



# Sahtu Land Use Planning Board

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## Follow-up Meeting with INAC on Actions

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**Date: February 18, 2011, 9 am – 12 pm**

**Location: 10<sup>th</sup> Flr Boardroom, Bellanca Building, Yellowknife**

### Participants

Heidi Wiebe, Sr. Planner, SLUPB

Dick Spaulding, Legal Counsel, SLUPB

Arthur Boutillier, INAC

Greg Yeoman, INAC

Scott Duke, Department of Justice, GC

### Opening Comments

Heidi: The purpose of the meeting is to explore room for movement on Actions as I mentioned in my emails. INAC's prior comments seemed to indicate that the concerns were related to the individual substance of what each Action was asking. Given that, we're hoping that with the right wording, they'll be acceptable as mandatory. I've put together some basic options for us to explore. There is no guarantee we'll hold to the specific wording presented as we're not at the stage of making decisions yet, but we're using this opportunity to see what may work and what won't work to report back to the Board. As usual, we're taking notes of discussion and these will be posted on our record, but these discussions are considered exploratory only and no one will be held to any outcomes of decisions from these discussions.

Dick: There may be some areas where INAC resistance to mandatory actions is stronger than in others. E.g. Scott said in November that INAC couldn't accept an action that would force them to change legislation. There is agreement on that – under the Act, plan approval can't require a statute or regulation to be changed. Looking at the Actions in front of us, do any of these present such concerns? There was also an indication of greater concern on INAC's part for an action setting a new funding commitment. There may be a difference of position there, on a policy level. The fact that an Action requires new spending doesn't automatically take it out of the realm of reasonable Actions. But the Board recognizes that new spending items would be more difficult to get approved, for policy reasons – e.g. requirement of treasury board process. The government approved certain mandatory actions in the JRP report, including some that would require new funding commitments, which seem already to have had support within government. So it still appears useful to examine the substance of the Action and see where/if government wants to move something forward.

Greg: On funding, you said it is not necessarily problematic if it requires new funding, if the government has already planned to do those activities. Can you clarify?



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Dick: The Government has approved new spending items in the JRP report, so some items that require new money do not seem to be a problem. In accepting the Action, INAC identified that they had already secured new funding for it.

Scott: That's correct. They had already committed to some things and were planning to do them and were prepared to fund it. We need to be careful here because a number of JRP recommendations directed certain things and government only accepted some of those and in a modified format based on what they would be willing to accept. In the government response, they went as far as they could.

Heidi: That's the same type of discussion we want to have here. What is government willing to approve in an action and still keep it mandatory?

Scott: Fundamentally there is a difference between how the Board conceives the land use plan. The Board takes a broader view of what the Plan can do vs. government. INAC views that S. 46 is aimed at conditions for permits while the Board thinks it can be used to fill policy gaps. We may not have to resolve that. If a party to the Plan were willing to accept a binding action, then they can do that. If a Plan is going to go forward for approval with a binding action, how do we enforce that? My client's interests need to be protected. If an Action is mandatory and 10 years later the government decides it doesn't want to do that, what happens? If a LWB issues a licence and someone doesn't follow the CR, there is a legal process to enforce that and rectify the situation. What I'm not clear on is what happens with all the Actions if we don't follow through?

Dick: It would be enforceable in the courts in the same way and to the same extent as the JRP recommendations are. Yes, notionally, if the government changes its mind, can't get money, or has different priorities, now that it has approved the JRP recommendations, an interested party would have the option of seeking a declaration from the courts that INAC is in breach of its statutory obligation. The courts may be reluctant. Judges don't like to deal with admin issues, especially for very general actions, and administrators know this. In Nunavut, in building Bill C-25, when the parties built the sister clause to S. 46(1) in the MVRMA, they didn't come up with language to enforce Actions despite trying.

Greg: Everyone needs to be clear on exactly what they are doing and what they are responsible for.

Scott Duke left the meeting temporarily for another appointment.

#### O&G Sideline Discussion

Greg: We may not get all the information on your oil and gas questions into our Feb 25<sup>th</sup> submission, but we'll get it into the Hearing presentation.

Heidi: That's too late. All the big issues need to be in by Feb 25 before we call the hearing. That discussion may or may be flagged for open discussion during the Hearing depending on your answer. If we don't get your answer until the Hearing, we would have already decided on our Hearing discussion topics prior to that and we would miss the opportunity to hear from the other Parties on that.



Dick: I will encourage Scott to get his client's perspective on the record well before the hearing. If this is a point of legal difference, I want to identify it and have the chance to discuss it before the Hearing. These issues may not have a lot of air time at the Hearing. The purpose of the hearing is not to hear matters of law.

Arthur: Let's hear what Scott has to say on this oil and gas discussion when he returns to the meeting.

Scott Duke returned. Heidi recapped discussions for Scott.

Greg: You'll get the next set of comments from us on Friday. If it's not what you need, you should follow up with Teresa Joudrie.

**Action: Dick and Scott agreed to continue to discuss this issue to determine if there are any legal elements that could affect the Hearing.**

## **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.*

### **Considerations:**

- Administrative Action necessary to implement the Plan, should occur as a matter of process
- No specific comments received

**Approach:** No change

### **Discussion:**

INAC is ok with the substance as proposed but reserves its overall position on mandatory Actions.

## **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.*

### **Considerations:**

- Both INAC and GNWT support the intent of this Action and Actions 3-6 and expect to be at the table.
- Others have raised concerns with the fact that participation is self-funded (described in the context section). We will need to find a funding solution to make this Action work.



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**Approach:** No change

**Discussion on Actions 2-6:**

Arthur: We agree that the timelines should be deleted from Actions 3-6.

Greg: I want to understand what is required to implement these actions.

Arthur: How would it actually work on the ground if participation is voluntary?

Heidi: I envision quarterly meetings and a working group similar to what was done in developing the Great Bear Lake Watershed Management Plan. Everyone commits to coming and working together, bringing whatever information and resources they have at their disposal to advance discussions. We are looking for some funding. The communities, the SLWB and the SRRB have all told us they cannot participate if it is self-funded, which obviously undermines the success of this whole idea. One idea I've had is to build in an implementation guide for Actions, similar to that for the CRs, where I could outline some of these expectations in more detail. Would that be welcomed?

Greg: More detail is sometimes better. Why is the working group being given the deliverable? The products you list should be the Board's deliverable. The group's deliverable is to show up and bring their input. Government is really only committing to participate, and likely do some work between meetings to advance discussions. Whether or not the group achieves an end product is up to the Board as they are driving this work.

Scott: Maybe a detailed implementation plan will be helpful for this, similar to what they do for the land claim. This would identify specific activities and costs needed to implement the different requirements of the Plan.

Arthur: This is part of the risk assessment done for every land use plan. It's a matrix of deliverables and commitments that the government is agreeing to in approving a Plan.

Greg: Given these discussions, it seems that there is little difference between describing Actions as requiring "reasonable efforts" to implement and describing them as being legally binding. For these Actions, it says participation is voluntary.

Dick: We don't read S. 46 that way. It just says the bodies referenced have to implement the Plan. It would only confuse the effect of the Act to add qualifying language like "reasonable efforts" to describe the implementation requirement for Actions. Recommendations, on the other hand, are in the Plan as ideas or suggestions for consideration but not central to the Board's mandate, and those are described as not legally binding.

Dick (summary): Greg and Scott have mentioned placing some implementation detail outside the body of the Plan. Perhaps we should identify that approach as a possible option for some of the Actions in Draft 3.

Heidi: It may be similar to the CR Implementation Guide, as an appendix to the Plan.

Scott: An implementation Plan is usually a separate document and subject to 5-year review. It may be better to keep it separate from the Plan.



Greg: Action 5 is way too big. Filling knowledge gaps, developing strategies and targets could have big money attached. Maybe restructure the deliverables to tie it better to CIMP. Have you talked directly with CIMP people on this? If not, you should. For Action 3, the LWBs are already addressing these guidelines in their working group. Plus, you've already got government guidelines. Don't reinvent the wheel.

### **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.*

#### **Considerations for Actions 3-6:**

- The SLUPB will have to set priorities for the SWG and more realistic timelines for when these Actions can reasonably be fulfilled. They can't all be done in 4 years.

#### **Approach:**

- Delete "within 4 years" from each
- Consider grouping into 1 and prioritizing or organizing them in some way.

### **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".*



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## 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.*

### Considerations:

- INAC and the GNWT raised concerns that they have other considerations in setting enforcement priorities, such as the type of project, risk of impact, and the proponent's compliance history.

### Approach:

**Possible Rewording:** All government departments and agencies and other bodies having monitoring and enforcement responsibilities shall consider the zone designation in setting their inspection and enforcement priorities, recognizing that Conservation Zones and Special Management Zones have been identified as sensitive areas requiring a higher level of care.

### Discussion:

Scott: Our previous issues existed because when you start fettering prosecutorial discretion, you get into legal issues. You may also set up regional differences, where you're asking the inspectors to give greater priority to enforcement in the Sahtu, than in other regions. We like this new wording better. As a practice, they already do what you're asking for, but it might be a problem making it a requirement. However, the new wording is better (i.e. "consider") and takes care of this issue.

## 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.*

### Considerations:

- NEB: Cannot be implemented by the NEB because of their quasi-judicial status – recommended adding "where reasonable to do so" to address this issue.
- DFO: Does not have the funds or capacity to undertake this action at this time. Suggested deleting the 4-year time frame and adding "as human and fiscal resources permit".
- INAC: Asked what would be sufficient to meet the requirement to collaborate.
- GNWT: No specific direction.
- Costs would be mostly in implementing this strategy, not in developing it; it would cost little to assess areas of responsibility, identify areas where they could increase community involvement and consult communities on it (maybe 3 or 4 meetings over a few years).



- Government may be overlooking the benefits of this Action in the form of increased monitoring and inspection activity once its up and running.
- Could provide a section on implementation expectations for Actions in the Plan similar to CRs.

**Approach:**

**Possible Rewording:** Responsible authorities with patrol, monitoring, inspection and enforcement responsibilities shall:

- 1) assess their activities for opportunities to partner with community organizations to increase both community involvement and the level of these activities; and
- 2) work with community land corporations, renewable resources councils, First Nations and community councils, to develop a strategy to act on these opportunities.

The strategy should emphasize training initially with a long term goal to maximize community involvement in these areas of responsibility.

**Implementation Expectations:** Ideally, government would hold an initial meeting with communities to get broad input on how they could assist in monitoring and inspection activities. Then government would do an assessment of their areas of responsibility; write a discussion paper; take it back to communities to discuss options, interest, capacity, opportunities, etc.; revise it; and cost it out (implementation plan). They would likely need a few meetings with communities. It would be up to each department to fulfill this Action individually or they could coordinate.

**Discussion:**

Arthur: We can't disagree with the wording but it still seems onerous and involved. Maybe this could be linked to the Sahtu Working Group instead?

Scott: A lot of discussion on community monitoring came up through JRP. Look at the government response on the JRP Report. Most of those Recommendations were directed at the proponents though.

Heidi: We made the changes to simplify the work needed to implement this as much as possible. We have removed implementation of the strategy at this point as that is where the costs would be. We thought it might be best to get a strategy going first, and then give people the opportunity to assess the costs and operationalize it later. In developing the strategy, I envision two steps. The first is for government to figure out for itself where it can increase community involvement – this is a desktop exercise. The second is to then take that to the communities for discussion. They may have ideas that the inspectors haven't even thought of. Remember that there is a benefit to this Action as well, not just a cost. The community people are out there and have eyes on the land that can benefit those with inspection and enforcement responsibilities.

Scott: One of the things that came through the JRP discussions is, who do people call when they are out on the land and they see something?

**Action: Arthur will run the wording by the district inspectors and get back to us next Friday.**

**INAC Response:** Conrad Baetz in the Inuvik District Office was contacted and had no specific objections.



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## 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.*

### Considerations:

- This Action is directed at the DSOs, not government.
- There were no specific government comments.

**Approach:** No change

### Discussion:

Scott: The issue is with TK confidentiality. Communities want TK kept confidential. What if we get ATIP'd? There is nothing we can use to prevent disclosure.

Heidi: This is an Action directing SSI and DSOs to develop guidelines. There is no actual transfer of traditional knowledge involved in this Action. Can I assume that since we are directing SSI and the DSOs and not government, that government will have no issues here?

Scott: Action #9 is directed at SSI and the DSOs, not government, so it may not be an issue here. It may be worth noting that governments can only agree to keep things confidential in accordance with privacy and access to info legislation. The current wording for Action #9 is acceptable as long as it is acknowledged that governments have different considerations and obligations when it comes to keeping information confidential. Also, the SLWB and MVEIRB may have their own confidentiality guidelines.

## 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.*

### Considerations:

- The SRRB and ENR raised confidentiality issues with making the data publicly available. Can be addressed by removing "the public" from the distribution list and clarifying the reasons for which it is intended to be distributed.
- DFO raised issues with the cost of implementing this. The intent is not to require a whole ton of new data collection but make current wildlife information more accessible for use in applications. Currently one has to do a lot of digging to compile data from a variety of sources.

### Approach:

**Possible Rewording:** "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 necessary to make effective land use decisions, and make that data accessible to applicants and other parties involved in land use planning and regulatory processes."

We could add additional wording re confidentiality if this doesn't go far enough. E.g. "Data may be provided confidentially where necessary."

**Discussion:**

Scott: The wording looks good. Keep ATIP in mind. If we have traditional knowledge, which communities generally want kept confidential and we get ATIP'd, there is nothing we can do to avoid disclosure of that information. This is just for your awareness.

Heidi: We're directing regulators to provide the information that they have. This is not about community TK.

**New Action Request: Scott, can you provide some wording regarding ATIP if you still think it is needed please?**

Scott: Suggest adding something to Action #10 along the lines of "Data will be provided subject to laws of general application regarding privacy and access to information." or something similar.

**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.*

**Considerations:**

- This Action directs DFO, not GNWT or INAC
- DFO suggested revised wording that we are working with them on.
- INAC and GNWT provided no specific comments on this Action.

**DFO suggested wording:**

DFO shall work with communities as requested and as resources permit

- a) to document community traditional knowledge of fish and fish habitat; and
- b) to discuss
  - a. community concerns related to water withdrawal, and
  - b. alternative solutions to water withdrawal related to specific projects.

**Proposed Rewording:**



Action: DFO shall work with communities as requested to discuss community concerns related to water withdrawal, and alternative solutions to water withdrawal related to specific projects.

Recommendation: DFO is encouraged to work with communities to document community traditional knowledge of fish and fish habitat.

**Discussion:**

Heidi: Since we're directing DFO, and we're working it out with them, are we correct in thinking that INAC will not object to whatever we work out with them?

INAC Response: O.K.

## 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.*

**Considerations:**

- We used GNWT's exact wording as provided to us from their comments on the integration of the GBLWMP.
- INAC provided no specific comments.

**Approach:** No change

**Discussion:**

INAC Response: O.K

## 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.*

**Considerations:**

- Administrative action - it was in Chapter 2 previously. We made it an Action to be transparent and consistent in format.
- Neither INAC nor the GNWT provided specific comments on this Action.

**Approach:**



Option 1: No change

Option 2: If they really resist, we could just move it back to S. 2.3.2 (D) as it was in Draft 2. It would still be a requirement of the Plan.

**Discussion:**

Greg: Maybe you would get the report after the emergency has been dealt with, rather than in the middle of it (current wording talks about indicating when the emergency might end, implying that it would be submitted in the middle of the emergency).

**Action: Greg agreed to double check on the wording and get back to us.**

Greg's Response: Suggest revising the Action to include the option of submitting a report after the emergency has concluded. The current wording requires an indication of when the emergency might end, implying that the report should be submitted while the emergency was still ongoing, which may not be possible.

## Closing Discussions

Dick: If INAC is developing its coordinated policy on how to deal with Actions based on work being done on the Dehcho Plan (e.g. reference to "reasonable efforts" language), that could be unfortunate, because they are fundamentally different processes. One is statutory and one is not. The mandatory plan implementation wording of the Act needs to be interpreted consistently with the mandatory EA decision implementation wording.

Greg: Can we comment on some of the CRs? Can you tell us how the Board is responding to our previous submission? For instance, with CR #2, subsection 2, we believe that "carried out" is beyond the timeframe of a conformity check. When checking conformity, you can look at the application and see that the project has been designed using the TK provided, but how could you check that it has actually been carried out accordingly? That happens after the authorizations have been granted, at the enforcement stage.

Heidi: We have done a preliminary scan of all the comments, though we have not formulated any specific decisions for CRs yet. Again, that happens after the Hearing. We focused on Actions first because the issues were more significant there. We'll be taking all comments into consideration as we always do. We got some very good suggestions from various parties, and even several submissions that were suggesting similar changes for some CRs, which makes our decisions easier. I'm not prepared to talk details about any specific changes to CRs today but as always, feel free to highlight specific points of interest to INAC.