SAHTU LAND USE PLANNING BOARD

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*

WRITTEN ARGUMENT of the GOVERNMENT OF THE NORTHWEST TERRITORIES

I. ISSUE

1. Sahtu Land Use Plan Draft 3 ("Draft 3"), was issued by the Sahtu Land Use Planning Board ("the Board") in July 2010.

2. The Board directed that any "party that considers a term of Draft 3 to be outside the authorized scope of a land use plan under the MVRMA to submit complete written argument in support of its position by April 21, 2011."

    - **Notice of Rescheduled Hearing on Draft 3 Sahtu Land Use Plan, March 25, 2011, at page 3.**

3. The Government of the Northwest Territories ("the GNWT") is a party and a land use plan approver under subsection 43(3) of the *Mackenzie Valley Resource Management Act* S.C. 1998, c. 25 ("the MVRMA").

    - **MVRMA, subsection 43(3).**

4. Draft 3 contains requirements, described as "Actions", that purport to establish mandatory obligations for certain bodies charged with implementing the Sahtu Land Use Plan.

    - **Draft 3, Chapter 6.**

5. It is the GNWT's respectful submission that it is beyond the jurisdiction of the Board to adopt a Sahtu Land Use Plan containing "Actions", as contemplated and defined in Draft 3.

6. This submission constitutes the GNWT's argument solely with respect to the position described at 4. above. It is the GNWT's understanding that Draft 3 will be subject to substantial revision. The GNWT reserves the right to identify other objections, jurisdictional or otherwise, with respect to a future draft Sahtu Land Use Plan that is adopted and submitted to the territorial Minister for approval pursuant to sections 41 and 43 of the MVRMA. In that event, the MVRMA sets out an approval process, including provision for written reasons from the territorial Minister.

- **MVRMA, sections 41 and 43.**

II. ARGUMENT

The Land Claim Agreement and the Legislative Framework

7. The permissible content of a land use plan, and the binding effect of a land use plan, are set out in sections 41 and 46 of the MVRMA respectively.

- **MVRMA, section 41 and 46.**

8. In the GNWT's respectful submission, the land use planning provisions of the MVRMA must be read together with the *Sahtu Dene and Metis Comprehensive Land Claim Agreement* ("the SDMCLCA"). The SDMCLCA was given the force of law by the *Sahtu Dene and Metis Land Claim Settlement Act* of 1994. That Act provides that where there is any inconsistency between the SDMCLCA and the provisions of any law, the SDMCLCA prevails to the extent of the inconsistency or conflict.

- ***Sahtu Dene and Metis Land Claim Settlement Act*, S.C. 1994, c.27, section 8.**

9. It is recognized that a mere difference in the text of provisions of the SDMCLCA and the MVRMA with respect to a particular matter may not constitute an inconsistency. It is also recognized that in enacting the MVRMA, Parliament necessarily added more prescription and detail to the framework for land and water regulation than was set out in the SDMCLCA. However, in the GNWT's submission, an examination of the SDMCLCA remains helpful, and sometimes imperative, to an understanding of the legislative intent of the MVRMA.

10. The GNWT submits that in particular, the preamble to the MVRMA provides some assistance in determining the intention of Parliament as it relates to the SDMCLCA, and as reflected in the MVRMA. In part, that preamble reads as follows:

> AND WHEREAS the intent of the [Gwich'in and Sahtu Dene and Metis Comprehensive Land Claim] Agreements as acknowledged by the parties is to establish [the land use planning, land and water, and environmental impact review] 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;...

- **MVRMA, Preamble.**

11. Chapter 25 of the SDMCLCA sets out principles applicable to the regulation of land and water in the Sahtu Settlement Area. Chapter 25 includes the land use planning provisions. The applicable principles are that:

> (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.

- **SDMCLCA, section 25.1.1.**

12. Section 35 of the MVRMA sets out the principles applicable to land use planning for each settlement area of the Mackenzie Valley. Section 35 reflects principles found in the SDMCLCA at section 25.2.4.

    - **MVRMA, section 35.**
    - **SDMCLCA, section 25.2.4.**

13. In the respectful submission of the GNWT, the land use planning provisions of the MVRMA, and in particular those provisions with respect to the permissible content and intended effect of a land use plan, must be given a purposive interpretation within the context of the surrounding statute, informed by the underlying provisions of the SDMCLCA.

    - **MVRMA, sections 41 and 46.**
    - **SDMCLCA.**

Interpretation of subsection 41(2) of the MVRMA

14. The SDMCLCA states, as a principle, that a land use plan "shall provide for the conservation development and utilization of land, resources and waters". Subsection 41(2) of the MVRMA states, as a requirement, that a land use plan "shall provide for the conservation, development and use of land, waters and other resources" in a settlement area.

    - **SDMCLCA, subsection 25.2.4(e).**
    - **MVRMA, subsection 41(2).**

15. Language notably similar to the language in subsection 41(2) is employed by the *Constitution Act, 1867* in describing the legislative authority of provinces. For example, the *Constitution Act* provides provincial legislatures with legislative authority for the "*development, conservation and management* of non-renewable natural resources and forestry resources" in each province.

    - ***Constitution Act, 1867*, subsection 92A (1)(b).**

16. Similar language is contained in the *Yukon Act*, reflecting in part the devolution of responsibility for land, water and resource management from the federal government to the Yukon territorial government that became effective in April 2003.

    - ***Yukon Act*, S.C. 2002, c.7, subsection 19(1)(b).**

17. It is respectfully submitted that a reading of subsection 41(2) of the MVRMA in isolation would burden the Board with managing, through a land use plan, the full range of province-like powers over lands, waters and resources within the Sahtu Settlement Area. It is submitted that this would lead to a result not intended by the signatories to the SDMCLCA, or by Parliament. It is the GNWT's submission that such a broad reading is not supported by the principles or provisions set out in the SDMCLCA, and in particular, the principle that "government shall retain the ultimate jurisdiction for the regulation of land and water".

    - **MVRMA, subsection 41(2).**
    - **SDMCLCA, section 25.1.1 (c).**

18. It is submitted by the GNWT that the mandatory requirement in subsection 41(2) of the MVRMA can only be properly interpreted by reading it in the context of the overall MVRMA legislative scheme, with a particular focus on subsection 46(1) which provides evidence of how a land use plan is intended to bind actors in the regulatory system, and subsection 41(3) of the MVRMA, which sets out the permissible content of a land use plan. As stated by Locke J. of the Supreme Court of Canada, "The broad general rule for the construction of statutes is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest".

- **MVRMA, sections 41 and 46.**
- ***Greenshields v. The Queen*, [1958] S.C.R. 216.**

Interpretation of section 46 of the MVRMA

19. Subsection 46(1) of the MVRMA sets out the requirement for listed governments and bodies to "carry out their powers in accordance with the land use plan applicable in a settlement area":

> **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.

- **MVRMA, subsection 46(1).**

20. Draft 3 defines an "Action" as follows:

> "Action" means a requirement of this Plan that is to be implemented outside of the regulatory process, and outside the granting of leases, interests in land, and consents to the use of land.

- **Draft 3, Definitions, p. ix.**

21. It is the GNWT's submission that, properly construed, subsection 46(1) establishes that a land use plan under the MVRMA is binding *only* through the issuance of instruments relating to land use, or through the establishment or issuance of interests in land, and consents to the use of land.

- **MVRMA, subsection 46(1).**

22. In the submission of the GNWT, an overly broad reading of subsection 46(1) requiring that all "powers" of "departments... of the federal and territorial governments" must be carried out in accordance with the land use plan was not intended by Parliament. Federal and territorial government departments have a broad range of powers and capacities bearing on land and water use that they exercise on behalf of the public. Some of these powers are exercised on a Mackenzie Valley-wide, a territory-wide, or even a nation-wide basis.

- **MVRMA, subsection 46(1)**
- **See for example, *Environment and Natural Resources Establishment Policy* 53.01, 29 March 2005.**

23. In drafting subsection 46(1), it is submitted that Parliament cannot have intended to bind itself and the GNWT in respect of the exercise of these broader responsibilities. Had that been the intention, each plan could theoretically establish different and conflicting mandatory requirements with respect to these

broad responsibilities in the Sahtu Settlement Area, with consequences beyond a particular settlement area. At best, this would have resulted in the first completed and approved land use plans restricting the range of options available in succeeding land use plans in the Mackenzie Valley. At worst, it could have caused challenges for governments in complying with section 46 in respect of one or more land use plans in the Mackenzie Valley.

- **MVRMA, subsection 46(1).**

24. Parliament foresaw and intended the creation of a series of land use plans in the Mackenzie Valley, and sought an objective of "regulatory consistency between settlement areas". The Supreme Court of Canada has confirmed, as a presumption of statutory interpretation, that Parliament must be taken to know all that is necessary to produce rational and effective legislation. In the face of Parliament's stated objective, the GNWT submits that Parliament cannot have intended to create such an inconsistent and fragmented system as would result from an unduly broad interpretation of the word "powers" in subsection 46(1). To the contrary, the evidence and the SDMCLCA principles applicable to land and water regulation confirm that the opposite effect was intended.

- ***Hansard*, 36th Parliament, 1st Session, No.22 (October 28, 1997).**
- ***2747-3174 Québec Inc. v. Quebec (Régie des Permis d'alcool),* [1996] 3 S.C.R. 919, per L'Heureux-Dubé J., at para.**
- **SDMCLCA, subsection 25.1.1.**

25. It is submitted that the above analysis reinforces a conclusion that subsection 46(1) was intended to be binding only in respect of the issuance of licences, permits, and interests in land, which by their nature, will be located within and specific to the Sahtu Settlement Area.

- **MVRMA, subsection 46(1).**

26. Subsection 46(2) also aids in interpretation of subsection 46(1). Subsection 46(2) requires, in part, that the establishment of a national park in the settlement area is to be carried out in accordance with an applicable land use plan. By employing the words "in particular...", subsection 46(2) is not expressed as an exception to 46(1), but rather as confirming the ambit of subsection 46(1).

- **MVRMA, section 46.**

27. Subsection 46(2) can be viewed as a necessary clarification of the application of the land use planning provisions of the MVRMA. Section 34 of the MVRMA states that the land use planning provisions of the MVRMA do not apply "in respect of lands in a settlement area that comprise a park to which the *Canada National Parks Act* applies, that have been acquired pursuant to the *Historic Sites and Monuments Act* or that are situated within the boundaries of a local government." Absent the clarification in subsection 46(2), the inference might have been that the land use planning provisions had no application to "measures... leading to the establishment of a park...and the acquisition of lands", even though the process leading to park creation relates directly to the "permitted and prohibited uses of land, waters and resources" contemplated as content of a plan under subsection 41(3)(c).

- **MVRMA, sections 34, 41(3)(c), and 46.**

28. The GNWT submits that "measures...leading to the establishment of a park", such as choosing the location and determining the permissible uses of a park, can be viewed as establishing the permitted and prohibited uses of land, water and resources in the settlement area. Similarly, the acquisition of lands under the *Historic Sites and Monuments Act* relates directly to the acquisition of interests in land in the settlement area and the uses of that land. It is accordingly the GNWT's view that subsection 46(2) does not support a broader interpretation of subsection 46(1) that would include mandatory requirements in the nature of "Actions". Further, section 34 and subsection 46(2) are each supported by a specific underlying section in the SDMCLCA.

- **MVRMA, sections 34 and 46.**
- **SDMCLCA, section 25.1.2 (a).**

29. The GNWT's interpretation of section 46 of the MVRMA is further reinforced by the SDMCLCA provision underlying that section. In the GNWT's submission, the wording of section 25.2.9 of the SDMCLCA gives the intended mandatory effect of a land use plan greater clarity:

> 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.

- **SDMCLCA, section 25.2.9**

30. In the GNWT's respectful submission, an interpretation of section 25.2.9 of the SDMCLCA that would see "those authorities with jurisdiction to grant licences, permits, leases or interests relating to the use of land in the settlement area" bound to conduct *all* of their "activities and operations" in accordance with the

plan results in an absurdity. In the GNWT's submission, the mere fact that an authority issues a licence, permit, lease or interest was not intended to be the basis upon which it is bound to implement a land use plan in respect of *all* of its other activities. This interpretation could leave the binding effect of an approved land use plan to the whim of a government reorganization of responsibilities. For example, any functions that do not involve "the granting of licences, permits, leases or interests relating to land" could in theory be placed with an authority that *does not* issue licences, permits, leases or interests and be insulated from the binding effect of the plan. The GNWT submits that this result cannot have been intended by the signatories to the SDMCLCA, or by Parliament.

- **SDMCLCA, section 25.2.9.**

31. In the GNWT's submission, the only sustainable interpretation of section 25.2.9 is that the "activities and operations" relates to the granting of licences, permits, leases or interests in land.

- **SDMCLCA, section 25.2.9.**

32. The GNWT submits, in relation to subsection 46(1) of the MVRMA, that based on the long accepted presumption of consistent expression employed in statutory interpretation, the same words should be given the same meaning, and different words must be presumed to have intended a different meaning.

- **MVRMA, subsection 46(1).**
- ***R. v. Zeolkowski* (1989), 61 D.L.R. (4th) 725, at 732 (S.C.C.)**

33. Subsections 130(5) and 136(2) of the MVRMA, in the context of environmental assessment and environmental impact review, use wording that clearly binds federal and territorial ministers, and other regulatory actors, in respect of the broad range of their powers. These sections bind the ministers to carry out a decision "to the extent of their respective authorities". Had Parliament used similarly broad language in subsection 46(1), an intention to bind on a broader basis would have been manifest. It did not. Instead, it used the word "powers", which as the GNWT has already submitted, should be read within context as limited to the issuance of instruments relating to land use, or through the establishment or issuance of interests in land, and consents to the use of land.

- **MVRMA, subsection 130(5) and 136(2).**

Interpreting section 41 of the MVRMA

34. While the list of permissible content in subsection 41(3) is capable of very broad construction, there is a presumption that Parliament avoids superfluous or meaningless words. As stated by Lamer C.J. of the Supreme Court of Canada in *R. v. Proulx*, "It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage." In this regard, the GNWT submits that Parliament intended, by including the list in subsection 41(3), to limit the permissible content of a land use plan.

- **MVRMA, subsection 41(3)**
- ***R. v. Proulx*, [2000] 1 S.C.R. 61, at para. 28.**

35. Stated another way, Parliament could have relied wholly upon the discretion of the plan approvers under section 43 to determine the acceptable content of a land use plan, but chose not to do so.

- **MVRMA, sections 41 and 43.**

36. The GNWT submits that the list of permissible land use plan content in subsection 41(3), preceded by the words "A land use plan may include...", is a closed list. It follows that a land use plan may not include a matter not described on the list.

- **MVRMA, subsection 41(3).**

37. Land use plan content in the nature of "Actions" as defined in Draft 3 is not expressly found in the list in subsection 41(3) of the MVRMA.

- **MVRMA, subsection 41(3).**

38. It is the GNWT's submission, based on the legal principal of statutory interpretation known in Latin as *expressio unius est exclusio alterius* ("to express one thing is to exclude another"), that if Parliament had intended to include a particular matter on the list, it would have referred to that thing expressly. It is the GNWT's further submission that an inference of implied exclusion of "Actions" is particularly strong in this case, because "Actions", both as defined and as set out in Draft 3, are intended to be broad-reaching requirements "to be implemented outside of the regulatory process, and outside the granting of leases, interests in land, and consents to the use of land". As rightly recognized in Draft 3, "Actions" are, by definition, of a different class than the regulatory and land interest subject matter that is expressly contemplated by the MVRMA.

- **Draft 3, Definition of "Action", p. ix., s. 2.4 at p. 29 and s. 7.2.3 at p.286.**

39. Draft 3 appears to focus on the use of the words "policies", "guidelines", and "permitted and prohibited uses" in the list in subsection 41(3), to anchor the position that "Actions" are within the authorized scope of a land use plan under the MVRMA. The GNWT submits that a close examination of the other provisions of the MVRMA further supports implied exclusion: that "Actions" as defined in Draft 3 cannot be "read in" to the language of subsection 41(3) as permissible content of a land use plan.

- **Draft 3, section 1.2, p.2-3.**
- **MVRMA, subsection 41(3).**

40. Subsection 83(1) permits the Minister of Indian Affairs and Northern Development and the Tlicho Government to give "written policy directions binding on" particular land and water boards. The MVRMA also uses the words "directions on general policy matters" in section 106 in relation to matters within the jurisdiction of the Mackenzie Valley Land and Water Board.

- **MVRMA subsection 83(1), section 106.**

41. The GNWT submits, in relation to use of the word "policies" in subsection 41(3) of the MVRMA, that based on the presumption of consistent expression employed in statutory interpretation, the same words should be given the same meaning, and different words must be presumed to have intended a different meaning.

- **MVRMA, subsection 41(3).**

- ***R. v. Zeolkowski* (1989) (cited at para. 29 above).**

42. Parliament could have used words in subsection 41(3), as it did elsewhere in the MVRMA, to indicate that the policies are directed at or binding upon others, or are otherwise binding in some broad or "general" manner, but did not do so. In the GNWT's submission, the presumption is that something different was intended by Parliament.

    - **MVRMA, subsection 41(3).**

43. With respect to use of the word "guidelines", the GNWT submits that construed within the context of the legislative framework of the MVRMA, and the principles of the SDMCLCA, Parliament did not intend "guidelines" in a land use plan to be binding on governments or other actors in the system in the exercise of all of their powers. In the GNWT's submission, the Supreme Court of Canada's decision in *Friends of the Oldman River Society v. Canada* stands for the proposition that the word "guidelines" cannot be construed in isolation, and must be interpreted within the context of the statutory scheme as a whole.

    - **Subsection 41(3).**
    - ***Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3, at para.37.**

44. In conclusion, in the GNWT's submission, the only aspect of land use plan content that subsection 41(3) clearly describes as mandatory is found at c), "descriptions of permitted and prohibited uses of land, waters and resources". This mandatory aspect of Draft 3 is given effect through binding zoning and conformity requirements put into effect through issuance of instruments relating to land use, or through the establishment or issuance of interests in land, and

consents to the use of land.

- **MVRMA, subsection 41(3).**

Reallocation of Board Functions

45. The SDMCLCA states that government, through legislation, may provide for the reallocation of functions among the planning boards, the review board, and the land and water boards. Such a reallocation could in future provide the land use planning boards with additional responsibilities in relation to land, water and resource regulation. In the GNWT's submission, such a reallocation of functions has not yet occurred.

- **SDMCLCA, subsection 25.1.3 (d).**

46. In the GNWT's submission, subsection 25.1.3 (d) of the SDMCLCA is evidence that the signatories to the SDMCLCA contemplated a defined, if sometimes overlapping role for each of these components of the integrated system of land and water management in the Mackenzie Valley.

III. RELIEF REQUESTED

47. The GNWT therefore respectfully requests the concurrence of the Board that "Actions", as defined in Draft 3, are not within the authorized scope for a land use plan under the MVRMA.

48. The GNWT respectfully requests that the Sahtu Land Use Planning Board revise any future draft Sahtu Land Use Plan to delete "Actions" before adopting a plan and submitting it to plan approvers under section 43 of the MVRMA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 20TH DAY OF APRIL 2011.

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