

15 Protecting Indigenous Hunters: The Social and Environmental Protection Regime in the James Bay and Northern Quebec Land Claims Agreement⁶⁰

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Introduction

In many parts of the United States and Canada, Indian communities have increasingly used aspects of existing environmental and land rights legislation in order to increase their power to effectively oppose large scale development projects. The extension of this technique in order to oppose off-reserve developments has proven effective where the region-wide impacts of such developments affect reserve lands or the Native community's use of off-reserve lands (Jorgensen, *et. al.*, 1978). As promising and encouraging as these successes are, however, the cases to date tend to point-up the uncertainties and ambiguities of such challenges. Depending as they do on legislation not

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designed to be responsive to the particular nature or full scope of Native interests, Native actions are often forced into simple obstructionist or delaying tactics, which although better than existing alternatives, nevertheless tend not to focus on the bases for Native interventions, and tend not to generate wider public support for Native interests.

Furthermore, because the Native challenges are forthcoming in response to project proposals, their effectiveness depends on finding sufficiently strong legal bases for opposition within the already existing legal framework, and such bases are not always available. These uncertainties of responding on a project by project basis through existing legislation emphasize the possible value of trying to use the power generated through these challenges not only to deal with a project proposal at hand, but also to seek new forms of general legislation that recognize Native participation in decisions concerning all future development projects in an area. By this means, the opposition and protest may cease to be simply responsive to developers' initiatives and may create a situation in which Native interests must be systematically presented and taken into account.

It has not been common for an indigenous people to be involved in the design and implementation of a social and environmental impact assessment and protection regime on a regional scale. Nevertheless, this is a possibility that may be worth consideration by Native peoples of Canada and the United States whenever they begin to claim or exercise their rights for an effective say in the planning and approval or rejection of planned projects. It could be particularly important as large scale energy developments with regional impacts become more common, and as Indian control of reserve lands becomes an increasingly insufficient basis for protecting those lands from the impacts of developments. The issue is especially urgent for the northern aboriginal peoples who depend on access to the wildlife resources of extensive regional tracts of land still used for intensive hunting and fishing subsistence activities.

While the opportunities for involvement in the design and implementation of regional protection regimes may not be frequent, I would argue that the opportunities that do exist may be lost unless there is a growing recognition and expression of the need for such involvement.

In Canada, the Cree and Inuit peoples of northern Quebec have recently negotiated the creation of regional, environmental and social protection regimes as a part of their aboriginal rights agreement. This is an important first test of this technique for giving local land-based

indigenous communities more effective participation in the regulation of development activities in their regions.

In the present chapter I briefly outline the context in which the James Bay and Northern Quebec negotiations took place and describe the form and logic of the social and environmental regime which was negotiated. I then evaluate the initial experiences with the regime. Although definitive evaluation is not as yet possible, several general comments are offered by way of conclusion.

The question of how to design effective regimes has received considerable less attention in the literature than how to use the legislation that already exists. This analysis addresses the former issue, emphasizing insufficiencies of typical environmental and social impact review procedures as bases for effective and continuing protection of Native peoples and communities. I will emphasize the need for: recourses against government abuse or omission; ongoing monitoring of government policy and legislation; special means for Native participation; means of making inputs to decision making effective; and the integration of social/environmental regimes with other protections for Native interests. In particular, I will highlight the close link that must exist between the legal recognition of specific Native rights and any effective indigenous participation in the structures and processes for regulating regional development activities. The latter focus will be discussed in the context of the need for realistic assessments of the political leverage available to indigenous communities. I will emphasize possible types of rights, structures and procedures which could be effective in the frequent cases where leverage is insufficient to gain recognition of an absolute right to unilaterally regulate development activity in a region.

The Context of Negotiation of the James Bay Agreement

It has been realized for some time that the Canadian governments have paid lip service to the interests of northern Native peoples, including the Native peoples' interests in their lands, while promoting large scale resource developments without restraint (Freeman and Hackman, 1975; Usher and Beakhus, 1973). In the face of this policy it has been clear that what is needed are means to give more effective power to local people to alter the course of the developments which take place on or near their lands. However, full implementation of this objective would require a fundamental restructuring of power relationships within the country. In the present historical moment, the means to such restructuring are not available to Native peoples, nor to others for that matter. Despite this reality, numerous Native communities have survived, and in the northern parts of North America they have retained a

distinctive land-based subsistence economy. This has not been done without difficulty, but it has been shown to be possible to date. The central question is whether the means to continue this partly dependent, but relatively autonomous existence can continue to be created.

There is little doubt but that the Native people of the Canadian north are committed to maintaining their way of life, including their economic links to the land. It is therefore clear that for the immediate future they will have to recreate this life within the context of the present national and international political, economic, bureaucratic, judicial and legal systems. The most promising means so far used in this process has been a limited legislated decentralization of decision making, brought about through legal and political action by Native people using existing anomalies in the present legal structures.

The negotiation of the James Bay and Northern Quebec Agreement (JBNQA) in 1974 and 1975 provided the aboriginal peoples of James Bay and Northern Quebec regions (see Map 1), Cree and Inuit, with such an opportunity. The agreement was the first modern comprehensive aboriginal rights settlement in Canada, and the first such settlement to explicitly specify a set of aboriginal rights, including the means thought necessary to maintain the indigenous hunters' way of life.

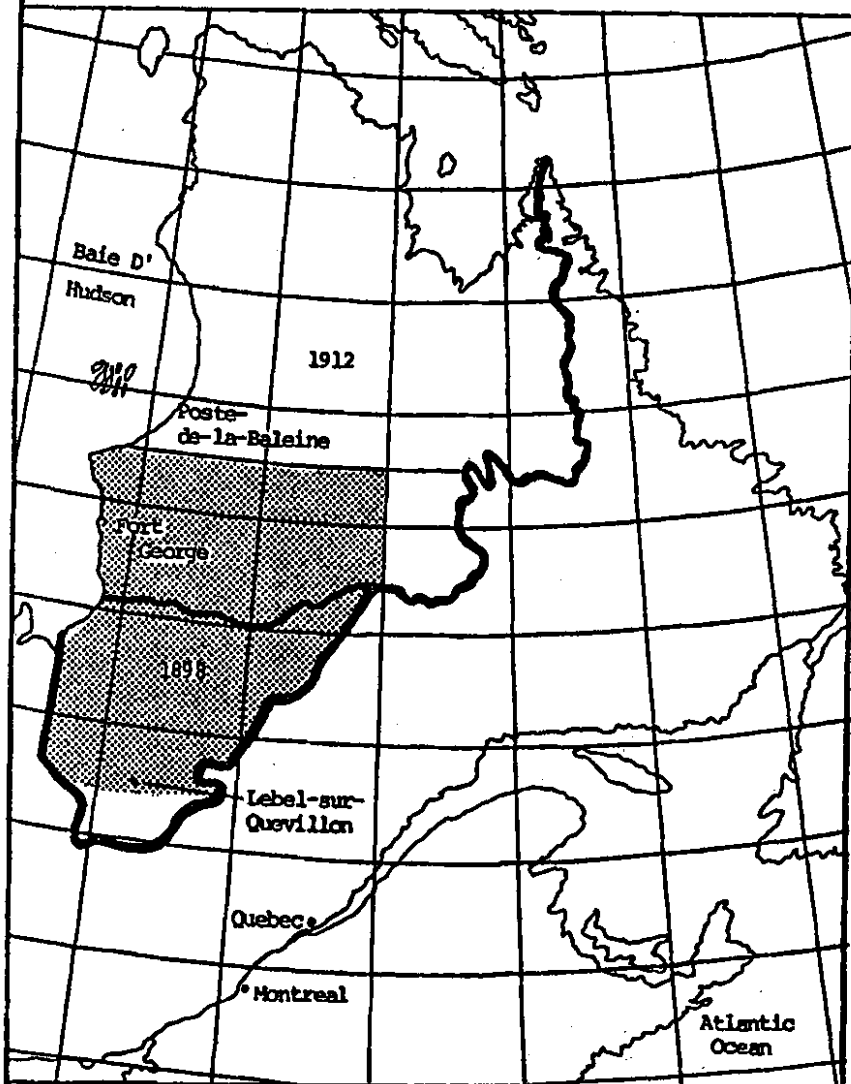
The process was a difficult one because, while the Cree and Inuit were determined to maintain and enhance their hunting cultures, societies and economies through definition of aboriginal hunting rights and benefits (and to do so along side a developing service and business economy), they had, in exchange, to accede to the asserted right of the governments to promote the general development of the natural resources of the region. This conflict structured the framework in which the negotiations with the provincial and federal governments proceeded.


This conflict was defined by two positions. On the one hand, the government insisted that it retain the final authority over all development in the region, except that on reserve lands, in order to assure that aboriginal people could not block regional development. On the other hand,

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MAP 1

THE TERRITORY COVERED BY THE JAMES
BAY AND NORTHERN QUEBEC AGREEMENT



 Lands covered by 1971
development act

Lands transferred in
1898 and 1912 from
federal to provincial
jurisdiction.

the Cree insisted that the maintenance of their hunting societies depended on continuing access to, and protection of, the wildlife resources of most of the lands of the region and not just to those of the reserves, which covered only a limited portion of their hunting lands.

These positions had to be resolved by negotiations because neither side had the power to impose its views absolutely and without significant cost. From the government's point of view, it was forced by the courts to accept the fact that the aboriginal rights of the Cree and Inuit had not been extinguished by any government action, and therefore they were able to ask the courts to intervene on their behalf against developers. From the Native point of view, it was unclear whether the courts would maintain a strong definition to such rights and actually prevent development, or merely recognize a usufructuary interest in the land which would have a more limited impact on development activities. Given the parliamentary system, it was also clear that government legislation could extinguish, or more likely unilaterally define, what the aboriginal right was, although not without a public outcry. These considerations made undefined aboriginal rights effective levers for court challenges to development and for political protest. However, the same considerations made it unlikely that a strict insistence on legal pursuits of aboriginal rights would result in a fundamental redistribution of power within political structures, or in adequate protection of the indigenous peoples from the immediate impacts of the ongoing development.

The Basis of Compromise on the Regulation of Development

The distribution of power and legal resources available to the Cree and Inuit, the ongoing construction of the La Grande complex, and the overall package of benefits negotiated to support their hunting societies (see Felt, 1979; 1980) led the Cree and Inuit to seek a compromise on environmental matters within the negotiations when it became clear that they could not achieve a full control of regional development activities.

The seeking of compromise on this issue was based on three judgments. First that a social and environmental protection regime could be designed which would significantly reduce and limit the impacts of development activities in the region on the Native peoples. Second, that based on the experience already encountered of the impacts of mining, forestry operations and hydro-electric development, Native people's subsistence activities and economies could survive and continue to evolve in the

context of a carefully regulated regional development." And third, that the establishment of formal legal recognition that the Native people had rights to a direct and systematic say in all decisions on the authorization and regulation of development projects, in their region would strengthen their position significantly with respect to future developments.

Among the special aboriginal rights the Cree wanted, therefore, were legal recognitions of their special interests, needs and status as well as special provisions for their involvement in the measures needed to implement their rights and to protect themselves and the regional environment against the negative impacts of future development. Furthermore, they insisted that this be over and above any existing procedures for involving sectors of the general public in the environmental protection measures then in force. The Cree and Inuit argued that because they were giving up some as yet undefined claims to special status, they had to be given a defined special status in exchange.

The negotiated regime for social and environmental protection was therefore an attempt to ensure that regulation of development would proceed so that Native objectives were met. It is a unique regime in several respects: 1) the constraints it places on government authority, in order to afford protection of aboriginal peoples' interests; 2) the provisions for involvement of the aboriginal peoples in regional procedures and institutions; 3) its combination of an impact assessment procedure with a means for ongoing review of legislation, regulations, policies and the quality of the regional environment and of social life; and 4) the way it is designed to complement other programs and policies so as to assist the maintenance of hunting in the face of those development impacts which are unavoidable.

Principal Features of the Social and Environmental Protection Regime

At the time of the negotiation of the JBNQA the federal and provincial governments had only very weak environmental and social protection regimes in force. The Cree and Inuit insistence on a regime that had the potential to effectively

"The latter judgement was based on an assessment of the particular nature and mix of the key wildlife resources, the types of development which foreseeably could occur, and the patterns of the Native hunters' use of the region. Importantly, this conclusion need not apply elsewhere in the North, but does appear to be true in this region if "carefully regulated" is emphasized.

protect them and their regional environment constituted not only a claim for the addition of special provisions, but demand for a complete revision of existing provisions.

Notably, there was no explicit social component in the provincial procedure, nor any reference to specially affected human populations in either the Canadian or Quebec procedures. In addition, there was no general obligation to conduct public assessment and review comparable to recent legislation in the United States. It should be noted however, that the latter legislation would not have satisfied the Cree and Inuit either, because they insisted on the need for special treatment as affected populations and because they insisted on special status and involvement in the procedures to be established.

Therefore, the Cree and Inuit had to insist upon the creation of a general, obligatory and effective social and environmental protection regime, as well as insisting on provisions for their special protection and involvement. However, this lack of well developed regulatory regimes designed by the provincial and federal governments enhanced the opportunity to design new and appropriate provisions.

The first issue that confronted the Cree negotiators, given their insistence on special recognition and participation, was what the main components of the regime should be. The procedure of subjecting new actions with potential environmental and social impacts was already common in the United States, and in some jurisdictions in Canada. Such a mechanism was thought appropriate, if specifically designed for the James Bay case. Two questions arose from this decision, whether Cree participation could be effective, and whether an assessment and review procedure per se would be sufficient to protect Cree interests.

Whether the Cree hunters could effectively participate in a formalized legal and inevitable bureaucratic procedure was considered in the light of their recent experience. The Cree opposition to the James Bay hydro-electric project demonstrated the possibility for such involvement. In the courts, where the Cree and Inuit initially fought the hydro project, the hunters had explained their way of life and their evaluations of the serious impacts which that project

"The remainder of this chapter describes the regime established for the Cree portion of the James Bay and northern Quebec territory. The Inuit regime varies from this in several respects, due in part to the creation of a non-ethnic regional government in the Inuit areas in contrast to the ethnically defined Cree Regional Authority.

would have on them. They had argued against project construction, and had indicated the kinds of environmental and social problems that would be created if it went ahead. They had thus demonstrated a willingness to use Euro-Canadian institutions and formal hearing procedures to express and pursue their concerns.

Furthermore, the entire process of preparing for court presentations had led to extensive discussions in the Cree communities about their own experiences with externally initiated development projects. It led to the formulation of both a general consensus to fight developments over which they had no say, and specific consensus over the changes they felt essential in order to moderate the impacts of the hydro-electric project.

Finally, following the major court victory, the decision to enter into negotiations with the governments indicated that the Cree were not opposed to all development. Rather, they perceived their survival as a distinct people to depend on an effective say in future regional development activity.

The second question was: What kind of mechanism could be designed to serve Cree interests? Experience in other jurisdictions indicated that environmental and social impact assessment and review could be effective when considering a specific project or action, but were less effective when directed to broad legislative, administrative and policy changes. Furthermore, environmental and social impact assessment and review basically followed from initiatives by a proponent. That is, the initiative to implement a review was usually only taken when a project proposal was initiated by a proponent, and a review could not be initiated by an affected third party, for example a local population. Therefore, impact assessment and review procedures generally did not examine or challenge the status quo. Moreover, the procedures were time-bound. They demonstrated a relatively restricted capability for continuing assessments after authorization and during implementation of a development, when unforeseen consequences were frequently encountered.

These considerations led the negotiators to reject a regime simply composed of an impact assessment and review procedure, and to negotiate a two-component social and environmental regime. On one hand, they sought a social and environmental impact review procedure which would apply to all new development, defined as projects consisting of any work, undertaking, structure, operation or industrial process which might affect the environment or people of the territory.

On the other hand, they sought a procedure whereby social and environmental (including land use) regulations

and policies could be reviewed and/or adopted to minimize the negative impact of development on aboriginal peoples and their wildlife resources of the region.

The Cree thus negotiated a joint, government-Cree committee with a mandate for reviewing existing legislation, policy and regulations, and for conducting mandatory reviews of any proposed changes to these. The committee was empowered to initiate needed additions or changes to the existing legislative, regulatory or policy framework by recommending such to a governmental authority. It also supervises the implementation of the entire JBNQA social and environmental protection regime, thereby assuring that the results and experience with impact assessment and review can be "fed-back" into the legislative and regulatory regime. In effect, it generally provides a surveillance of both environmental quality and the quality of life in the region. The specific jurisdiction, authority and powers of this and other committees will be discussed below.

The Cree-Government Review Process

In addition to this committee, three joint Cree-government bodies were established to implement the impact assessment and review process. The first is an evaluation committee. Whether a particular type of project is subject to an impact assessment and review was negotiated. Under the resulting regime it is usually decided by whether or not that type of project is on one of the two lists of projects necessarily subject to or exempt from review. In the case of projects of a type not on the lists the JBNQA provides that the proponent of such a project shall provide a basic project description plus "information and technical data adequate to permit a gross assessment of the environmental and social impact of the project". The decision on whether such a project will be subjected to assessment is based on an evaluation of whether such a project may have significant impacts on the Cree people or on wildlife resources. The joint Cree-Quebec-Canada evaluating committee makes this evaluation and submits its recommendations for a decision by the appropriate governmental authority.

For projects which are subject to assessment the evaluating committee also recommends the timing, nature, and extent of the impact assessment required and whether there should be a preliminary or only a detailed assessment. This essentially involves providing recommended directives, or terms of reference, for the government authority to instruct the proponent in identifying and assessing impacts, and in developing alternatives, preventive and remedial measures.

The actual impact assessment statements required are prepared by the proponent, in accordance with the directives issued by the governmental authority, and a list of general

guidelines. The impact assessment statements are then reviewed by the review committee, and/or review panel, which recommend responses to the appropriate government authorities.

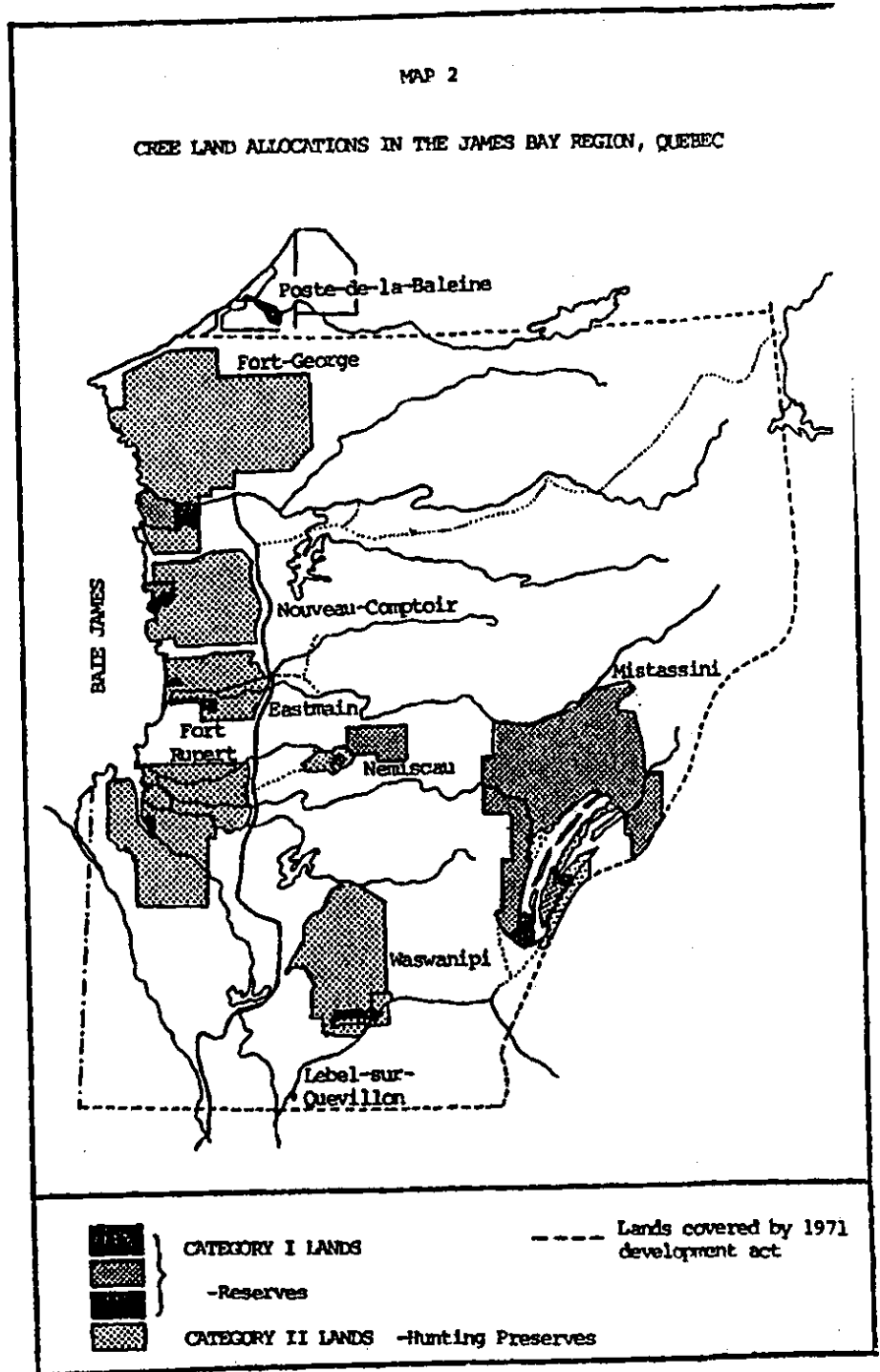
The review committee and review panel are parallel Cree/Quebec and Cree/Canada bodies which consider projects within the jurisdiction of the respective provincial or federal governments. A developer may be required to prepare only a detailed impact assessment statement, or in the case where there are important project location or design alternatives, both preliminary and detailed impact assessment statements. In the case of a preliminary impact statement the review bodies recommend which alternative forms of development should be studied further by the developers and thus subjected to a detailed impact assessment. In the case of a detailed impact assessment statement, they recommend whether or not a development should be authorized to go ahead, and if so, they may recommend the terms and conditions, including modifications and remedial measures which the developers should be required to respect and/or undertake.

Jurisdiction, Decision Making and Protecting Cree Interests

The Cree wanted a regime in which they had final decision making authority over the entire area which they use and had rights to. As indicated above, they were unable to get final decision making authority over development activities occurring off their reserves. The key question therefore became whether the regime could still afford significant protection for the Cree and their regional interests.

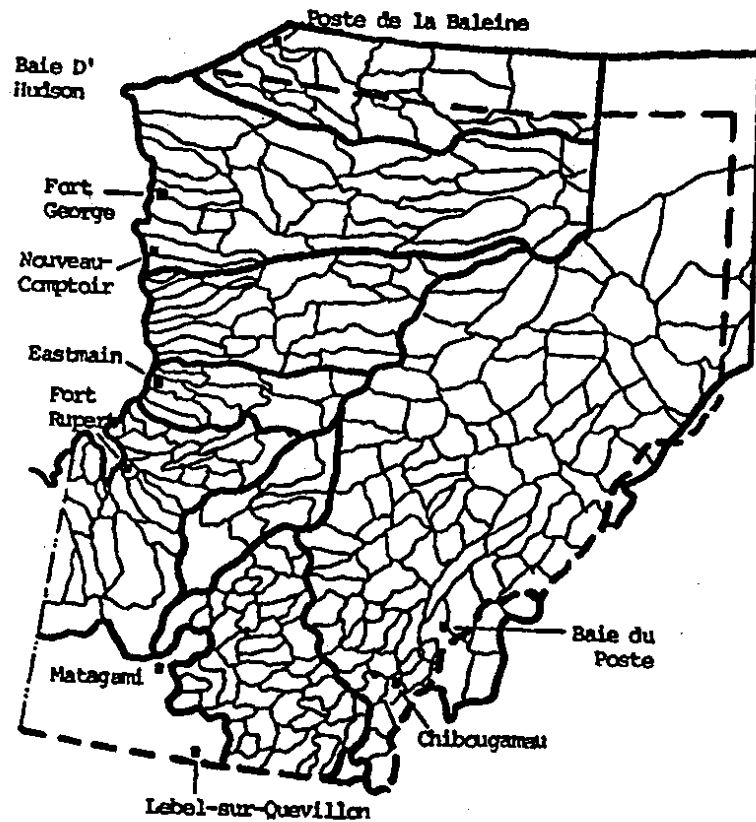
The final jurisdictional division gave decision making authority to the respective federal and provincial ministers, according to their jurisdiction with respect to the projects involved, on most of the territory (approximately 145,000 square miles) and to the local Cree governments on the reserve lands (approximately 2,000 square miles, see Map 2). Relative to the patterns of Cree land use, (see Map 3) the land under Cree control is limited, and the essential questions concern the ability of the Cree to affect events on non-reserve lands.

Given their geographically limited jurisdiction, the Cree focussed on negotiating a regime which could assure that the special Cree rights, interests and regional concerns would be effectively protected even if the Cree did not have a general decision making authority, and given that the joint committees were only mandated to make recommendations to the appropriate governments. This objective gave rise to a number of provisions for mechanisms that would give weight to Cree interests, to Cree inputs to



MAP 3

APPROXIMATE TRAPLINE AREAS OF JAMES BAY CREE HUNTERS



the joint bodies, and to the recommendations of those bodies. It was clear in this situation that participation in a simple consultative capacity would not be sufficient. Cree inputs would have to be formal and difficult to ignore and government decision making authority would have to be legally and procedurally constrained.

One provision was to establish a series of principles which are legally binding on the governments which exercise final decision making authority with respect to development and the environment. Such principles serve as directives and constraints, and they partially balance the considerable pressures which could be brought to bear on government policy makers by developers, certain sectors of the non-Native public, and other government agencies.

These principles are listed in the JBNQA and the legislation which implements it. They provide that all bodies established by the regime, and all levels of government with responsibility over the territory, will give due consideration to: 1) protection of the aboriginal people, societies, communities and economies; 2) protection of the wildlife resources, the physical and biotic environment, and the ecological systems of the region; 3) protection of the hunting, fishing and trapping rights of indigenous people, and their other rights and guarantees in lands; 4) minimization of the impacts on the aboriginal peoples by means of the regime, and especially by reasonable means through the impact assessment and review procedure; and, 5) respecting the involvement of the Cree people in the application of the regime. The agreement also acknowledges the principle of 6) the right to develop by persons acting lawfully, i.e. in accordance with regime. Finally, the legislation, which gives the agreement and these principles the force of law, supercedes all other legislation which may conflict with it.

The Cree feel that the principles offer some general but real criteria which can: 1) guide the operation of the regime; 2) be used as general criteria for decision making; 3) be used to evaluate the performance of the regime and the exercise of government authority, and most importantly, because they are legally binding on governments; 4) provide a legal basis for recourse against a serious violation or a systematic pattern of government decisions which did not protect the Cree interests. This ultimate recourse to the judicial system is essential to give the principles and the Cree the clout they need to protect their culture and environment.

The second mechanism involved the legal framework of the series of consultative committees which make recommendations to the appropriate governmental authority with decision making powers. Each of these is designed to

provide maximally effective consultation, and recommendations that have some government support and that are difficult to dismiss, as opposed to ad hoc or occasional advice. The advisory, evaluating and review committees are each designed as: 1) permanent bodies, with continuing membership of both Cree and government appointees; 2) bodies with a formal organization, a budget and a secretariat; 3) obligatory and exclusive bodies, which the responsible government authority is obliged to consult and cannot by-pass before taking any decision or action; 4) expert bodies, with members who can deal with issues knowledgeably, including both scientific and Cree experts; 5) bodies that recognize special Cree standing, status and inputs; and, 6) bodies whose members have effective mandates to represent parties, that is where substantial discussion and compromises can occur, and where the typical final outcome can be joint agreement upon recommendations. Furthermore, procedures were established whereby, if a governmental authority wishes to take a decision inconsistent with a committee recommendation, then it must convene the committee to explain and discuss its position before legally taking the decision. Thus, while the committees are consultative, such consultation and their recommendations are made more effective and "weighty" by being obligatory, exclusive, joint, permanent, expert, formal, authoritative, and accessible to the Cree.

With respect to Cree participation, it was deemed necessary that the Cree participate in each stage of the social and environmental protection regime. The Cree therefore designed and negotiated a regime in which they have ample and effective opportunities to put on record to committees, proponents and governments what their interests are, what impacts they anticipate and want dealt with, and what they think will be necessary to adequately protect them. Three kinds of input and participation were incorporated into the JBNQA and the legislation.

- 1) The Cree appoint 40 to 50 percent of the members, and therefore have direct inputs on each of the decisions recommended by the committees. This is intended to allow the Cree to put an informed commentary into the deliberations and documents on all recommendations for decision and action.
- 2) The Cree communities may make representations before the review bodies. In this case both written and oral presentations can be made, including the possibility of presentations by interested individual Cree. This is in effect, a provision for a restricted form of public hearings specifically for the Cree. Through invitation, Cree individuals or communities can have similar access to the other committees. It provides for direct inputs by

affected Crees to government decision-makers on the committees.

- 3) Specifically with respect to the impact assessment and review procedures, the procedures assure that the Cree are necessarily informed of any project submitted for impact assessment and review before an impact statement is drafted, and they provide that a Cree governmental authority may make representation directly to the proponent. This was done to ensure that in cases where the Cree wish to avail themselves of the opportunity, they can make direct contact with and inputs to the proponent during an early stage of his preparation of the impact statement. Judicious use of this mechanism was thought likely to establish direct contact with the proponent and to afford the maximal possibility of the Cree and the proponent agreeing on project alternatives and/or terms and conditions without confrontation, where such could be avoided.

If the Cree found that their inputs were not being considered adequately in the final decisions, the structuring of systematic inputs would facilitate Cree representatives on joint bodies submitting dissenting opinions. These would then provide the basis for using other available recourses, particularly litigation, should an apparent breach of the detailed procedure or of the principles be involved.

The combination of these explicit principles, obligatory consultative procedures, and mechanisms for Cree inputs into consultations, was thought to sufficiently constrain the exercise of governmental authority that it would have to respond to, and in part serve, Cree interests and concerns.

Making Compromise Liveable: Relation of the Regime to Other Provisions of the JBNQA

The compromises involved in accepting this limited control over development activities and social and environmental protection were hard ones for the Cree. As indicated above, compromise was accepted because the Cree were convinced that given their way of life and given the resources on which they depend, their culture and economy could survive in the context of a carefully controlled pattern of development.

These provisions were not all that the Cree desired, or all that they considered just. But given their experience of the James Bay Hydro-electric Project, which was designed and built between 1971 and 1974 without any effective Cree input, they believed that these provisions would

significantly improve their situation. The Cree were not willing to hold out for an ideal regime, because they had too much to lose. Their primary objective was to establish the conditions for the continuation and enhancement of their hunting activities, on which their culture and social organization depended. They felt these conditions were deteriorating prior to the JBNQA, and that continuing to live without new recognition of their right to affect the course of development would, de facto have further eroded their chances for survival.

It is thus important to note that the environmental and social protection regime was only one section of the JBNQA among nearly twenty sections applying to the Cree, many of which provided other support for Cree hunting activities. The maintenance of hunting activity by the Cree was thought to depend on four issues which were critical at the time of the commencement of negotiations: 1) the recognition of a basic right to hunt at essentially all times, all places, by all Native people for all currently pursued purposes; 2) an effective Cree role in wildlife management; 3) resolution of conflicting use of wildlife resources with non-Native sports hunters and fishermen; and, 4) the potential impacts of future development. The JBNQA provided means to deal with each of these (see Feit, 1979).

Various provisions were thus negotiated in the JBNQA to assist Cree hunters to continue their activities and economy. Harvesting rights were recognized to be exercisable wherever physically possible, subject to certain limited restrictions. This assured that general hunting laws or the legal taking of land for development purposes would not preclude hunting activities. The key problem was the actual physical transformation of the land and its wildlife resources by development activity, and the impacts of such transformations on harvesting activities. Clearly development was going to occur, and however well regulated it might be, some reductions in wildlife populations were also going to occur.

In order to survive impacts brought about the reduction of wildlife populations, the Native people were going to need increased access to the remaining wildlife resources. The JBNQA was designed so that this could happen in several ways. First, in the case of those species for which there was a substantial non-Native as well as a Native kill, the issue was who would first suffer any reduction of the populations of these species. The hunting regime provided a mechanism for the priority of Native harvesting over sport hunting and fishing, whereby the consequent reduction in sustainable yields of wildlife would be reduced first from the total non-Native sport kill. Thus, for certain key species, impacts on the total Native kill could be moderated by the operation of the guaranteed allocation of harvests

and the mechanism for priority to Native harvesting (see Feit, 1979).

A Guaranteed Annual Income Program

Whereas this strategy works at a generalized level, it does not reduce impacts on individual Native hunters whose trap lines are affected by development. For these men alternative means of hunting had to be provided. One response was to establish a guaranteed annual income program providing payments indexed to rises in the cost of living for all Cree hunters who live by harvesting as a way of life. The Income Security Program agreed upon provides an annual guaranteed income to Cree hunters who meet the basic requirements: a) that more time be spent each year in hunting and related traditional activities than is spent in wage employment, and b) that at least 4 months be spent in hunting and traditional activities of which 90 days are out of settlements "in the bush". The payments averaged approximately \$5,800 per family in 1979-80. The main payment was a \$16.64 per diem for the head of household, and a similar amount for the consort. It was based on days spent "in the bush" in hunting and related traditional activities and paid four times a year (Scott and Feit, in press; LaRusic, 1979; Scott, 1979, 1977).

This program was established to provide economic security for Cree hunters in the face of changing conditions, and in part, to provide them with the means to maintain, modify or expand harvesting activities in times of disruption caused by development.

The provisions of the Income Security Program are complemented by the provision for a Cree Trappers Association and a Wildfur Program, and by provision for remedial works corporation to provide programs responding to the impacts of the hydro-electric developments. These bodies could provide additional funds to hunters where ISP payments are inadequate, for example as transportation subsidies. However, their major role is to provide the community-wide services and infrastructure needed by hunters and to provide locally controlled access to the goods and the markets with which hunters enter exchanges. As such these agencies are involved in the provision of bush radio communications, airplane dispatching services, construction of snowmobile trails, base camps and improved bush camps, provision of fur marketing services, and improvement of equipment supply to the villages. The remedial works corporation is also mandated to undertake programs to improve the biological productivity of the habitat, although it is not clear yet whether such measures could effectively improve harvesting.

The central question is whether this combination of provisions will allow the Cree to maintain their subsistence production at adequate levels and protect the structure of their culture and society. There is no definitive answer to this question at this time. Most of those involved in the negotiation process were, on the basis of all the evidence available, hopeful with respect to the outcome."

Implementation of the Social and Environmental Protection Regime

The James Bay and Northern Quebec Agreement was signed in November, 1975. The general federal legislation for implementing the agreement followed in 1977, and the specific provincial legislation necessary to implement the social and environmental protection regime was only passed in 1978. Much of the time since has been spent setting up the new administrative structures, and operationalizing the regime by setting budgets, appointing representatives, hiring staff, adopting internal rules and by-laws, establishing procedures, and informing government agencies and potential proponents of their responsibilities and of the procedures. As a result, only a limited number of medium or large-scale existing or proposed development projects have as yet been subject to consideration, and no large scale project has as yet received full authorization. Nevertheless, operating and potentially effective committees and procedures appear to have been established, and several small and medium-scale projects have proceeded to authorization with terms and conditions which effectively incorporate Cree concerns.

Thus, there is only an incomplete experience with the regular operation of the regime to date, and the strengths and weaknesses of the regime in practice are still being discovered and created.

Administratively, both the federal and provincial governments have established special offices or sections within their respective environment departments to assist fulfilling the obligations they have made under the James Bay and Northern Quebec Agreement. The James Bay and Northern Quebec Office of Environment Canada in Quebec City operates on a budget of about \$350,000 per year, and has more than five full-time professional staffers. It coordinates federal participation in various committees and procedures under the regime.

"Only fragmentary and partially analyzed data have become available to date, but what material there is suggests these hopes are generally being fulfilled.

The provincial government has established a James Bay and Northern Quebec section within its Ministry of the Environment. Although the budget allocated to James Bay and Northern Quebec work is not readily distinguishable, about \$100,000 is expended in addition to regular ministry staff and operating expenses. At present three professional staff work extensively on regional matters, approximately three or four others work part-time on regular basis, and other professional staff are called on as needed. One of the professional staff members administers the regime processes, and a second administrator is now envisaged.

The Cree Regional Authority (CRA) has a staff of two Cree and two non-Native professionals working primarily on regime related matters, and another two Cree and two non-Native advisors working on a part-time basis. In addition, there are eight Cree local environment administrators, one for each of the Cree villages. The local administrators exercise decision making authority over reserve lands. The Cree set up with the Faculty of Education of McGill University a training program for their local administrators, and they are now temporarily employed on salaries from the CRA. The educational program secured government support, but the Cree are still trying to secure government assistance to assure the permanent employment of the local administrators.

The contribution of the CRA staff to the implementation and operation of the regime has been substantial. Thus, the financial costs to the Cree have been considerable, probably approximating those being incurred by the provincial government, although less than those allocated by the federal government. The regime originally provided for certain costs of Cree staff and appointees to be paid by the senior governments, but it has become clear that these provisions did not adequately take account of either the total costs to the Cree, or of the amount of time which CRA staff would have to contribute to the general operation of the regime in order to assure its proper functioning. Discussions have recently begun between the Cree and the provincial and federal governments with the aim of providing a more equitable distribution of the costs of operating the regime.

Relations of Proponents to the Cree and to the Regime

With the committees and personnel now in place, initial experiences with the operation of the regime have revealed several areas of initial success and of initial tension, in which effective operation in the long-run will depend on the precedents being set in these the earlier years. These areas involve the relationship between proponents and the Cree, and between proponents and the regime, ambiguities of

Cree participation, and the relationship of the regime procedures to government decision making.

The conflicts which have emerged between some developers and the regime provisions center about the regime structures which were established to encourage bilateral contacts between the Cree and proponents. These provisions, which emerged out of the Cree experiences during the negotiations of the regime, have been highly effective at encouraging proponents to seek out Cree inputs, but they have also created tensions with other regime procedures.

During the negotiations leading up to the JBNQA the Cree were negotiating both the regime that would apply to future development, as well as negotiating the possible modifications, remedial works and the approvals that would be applied to the La Grande hydro-electric complex. The latter negotiations were conducted directly with the government-controlled corporations mandated to build the project. These, and subsequent negotiations, led to agreements primarily on remedial works, indirect compensation for damages, and on authorizations for that hydro project. As a result of these negotiations, significant funding was provided to the Cree to organize their own programs to remedy project impacts, and as indirect compensation to improve their community infra-structures and services. These negotiations were not, however, effective in the long-run at meeting the Cree objectives of significantly reducing and modifying the scale of the projects or undertaking preventive measures to reduce and avoid impacts. The authorizations the proponents eventually received permitted them to design their projects so that they optimized their economic benefits.

From the proponents' points of view the costs of remedial works and indirect compensation were an acceptable and very small fraction of the total cost of project construction and net project output. From the Cree point of view these negotiations were seen as a partial success, providing substantial sources of funds, relative to other sources, to assist the Cree to survive project impacts and improve their living conditions. The negotiations with proponents were thus seen as having been successful, if only partially successful, and the social and environmental protection regime was therefore, to permit bi-lateral negotiations with proponents.

Thus, as the regime comes into operation, proponents perceive that they now have two avenues for seeking to deal with Cree interests, bi-lateral talks and exchanges through regime committees and procedures. The relationship between the two has been found to be complex, and the regime has been found not only to permit, but to encourage bi-lateral negotiations. Authorization for projects can only be given

by the responsible governments after completion of the regime proceedings. Concern about how the Cree will exercise the special rights and participation they have in that process serves as an important impetus to proponents to seek out bi-lateral discussions and negotiations with the Cree. Thus the regime serves much the way the Cree court actions did during the negotiation of the JBNQA, as a lever for the seeking of compromises by the proponents. This is critical because the legal recourses by the Cree on the basis of aboriginal rights are less likely to be effective after signing the JBNQA. Thus, while some court action now would be based on the provisions of the regime itself. Proponents thus attempt to enter into negotiations with the Cree largely because of the existence of the regime.

In this respect the regime has been immanently successful, it has created a situation where the Cree are no longer simply ignored, and in which many proponents actively seek out Cree inputs and concessions to Cree interests. This is a radical break with the situation which existed a decade ago.

The official Cree policy is therefore one of pursuing extensive bilateral negotiations with certain proponents as well as pursuing full participation in the operation of the regime. Because negotiations, when successful, involve agreements on remedial measures and especially on compensation, they can compliment the regime process by providing agreements on issues not likely to be settled so satisfactorily through assessment and review. The regime is potentially strongest in the areas where negotiations are weakest--namely rejection of a project, project design modifications and choice of site locations, preventive measures, monitoring procedures, and specific remedial works undertakings by the proponents. Negotiations are the best arenas for financial compensation and funds for Cree controlled remedial works.

Initial experience with the regime has shown conflicts, however, because if negotiated agreements can compliment review procedures, they may also be perceived by proponents as a means to pre-empt the latter as well. Thus, some proponents have clearly hoped to negotiate agreements with the Cree on remedial measures, funds and compensation in the hope this will facilitate authorization of their projects through the regime. This could happen through convincing government authorities that Cree concerns have already been met in a bi-lateral agreement and that the regime procedure need be nothing more than a rubber stamp. Or, it could happen by the Cree accepting a trade-off of compensation and funds for remedial measures, for not opposing the project or seeking modifications, preventive measures, specific remedial works, or monitoring, through the regime.

Proponents have explored both avenues to pre-empt the regime.

The Cree have continued to officially support both processes, and are attempting to explore the means of keeping both procedures operating effectively. The issues are complex, and inevitably disagreements on priorities and means also occur within the Cree organization, differences which proponents attempt to use to their advantage.

The main danger is that the development of the regime in the long-run can be weakened if it is successfully bypassed by specific negotiations in the short-run. The Cree are therefore trying to set precedents in these initial phases of the operation of the regime that strengthen both avenues for dealing with development proposals, and that avoid endangering the credibility or effectiveness of the regime.

This is essential because the regime provides the key leverage for negotiations, as well as the only effective means by which to stop or significantly modify future projects that may be totally unacceptable to the Cree. Maintenance of the relative integrity of the two procedures is therefore critical for the future use of both the regime and of negotiations.

Ambiguities Arising from Cree Initiated Projects

A second complex area for Cree policy involves the relationship of Cree initiated projects to the regime. The regime was designed as a universal one, applying to all projects in the territory. It was assumed that decisions on Cree initiated projects on Cree reserve lands would be reviewed the same way as other projects, but the recommendations would be sent to the Cree local administrators in the concerned local Cree governments, who have final decision making authority. Since the Cree projects presently underway are mainly community infrastructure and housing programs and remedial works projects, which generally have extensive community input, and clear and widespread community support, the purpose of the regime procedure is not apparent.

In addition, since the projects are generally being attempted on a crash schedule, and sometimes with severe cost constraints, the regime processes often look counter-productive, especially to the contracting firms and external planning and engineering consultants. In some of these cases Cree projects have thus been initiated without going through full regime procedures, with the cooperation of the specific government departments concerned. Indeed, government funding often is only available for expenditure within a relatively brief period, thus lending support for

the adoption of abbreviated procedures. These Cree initiated projects which by-pass the regime threaten to set a precedent as dangerous as that which could be set by other proponents, and thus this situation has generated considerable internal discussion within the Cree organization.

Although the regime does not necessarily involve real substantive costs or delays, it is nevertheless perceived by some as an unnecessary risk for tight schedules, especially as it is unclear what the purpose of submitting such Cree projects to the regime is at this time. Others note, however, that this is a situation that may change with time however. While the Cree now have a range of some 25 to 30 administrative and corporate organizations established, including school boards, health boards, construction and transportation companies, and local community and regional government structures, these are still run in a relatively coordinated fashion, and conflicts between entities and communities are not common.

In the future, however, as the number and scale of entities grow, and possibly as the Cree populations in the communities themselves diversify, as the projects proposed in the communities become more specialized and of less universal benefit, the positions and interests of sectors of a community in response to some projects initiated by Cree entities may be considerably more diverse than presently is the case. Under these conditions the regime could serve to operate as a Cree-controlled means of inexpensive professional advice in the public assessment and review of project proposals, and as a means of encouraging the development of community consensus prior to the decisions by local authorities on authorization. For the moment, however, there is an effort to develop policies which would respond sensibly to the present realities, while not setting precedents that would weaken the regime for the future.

The need for policy formulation is also reflected in a growing awareness within Cree government of the importance of identifying clearly what are Cree interests and priorities, so that available resources can effectively be applied to specific objectives. Unless such identification and priority is undertaken, the enormously diverse range of development issues that arise tends to disperse resources, cost more, and reduce results. The environmental priorities identified at the present time include reduction and regulation of the impacts of forestry operations on Cree lands and hunting activities and limitation of the impacts of hydro-electric development.

The Role of Governments: The Key Tests of the Effectiveness of the Regime

These two types of development, forestry operations and hydro-electric projects, are the two development activities with the most widespread impact on the regional environment and on Cree land use, and dealing with them will probably constitute the major tests of the effectiveness of the regime.

In the case of forestry operations, only the initial steps in the procedures to deal with forestry have been taken to date, yet it has already been demonstrated that the Cree and the Quebec governments are both willing to bring these existing large-scale projects under careful examination and review, and to subject them to terms and conditions which effectively reduce their impacts on Cree hunters. While initial disagreements concerning the nature of the application of the regime to forestry operations existed between the Cree and the government, discussion and legal opinions resolved the key points of contention. A relatively clear set of provisions in the JBNQA led to the implementation of a highly innovative and joint approach to the regulation of the impact of both ongoing and future forestry developments. This success appears to reflect, in part, both the strength of the agreement and the interest of the main government department concerned with forestry to maintain its presence and jurisdiction over this sector in the face of possible challenges from the department primarily mandated to implement the environment regime.

Whatever the mix of reasons, operations and procedures are now established that effectively decentralize the aspects of regulating forestry activity that are of primary concern to the Cree, namely the decisions on which areas will be cut or preserved. The procedures provide that Cree hunters decide which stands of trees must not be cut in order to protect important moose, fish and beaver habitats and populations, and these instructions are communicated to local departmental offices. Their instructions are then incorporated into the locally issued government cutting permits, thus legally preventing the cutting of forests on these specific lands. While only a limited percentage of land is excluded from cutting, this promises to significantly reduce the impacts of forest cutting operations on the wildlife and on the Cree hunters' use of the land.

The forestry experience emphasizes the value of having a regime that subjects ongoing developments, regulations, and procedures to examination and modification. It also shows the general effectiveness of the basic obligations, principles, procedures and participation specified in the regime to modify departmental policies so as to meet Cree

interests, at least where there is no major conflicting interest.

In comparison to the forestry issue, the measures needed to limit the impacts of the new hydro-developments that are being planned for the region have been less adequately implemented to date. The main reasons I believe, lie in the fact that while the former measures were consistent with, or at least did not conflict with governmental interests, the latter conflict in part with major policies of each of the governments involved.

The initial responses to new hydro-development have primarily concerned the Cree and Quebec, and the government of Canada has been much less actively involved in review of proposed projects. While this partially reflects the lower number of project dimensions involving federal jurisdiction, it also appears to be a result of a policy decision on the part of the federal government. The Canadian government wishes to keep a low profile in the Province of Quebec where separatist sentiments are vocal, especially in relation to projects involving participation or support from the provincial government and its corporations.

While such a policy is consistent with previous positions of the federal government during negotiation of the James Bay and Northern Quebec Agreement, it involves a minimalist reading of the JBNQA provisions to which the federal government is bound.

Recognition of this position has led some proponents to actively avoid submitting their projects to a federal impact assessment and review, knowing that the federal government is more likely to remain passive rather than to protest. While these projects are still subject to assessment and review under the Cree/Quebec committees, and do not thereby escape the regime, the failure of the federal government to act limits the issues and resources involved in the review.

In the absence of more direct involvements, the main activities of the federal office mandated to implement provisions of the regime have been to create a major documentation center and bibliographic service on the James Bay and Northern Quebec region. It has commissioned several reports bringing together existing information on specific environmental or social concerns. The Cree have found the reports on their communities to be grossly inadequate, and have questioned the role of such documentation, fearing that it may undercut and replace direct contact by proponents with the Cree communities affected by a proposed project. This, however, remains a secondary concern to the passivity of the federal bureaucracy in respect to the main substance of its mandate under the JBNQA.

On the provincial side, the assessment and review of hydro projects has also demonstrated initial difficulties. The crown corporations promoting the developments are large and powerful organizations within the provincial bureaucracy. The potential conflicts between them and the department charged with regulating the environmental and social impacts of their projects tend to push decision-making high up in the bureaucracy into the political arena. This tends to remove key considerations and decisions from the joint Cree/Quebec committees and locates them with internal Quebec committees, or with senior civil servants or politicians. In any case, there is a tendency for the decisions to be removed from Cree view and participation. The middle level and senior civil servants appointed to the joint committees sometimes sit without effective mandates, and no effective discussion, compromise or consultation takes place. Joint committees then tend to be treated as adjuncts to the internal governmental committees, as mere formalities, where discussions taken elsewhere in government get reported and cursorily rubber stamped before being finally approved and implemented. This is contrary to the intent, process, structure, and legal provisions of the regime.

This experience with hydro-electric projects contrasts with the experience with small and medium-scale developments. In the latter case effective discussion, joint recommendations, and consistent decisions and follow-up by government are generally the rule. The tendencies in the opposite direction are not yet far advanced, but they are apparent in respect to the treatment of large-scale provincially sponsored or supported development. The problems inherent in treating the hydro projects thus threaten to establish a pattern which could seriously reduce the effectiveness of the regime.

Conclusions

These successes and problems then bring us back to the fundamental questions underlying the objectives and compromises in the negotiation and design of the regime: the willingness and capability of the senior governments to fulfill the legal obligations designed to assure the protection of Cree interests; and the desirability of recognizing a Native right to systematically make inputs to decisions concerning development schemes in their region.

The contrast between an active provincial participation in forestry, a relatively passive federal involvement in the review of hydro developments, and a centralization of provincial decision making mandates in the reviews of these same projects, despite identical governmental obligations, is important. It demonstrates that where governments retain final decision making authority, they will attempt to use

this position to adopt a range of political and bureaucratic responses and interpretations in order to pursue and justify their major policies and interests. Where there is conflict with major policies and/or government sponsored developments, some significant attempt at derogation from the strict legal intent of the provisions of the regime can occur.

If and when this derogation is perceived to have significantly weakened the guarantees of protection in the Cree case, it may provoke the first test of regime provisions designed to force government compliance, through recourse to the legal system. The outcome of a court challenge to government derogation from the procedures, principles and intent of the regime will be the critical test, establishing a precedent that will affect the range of likely future government interpretations of their responsibilities, and the extent of effectiveness of the constraints on government actions.

However, whether or not the particular structures, procedures and legal recourses of this regime prove effective for dealing with large-scale government sponsored projects, it is already clear from the experience to date that they can be effectively used to regulate the impacts of other kinds of large-scale operations, even ongoing ones, as well as diverse small- and medium-scale projects.

Moreover, the establishment of a new environmental and social protection regime which recognized Cree rights, interests, and participation has clearly strengthened Cree ability to have significantly greater impacts on planned and ongoing developments in their region. The Cree are no longer ignored, as they were for many years, by both proponents and governments. By having a clear and permanent recognition of their role in development assessment and social and environmental protection, they have forced proponents and governments to come to them as a regular procedure, to do so on the basis of special Native rights and interests, and to respond in most cases to the Native objectives.

While the use of existing legislation and rights to oppose proposed developments was an essential first step, it was important and valuable for the Cree to look beyond a series of project by project rear guard actions. They were able to use the leverage generated in such battles, as well as other political means, to gain recognition of their rights, needs and permanent interests in protecting their communities and their regional environments. Such recognition required social and environmental legislation of a form that was fundamentally different from any other which presently exists.

The result has been that the Cree are now a force to be reckoned with by developers and governments, and that several additional means exist for the ongoing process of systematically articulating Cree interests into impacts on regional development schemes.

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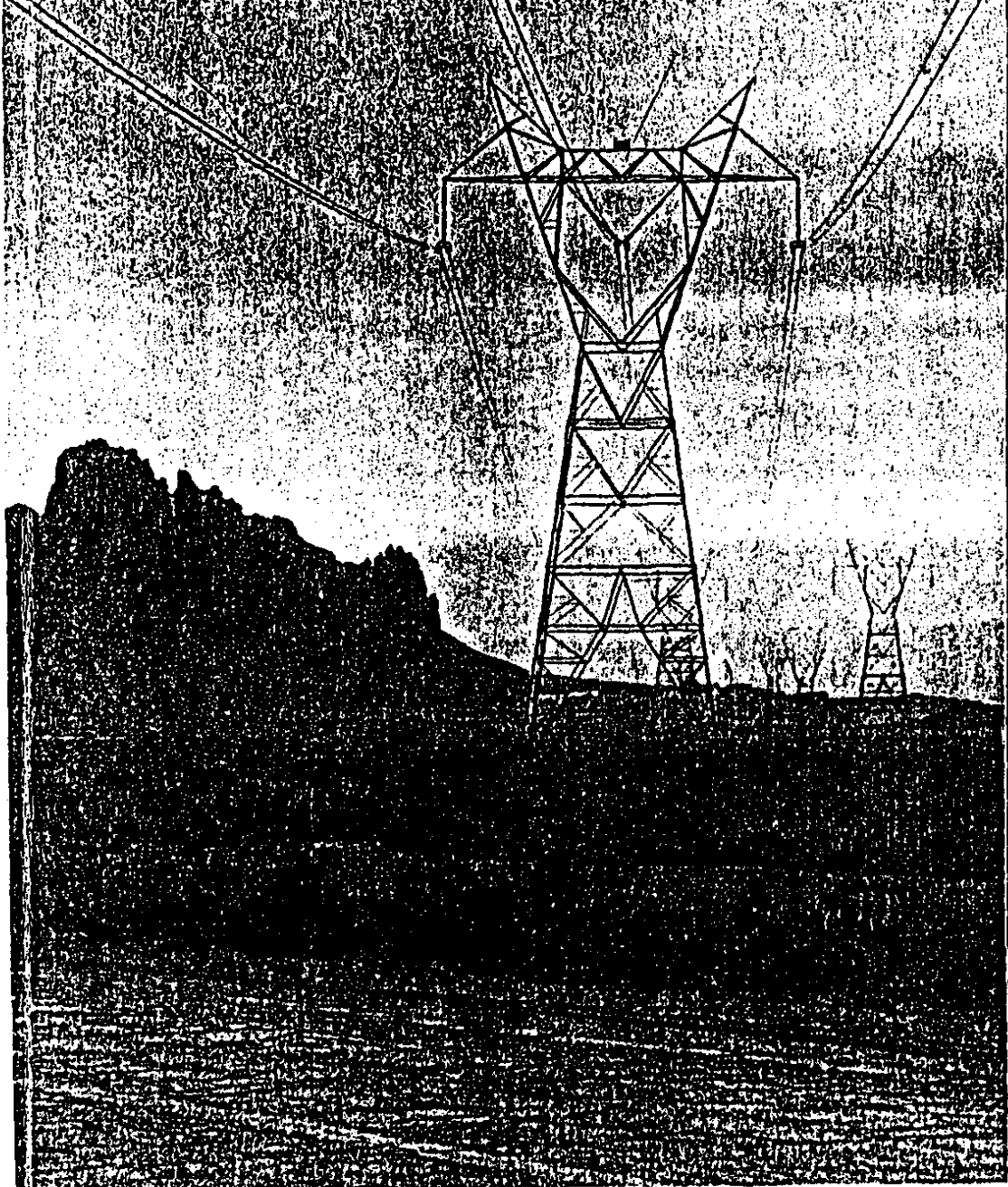
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