

SAHTU LAND USE PLANNING BOARD

REPLY ARGUMENT ON MANDATORY ACTIONS AND THE JURISDICTION OF THE BOARD

THE SAHTU SECRETARIAT INCORPORATED

**John Donihee
Counsel
The Sahtu Secretariat Incorporated
c/o Donihee Law Office
3516 Underhill Drive N.W.
Calgary, AB
T2N 4E8**

I. STATEMENT OF FACTS OR ISSUE:

1. The Sahtu Secretariat Incorporated (SSI) accepts the statement of facts and legislative authorities set out by Counsel for INAC.
2. SSI takes no issue with the description of the "ISSUE" set out by Counsel for the GNWT.
3. Appendix 1 to this argument is the list of Actions drawn from pages 308-310 of Draft 3 of the Plan (Appendix 2).
4. Review of the 13 Actions set out therein indicates that they are not all mandatory.
5. Action 1 would only take place on request by the Board. It is consistent with the Board's authorities under s.47(1) of the *Mackenzie Valley Resource Management Act*, (MVRMA).
6. Actions 2 through 6 are to be taken by the Sahtu Working Group (SWG) which is a "collaborative forum". No party is required to participate.
7. Action 7 is subject to the discretion of a party involved in inspection and enforcement and is not mandatory.
8. Actions 8 and 9 are mandatory.
9. Action 10 is mandatory but so central to the mandates of these wildlife management agencies under existing fisheries, wildlife and species at risk law that it is hard to imagine the requirements of this Action not being met.
10. Actions 11, 12 and 13 are mandatory.

II. ARGUMENT:

11. The statutory interpretation arguments, including arguments about reading the *Sahtu Dene and Metis Comprehensive Land Claim Agreement* (Sahtu Land Claim) together with the (MVRMA advanced by both INAC and GNWT are common ground. SSI takes no issue with the approach suggested. It is clear from s.3.1.18 of the Sahtu Land Claim that it can be used in aid to interpretation of the MVRMA.
12. It is evident from even a quick reading of the arguments advanced by INAC and GNWT that they have much in common. In fact they argue the same points in the same order in many instances.
13. While it may seem trite to point this out, any ruling made about the Board's

jurisdiction to set out mandatory Actions should have no impact on those Actions proposed in the Plan which are not mandatory.

14. One of the points raised in support of both the INAC and GNWT positions is that subsection 41(3) of the MVRMA represents a “closed list”. With respect, it is hard to see how such an assertion can be in light of the plain wording of this subsection. It starts off “A land use plan **may** include ...” (emphasis added).
15. This wording is clearly permissive. Nothing in paragraphs (a) to (e) of the subsection has to be in a plan. Further, the list is not closed or exhaustive. To have the meaning proposed by INAC or GNWT the wording would have to be “A land use plan may **only** include ...”.
16. The MVRMA should be construed liberally and it should be read in remedial fashion. It serves no one’s interests in the long term to construe ss.41(3) narrowly and to insist that if something isn’t on the list in that subsection that it cannot be in the Plan.
17. If the INAC and GNWT argument is correct, the Board cannot include Recommendations in the Plan either because “recommendations” are not on the ss.41(3) list.
18. It is also worth pointing out that both Canada and the GNWT approved the Gwich’in Land Use Plan which includes Actions. What is different this time?
19. With respect, we submit that what is different is the Board’s position that it can include mandatory Actions in a plan. In the SSI’s view, it is clear that a land use plan can contain a list of Actions to be undertaken after plan approval.
20. We respectfully submit that the Board should focus its attention on the question of whether it has jurisdiction to include mandatory Actions, not whether it can include Actions in a plan.
21. Thus in SSI’s submission, the proper focus of an inquiry into the Board’s authority should be on section 46, not section 43 of the MVRMA.
22. Neither INAC nor GNWT takes issue with the application of the Plan to the issuance of any licence, permit or other authorizations relating to the use of land or waters or the deposit of waste. This language is drawn from ss.46(1) MVRMA. Likewise, section 25.2.9 of the Sahtu Land Claim extends that application to bodies with the jurisdiction to issue leases or interests in land.
23. The issue to be resolved by the Board is squarely to the question of how the words “... shall carry out their powers in accordance with the land use plan applicable in a settlement area.” found in ss.46(1) below should be interpreted.

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. (emphasis added)

24. The definition of "Action" set out in the Plan: "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." does not clearly indicate that an Action is intended to be mandatory.

25. The following passage from section 7.2.3 of the Plan seems to characterize the interpretation of ss.46(1) of the MVRMA and s.25.2.9 of the Sahtu Land Claim which is causing INAC and GNWT concern:

"Under s. 46(1) of the MVRMA, "First Nations, departments and agencies of the federal and territorial governments ... **shall carry out their powers in accordance with the land use plan**". **These bodies carry out the Plan's Actions outside the regulatory process. Actions are related to the use of land, waters, or resources, and in many cases support the regulatory process.** For example, they may include the mapping of habitat features so that impacts may be mitigated in authorizations. They may also include policy measures, such as policies for the collection of TK in relation to applications for land use." (emphasis added: from page 286 of the Plan)

26. With the greatest of respect to the Board, SSI has carefully reviewed the INAC and GNWT arguments in relation to ss.46(1) MVRMA and s.25.2.9 of the Sahtu Land Claim and SSI is in agreement with the arguments advanced by these parties.

27. For the sake of brevity, SSI adopts the argument set out in paragraph 26 of the INAC argument and set out below.

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.

28. SSI is of the view that neither the Sahtu Land Claim, nor the MVRMA should be interpreted in a manner which would allow the Board to impose mandatory requirements for action on the bodies listed in ss.46(1) of the MVRMA or s.25.2.9 of the Sahtu Claim .

29. For all of these reasons, SSI submits that the Board does not have the authority to impose mandatory Actions on either responsible authorities or regulators under the Plan. SSI respectfully requests that the Board rule accordingly.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29TH, DAY OF APRIL 2011.



**John Donihee
Counsel to SSI**

APPENDIX 1: SSI REPLY ARGUMENT

From Plan Appendix 2. List of Actions

The Plan's Actions, developed in Chapter 6, are reproduced in this Appendix for ease of reference. Actions are Plan requirements that are to be implemented outside the regulatory process.

Action #1 – Plan Implementation Monitoring

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

Action #2 - Sahtu Working Group

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

Action #3 - Community Engagement Guidelines

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

Action #4 – Best Practices

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

Action #5 – Sahtu Cumulative Effects Management Plan of Action

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

Action #6 – Sahtu Environmental Monitoring Program

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

Action #7 - Inspection and Enforcement Priorities

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

Action #8 – Community-Government Monitoring and Enforcement Strategy

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

Action #9 - Traditional Knowledge Guidelines

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

Action #10 - Access to Wildlife Information

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

Action #11 - Fish Habitat & Water Withdrawals

DFO shall work with communities

- a) to document community traditional knowledge of
 - i. fish and fish habitat, and
 - ii. water levels and quality; and
- b) to discuss
 - i. community concerns related to water withdrawal,

- ii. DFO's winter water withdrawal protocol, and
- iii. alternative solutions.

Action #12 - Air Quality

- (1) ENR shall ensure that interested parties are provided with a paper copy of the Annual Air Quality Report, and directed to ENR's Air Quality Programs Coordinator as necessary.
- (2) ENR shall continue to study the feasibility and advisability of expanding the air quality monitoring network in the NWT. This will be based primarily on industrial development, population growth, and available resources.
- (3) ENR shall continue to develop air quality related regulations, guidelines and/or standards, as appropriate, for application within territorial jurisdiction through the NWT Environmental Protection Act. ENR will continue to work with the Land and Water Boards and responsible federal agencies to encourage their air quality objectives for new and existing developments, territory-wide.

Action #13 - Emergencies Activities Reporting

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