Sahtu Land Use Planning Board

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July 27, 2011

Trish Merrithew-Mercredi, Regional Director General
Indian and Northern Affairs Canada

Gary Bohnet, Deputy Minister, Department of Environment and Natural Resources
Government of the Northwest Territories

Ethel Blondin-Andrew, Chairperson
Sahtu Secretariat Incorporated

Re: *Response of the Sahtu Land Use Planning Board to Written Arguments submitted respecting the Jurisdiction of the Board to adopt a Land Use Plan containing Actions*

Dear Sir and Madams,

Please find attached the Sahtu Land Use Planning Board's response to written arguments submitted by your organizations regarding the jurisdiction of the SLUPB to include mandatory Actions in the Sahtu Land Use Plan.

The Board appreciates the efforts of your legal counsel to provide clarity regarding your positions on this matter. The Board has carefully reviewed your submissions and, reluctantly, disagrees with the conclusions put forward. Our reasoning for this is laid out in the attached response.

However, the Board also notes that both INAC and the GNWT have stated clearly that, legal arguments aside, they do not support a land use plan that contains mandatory Actions. Please be assured that the Board has heard this message. In the interests of completing this first Plan as soon as possible, we will work with all approving Parties to find an acceptable solution for the Final Draft. We began discussions on this issue immediately following the Hearing and we intend to continue these in the fall as stated in our Post-Hearing Follow-Up Letter of June 8, 2011. However, the Board may raise this issue again in future Plan revisions.

Again, we thank you, your staff and your legal counsel for your efforts to help us understand your positions on this matter. We look forward to working together over the coming year to complete a Sahtu Land Use Plan that is acceptable to all parties.

Sincerely,

Judith Wright-Bird, Chairperson
Sahtu Land Use Planning Board

Response of the Sahtu Land Use Planning Board to Written Arguments respecting Board Jurisdiction under the Mackenzie Valley Resource Management Act to adopt a land use plan containing Actions

July 27, 2011

Table of Contents

Introduction

1. In the course of preparing a land use plan for the Sahtu settlement area under the *Mackenzie Valley Resource Management Act* ("*MVRMA"*), the Sahtu Land Use Planning Board ('SLUPB" or "Board") invited comments on the July 2010 Draft Plan ("Draft Plan"). The Draft Plan distinguishes between terms of the Plan that are required to be implemented in the regulatory or land disposition processes, and terms that are required to be implemented by other means. The Draft Plan contains twenty of the former terms (including one that sets out the Plan's zoning scheme), described as "Conformity Requirements." The document contains thirteen of the latter terms, described as "Actions". For convenience, the Actions are reproduced in an Appendix to this Response.

2. As described in the Draft Plan, the regulatory process is the process of determining whether or on what conditions a particular land use will receive an authorization required under legislation.[1] The land disposition process is that of determining whether or on what conditions a particular land use will receive the consent of a landowner, granted by means of leases or other interests in land, or licences.[2]

3. In comments on the Draft Plan, the federal Department of Indian Affairs and Northern Development ("INAC") submitted that terms of a land use plan that would have to be implemented outside the regulatory or land disposition processes would not be legally binding on government.[3] The Government of the Northwest Territories ("GNWT") submitted that "it is not appropriate for the GNWT to be legally bound" by such terms.[4] After discussion between legal counsel for government and the Board regarding the basis of these comments, the Board directed any party to the planning process that considers a term of the Draft Plan to be outside the authorized scope of a land use plan under the *MVRMA* to submit written argument in support of its position to the Board. The GNWT and Minister of INAC filed written argument on this issue on April 20 and April 21, 2011, respectively.[5] The Sahtu Secretariat Incorporated ("SSI") filed reply argument on April 29, 2011.[6]

4. The three parties that filed written argument (the "three parties") all take the position that a land use plan prepared under the *MVRMA* may not contain terms required to be implemented outside the regulatory or land disposition processes.[7] (This Response will refer to such terms as Action-type terms).

5. A public hearing on the Draft Plan, convened pursuant to subsection 42(2) of the *MVRMA,* took place on May 3-5, 2011. At the hearing's opening, the Board informed the hearing participants of the position taken in the arguments filed. Recognizing that the three parties in question represent the parties to the *Sahtu Dene and Metis Comprehensive Land*

Claims Agreement ("*Sahtu Agreement*", or "Agreement"), and that the same parties approve Sahtu land use plans under the *MVRMA*, the Board informed the hearing participants that it would take further time after the hearing to respond in writing to the arguments.

Main Relevant Provisions of the *MVRMA* and *Sahtu Agreement*

Mackenzie Valley Resource Management Act (S.C. 1998, c. 25)

> An Act to provide for an integrated system of land and water management in the Mackenzie Valley, to establish certain boards for that purpose and to make consequential amendments to other Acts

Preamble

WHEREAS the Gwich'in Comprehensive Land Claim Agreement and the Sahtu Dene and Metis Comprehensive Land Claim Agreement require the establishment of land use planning boards and land and water boards for the settlement areas referred to in those Agreements and the establishment of an environmental impact review board for the Mackenzie Valley, and provide as well for the establishment of a land and water board for an area extending beyond those settlement areas;

WHEREAS the Agreements require that those boards be established as institutions of public government within an integrated and coordinated system of land and water management in the Mackenzie Valley;

AND WHEREAS the intent of the Agreements as acknowledged by the parties is to establish those boards for the purpose of regulating all land and water uses, including deposits of waste, in the settlement areas for which they are established or in the Mackenzie Valley, as the case may be;

…

PART 2

LAND USE PLANNING

Guiding principles

35. Land use planning for a settlement area shall be guided by the following principles:

(*a*) the purpose of land use planning is to protect and promote the social, cultural and economic well-being of residents and communities in the settlement area, having regard to the interests of all Canadians;

(*b*) special attention shall be devoted to the rights of the Gwich'in and Sahtu First Nations under their land claim agreements, to protecting and promoting their social, cultural and economic well-being and to the lands used by them for wildlife harvesting and other resource uses; and

(*c*) land use planning must involve the participation of the first nation and of residents and communities in the settlement area.

…

Land Use Planning

…

Preparation of land use plan

41. (1) A planning board shall prepare and adopt a land use plan for submission and approval under section 43.

Purpose of land use plan

(2) A land use plan shall provide for the conservation, development and use of land, waters and other resources in a settlement area.

Contents of land use plan

(3) A land use plan may include

(*a*) maps, diagrams and other graphic materials;

(*b*) written statements, policies, guidelines and forecasts;

(*c*) descriptions of permitted and prohibited uses of land, waters and resources;

(*d*) authority for the planning board to make exceptions to the plan and the manner of exercising that authority; and

(*e*) any other information that the planning board considers appropriate.

…

Submission to first nation and Ministers

43. (1) Following the adoption of a land use plan, the planning board shall submit it to the first nation of the settlement area, the territorial Minister and the federal Minister.

…

(4) []… the land use plan …takes effect on the date of its approval by the federal Minister.

…

Cooperative planning

45. (1) The planning board for a settlement area may cooperate with any body responsible for land use planning in any other area, either within or outside the Northwest Territories, that is adjacent to the settlement area.

Joint land use plans

(2) A planning board may, in conjunction with a body referred to in subsection (1), prepare a land use plan for the settlement area and an adjacent area of the Mackenzie Valley, which shall be subject to the requirements of this Part in respect of the portion of the plan relating to the settlement area.

Compliance with Plans

First nations, governments and licensing bodies

46. (1) The Gwich'in and Sahtu First Nations, departments and agencies of the federal and territorial governments, and every body having authority under any federal or territorial law to issue licences, permits or other authorizations relating to the use of land or waters or the deposit of waste, shall carry out their powers in accordance with the land use plan applicable in a settlement area.

National parks and historic sites

(2) In particular, measures carried out by a department or agency of government leading to the establishment of a park subject to the *Canada National Parks Act*, and the acquisition of lands pursuant to the *Historic Sites and Monuments Act*, in a settlement area shall be carried out in accordance with the applicable land use plan.

…

Determination of conformity

47. (1) A planning board shall determine whether an activity is in accordance with a land use plan where

(*a*) the activity is referred to the planning board by a first nation or a department or agency of the federal or territorial government or by the body having authority under any federal or territorial law to issue a licence, permit or other authorization in respect of the activity; or

(*b*) an application for such a determination is made by any person directly affected by an activity for which an application has been made for a licence, permit or authorization.

Time of referral

(2) The referral or application must be made before the issuance of any licence, permit or other authorization required for the activity.

…

Final decision

(4) Subject to section 32, a decision of a planning board under this section is final and binding.

…

PART 3

LAND AND WATER REGULATION

Conformity with land use plan — Gwich'in and Sahtu Boards

61. (1) The Gwich'in Land and Water Board and the Sahtu Land and Water Board may not issue, amend or renew a licence, permit or authorization except in accordance with an applicable land use plan under Part 2.

…

PART 5

MACKENZIE VALLEY ENVIRONMENTAL IMPACT REVIEW BOARD

Decision by ministers

130. …

Effect of decision

(5) The federal Minister and responsible ministers shall carry out a decision made under this section to the extent of their respective authorities. A first nation, local government, regulatory authority or department or agency of the federal or territorial government affected by a decision made under this section shall act in conformity with the decision to the extent of their respective authorities.

Comprehensive Land Claims Agreement between Her Majesty the Queen in right of Canada and the Sahtu Dene and Metis as represented by the Sahtu Tribal Council, signed September 6, 1993

25 LAND AND WATER REGULATION

25.1 GENERAL

25.1.1 The following principles apply to this chapter:

(a) an integrated system of land and water management should apply to the Mackenzie Valley;

(b) the regulation of land and water in the settlement area and in adjacent areas should be co-ordinated; and

(c) government shall retain the ultimate jurisdiction for the regulation of land and water.

…

25.1.3 (a) The Planning Board described in **25**.2 and the Land and Water Board described in **25**.4 shall be established as institutions of public government by legislation, not later than two years after the date of settlement legislation, which shall implement the provisions of this chapter and may provide for any other matter consistent with this chapter.

…

25.2 LAND USE PLANNING

25.2.1 The Planning Board shall have jurisdiction, in accordance with the provisions of this agreement, for developing a land use plan for the settlement area and for reviewing and proposing

approvals, exceptions and amendments to the plan. The Planning Board shall have regard to any land use plan preparation work undertaken in the settlement area
prior to the date of establishment of the Planning Board.
...

25.2.4 The following principles shall guide land use planning in the settlement area:
(a) the purpose of land use planning is to protect and promote the existing and future well-being of the residents and communities of the settlement area having regard to the interests of all Canadians;
(b) special attention shall be devoted to:
(i) protecting and promoting the existing and future social, cultural and economic well-being of the participants;
(ii) lands used by participants for harvesting and other uses of resources; and
(iii) the rights of participants under this agreement;
(c) water resources planning is an integral part of land use planning;
(d) land use planning shall directly involve communities and designated Sahtu organizations; and
(e) the plan developed through the planning process shall provide for the conservation, development and utilization of land, resources and waters.
...

25.2.8 Decisions of the Planning Board in respect of the land use plan shall be subject to approval by government in a manner to be provided in legislation.

25.2.9 Upon approval of a land use plan, those authorities with jurisdiction to grant licences, permits, leases or interests relating to the use of land and water in the settlement area shall conduct their activities and operations in accordance with the plan.
...

25.3 ENVIRONMENTAL IMPACT ASSESSMENT AND REVIEW
…
25.3.16 Except in the case of an agency described in **25.**3.17, any decision of the Minister pursuant to **25**.3.14 shall be implemented by the Land and Water Board and by each department and agency of government responsible for issuing a licence, permit or other authorization in respect of the development proposal to the extent of the legislative authority of each department and agency.

Summary of Arguments filed

GNWT

6. The GNWT argues that the focus of the *MVRMA*, as informed by the *Sahtu Agreement*, is regulatory.[8] The words "shall provide for the conservation, development and use of land, waters and other resources" in subsection 41(2) must be read in that context.[9] The GNWT argues that the contents of a land use plan permitted by the companion provision, subsection

41(3), must be intended to have binding effect only in a regulatory or land disposition context. The GNWT reasons that

i) the words "descriptions of permitted and prohibited uses" in paragraph (c) include the only mandatory words in subsection 41(3), and permitted and prohibited uses receive their binding effect in the regulatory and land disposition processes;[10]

ii) the other land use plan contents listed in subsection 41(3) that might be considered to support Action-type plan terms implicitly – "policies" and "guidelines" – cannot be intended to have binding effect, because they do not necessarily have a mandatory character and are not described in this subsection as mandatory;[11]

iii) the contents list in the subsection does not include Actions expressly (i.e. does not include any mandatory plan content that receives its binding effect outside regulatory and land disposition processes);[12]

iv) the list in the subsection being closed, it follows that the permissible content of a land use can have binding effect only in a regulatory or land disposition context.[13]

In short, the GNWT argues, a land use plan is without authority under section 41 to include terms that government must implement outside the regulatory or land disposition processes.

7. The GNWT argues that section 46, read in context, uses the words "carry out their powers" to refer only to regulatory or land disposition powers, not to "all" powers of the bodies listed.[14] Subsection 46(2), requiring that measures leading to the establishment of National Parks be carried out in accordance with land use plans, is said to clarify this meaning of "powers".[15]

8. The *Sahtu Agreement* is said to support this reading, in that the Agreement's pertinent focus is similarly regulatory.[16] In particular, the Agreement's provision giving land use plans 'binding effect' applies, by its terms, only to regulatory or land disposition powers.[17]

9. Further considerations are said to support this view. The Agreement recognizes that government retains ultimate jurisdiction for the regulation of land and water in the management system to be established.[18] (Section 25.1.1, in which this principle appears, applies to the chapter containing the Agreement's land use planning provisions.) Also, it is argued, to read the Act more broadly would give land use plans unreasonably wide scope,[19] overburden the Board,[20] and lead to a geographically fragmented system of land and water management in the Mackenzie Valley rather that the integrated system intended.[21]

INAC

10. Emphasizing that the *MVRMA* must be read in the context of the *Sahtu Agreement*, INAC, too, argues that section 41 confines the content of a land use plan that can have binding effect to "descriptions of permitted and prohibited uses", and that this precludes any statutory implementation responsibility for Action-type plan terms.[22]

11. With respect to section 46, INAC argues that the scope of plan implementation responsibility provided under the Act and the Agreement, respectively, is coextensive. The responsibility is restricted to authority to issue "authorizations".[23] In contrast to the Draft Plan's usage (noted at paragraph 2 above), INAC interprets "authority under any federal or territorial law to issue licences, permits or other authorizations" in subsection 46(1) as including authority to grant interests in land or consent to the use of land by other means.[24] INAC argues that the powers of the "departments and agencies" that are listed separately in this subsection from "every body having authority … to issue authorizations" consist only of powers to issue authorizations.[25]

12. Along with the GNWT,[26] INAC also treats the Action-type responsibility of departments and agencies for implementing Ministers' decisions that is provided in Part 5 of the *MVRMA* (*Mackenzie Valley Environmental Impact Review Board*) as having been extended by the words "to the extent of their respective authorities." The absence of similar words in subsection 46(1), it is argued, implies that the powers referred to in subsection 46 (1) are relatively limited.[27]

13. INAC agrees with the GNWT that the reach of plan implementation responsibility under Part 2 of the Act is necessarily confined by the Agreement principle that "government shall retain the ultimate jurisdiction for the regulation of land and water." INAC argues that this principle would be contravened if the Act provided a planning board with jurisdiction to adopt Action-type terms in a land use plan. INAC argues that to give a planning board such jurisdiction would remove government discretion to make "policy and program decisions" respecting land and water administration that is protected by the principle.[28]

SSI

14. In its reply argument, SSI agrees with INAC and the GNWT that a land use plan may not contain terms that are required to be implemented outside the regulatory or land disposition processes. SSI's argument differs from those of the government parties mainly in holding that the analysis should focus on section 46 of the *MVRMA* rather than section 41.[29]

15. SSI disagrees with the INAC and GNWT view that section 41 indicates by omission that a Plan may not contain Action-type terms.[30]

16. SSI adopts INAC's argument that section 46, interpreted in light of the *Sahtu Agreement*, cannot have been intended to include all powers respecting land and water management in its description of the "powers" that must be carried out in accordance with a land use plan.[31]

17. The SSI reply also contains submissions regarding the character and reach of particular Actions. The Board finds these comments helpful and will consider them when examining possible revisions to the Draft Plan, but the Board has not found it necessary to respond to them here.

Points of clarification regarding the intent of the Draft Plan

18. As the arguments filed depend on the intent of the Draft Plan, three instances where an argument interprets the Draft Plan differently than was intended by the Board can be clarified immediately. In each case the Board is prepared to consider using different wording in the adopted Plan in order to convey the intention more clearly:

(a) In response to the SSI arguments,[32] where the Draft Plan refers to a Plan "requirement," whether in presenting Conformity Requirements or Actions, it is intended that the term in question will have mandatory effect, once approved.

(b) In response to the arguments of SSI and INAC, [33] in particular, the only mandatory effect that the word "requirement" is intended to convey respecting Conformity Requirements and Actions is the subsection 46(1) requirement to carry out a power in accordance with the Plan term in question. (In the case of the Sahtu Land and Water Board, the subsection 46(1) requirement is restated, in effect, by subsection 61(1) of the Act.[34]) It is not intended that a land use plan may impose obligations on any person or body by force of the approved plan alone, or by force of any other *MVRMA* provision. The explanation of Conformity Requirements and Actions in Chapter 7*, Plan Approval & Implementation,* is intended to be the controlling explanation in the document.

(c) In response to the GNWT arguments[35], in particular, the Chapter 7 description of Actions as addressing "broad land use issues"[36] is intended only to describe the breadth of land use issues addressed by Actions by comparison with the breadth of issue typically addressed in a Conformity Requirement. (Conformity Requirements are introduced in Chapter 4*, Zoning and Conditions for Development.*)

The Board's formulation of the issue for response, and the Board's analysis, rely upon this reading of the Draft Plan.

Issue

19. The *MVRMA* requires a land use plan to provide for the conservation, development or use of land, waters and other resources. The Act places duties on government and the First Nation to carry out their powers in accordance with a land use plan, which take effect if and only if the plan is approved by Ministers of the federal and territorial governments and by the First Nation. (In places the Board's analysis will refer to these duties as "plan implementation duties" or "plan implementation responsibilities"). The issue raised by the arguments is whether the *MVRMA* requires a government department or agency to carry out its powers in accordance with provisions of an approved land use plan for the conservation, development or use of land, waters and other resources where government is acting outside the regulatory and land disposition processes.

20. For example, if an approved land use plan provides for research relating to land conservation to be undertaken, must the department empowered to conduct such research act in accordance with the plan? If so, then the Board may adopt a plan containing terms that rely for their implementation on powers of government that are not strictly regulatory or incidental to land ownership. Upon plan approval, the responsible departments would be required by the Act to follow such terms. If not, the *MVRMA* would not require such terms to be implemented, even if approved. No other effect being given to such terms under the Act, it would not appear to serve any statutory purpose for the Board to include terms of this nature in a land use plan. Practically speaking, at least, there would be no "jurisdiction"[37] in the Board to adopt such terms.

Analysis

a. Interpretive principles

21. The Board agrees with the three parties that a sound analysis of the issue in question must interpret the *MVRMA* in the light of the Agreement that the Act implements.[38] The main principle of statutory interpretation that will be relied on in this analysis is Driedger's modern principle, cited in the INAC argument, as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[39]

b. The role of "Actions" in the Draft Plan

22. It is useful at the outset to review how and why the Draft Plan distinguishes between terms that are intended to be implemented by regulatory/land disposition means, and terms intended to be implemented by other means.

23. It is a commonplace of land use planning in any context that insufficient attention during a Plan's development to how the Plan will be implemented will undermine the Plan's effectiveness. Indeed, the three approving parties have all stated on the Sahtu planning record that the means of implementing the Sahtu Plan must be made clear in order for the Sahtu Plan to receive approval.[40] For these reasons, the Draft Plan reserves a chapter to Plan implementation, and distinguishes between different types of term in the Plan *according to their different means of implementation*. The purpose of the implementation detail, including the distinction between Actions and Conformity Requirements, is less to address *what* the Plan is designed to accomplish than to show *how* the Plan's terms may be realized if the Plan is approved.

24. The *MVRMA* does not require a land use plan to differentiate between types of Plan term. The Draft Plan could have designated all of the provisions that are intended to trigger the Act's implementation duty "Terms" (leaving out of the category Plan content that is not intended to have any statutory effect). Conversely, the Draft Plan could have adopted an array of types of Plan term, according to the assorted government functions relied on in the terms, such as information exchange, reporting, data analysis, data collection, or licence condition design. Clearly, the Act grants significant leeway as to how much implementation guidance to include in a land use plan.

25. The Board is the body mandated by the *MVRMA* to prepare draft Sahtu land use plans. Attending to the lessons of land use planning elsewhere and the direction received from the approval bodies, the Board chose in the Draft Plan to provide a moderate level of implementation guidance in the differentiation of Plan terms, distinguishing two types, based on the distinction in functions of government that, on its face, section 46 of the *MVRMA* itself appears to make. That is the distinction between regulatory and other powers. (For further guidance, readers have the text of each term, which also distinguishes between government functions in many instances, and the Plan's implementation chapter. A separate Draft Implementation Guide was also circulated for discussion.)

26. The Draft Plan's distinction between Conformity Requirements and Actions is made in Chapter 7, *Plan Approval & Implementation*, as follows:

> **7.2.3 Role of Regulators and Responsible Authorities**

> Under s. 46(1) of the MVRMA, "First Nations, departments and agencies of the federal and territorial governments ... shall carry out their powers in accordance with the land use plan". These bodies carry out the Plan's Actions outside the regulatory process. Actions are related to the use of land, waters, or resources, and in many cases support the regulatory process. For example, they may include the mapping of habitat features so that impacts may be mitigated in authorizations. They may also include policy measures, such as policies to be followed in establishing a Park or other protected area.
>
> For convenience, the Plan refers to the bodies that carry out Actions as "responsible authorities".
>
> In addition, under the same MVRMA provision, "every body having authority under any federal or territorial law to issue licences, permits or other authorizations relating to the use of land or waters or the deposit of waste" is responsible to implement the Plan. These bodies apply the Plan's Conformity Requirements in the regulatory process, i.e. in determining whether and on what terms a land use will be authorized. Conformity Requirements direct how land may be used.
>
> For convenience, the Plan refers to the bodies that apply the Conformity Requirements as "regulators".[41] Note that regulators are also "responsible authorities" - responsible for carrying out Plan Actions within their jurisdictions - when they act outside the regulatory process.[42]

27. Two benefits of differentiating between these two types of Plan term were anticipated. First, government would receive direction as to which type of government function is considered responsible for implementation of which set of Plan terms. Second, and more importantly, the distinction tells land use proponents, 'up front' so to speak, which Plan terms will affect whether the proponent will get an authorization or consent, and on what conditions. Many land use proponents cannot be expected to be familiar with the *MVRMA* system. Conformity Requirements concern land use proponents directly; Actions are for government and the First Nation, and proposed activities need not conform to Actions.

28. The name "Conformity Requirements" reflects the Act's process set out in section 47 for determining the conformity of an activity that requires an authorization or consent with the land use plan. The name "Action" is from the word that is in general usage to describe 'what is to be done' at the conclusion of a planning process or meeting. Both names appear in the first two northern land use plans approved by the federal government and a territorial government under a land claims regime, the *Keewatin Regional Land Use Plan* and *North Baffin Regional Land Use Plan*, both approved in June 2000 under the *Nunavut Land Claims Agreement*. As in the Sahtu Draft Plan, the two Nunavut land use plans attribute responsibility to implement Actions to government entities carrying out non-regulatory powers.[43]

29. Differentiation between "Action Items" and other Plan terms is also a feature of the *Gwich'in Land Use Plan*, approved by the GNWT and Government of Canada under Part 2 of the *MVRMA* in 2003. Most of the "Actions Items" in the Gwich'in Plan appear not intended to have binding effect, but at least one such item appears intended to have an effect similar to Actions in the Sahtu Draft Plan, as follows:

> Action Items
>
> 1. The Department of Indian Affairs and Northern Development shall provide all available information on known waste sites for the Gwich'in Settlement Area to Gwich'in and co-management groups.[44]

This is comparable in character to Action #10 of the Draft Sahtu Plan: see the Appendix to this Response.

30. In response to the GNWT's argument, it should be noted that Actions in the Draft Plan are not "broad-reaching" requirements by definition.[45] As noted above (paragraph 18), a relatively wide set of issues tends to be addressed by the Actions in the Draft Plan by comparison to the Conformity Requirements. However, the difference between an Action and a Conformity Requirement depends only on the government power that is relied on to ensure that the Plan term is followed. The Draft Plan contains some Actions that affect a narrow range of the powers of departments and agencies, and only specific operations, and some Conformity Requirements that affect a relatively wide range of regulatory or land disposition powers and operations.

c. Are any powers of government other than powers to issue authorizations subject to the duty to implement a land use plan under subsection 46(1)?

i) Focus of the *MVRMA*

31. The GNWT argument emphasizes the regulatory purpose of the *MVRMA*. The GNWT appears to view the Act's overall "regulatory" focus as a factor that supports confining our understanding of the reach of subsection 46(1) to regulatory matters. (The GNWT makes the same point respecting how section 41 should be understood. The Board's analysis here applies equally to the Board's consideration of the significance of section 41 below, at **e**.)

32. On examination, the Act's preamble, which is the *MVRMA* provision cited by the GNWT on this point, appears to attend at least as much to "management", from which the Act takes its title, as to "regulating" land and water. (The GNWT and INAC[46] also rely on s. 25.1.1 of the

SLCA, but the principles set out in the Agreement also reflect significant concern for integrated management.) "Management" of land and water would appear to include a wide range of functions. In any event, whether viewed through a "regulation" or "management" prism, in the Board's view it is reasonable to read the Act as recruiting to its cause a wider set of government functions than authorization issuance and land disposition. The excerpt from the Draft Plan quoted in **b.** above (para 26) gives examples of how Action-type terms can support the regulation of land use.

33. Turning to the Act's substantive provisions, there is no doubt that the *MVRMA* scheme includes duties that must be met by other than regulatory means. Part 5 places implementation responsibility for environmental impact reports on departments and agencies other than regulators: subsections 130(5) and 136(2). (This example is discussed further below, at **d. (iv).**) Another example is Part 6, which provides for bodies or persons that do not necessarily regulate anything to monitor cumulative impacts and conduct environmental audits: sections 145, 146, and 148. In the language of the Draft Plan, Part 6 of the Act is a set of Actions to ensure the integrated management of land and water.

34. The logical 'fit' of land use planning in the overall scheme also appears to resist the GNWT's premise. The Act establishes an integrated resource management scheme in which land use plans have binding effect. Land use planning is not a regulatory process; it is policy-based. The task of planning is to translate broad goals and policies into specific direction and actions to achieve those goals. The process involves First Nations and government, in concert with the people affected, making decisions about the use of the land, waters and resources. The overarching purpose of the exercise (set out in paragraph 25.2.4(a) of the Agreement and section 35 of the Act) is wide and ambitious: planning is to ensure that land is used for the well-being of the people affected. Having given planning decisions binding effect on the powers of regulators and land owners, why would the Act leave other functions of government that manage the matters provided for by land use plans without plan implementation responsibility? To do so would seem to leave gaps in responsibility in a system that is designed to be integrated and coordinated.

35. Accordingly, subject to the related analysis at **f.** below, the Board does not accept that the Draft Plan's provision for Actions is inconsistent with the overall focus of the Act.

ii) Subsection 46(1)

36. Apart from the corresponding provision in Part 3 respecting the duty of the Sahtu Land and Water Board,[47] section 46 is the only provision in the *MVRMA* that places duties to implement land use plans on any body. In view of the INAC argument that the duties imposed by this section attach only to one set of powers – powers to issue authorizations - the threshold

question for analysis is whether the Draft Plan is accurate in portraying "departments and agencies" that do not "issue licences, permits, or other authorizations" as having *any* responsibility under subsection 46(1) to "carry out their powers in accordance with the land use plan applicable". (The GNWT argument does not address whether section 46 describes one or more sets of powers.[48])

37. To be clear, it is not disputed that, in order to be caught by the subsection 46(1) requirement, any government powers must involve the conservation, development or use of land, waters or other resources. Otherwise the document being followed would not be an applicable land use plan.

38. On a plain reading of the text, the answer to the threshold question must be 'yes'. If Parliament had not intended some powers of entities other than the regulatory bodies listed to be subject to the subsection 46(1) requirement, it would have not have enumerated "departments and agencies" separately in the subsection. In particular:

a) the commas that precede "and every body" and that follow "deposit of waste" clearly indicate from a grammatical standpoint that the limitation "authority to issue licences, permits or other authorizations …" is restricted to the bodies referred to between the commas;

b) this point is even clearer in the French version of subsection 46(1): "… *Ainsi que* les organismes *chargés* …" clearly distinguishes between the "ministères et organismes des gouvernements fédéral et territorial" and the "organismes *chargés* … de délivrer des permis ou autres autorisations …" (emphasis added);[49]and

c) the contrary interpretation advanced by INAC would leave the words "departments and agencies of the federal and territorial governments" without any meaning, contrary to the presumption against redundancy.[50]

39. In the context of the other *MVRMA* provisions cited by the GNWT and INAC, this answer supports an entirely coherent and workable reading of the Act's land use planning scheme. The mandate of a land use plan is bounded by the words "provide for conservation, development and use of land, waters, and other resources" in section 41. A land use plan would have to exceed its mandate in order to harness government powers that are not involved in the conservation, development or use of land, waters and other resources. Thus, the mandate of a land use plan is necessarily coextensive with – neither more nor less broad than – the scope of the powers that is subject to the duty to implement the plan. This is what we should expect in a coherent statutory scheme.

40. Thus, in the Board's view, subsection 46(1) of the Act does extend the duty to implement a land use plan to government powers other than powers to issue authorizations.

The implications of this answer to the threshold question for analysis depend in part on the meaning of "authorizations" in section 46. As noted above, INAC treats land dispositions as included in "authorizations" under the section. On that basis, INAC's argument that only one set of powers is encompassed in section 46 would result in issuance of land dispositions being caught by the section 46 duty, and no other functions excepting issuance of authorizations. If land dispositions, however, were not in fact included in "authorizations" under section 46, land disposition functions would not be subject to any plan implementation duty under the INAC argument. Rejecting INAC's argument, and adopting the view that section 46 attaches the plan implementation duty to two different sets of powers, enables the Board's remaining analysis to treat land dispositions as one function in the separate set of powers of the "departments and agencies of the federal and territorial governments" referred to in subsection 46(1). Unanswered, however, is the question whether there are persuasive reasons to read the scope of this separate set of powers as *limited* to land disposition issuance.

d. Are the non-regulatory powers of government that are subject to the duty to implement a land use plan restricted to powers to consent to land use?

i) Subsection 46(1) and the Agreement

41. If the duty to implement land use plans did not extend beyond regulatory and land disposition functions, the three parties' contention that Actions in the Draft Plan cannot be binding on government would have to be accepted. The Draft Plan defines "Actions" by reference to implementation measures other than authorizations and land dispositions.[51] (Under the Draft Plan it is "Conformity Requirements" - with which the arguments filed do not take issue – that stand to be implemented by means of authorizations and land dispositions.[52])

42. The next question for analysis is whether the GNWT and INAC arguments show that the scope of the non-regulatory functions listed separately in subsection 46(1) is limited implicitly to land disposition issuance. The Board agrees with SSI that section 46 should be the focus of the inquiry. The answer to this question requires examining how the Agreement relates to subsection 46(1) of the Act, and how subsection 46(2), section 47, and provisions in Part 5 of the Act inform the meaning of subsection 46(1).

43. On the one hand, as the GNWT and INAC point out, the land claim agreement whose provisions the Act is intended to implement does not extend the duty to implement land use plans beyond regulatory and land disposition functions. (Possibly, "activities and operations" in the Agreement extends moderately the set of functions that a regulator must exercise in accordance with the plan, beyond the issuance of authorizations, but the Agreement duty

clearly does not reach to bodies that do not exercise any regulatory or land disposition function. The GNWT and INAC disagree with any suggestion of a moderate extension in the Agreement.[53] It is not necessary to pursue this point.) Section 25.2.9 of the Agreement states:

> 25.2.9 Upon approval of a land use plan, those authorities with jurisdiction to grant licences, permits, leases or interests relating to the use of land and water in the settlement area shall conduct their activities and operations in accordance with the plan.

On the other hand, one would have to read down the language of the Act in order to arrive at such a restriction in the Act. There are no limiting words in section 46 or elsewhere in the *MVRMA* that restrict the "departments and agencies" referenced to land disposition bodies or any other subset.

44. The Board does not accept the arguments filed on this question. In the Board's view, the "departments and agencies" referred to in subsection 46(1) can only be understood reasonably to include all such bodies whose powers involve the conservation, development or use of land, waters or other resources. The category is not restricted to land disposition bodies. Subject to consideration below of section 41 and the further factors urged by INAC and the GNWT, this suggests that the Draft Plan is accurate in attributing plan implementation responsibility under subsection 46(1) to government departments and agencies that do not exercise either regulatory or land disposition functions.

45. If widening the scope of implementation responsibility for a land use plan in the Act would conflict with the Agreement, then, of course, subsection 46(1) would have to be read down in the manner advocated by the three parties. As the GNWT notes, the Act's provision would be inoperative to the extent of an inconsistency or conflict.[54] There is, however, no inconsistency or conflict with the Agreement entailed in expanding by legislation the scope of government's responsibility to implement land use plans. A role for researchers, for example, does not interfere with a role for regulators. Accordingly, the GNWT and INAC (and, presumably, SSI) do not assert inconsistency or conflict. Their argument is simply that the Agreement's provision clarifies the intent of subsection 46(1), in a restrictive way.[55] Taken at its highest, the argument appears to be that the Agreement provision does not support a wider meaning for the implementation section of the Act.

46. In response, the Board does not view subsection 46(1) itself as lacking in clarity with respect to its non-regulatory ambit. The words "department and agency" are to be understood in their ordinary sense, coherently with the related provisions of the Act. It is unambiguous for Parliament to enact an obligation on government departments and agencies to use all their related powers to implement a land use plan that provides for conservation, development or

use of land, waters, and other resources, leaving to the approving Ministers and First Nation the decision what Plan to approve on that basis.

47. Moreover, in the Board's view, the following factors suggest that this wider reading of subsection 46(1) *supports* the Agreement, rather than departing from its intent:

a) The Agreement's ratification legislation already gives public law effect to the Agreement;[56] implementation legislation for the planning provisions is mandated to go further and "implement the provisions of this chapter" (chapter 25). In the process, Parliament "*may provide for any other matter consistent with this chapter*" (SLCA, s. 25.1.3 (a))(emphasis added).

b) It cannot be said that the Agreement does not support a provision of the Act only because the Act's provision is not found in the Agreement. If that were the case, several critical features of the land use planning scheme in the Act whose force has not been doubted in the process of developing a Sahtu land use plan would have to be considered unsupported by the Agreement, including not only the *MVRMA*'s Plan approval role for the Sahtu First Nation and the *MVRMA* plan conformity determination process, but subsection 41(3) of the Act, the 'plan contents' clause that is relied on prominently by the GNWT and INAC in their arguments on this issue.

c) Once the range of government functions that stands to be triggered by Action-type terms in a land use plan is examined in a practical way, it becomes clear that it would be unreasonable and contrary to the purposes of the Agreement and the Act to exclude all government functions that lie outside the regulatory or land disposition processes from responsibility to implement land use plans. Many such functions support the regulatory and land disposition processes themselves or otherwise contribute significantly to land and water management and, in particular, the conservation, development and use of land, waters and other resources. In short, at a practical level, the wider reading of subsection 46(1) would appear to *advance* the spirit and intent of the land claim agreement. The utility of such wider responsibilities for plan implementation seems to illustrate why the Agreement expressly contemplates supplementary provisions in implementation legislation.

48. An example illustrates the point in (c) above. Conformity Requirement #7 of the Plan provides for regulators to take account of wildlife concerns such as critical wildlife habitat when issuing authorizations for land uses. Regulators and land disposition bodies do not necessarily generate and analyze wildlife data themselves. Accordingly, Action #10 supports the regulatory process and the Plan objective of protecting critical wildlife habitat by requiring departments and agencies that do such work to develop and maintain critical wildlife habitat information, and to provide it to land users on request so that they can ensure it is taken into account when applying for authorizations and dispositions. Without implementation of Action #10, Conformity Requirement #7 would be ineffective.

49. A scan of the Appendix to this Response will identify several other non-regulatory functions, such as information exchange, reporting of data and of data analysis, policy development (including policy relating to community consultation), monitoring, and operations protocols (including protocol for the use of traditional knowledge), that clearly stand to contribute to effective planning for land use.

50. Finally, it is significant that the implementation provisions of Part 5 of the *MVRMA* surpass the scope of the related Agreement provision even more than does the Draft Plan's interpretation of their Part 2 counterpart. The Agreement provision for the implementation of environmental review reports reaches only to regulatory functions. It does not extend even to land disposition functions. The relevant portion of section 25.3.16 of the Agreement states:

> 25.3.16 … [A]ny decision of the Minister pursuant to s. 25.3.14 shall be implemented by the Land and Water Board and by each department and agency of government responsible for issuing a licence, permit or other authorization in respect of the development proposal to the extent of the legislative authority of each department and agency.

As discussed further in **iv)** below, the GNWT and INAC accept the extension of Action- type responsibilities by the *MVRMA* under Part 5. The arguments filed do not offer any reason why an extension of implementation duties under the Agreement should be seen as supportive of the Agreement in Part 5 of the Act, but not in Part 2.

ii) The significance of subsection 46(2)

51. In the Board's view, measures leading to National Parks establishment provide a further example of government functions that fall clearly within the land use planning mandate, yet do not constitute regulatory or land disposition measures. Subsection 46(2) of the Act requires that such measures be carried out in accordance with applicable land use plans. As the GNWT points out, the opening words "in particular" confirm that this requirement is a subset of the types of requirement in subsection 1, rather than an exception.[57] In the Board's view, subsection 46(2) thus confirms Parliament's intention to treat Action-type functions as subject to the duty to implement land use plans.

52. The GNWT's different view of the significance of this provision appears to stop short of holding that park establishment measures constitute land disposition functions. The GNWT asserts only that measures such as setting a park's location and parameters of use reflect the plan mandate to establish permitted and prohibited uses within the meaning of paragraph 41(3)(c), and that counterpart measures carried out under the *Historic Sites and Monuments Act* relate directly to acquisition of interests in land and permitted uses.[58]

53. The GNWT's reasoning, however, simply illustrates the main point under **i)** above. Establishing a park is not the issuance or denial of an authorization or the attachment of conditions to an authorization, and it is not a disposition of land, yet this government function directly affects the regulation of land use and management of land, just as does the providing of habitat data to regulators. Government functions other than regulatory or land disposition functions can support the regulation and management of land, and such functions therefore receive plan implementation responsibility under the Act. Subsection 46(2) does not purport to exhaust the range of non-regulatory and non-disposition functions that are subject to the duty to implement land use plans, but it confirms their presence in subsection 46(1) and provides a useful illustration of their role in the overall scheme.

iii) The significance of section 47

54. As the INAC argument points out, the *MVRMA* also provides a process to determine whether or not a land use activity conforms with an approved land use plan. In effect, the section 47 process tells regulatory bodies and affected parties, but most importantly the land use proponent, whether regulators may issue an authorization for the activity without breaching their duties to implement the plan, and if so, subject to what conditions of the plan. The Board's determination is "final and binding" in that respect. The Act provides no other consequence for the activity or the land user.

55. Because the section 47 process determines the conformity of "an activity", the determination that results can apply only to regulatory powers and land disposition powers. For ascertaining whether government department and agencies are acting in accordance with Action-type terms, as required by subsection 46(1), the *MVRMA* provides only for plan monitoring and a 5-year plan review.

56. INAC argues that section 47 of the Act reinforces the view that plan implementation duties are restricted to regulatory and land disposition functions.[59] In response, in the Board's view, the targeted reach of section 47 does not imply any such restriction. The logic of the scheme suggests that a conformity determination process for the discharge of government responsibilities outside the regulatory or land disposition processes powers is not considered necessary, because Action-type responsibilities do not affect land users directly. It is not uncommon, even where land users are affected directly by duties that attach to a regulatory process, for legislation to omit a process for determining whether government is meeting its statutory duties. This does not imply that the statutory duties do not exist, or are not enforceable by the courts. Neither the duties of regulatory bodies nor of other government departments and agencies to implement approved environmental impact reports under Part 5 of the *MVRMA*, for example, are supported by a conformity determination process, but there is

no dispute that both sets of Part 5 duties are legally binding (subsections 130(5); 136(2), *MVRMA*).

57. In the Board's view, relative certainty for land use proponents, and for all parties interested in the application of land use plans to particular activities, is a compelling and sufficient rationale for the limited reach of section 47 in the scheme.

iv) The significance of the counterpart provisions to implement environmental assessment and review panel reports – subsections 130(5) and 136(2)

58. Within the *MVRMA*'s integrated management scheme, development projects must conform with both the land use plan approved under Part 2 and any environmental impact reports approved under Part 5. As in the case of land use plans, environmental impact reports depend on the exercise of independent functions of government for their implementation. Similarly, such reports also rely on implementation duties imposed by the Act upon government for their mandatory effect.

59. Since environmental impact reports are project-specific and triggered by applications for authorizations, one might anticipate that the functions engaged by the implementation duties set out in subsections 130(5) and 136(2) would extend only to regulatory or land disposition functions. As seen above (paragraph 50), that is how the Agreement reads. Instead, however, we find in the Act a structure and comparable scope of implementation responsibility practically the same as in subsection 46(1). That is, the responsibility of "departments and agencies" is enumerated separately from and in addition to the responsibility of regulators, and the former is not restricted substantively. The comparable wording is practically the same.

60. In practice, since the coming into effect of the Act, many environmental impact reports have been approved by the federal and territorial Ministers responsible. Some such reports rely, for implementation of particular terms, on government functions that are not regulatory and do not involve land disposition. For example, the joint review panel report on the Mackenzie Gas Pipeline (MGP) proposal, approved by the Governments of Canada and the Northwest Territories in a 2010 joint response, contains terms to be implemented outside the regulatory or land disposition processes. Two of the recommendations approved are as follows:

> **Recommendation 11-4**
> *The Panel recommends that the Government of the Northwest Territories provide the Proponents, industry, regulatory authorities and planning boards with the results of their assessments of Goal 2 ecologically representative areas in the 16 ecoregions as they are completed.*
> **Response**
> The Governments of Canada and the Northwest Territories accept this recommendation.

For clarity, the Governments note that "their assessments of Goal 2 ecologically representative areas" refers to the ecological representation analyses that are completed by the Government of the Northwest Territories.

…

Recommendation 11-6

The Panel recommends that, within one year of the date of the Government Response to the Panel's Report, the governments of Canada and the Northwest Territories provide the Northwest Territories Protected Areas Strategy process with sufficient financial and technical resources to complete the implementation of the Mackenzie Valley Five-Year Action Plan (2004–2009). In addition, these governments should allocate appropriate and adequate financial and technical resources annually to complete the establishment of and implementation of a network of protected areas in the Mackenzie Valley.

Response

The Governments of Canada and the Northwest Territories accept this recommendation.

The Mackenzie Valley Five Year Action Plan has been implemented and federal funding for the establishment of federal candidate protected areas within the sixteen ecoregions affected by the Project has been expended.

The next phase of this initiative will be carried out under the Northwest Territories Protected Areas Establishment Action Plan (2010-2015). Federal funding for this phase of work has been secured. The Government of Canada will focus on establishing and managing six National Wildlife Areas in the Northwest Territories and completing the designation and management of the Saoyu-Edacho National Historic site. Establishing these sites will support the network of protected areas in the Mackenzie Valley. The Government of the Northwest Territories intends to evaluate six potential territorial protected areas.

The identification and protection of additional sites will be guided by the multi-stakeholder process established in the Protected Areas Strategy.

(GOVERNMENTS OF CANADA & OF THE NORTHWEST TERRITORIES
FINAL RESPONSE TO THE JOINT REVIEW PANEL REPORT
FOR THE PROPOSED MACKENZIE GAS PROJECT, November 2010)

The Governments' decisions to accept the recommendations in question trigger a duty of departments and agencies to carry out their powers accordingly under subsection 141(6), the provision of the Act that applies subsection 136(2) to the MGP joint panel report.

61. The above examples are similar in character to the Actions to implement land use plans contained in the Appendix to this Response.

62. In the Board's view, this comparison of subsections 130(5) and 136(2) with subsection 46(1) leaves little room for doubt that the scheme of the Act contemplates the implementation of land use plans by Action-type terms. Further, the practice under Part 5 bears out the utility and feasibility of this reading of Part 2. The two MGP examples quoted above demonstrate that non-regulatory commitments have an important role to play in the integrated management of land and resources.

63. In response to INAC's emphasis on the project-specific nature of Part 5 decisions,[60] the Board notes that neither of the terms quoted above from the MGP approval are specific,

themselves, to the pipeline project. They assist in developing policy and protocol that will apply to the affected area and elsewhere. Analogously, the Actions contained in the Draft Plan tend to apply to the entire Sahtu Settlement Area. But in any case, again, the logic of the Act's scheme strongly suggests that if the government functions relied on by Actions can be bound to implement Ministers' project-specific decisions, we may expect that they can be bound, equally, to implement Ministers' planning decisions for a settlement area.

64. The GNWT and INAC arguments accept that the implementation duty for environmental impact reports extends to Action-type responsibilities, but assert that words extending the duty in order to achieve this result, found in the Part 5 provisions, are absent from subsection 46(1).[61] In the Board's view, the absence of the words in question in subsection 46(1) does not restrict the ambit of implementation responsibility described in that provision. The words "to the extent of their respective authorities" originate in, and presumably appear in the Act on account of, the express language of the Agreement quoted in paragraph 50 above. (The Agreement words, referring to departments and agencies that exercise regulatory functions only, are "to the extent of the legislative authority of each department and agency.") The emphasis in the Agreement phrase is, in the Board's view, on "each," and in the Part 5 phrase it is on "respective". In both contexts, the purpose of the qualifying words appears to be to clarify that the responsibility held by each of the bodies enumerated *does not extend beyond* the authorities that each body possesses. In the land use planning implementation provision, the Agreement parties did not include similar language respecting the regulatory and land disposition functions addressed in the Agreement. In that provision it was considered to go without saying that the duties provided do not create liabilities that cannot met, or grant powers that bodies do not already have. Parliament also apparently considered the same understanding to go without saying in subsection 46(1).

65. In any event, the absence of qualifying words such as "to the extent of their respective authorities" cannot reasonably be construed to have a limiting effect on the words "carry out their powers" in subsection 46(1). As just noted, in their Part 5 context, the qualifying words appear to clarify a maximum rather than a minimum extent. In Part 5 they appear to clarify that "no more than" rather than "no less than" the powers described are subject to the duty. But even if, as INAC and the GNWT appear to assume, these words play the opposite role in Part 5, they cannot reasonably be understood to extend the class of powers that they describe. Adopting the INAC and GNWT assumption, these words plausibly may mean that the duty to implement environmental impact reports attaches to no more than *and no less than* the powers that the bodies described have, but they cannot mean that the duty attaches to powers in addition to those described. For that meaning, we would have to see very different language, such "to the extent of their authorities under other legislation and of, in addition, the following authorities". In short, the phrase "to the extent" of their respective authorities can only

reasonably confirm the extent of the authorities that is already described. It would strain ordinary meaning to interpret a neighbouring provision in Part 2 that omits these words as thereby restricting responsibility to a subclass of the powers held by the bodies referred to.

66. Here again, in the Board's view, it is equally significant that the GNWT and INAC account for the qualifying words in the Part 5 implementation provisions is not supported either by the logic of the *MVRMA* scheme. The GNWT and INAC argument does not offer any reason why a project-specific assessment triggered by regulatory applications would merit the support of non-regulatory implementation measures, but not a relatively freestanding and policy-based land use plan.

e. The significance of section 41: does the mandate of a land use plan provided in section 41 preclude dealing with matters other than those for which regulators and land owners are responsible?

67. The GNWT and INAC argue that the mandate of a land use plan to provide for "conservation, development, and use of land, waters and other resources" in subsection 41(2) does not reach outside the regulatory/land disposition sphere of government functions, and that subsection 41(3) establishes this restriction.

Subsection 41(2)

68. A preliminary observation is that this reading of section 41 is incoherent with the reading of section 46 adopted in the analysis above, in that it would leave a substantive duty provided for in the implementation provision of the Act without any possible work to do. The scope of government's plan implementation duties would exceed the permissible scope of a land use plan: departments and agencies acting outside the regulatory or land disposition processes would be responsible for following plan measures that a land use plan would not be permitted to contain. As we have seen, the GNWT and INAC arguments avoid this result by reading a similar restriction into section 46. The Board's contrary reading of section 46 would have to be reconsidered if the GNWT and INAC arguments here were compelling. In other words, the principle that statutory provisions must be read together and in harmony with the scheme of the Act would suggest that the GNWT's and INAC's reading of section 41 should stand or fall with their reading of section 46.

69. In the Board's view, the argument that subsection 41(2) restricts the plan mandate to regulatory and land disposition matters is answered, again, by giving the words of the provision in question their ordinary sense. There are simply no limiting words in subsection 41(2) that state or imply the restriction argued. To emphasize, the GNWT and INAC do not assert that the

ordinary meaning of the words "provide for the conservation, development or use of land, waters or other resources" may only include regulatory and land disposition matters. On the contrary, the GNWT, in particular, argues that it is because the scope of these words is manifestly more broad that they must be read restrictively in this context.[62]

70. Further, in this case, the Act echoes the words of the Agreement, which states, as a principle to guide land use planning in the settlement area, that the "plan developed through the planning process shall provide for the conservation, development and utilization of land, resources and waters": paragraph 25.2.4 (e), *Sahtu Agreement*.[63] In the Board's view, an interpretation attributing to an Agreement provision for the mandate of a co-management board less than the provision's ordinary meaning should be avoided. The honour of the Crown is at stake in the interpretation of modern treaties.[64]

Subsection 41(3)

71. The Board accepts the GNWT's view that section 41 of the Act governs the permissible content of a land use plan and section 46 a plan's binding effect, allowing, as the GNWT emphasizes, that the two sections should be read coherently with one another.[65]

72. In the Board's view, however, caution needs to be exercised in construing the combined effect of subsections 41(2) and (3). Subsection (2) provides the mandate of a land use plan, in the sense of the function that the plan must perform in the integrated management system. (The marginal note refers to a plan's "purpose", but, as INAC and the GNWT acknowledge, subsection (2) *requires* the Board to provide for the matters described.[66]) Nothing suggests that subsection (2) is subordinate to subsection (3). Rather, subsection (3) provides for the information that a land use plan may contain. It follows that, rather than curtailing the ordinary meaning of subsection (2), subsection (3) should be presumed to avoid doing so. There would have to be unequivocal language in subsection (3) in order for it to have the effect of restricting the ordinary meaning of subsection (2). Reading subsection (3) on that basis, and for the reasons that follow, the Board does not accept the GNWT and INAC arguments that subsection (3) confines the permissible content of a land use plan to regulatory or land disposition matters or implies that the Act has that effect.

73. The Board agrees with SSI that subsection 41(3), by its terms, is permissive.[67] The French text underscores this role. The French text of subsections 41(1) –(3) reads:

Préparation et adoption

41. (1) L'office prépare et adopte un plan d'aménagement et procède ensuite aux envois prévus par l'article 43 pour que le plan reçoive les agréments qui y sont mentionnés.

Contenu obligatoire

(2) Le plan d'aménagement doit pourvoir à
la conservation, à la mise en valeur et à l'utilisation
des terres, des eaux et des autres ressources
de la région désignée.

Éléments facultatifs

(3) *Il peut en outre* comporter:
a) des représentations graphiques, notamment
des cartes et des diagrammes;
b) des déclarations écrites, des principes directeurs,
des directives et des projections;
c) la mention des utilisations autorisées ou
interdites des terres, des eaux et des ressources;
d) l'attribution à l'office du pouvoir d'accorder
des dérogations à ses dispositions et les
modalités d'exercice de ce pouvoir;
e) *tout autre élément* que l'office estime indiqué. (emphasis added)

The French text confirms that subsection (3) does not restrict substantively how the Board may accomplish its subsection (2) mandate. As SSI emphasizes, none of the types of information listed is necessary; there is no irreducible content required.[68] Whether one describes the list in the subsection as "closed" or not, the items listed in paragraphs (a) to (d) do not exhaust the range of types of content that a land use plan may include. The concluding permission in paragraph (e) to include "any information" or "tout autre élément" ... "that the planning board considers appropriate" clearly leaves the Board broad authority, in preparing and adopting the Plan, to determine what type of content to include or leave out.

74. Rather than prescribing the type of content that a land use plan may include, subsection 41(3), in the Board's view, equips the Board with types of information to generate in performing the task that *is* prescribed, which is the mandate provided in subsection (2). The guidance offered is useful for Board staffing, training and funding purposes. It also indicates to the approving parties, and to the wide range of implementing bodies and land use proponents that will depend on the document, what they may reasonably expect to find in a land use plan for their own purposes. Among other characteristic ingredients of a land use plan listed, several confirm that a land use plan typically will provide rationale ("diagrams" and "written statements") and projections ("forecasts") in addition to content that provides for conservation, development and use prescriptively.

75. An exceptional feature of subsection (3) is paragraph (d), not referred to in the arguments filed. Paragraph (d) empowers a planning board to make exceptions to the binding effect that section 46 gives to a plan. Paragraph (d) is permissive in the sense that the Board may choose to include exception-making authority in a plan or not, depending on the nature of the other content adopted. Paragraph (d) is the only provision in subsection (3) that addresses

the issue of the binding effect of a plan directly. (Its effect does not differentiate between regulatory and other government functions; paragraph (d) therefore does not bear on this analysis by itself.)

76. In the Board's view, rather than confirming that "policies", "guidelines", or "written statements" must be non-binding in a land use plan, subsection 41(3) leaves the binding effect of the contents of a land use plan unrestricted. Paragraph (d) is a narrow exception to this role for subsection 41(3). 'Binding effect', as the GNWT argument accepts in all other respects, is otherwise the province of section 46.

77. The GNWT and INAC argue, against the view just stated, that paragraph 41(3)(c) *confirms* the binding effect of the zoning-type terms of a land use plan.[69] In response, the lead-in word "description" implies otherwise, and treating paragraph (c) as a description accords better with the "information" character that the last paragraph of subsection (3) attributes to the whole subsection. On this plausible view, paragraph (c) simply provides that zoning is an available method of land use planning. It is sensible to single out zoning for mention in this context because zoning measures tend to characterize the land use planning process addressed in Part 2 compared to, for example, the process of environmental assessment and review addressed in Part 5. Zoning, however, is not a necessary feature of a land use plan. The two land use plans that have been approved in Nunavut under a comparable land claims regime, for example, employ general land use conditions rather than zones for their basic design.[70]

78. Of equal importance, however, even if subsection (3) were a closed list that authorizes the Board to include only the listed kinds of content in a plan, neither the GNWT nor INAC go so far as to say that paragraph (c) would give permitted or prohibited land uses any binding effect by itself. It appears to be common ground that the binding effect of all permissible plan content is provided in section 46. Section 46, however, does not differentiate binding effect by reference to any particular content listed in subsection 41(3). Subsection 46 requires that all the powers described be carried out in accordance with the applicable "land use plan", not in accordance with a list of permitted or prohibited uses contained in a plan, or any other particular plan content. It is not suggested, either, that plan ingredients other than prohibited and permitted uses listed in subsection 41(3), such as "policies", "guidelines" or "written statements," cannot receive binding effect, or should not be presumed to have binding effect, in legislation. It follows that there simply is no logical implication in subsection 41(3) that any plan contents might have non-binding effect. To suggest otherwise is to reverse the agreed roles that sections 41 and 46 play in the *MVRMA* scheme. It suggests that *permitting* a plan to adopt zoning provisions under section 41 necessarily *withholds binding effect* to policies and guidelines, notwithstanding that section 46 gives binding effect to any plan content that is approved.

79. To emphasize, in the Board's view, there is no implied exclusion of binding implementation duties in a statement that only confirms duties provided elsewhere. For controlling effect on plan implementation responsibility outside section 46 and paragraph 41(3)(d), one must return to subsection 41(2), which subsection 41(3) only purports to facilitate, and whose ambit is broad. There the controlling link is direct: subsection 41(2) sets out what the Board shall provide for in a "land use plan", and it is only a "land use plan" with which exercise of the powers referred to in section 46 must comply.

80. Treating "policies", in particular, as necessarily non-binding under section 41 despite the mandatory language of section 46 would oppose the clear aims of the Agreement and Act to ensure that land use planning is a wide-ranging and deliberative process that has meaningful results. As noted above, the planning boards are the only institutions of public government established under the Act that have the luxury of making decisions on other than a project-specific basis, and land use planning by nature is a process of making policy (iteratively, with the active participation of departments and agencies). If a Minister could not approve land use planning policies generated in the process with the confidence that such policies will be binding, one would have to ask why standing planning boards whose recommendations for licence and permit conditions, once approved, are binding, are established under the Act independently of land and water management boards.

81. The foregoing point is not to suggest, of course, that land use regulation or land disposition can be severed from policy-making functions. The GNWT notes that Ministerial policy-direction is a component of Part 3 of the *MVRMA*, for example.[71] But if policy-making also occurs in the regulatory process, it would not appear sensible to equip a land use plan to have binding effect in the process with respect to its list of prohibited land uses, yet deprive the plan's more general policy content for land use regulation of binding effect. Indeed, INAC and the GNWT's stated preference for Conformity Requirements in a Sahtu Plan that are "goal-based", rather than prescriptive, would appear to leave such terms without any statutory effect under their argument.[72] Finally, in response to the GNWT's contrast of planning policies under Part 2 with policy directions under Parts 3 and 4 respecting the Minister's role,[73] the Board notes that such a contrast falls away once the Minister's role in approving land use plans under section 43 is taken into account.

82. Similar considerations inform how the statutory effect of plan "guidelines" referred to in subsection 41(3) should be understood. The Board accepts the GNWT's point that, according to the Supreme Court of Canada, the question whether "guidelines" provided for in a statute are binding must be decided in the context of the statute as a whole: *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R.[74] It should also be noted that the

Supreme Court concluded in the *Oldman River* case that "guidelines" were intended to have a binding effect on government under the legislation in question.[75]

83. In the Board's view, all of these considerations support the Draft Plan's premise that Action-type terms form part of the permissible content of a land use plan prepared under section 41 of the *MVRMA*.

f. Further considerations argued (government's ultimate jurisdiction, unreasonably broad planning mandate, fragmentation of the system)

Agreement principle that government shall retain the ultimate jurisdiction for the regulation of land and water

84. INAC and GNWT assert that the ultimate jurisdiction of government for the regulation of land and water use that is a design feature of the Agreement's planning provisions would be undermined if the Act made departments and agencies responsible to implement plan Actions. In the Board's view it is a complete answer to this argument to recognize that no implementation responsibility under the Act is incurred unless and until the Ministers approve a land use plan containing the Actions in question. The Ministers retain jurisdiction by means of their plan approval authority over any policy contained in an adopted Plan.

85. Ministers' jurisdiction under s. 43 of the *MVRMA* is "ultimate" in the ordinary sense of "last" or "final".[76] "Ultimate" does not normally refer to the breadth of what is described, as INAC and the GNWT arguments appear to suggest. Neither argument, in particular, suggests that there is any reason in the Act or Agreement to assume that government functions that are not regulatory have some higher rank, or may be presumed to be less affected by legislative duties, than regulatory functions in such schemes.

86. In the Board's view, this response also answers INAC's contention that Parliament's jurisdiction to administer and regulate Federal lands and waters would be "usurped"[77] if the Draft Plan's conception of Actions were accepted.

87. It is also difficult to see, in the Board's view, how the Agreement's assurance that government's authority remains "ultimate" respecting "regulation" could operate to prevent Parliament from assigning responsibility over *non-regulatory* matters to government departments and agencies.

88. Moreover, although the Agreement principle applies equally to planning and environmental impact matters, the INAC or GNWT argument based on government's ultimate jurisdiction does not refer to the provisions of Part 5 of the *MVRMA* that extend

implementation responsibility under the Agreement to non-regulatory functions. If such an extension of implementation responsibility in Part 5 does not contravene this Agreement principle, it is difficult to see how a similar extension of responsibility in Part 2 could contravene the principle.

Unreasonably broad planning mandate

89. In response to the GNWT assertion that a duty on the part of departments and agencies to implement Actions in a land use plan would result in an overbroad land use planning mandate, the Board does not find this assertion persuasive for the following reasons:

a) Planning under the *MVRMA* must be by design the broadest of the mandates for the institutions of public government established in the new integrated system of management. While environmental assessment and review is, for practical purposes, co-extensive for projects of sufficient scale, planning boards could not plan thoroughly for the sake of the well-being of the people of their regions if the *MVRMA* did not ensure that the results of their work are implemented by the full range of government powers that applies to the conservation, development and use of land, waters and other resources.

b) As seen above, a similar scope of implementation responsibility is provided for environmental assessment reports under Part 5.

90. In particular, the GNWT contends that it would be extraordinary for Parliament to delegate a planning function similar in scope to a head of legislative power respecting conservation, development and use of land.[78] In the absence of legal authorities having been cited in support of this argument, the Board notes the following:

a) It is not clear that there is any necessary connection between legislative jurisdiction over land use matters, and the distinction between government functions involving land use regulation and land disposition and other delegated functions that is at issue in this Response. Legislative authority is not claimed in the Draft Plan, and the validity of Part 2 of the *MVRMA* is not challenged in the arguments filed. It is not clear what role the scope of legislative subject matter drawn on by Parliament plays in the GNWT's argument.

b) Nothing in the Draft Plan suggests that the scope of the Board's authority to adopt a plan under the Act is more broad than the scope of the Minister's authority to approve the plan.

c) Many institutions of public government have responsibilities that extend across a broad range of legislative subject matter. For example, the authorities of the *MVRMA* Land and Water Boards established under Parts 3 and 4 of the Act, and, as just noted, of the Review Board under Part 5, are of comparable scale in terms of legislative subject matter.

Fragmentation of the system

91. The region-by-region design of Part 2 of the *MVRMA* reserves to the government parties that take part in the plan development process, and the Ministers that approve the results, a lead role in ensuring that regional land use plans fit well with each other and with territory-wide and national policy. The Conformity Requirements and Actions in the Draft Sahtu Plan draw on many government policies that apply across the NWT. The inclusion of Actions in the Draft Plan does not reduce the integrating role of the government parties or Ministers. The territorial and interprovincial span of the MGP, for example, illustrates that regulatory functions are not, by their nature, necessarily region-specific. As section 46 does not restrict the scope of regulatory authorities' responsibility to implement land use plans out of concern for the extra-regional span and impact of many projects, there is no reason to presume that section 46 withholds such responsibility from bodies exercising non-regulatory functions out of such concern. In particular, rather than restrict the regional planning mandate out of concern for extra-territorial impacts, provisions such as sections 45 and 15[79] of the Act equip and direct the Board to deal with the impacts of its work across settlement area boundaries.

92. The GNWT and INAC have not identified an instance in which the Board's adoption of an Action might raise a cross- boundary concern that is different from the type of concern that is part of the plan development process respecting Conformity Requirements.

Summary of Analysis

93. The Board agrees with the GNWT that section 46 of the Act provides for the binding effect of a land use plan, and that section 41 provides for a plan's permissible content. The Board agrees with SSI that section 46, read in its entire context, is the proper focus for analysis. The Board's analysis turns mainly on the meaning of the words "departments and agencies ... shall carry out their powers in accordance with the land use plan" in subsection 46(1).

94. The arguments filed assert a restriction on the plan implementation duties of departments and agencies that does not appear in the Act. In the Board's view, the "powers" of the "departments and agencies" referred to in section 46 cannot be equated with the regulatory powers enumerated separately in the same provision. Parliament has provided for two sets of government function to implement land use plans. This interpretation of subsection 46(1) results in a coherent and workable scheme for the implementation of land use plans, in which the scope of implementation responsibility matches the scope of the planning mandate to provide for the conservation, use, and development of land, waters, and other resources.

95. Nor may the non-regulatory powers referred to in section 46 reasonably be understood to be restricted to land disposition functions. The Draft Plan's reading of the *MVRMA* is accurate: the *MVRMA* places responsibility to implement a land use plan on any department or agency whose powers relate to the plan, provided that the terms of the plan fall properly within the mandate to provide for conservation, development, and use of land, waters, and other resources. The duty of "departments and agencies" to "carry out their powers in accordance with the land use plan" under subsection 46(1) applies to the same range of government functions as it would if the text read "departments and agencies other than regulatory bodies" or "shall carry out their powers other than those which concern the regulation of land use or disposition of land". In support of this conclusion are the following considerations:

a) It is relevant that the Agreement does not provide for plan implementation responsibility outside regulatory and land disposition functions, but the Agreement provides expressly for supplementary provisions to be made in the implementation statute, and Part 2 of the *MVRMA* contains several key supplementary provisions outside section 46. The extension of plan implementation responsibility that is provided for in section 46 supports, rather than compromises, the intent of the Agreement, and there is no question of inconsistency with the Agreement.

b) The Act's only example of a non-regulatory department and agency function caught by the plan implementation duty, provided in subsection 46(2), is not a land disposition function.

c) The Act's conformity determination process supports the implementation of land use plans in the regulatory and land disposition processes on a case-by-case basis. Its presence in section 47 does not imply that government's plan implementation responsibilities are restricted to those that affect land users directly.

d) The analogous provisions to implement environmental impact reports contained in Part 5 of the *MVRMA*, whose descriptions of department and agency responsibility is practically the same as in subsection 46(1), clearly are not restricted to land disposition functions, and governments have not construed the Part 5 provisions in such a restrictive manner when accepting Action-type recommendations under Part 5 for projects such as the MGP. No Agreement objection to the Part 5 provisions is referred to in the arguments, yet these provisions extend implementation responsibility further beyond the Agreement than does the Draft Plan's reading of subsection 46(1).

96. Consideration of section 41 in its whole context does not alter the Board's view:

a) The ordinary meaning of the MVRMA's plan mandate provision, subsection 41(2), does not imply the restriction argued for. Subsection 41(3), whose role is supportive of the plan mandate, should not be understood to curtail the mandate described in subsection 41(2).

b) As SSI points out, the list of plan contents provided in subsection 41(3) is permissive. The final paragraph of this subsection leaves to the Board the determination what type of content to include or not to include in a land use plan.

c) Subsection 41(3) does permit the Board to provide for exceptions in a land use plan that would qualify section 46 plan implementation responsibility on a case by case basis. However, even if subsection 41(3) were viewed as a closed list of the contents that a land use plan may contain, the enabling of a land use plan to include "descriptions of permitted and prohibited uses" would not imply that the only binding effect of a land use plan can be to prohibit land uses. To read one paragraph of subsection 41(3) as delimiting the entire scope of plan implementation responsibility under the Act would require rewriting section 46 and denying section 46 its agreed role in controlling the binding effect of a land use plan. In particular, such a reading would appear to disqualify goal-based Conformity Requirements in the Draft Plan, whose inclusion the GNWT and INAC support.

97. The further arguments that the scope of plan implementation responsibility asserted in the Draft Plan respecting Actions would encroach unreasonably on the land and water management role of government are not persuasive in light of the broad purpose of land use planning in the *MVRMA* scheme and the ultimate authority of Ministers to approve or not approve land use plans.

Conclusion

98. The Board wishes to thank counsel for the GNWT, INAC and SSI for the considerable assistance provided in their written argument. For the reasons set out in the Analysis, the Board does not accept the position taken in the arguments filed. In the Board's view, the *MVRMA* authorizes the Board to adopt a land use plan containing Actions and authorizes the Ministers and First Nation to approve such a plan. If a land use plan containing Actions were to be adopted and approved, and presuming that the plan provided only for the conservation, development or use of land, waters, and other resources, all departments and agencies exercising functions related to the plan would be required under the *MVRMA* to act in accordance with the plan.

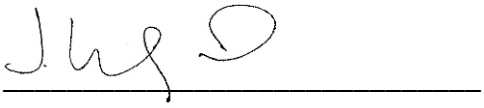
99. In reaching this conclusion, the Board has been mindful that the main position taken in the arguments filed reflects the agreement of both parties to the *Sahtu Agreement*. As the Yukon Supreme Court noted in a recent decision,[80] it is significant but not determinative when the parties to a modern treaty stating their views in a proceeding agree on the meaning of the treaty. Here the main issue relates to the implementation statute rather than the land claim

agreement. As an independent tribunal, the Board must reach its own decision. However, the Board disagrees with the representatives of the Crown and Dene and Metis parties to the *Sahtu Agreement* on this matter reluctantly.

100. The Board will rely on this conclusion when considering revisions to the Draft Plan in light of the comments received at the recent public hearing and all other comments submitted.

101. The Board also acknowledges that two of the approving parties for the Sahtu Plan, INAC and the GNWT, have stated in comments that, regardless whether Action-type terms are permissible under the *MVRMA*, these parties currently oppose inclusion of Actions in the Sahtu Land Use Plan as a matter of policy. INAC and the GNWT can be assured that the Board will take those comments into account when the Board considers revisions to the Draft Plan and decides to adopt the Sahtu Land Use Plan and submit it for approval.

Respectfully provided,



July 27, 2011

Judith Wright-Bird, Chairperson,

Sahtu Land Use Planning Board

Endnotes

[1] "'[R]egulatory process' means the process of determining whether or on what terms an authorization will be issued"; "'authorization' includes a licence, permit or other authorization relating to the use of land, issuable under any federal or territorial law": Draft Plan, *Definitions*, at pp.ix-xi.

[2] The type of authority referred to in the Draft Plan and this Response as "land disposition" powers could also be described as "land consent" powers. The difference between an interest in land and a licence to use land is not material to the issue addressed in this Response.

[3] The Draft Plan defines "Action" as a "requirement of this Plan that is to be implemented outside the regulatory process, and outside the granting of leases, interests in land, and consents to the use of land" (*Definitions*, p.ix). INAC stated in its October 16, 2010 comments that "the Departmental position … was that "Actions" were not legally binding on the parties, although the parties would make reasonable efforts to fulfil them" (p. 10, referring to INAC comments on a previous draft). INAC added that "the use of the mandatory 'shall' language" in certain Actions in the Draft Plan "is problematic for the Department if the Board deems these and other Actions in the Plan as binding." (p. 18) Copies of all written comments received by the Board on the Draft Plan are available on the SLUPB website: www.sahtulanduseplan.org.

[4] GNWT comments dated February 25, 2011, p. 6. The GNWT explained: "Section 46 establishes a legal requirement for the territorial government to carry out its powers in accordance with the land use plan. Potentially everything contained in the Plan could be construed as a legal requirement." (ibid.)

[5] *Written Argument of the Government of the Northwest Territories Re: Direction to Parties dated March 25, 2011 on argument with respect to the authorized scope of a Land Use Plan under the Mackenzie Valley Resource Management Act,* April 20, 2011 ("GNWT argument"); *Written Submissions of the Minister of Indian Affairs and Northern Development.* April 21, 2011 ("INAC argument"). The latter Minister's department has since been renamed "Aboriginal Affairs and Northern Development".

[6] *Reply Argument on Mandatory Actions and the Jurisdiction of the Board*, Sahtu Secretariat Incorporated, April 29, 2011 ("SSI argument").

[7] GNWT argument, para. 5; INAC argument, para. 13; SSI argument, para. 28.

[8] GNWT argument, paras. 10, 17.

[9] GNWT argument, paras. 14-18; 34, 44.

[10] GNWT argument, para. 44.

[11] GNWT argument, paras. 39-43.

[12] GNWT argument, para. 37.

[13] GNWT argument, paras. 34, 36, 38,, 44.

[14] GNWT argument, paras.19-25.

[15] GNWT argument, paras.26-28.

[16] GNWT argument, paras. 8,9, 13.

[17] GNWT argument, paras. 29-31.

[18] GNWT argument, paras. 17, 24.

[19] GNWT argument, para. 15.

[20] GNWT argument, para. 17.

[21] GNWT argument, paras.22-24. (Para. 26 of the INAC argument makes a similar assertion.)

[22] INAC argument, para. 14-22.

[23] INAC argument, paras. 13-14; 23-25.

[24] INAC argument, para. 26.

[25] INAC argument, para. 24.

[26] GNWT argument, para. 33.

[27] INAC argument, paras.31-33.

[28] INAC argument, paras. 14; 28-29.

[29] SSI argument, paras.28; 21. (The reference in para. 21 of the SSI argument to "section 43" appears intended to be to subsection 41(3).)

[30] SSI argument, paras.14-20.

[31] SSI argument, para. 27.

[32] SSI argument, paras. 18-20.

[33] SSI argument, paras. 28-29; INAC argument, paras. 20,27.

[34] The Act's purpose in restating the subsection 46(1) requirement in subsection 61(1) appears to be to ensure that the Land and Water Boards' powers to issue licences and permits are not interpreted to operate free of the section 46 duty. A Land and Water Board (LWB) is a body that issues authorizations within the meaning of subsection 46(1), but the LWBs' separate establishment in the same Act might have led to questions regarding the LWBs' duty to implement land use plans in the absence of clarifying language.

[35] GNWT argument, para. 38.

[36] Draft Plan, section 7.2.3, p.286.

[37] The Agreement states that the Planning Board "shall have jurisdiction, in accordance with the provisions of this agreement, to develop a land use plan for the settlement area" and that "[d]ecisions of the Planning Board in respect of the land use plan shall be subject to approval by government" (sections 25.2.1, 25.2.8).

[38] *Sahtu Agreement*, section 3.1.18; GNWT argument, para. 8; INAC argument, paras. 19, 23, 26; SSI argument, para 11.

[39] *Driedger on the Construction of Statutes* (3d. ed., 1994), cited in INAC argument, para 17.

[40] GNWT Comments on Draft 2, July 27, 2009, p. 1; INAC Comments on Draft 2, July 31, 2009, pp. 1, 4, 23; SSI Submission to SLUPB on Draft 3, March 31, 2011, pp. 2-4.

[41] As the Board clarified in its February 17, 2011 letter to the planning parties, the intent of the Draft Plan is that Conformity Requirements will be applied in the land disposition process, as well as in the regulatory process. The written arguments filed proceed on this understanding. The three parties do not take issue with inclusion in a plan of terms that are intended to be binding in the land disposition process.

[42] Draft Plan, Chapter 7*, Plan Approval & Implementation*, p. 286.

[43] *Keewatin Regional Land Use Plan* and *North Baffin Regional Land Use Plan*, approved by the Governments of Nunavut and Canada. The North Baffin plan, for example, explains the distinction between Actions and Conformity Requirements as follows:

> Each planning term is followed by a code which indicates its legal status. [A] refers to "actions", or measures that, on approval of this plan, are required to be taken either by government or the NPC pursuant to s. 11.5.9 of the NLCA. [CR] refers to "conformity requirements" that, on approval of the plan, will be applied by the NPC in determining the conformity of project proposals with the plan under s. 11.5.10 of the NLCA.
>
> *North Baffin Regional Land Use Plan* (2000), p. 29, note 7.

The *Nunavut Land Claims Agreement* imposes a duty on government to implement approved land use plans in the following language:

> 11.5.9 Upon approval by Cabinet and the Executive Council, the plan shall be implemented on the basis of jurisdictional responsibility. All federal and territorial government departments and agencies shall conduct their activities and operations in accordance with the plan as approved.
>
> *Nunavut Land Claims Agreement*, 1993

The distinction between Actions and Conformity Requirements appeared in the Nunavut plans during the plan approval process. Because the terms submitted for approval had not differentiated between modes of implementation, many of the terms in the approved Nunavut plans were designated both "Action" and "Conformity Requirement." (The Draft Sahtu Plan makes the distinction between Action and Conformity Requirement in the writing of the terms, so the Sahtu Draft terms receive only one or the other designation.) Another difference between the Nunavut and Draft Sahtu Plan usages of "Action" is that, in the two Nunavut plans, Actions include duties to be carried out by regulators in the regulatory process. Many of the Actions in the Nunavut plans, however, extend to non-regulatory functions of government. As the North Baffin plan, for example, explains, "many of the requirements of this plan involve commitments for action by governments and government agencies. They do not apply directly to individual project proposals." (Introduction, p. 1). The following Actions from the Nunavut plans illustrate the latter usage, shared with the Draft Sahtu Plan:

> 3.2.2 DSD shall continue to develop the Nunavut Sustainable Development Policy for the land and water areas of Nunavut, currently still in the drafting stages, and shall implement the policy when complete.

> 3.2.4 DIAND shall continue to use CLARCs [Community Land and Resource Committees] to dispense land use-related information in the communities.
>
> 3.2.6 Provided that a significant and relevant amount of activity has occurred, lands managers and government resource managers shall hold annual information sessions in the region, or provide yearly updates on their activities within the region to each community…
>
> *North Baffin Regional Land Use Plan* (2000), p. 92.
>
> 3.7 DIAND, with the assistance of DSD, shall continue to maintain a central record of carving-stone deposits and communicate this information to the communities and appropriate Inuit authorities.
>
> 5.2 Both levels of government shall give priority to the improvement of existing regional transportation infrastructure over the construction of new facilities.
>
> *Keewatin Regional Land Use Plan* (2000), pp. 89-90.

[44] *Gwich'in Land Use Plan* (2003), page 135.

[45] GNWT argument, para. 38.

[46] INAC argument, para.1.

[47] Subsection 61(1), *MVRMA*.

[48] The GNWT does appear to acknowledge that comparable provisions in another Part of the Act – subsections 130(5) and 136(2), providing the duty to implement environmental assessment reports prepared by the Mackenzie Valley Environmental impact Review Board – enumerate regulatory powers separately from other powers, and that in that case, at least, departments and agencies carrying out non-regulatory powers are caught by the implementation duty: GNWT argument, para.33.

[49] The French text of subsection 46(1) reads:

> Observation par la première nation, les gouvernements, etc.
>
> **46.** (1) Les premières nations des Gwich'in et du Sahtu, les ministères et organismes des gouvernements fédéral et territorial ainsi que les organismes chargés, aux termes des règles de droit applicables dans la région désignée, de délivrer des permis ou autres autorisations relativement à l'utilisation des terres ou des eaux ou au dépôt de déchets sont tenus d'exercer leurs attributions en conformité avec le plan d'aménagement.

[50] "It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain": *Sullivan on the Construction of Statutes*, 5th ed. (2008), p. 210. The GNWT relies on this presumption in its reading of subsection 41(3) of the Act: GNWT argument, para.34, citing *R v. Proulx*, [2000] 1 S.C.R. 61, at para.28.

[51] See note 3 above.

[52] "Conformity Requirement" means a requirement of this Plan that is to be implemented in the regulatory process, and in the granting of leases, interests in land, and consents to use the land" (Draft Plan, *Definitions*, p. ix).

[53] GNWT argument, para. 30; INAC argument, para. 25.

[54] GNWT argument, para.8.

[55] GNWT argument, paras. 9, 29; INAC argument, paras. 23,25.

[56] *Sahtu Dene and Metis Comprehensive Land Claim Agreement Act*, S.C. 1994, c. 27 (*SLCAA*), section 4. Paragraph 25.1.3(a) of the Agreement does not purport to establish the Planning Board in the absence of implementation legislation, but the *SLCAA* appears to impose the Agreement's plan implementation duty on government independently of section 46 of the Act.

[57] GNWT argument, para. 26.

[58] GNWT argument, paras.27-28.

[59] INAC argument, para. 30.

[60] INAC argument, para. 32.

[61] GNWT argument, para. 33; INAC argument, para. 31.

[62] GNWT argument, para. 15-18.

[63] The GNWT and INAC arguments both recognize that subsection 41(2) of the Act is to be read in the light of paragraph 25.2.4(e) of the agreement. See GNWT argument, para. 18; INAC argument, para. 14.

[64] *Beckman v. Little Salmon/Carmacks First Nation*, 3 S.C.R. 103, at para. 12.

[65] GNWT argument, paras. 7 and 13.

[66] GNWT argument, para. 14; INAC argument, para. 18.

[67] SSI argument, para. 15.

[68] SSI argument, para. 15.

[69] GNWT argument, para. 44; INAC argument, para.22.

[70] For example, the *North Baffin Regional Land Use Plan* (2000) explains its design as follows: "Making decisions about particular cases on the basis of a set of policies, principles and standards, rather than specific and pre-determined land use designations, is an established method of land use planning." (Introduction, p.9)

[71] GNWT argument, para. 40.

[72] INAC PowerPoint presentation submitted April 21, 2011, and GNWT PowerPoint Presentation submitted April 21, 2011. Presented at the SLUPB Public Hearing on the Draft Sahtu Land Use Plan, May 3-5, 2011, Norman Wells, Northwest Territories.

[73] GNWT argument, paras. 40-42.

[74] GNWT argument, para.43.

[75] *Oldman River*, at para. 37.

[76] *Concise Oxford Dictionary*, 8th ed., 1990.

[77] INAC argument, para.26.

[78] GNWT argument, paras. 15-17.

[79] Section 15 of the *MVRMA* reads:

> Implementation of right of representation of other aboriginal peoples
>
> **15.** Despite any provision of this Act respecting members of a board, if an aboriginal people has a right under a land claim agreement to representation on that board in relation to a decision of the board that might affect an area used by that aboriginal people that is outside the board's area of jurisdiction, the board shall, in accordance with that land claim agreement, determine how to implement that right.

[80] *Western Copper Corporation v. Yukon Water Board*, 2011 YKSC 16: "[111] It is also significant, but not necessarily determinative that Yukon and the First Nations, two of the three parties that negotiated the UFA, are in substantial agreement on how it should be interpreted. This is somewhat unique as it is often the original parties to an agreement that have contrary interpretations."

Appendix: List of Actions from Draft 3 Sahtu Land Use Plan

Action #1 – Plan Implementation Monitoring

In order for the SLUPB to monitor implementation of this Plan, Regulators that authorize a land use activity in the SSA shall provide copies of such authorizations to the SLUPB on request within a reasonable time.

Action #2 - Sahtu Working Group

The SLUPB shall establish and lead a Sahtu Working Group with representation from SSI and other designated Sahtu organizations, the federal and territorial governments, the SRRB, the SLWB, industry (oil and gas, mining, others), and non government organizations as a collaborative forum through which to discuss, study and resolve key regional land use issues and informed decision making. The Sahtu Working Group will work on Actions 3-6 below to develop appropriate measures for consideration and integration into future Plan revisions.

Action #3 - Community Engagement Guidelines

The Sahtu Working Group shall collaborate to develop community engagement guidelines that define guiding principles, processes, and roles and responsibilities of government, industry and community organizations for community engagement in the SSA within 4 years. These may be incorporated into future revisions of the Sahtu Land Use Plan.

Action #4 – Best Practices

The Sahtu Working Group shall build on and refine the Plan's Conformity Requirements into a set of Best Practices for land use for the Sahtu Settlement Area within 4 years. The results may replace the Plan's Conformity Requirements through future Plan amendments.

Action #5 – Sahtu Cumulative Effects Management Plan of Action

The Sahtu Working Group shall develop and begin implementation of a Sahtu Cumulative Effects Management Plan of Action within 4 years. Through the Plan of Action, the Working Group shall identify key knowledge and data gaps, design and implement research and data gathering projects to address those gaps, identify and test interim management strategies including targets, and implement chosen management strategies. The results of this work may be integrated into future Plan amendments.

Action #6 – Sahtu Environmental Monitoring Program

Within 4 years, the Sahtu Working Group shall develop a Sahtu Environmental Monitoring Program that defines regional monitoring priorities, practices and direction for work carried out under the Cumulative Impact Monitoring Program within the Sahtu Settlement Area. In developing the Sahtu monitoring program, the Working Group should consider research and monitoring recommendations identified in the "Great Bear Lake Watershed Research and Monitoring Plan", and "Rakekée Gok'é Godi: Places We Take Care Of".

Action #7 - Inspection and Enforcement Priorities

All government departments and agencies and other bodies having monitoring and enforcement responsibilities shall give priority, where reasonable to do so, to inspection and enforcement of activities occurring within Conservation Zones and Proposed Conservation Initiatives, followed by Special Management Zones, then General Use Zones.

Action #8 – Community-Government Monitoring and Enforcement Strategy

Within 4 years, responsible authorities with enforcement responsibilities shall collaborate with appropriate community organizations (land corporations, renewable resources councils, First Nations, community councils) to develop and begin implementing a Sahtu community - government strategy to partner in patrols, monitoring, inspection and enforcement responsibilities. The strategy should emphasize training initially with a long term goal to maximize community involvement in these areas of responsibility.

Action #9 - Traditional Knowledge Guidelines

SSI and other Designated Sahtu Organizations shall collaborate with community governments (First Nations, Charter community councils), the SRRB and Renewable Resource Councils to develop guidelines for the collection (including purpose and scope), use and management of traditional knowledge within the Sahtu Settlement Area.

Action #10 - Access to Wildlife Information

Responsible authorities (ENR, CWS, SRRB, and DFO) shall develop and maintain current data on important and critical wildlife habitat for fish, furbearers, waterfowl, raptors, barren-ground caribou, mountain and boreal woodland caribou, moose, muskox, mountain goats, Dall's Sheep, grizzly bears and black bears and make the data readily accessible to land users and the public.

Action #11 - Fish Habitat & Water Withdrawals

DFO shall work with communities

a) to document community traditional knowledge of
    i. fish and fish habitat, and

ii. water levels and quality; and

b) to discuss

i. community concerns related to water withdrawal,

ii. DFO's winter water withdrawal protocol, and

iii. alternative solutions.

Action #12 - Air Quality

(1) ENR shall ensure that interested parties are provided with a paper copy of the Annual Air Quality Report, and directed to ENR's Air Quality Programs Coordinator as necessary.

(2) ENR shall continue to study the feasibility and advisability of expanding the air quality monitoring network in the NWT. This will be based primarily on industrial development, population growth, and available resources.

(3) ENR shall continue to develop air quality related regulations, guidelines and/or standards, as appropriate, for application within territorial jurisdiction through the NWT Environmental Protection Act. ENR will continue to work with the Land and Water Boards and responsible federal agencies to encourage their air quality objectives for new and existing developments, territory-wide.

Action #13 - Emergencies Activities Reporting

Where a land use activity is carried out, that would be prohibited under a zoning requirement if not for the emergency exemption, the body responsible for carrying out the activity shall provide a written report to the Board describing the operation, indicating when the emergency is likely to end and what, if any, restorative measures consistent with the vision and goals of the Plan are planned, as soon as possible.