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### WITHOUT PREJUDICE

Ms. Heather Bourassa  
Chairperson  
Sahtu Land Use Planning Board  
Fort Good Hope, NT

### Delivered Electronically

Dear Ms. Bourassa:

**RE: SSI Comments on SLUP Board Discussion Paper of  
Revisions to Draft 3 of the Sahtu land Use Plan**

I am pleased to enclose the Sahtu Secretariat Incorporated (SSI) comments on the captioned Discussion Paper, released by the Sahtu land Use Planning Board (the Board) in June 2012. We offer these comments in order to assist the Board in finalizing the plan and to encourage communication and collaboration amongst the approving parties and the Board as the Sahtu land use planning process enters its final stages.

As you are no doubt aware, SSI has had limited resources available to it in order to review and analyze the Discussion Paper. We are most appreciative of the Board's assistance in providing its summary of the issues which warrant attention in the upcoming Tripartite meeting through its "Key Questions" document. SSI wants to be clear, however, that the attached comments are offered only to assist the Board and other parties and not as a final position on the changes to the plan proposed in the Discussion Paper. We hope to learn from the Board and other parties through the Tripartite meeting and thus to be better prepared to address the decision-making process which will begin after the Board releases its final proposed changes for the plan.

Yours truly,

Ethel Blondin-Andrew  
Chairperson SSI

cc: SSI Board  
Approving Parties

## **SSI COMMENTS ON PROPOSED CHANGES TO DRAFT 3 SAHTU LAND USE PLAN**

### **1. INTRODUCTION:**

The Sahtu Land Use Planning Board (Board) released Draft 3 of the Sahtu Land Use Plan (Plan) in July 2010. The Board held a public hearing on the Plan in May 2011 and conducted a series of three workshops thereafter to test the Plan and its application with a series of case studies. The Sahtu Secretariat Incorporated (SSI) participated in these proceedings. District land corporations, community representatives and other participants from the Sahtu region were present in the hearing and workshops. Throughout, SSI attempted to ensure that the Plan would protect the land and resources in the Sahtu region while ensuring that it could work in an efficient and effective manner. The SSI review of the proposed revisions to Draft 3 of the Plan has been based around similar goals. To be more specific, SSI's approval of a final draft Plan will require that the Plan meet the following criteria:

1. The Plan must be appropriately protective of the land, water, wildlife and other resources upon which participants depend for their way of life and self-sufficiency, for their cultural and spiritual well-being and heritage;
2. The Plan must reinforce and work effectively with the existing co-management and regulatory regimes established by the Sahtu Dene and Metis Land Claim Agreement;
3. The Plan must achieve its goals without imposing onerous burdens on district land corporations and participants in the land claim agreement.

SSI will review the final draft Plan against these criteria and will work with district land corporations and communities in order to ensure that the Plan will operate in the best interests of participants and the Sahtu region.

### **2. REVIEW OF THE BOARD'S DISCUSSION PAPER AND KEY QUESTIONS DOCUMENTS:**

#### **Issue #1      Role of the District Land Corporations in Plan Implementation**

Statement of Issue: Counsel for SSI raised this issue in the context of discussions about the role of district land corporations in the implementation of the Plan. Legal discussions ensued. Simply put, SSI pointed out that there are discrepancies between the language in section 25.2.9 of the land claim agreement and section 46 of the *Mackenzie Valley Resource Management Act* (MVRMA). Moreover, the definition of Sahtu First Nation in the MVRMA refers to SSI and not the district land corporations. In SSI's view, it is less than clear that the land corporations are required to comply with section 46 of the Act.

Context of Discussions: Counsel for the various parties discussed this matter and never came to agreement on the interpretation of the statutory authorities. However, during the workshops, counsel for SSI made it clear that the SSI concern related to the lack of capacity and resources available to district land corporations should they be responsible for full implementation of all the Conformity Requirements (CRs) set out in the Plan. SSI has never taken the position that the plan does not apply to settlement lands or that it itself is not bound by the Plan.

Potential Resolution: In SSI's view, the concerns which it raised in relation to this matter are directly linked to the discussion under the heading "Application of CRs and Minimum Thresholds" found on page 22 of the Discussion Paper. As is indicated in the Board's Key Questions document, all three approving parties have requested that rights/land dispositions only be subject to the zoning requirements set out in CR #1 and not the other CRs. In SSI's view, such an outcome would significantly reduce the burden placed on district land corporations to ensure conformity with the Plan before an interest in settlement land is granted

SSI Position: SSI will have more to say about this issue below. But for purposes of the Tripartite meeting, the Board and approving parties should be advised that it is not SSI's intent to pursue a legal debate about the proper interpretation of section 25.2.9 of the land claim and section 46 of the MVRMA if another solution to its concerns about the effect of the Plan on the capacity and resources of the district land corporations can be identified.

## **Issue #2      Application of the Plan to Protected Areas (Dual Designation)**

Statement of Issue: Draft 3 of the Plan leaves open the possibility that a proposed protected area identified under the Protected Areas Strategy or otherwise, might also be zoned as a Conservation Zone and be subject to the CRs based in the Plan as well as to any regulatory framework imported through statutory designation of the area. Governments, both Canada and GNWT, have indicated that we do not support Dual Designations.

Context: Subsection 46 (2) of the MVRMA exempts National Parks and National Historic Sites and Monuments from the application of the Plan. In SSI's view, if governments had wanted to exempt other conservation areas from the Plan they could have done so at the time that the Act was developed. The concern advanced by governments seems to be that Dual Designations will be inefficient and confusing. SSI certainly agrees that such problems should be avoided. It should also be remembered, however, that these proposed conservation areas are strongly supported by Sahtu communities and that they include areas of significant ecological and natural value. SSI would also note that it is uncertain how quickly or even whether governments will choose to exercise their statutory authorities and to designate these areas. Thus, it appears that if they are not addressed in the Plan there is some risk that the values present in these special areas could be adversely affected during the period between Plan approval and designation and protection under legislation.

Potential Resolution: We are only talking about a few areas. Some are well advanced in the process of designation under legislation. Others have not progressed much in recent years. The

Board is suggesting including them in the Plan to protect them now and that an amendment to the Plan could take place later to leave those areas to be managed pursuant to the relevant legislative framework and thus avoid confusion and duplication if government decides to take action to protect these areas under statutory systems. This seems to SSI to be a reasonable compromise.

SSI Position: SSI will listen to the parties and the Board in the Tripartite meeting before taking a final position on this issue.

### **Issue #3 Exemptions for Existing Uses (Grandfathering)**

Statement of Issue: The Board's approach in Draft 3 of the Plan has been that rights and authorizations issued before the Plan comes into force are allowed to continue until those rights and authorizations expire. Upon renewal, the activity will continue to be exempt from the zoning CRs but not from others. The issue thus relates to the extent to which existing rights and authorizations should be exempt from the Plan.

SSI Position: SSI has questioned the operation of the Board's proposed approach to this Grandfathering issue. Discussion during the workshops allayed some of SSI's concerns, but we are of the view that this issue requires further discussion at the Tripartite meeting.

SSI wants to understand whether the application of the non-zoning CRs (2 to 19) to a grandfathered use may effectively sterilize or eliminate future potential for exercise of the rights or interests held by the operator. We do not challenge the Board's intention which appears to be to ensure that activities which take place after the Plan comes into force are conducted in a way which is entirely consistent with the Plan. SSI's concern, however, relates to the possibility that rights holders caught in this situation may argue that the Plan essentially expropriates their rights to future development. If this legal risk is real and if existing rights holders would be unfairly treated after the Plan comes into force, then SSI is of the view that the Board should give further thought to the application of the Plan to such uses.

This issue is complex and SSI recommends further discussion of it in the Tripartite meeting.

### **Issue #4 Authorizations that Implement the Plan**

SSI Position: SSI is satisfied with the proposed revisions made to the list of licenses permits and authorizations issued under federal and territorial laws which will be subject to conformity determinations pursuant to the Plan.

With respect to the revised version of table 11, however, SSI offers the following comments. The table seems to suggest that SSI is in some way involved in land administration. This is incorrect. Furthermore, the table identifies the Sahtu Final Agreement as an "Act or Regulation" which is also incorrect. The district land corporations do grant interests in the settlement lands but they do so as an exercise of their rights as property owners. The granting of these interests has nothing to

do with any statutory or regulatory framework found in either federal or territorial law. SSI does not suggest that the use of settlement lands is not subject to the Plan, however, we refer you to our discussion of issue #1 above and issue #5 below in order for the Board to fully understand SSI's concerns and its position in relation to the role of the district land corporations.

As indicated earlier in this submission, this is a matter which SSI suggests must be further discussed at the Tripartite meeting.

#### **Issue #5      Application of CRs to Rights and Land Dispositions**

Statement of Issue: This issue relates to the question of whether all CRs should apply not only to the issuance of licenses, permits and authorizations under federal and territorial law but also to all dispositions of interest in land, some of which, as indicated above in the case of district land corporations, take place as an exercise of proprietary authority and outside the context of either federal or territorial law. The Board's position has been that the CRs should apply in both instances. It appears that all three approving parties have requested that the Plan require that rights for land dispositions only be subject to the zoning requirements of the Plan. SSI has indicated on numerous occasions that the district land corporations do not have the resources or technical capacity to conduct conformity determinations which require the analysis of the relationship between a proposed land use and the Plan including 17 or 18 different CRs. SSI has not changed its position.

SSI Position: SSI will not approve the Plan if it is structured in a way that imposes the full burden of conformity determination for all CRs on district land corporations when they make dispositions of rights or interests in settlement lands.

#### **Issue #6      Minimum Thresholds**

Statement of Issue: Governments have asked the Board to limit the application of certain CRs to activities requiring a land use permit or a water license. This approach to limiting the application of CRs has been discussed under the heading "Minimum Thresholds". Included in this discussion, as indicated in the draft comments by AANDC are other legal concerns which arise when the CRs require regulators with limited jurisdiction to impose requirements or obligations on applicants which go beyond the regulator's jurisdiction. SSI has participated in this discussion as well. The language in Draft 3 of the Plan often requires regulators to ensure certain outcomes (for example, words such as *Regulators will ensure..* are used).

Proposed Resolution: SSI suggests that the Board produce a table for purposes of the Tripartite meeting which lists which CRs are applicable to each of the dispositions of interests in land and the licenses permits and authorizations found in table 11 of the Plan. There is a need, in SSI's view for such an analysis in order for the approving parties to derive a complete understanding of the way the CRs will affect land and water uses. Once that table is available we also suggest that consideration be given to whether the regulator or issuing party has the authority or jurisdiction to do what the CR requires of it.

SSI Position: SSI requires the opportunity to give this issue further consideration in the Tripartite meeting before coming to a firm position.

#### **Issue #7      Conformity Determination Referral Process**

Statement of Issue: During the May, 2011 hearing, SSI raised the possibility that all conformity determinations be referred to the Board for the first five-year planning cycle. SSI made this suggestion because it was concerned that the system of CRs set out in Plan was complex and that in order to achieve the Board's intention and satisfy community expectations that the Plan needed to be properly implemented. At the same time, SSI was concerned that different regulators could adopt different interpretations of the same CRs and their requirements, thus resulting in a patchwork quilt of Plan implementation. This was the rationale for the SSI suggestion that the Board be responsible for conformity determinations for the near-term.

The SSI suggestion was made with full knowledge that the Board did not have the resources under its current budget to complete this work. At the same time, the Sahtu Land and Water Board indicated that it would prefer to have conformity determinations completed early in its process in particular because of the tight timelines associated with treatment of land use permit applications under the regulations.

Context: SSI is aware that the MVRMA does not require the Board to be responsible for conformity determinations unless such matters are referred to it pursuant to section 47 of the Act.

Proposed Resolution: SSI would like to hear from the other approving authorities about their final positions in relation to this issue. It appears from what we have been told that AANDC and GNWT are changing their positions about mandatory referrals. Clearly if governments do not support this approach and resources are not made available to the Board, then mandatory referrals will not take place and all parties will make do with what the Plan requires and the MVRMA allows.

SSI Position: SSI requests that this matter be discussed at the Tripartite meeting. SSI will indicate its position in respect to this issue after it hears from the Board and the other approving authorities.

#### **Issue #8      Conditional Conformity Determinations**

Statement of Issue: The Board indicates that if required to conduct a conformity determination it will generally give a "conditional conformity determination". In so doing the Board indicates that it is relying on the regulators to implement those CRs whose language refers to terms and conditions that regulators can impose through their statutory or regulatory powers to conditionally authorize the land use. Section 47(4) of the MVRMA, however, specifies that a decision of the Board under this section is final and binding. The language in section 47 makes no explicit reference to a power of the Board to make a conditional determination. As SSI

understands what the Board has said, the use of the word “conditional” simply refers to the fact that the final conformity of the land use will be achieved once the regulator has decided whether and what terms and conditions may be needed to satisfy the goals of the Plan. The regulators are thus guided by the Plan but in no way fettered by the Board’s “conditional decision”.

Proposed Resolution: Assuming that SSI’s interpretation of the Board’s intention is correct we have no major concerns with this approach. SSI suggests, however, that this issue would benefit from discussion and clarification in the Tripartite meeting.

Where CRs are written in such a way as to enable regulators to make final decisions on permit terms and conditions subject to broad guidance provided by the Plan, SSI does not see any legal issues.

SSI Position: SSI requests that this matter be discussed at the Tripartite meeting. SSI will indicate its position in respect to this issue after he hears from the Board and the other approving authorities.

#### **Issue #9      Difference between General Use Zones and Special Management Zones**

Statement of Issue: During the workshops, SSI and the GNWT asked the Board to provide better differentiation between General Use Zones and Special Management Zones. Review of the Plan by these parties resulted in the conclusion that there were few differences between these two zones in terms of Plan implementation. Consequently, Board staff were asked to justify the establishment of two different kinds of zones when the management framework for those areas was essentially the same.

Proposed Resolution: The Board has set out a proposal to better distinguish between these zones in terms of the application of the Plan to them in Appendix 1 to its Discussion Paper. The Board has suggested that these options be discussed at the Tripartite meeting. SSI agrees with this suggestion and looks forward to participating in the discussion.

SSI Position: SSI requests that this matter be discussed at the Tripartite meeting. SSI will indicate its position in respect to this issue after he hears from the Board and the other approving authorities.

#### **Issue #10      Land Use Zoning CR#1 -- Oil and Gas Activity in Conservation Zones**

Statement of Issue: SSI understands that this issue results from requests made by the oil and gas industry through AANDC to allow low impact seismic exploration and directional drilling to take place so that oil and gas pools under Conservation Zones can be developed from outside those areas.

Context: There is no support in Sahtu communities for such an exception to the way in which Conservation Zones are managed. The Board has indicated that it is not in favor of such change.

SSI Position: SSI does not currently support such a change to the authorized uses of Conservation Zones. However, SSI requests that this matter be discussed at the Tripartite meeting. SSI will indicate its final position in respect to this issue after he hears from the Board and the other approving authorities.

## **Issue #11 CR #5 Watershed Management**

Statement of Issue: This CR requires that there be “no substantial alteration of water quality, quantity and rate of flow” within Special Management Zones, Conservation Zones and Proposed Conservation Initiatives. The GNWT appears to believe that this CR is inconsistent with the Sahtu land claim agreement and takes the view that the imposition of such requirements outside of settlement lands would result in a change in the treatment of non-settlement lands not provided for in the land claim agreement. AANDC has other issues with the language set out in CR #5.

Context: In its communication with SSI, the Board has proposed a "compensation clause" as a potential solution to the GNWT's main concern. It is not clear to SSI how or why such a compensation clause might be needed. Subsection 14(4) of the *NWT Waters Act* already provides a water compensation system which is applicable not only to aboriginal water users but to any licensees or prior applicant adversely affected by a new application for a water license. The Sahtu Land and Water Board is prohibited from issuing a water license before any compensation claims have been determined. Given this regulatory context it is unclear to SSI what advantage might be gained by including yet another imposition of water compensation requirements through the Plan.

It is also worth noting that almost all material uses of water or deposits of waste into water in the Sahtu are subject to regulation by a co-management tribunal established by the Sahtu Land Claim. The Sahtu Land and Water Board already diligently protects water resources in the Sahtu on behalf of participants. This regulatory framework doesn't just apply to activities which will generate "substantial alteration" of water resources. It effectively applies to every activity which may use more than 100 m<sup>3</sup> of water per day. This system also applies to the whole region irrespective of land use Plan zoning.

In SSI's view, the question for the Board is whether this proposed CR, which is intended for application in Special Management Zones, Conservation Zones and Proposed Conservation Initiatives will provide any significant new protection for water resources beyond that already provided by the regulatory system.

SSI Position: SSI is aware of and strongly supports the need for the protection and conservation of water resources in the Sahtu region. SSI notes the proposed language of the CR, and the use of the words "substantial alteration". In SSI's view the test contained in this CR is subjective. That leaves SSI with the questions “Who will determine what substantial alteration means?” and “Will they have expertise equivalent to the SLWB?”.

SSI requests that this matter be discussed at the Tripartite meeting. SSI will indicate its final position in respect to this issue after he hears from the Board and the other approving authorities.

#### **CR #6            Drinking Water – SSI Concern**

Statement of Issue: SSI has indicated difficulty with respect to the first clause in this CR on several occasions. Our concern relates specifically to the use of the word "contamination". The CR prohibits "contamination" of water within community catchments. The word contamination is not defined.

The problem is that the current regulatory system operated by the Sahtu Land and Water Board under the *Northwest Territories Waters Act* specifically allows for the deposit of waste into water pursuant to a water license. SSI would like the Board to clarify how the prohibition in clause 1 of CR #6 is intended to interact with SLWB approval of waste deposits in community catchments areas. Is the SLWB approving "contamination"?

There is in our view, another problem with this CR. Most communities have a municipal water license which allows for the deposit of waste into water downstream of the community water intake. These outfalls are still within the community catchments areas set out in the Plan. SSI is concerned that the effect of the first clause of CR #6 would be to prohibit the deposit of effluent from community sewage systems into water within the community catchments areas [we assume sewage effluent is "contamination"]. This CR could thus prohibit the treatment and disposal of sewage from all municipal systems in the Sahtu.

SSI Position: SSI requests that this matter be discussed at the Tripartite meeting. SSI will indicate its position with respect to this issue after it hears from the Board and the other approving authorities.

#### **Issue #12        CR #11            Project Specific Monitoring**

Statement of Issue: As SSI understands the changes to CR #11 clause 1 as set out in the Discussion Paper, the Board now proposes that it apply throughout the Sahtu region. The GNWT has suggested that this CR only apply to activities requiring a land use permit or a water license. This could, in effect, act like a minimum threshold. The proposed, revised language for this CR set out in the Discussion Paper requires regulators to ensure that any land use activity includes a site-specific monitoring program developed in cooperation with affected communities.

Context: The use of the words "land use activity" in clause 1 of CR #11 should be clarified by the Board. If we assume that all of the regulatory authorizations set out in table 11 of the Plan approve "land use activities" then regulators are going to have to insist on site specific project monitoring for such activities as Research Licenses, Archaeologists Permits, Mill Licenses Timber Transport Permits, Tourism Operator Licenses, Subsurface Storage Licenses and Scientific Collection Permits, as well as the granting of an interest in settlement lands by district land corporations. Many of these approvals, and others in table 11, seem to result in a use of land or water in only a general sense. It is not clear to SSI that community concerns about the use of

land and water should necessarily have to translate into monitoring requirements for every one of the instruments described in table 11. It is obvious, however, that CR #11 should apply to land use permits and water licences.

SSI Position: SSI has no concerns about CR #11 clause 2.

SSI supports the communities' concerns in ensuring that all material activities which affect the land or water are subject to appropriate monitoring. At this point, however, the Board's position that every single type of activity based on all of the licenses and interests listed in table 11 should be subject to project specific monitoring (which is going to have to be based on a program developed in cooperation with the affected community) may not be reasonably achievable. SSI's concern relates to its understanding of the limits of community resources and to the difficulties which may emerge when all of the applicants for these licenses, permits and authorizations start competing for community time without having the resources to compensate community members for their input and assistance.

SSI requests that this matter be discussed at the Tripartite meeting. SSI will indicate its position in respect to this issue after it hears from the Board and the other approving authorities.

#### **Issue #13 CR #12 and CR#13 -- Financial Security and Closure and Reclamation**

CR #12 Statement of Issue: The revised wording of CR #12 proposed in the Discussion Paper requires the SLWB to ensure that financial security be posted for all activities requiring a land use permit or water license unless they are to be carried out by government.

Context: The Land and Water Boards have over 14 years experience since the MVRMA came into force. They have given thorough consideration to the circumstances in which financial security is appropriate. Their conclusion has been that it makes little sense to take security when the amounts involved are less than \$50,000. The reasons for this are practical relating to the administrative burden of managing the security and these boards' assessments of risk to the environment. These practical concerns warrant consideration by the Board.

SSI notes as well that as it is currently worded, CR #12 duplicates provisions already found in the land and water regulatory regime for the Mackenzie Valley.

SSI Position: SSI requests that this matter be discussed at the Tripartite meeting. SSI will indicate its position in respect to this issue after it hears from the Board and the other approving authorities.

CR#13 Statement of Issue: SSI has no concerns with the revised wording of CR# 13.

#### **Issue #14 CR #15 Ecological Integrity**

Statement of Issue: SSI has no concerns with the revised wording or CR #15.

### **Issue #15      Removal of Actions and Recommendations from Plan**

Statement of Issue: As indicated by the Board, this issue appears to relate to an AANDC concern that if Actions and Recommendations are left in the text of the Plan there may be some suggestion that funding should be provided to accomplish these matters. In SSI's view this is not a planning issue but rather a funding issue. It has been clear for some time that Actions and Recommendations are not intended to be mandatory. Discussion among the parties has focused on ways to try to ensure that those Actions and Recommendations which are derived from the Board's consultation with communities result in some outcomes in terms of the management of land use activities in the Sahtu region.

Context: At this point, it is not clear to SSI why this text should be removed from the Plan. There is, to SSI's knowledge, no legal reason why Actions and Recommendations cannot remain in the Plan. SSI suggested during the hearing and workshops that efforts should be made to take advantage of the work undertaken by the Board and reflected in these Actions and Recommendations. We suggest that the Board and approving parties look for constructive ways to adopt this work during the discussions to be held in the Tripartite meetings.

SSI Position: SSI requests that this matter be discussed at the Tripartite meeting. SSI will indicate its position in respect to this issue after it hears from the Board and the other approving authorities.

### **3. CONCLUSION:**

SSI commends the Board for its considerable efforts to respond to the input from the parties, communities and Sahtu participants received during the hearing and workshops. The Discussion Paper represents a major effort to reconcile the often disparate points of view and comments provided to the Board. The Board's obvious efforts to seek accommodation and develop solutions while preserving the intent of the Plan and respecting the wishes of the communities are acknowledged by SSI.

We look forward to an open and collaborative discussion amongst the board and approving parties at the Tripartite meeting.