolutions.

The NFC independently commissioned a review of the WAPB in 1986. [145] Recommendations for improving the function of the Board included that;

≅ a formal agreement should be established to fix formal representation to the Board;

≅ an independent secretariat for the WAPB be set up;

≅ Cree translation was necessary at meetings;

≅ the honoraria paid to WAPB members was inappropriate;

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[142] WAPB Minutes of August 12, 1982 Meeting and September 14, 1982.

[143] For example WAPB minutes of June 8, 1984, May 1, 1985, and January 23, 1987 minutes.

[144] Wildlife Advisory and Planning Board. February 20, 1986 Meeting Minutes.

[145] Environmental Consultants, Inc. to NFC. Dated December 10, 1986.

≅ independent technical assistance was needed by Board.

In July of 1988 the WAPB Chairman, WAPB secretary, and a member of the Provincial Wildlife Branch reviewed the progress of the WAPB and concluded improvements such as better understanding, better communication and better information were needed. Suggestions for improving the role of the WAPB included: use of a translator and facilitator; meetings with Ministers; special workshops and plain talk about joint management; create new topics; recommend policy and law; time WAPB meetings to be in step with DNR Seasons Meetings; hold WAPB meetings in communities rather than Thompson; have DNR explain its programs; develop management plans; send resolutions directly to the Ministers; invite experts to make presentations to the Board; examine other joint management agreements; keep regular members and advisors.[146]

In 1989 legal counsel to the NFC, Lang Michener, summarized the record of the WAPB as follows:

> ***"There were continuing difficulties in agreeing on the appropriate financing and provision of resources for the Board, particularly in regards to obtaining funds for consultants to advise the Board, for seminars relating to wildlife issues and for simultaneous English-Cree translation. The history of the Board indicates a continuing disagreement about the appropriate role of the Board. The Bands sought to use the Board to achieve specific objectives and to implement specific recommendations related to wildlife, but in fact the recommendations provided by the W.A.B. to the Province were often not acted upon or even replied to by the Province."***[147]

Apart from translation equipment being provided at some, but not all, WAPB meetings, none of the functional recommendations developed during the period 1986 through 1989 have been implemented.[148]

Attempts by the WAPB to Develop a Joint Management Framework

In 1985 the idea of framing a joint wildlife management agreement was conceived. In June of 1985 the NFC presented a paper to the WAPB calling for joint First Nation/Provincial management of all resources within the Resource Areas. In part it said;

> ***"In combination, the provisions of the NFA reflect: the concern of all parties for the protection and expansion of the Indian economy and environment to the greatest extent possible, and a summary of Band rights with regard to resource allocation,***

[146] NFC Files, WAPB July 1988.

[147] Summary of Status Reports and Legal Opinions Concerning: Employment Task Force, Schedule 'E' and Wildlife Advisory and Planning Board. October 16, 1989. Document prepared for the Northern Flood Committee.

[148] Mr. H. Folster, Chairman, WAPB. Personal Communication. November, 1993.

development and management for which the Bands understood they had won acceptance by the other parties through the signing of the NFA. Many proposed NFA implementation mechanisms, including the WAPB, were designed and interpreted by the other parties consistent with their 1977 understanding of the powers and responsibilities of Indian Bands. This represents an outmoded view of Indian participation, given the evolving concept of Indian self-government and self-reliance. Indian self-determination is largely contingent upon control over their land and resources. A joint management scheme is one step towards realizing the twin goals of self-government and self-reliance."[149]

"When the NFA provisions concerning land exchange are effected and the Bands gain access to their treaty land entitlements, the NFA Bands will become the largest landowners, next to the crown, in the affected area. This simple geographic fact is another practical consideration in giving the Bands a strong voice in governing regional land and resources. This joint management approach permits an effective and fair implementation of the land and resource entitlements in the NFA. Indian control is increasingly being seen as an integral component of the provisions of the NFA and the present resource management mechanism does not provide for sufficient Indian involvement and control over their resource base."[150]

The Province responded that while it generally supported the concepts advanced it emphasized that *"the final responsibility for the management of Crown resources rests with the Minister designated who accepts advice from users and professionals alike."*[151]

Resolutions advising Manitoba of the value of joint management were passed by the WAPB on September 1, 1986 and again on February 20, 1986. On May 11, 1987, the WAPB agreed that joint management was desirable and necessary and proceeded to hold a workshop on July 10-12, 1987.

In September of 1987, the NFC again tabled with the WAPB a framework for a joint land and resource management regime based upon existing Treaty and NFA rights. The Provincial response was that the NFC proposal addressed matters which did not;

"relate to the N.F.A., the N.F.C., or the W.A.P.B., but to the much larger constitutional topic of aboriginal and treaty rights. It is a matter than must be considered and resolved in relation to all Indian Bands, not just those that are party to the N.F.A. The mandate of the W.A.P.B. is limited to the recommendations to all parties to the agreements as to how wildlife of the resource area can best be managed to the benefit of both Band members and other resource users. I am very hopeful that the W.A.P.B. can fulfil its

[149] Northern Flood Committee. Presentation to Wildlife Advisory and Planning Board. "Northern Flood Agreement - Land and Resource Management and Development." June, 1985.

[150] Ibid.

[151] "Management of Lands and Resources, June 1985 Presentation - Initial Response, Department of Natural Resources" no date.

mandate and recommend to all parties to the N.F.A. a form of wildlife resource management that will meet the needs and desires of the bands while continuing to enable Manitoba to meets its responsibilities to all Manitobans."[152]

The NFA Chiefs' response to this Provincial position was;

"We are disappointed by your response. We believe that you and your colleagues have not given adequate weight to the special provisions of the Northern Flood Agreement Bands in regard to resource areas under the Northern Flood Agreement. It is our belief that these provisions (Article 15) of the Northern Flood Agreement do provide entitlements to the Northern Flood Agreement Bands that place them in a position superior to other Bands that can rely only on their aboriginal and treaty rights. We believe that the Northern Flood Agreement requires the development of resource management arrangements and processes that recognize and build on the particular entitlements of the Northern Flood Agreement."[153]

A draft joint management agreement collaboratively drafted by the WAPB and Department of Natural Resources advisors was tabled in the early fall of 1988. The draft agreement expanded the role of the WAPB as well as included a WAPB constitution. This document was not endorsed by the NFA Chiefs primarily because joint management was a matter for NFA communities and because the WAPB was not exclusively of Treaty membership, the agreement as proposed would grant Treaty and NFA rights to non-Treaty groups, the proposal was deemed premature since there was no consensus amongst the NFA parties as to the meaning of Article 15, and finally, the Chiefs pointed out the WAPB had neither resources or funding to implement the proposal.[154]

In late 1988 the NFC tabled another joint management regime with the WAPB. Essentially this proposal called for an independent management authority responsible for the design and implementation of measures for the preservation, protection, enhancement, use and allocation of all lands and resources within the NFA First Nation Resource Areas. The Authority would be overseen, managed and controlled jointly and equally by persons appointed by the NFC and Manitoba. The Authority would operate within the limitations imposed by statutes of Manitoba and Canada. The Department of Natural Resources response was;

"... you will be pleased to know that Manitoba is taking the initiative in this area to prepare its own proposal regarding wildlife resource management plans. With regard to the particulars of your letter, Manitoba cannot agree that it would be appropriate to delegate 'authority to control harvests, control habitat and control selected factors affecting wildlife species' as well as to provide for the transfer of 'executive control

[152] The Honourable E. Harper, Minister of Northern Affairs, Manitoba, to the Five NFA Chiefs. Dated November 26, 1987.

[153] Chief R. Spence, President of the NFC, to The Honourable E. Harper, Minister of Northern Affairs, Manitoba. Dated February 4, 1988.

[154] Chief A. Ross, Acting Chairman, Northern Flood Committee Inc. to Mr. Hubert Folster, Chairman, WAPB. Dated January 17, 1989.

of staff and program to the delegate'. You should also recognize that, while such arrangements may have been agreed to in some jurisdictions, it would be unreasonable to expect that Manitoba would consent to the delegation you propose over the estimated 25 million acres of crown land involved. If for no other reason, this would be problematic as the NFA requires that Manitoba manage area resources so as to ensure that 'all' permanent residents living in or near a resource area continue to have access to wildlife resources."[155]

Since 1990, the concept of joint management has not been discussed either by the NFC with the other NFA parties, nor at the WAPB level.

6.8.2 Priority Rights and Allocation

NFA First Nation members were granted, as a matter of policy, priority rights to all wildlife resources within the Resource Areas. Article 15 also affirms the rights of existing users and other northern Manitoba residents. In 1977, many Aboriginal people residing in the off-Reserve communities held commercial fishing and trapping licences and a number of non-Aboriginal individuals resident in northern Manitoba held commercial fishing and sport fishing/hunting lodge licenses for lakes inland from the regulated waterways. These individuals have continued to utilize the resources. Generally speaking, both NFA First Nation members and others have continued to share in the wildlife resources of the area with relatively little conflict.

Typically, the First Nations' and/or the WAPB have been notified by Manitoba when a non-NFA person/organization has expressed interest in a permit or license to utilize wildlife resources. The First Nation is given the opportunity of first refusal, however, if the First Nation did not have the financial resources to acquire the license, the Province typically granted the right to the applicant.

There has only been one allocation issue brought to arbitration. In 1992, the Arbitrator made a very clear ruling on the meaning of priority right under Article 15. In this case, a non-Aboriginal person who had held a fishing quota on three inland lakes in the Norway House Resource Area expressed desire to sell his licenses. Manitoba notified Norway House First Nation that the licenses were available. Norway House took the position that the right to fish these lakes was provided for under the NFA and therefore it was unnecessary for the community to have to purchase the right to fish these lakes. Manitoba approved the sale of the licenses to an individual from Cross Lake First Nation. In response, Norway House First Nation filed a claim against Manitoba.

The Arbitrator ruled he cannot order Manitoba to change its policy which allows individual licensed fishermen to sell their quota. He did however examine whether the Province had lived up to its NFA promise to grant first priority to wildlife resources. He found that because the Cross Lake member to whom the license was issued did not have a right to fish the lakes in 1977 (an

[155] Mr. L. DuGuay, Manager, Northern Flood Agreement, Manitoba Department of Northern Affairs, to Chief A. Ross, Acting Chairman, Northern Flood Committee. Dated February 13, 1989.

existing right), the Province was in breach of Article 15.3. He also ruled that a person with an existing right in 1977 could not transfer that right through sale. He stated;

> ***"The 'proprietary interest' that exists under the Province's policy exists to further certain policy objectives. The Province's capacity to make policy and to change its policy is not at issue. The issue as I see it is simply whether the Article 15 policy provisions have been infringed upon by the policy that seeks to recognize a fisherman's 'proprietary interest' in his or her license as it has been applied by the Fisheries Branch to the reallocation of lakes. I am unable to accept that the "present right at law" referred to in Article 15 is an interest of the sort that can be said to flow from Mr. ... to the subsequent license holder and I must conclude that the Province, by issuing a license to Mr. ..., acted in a manner that was inconsistent with the Article 15 policy provisions. Offering a right of first refusal, or in any other way requiring the Band to pay, either directly, or indirectly out of the funds allocated for a fishing program, for a 'proprietary interest' that exists only within the framework of another more general Fisheries policy does not comply with the Province's policy obligations under Article 15. The breach of Article 15 leaves the Province liable to damages to the extent set out in Article 14."***[156]

Of particular significance to all future wildlife allocation concerns, the Arbitrator's interpretation of Article 15 was;

> ***"Applied to the present case, it would appear that damages would be appropriate if the policy contained in Article 15, namely the promise to restrict access to wildlife in the Resource Area as discussed above, is considered to be a project related compensatory benefit flowing to the Band. It appears to me that the Article 15 policy is by it nature a form of project related compensation. It amounts to a compensatory benefit flowing to the Band which is intended to give the residents of the Reserves first priority in the Resource Area as defined in the NFA."***[157]

The Arbitrator ordered Manitoba to pay Norway House First Nation the net income losses they did not achieve during the period that the Cross Lake resident held the license and to continue paying such losses until such time as Manitoba revokes the license. Manitoba has filed an appeal in the Manitoba Court of Appeal.

Allocation of wildlife resources is becoming a substantial issue as the communities negotiate Article 15 and Article 19 programs. The NFA communities carried out their subsistence fishing activities in close proximity to the Reserve in waters now regulated by the Project. Because of the damage to subsistence fisheries, the communities are attempting to negotiate programs which will allow them to financially and logistically access additional resources, most particularly from lakes within their Resource Areas that are not affected by the Project. Most of the inland lakes are commercially fished by non-NFA residents.

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[156] NFA Arbitration Claim #162. Award of the Arbitrator. September 14, 1992.

[157] Ibid.

For example, protracted negotiations and an arbitration hearing on the matter of sturgeon resources in the Cross Lake Resource Area led to Manitoba buying out all the commercial sturgeon fishing license holders at Cross Lake and downstream as both a conservation measure and for re-allocation of the resource to subsistence use.[158]

Norway House First Nation has recently developed a subsistence fishing program which will provide incentive for families to travel to inland lakes to acquire a supply of fish. Manitoba has expressed concern about the community fishing at lakes where Manitoba has issued commercial fishing and sport fishing lodge licenses. While Manitoba recognizes the Aboriginal right to harvest, and is acutely aware of the Supreme Court of Canada decision in *Sparrow,* it is not willing to contribute dollars to Article 19.4 programs which will allow domestic fishing on these lakes.

Given the Arbitrator's interpretation of Article 15 and recent court decisions, allocation issues under the NFA are likely to become more pronounced in the near future.

6.8.3 Encouragement to Harvest

Some nine years passed before negotiations started on programs to encourage the use of the community traplines and to encourage fishermen and trappers to pursue hunting, fishing, and trapping activities. These negotiations were initiated by the First Nations and resource harvesting organizations when the Parties did not respond to claims filed in 1984. Because the encouragement component is inextricably linked to compensation and mitigation, all three are discussed in the following section of this report.

6.9 Mitigation and Compensation

Obligations in respect of mitigation and compensation were identified in Section 5.4(D) of this report.

An evaluation of progress toward implementation of Articles 5, 12, 13 and 19 presents several difficulties. First, while the Agreement generally obligates Manitoba and/or Manitoba Hydro to address and ameliorate Project induced problems on navigation, access, and harvesting activities, few specific actions are defined. For example, Article 12.5.8 obligates the Parties to provide alternate transportation facilities but it does not say under what circumstances, when or how.

Secondly, Articles of the NFA do not stand alone, rather they are inextricably linked, and thus implementation of a particular provision of one Article necessarily means progress in another. The same holds true for the claims. For example, improvements to navigation (Article 5) also represents a mitigation effort under (Article 19).

[158] Authors personal knowledge.

Third, in many cases implementation occurred as a result of the claims process which resulted in settlements involving a combination of compensation and mitigation. For example, implementation of Article 19.4 in respect of domestic fishing at Cross Lake was achieved in 1990 through the settlement of a claim which provided monetary compensation for the period 1977-1990 and a combination of compensation and mitigation for a future four-year program.

Finally, there is no formal record in existence that documents what obligations/actions have or have not been fulfilled and why or why not, when or by whom. Nor has there been any evaluation conducted on whether remedial or mitigation measures implemented to date have been effective.

Combination of the above factors makes it particularly difficult to describe with any degree of precision what exactly has happened in respect of implementation. The balance of this section examines the implementation record in respect of clearly defined NFA provisions followed by a general description of mitigation and compensation prior to 1984 (i.e. voluntary implementation) and after 1984 (i.e. claims filed).

6.9.1 Specific Obligations

A) Review of Registered Trapline Program (Article 19.2)

Discussions between the NFC and Hydro regarding review of the Registered Trapline Program (RTP) began in late 1980, a year before the five year program was to expire. Manitoba Hydro proposed establishing a review team consisting of four members representing the NFC, Manitoba Registered Trappers Association, Manitoba and Manitoba Hydro. The purpose of the review team was to determine which traplines were still impacted and to make recommendations regarding continued assistance and/or remedial measures. The team was to complete its review by August, 1981.[159] The NFC felt it should have greater representation on the review team and suggested that the WAPB perform the review.[160] Apparently the review was neither conducted by a review team as suggested by Hydro, or by the WAPB and appears to have been conducted unilaterally by Manitoba Hydro.

Manitoba Hydro's approach to the RTP review was to utilize fur production records as a sole measure of adverse impacts to trapping. Simple criteria were applied. If a trapper had not trapped at least three out of the five years under the RTP or had production levels equal to his pre-project average for three of four defined aquatic species, Hydro surmised that the Project was no longer causing an impact and decided the trapper would no longer be eligible for compensation.[161] The net result of Manitoba Hydro's RTP review was that it proposed to terminate

[159] Proposed Five Year Review of Trapline Program. Manitoba Hydro. November 27, 1980.

[160] Chief G. Ross, Cross Lake, to Chief R. Spence, Chairman, WAPB. Dated December 15, 1980.

[161] D.B. Sinclair, Director, Production Division, Manitoba Hydro, to J. Keeper, Executive Assistant, NFC. Dated October 23, 1981.

compensation payments to 121 of the 147 trappers originally part of the program.[162] No record of response by the trappers or NFC was located, however, Manitoba Hydro terminated all payments in 1981. A total of $425,760 (nominal dollars) was paid out to trappers during the period 1976-1981 (Manitoba Hydro 1992).

No further payments were made to trappers for three years and in 1984 trappers from each of the five communities filed claims against Manitoba and Manitoba Hydro for failure to negotiate and implement Article 19.2 trapping programs and for compensation for past losses.

B) Removal of Causeway Near Cross Lake (Article 5.2).

During construction of the access road to the Jenpeg facility in 1973 a causeway was built across the Minago River blocking a navigable waterway utilized by members of the Cross Lake First Nation to access traplines and hunting areas to the south and west of the community. Manitoba and/or Manitoba Hydro was to have removed the obstruction within two months of NFA Ratification which would have been May, 1978. With the causeway in place, access into the Minago River required portaging equipment and boats/skidoos up steep banks covered with sharp crushed rock. Sometime in 1979, a small underpass was inserted into the causeway, but because of the fast flowing water created by the damming effect of the causeway, navigation was still hazardous.[163]

On June 3, 1982, Cross Lake First Nation filed a claim against Manitoba and Manitoba Hydro alleging that Manitoba had not removed the Minago River causeway within the agreed upon time limit, that free and natural navigation of the river had been obstructed and as a consequence community members had suffered additional expense and effort, loss of time, damage to property, and reduced harvest success. They sought an order from the Arbitrator directing that Manitoba remove the obstruction and pay damages for failure to comply or give effect to Article 5.2.[164] Subsequent to the filing of the claim Manitoba constructed a bridge over the period 1984-1987. By February of 1988, the Arbitrator issued a final order directing Manitoba and/or Hydro to pay $235,000 for past damages.[165]

By 1988 the newly constructed bridge was settling into the river once again forming barrier to free and normal navigation. Manitoba attempted various repairs during the next two years and eventually had to close the bridge for major repairs. By 1991 the renovated bridge was open. During the entire time from 1988 through 1991 navigation under the bridge was dangerous.[166] On February

[162] Trapline Compensation Program 1975 - Analytical Review. Manitoba Hydro. September, 1981.

[163] Arbitration Claim #24. Affidavit of Walter Monias. Dated June 8, 1982.

[164] Arbitration Claim #24. Points of Claim. June 3, 1982.

[165] Arbitration Claim #24. Final Order 24-2. Dated February 11, 1988.

[166] Arbitration Claim #152. Affidavit of Ernest Scott. October 2, 1992.

9, 1993 Cross Lake First Nation filed another claim against Manitoba for losses associated with obstruction to navigation during the period 1988 through 1991 and asked the Arbitrator to order Manitoba to pay damages.[167] The claim is still pending.

C) Removal of Causeway on Footprint River (Article 5.2)

Residents of Nelson House First Nation accessed hunting, fishing and trapping areas north of the community via the Footprint River. Prior to the Project the river was navigable. Flooding caused by the CRD required the construction of a large causeway at the site where provincial highway #391 which joins the towns of Thompson and Lynn Lake crosses the Footprint River. In 1975/76 Manitoba constructed a 40 foot high rock-filled causeway with steep grades. This structure was a substantial obstruction to anyone attempting to navigate the river. Between 1975 and 1982 the causeway created dangerous conditions for Nelson House residents. A number of claims for equipment damage and personal injury were filed. (ID Systems Ltd. 1982).

The Premier of Manitoba told the community at a workshop in the Fall of 1976 that the Province would build a bridge. The existing causeway was in violation of the Navigable Waters Protection Act.[168] Under Article 5.2 Manitoba was to have removed the Footprint River causeway within two months of the NFA being ratified; the deadline was May of 1978. Three years later the causeway was still in place and Nelson House First Nation filed Arbitration claim #14 in October of 1981. Six months later the Arbitrator ordered that Manitoba retain a consultant to investigate and assess the impact of the causeway and recommend measures to improve navigation.[169]

Manitoba removed the causeway and replaced it with a bridge in 1987 and paid the community $210,000 in damages (Department of Indian Affairs and Northern Development 1989).

D) Notigi Portage Facility

Pursuant to Article 5.6 Manitoba Hydro agreed to construct and maintain a portage facility at the Notigi Dam so as to enable free and safe navigation of the Burntwood River. The clause did not specify a deadline for undertaking the obligation. A sum of $125,000 ($1977) was made available to Nelson House First Nation under Schedule G to construct landing facilities, docks and a portage at the Notigi site. Upon review of available files, it is not clear what, if any, work was undertaken with these funds.

In November of 1981, Nelson House filed Claim #17 against Manitoba Hydro alleging failure to comply with Article 5.6. In 1982, Manitoba Hydro investigated various options for improving navigation. Remedial measures included two options: Hydro would construct a shelter

[167] Arbitration Claim #152. Points of Claim. Dated February 9, 1993.

[168] C. Gillespie, legal counsel to NFC, to J. Keeper, Chairman, NFC. Dated December 11, 1981.

[169] Arbitration Claim #14. Interim Consent Order 14-2. April 22, 1982.

on either side of the dam equipped with a telephone so that boaters could call on-site Hydro personnel who would then load the callers boat and equipment and deliver it to the other side of the dam. This service, estimated to cost $30,000 ($1982) in capital and $1,000 per annum, was to be available six days a week. The second option involved construction of a mechanical tramway and boat cradle which could be self-operated. This option was estimated to cost between $230,000 and $427,000. Manitoba Hydro recommended the cheaper option.[170]

Some six years passed without any remedial works being undertaken. In 1988, Manitoba Hydro commissioned a consultant to investigate options for a portage facility combined with a recreational camp site (Hilderman et.al. 1988). A year later, Nelson House First Nation commissioned another study which estimated the total cost of constructing a camp site/portage facility would be in the order of $1.1 million (Courtnage and Company Architects 1989). At the time of writing, the dam remains an obstruction to navigation and none of the recommendations suggested by consultants retained by either Manitoba Hydro or the First Nation have been implemented.

E) Construction of Weir at Cross Lake

Article 10.2 states that it may be appropriate for Manitoba Hydro to construct a control structure at or near the outlet of Cross Lake to prevent the occurrence of low water levels and to restore to the extent practical, the natural pattern of seasonal fluctuation in lake level.

In 1984 Manitoba Hydro offered Cross Lake First Nation $8 million in lieu of constructing a weir.[171] This offer was rejected. The weir was built in 1991 at a reported cost of about $9 million (Manitoba Hydro, 1992).

6.9.2 Pre 1984 "Voluntary Implementation"

Over the course of the past sixteen years Manitoba Hydro has processed and paid out over $2 million in respect of some 3,000 non-arbitration claims and 56 arbitration claims filed by individuals. The bulk of these claims have been for damage to or replacement of skidoos, boats, motors, cabins, docks, trapping equipment or fishing nets. As of March, 1992, Manitoba Hydro reports it has spent $31 million[172] on NFA implementation; a value significantly greater than its original estimate of $16-$20 million to fully address mitigation and compensation (Manitoba Hydro 1992).

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[170] A.T. Suchak, Law Department, Manitoba Hydro, to C. Gillespie, Legal counsel to the NFC. Dated May 12, 1982.

[171] C.J. Goodwin, Executive Manager, Corporate Planning, Manitoba Hydro and L. Jolson, Assistant Deputy Minister, Manitoba Department of Northern Affairs, to Chief W. Monias, Cross Lake Indian Band. Dated November 23, 1984.

[172] Figure does not include $6.3 million paid out to Split Lake First Nation under the PBS.

In respect of compensation paid out prior to the filing of Article 15 and 19 claims, the Utility reports payments as follows (Manitoba Hydro 1992):

Trapping - $2.38 million for compensation to trappers under the RTP, trail clearing, and a safe trail and ice marking program.

Fishing - $157,000 for replacement of fishing nets and $329,436 in respect of income subsidies and transportation to Cross Lake fishermen.

With respect to remedial work obligations under Articles 5, 12 and Schedule G, Manitoba Hydro reports expenses as follows (Manitoba Hydro 1992):

- docks, community and private $ 750,000
- shoreline clearing, protection, debris removal $3,234,653
- navigation, portages and landings $ 505,581

$4,490,234[173]

6.9.3 Article 15 and 19 Claim Based Actions

Under the terms of Article 19, the Parties were to negotiate and Manitoba and/or Manitoba Hydro were obligated to compensate trappers and fishermen for all direct and indirect losses experienced prior to and after 1977 and implement programs to encourage the fishermen and trappers to continue fishing and trapping. Article 15.8 called for negotiation and implementation of a community trapline program. In 1984, the commercial fishermen and trapping organizations in each NFA community filed claims alleging failure of the Parties to negotiate and failure of Manitoba and/or Manitoba Hydro to implement programs. As well, all five First Nations filed a single claim alleging failure to compensate the communities for losses in respect of domestic fishing activities and failure to implement a program. Two claims were filed in respect of performance failures under Article 15.8 (i.e. 4 First Nations filed a joint claim and Cross Lake filed its own). In total, 11 claims were filed.[174]

In July of 1984, Manitoba and Manitoba Hydro offered to resolve all of the resource harvesting and remedial works claims for a total sum of $20.7 million in exchange for full and final release of all past and future obligations. The communities were offered $9 million in regard to Articles 15.8 and 19.[175] The offer was rejected by the NFC on the grounds that the amounts offered for past damages were not enough to address the losses experienced by the people and that compensation was not an acceptable approach to resolving future and continuing adverse effects of the Project.[176] A subsequent offer of $10.6 in regard to Articles 15.8 and 19 was also rejected by

[173] Figure does not include cost of Minago River or Footprint River bridges.

[174] Split Lake and York Landing commercial fishermen and trappers collectively filed claims.

[175] Manitoba/Manitoba Hydro Proposal for Settlement of all Resource Related Claims under the Northern Flood Agreement. September, 1984.

the NFC.[177]

During the period 1987 through 1989 the First Nations and commercial resource harvesting organizations retained legal and technical expertise under the cost order system and prepared proposals for resolution of outstanding compensation and programs for addressing Project impacts. All claims were eventually resolved by negotiation.

One of the primary difficulties encountered in negotiating compensation and mitigation has been a lack of evidence on all sides about nature, duration or magnitude of Project related impacts on resource harvesting activities. Usher and Weinstein (1991) state;

> ***"Data on household harvests by species, and if possible by edible weight, provide the most important indicator of subsistence income. Generally, these data result from surveys which are often done on the basis of informant recall. In the context of impact assessment, pre- and post-project data sets of adequate depth and consistency are required for comparative evaluation."***

Baseline or current information about subsistence resource harvesting activities or consumption levels in the NFA communities is lacking or incomplete (Usher and Weinstein, 1991). A continuous record of production by commercial fishermen and trappers exists, however, production records only indicate what was harvested and reported. They do not for example indicate the relative abundance of species, nor do they provide information about the cost or effort or change in cost or effort of harvesting activities.

Lack of pre- and post-Project information about the resource base and resource harvesting activities combined with a lack of either a comprehensive impact assessment or on-going environmental and socio-economic monitoring program, has resulted in significant information gaps. Evidence, required in adversarial proceedings, is most often simply not available. Oral evidence provided by elders is typically considered by the Proponents as "anecdotal" and not sufficient evidence to convince either the Provincial Cabinet or Manitoba Hydro Board of Directors. For this reason alone, resolution of the issue of past compensation and the nature of mitigation programs has been particularly protracted and adversarial.

A second factor contributing to difficultly in resolving claims and implementing programs of mitigation and/or compensation derives from the two very different positions held by the Parties in respect of the importance of resource harvesting activities dating back to 1977, and on-going differences of opinion regarding the meaning of and obligations of Articles 15 and 19. As pointed out earlier, the Proponents' view in 1977 was that resource harvesting activities contributed little to the local or regional economy and that the Cree lifestyle would decline and disappear regardless of whether or not the Project was built. The proponents argue that they are not obligated for all Project related declines or losses in harvesting activities because the importance of these activities would

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[176] Presentation by NFC Board to Provincial Cabinet Ministers. Chief W. Apetagon. August 14, 1984.

[177] Op.cit.

have declined anyway due to "modernization". The communities, on the other hand argue that the NFA obligated the Proponents to encourage them to continue harvesting, and that this aspect of their economy should have remained vital and sustainable with or without the Project.

A) Community Trapline Program (Article 15.8)

The First Nations retained legal and technical expertise around 1989[178] and submitted proposals for mitigation and compensation. Negotiations by Cross Lake, Nelson House and Norway House were concluded by 1993 resulting in settlements providing for retroactive compensation and short term mitigation programs (i.e. 5-7 year duration).[179]

As of 1993, total payments negotiated under the community trapline claims for Nelson House and Norway House have amounted to approximately $750,000 (Manitoba Hydro 1992 and Claim #36 Interim Orders No. 31A and 36-2).[180] The Programs in place primarily provide funds for implementation of locally developed traditional lifestyle skill school curriculums (both in class and in the field) with strong emphasis on elder-youth interaction, and apprenticeship programs for youths not in school.[181] In contrast, Manitoba and Manitoba Hydro in 1984 offered to resolve this claim for these two communities in perpetuity for approximately $110,000.[182]

B) Commercial Trapping Programs (Article 19.2 and 19.3)

The trapping associations in each community retained legal and technical expertise around 1987 and submitted proposals for mitigation and compensation. Negotiations were concluded by the end of 1989 resulting in settlements providing for retroactive compensation and short term mitigation programs (i.e. 5-7 year duration).[183] Each program is to be evaluated, revised and renegotiated at the end of its term.

The Article 19.2 programs contained the following components; grub stake and fur advance monies, trail improvements, safe ice route marking, equipment and transportation assistance fund, trapper education apprenticeship program, muskrat habitat improvement, cabin and radio funds, and administration. The settlement documents call for an evaluation committee to be struck, however, the programs have not been monitored or evaluated for their effectiveness.

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[178] Split Lake/York Landing initiated work on their claim but stopped during Comprehensive Negotiations.

[179] Author's personal knowledge.

[180] Value of Cross Lake First Nation community trapline program not known at the time of writing.

[181] Author's personal knowledge.

[182] Manitoba/Manitoba Hydro Proposal for Settlement of all Resource Related Claims under the Northern Flood Agreement. September, 1984.

[183] Author's personal knowledge.

As of 1992, total payments under the commercial trapping claims have amounted to approximately $3.32 million (Manitoba Hydro 1992). In contrast, Manitoba and Manitoba Hydro in 1984 offered to resolve these claims in perpetuity for an amount of $2.10 million.[184]

C) Commercial Fishing (Article 19.4)

Norway House commercial fishermen negotiated a settlement in the Fall of 1987 but not before several hundreds of thousands of dollars were spent both by Manitoba Hydro and the fishermen in collecting evidence to support their separate and sometimes apposing positions. Eventually, the fishermen negotiated a package including compensation for the period 1977-1987 and a three-year income subsidy program worth $2.2 million. Two subsequent interim income subsidy programs have been negotiated.

Project induced low summer water levels at Cross Lake resulted in a total collapse of the fishery. Since 1985, Cross Lake commercial fishermen have received annual compensation payments totalling approximately $676,000 (Manitoba Hydro 1992). In 1988, the fishermen negotiated a ten year compensation package which provides annual payments based upon an agreed formula.

In 1988, Nelson House and Split Lake commercial fishermen negotiated packages providing compensation for past income losses/loss of opportunity and one-year experimental programs. The programs provided for income support, equipment repair, docks, capital assistance, test fishing, administration and program evaluation. These programs were subsequently renewed on an interim basis.

As of 1992, total payments received by the commercial fishermen in compensation and as benefits under the Article 19.4 programs is approximately $5.17 million (Manitoba Hydro 1992). In contrast, Manitoba and Manitoba Hydro in 1984 offered to resolve these claims in perpetuity for an amount of $2.25 million.[185]

D) Domestic Fishing Programs (Article 19.4)

Cross Lake activated its domestic fishing claim in 1988 and after two years of negotiation succeeded in obtaining a package including $4.4 million in retroactive compensation and $1.5 million for a four-year program. The fact that the Project destroyed the fishery was never challenged by the Proponents, however, negotiations were adversarial. Discussions focused upon such issues as appropriate means to convert the lake quota from "whole weight" to "edible weight", appropriate proxy values to attach to the food value of the fish, and recognition of intangible recreational and cultural losses. As well, there was disagreement over the type of mitigation program to be implemented.

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[184] Manitoba/Manitoba Hydro Proposal for Settlement of all Resource Related Claims under the Northern Flood Agreement. September, 1984.

[185] Ibid.

Manitoba Hydro's initial position was that the Utility would purchase fish and deliver it to the community. The community's position was that the activity and not just the product had to be replaced. The program ultimately negotiated provides incentive payments for individuals to fish at alternate off-system lakes, capital funding for the construction of a fish storage/distribution centre and delivery truck, funds for the purchase of fish and/or development strategies to locally produce alternative food supplies, administration and evaluation.[186]

Nelson House First Nation negotiated a domestic fishing program in 1991 valued at $3.6 million which provided compensation for past losses and an interim program which allows for the purchase of fish from local commercial fishermen fishing off-system lakes and a cultural camp.[187] Negotiation of the claim went smoothly as Manitoba Hydro recognized that elevated methylmercury levels in fish is a Project related impact.[188]

Norway House First Nation initially began negotiation of their domestic fishing claim in 1989 and stopped for a period during the latter part of the Comprehensive Negotiation Process, began again in 1991 for a period of about six months[189], stopped and most recently began in April of 1993. Norway House, Manitoba and Manitoba Hydro have attempted to collaboratively negotiate a package of compensation and mitigation for many months. In July, 1993, Norway House tabled a proposal which the other Parties have refused to counter. Manitoba and Manitoba Hydro notified the First Nation in August that they see no point in further negotiations until biophysical studies are undertaken. It is the position of these parties that impacts of the Project on domestic fishing are minimal. Norway House residents believe the Project has directly (less fish, more debris in nets, changed fish migration behaviour) and indirectly (loss of faith in environment, decline in fish quality) impacted the domestic fishery. Norway House is proceeding to obtain funding under the cost order system to undertake[190] biophysical and socio-economic impact research for purposes of assembling evidence for arbitration.[191]

The effectiveness of mitigation programs is restricted by factors such as limited quantities of fish resources in the smaller, non-impacted lakes in the Resource Areas, the expense of accessing remote lakes, and existing third party interests such as sport lodges and commercial fisheries which to date have not been bought out by the Province.

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[186] Authors personal knowledge.

[187] B. McMullen, Mitigation Department, Manitoba Hydro. Personal Communication. May, 1993.

[188] D. Rogalsky, Mitigation Department, Manitoba Hydro. Personal Communication. August 26, 1993.

[189] Negotiations terminated because local First Nation members who were participating in the negotiations as the Domestic Fishing Committee refused to attend meetings until Manitoba and Manitoba Hydro paid them an honorarium in lieu of the fact they were providing consulting advice. Subsequent requests for honorariums for the most recent Committee members have been denied.

[190] Author's personal knowledge.

[191] Author's personal knowledge.

As of 1992, total payments under the domestic fishing claims for Cross Lake and Nelson House alone have amounted to approximately $9.5 million (Manitoba Hydro 1992). In contrast, Manitoba and Manitoba Hydro in 1984 offered to resolve this claim (all five communities) in perpetuity for approximately $650,500.[192] In 1990 the Parties offered to buy-out this claim (all five communities) in perpetuity for approximately $12 million.[193]

6.10 Implementation of Environmental Provisions

Canada, Manitoba and Manitoba Hydro agreed, as a matter of policy, to implement the recommendations published in 1975 by the Lake Winnipeg, Churchill and Nelson Rivers Study Board (Article 17.1). It should be noted that the work of the Study Board does not represent a particularly comprehensive or accurate environmental assessment document. Specific recommendations relevant to the NFA communities were described in Section 5.4. The Parties agreed to plan and implement an approach to monitoring environmental and socio-economic change for purposes of determining Project related adverse effects in recognition that such information was necessary to give effect to the NFA (Article 17.5).

The first step of Article 17 implementation required Manitoba and Canada to immediately ("forthwith") identify recommendations they would independently or jointly implement and notify the First Nations. A search of the NFC library yielded only one such document. In 1988, ten years after the NFA was signed, Canada published a report entitled The 1987 Status Report of the Government of Canada, Implementation of the Lake Winnipeg, Churchill and Nelson Rivers Study Board Recommendations. This report identified on a recommendation-by-recommendation basis, the agency or agencies responsible for implementation. The report does not indicate that identification of responsibility was determined through discussion with or agreement by Manitoba and/or Manitoba Hydro; it appears to be a unilateral effort by Canada.

Once jurisdiction for overall implementation was determined, each of the three Parties was to report annually to the First Nations about which recommendations would be implemented, the projected date of commencement, and if any recommendation was not going to implemented, the reason for the decision. Again, a search of the NFC library yielded only one such document - the same 1988 Federal report cited above.

In regard to Canada's performance in fulfilling Articles 17.2 and 17.3, the Auditor General of Canada (The Report of the Auditor General of Canada 1992:376) reports;

"We also found that DIAND did not have a plan for the required environmental monitoring. Furthermore, DIAND had not complied with the NFA requirement to report to the

[192] Manitoba/Manitoba Hydro Proposal for Settlement of all Resource Related Claims under the Northern Flood Agreement. September, 1984.

[193] "Proposed Basis of Settlement of Outstanding Claims and Obligations". Presented by Negotiators for Manitoba Hydro, Canada, Manitoba and the Northern Flood Committee. October 25, 1989.

bands annually on the implementation status of recommendations... The most recent report filed by Canada covers 11 years ended December 1987. We could find no documented reasons to justify a reporting gap for the four years ended in 1991."

6.10.1 Co-ordinated Long-term Ecological Monitoring Program

Routine mercury sampling of commercially caught fish in the Burntwood River (diversion channel) in 1977/78 led to the discovery of elevated mercury levels. The question of whether the elevated mercury levels were Project related was discussed between Manitoba and Canada during 1978/79 (Canada-Manitoba Agreement on the Study and Monitoring of Mercury in the Churchill River Diversion, Summary Report, 1987). The Federal department of Fisheries and Oceans informed DIAND in late 1980 that their research indicated elevated mercury levels in fish within the Project area.

Both DIAND and the NFC were aware that research activities were being planned under the auspices of a joint federal/provincial mercury monitoring agreement.[194] The NFC's frustration over the lack of involvement by DIAND in the design of the mercury monitoring study and lack of recognition by both federal and provincial departments of NFA obligations is characterized in correspondence from the NFC to DIAND as follows[195];

"With our letter of September 8, 1980, we raised the following concerns: Because of our mutual third-party interest in this study and its results - especially those results which, under the Northern Flood Agreement, may give rise to entitlements for compensation and/or relief from conditions which may threaten the health, safety or well-being of Northern Flood Committee Bands and Band Members - we would appreciate hearing from you to what extent the Department of Indian Affairs is participating in this study." (emphasis not added)

"When we did not hear from you for over two months, we assumed that our letter of September 8, 1980 - and, in particular, the parts cited above - had aided you with a perspective not previously thought of, and that you would be acting on our concerns by proposing appropriate changes to the study. Looking at the inter-departmental meeting notes of your October 9, 1980 meeting, our concerns were not even discussed; nor were the linkages and interface requirements with the Northern Flood Agreement examined. Examining the early history of this pending agreement, we note how marginal Indian Affairs' interest in this study has been - and still is. Nowhere do we find in the records available to us that your Department considered the formal invitation, extended to it on February 6, 1980, to participate in the design of the study."

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[194] R.A. Hale, Chief, Water Planning and Management Branch, Inland Waters Directorate, Western and Northern Region, to J.D. Marshall, A/Director, Resource Development Impacts Office, DIAND, Ottawa. Dated December 19, 1980.

[195] Chief R. Spence, President, NFC, to D. Kerfoot, Manager, Community Planning, Indian and Inuit Affairs, DIAND, Winnipeg. Dated December 9, 1980.

Despite DIAND's awareness that researchers believed there was a cause and effect linkage between elevated mercury levels and flooding caused by the Project, the NFC alone filed a mercury related claim (Claim #12) in April, 1981 against all three other NFA parties. After a week long hearing in June, 1981, the NFA Arbitrator ordered Canada to implement a comprehensive mercury research program incorporating ongoing testing of mercury levels in all NFA First Nation members; implementation of a public education program; determination of pre and post project mercury levels, the cause of any increased mercury levels, and remedial or mitigatory measures; and training and employment of NFA Band members so that they could participate in the studies.[196]

In partial fulfilment of the Arbitrator's order the "Canada-Manitoba Mercury Monitoring Agreement" was signed on March 10, 1983 and made retroactive to April 1, 1982.[197] A four-year agreement, the total $760,000 budget of the study was shared equally between Manitoba and Canada (Canada-Manitoba Agreement on the Study and Monitoring of Mercury in the Churchill River Diversion, Summary Report, 1987). Of particular note, neither DIAND nor the NFC were members of the Mercury Agreement steering or technical committees. The objectives of the agreement were to further investigate mercury levels in water, sediments, and the aquatic food chains along the Churchill-Nelson Rivers diversion route, to determine the sources of mercury, to research how mercury is released and enters the food chain, to assess the significance of the findings for future water management activities, and to advise the public about the findings. This research substantiated that Project related flooding along the diversion route had caused elevated mercury levels in fish. Mercury levels in most of the Cree people tested were within acceptable limits (Canada-Manitoba Agreement on the Study and Monitoring of Mercury in the Churchill River Diversion, Summary Report, 1987). Further study of mercury was carried out by Canada during the period 1987-1992 under the auspices of the Federal Ecological Monitoring Program and by Health and Welfare Canada.

Upon release of the Summary Report, the NFC conducted a complete review to determine if the Report and findings complied with the Interim Order on Claim #12. The NFC acknowledged that the Mercury Study was an excellent analysis of all pertinent facts about mercury. Although beyond the terms of reference, the NFC was nevertheless critical that the study did not explicitly define elevated mercury levels as an "adverse effect" of the hydro project, nor did it identify and attach significance to the social and economic impacts associated with elevated mercury levels in fish, nor did it present any remedial or mitigatory recommendations.[198] These concerns were brought to the attention of both the Premier of Manitoba and the Minister of DIAND.[199]

In response to NFC's criticisms about the mercury study, the Minister of DIAND indicated

[196] Claim #12 - Interim Order by Arbitrator P.Ferg, dated June 29, 1981.

[197] An agreement had been in draft stages prior to the Arbitrators award.

[198] Review of Canada-Manitoba Mercury Study. January, 1988. Prepared by Overview Planning Institute for the NFC.

[199] NFC Chiefs to Premier of Manitoba and Minister of IAND, the Honourable W. McKnight. Dated February 4, 1988.

he was prepared to assist the NFA Bands in seeking compensation/mitigation from the project proponents. As well, he supported the need for a social impact assessment. He indicated that federal officials would shortly discuss with the NFC[200] appropriate grounds for advancing Claim #12.[201]

File review indicates that a Mercury Task Force with representation by the NFC, Canada and Hydro met during the period late 1989 through early 1990 for purposes of identifying remedies regarding Claim #12.[202] The concept of a "mercury disability compensation board", based upon the model developed for the northwestern Ontario communities of Whitedog and Grassy Narrows, was investigated.[203] Essentially, the Mercury Task Force ceased to exist at the same time as the demise of the Comprehensive Negotiation Process in 1990.

While the filing of Claim #12 resulted in action on the issue of mercury monitoring, inaction on implementation of Study Board recommendations 5c and 10 resulted in the NFC filing Claim #18 in December, 1981. In response to the claim, the four Parties formed an ad hoc Claim #18 Advisory Committee in 1982 to attempt to define the specific objectives and major elements of a monitoring program. The Committee engaged the services of an independent consultant to prepare a workplan which was completed in June of 1983. The consultants recommended a five-year study, estimated to cost $2.4 million, of short and long-term monitoring actions to respond to arbitration claims, assist in management of resources in the impacted area, and assist in planning of future hydro-electric projects. This program did not address social impact monitoring (MacLaren Plansearch 1993). The joint five-year program was never executed and the Claim #18 Advisory Committee ceased to exist.

Manitoba and Manitoba Hydro responded to the claim four years later, 1985, by forming a bilateral Program Advisory Board. It was not until 1986, when Canada and the NFC joined PAB, that a co-ordinated effort was realized (Environment Canada 1992b).

PAB's terms of reference stated that the principal objectives of their research and monitoring program were:

"*i) to determine project-induced ecological and socio-economic changes, impacts and adverse effects within the affected resource areas of the NFA communities; and,*

ii) to provide an information-base to assist in the design and implementation of appropriate compensation, mitigation and/or remedial works and measures for adverse

[200] Authors personal experience.

[201] Honourable W. McKnight, Minister IAND, to Chief R. Spence, Chairman, NFC. Dated May 17, 1988.

[202] For some reason none of the Mercury Study steering or technical committee members were involved with the Task Force.

[203] M. Egan, Policy Analyst, Manitoba Resource Development Impacts Office, DIAND, Winnipeg, to S. Freedman, QC, Winnipeg. Dated January 11, 1990.

effects."[204]

The terms of reference also recognized the value of NFC participation on the Board[205] and thus it was agreed that Canada, Manitoba and Manitoba Hydro would provide funding to the NFC to facilitate their participation.[206] PAB continued to meet regularly over the period 1986-1989 while Manitoba/Manitoba Hydro and Canada carried out independent ecological monitoring programs (Environment Canada 1992b).

Manitoba and Manitoba Hydro developed a five-year ecological monitoring program in 1985. The focus of the program was primarily on fish and moose monitoring.[207] A year later, 1986, Canada committed funding to implement a five-year program known as the Federal Ecological Monitoring Program (FEMP). The program was implemented primarily by the Department of Fisheries and Oceans and the Department of Environment (Environment Canada, 1992b). Work conducted between the two programs was split with the federal government focussing primarily on a reservoir model of Southern Indian Lake and Manitoba and Manitoba Hydro focussing on wildlife throughout the affected area and fisheries in the other lakes not included in the FEMP.[208]

Canada's FEMP was carried out over the period 1986/87 through 1990/91 at a cost of approximately $2.5 million[209]. Its objectives were (Environment Canada, 1992a):

a) to the extent possible, to determine pre-project conditions;

b) to monitor post-project conditions,

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[204] "Claim #18 Program Advisory Board Terms of Reference, March 1987." Included in Northern Flood Agreement Comprehensive Long Term Environmental Monitoring Program, Four Party 1987/88 Workplan. Prepared by MacLaren Plansearch Inc. April 27, 1987.

[205] In January of 1987, Manitoba and Hydro were ordered by the Arbitrator to pay the NFC $20,000 in order that the organization could retain a consultant to participate in the design of ecological monitoring programs and participate in the design of a mechanism for socio-economic monitoring (Claim #18, Interim Order 18-2, Arbitrator Pat Ferg, January, 1987).

[206] Op.cit.

[207] Expenditures by Manitoba to date is unknown. Manitoba Hydro reports expenditures on resource monitoring as of March, 1992, at $94,706.

[208] Under FEMP, a reservoir model approach to the study of Playgreen Lake was proposed, however, this offer was rebuffed by the NFC.

[209] Federal Treasury Board (T.B. 800953 February 6, 1986) approved $12.9 million which was apportioned between five federal departments, including DIAND. The stated cost of FEMP (.e. $2.5 million) only represents contracted service, project management, and report publication expenditures. It should be noted that approximately 25% of the total cost of FEMP was expended on Southern Indian Lake studies and approximately another 25% was expended on project management and publication of findings.

c) to increase understanding of the significant factors that could affect future ecological conditions in the impacted area (for example the recovery time for specific impacts and potential impacts from future projects); and

d) to advise the public, especially the NFA communities, of the findings.

Subjects studied under FEMP were: water quantity and quality; sediment and morphology; mercury; fish and aquatic life; waterfowl; and resource harvesting. Findings of FEMP were published on an interim basis with a final report issued in April 1992. Future and continuing studies have been recommended in all six of the original FEMP subject areas (Environment Canada 1992a).

PAB existed until April, 1989, when it was dismantled under instruction of the Senior Negotiators of the Comprehensive Negotiation Process and replaced with an Environmental Monitoring Steering Committee (EMST). It was the unanimous opinion of EMST representatives that;

"PAB did not function in an effective manner to fully implement the parties' respective NFA environmental assessment and monitoring obligations."

Strengths and weaknesses of PAB were identified as:[210]

Strengths:

≅ The PAB represented a mediation as opposed to a legal approach to resolution of Claim 18;

≅ Consensus had been possible on some issues;

≅ Face to face dialogue had generated goodwill and built trust between most of the parties;

≅ Knowledge and information exchange had been facilitated, and;

≅ There were no other competing forums.

Weaknesses:

≅ There was no collective funding, authority and/or accountability;

≅ The lack of a 4-party senior management level to provide PAB direction;

≅ There was little linkage between PAB and the people impacted by the Project;

[210] Northern Flood Agreement Four Party Global Negotiations. Report of the Environmental Monitoring Steering Committee. August, 1989 (pp. 7-8).

≅ There was a lack of sufficiently committed personnel and resources;

≅ The connection between financial resources and regular governmental program activities had been too close;

≅ There was a tendency to undertake too much research and/or data collection without enough emphasis on professional judgement of the meaning and significance of adverse impacts;

≅ There was a lack of integration with other elements of the NFA claims process, especially claims resolution;

≅ The PAB was only a consultive body;

≅ There were no PAB-defined product aspirations other than annual reports and workplans;

≅ The products overseen by the PAB had not been produced on a timely basis.

Regarding the merits and shortcomings of PAB, the final FEMP report stated;

"At the time, PAB was unique in that it was the only established mechanism for 4-party dialogue on any of the NFA provisions. Its creation offered the promise of a coordinated (and, ideally, a fully integrated) comprehensive ecological monitoring and research program. The 4-Party PAB provided an opportunity whereby the direction and progress of FEMP, and its equivalent provincial and Manitoba Hydro programs, could be reviewed within the context of: (1) its success in addressing those environmental concerns of greatest interest to the NFA communities, as expressed by the NFC; (2) its contribution to an improved understanding of the environmental impacts of the LWCN project; and (3) its scientific merits. Unfortunately, however, the promise of the 4-party PAB was only partially realized; with only limited cooperative, and no truly integrated activities undertaken, the PAB process could be more appropriately described as an exercise in joint unilateralism. The lack of formal structure, a common budget, and a shared vision of how best to realize PAB's objectives prevented the full attainment of its original purpose. Shortly after the commencement of the global negotiations[211] process, PAB disbanded." (Environment Canada, 1992b:3-2).

The Auditor General of Canada states;

"We expected to find a co-ordinated approach among the NFA parties, under DIAND's leadership, to identify, evaluate and resolve environmental issues relating to the NFA. We also expected that DIAND would have an appropriate plan for implementing its own NFA environmental responsibilities. Without these mechanisms, we believe management effectiveness is reduced and the possibility of

[211] i.e. the four-party political negotiations which took place during the period 1986-1990.

non-compliance with the NFA is increased. Our review disclosed that various environmental monitoring programs and boards or committees representing the parties were established periodically to analyze issues, perform studies, provide advice and monitor effects of the Hydro projects. However, none of these bodies had the authority to assign responsibilities among the parties and enforce necessary action. Eventually, they disbanded and unresolved environmental issues were left to linger in the claims arbitration process." (The Report of the Auditor General of Canada 1992:376).

6.10.2 Mechanism for Social and Economic Monitoring

No mechanism to monitor Project related socio-economic impacts has ever been established under the NFA. Sometime in the mid-1980's the NFC requested support from Canada to involve the Canadian Environmental Assessment Research Council to frame a fully integrated NFA-specific socio-economic and ecological monitoring program. The subject was discussed amongst the PAB representatives and a socio-economic impact assessment was expected to begin in 1988 (Department of Indian Affairs and Northern Development 1988). To date, no such study has been implemented.

With one exception[212], all of the Mercury Study, FEMP, and Manitoba/Hydro studies focused upon biophysical changes without examining and reporting the meaning of impacts on the resource users residing in the NFA communities. According to Ms. L. McKerness, former coordinator of the FEMP, Canada's research constituted an isolated program not well linked to other environmental assessment or monitoring work being carried out by Manitoba and/or Manitoba Hydro or to NFA claims which had been filed by the NFC and constituent First Nations. An adversarial climate existed between the NFC and other Parties by the time FEMP was initiated which, in Ms. McKerness' view, contributed to distrust regarding the motives of FEMP. Because of a lack of open communication between FEMP investigators and the NFC and the lack of explicit definition of community concerns, FEMP was unable to identify socio-economic impacts. Thus, FEMP was limited to scientific investigation of environmental impacts.[213]

The Auditor General of Canada (The Report of the Auditor General of Canada 1992:377) states;

"...we found no evidence that a comprehensive environmental impact assessment had ever been performed. We believe such an assessment is essential for NFA implementation because the purpose of the Agreement is to compensate for

[212] Under the auspices of FEMP, Usher and Weinstein (1991) examined Project effects on resource harvesting activities. They found that insufficient baseline and current data on subsistence harvesting activities made analysis of adverse impacts difficult. The study concluded that until a social impact assessment was conducted it would be impossible to fully understand the implications of the biophysical changes on the NFA communities.

[213] Ms. Lorna McKerness, former FEMP Coordinator. Personal communication. June 23, 1993.

adverse environmental impacts."

6.10.3 Giving Effect to the NFA

Absence of on-going monitoring of project related social and economic change during the past sixteen years, combined with inadequate pre-Project baseline data, has resulted in a lack of scientific documentation of impacts. Traditional ecological knowledge and community evidence is often the only source of information. The lack of "scientific" information and failure by the Parties to completely accept community evidence has been a primary factor leading to difficult and protracted claims negotiations regarding reimbursement for past damages (i.e. retroactive compensation).

Since 1989, a number of agencies have independently recommended that impact assessments be carried out. For example, while still in existence, the EMSC reported;

> ***"information on adverse effects is lacking yet the NFA is an agreement about adverse effects. The lack of NFA implementation to date is largely symptomatic of this lack of information. The claims process has proceeded largely without the benefit of agreed-upon fact regarding definition and nature of adverse effects."***[214]

Towards the end of 1989, the EMSC agreed;

> ***"Regardless of the outcome with respect to the completion of ongoing "Global Negotiations", there is a requirement that a mechanism be in place to gather, analyze and disclose environmental information. Such information is required to enable NFA Communities and other affected by the hydro project to facilitate fair and equitable evaluation of entitlements resulting from project-induced adverse effects. EMSC unanimously conclude(d) that statements of adverse effects are urgently required and recommend(ed) that such statements should be produced for each NFA community as soon as possible."***[215]

The final FEMP report recommended;

> ***"that the appropriate parties to the NFA conduct a social impact assessment (SIA) of the LWCN project on the six native communities in the FEMP study area."*** (Environment Canada, 1992a:14).

In 1992, the Conawapa Environmental Review Panel stated in their draft guidelines for the preparation of an environmental impact statement of Manitoba Hydro's proposed Nelson River Conawapa generating station[216];

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[214] Northern Flood Agreement, Four Party Global Negotiations. Report of the Environmental Monitoring Steering Committee. August, 1989.

[215] Ibid.

[216] Energy produced by the proposed Conawapa station was to be sold to Ontario Hydro pursuant to a contractual

> ***"A cumulative impact assessment is necessary because the Project cannot be developed in isolation from other developments and the impacts it creates will not operate in isolation from the impacts of those other developments. Indeed, the Project is simply the latest in a series of developments, hydroelectric and otherwise, which may affect environmental conditions in and around the Nelson River drainage basin... In order to assess the potential impacts of the Conawapa Project, the EIS must determine to the extent possible, the natural conditions prior to northern hydroelectric development (the baseline), the evolution of the environmental conditions to the present, and the capability of the environment to cope with change. (In describing) the human setting for the proposed Project (Manitoba Hydro) shall, to the extent possible, assess how past hydroelectric development may have affected the social fabric of communities."*** (Conawapa Environmental Review Panel, 1992).

The Auditor General of Canada (The Report of the Auditor General of Canada 1992:380) recommended that DIAND should;

> ***"...ensure that a valid environmental assessment is performed to determine and report on the impact of the Hydro projects and use the impact statements resulting from the environmental assessment as a basis for preparing a plan for further implementation of the NFA or assessing the adequacy of any proposed plans..."***

Despite these very strong recommendations, some from agencies and boards that Canada, Manitoba, or Manitoba Hydro were/are members of, none of the Parties have any plans, nor have they committed any funds, to carry out such studies.

In summary, studies which were carried out in the period 1971-1975 by the Study Board failed to establish adequate and credible biophysical and socio-economic baseline data. The Parties failed to respond quickly to their obligations for a coordinated monitoring program. The Project had been in operation for some five years before the Parties were induced by the filing of Claim #18 to address their obligations. No real coordinated approach has ever been achieved, and while biophysical studies have been carried out on a unilateral basis, the social impacts of the Project on the NFA communities have never been monitored, identified or quantified.

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arrangement between the two Utilities. The entire Project was abandoned by December of 1992 after Ontario Hydro informed Manitoba Hydro that they would not purchase electrical energy from Manitoba as agreed under the contract between the two Utilities. Consequently, the Conawapa Environmental Review Panel was disbanded.

6.11 Summary of Implementation

The sixteen year record of attempts to implement the NFA probably differs sharply from the expectations of each of the Parties in 1977. Costs have vastly exceeded the expectations of the governments and the Utility, and the results have been extremely disappointing to the NFA communities. A few main points summarize the record.

≅ The four Parties quickly separated themselves into a three party group resisting implementation and one party urging action to meet the terms of the Agreement. The lack of a will to implement forced the NFC, almost from the beginning, to fight for its birthright. Canada even attempted to deny the NFC operating funds to pursue its struggle.

≅ Confronted by the recalcitrance of the other Parties, the NFC turned to Arbitration to force implementation, and when the Arbitrator supported the NFC the three Parties sought relief from the courts.

≅ By 1984, the NFC, frustrated by the lack of action, and the other Parties disturbed by the potential cost of implementation, began searching for agreement concerning implementation. The NFC was seeking action; the other Parties were seeking limits to their liabilities.

≅ From 1984 to 1993, NFC communities have continued to seek implementation enforced by arbitration, while simultaneously attempting to negotiate a more expeditious resolution.

≅ Formal negotiations begun in 1988 led to a "Proposed Basis of Settlement" in 1990. The PBS was accepted by one of the NFA communities and remains central to the policies of the other Parties. In the past two years, three more of the communities have entered into various forms of comprehensive negotiations.

≅ From 1984 to 1993, Arbitration has proceeded at a slow pace. Frustration continues to accumulate, and no party is satisfied with the results.

≅ As of 1990 the three Parties had spent something in the order of $130 million. Much of the impact of the Project remained unmitigated and many provisions of the NFA had not been implemented. A final offer under the PBS in the order of $246 million for programs of mitigation and compensation was rejected by four of the five NFA First Nations. Condemnation of the failure of the Agreement by the Federal Auditor General is echoed by the communities.

≅ A flawed planning process, executed by an insensitive provincial government and its hydro-electric utility, and the failure of the federal government to accept its responsibilities to adversely affected First Nations communities, forced the preparation and signing of an agreement which thus far has not met the needs of any of the Parties.

7.0 KEY PROBLEMS WITH THE AGREEMENT

Problems with NFA implementation originate in the wording of the Agreement which reflects the positions held and compromises made by the Parties in 1977. To recapitulate, Canada and Manitoba agreed in 1966 to build a hydro project in northern Manitoba. The province erroneously believed it had untrammelled authority to utilize land and water resources for the Project and did not understand the rights of Aboriginal people. Manitoba Hydro believed the welfare of aboriginal people was the responsibility of the governments and the Province believed the welfare of Aboriginal people was the responsibility of the Federal Government. The Federal Government believed the proponents, Manitoba and Manitoba Hydro, should be responsible for any and all damages the Project might create.

Despite Canada's fiduciary responsibility to First Nation communities and legislative responsibility for fisheries and navigable waters, and Manitoba's public trust responsibilities for all other resources, Manitoba Hydro was issued licenses to commence construction of the Project before any environmental impact assessment was done. The environmental impact assessment, conducted simultaneously with Project design and construction, failed to provide basic information about the natural state of the environment, failed to predict with any accuracy Project related changes or impacts to the water regime or aquatic and terrestrial resources[217], and most importantly, failed to identify or predict the nature and magnitude of adverse impact on the communities. As a result, the nature of impacts was severely underestimated as was the cost of mitigation and compensation.

The NFA was not negotiated willingly. Adversarial positions concerning responsibility, combined with ignorance and/or lack of concern about the nature of impacts, and time constraints of the negotiation process, resulted in the drafting of a deliberatively vague agreement. It was an agreement none of the Parties really wanted and it reflects an attempt to avoid responsibility and a lack of will to confront the impact of the Project on the affected communities. It may however, have been the only agreement possible given the political climate of the day. Expectations about what the Agreement meant were diverse. The NFA First Nations expected immediate action on the part of the other three signatories to confront adverse impacts. Canada assumed that its obligations were limited to actions which could be accommodated within existing budgets. Manitoba set out to make sure that the Agreement did not obligate them to take on Canada's responsibilities and Manitoba Hydro endeavoured to limit its liability. Disparate views led to unilateral strategies to limit responsibilities rather than coordinate and share them.

In examining key difficulties with NFA implementation two categories of problems emerge. First, many problems related to implementation derive directly from vaguely worded or missing elements of the Agreement. And secondly, partially because of this vagueness and partially because positions held in 1977 were maintained, lack of implementation has created subsequent problems. The following sections outline and discuss some of the salient problems which have emerged since the NFA was signed in 1977.

[217] Part of the reason for the failure of the EIS to accurately predict impacts stemmed from the fact that Manitoba Hydro did not document and disclose basic information about the Project design (see Commission of Inquiry into Manitoba Hydro 1979).

7.1 Problems Associated with the Agreement

7.1.1 Lack of Definition in NFA

Generally, the NFA lacks precise definition in respect of responsibility or actions required. It seldom specifies deadlines or timeframes. The meaning of key words used throughout the agreement are vague and undefined, and there are few if any criteria or targets for measuring the effectiveness of actions or programs. The examples which follow illustrate some of these shortcomings.

≅ Article 5 obligates Manitoba and/or Manitoba Hydro to maximize the free and normal use of navigable waters. The term maximize is not defined. Certain activities are specifically identified, for example removal of the obstructions caused by two causeways. The clause does not say what is required to remove the obstruction (eg. insert a large culvert of sufficient size to allow safe passage of a 16 foot boat).

≅ Article 15.8 and 19.4 obligate the Parties to negotiate programs of compensation and mitigation in respect of the community traplines and fishing. The clause does not define or even suggest the scope, nor does it specify time limits or methods.

≅ The terms "adverse effect" or "adversely affect" appear 28 times within the main body of the NFA. These terms are not defined within the Agreement. (In the long term this may prove to be an asset given the evolutionary nature of impact assessment procedure).

≅ Article 15.8 states that the Parties will facilitate and encourage the use of the community traplines. Again, the clause does not specify scope, scale, timing or method. The term 'encourage' is not defined.

≅ There is no provision or requirement for monitoring or evaluating the resource harvesting programs which are mandated under Articles 15.8, 19.2 or 19.4. Resort to Arbitration is the only instrument available to force a review.

7.1.2 Lack of Structure

Under the NFA the Parties simply agreed that they would undertake certain activities and negotiate further on others. The NFA did not provide for the creation of an joint 4-Party entity responsible for management, negotiation, implementation or monitoring. Nor does the NFA explicitly[218] require the Parties to provide funding to the NFC to carry out such a role (unlike for

[218] As previously reported, the NFA Arbitrator ruled that the NFA does obligate the Parties to fund the NFC, this award was however overturned by the Manitoba Court of Appeal.

example the Cree Regional Authority). Thus, each signatory to the Agreement established its own independent office. Currently, NFA implementation activity is handled by Manitoba Hydro's mitigation department, Manitoba's NFA Manager, and Canada's Winnipeg based NFA Office, and the NFC. Each agency reports through its own command structure to one of the parties, and the parties do not share a common view of the Agreement or common implementation goals. This fragmented approach has not fostered an environment conducive to the formulation of common goals and objectives, identification of individual and/or joint responsibilities, co-operation and co-ordination, development of implementation plans or strategies, or effective monitoring.

The absence of an joint entity responsible and accountable for implementation has resulted in an absence of pressure to get on with implementation. Apart from political pressure from the NFC, the arbitration instrument is the only enforcement tool available. Moreover, there is no common and agreed record of implementation activities, nor has there been any form of joint evaluation of the effectiveness of activities to date or determination of what activities or obligations remain unfulfilled. Even the office of the Auditor General of Canada has been unable to discover the extent of implementation or the magnitude of outstanding responsibilities of Canada (The Report of the Auditor General of Canada 1992). The other parties are no better informed.

Frequently, the fragmented, unilateral approach to implementation has resulted in each Party independently formulating its own interpretation of obligations and seeking to limit its responsibility and/or liability. For example, Canada maintained for years that its NFA obligations do not extend beyond normal program funding and has insisted that the proponent should meet all costs. Disagreement with this position by Manitoba and Manitoba Hydro is reflected in the third party notices against Canada on many claims and a standard clause in claim settlement agreements which reads "obligations of Canada unresolved".[219]

The NFC and its constituent First Nation governments have not had an equal voice on matters of implementation or in the selection or removal of the Arbitrator. Instead, the NFC has always been in a minority position[220] attempting to deal with three separate entities of formidable size, resources and power.

7.1.3 Lack of Defined Funding

When the NFA was signed, the cost of implementation had not been calculated. With one or two discrete exceptions, the Agreement does not address the issue of meeting the costs of

[219] For example Norway House Community Trapline Claim #36, Interim Order 36-2. "It is agreed by the parties hereto that the obligations of Canada in respect of the matters referred to in Claim #36 have not been resolved as of the date of this Settlement Agreement. It is agreed by the parties that Manitoba and Hydro may refer the question of the extent of Canada's liability with respect to matters referred to in Claim #36 to the Arbitrator in accordance with the Third party Notices in Claim #36, and in this respect, the Claimants undertake to cooperate with Manitoba and Hydro."

[220] For example, the selection or removal of an Arbitrator only requires 3 or 4 votes. The NFC has only one vote.

implementation or even the costs of administration.[221] No common pool of funds is provided to enable the Parties to jointly manage, monitor or evaluate implementation activities, and the Agreement contains no formal cost-sharing agreement to fund such programs. Instead, Canada has somewhat reluctantly provided funds to meet NFC administration costs and has enabled the employment of Implementation Managers in NFA communities. Manitoba Hydro has provided funds to enable the communities to employ Communicators.

With respect to execution of specific NFA obligations, financing has been accomplished on an ad hoc basis. DIAND has implemented the NFA primarily with regional base funds and its ability to meet obligations has been limited by annual budgetary constraints. Financing of Canada's major implementation efforts during the period 1986-1990[222] was achieved by DIAND's successful Treasury Board submission. Manitoba has funded implementation primarily through normal departmental funds[223]. Cabinet approval is required by Manitoba and Board approval is required by the Utility to meet obligations in respect of arbitration claims. NFA implementation actions are not planned on a year-to-year basis and consequently the Parties, particularly Canada and Manitoba, have not budgeted for NFA related expenditures. Often, implementation actions cannot be undertaken due to budgetary constraints.

7.1.4 Existing Institutions

A) The NFC

As documented in the foregoing sections 5.1.2 and 6.2, the NFA confers specific obligations upon the NFC and yet despite clear direction from the Arbitrator, the other Parties maintain they have no legal obligation to ensure that the NFC is afforded an opportunity to actively participate in all matters of implementation.

Resort to Arbitration is the only vehicle available to the NFA First Nations to "enforce" or "prompt" the other Parties to meet their obligations. For reasons explained in section 5.1.2 of this report, the NFC and NFA First Nations have not been able to access negotiating funds under Article 24.35 of the Agreement. That is, Article 24.35 only speaks to legal and consulting costs and not costs of First Nation governments, First Nation members, and/or the NFC.[224] The ability of the

[221] Under the land provisions the Agreement states that all costs associated with surveying of easements and new Reserve lands shall be borne by Manitoba. Article 15 states that Manitoba shall be responsible for the expenses of the WAPB and Schedule "G" defines an amount of money to be made available by Manitoba Hydro to the First Nations to undertake specific remedial works.

[222] Efforts included funding of sewer and water program under Article 6, FEMP, and a five-year NFC core funding package.

[223] For example, ecological monitoring activities have been carried out primarily by existing Department of Natural Resources staff.

[224] Manitoba Hydro does pay expenses (travel, accommodation etc.) of First Nation members who attend negotiating meetings in Winnipeg. However, they will not pay "consulting" fees to these individuals (who are often community

NFC to represent the collective interests of the First Nations has been restricted by the Parties refusal to adequately fund the NFC (Canada has provided limited funding as a matter of policy) and the inability of the NFC to utilize the Arbitration cost order system.

B) Project Impact Monitoring - Program Advisory Board

The requirement for a co-ordinated approach to monitoring of Project impacts stems from the recommendations of the 1971 Study Board which were embodied in Article 17 of the Agreement. The objectives, strengths and weaknesses of the PAB have been previously described in section 6.10.1 of this report. Briefly, the PAB lacked a common pool of funds to meet its objectives, it had no mandate or authority to direct or undertake research, and has been described as an exercise in "joint unilateralism".

C) Wildlife Advisory and Planning Board

Functional shortcomings of the WAPB were identified in section 6.8.1 of this report. To reiterate, the WAPB has had difficulty in defining its role and jurisdiction, it has limited advisory capacity, and has limited resources.

The main clause of Article 15.5 defines the general purpose of the WAPB as "to consider and recommend on all matters affecting wildlife". This seems to be a broad objective, however, the sub-clauses which define the areas that the WAPB may consider and make recommendations provide no clear direction that the functional purpose of the Board is to be linked to implementation of the NFA. In fact, there are no cross-references between the WAPB and any other NFA Article and Article 15.5 does not address matters of Project impacts.

The WAPB does not have a clear mandate to involve itself in implementing the NFA, and because non-NFA organizations are represented on the Board, the NFC and First Nations have not pushed for greater involvement.

Attempts by the WAPB to develop or facilitate joint resource management schemes have failed primarily because: 1) Manitoba does not view this as an NFA obligation; and 2) because of the presence of non-First Nation members on the Board of the WAPB, the NFC does not want the WAPB involved as a joint manager of Treaty and NFA rights.

7.2 Problems Associated with Implementation

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elders). Requests for payment of honorariums to individuals who attend meetings in the communities or who are members of local negotiating committees or for interview fees have also been denied. The Parties have also refused to pay expenses or fees of NFC staff under the cost order system.

7.2.1 Interpretation of NFA Provisions and Obligations

Comments made to the communities at public meetings prior to the signing of the NFA are well remembered. For example, the residents of Nelson House were assured by (then) Premier Schreyer that the Footprint causeway would be replaced with a bridge. This commitment is not explicit in the NFA, but Nelson House expected the government to live up to the Premier's promises and were bitterly disappointed by the recalcitrance of the Province and Hydro to meet the commitment.

Community residents claim that they were told that the hydro Project would produce so much revenue that their lives would be better. They understood that the wording in Schedule E[225] of the NFA meant that the proponents would channel substantial amounts of the Project earnings back into the communities. Refusal by all parties to take effective action under Section E has created disappointment. Many of the NFA elders viewed the NFA as treaty making and they hoped the governments would live up to their promises better than they had a hundred years previously.

Effective implementation of the NFA would require good will, co-operation, and energetic co-operation. Many of the clauses are ambiguous and many called for further negotiation to attach meaning to them. Because the NFA does not provide a mechanism, other than the adversarial arbitration process, for definition of obligations or further negotiation, each NFA signatory simply maintained positions established before 1977 or developed a subsequent interpretation of its obligations.

For example, the First Nations understood the clauses in Article 15.8 and 19 to mean that they would be encouraged to continue their resource harvesting activities to the maximum extent possible; that is, the traditional way of life would remain vital regardless of Project impacts or any other influence. In the early years after 1978, the Project proponents tended to interpret their obligation as limited to such things as replacing damaged or lost nets and motors. By 1984, the proponents thought they could simply fulfil their obligations by throwing a modest amount of money at the communities.

By 1985, the cost of implementation was beginning to be understood by the Parties. Whereas in 1970 Manitoba Hydro thought the entire cost of the NFA might have been less than $20 million (Manitoba Hydro Task Force 1970), Canada was notified some sixteen years later by independent consultants that implementation might run in the order of $500 million (The Task Force on Program Review 1986). It was shortly after this realization that Canada, Manitoba and Manitoba Hydro focussed their attention on negotiating a one-time payment to resolve all of the NFA claims and thereby fix and discharge all of their obligations.

[225] Schedule E says that a comprehensive plan will be developed to eradicate mass poverty and mass unemployment and improve physical, social, economic and transportation conditions in the community.

7.2.2 Lack of Information

Perhaps the most important provision of the NFA was the obligation to undertake long term ecological and socio-economic monitoring. These actions were necessary to identify, measure, and monitor adverse impacts of the Project and thus define the magnitude and nature of the commitments of the Agreement.

A) Poor Baseline Data

The environmental impact assessment, and particularly the socio-economic aspect of the research, carried out during the period 1972-1975 was deemed inadequate at that time by the NFC. In 1977, uncertainty about existing and future Project impacts resulted in the entrenchment of the 1971 Study Board recommendations concerning baseline data, research and monitoring, and inclusion of the arbitration instrument in the Agreement.

The limited assessment of the environmental impact of the Project which occurred, was conducted without consultation with the Cree people and thus the researchers of the day did not understand the importance or nature of their mixed cash/income-in-kind economy or the importance of the resource base which made this way of life possible.[226] This lack of understanding cannot be solely justified on the basis of a poor state of research as a discipline. Manitoba Hydro had conducted a environmental impact assessment for its Grand Rapids Project in the early 1960's and many of the actual impacts of that Project were known by the early 1970's (see Special Forebay Committee Research Study 1986). Further, the environmental impact assessment conducted for the NFA Project stands in stark contrast to the quality of work done in respect of the MacKenzie Pipeline Inquiry conducted during the same era (see Usher and Weinstein 1991).

Apart from examination of government records on fur and fish production, researchers did not collect any credible information concerning subsistence production or consumption, nor did they investigate commercial or subsistence harvest activity patterns and costs.

B) Lack of Project Impact Monitoring

No comprehensive and planned approach to examination of ecological change was ever undertaken.[227] A few isolated studies were undertaken in the early 1980's, however, the majority of

[226] No comprehensive collection of pre-Project data on species population, productivity, or potential harvest opportunity exists. For example sturgeon, which are a highly prized food item in the Cree diet, were not studied at all. Waterfowl surveys included only one year of data and information was not collected from traditional hunting areas.

[227] A comprehensive research program on biophysical impacts at Southern Indian Lake was initiated by the federal government and comprehensive post-impact biophysical studies have continued. Although Southern Indian Lake is a component of the Project, it is geographically located outside the NFA First Nation territory.

studies did not begin until 1986/86, some fourteen years after the initial impacts of the Project. These studies have documented post-Project conditions, however, identification of impacts has been hampered by a lack of comparable pre-Project data.

There has been no monitoring whatsoever of socio-economic change caused by the Project.[228] Thus identification and measurement of Project impacts on resource harvesting activities, including factors such as increased effort and expense, reduced production levels, concerns about quantity and quality of resources, has not been officially documented. The cumulative impact of physical, biophysical, social and economic change has never been identified or measured.

C) Acceptability of Evidence

Communities have undertaken to collect some information regarding Project impacts in preparation for negotiation or arbitration of specific claims. However, because baseline data is lacking and monitoring has not occurred, gathering of data is restricted to retrospective analysis and inference.

Estimation of pre- and post-Project subsistence harvest levels or expenses are typically based upon information provided by Cree elders. Because of the lengthy period that has passed between the time the Project was started and the activation of the claims, this approach is stymied by factors such as recall failure (information tends to be qualitative rather than quantitative)[229] and small sample size (i.e. many people who would have been old enough to recall the way things were before the Project have passed on). Evidence collected under the claims process has been developed for purposes of estimating the monetary value of compensation. Community evidence can be collected using scientifically rigorous methods, however, to date such studies have not been conducted.

Community evidence is accepted in the arbitration process in either verbal testimony or affidavit form. NFA Arbitrators have sat in the communities and listened at length to the evidence of elders. With one exception (see comments on Cross Lake First Nation recreation claim below), these hearings have occurred recently and have not yet resulted in an adjudicated result, i.e. it is too soon to tell how this evidence will be treated by the current Arbitrator.

Under the claims process, the Project proponents rely more heavily on independent certification of environmental damage over community evidence. Particularly, Manitoba Hydro frequently demands "concrete" evidence of impact to take to their Board. For example, the Utility accepted liability for damages to the domestic fisheries based upon Provincial reports of virtual annihilation of the fishery at Cross Lake and Federal reports of elevated mercury levels in fish

[228] Recognition of the importance of post-impact monitoring and procedures for monitoring were established at the time the NFA was signed. See for example, Berger (1977) The Report of the MacKenzie Valley Pipeline Inquiry.

[229] For example elders frequently describe impacts in terms of "I used to catch enough fish to feed my family and low water levels makes it more difficult and costly to practice my fishing".

analyzed from areas traditionally harvested by Nelson House. On the other hand, it required intervention of the Arbitrator to force commencement of a settlement of the less tangible Cross lake recreational claim. It was resolved on an interim basis primarily because of the compelling evidence of the community in the Cross Lake recreation claim. In 1982 the Arbitrator attended in Cross Lake for a week and listened to testimony about the impact of fluctuating water levels on recreational activities. At the conclusion of the hearing the Arbitrator ordered Manitoba Hydro to pay for the construction of a skating arena as an interim compensation measure.

When independent studies of impact are not available, community evidence is not always taken seriously. For example, evidence collected at Cross Lake during public meetings, in-depth interviews and from oral testimony before the Arbitrator indicated that a viable subsistence sturgeon fishery existed prior to the Project and that sturgeon had become less available since the Project. The community attributed the entire decline in the fishery to the Project. Despite evidence provided by the community and expert witnesses, Manitoba and Manitoba Hydro argued that the sturgeon fishery was depleted before the Project was built and therefore they were not liable for damages.

7.2.3 Adversarial Approach to Implementation

As discussed in section 6.5.3 of this report, the filing of a claim does not necessarily mean the Parties resolve the issue before the Arbitrator. In fact, most arbitration hearings occur only after protracted but unsuccessful negotiations. The prospect of arbitration is however, always on the Parties' minds. As a result, the claims driven process is an adversarial and legalistic approach to implementation whether the claim is resolved through negotiation or arbitration.

Over one hundred claims have been filed by the First Nations and resource harvesting organizations. These claims were filed to meet deadlines outlined in the arbitration clauses. While filing of these claims was necessary in order for the First Nations to protect their rights and interests, the action has distracted attention from implementing the Articles of the NFA and has focussed attention on settling claims.

The claims relate to discrete problems. Fragmentation of consideration of the impact of the Project into segments involving only one component of impact results in loss of attention to the total and synergistic effects of the Project on the enterprises and interests of individuals and the community.[230] For example, individual claims were filed in respect of subsistence trapping, hunting and fishing, and yet in reality resource harvesting activities are most often carried out simultaneously. Low water levels, unsafe ice, debris etc. adversely impact on all community

[230] Claims filed under the NFA do not all correspond with specific Articles and their is significant overlap between claims. For example, the fishing and trapping claims allege loss of cultural and recreational opportunity, but there are also separate claims for culture and recreation. In the authors opinion, lawyers working for the NFC were under time pressure to file the claims before the deadline and attempted to file a claim for every conceivable aspect of the Agreement and every known adverse effect. It is doubtful that the NFC anticipated that implementation of the Agreement would be driven on a claim by claim basis through the Arbitration mechanism.

activities including commercial and subsistence harvesting, recreation and social and cultural pursuits. Implementation of the NFA by means of claims limits the opportunity to comprehensively address the cumulative impact on the communities[231] and develop plans for resolving Project related problems.

Because mitigation and compensation programs were not implemented until at least ten years after the Agreement was signed, much attention has been focussed on developing estimates of appropriate retroactive compensation. While the NFA states that the onus of proof is on Manitoba Hydro to show that the Project did not cause an adverse effect (Article 23.2), in practice, it is the NFA communities who must prove that the damage has occurred and provide evidence of quantum. Since there is no credible baseline information, and since there has been little or no monitoring of impacts, the communities have had to rely heavily on outside legal and technical expertise. There is considerable resentment in the communities toward the only people who appear to be benefitting from the NFA, the lawyers and technical consultants.

Canada, Manitoba and Manitoba Hydro agreed to NFA obligations in respect of Article 15 (Wildlife Policy) and Environmental Monitoring (Article 17) only as a matter of policy. Attempts by the First Nations to force implementation are limited by the wording in Article 14 which says it is inappropriate to empower an Arbitrator to order government policy. Canada's legal position is that the Arbitrator cannot order the government to do anything, his powers are limited to issuing recommendations (refer to section 6.2 of this report).

7.3 Conclusion

The NFA was born of a need to address the impact of a flawed project planning process which permitted the commencement of an enormous resource development project without prior assessment of the environmental, social and economic consequences and without reference to Treaty and Aboriginal rights, which it could be expected to engender. Construction of the Project began in 1970, and by 1976 major adverse impacts were evident and viability of the Project was threatened by potential litigation originating on behalf of adversely affected persons and communities. Confronted with the emerging reality of the consequences of the Project, Canada, Manitoba, and Manitoba Hydro reluctantly entered into the NFA and the NFC, representing the interests of First Nations communities adversely affected, also reluctantly agreed to accept the NFA as a vehicle to address the problems caused by the Project.

The Agreement as drafted, was vague enough and imprecise enough, to permit grudging approval by Canada, Manitoba, and Manitoba Hydro, none of whom had reconciled themselves to acceptance of responsibility for the impact of the Project. The three parties did not intend, and have

[231] For example compensation to the community of Cross Lake for the loss of their domestic fishery was based upon the value of the food product. This community also has filed claims for stress and anxiety, loss of recreational opportunity, and cultural losses. Portions of these claims were resolved in respect of domestic fishing activities without monetary payment for these additional damages or losses.

never intended, to co-operate energetically in measures designed and determined to be effective in confronting the adverse impacts of the project. They have instead used every legal device to limit their individual liabilities under the Agreement. The sixteen year history of the NFA is largely a record of the deployment of those devices.

The NFC and NFA First Nations have been, from the first year, bitterly disappointed by the failure of the Agreement to deliver to them effective and adequate programs of mitigation and compensation. There were many in the affected communities who believed, in 1977, that the NFA was a Treaty and a legal contract reflecting earnest intent of the other parties to address meaningfully the consequences of their actions. This position has subsequently been affirmed by the Aboriginal Justice Inquiry of Manitoba (Report of the Aboriginal Justice Inquiry of Manitoba 1991).

In practice the NFA has proved to be a design for the avoidance of responsibility rather than a design for redress of adverse consequences. The Agreement has been severely criticised by the Auditor General of Canada and by other agencies of the federal government. To the communities it is a manifestation of bad faith by both levels of government. It has done little to address the impacts which continue to confront the communities. Those provisions of the Agreement which have been wholly or partially implemented have been executed in an atmosphere of animosity and distrust. In brief, the Agreement has not met the needs of any of the parties.

8.0 CONCLUSIONS AND RECOMMENDATIONS

8.1 Strengths and Limitations of the NFA

Perhaps one of the most significant achievements of the First Nations with respect to the NFA is that they were able to negotiate it without the surrender of any Reserve land and without relinquishing any Aboriginal or Treaty rights. As well, the Agreement has no termination date, and thus obligates the signatories to continue implementing its provisions and compensating for damages for the life of the Project as it exists today and as it may evolve in the future.

The land provisions of the Agreement recognize the high value Cree people attach to Reserve land. Manitoba Hydro was only granted an easement on Reserve land. In return for the easement, Manitoba should have transferred four new and additional acres which would be accorded Reserve status.

The land provisions are flexible, allowing the First Nations to select additional Reserve lands from anywhere within their traditional use territory. The First Nations were not required to select land adjacent to their existing Reserve boundaries, nor did they have to select one large parcel. In theory, the hold area concept which provided for exclusive use of provincial crown in addition to Reserve land selections presented enormous opportunities for the First Nations to exercise greater control of land use and development in their territory. The strategy employed by the NFA First Nations in both their Reserve and hold area land selections, if implemented, would have broadened their control and jurisdiction over lands and resources.

The importance of traditional resource harvesting activities is well recognized in the Agreement. Bearing in mind that the Project was enormously destructive and some impacts are unmitigable, had the NFA Parties engaged in timely and meaningful negotiations, mitigation and development programs designed to encourage continuance of harvesting practices could have offset some adverse effects. The NFA does not limit the nature or extent of obligations in respect of such programs to simply addressing Project impacts. Rather, the Agreement obligates the Parties to jointly examine ways of managing wildlife resources and encouraging maximum resource harvesting activities and opportunities.

The NFA required the Parties to monitor environmental and socio-economic changes in the communities and surrounding areas and to identify Project related impacts. Had this obligation been met in a timely and comprehensive manner, critical information would have been available for determining just and fair compensation. This information would have provided a sound basis for examining the feasibility of mitigation measures and/or developing and executing alternative resource harvesting programs.

Dispute resolution by arbitration potentially represents a more flexible and less costly approach than litigation. Rules of evidence are less restrictive than those applied in the courts as are options for remedy. A most important feature of the arbitration agreement is that NFA First Nation legal and consulting costs associated with accessing and using the dispute resolution mechanism are borne by the other NFA Parties.

The effectiveness of the NFA is severely compromised by lack of a defined implementation process. Absence of an agency authorized and accountable for implementation, combined with ill or non-defined terms, timeframes, deadlines, targets or criteria, has left the Agreement open to wide and often discrepant interpretation.

Reliance on arbitration and the claims process as a means of forcing the Parties to meet their obligations has drawn the focus of attention away from implementing the Agreement and resulted in efforts being expended on settling claims and discharging responsibility. The claims process is adversarial and has resulted in lawyers and consultants controlling the process. Dominance by "outsiders" has resulted in community residents feeling bitter that NFA benefits seem to flow to everyone but them.

8.2 Recommendations for Future Agreements

In developing recommendations based upon the NFA experience, it must be recognized that the Agreement was negotiated and signed in a much different political era than exists today. Attitudes, political and legal realities, and knowledge and understanding of environmental impact assessment have changed significantly in the past two decades. Aboriginal and Treaty rights have and continue to be recognized and defined through political and legal venues. Federal and provincial legislation now require proponents of resource developments to conduct environmental impact assessments as a prelude to approval. Meaningful consultation with and involvement of

Aboriginal communities in such processes is now considered a standard component of impact assessment procedure. An ever increasing body of understanding about impacts related to existing resource development projects, combined with improvements in environmental impact assessment procedure, means Projects are now examined from a position of greater comprehension.

Political and legal realities of today should ensure that the process by which Manitoba Hydro was issued its Churchill and Nelson River Hydro Project licenses and the type of environmental impact assessment that was done in the early 1970's does not happen again. Based on the NFA experience, future agreements between Aboriginal organizations and hydro-electric project proponents should address or include the following;

≅ at the earliest planning stage of the project a process, involving maximum Aboriginal participation and adequate funding, should be developed to: identify existing and potential land and resource uses (scoping); and collect and document all physical, biological, social, economic, cultural data (preferably multiple year data should be collected in recognition of natural fluctuations in weather, species abundance, and harvesting activities).

≅ adverse impacts should be identified, measured if possible, and options and costs in respect of remedies (mitigation and/or compensation) determined in advance of the project being approved. Aboriginal governments/organizations should have the right and opportunity to explore and engage in resource development partnerships or in the event they deem that the project impacts will cause too much damage, they should have the right of veto power.

If an Agreement is signed:

≅ it must recognize that unforseen or unknown impacts may arise.

≅ include a rigorous environmental monitoring program should be designed in consultation with the Aboriginal party and be included in the agreement. Aboriginal people should have maximum involvement in the implementation of the monitoring program. The agreement should create an independent but joint party agency with authority and financing to design, approve and facilitate post-Project monitoring.

≅ if the Project is going to impinge upon or in any way diminish the value of Reserve land, selection and transfer of new land should occur prior to Project construction and before an agreement is finalized.

≅ it should provide clear and precise definition of obligations and responsibilities in respect of what each provision means and who is responsible for implementation.

≅ each provision in the agreement should have a specified start and completion date and include specific penalties for performance failure.

≅ it should include a framework to address implementation management, execution, monitoring and

evaluation. The agreement should clearly specify how the parties will finance implementation.

≅ it should clearly recognize the role of the Aboriginal party in implementation and include a commitment to adequate, long-term funding for this party to fulfil its role and obligations.

≅ Aboriginal representation in any and all institutions created by the agreement should be equal to that of the other parties. For example, if the Aboriginal party is one of say three parties, then they should have two votes to equal the voting power of the other two parties.

≅ although collection of baseline data, conduct of an environmental impact assessment, and a commitment to long-term monitoring of impacts should reduce the potential for disputes, a dispute resolution mechanism should still be built into the agreement. It should specify that all costs (community as well as legal and consulting) anticipated by the affected community in assembling evidence and participating in such a process (or appeal) should be borne by the Project proponent(s). The proponent(s) should not, however, have exclusive authority to determine the necessity and/or reasonableness of such expenses. The Aboriginal party should have equal voting power in the selection/dismissal of the arbitrator. And finally, there should be no limitation on the level of court in which an appeal can be argued.

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APPENDIX A

NFA ARTICLES 3, 4, 5, 15, 17, 19 and 24

APPENDIX B

1971 LAKE WINNIPEG, CHURCHILL AND NELSON RIVER STUDY BOARD RECOMMENDATIONS

APPENDIX C

EXAMPLE NFA POINTS OF CLAIM AND COST ORDER