IN THE MATTER OF THE
Sahtu Dene and Métis Comprehensive Land Claim Agreement;

AND IN THE MATTER OF THE
Mackenzie Valley Resource Management Act, S.C. 1998, c. 25;

AND IN THE MATTER OF A PUBLIC HEARING CALLED
BY THE SAHTU LAND USE PLANNING BOARD
PURSUANT TO S. 42(2) OF THE *ACT*

WRITTEN SUBMISSIONS OF THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

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Part I – Statement of Facts

1. Section 25.1.1 of the *Sahtu Dene and Métis Comprehensive Land Claim Agreement* ("SDMCLCA") sets out the principles which apply to Chapter 25, "Land and Water Regulation":

> 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.

2. Land use planning in the Sahtu Settlement area is provided for in sections 25.2.1 to 25.2.10 of the SDMCLCA. Section 25.2.1 reads as follows:

> 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 the establishment of the Planning Board.

3. Section 25.2.4 sets out the principles which shall guide land use planning in the Sahtu settlement area:

> 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.

4. Section 25.2.8 describes the process for approval of the land use plan:

> 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.

5. Section 25.2.9 describes how authorities will comply with the land use plan:

> 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.

6. Land use planning is also provided for in sections 33 to 50 of the *Mackenzie Valley Resource Management Act*, S.C. 1998 c. 25 ("MVRMA"). Preparation of a land use plan is provided for in section 41:

> 41(1) A planning board shall prepare and adopt a land use plan for submission and approval under section 43.
> (2) A land use plan shall provide for the conservation, development and use of land, waters and other resources in a settlement area.
> (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.
> (4) A planning board shall take into consideration a land use plan proposed by the first nation for its settlement lands in the settlement area, and may incorporate that plan into the land use plan for the settlement area.

7. Section 43 sets out the process for the submission of the plan to the first nation, territorial Minister and federal minister, and for the approval of the plan by those parties:

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.
(2) Where a first nation approves a land use plan, it shall notify the federal Minister and the territorial Minister in writing of the approval.
(3) On being notified pursuant to subsection (2), the territorial Minister may approve the land use plan, and in that case shall notify the first nation and the federal Minister in writing.
(4) On being notified under subsections (2) and (3), the federal Minister may approve the land use plan, which takes effect on the date of its approval by the federal Minister.
(5) Where a party to which a land use plan is submitted does not approve the plan, that party shall notify the other parties and the planning board, in writing, of the reasons for not approving the plan.
(6) After a planning board has considered any reasons provided to it under subsection (5) and made any modifications to the land use plan that it considers desirable, it shall submit the plan for approval as provided in subsection (1).

8. Compliance with an approved land use plan is set out in section 46:

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.
(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.

9. The Sahtu Land Use Planning Board ("SLUPB") issued Draft #3 of the Sahtu Land Use Plan ("SLUP") on July 12, 2010.

10. Draft #3 of the SLUP defines "Actions" 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 the land.

11. "Actions" are further explained on p. 263 of the SLUP:

> **Actions** are Plan requirements that are intended to be implemented outside of the regulatory process. That is, they do not affect or relate to individual applications, though many support the regulatory process through the provision of new information or guidelines.

12. The SLUPB takes the position that it has the jurisdiction to adopt a plan containing mandatory actions which legally bind the parties listed in s. 46(1) of the MVRMA to implement those actions. It holds that the manner in which legally binding actions would be enforced would be through an application to a court of competent jurisdiction for a declaration that a party was in breach of its obligation as contained in an action. In a letter dated March 25, 2011 the SLUPB 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."

Part II – Argument

13. The Minister of Indian Affairs and Northern Develoment ("INAC") submits that it is beyond the jurisdiction of the SLUPB to adopt a Sahtu Land Use Plan containing mandatory actions which bind the bodies described in s. 46(1) of the MVRMA and s. 25.2.9 of the SDMCLCA.

14. There are three elements to INAC's argument that a land use plan cannot contain mandatory actions:

a) The purpose and content of a land use plan as described in s. 41 of the MVRMA do not contemplate mandatory actions, and cannot be interpreted to permit a land use plan to bind bodies through mandatory actions;

b) The way in which first nations, governments and licensing bodies described in s. 46(1) of the MVRMA and s. 25.2.9 of the SDMCLCA are bound to comply with an approved land use plan does not contemplate powers or activities beyond the issuance of licences, permits or other authorizations relating to the use of land or waters or the deposit of waste; and

c) Government retains ultimate jurisdiction for the regulation of land and water in the settlement area pursuant to s. 25.1.1 (c) of the SDMCLCA, which means that government retains some discretion to make policy and program decisions with respect to the administration of land and water in the Sahtu settlement area, subject to the existing statutory regime and the SDMCLCA. The SPLUB is only one part of a larger system of integrated land and water management which applies throughout the Mackenzie Valley.

Finally, these submissions will compare and contrast the provisions for land use planning in ss. 33-50 of the MVRMA with the process for environmental assessment and the decision by ministers in s. 130 of the MVRMA.

a) Section 41 of the MVRMA

15. Section 25.2.4 of the SDMCLCA set out the applicable principles which will guide land use planning in the settlement area. Section 41(3) of the MVRMA describes the permissible contents of a land use plan.

16. It is submitted that the land use planning provisions of the MVRMA must be read having regard to Chapter 25 of the SDMCLCA, and in particular those sections which deal with land use planning in part 25.2. 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 Métis Land Claim Settlement Act, S.C. 1994, c. 27, s. 8.

17. It is further submitted that those sections of the MVRMA dealing with land use planning should be interpreted in a broad purposive way which respects the overall scheme of the statute and the relevant provisions of the SDMCLCA. It is submitted that the approach that should be taken to the interpretation of the statutory provisions comes from *Driedger on the Construction of Statutes*:

> 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.
>
> *Driedger on the Construction of Statutes*, (3rd ed., 1994).
>
> *North American Tungsten Corporation Ltd. v. Mackenzie Valley Land and Water Board*, 2002 NWTSC 76 (CanLII).
>
> *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43 at paras. 26-27.

18. Section 25.2.4(e) of the SDMCLCA provides that a principle of land use planning is that the plan "shall provide for the conservation, development, and utilization of land, resources and waters." Section 41(2) of the MVRMA states that as a requirement a land use plan "shall provide for the conservation, development and use of land, waters and other resources" in a settlement area. Section 41(3) of the MVRMA describes the permissible content of a land use plan.

19. It is submitted that section 41(3) must be read in light of s. 25.2.4(e) of the SDMCLCA and s. 41(2) of the MVRMA. Further, it is submitted that, given the approach to statutory interpretation in paragraph 17, *supra*, the permissible content of a land use plan as described in s. 41(3) does not include legally binding actions which are meant to bind a first nation, government, or licensing body. The list of permissible contents is a closed list. "Maps", "diagrams", "other graphic materials", "written statements", "policies", "guidelines", "forecasts", "descriptions and permitted and prohibited uses of lands, waters and resources", and "any other information that the planning board considers appropriate" do not in their ordinary sense include and cannot be interpreted to include legally binding actions as defined in Draft #3 of the SLUP. Nor does reading s. 41(3) in context with the use of the phrase "shall provide for the conservation, development, and utilization [use] of land, resources and waters" in s. 25.2.4(e) and s. 41(2) suggest that the permissible contents of a land use plan that would include legally binding actions.

20. It is submitted that nothing in Chapter 2 of the SDMCLCA would allow for the inclusion of legally binding actions in a land use plan. Further, interpreting s. 41(3) of the MVRMA in a broad, purposive way in light of s. 25.2.4 of the SDMCLCA does not confer any jurisdiction on the SLUPB to adopt a plan which legally binds first nations, governments and licensing bodies through mandatory actions. Indeed, the very definition of "Actions" in Draft #3 expressly states that they are "intended to be implemented outside of the regulatory process, and outside the granting of leases, interests in land, and consents to the use of land", which is something different than the jurisdiction of the SLUPB and regulatory subject matter contemplated by the SDMCLCA and MVRMA with respect to land use planning.

21. For example, s. 106 of the MVRMA provides that the Mackenzie Valley Land and Water Board "may issue directions on general policy matters or on matters concerning the use of land or waters or the deposit of waste that, in the Board's opinion, require consistent application throughout the Mackenzie Valley." The use of "policy" in this section is consistent with the use of "policies" in s. 41(3), and cannot be interpreted in the normal sense to include legally binding obligations.

22. The only permissible content listed in s. 41(3) which could reasonably be interpreted as giving the SLUPB jurisdiction to adopt a land use plan with legally-binding content is s. 41(3)(c), "descriptions of permitted and prohibited uses of land, waters and resources." This has been expressed in Draft #3 through the zoning approach and especially the conformity requirements which may apply to any particular zone. Inasmuch as the conformity requirements and zoning restrictions condition the issuance of authorizations relating to the use of land or water or the deposit of waste they are permissible pursuant to s. 41(3)(c).

b) Section 46 of the MVRMA

23. Once a land use plan is approved by the first nation, GNWT, and Canada, they are bound to "carry out their powers in accordance with the land use plan applicable in a settlement area" pursuant to s. 46(1) of the MVRMA. Section 25.2.9 of the SDMCLCA further requires "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." It is submitted that the term "powers" in s. 46(1) and "activities and operations"

in s. 25.2.9 must be interpreted in accordance with the approach described in paragraph 17, *supra*, and in particular in light of the balance of those sections.

24. It is submitted that the term "powers" in s. 46(1) must also be interpreted with regard to the description of those bodies bound by s. 46(1) to comply with the land use plan: "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**. . . ." [emphasis added]. In other words, once a land use plan is approved, those bodies bound to comply with it pursuant to s. 46(1) are only bound insofar as they have the authority to issue regulatory authorizations with respect to the use of land, waters, or the deposit of waste. Only those bodies with regulatory authority relating to the use of land or waters or the deposit of waste are captured by s. 46(1); only the exercise of that authority to issue licences, permits or other authorizations must be in compliance with an approved land use plan pursuant to s. 46(1).

25. Further, s. 25.2.9 of the SDMCLCA uses very similar language: "those authorities **with jurisdiction to grant licences, permits, leases or other interests relating to the use of land and water in the settlement area**. . . ." [emphasis added]. The term "activities and operations" as used in that section must be interpreted with regard to that description of the authorities' jurisdiction, i.e., the jurisdiction to issue regulatory authorizations with respect to the use of land and water in the settlement area. Again, only those authorities with jurisdiction over the regulation of land and water are bound by s. 25.2.9, and only to the extent that they are granting licenses, permits, leases or other interests relating to the use of land and water.

c) Section 25.1.1(c) of the MVRMA

26. It is submitted that to interpret s. 46(1) and s. 25.2.9 in such a way as to capture the plenary jurisdiction of government with respect to the administration and regulation of land and water is too broad and not permitted under the overall scheme set out in the MVRMA and SDMCLCA. Federal and territorial governments, as well as agencies and tribunals created by those governments, have a wide range of jurisdiction with respect to land and water in the settlement area, throughout the Mackenzie Valley, and in the case of the federal government, throughout the country. It is submitted that s. 46(1) and s. 25.2.9 were not drafted in such a way as to bind all aspects of jurisdiction with respect to land and water management in the settlement area, nor Parliament in exercising its broader jurisdiction over land and water. Instead, they were meant to capture the issuance of authorizations relating to the use of land and water and the deposit of waste, including the issuance of interests in land and consents to use the land, and to be part of a larger overall statutory regime for the regulation of land and water in the Mackenzie Valley.

27. It is submitted that to interpret s. 46(1) and s. 25.2.9 in such a way that mandatory actions could legally bind first nations, governments and other licensing bodies would effectively give the land use planning boards a wider jurisdiction over the administration and regulation of land and water than was intended in the MVRMA and SDMCLCA, and indeed give them jurisdiction that would usurp the statutory and constitutional jurisdiction of Parliament to administer and regulate Federal crown lands and waters. The fact that a first nation, government, or other licensing body may issue licence, permits, or interests in land was not intended to be a trigger for

the jurisdiction of the SLUPB to adopt a land use plan which would legally bind those bodies in all aspects of their jurisdiction and authority over land and water.

28. Indeed, the principles which apply to land and water regulation as set out in s. 25.1.1 of the SDMCLCA contemplate "an integrated system of land and water management" in the Mackenzie Valley, and that "government shall retain the ultimate jurisdiction for the regulation of land and water." It is submitted that, pursuant to these principles, the SLUPB is only one body with jurisdiction with respect to the regulation of land and water in the Sahtu settlement area, and shares its jurisdiction with the other bodies created pursuant to Chapter 25 (e.g., the land and water boards and Mackenzie Valley Environmental Impact Review Board), land claims organizations which own and administer Sahtu lands, and the federal and territorial governments and other agencies of those governments.

29. A specific example of where the federal Minister retains broad jurisdiction under the MVRMA, and of where policy directions can be made binding on a board, is section 83(1) of the MVRMA, which provides that "the federal Minister may, after consultation with a board, give written policy directions binding on the board with respect to the exercise of any of its functions under this part [Part 3 - Land and Water Regulation]". Policy directions issued by the federal Minister pursuant to this section are explicitly stated to be binding on a board, whereas e.g. the policy directions which may be issued by the board pursuant to s. 106 of the MVRMA are not stated to be binding.

30. It is submitted that a role has been identified in s. 47(1) for the SLUPB with respect to determining whether an activity is in accordance with a land use plan, and that role is limited to where "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 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." It is submitted that the board's authority in this section is triggered by an application for a licence, permit or other authorization, which reinforces the argument that s. 46(1) is limited to capturing first nations, governments, and other bodies when they issue those sorts of regulatory authorizations.

d) Comparison with Sections 130(5) and 136(2) MVRMA

31. Section 130(5) of the MVRMA provides that once the federal Minister and responsible ministers make a decision with respect to a report of environmental assessment, "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." Section 136(2) sets out an identical process for a decision with respect to a report of a review panel. It is submitted that the use of the phrases "shall carry out a decision made under this section to the extent of their respective authorities" and "shall act in conformity with the decision to the extent of their respective authorities" suggests a broader range of powers than those contemplated in s. 46(1).

32. Further, it must be noted that an environmental assessment report or report of a review panel is only with respect to a single, discreet development proposal, and is triggered by an application for a land use permit, water licence, or similar regulatory authorizations necessary for the development. Once a decision has been made pursuant s. 130(1) or 135(1), the obligation to implement such reports pursuant to ss. 130(5) and 136(2) is carried out in the context of the issuance of the specific regulatory authorizations which necessitated the environmental assessment or impact review. The obligation with respect to implementing a report of an environmental assessment or impact review does not extend to all aspects of a first nation's, board or agencies' or governments' jurisdiction over land and water.

33. It is submitted that a reasonable interpretation of ss. 130(5) and 136(2) does not support the interpretation that s. 46(1) of the MVRMA and s. 25.2.9 of the SDMCLCA are intended to bind first nations, governments and licensing bodies in broader ways other than the issuance of regulatory authorizations with respect to the use of land and water and interests in land.

Part III – Conclusion

34. It is submitted that the SLUPB does not have the jurisdiction pursuant either to the MVRMA or SDMCLCA to adopt a land use plan that contains actions which are intended to be legally binding on first nations, governments, and regulatory authorities.

35. These submissions are with respect to the jurisdiction of the SLUPB to adopt a land use plan containing legally binding actions, and specifically with respect to Draft #3 of the SLUP. The Minister of Indian Affairs and Northern Development reserves the right to raise other

jurisdictional objections with respect to any future draft that is adopted by the SLUPB and submitted to the Minister for approval pursuant to s. 43(4) of the MVRMA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Yellowknife, Northwest Territories, this 21st day of April 2011.

Scott Duke
Counsel for the Minister of Indian Affairs
and Northern Development
and Agent for the Attorney-General
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LIST OF AUTHORITIES

1. *Mackenzie Valley Resource Management Act*, S.C. 19984, c. 25
2. *Sahtu Dene and Métis Comprehensive Land Claim Agreement*
3. *Sahtu Dene and Métis Land Claim Settlement Act*, S.C. 1994, c. 27.
4. *Driedger on the Construction of Statutes*, (3rd ed., 1994).
5. *North American Tungsten Corporation Ltd. v. Mackenzie Valley Land and Water Board*, 2002 NWTSC 76 (CanLII).
6. *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43 at paras. 26-27.