Dehcho Land Use Planning Committee
Minutes of Legal Issues Meeting
DLUPC – DIAND – EC – GNWT – DFN
Yellowknife, NT (Bellanca Building, 8th Flr)
April 11, 2006, 9AM – 5PM

Participants:
John Holden, Legal Counsel, GNWT
Jane McMullen, Policy Analyst, PLC, ENR, GNWT
Carolyn Laude, Assistant Negotiator, AAIR, GNWT
Phillip Gibson, Legal Counsel, DIAND
David Livingstone, Director, Renewable Resources and Environment, DIAND
Greg Yeoman, Resource Management Advisor, Environment and Conservation, DIAND
Mike Walsh, Assistant Negotiator, Comprehensive Claims Branch, DIAND
James Harvey, Legal Counsel, Environment Canada (Teleconference)
Steve Harbicht, Head, Assessment and Monitoring, Environment Canada
Chris Reid, Legal Counsel, Dehcho First Nations
Jonas Antoine, DFN Representative

Dehcho Land Use Planning Committee Delegates:
Richard Spaulding, Legal Counsel
Adrian Boyd, Canada's Representative (Meeting Chair)
Ron Antoine, GNWT's Representative
Petr Cizek, DFN's Representative
Heidi Wiebe, Executive Director (Transcriber)

Call to Order: 9:15 AM

Opening Remarks

David Livingstone: We all want a plan we can approve and support but there are challenges. We need to be open about extending the planning period. We understand the pressures are coming from all sides and giving conflicting direction. We're on the same team.

John Holden: I'm new to this ("days" new) and I'm on a learning curve. I understand this to be a "without prejudice" discussion – a good faith discussion. But the agenda is termed a "legal meeting" with specific questions. Some of the questions seem to be a little off-kilter in that they are too specific given that the larger general questions haven't been decided. I agree with DIAND that the goal is to come up with a workable plan for the region.

Adrian Boyd: This is a legal meeting to deal with technical legal issues as requested by the governments at the Regional Forum (not sure which one raised it initially).

Jonas Antoine entered the meeting.

Richard Spaulding: The Committee is asking for more legal detail behind the concerns presented. I'd like to emphasize that we'll get the most out of the meeting if counsel can lay their cards on the table to fully explain what is behind the comments so we can decide how best

to address them. Some of this discussion is best to keep at a general level. I'm hoping we can get into discussing possible solutions to some of the issues. The Committee will take from the discussion what it can and make the changes it feels are appropriate.

David Livingstone: There are policy issues as well and that is reflected in the agenda. It's a question of deciding where issues are best addressed – in the Land Use Plan or at Main Table. What's in the Plan is more of a resource management regime and not a land use plan. This is better negotiated at the main table and not in the Plan. While we have legal issues on some of the Conformity Requirements (CRs) we also question whether some of those CRs are in the right place.

1. **Existing Legislation: Can the Plan be implemented within existing regulatory processes (DIAND, EC, and GNWT)?**
    a. **Unlawful sub-delegation or fettering of discretion – affects CR # 3, 11, 13, 16, 17, 21, 23 (DIAND) (e.g. mandatory use of traditional knowledge protocols and policies)**
    b. **Provisions of Acts or Regulations that are inconsistent with Terms of the Plan – please specify (GNWT)**

David Livingstone: One area of concern is the mandatory use of TK policies in protocols. There is no legislative basis for this.

Chris Reid entered the meeting.

Phillip Gibson: "Can the plan be implemented" depends a lot on the content of the Plan. It won't have the benefit of the MVRMA to implement it. It has to work with the tools that are available to implement it. When parliament delegates responsibility to someone to do something, it expects them to do that thing. If it has discretion to do that, then it has to exercise that discretion. If I was authorized to issue a permit, I cannot say I'll only issue it if my brother agrees because my brother is not authorized to do that. So where the Plan says something will only happen if DFN supports it or if a protocol is followed and if that doesn't happen, then the permit can't be issued - that is fettering discretion. That is beyond the scope of authority delegated from parliament to the regulatory authority. This pertains to several CRs but not every part of every CR – only where support of DFN is required or where there is a need to enter into an agreement.

John Holden: Phil has explained the concerns around fettering but I find the question that leads off the agenda is inseparable from the larger thematic differences. Our Parties seem to have problems with the Plan so the question should be reworded. "Could the eventual Plan as agreed to by the Parties be implemented within the legislative framework?" We want the Plan to fit into our existing framework and we have offered detailed comments regarding the scope of the plan, the role of the Committee, and consistency with legislation to make this work. The Plan finds its context within an Interim Measure Agreement. As an interim measure, has it expanded beyond its scope? Some of the terms don't seem to be related to the land or consistent with land use planning. These are the things that need to be resolved before you can determine the Plan's place within the regulatory framework.

Chris Reid: This sounds like we're trying to negotiate the terms of reference for the land use plan and this was done at main table 5 years ago. It seems like we're just coming back to those

items. It seemed like GNWT comments from January were on things they have no mandate for – like oil and gas. I don't understand why the GNWT is taking positions on things like oil and gas. I haven't seen the most recent submission from a few days ago. In that these are meant to be discussions on the land use plan they should be restricted to what they can bring to the table. Things like forestry and tourism. I leave it to DIAND to comment on things within their jurisdiction and GNWT should restrict their comments to things within their jurisdiction. I'd like to hear from federal officials why they can fetter discretion in some areas and not others.

Richard Spaulding: In response to John Holden's comments, most of those items are on the table for today in different places. There are two different types of concerns under agenda item 1 – in one case there is unlawful subdelegation or fettering of discretion going on and secondly that there may be some inconsistencies in the Plan with legislation. When we finish off agenda item 1 we should know those inconsistencies, then we can move on to other items. Regarding fettering discretion, it would be helpful to hear from DIAND about fettering discretion in the IMA. The type of requirements that are raised as concerns (DFN support clauses), it struck me that there are provisions in the IMA itself that are of the same type – e.g. sections 41 and 50. How can those terms be acceptable to warrant the Minister's signature and commitment through the IMA and not be acceptable in the Land Use Plan?

Adrian Boyd: John asked, "Is this really land use planning"? When you're working with communities, and I look at CR #16 on hydro development for example, this is a common term and is also found in the Keewatin Plan. It is there to give flexibility so if there is a change in values then government can work with communities to get support and allow development to proceed without plan amendment, which could take some time to get approved. So we use these provisions as an opportunity to provide flexibility in decision making so we don't end up in amendment in 2 or 3 years when values change.

David Livingstone: This is an interim plan – pending resolution of major issues at main table so there is no direct parallel to other plans. The main table will address the resource management regime under which this fits – right now it's the MVRMA. We will not amend legislation at this time so if it can't fit with existing legislation it won't be approved by Canada. We're constrained by what is happening or not happening at main table.

Chris Reid: So Adrian's point about what is happening in Nunavut, if we can find a way to get around this without changes in legislation, then we're ok?

David Livingstone: If we can implement it in current legislation without changing legislation or fettering discretion you are over that hurdle.

Phillip Gibson: Just because it can be done legally doesn't mean Canada will agree to do it. There is a legal part and a policy part.

David Livingstone: I did a little sketch yesterday about the resource management system. The Plan is more than what we expect to see right now – it is a resource management regime in the absence of one and we are not going to negotiate that through the land use plan. We will not pre-empt discussions at main table. Part of the challenge is that many of the CRs go beyond what we are comfortable with at this time. For the time being, we will defer to main table on many of those issues and take them off the planning table. The main answer is it must be implemented through legislation or it won't happen.

James Harvey: A lot of these issues were discussed in the IMA or the planning terms of reference. I don't have those documents – can they be forwarded at some point?

General discussion on where to find these documents online.

Chris Reid: I asked if we find that the Nunavut plan was implemented within existing legislation are we good then? Canada said, well just because it can be done, doesn't mean we'll do it. This is consistent with how Canada has acted in the past. If we resolve these issues, then Canada says we won't do it anyway, then what are we doing?

David Livingstone: That's why we wanted to discuss the policy questions first. The Nunavut plan was implemented through the Nunavut Land Claim Agreement (NLCA) which started a new regulatory regime. That's not the case here. We have an issue that the plan captures elements of the regulatory system.

Chris Reid: I would like to see more detail around the legal issues. What is the analysis Canada has done to show that these CRs are not consistent with legislation? When we negotiated the IMA, there are statements in there that fetter discretion. Now Canada has reneged on those because it fetters their discretion but we have never seen any background to support that.

Phillip Gibson: The IMA has statements in it requiring community support, but it also has statements that say it is not a legal document. Any undertaking of government has to be read in light of the existing legislation. Those statements have to be read together so that the Minister acts according to law. The Minister has undertaken a commitment to implement this Plan.

Chris Reid: Canada agreed to those sections of the IMA based on the fact that it would act according to them as if they were binding. They refused some terms we asked for in the IMA on the basis that it fettered discretion, but others were ok. The IRDA, which is legally binding, requires the signing of Impact Benefit Agreements (IBAs) before an oil and gas issuance cycle is initiated for example.

David Livingstone: Each set of negotiations will have its own flavour and in this particular game we are saying we are not prepared to fetter discretion in certain areas.

Richard Spaulding: If that is the take home message then I'm not sure we can get more out of this discussion. It is not the intent of the Plan to propose terms that are not consistent with legislation.

Adrian Boyd: That has been our expectation all along – to be consistent with legislation. We have asked repeatedly for a list of where we are not consistent with legislation. Have we received a list Heidi?

Heidi Wiebe: Not yet.

David Livingstone: It would be the MVRMA, which does not set out a veto for First Nations.

Jane McMullen: It's wherever you have given yourself authority that rests with the GNWT.

Adrian Boyd: Does Canada know that the biggest concern in the Dehcho is the lack of consultation?

David Livingstone: We understand that. We are approaching from different directions and we have to find middle ground. The communities should probably be more involved in decisions made in their backyard.

Jane McMullen: Consultation is recognized as an issue and is always improving.

Richard Spaulding: I'm still stuck on what is the essential difference between commitments made in a land use plan and those made in the IMA which did not result in changes in legislation to implement it. What is the distinction? Is this commitment to implement the Land Use Plan of a legal nature, while the commitment to abide by the IMA is not?

Phillip Gibson: The commitment to implement the plan comes with policy direction that is binding on the MVLWB, who then has to ensure every permit and license it issues is consistent with the Plan through the Terms and Conditions it sets. The political commitment has legal results and there are limits to that within the existing regulatory regime. There's a problem with the IMA as it sets certain requirements that we can't deliver. The effect of the Plan is legally binding so we have to make sure it is consistent with existing requirements.

Petr Cizek: There are only one or two CRs that are not covered by the policy direction to the MVLWB. That policy direction is the single most important tool.

Phillip Gibson: Yes the policy direction is key, but there are limits to the policy direction – it cannot make the Board (MVLWB) do anything that the Board doesn't have the authority to do. Assuming the direction is consistent with board powers, then the results of policy direction are legally binding through the results of the terms and conditions on licenses to be consistent with the plan.

Adrian Boyd: So if on the hydro term we just restrict it are we okay?

Phillip Gibson: It might be legal but we may not think that's the way to go.

Adrian Boyd: We are working under the IMA.

David Livingstone: The MVRMA does not recognize or give substance to the Land Use Plan. This Plan is invisible to the MVRMA.

Adrian Boyd: Read S. 3 and 4 of the IMA. If the IMA doesn't apply and the MVRMA doesn't apply according to you, what should we have based the Plan on? We've used all the direction documents and now you say that's not what we should have been doing at all. What should we do?

David Livingstone: It's good that you are consistent with the MVRMA and will make it easier in the end once it falls under there but for now you can't draw authority from the MVRMA. It doesn't give it legal effect.

Adrian Boyd: No, we would use the Minister's policy direction.

David Livingstone: That has limits and it still has to be consistent with the MVRMA as it currently stands.

Chris Reid: I have yet to see a legal opinion from justice on these issues. Section 35 of the constitution also applies here and binds the Minister's discretion. E.g. The Mining Recorder's authority must be read in light of S. 35 rights – that doesn't change the legislation but it must be read in light of that. The same applies here. The plan is established under the IMA and should be read in light of negotiations on S. 35 rights when the Minister is exercising his discretionary authority. Some of the existing legislation may even be invalid in light of S. 35 obligations. Does DIAND consider S. 35 or not? They never mention it in their discussions. You have to interpret these acts in light of your constitutional obligations. Or for that matter S. 15 of the Charter – E.g. the DFN legal challenge last year on the MVRMA that was later dropped.

Richard Spaulding: Isn't it the constitution that fetters discretion of permit issuers? The IMA seems to have this element in it by requiring First Nation support. I don't see anything in legislation under which the IMA support clauses are implemented that says they can't do it. See for example, S. 41 of the IMA on Oil and Gas. This is implemented under the Canada Petroleum Resources Act and there is nothing in that Act that precludes the Minister from requiring First Nations support before rights are issued. The Committee has to work within existing "valid legislation" according to S. 35 so I'd like an answer to Chris' S. 35 question.

Phillip Gibson: Are you saying the asserted right of the Dehcho First Nations justify the provisions of the Draft Plan and would allow the Minister to direct the Board to do the things in the Plan despite existing legislation? Is that correct?

Richard Spaulding: That appears to be the premise of the IMA and the Plan is consistent with the IMA.

Phillip Gibson: It's a negotiated agreement and you have to read all the parts and then you'll see that requiring DFN support is not binding on the Minister.

Richard Spaulding: What happens when the Minister signed the IMA? It was a commitment that Canada will do something. But this is not a legally binding contract. What happens if the Minister approves or favourably considers a land use plan that says Canada will provide policy direction to protect heritage resources and not remove them without First Nation support? As I read it, this is not a legally binding commitment to act on the Plan, it's a political commitment. I see the commitments being the same as in the IMA. Canada will do certain things. Same thing happens with the land use plan through approval or favourable consideration. Let's say the Minister does not move forward with that political commitment, I don't see that as a legal breach. However once the Minister provides the political direction, at that point, the IMA says those directions are binding and so does the MVRMA and the Board is bound to follow those directions, and once the Board issues the permit consistent with the Plan, then the 3rd party is bound as well. Those are the parallels I see and I don't see a difference between the two. There is a difference in implementation mechanisms, but not in the commitments.

Mike Walsh: There is a connection being drawn between the IMA and the Land Use Plan. There are things in the IMA that are part of a negotiated agreement in instances like O&G activity. Most of these are things that Canada does on a regular basis but they were also negotiated. It would be hard for us to believe that because we negotiated these in one agreement, that in other cases where another party wanted a similar clause, that we would just agree to it because it's in here once.

Richard Spaulding: The Plan is a product of the IMA – everything follows from the IMA. My comments were about legal permissibility. Whether or not you want that is another thing.

10:45 am - break

11:05 am – meeting resumed

Richard Spaulding: Will DIAND consider providing something on the effect of S. 35 on the concern for fettering?

Phillip Gibson: I'm not sure what to say. Do you want us to consider S. 35 a requirement to implement provisions of the plan that we think would otherwise fall off side in the Plan? Is that what you're suggesting?

Richard Spaulding: I'm asking about the IMA primarily.

Phillip Gibson: I don't know if that was considered so there's nothing I can provide you. As an aside, if First Nations provided valid reasons for not supporting prospecting permits that the government could act on, then maybe DIAND could use those concerns rather than non-support in its consideration of whether to issue permits. Then it isn't really a support/non-support issue.

Richard Spaulding: We don't want to know what the negotiators were thinking; we just want to know how to interpret our mandate as set out in the IMA. The Plan seems to incorporate the same type of requirements that the government approved in the IMA that it is now saying is contrary to legislation and can't be repeated in the land use plan. If it is speculation that S. 35 allowed those clauses to be in the IMA, then we would expect the same thing for the Plan. You referred to the duty to accommodate – that is a live duty. It would be useful to have some input from DIAND as to whether S. 35 would allow for the type of requirements that are in both the IMA and draft Plan for First Nation support.

David Livingstone: We can try to do something for that and get it to you for next Tuesday. I think part of the dilemma is that one side of the table wants to go further and faster than the other. The Plan is a far-sighted document and the government is not comfortable with that. The government is the reluctant party to this and sometimes we have to be pushed into it. Right now we're not convinced that S. 35, while it might enable us to fetter discretion, is the right thing to do at this time – better to negotiate that through main table. My sense is that this is too far and too fast for now. We'll try to get something that is clearer and legally based on the S. 35 issue. The answer may be along the lines of "maybe, but not now".

John Holden: I concur with Mr. Livingstone's remarks and they generally reflect the GNWT concerns as well. Mr. Reid referred to the Plan as a step, just as the IMA is a step in negotiations, and this plan will share certain things with the IMA. What has concerned the GNWT is that we're not looking at a step - it's a dress rehearsal for the final thing. It's too far, too fast. This is food for future negotiations and should be considered there and maybe later it can be brought back into the Plan, after those negotiations have been completed.

Chris Reid: The comments are that a lot of this is to be left to a final agreement. Yes, this was meant to be an interim land use plan to be modified after a final agreement. The Committee has taken this into account. There are no amendments to legislation proposed. They've stuck to their mandate. They have stuck to the IMA and made recommendations in line with what is already in place. Kicking this to the main table was never the intention. Nothing in here looks to me to be appropriate for main table. One thing that is not up for negotiations is for this (the Plan) to be under the MVRMA – the DFN will not agree to the MVRMA long term. People

should not be under any illusions about negotiations right now – there is nothing happening as we have 2 completely different mandates. I wouldn't predict a final agreement any time soon. The Plan allows for these things to be implemented within existing legislation, parallel to the Dehcho Process and could survive if the Dehcho Process doesn't.

David Livingstone: I don't disagree but it's about figuring out how far it should go. The challenge is to get enough of a plan to be meaningful for everyone without losing the concepts in the Plan, and carries the intent forward without overstepping these limits to which we are prepared to go now. Not all of it is beyond legislation, just some elements. The majority of the Plan we are quire comfortable with. We can work on those areas that we have differences and narrow those differences and accept those areas we can live with, collectively. The Committee has the pen and we recognize the challenge of finding a solution that recognizes most of the feelings that have been expressed. You'll have to come up with a plan that is good enough. It won't be the Plan you would like. I don't want to leave this discussion with the impression that we are opposed to the Plan. We admire the vision of the Committee and it is unfortunate that we can't go as far as the Committee would like us to go but there is a limit in what we can deliver. We are all going to have to compromise. We have identified 6 or 7 CRs that we are uncomfortable with. E.g. CR #11 gives us trouble. Take what you have and roll it into CR #12 and leave it at that level. CR #11 is too prescriptive. If you leave it at CR #12 then maybe we can accept that.

Adrian Boyd: The MVLWB wants the prescriptiveness in the terms. They want clear rules.

David Livingstone: This is not the last shot at this plan. There will be other opportunities to make this the progressive and far reaching plan you want it to be.

Jonas Antoine: I want to remind you where this all came from. We're tired of compromise. We said we're going to do this the Dene way. I had a part in what you see here. The Dehcho people are very happy with what is in the Plan. You want us to compromise more? I met with Mr. Nault a few years ago and he did a good job of selling us on this process. He guaranteed us that the IMA was our protection. Now we hear the Minister is not honouring this agreement. The media came to us and asked us how we feel about the election. Nothing. We have been dealing with this stuff for 200 years. It is my job to pass on this information to DFN. They are not going to like this. We've worked very hard on this and the people are happy with what is in here. It also sounds like there is going to be a delay. We're happy with the pace it is going and we're looking forward to June to have a celebration on this. But from what I hear it may not happen. People like myself stand firmly on this, and the people I represent. I have a treaty with the Crown but the Crown doesn't seem to honour the treaty. It's a peace treaty. We haven't killed any settlers yet! Since 1921, other things have happened that has further strengthened our position regarding S. 35 of the Constitution. We have the agenda here and we have only touched on 1 item. Thank you.

David Livingstone: I'm not asking you to compromise your values but there are ways to ensure that those values are maintained in the final version of the Plan in ways that will satisfy Canada. At main table those remaining issues can be resolved and then we can come back to the Plan and fix it so it's closer to what was intended. We need to make some progress in tuning it to current circumstances. We do not want to compromise Dehcho values in that process.

Heidi Wiebe: Are DIAND's legal concerns restricted to the CRs mentioned regarding fettering discretion?

David Livingstone: Yes. We're okay with Actions. The other concerns are not legal but are more policy related – e.g. level of conservation.

Adrian Boyd: Moving on to Item number 2 on the Agenda then.

2. **Legal Effect of Plan Implementation:**
    a. **Will implementation of the Plan be legally binding in advance of a Final Agreement, and is the language of "Conformity Requirement" appropriate (EC, GNWT)?**
    b. **The legal effect of the Minister of Indian Affairs and Northern Development "considering favourably" the DCLUP on the part of Canada, in the absence of a land claims agreement and amendments to the MVRMA.**
    c. **What is the purpose and legal effect of an "Action" (DIAND, EC)?**

a. Will implementation of the Plan be legally binding before a Final Agreement?

David Livingstone: The Plan isn't but the effect of the binding policy direction is.

Phillip Gibson: There are also the land withdrawals as well that can be used to withdraw lands for certain purposes. There may be some room for parts of the Plan to just be carried out through direction to officials to carry out their duties.

Chris Reid: I agree.

John Holden: We agree.

Phillip Gibson: Is there equivalent GNWT legislation that allows ministers to provide binding policy direction to their departments?

Carolyn: We'll check.

Jane: There are different pieces of legislation that can do that and the GNWT is committed to implementing the policy directions of the Plan.

James Harvey: I am concerned about Action #7. The language should not be as mandatory.

Heidi Wiebe: We recognize Action #7 as a special case because there we are actually asking governments to create new legislation. Outside of that particular action, does Environment Canada have issues with the remaining actions? This was a recurring subject in EC's submission in January.

James Harvey: I would have to review this again, but I think Action #7 was a key one for us.

Jane McMullen: This is similar to the suggested changes by the GNWT. We looked at Actions and Recommendations that tell people to do something. If it was something we were prepared to do, then it could stay as an Action and we would seriously look at those in our review and those that would be binding through policy in the GNWT. In CRs, we looked at whether it was directly tied to the land or land use.

b. The Legal effect of DIAND "favourably considering" the Plan.

Richard Spaulding: The language is unusual. Is there a precedent or language from elsewhere where this has been used? It doesn't seem to present a problem though in terms of how people here are interpreting it.

David Livingstone: The term "approved" can definitely not be used. "Favourably considered" was a compromise. Approved would be used following main table resolution.

c. What is the purpose and legal effect of Actions?

David Livingstone: We'll make best efforts to do those things.

James Harvey: I like that language. We just don't want to be bound.

Richard Spaulding: The Plan does not purport to be legally binding but it can have legal effect. This is what David and Phillip have spelled out. I looked at the PAS and they use similar language. The PAS is essentially a land use planning initiative and has been approved by the territorial and federal governments. It uses similar language (e.g. Land uses will not be permitted in core protected areas). Think about that language being appropriate where the plan does not overstep the boundaries.

Phillip Gibson: The language does suggest that people will do something. I'd like to suggest the language be changed to describe best efforts or reasonable efforts to achieve the results. There is another level of terms - Recommendations. Maybe the Committee should set up a hierarchy of language – CRs use mandatory language ("will"), Actions require "reasonable efforts", and Recommendations use "should" or "encourage".

Heidi Wiebe: Actions currently use mandatory language to ensure progress is made in relation to the goals of the Plan in time for a 5-year revision so that we can approach future revisions with a better understanding. The timeframes are also set with that goal in mind. The Actions are critical for filling data gaps or resolving larger issues that are beyond the ability of the Plan to address. Unfortunately, when mandatory language is not used, often nothing happens. If it is the intent of all the Parties to see the Plan move forward in accomplishing the goals of the region, then we need strong commitments from the Parties to carry out these activities.

David Livingstone: Similar issues were raised in the Snap Lake EA. We couldn't commit parliament to guarantee that funding and we didn't use "best efforts" as well. We used "reasonable efforts".

Phillip Gibson: "Best efforts" means "leave no stones unturned". We can't put the government on the line to fund something that may not be doable. "Best efforts" sets a high standard. "Reasonable efforts" is better.

David Livingstone: Let's find middle ground on wording that achieves that.

Jane McMullen: When we looked at Actions and suggested rewording it was to give a firm commitment to stick to the plan, recognizing the value and intent of the Plan.

John Holden: The last three IMAs I've worked on do not use "will" as it sets too high a standard. We also would like "reasonable efforts".

12:00 PM – Lunch

12:50 PM – Resume

3. **Scope of the Plan (policy and legal):**
    a. **Can the Plan address issues subject to ongoing negotiations – e.g. land withdrawals, land and water regulation, forest management, tourism (GNWT)?**
    b. **Is the Plan constrained by what may or may not be provided to DFN under a Section 35 agreement – affects CR # 3, 4, 5, 11, 12, 13, 16, 17, 19, 21, 22, 23 (DIAND)?**

John Holden: If "address" means "supplant" then the answer is no. If "address" means "can the Plan refer to these items" then maybe but they have to be consistent with the IMA. They'd have to relate to land use. Main table still has a role to play in negotiating these items. If you mean the Plan should take the place of main table negotiations then no, we would not agree with that.

David Livingstone: We would concur – what is at main table stays there. The Plan should not bind main table.

Adrian Boyd: The Plan is not meant to bind main table – they are free to negotiate whatever and the plan will be changed to reflect that.

David Livingstone: This goes back to the fact that the Plan contains a number of items which are better left at main table.

Richard Spaulding: Which are those?

David Livingstone: The ones that fetter discretion. You need to retain the existing authorities and not compromise their mandates while achieving the intent of the Committee.

Heidi Wiebe: Given that it is government departments that implement the plan, how are we taking away from their mandate?

Jane McMullen: Looking at forestry for example. Only 2 items in the IMA deal with land use. The rest are forest management and should not be in the Plan.

Heidi Wiebe: Section 3 of the IMA states that the purpose of the Plan is to promote the social, cultural and economic well-being of residents and communities in the Dehcho territory. Since land use issues affect the social, cultural and economic well-being of residents and communities, Terms that set conditions for development to achieve those goals are required to meet our mandate.

Jane McMullen: There are other tools in an integrated resource management system beyond land use plans that can achieve those things.

Constraints of Negotiations on a S. 35 Agreement

David Livingstone: We don't want to pre-empt what happens at main table and will try to get you more detail regarding how S. 35 affects this work.

Richard Spaulding: I see that the list of problem CRs under the S. 35 question is longer than the fettering discretion list. Is there something else here?

Phillip Gibson: These represent things DIAND does not see as relevant to the Plan at this time.

Petr Cizek: The IMA is meant to have the Plan help get us to a final agreement.

David Livingstone: It's a cart and horse problem. We don't want the Plan driving negotiations. We want negotiations to drive the Plan.

Petr Cizek: That's a political consideration, not a legal one.

Chris Reid: It was intended that the Final Agreement would result in amendments to the Plan but there was never discussion and certainly not concession that the main table was the main vehicle for recognizing S. 35 rights. Interim agreements could also do that and the plan is an interim agreement. The main table could come apart at any time. We don't even have an agenda for Agreement in Principle discussions for some time. Going back to what Dick asked, what is Canada's position with respect to S. 35? I don't want to hear that that will be dealt with in the Final Agreement. How does it currently constrain existing legislation and current management? This hasn't been discussed, let alone agreed to in the past.

Phillip Gibson: Canada is working on a policy of how we are dealing with S. 35 rights. Even if this plan were adopted as is, there would still be an obligation to address any asserted S. 35 rights, to consult and accommodate those. That issue will have to be dealt with on an operational basis.

Chris Reid: One of the points of the Plan is to make it somewhat predictable in what those are.

Phillip Gibson: The CR on consultation – this should be dealt with elsewhere by the Regulatory Authorities when they are doing their work. This will be in the Final Agreement as well I'm sure.

Heidi Wiebe: The purpose of the term is to lay out the expectations so everyone can build better relationships. This gives direction to land users and regulators about what is required to help get projects approved. How is that not relevant to a land use plan?

Phillip Gibson: They are not related to land use.

Heidi Wiebe: They provide direction to the regulatory authorities on how the land should be managed.

David Livingstone: But they go too far and are too prescriptive.

Richard Spaulding: I'm not sure either process (land use planning or Final Agreement) drives the other. The Plan does not drive the main table negotiations. The idea of an interim protection mechanism doesn't drive the final decisions. Maybe we can resolve this through some "for greater certainty" language. Nothing in this document can prejudice what is negotiated later on. When you say, "what happens at the table drives the Plan," I think you can go too far on that one. The IMA sets up a different body to develop the Plan. There is also

some back and forth on the withdrawals section between the body of the IMA and how the Plan feeds into that. The Committee is charged with doing a particular job, more or less independently from main table. They more or less set the table. The idea of the IMA is to allow the things being negotiated to be maintained until the deal gets struck. It goes beyond a Final Agreement in many respects. A land withdrawal is more restrictive than what Final Agreements normally provide for, so that rights and interests stay on the table for negotiation. Other IMAs put prohibitions in place to allow negotiations to proceed unimpeded – all the rights are still on the table for negotiations because they haven't been given to someone else (e.g. the prohibition on new oil and gas development in the Dogrib IMA). The Committee is doing their job properly if they don't watch negotiations too closely. The Committee is within its rights of doing the job the Parties asked it to do, to develop a Plan that meets the Terms of Reference in the IMA. It provides for conservation and development, it lists the sectors to be dealt with, it stipulates that the Plan should identify what types of land use should take place, where, and terms and conditions. All of those things are up for grabs in the final agreement. It strikes me as damaging if the Parties are locked into the view that it ties their hands at main table and should avoid touching on the same topics – that is not interim protection – it doesn't protect the interests that are at stake for a successful negotiation. It seems to me it is more helpful to say that a particular term goes too far in designing a new institution for management, than to say it goes beyond what would be a term of a final agreement.

Adrian Boyd: When the IMA was developed, there was no development happening here. The Plan was seen as a way to allow development to proceed under rules the people are comfortable with so that development can proceed now instead of in 8 years when a Final Agreement is done. The Plan is meant to integrate community concerns into the decision making process.

Mike Walsh: There is partial agreement there. We thought we moved a long way down that path with the land withdrawals and certain clauses. There was a perception that no development was taking place. The same could be said now with the Plan in place, despite the largest land withdrawal in Canadian history. There was a hope that the Plan would track negotiations and that negotiations would be 3 years on and closer to an Agreement in Principle (Agreement in Principle). That hasn't happened the way we expected but the plan has moved along with an extra year of work and the plan has outstripped main table. The main concern is the scope and scale of the Plan. Just because a neutral 3rd party has come up with answers based on study and consultations, doesn't mean we are all ready to agree with it and approve it. These ideas are not lost; they can be integrated into further revisions down the road.

David Livingstone: It's really the CRs, and not that many, that are a problem. This is not a stretch to get an agreement here. A little patience might go a long way.

Adrian Boyd: I'm glad to hear that. I'm not convinced the GNWT shares your view.

Jane Mc Mullen: I'm not sure where you get that. We share the intent to see the Plan proceed and we have now provided specifics on that.

David Livingstone: You have pushed us beyond our comfort zone here and we have stretched a bit, but not that far.

Adrian Boyd: And we have to maintain comfort with the communities as well. We are not here to entrench positions but to understand each others views.

David Livingstone: The message here is to tell the negotiators to get moving.

4. **Contents of the Plan (policy and legal):**
    a. **Can the Plan reference a Background Report which provides context, rationale and additional information for interpretation?**
    b. **What is the purpose of recommendations and should these be included in a plan which is meant to be implemented?**

David Livingstone: We have no issues with a background report, and the recommendations should go in the background report.

Adrian Boyd: At the Regional Forum you said they could go in the Plan. Has that changed?

David Livingstone: It comes down to what is the Plan. To me it's the zoning and CRs. It might be a better approach to separate the map and CRs from the rest of it.

Adrian Boyd: If you take them out, from my experience then they will not be seen again by the people who will implement this. No one looks at a background report. These messages are coming from government and communities and they need to be considered.

Jane McMullen: Policy-wise for the GNWT, we suggested they either go in the Background Report or in an appendix. We are looking at ease of approval. We find the background info is extremely useful and a good reference. We agree we shouldn't bury the Recommendations. CRs will be implemented, Actions, if we can do them, will stay there, and we will also seriously consider the Recommendations.

Phillip Gibson: Does the Minister favourably consider the background report?

Heidi Wiebe: As currently written, the Background Report provides context, rationale and supporting information to help interpret the Plan but it is clearly written that only the Plan is subject to approval or "favourable consideration". The Background Report has some important sections though, such as the Zone Descriptions in Chapter 5 that provide more detail on the objectives of each zone, permitted uses, resource potential and conservation values.

Phillip Gibson: There is additional zone information in the Background Report?

Heidi Wiebe: Yes – see Chapter 5 (illustrated an example). It provides rationale for why the zones were given that designation and identifies zone objectives but there is no additional information required to legally implement them. But it is useful information that could be considered by regulatory authorities in determining whether or not a specific application conforms to the Plan. If there is anything in there you feel should be moved to the Plan we will look at that.

Jane McMullen: Our recent comments aim to sort out what should be in the Background Report vs. the Plan.

Heidi Wiebe: Some of the areas you asked us in recent comments to move to the Background Report are in fact rationale and should be in the Plan.

David Livingstone: Recommendations are good and should be there, providing they do not direct us.

Adrian Boyd: We will review wording to make sure they don't do that.

5. **Implementation Role (policy and legal): What is the role of the Committee in Plan Implementation (DIAND, GNWT)?**
    a. **What is the legal relationship between the DCLUP and the MVRMA? (DIAND)**
    b. **What is the role of the Committee in relation to determining conformity (e.g. S. 47(1) of the MVRMA)?**
    c. **What is the authority of the Committee in relation to Plan revisions, exceptions and amendments?**
    d. **Can the Committee perform implementation roles not detailed in the IMA that do not involve regulatory authority?**

Adrian Boyd: Our role is not clear and we use as our guide, the MVRMA and the IMA. A land use plan is a living document. What do you want us to do? Do you want us to be able to grant exceptions, revise it, and amend it based on new technologies and changing values?

David Livingstone: We would expect the Committee to monitor high level conformity with the Plan (auditing) to check that activities are done in conformity with the Plan. This means the Committee could track activities in Environmental Assessment but not insert itself in those processes as a directive organization.

Adrian Boyd: The Gwichin Land Use Planning Board are now consulting with the Gwichin Land and Water Board. Do you see us doing that?

David Livingstone: As required. But the Boards are themselves responsible for determining conformity and they need to do their own quality control. We see the Committee with an ongoing role but at arms length. You could be copied on all correspondence and provide comments but the MVLWB would not be required to accept your comments. There may be the need for exceptions and we would ask the Committee to sheppard those through. The Plan is also a living document and it would be unwise to stop revisions for 4 of the 5 years. You will need to be ready for revisions to coincide with wrap-up of negotiations. It's an ongoing role; not the same as spelled out for other planning Boards but it is similar.

John Holden: The concept of monitoring is the touchstone in the MVRMA and the exact nature of monitoring needs to be discussed further between the Parties.

Jane McMullen: You can take guidance from the MVRMA. I think auditing or monitoring is appropriate. There may be certain aspects the Plan would do by virtue of being a Plan but the GNWT says there needs to be more discussion of what that means. David mentioned a copying function to the Committee on correspondence. The language in the Plan would have to be clear about who is checking for what on conformity. More dialogue is required and we need to discuss this more.

Chris Reid: We'd prefer if the Committee has a larger role and we'd like them to have the same authority that other boards have under the MVRMA. We should see what is happening in other

regions. We would want the Committee to have a more ambitious role in monitoring conformity with the Plan.

David Livingstone: That could be discussed at main table for a final role. We need a slightly modified role for the interim.

Adrian Boyd: If the MVLWB did refer an application to us, do you see that as a possibility?

David Livingstone: Yes, but you wouldn't have the final say. It's better to err on that side than to authorize an activity that is not consistent with the Plan. Other authorities may want to check with you, but they shouldn't have to, and the Committee's response is not binding. Think of it as a sieve with a big filter and under a final agreement it might be a small filter.

Jane McMullen: The policy direction needs to be clear.

a. The Legal Relationship between the Plan/Committee and the MVRMA

Adrian Boyd: We use the MVRMA as a guide.

David Livingstone: We expect the Plan would be implementable within the context of existing legislation.

b. Role of the Committee in Determining Conformity:

Adrian Boyd: We'll look at final revisions in keeping with these discussions.

c. Plan Revisions, Exceptions, and Amendments:

David Livingstone: We see the Committee as the keeper of the Plan. We want someone to blame if it goes wrong!

Petr Cizek: Are we assuming that all exceptions need to be approved by the Parties?

Heidi Wiebe: For clarity, there will be no exceptions to zoning as that is not considered a minor variance. That would require a Plan Amendment and those require signing by all three parties.

David Livingstone: Define what is a minor variance or exception and we're good giving the Committee that role.

Petr Cizek: Giving us the ability to grant exceptions is bigger than giving us the authority to determine conformity. Granting an exception means we have the authority to overturn the terms of the Plan – that is far more serious than determining if something fits with the Plan.

Adrian Boyd: Maybe we shouldn't grant exceptions. Exceptions have created some issues in Nunavut and the Gwichin has also had a lot of exception requests, mostly around the Mackenzie Valley Pipeline I think.

Jane McMullen: The language needs to be clear on what would be up for exceptions. Some of the CRs are already exemptions on land uses. This needs to be clearly spelled out in chapter 3, relating to who does what.

Heidi Wiebe: Are you talking about terms like salvage logging where it is permitted in all areas despite forestry restrictions in some zones? Why would that go in the Plan Implementation section?

Jane McMullen: Yes – I consider those exemptions to the Plan as opposed to exceptions that we are talking about now. Those exemptions should be clearly spelled out in chapter 3 as it affects implementation.

David Livingstone: Maybe the clearest approach is no exceptions or amendments without approval of all three parties.

Chris Reid: One of the purposes of the plan is to provide flexibility. I think the Parties will just kick it back to the Committee.

Heidi Wiebe: An exception that requires approval of the 3 Parties is basically an amendment.

David Livingstone / Adrian Boyd: General consensus to take exceptions out of the Plan.

Jane McMullen / Carolyn Laude: But those discussions would still need to happen amongst representatives of the Party and then we would need to give the Committee direction.

d. Is there any legal impediment to going beyond the IMA and using the MVRMA?

David Livingstone: Not a legal impediment, no.

6. **Interpretation of "Traditional Land Use and Occupancy" in the Plan in relation to aboriginal title (DIAND).**
    a. **The definition of traditional knowledge.**
    b. **The pre-eminence given to "traditional use and occupancy" and the assertion that such will continue.**
    c. **The definition of "traditional occupancy".**
    d. **The consultation requirements**

David Livingstone: Our concern is that the term says activities cannot proceed if they affect traditional land use and occupancy (TLUO). Everything affects TLUO, so nothing could proceed.

John Holden: These types of definitions are main table topics that should not be settled in a land use plan.

Heidi Wiebe: We have a definition from Terry Tobias, a recognized authority on this subject. We have a map in the Background Report showing traditional land use and occupancy and we refer to it throughout the Plan and Background Report. We need a proper definition of TLUO so people understand what we are talking about and what the map is trying to show. Our definition should not prejudice what definitions are used at main table and we have talked about inserting "without prejudice" language in the Plan.

Phillip Gibson: Approval of this definition in the Plan by the Minister could be seen as the Minister accepting DFN's claims of aboriginal title.

Chris Reid: Is that a problem?

a. Definition of Traditional Knowledge (TK)

Phillip Gibson: We'd prefer it be referred to as a body of knowledge, not intellectual property. There is an appropriate definition in the Yukon Environmental and Socio-Economic Assessment Act.

b. The assertion that TLUO will continue

Petr Cizek / Adrian Boyd / Phillip Gibson: Back and forth regarding p. 10 of DIAND's comments about how the Plan affects traditional use. The statement in the "Scope and Application" section is incorrect in saying that the Plan won't affect aboriginal and treaty rights and activities, as any authorization issued in conformity with the Plan has the potential to affect aboriginal rights. The Committee explained that the intent was to convey that the Plan is not attempting to "regulate" or "manage" traditional land use or occupancy, in order to give comfort to the communities. The Committee recognizes the statement as currently worded is incorrect and will be revising it. The Committee will be clear that the Plan may "affect" or "interfere with" traditional land use and occupancy. The same concern applies to CRs #11 and 12 which state that proposed developments cannot affect traditional land use and occupancy. These would have to be reworded as well for clarity. Detailed discussion ensued about appropriate wording.

Heidi Wiebe: We've had discussions at the Committee level around these terms using words like minimize impacts to TLUO and providing mitigation/compensation for impacts. I think it best if we avoid trying to nail down specific language here today. We understand the direction of your concerns and can come up with suitable language.

Phillip Gibson: I think minimize may be too strong a word. Again, it sets a high test that says you must use whatever means to reduce your impacts to a minimum. It may be appropriate in Conservation Zones where the objective of the area is no commercial development, in which case, those that do go ahead should minimize their impacts. In other areas, minimize may not be the appropriate word.

Heidi Wiebe: I believe, in the two CRs listed, the sections in question are referring strictly to conservation zones, so "minimize" would be the correct language.

Jonas Antoine: I need to feel comfortable with this. We have agreements that say our way of life will not be impeded. This is also protected under S. 35. I want to feel comfortable with this before I leave here. It sounds like we could have that interrupted and I don't want that written in here.

David Livingstone: We want the Plan to be clear that TLUO is not regulated here and second that some land uses here will affect TLUO.

Heidi Wiebe: To give you an example Jonas, if the MVLWB issues a land use permit to do seismic work after making sure that the operation is in conformity with the Plan, and they cut down trees and maybe run over a berry patch that the community uses, then they have affected your traditional land use. If later on, the community also uses that new seismic line to access new hunting areas, that has also affected your traditional land use, but in a positive way. Either way, it would be wrong to say the activity didn't affect your land use. Maybe we could include an example like that to explain what we mean so it is clear.

c. Definition of Traditional Occupancy

Covered in initial discussion of this topic above (before moving into sub-bullets).

d. Consultation Requirements:
Phillip Gibson: This is in the CRs we identified as "not yet". There is an obligation to consult fully and meaningfully, but maybe there are situations where that is not currently required. This is in relation to the CR on consultation. This term doesn't mention anything about assessing the strength of the claim.

Chris Reid: Who does that assessment?

Phillip Gibson: The regulator.

Chris Reid: Then it doesn't need to be in here as they also assess the level of consultation required.

Richard Spaulding: What isn't being considered is whether or not this makes sense for good regulatory practice. The Haida case established that developers have no requirement to consult but that doesn't rule out the fact that it makes good sense to have developers consult with communities. This practice is spelled out in the MVLWB guidelines for developers. I don't think the Committee has to concern itself with this term exceeding constitutional requirements.

Phillip Gibson: I understand that Regulatory Authorities can go beyond current practices. We just don't see this as something the land use plan needs to get involved in.

John Holden: We cover similar ground in footnotes 112 and 113. We concur with DIAND comments from January. Again, I'm concerned that this is done in isolation from main table. I agree with Phillip about the need to assess the strength of the claim.

Coffee Break – James Harvey left the conference call.

7. **Concern over land use definitions used in the Plan (GNWT – all; DIAND re: mining).**

Mining Definition
Arthur Boutilier and Malcolm Robb entered the meeting to assist with this agenda item.

Arthur Boutilier: The intent here is to separate exploration and development in mining.

Malcolm Robb: Provided a chart on different phases of mining: exploration, deposit appraisal, construction, production, and closure and reclamation. Moving from exploration to appraisal, you have to have outlined something you can quantify in 3 dimensions and you quantify the economic parameters of that deposit. You can do all that and still walk away and there is no mine. It is in later appraisal stages that you get into heavier work. Most projects don't get past DA-1. Advanced exploration starts after DA-1. If you're in exploration, the project may not go forward.

Heidi Wiebe: What stage is Canadian Zinc at right now?

Malcolm Robb: They are somewhere between DA-2 and 3. They haven't done a feasibility study yet (DA-4).

Heidi Wiebe: We need to tie the definitions back to actual land uses. At what stage do you start to require land use permits?

Malcolm Robb: Right around Ex 4-5. That's when they start more detailed drilling.

Heidi Wiebe: We've made it clear in the Plan that activities that are below the triggers for a land use permit are not subject to the Plan and therefore are allowed everywhere. So it's only later stages of development that are restricted through the zoning.

Malcolm Robb: If you restrict mine development then you will also restrict exploration because no one will explore if they have no chance of development.

Heidi Wiebe: Then why would splitting the definitions of exploration and development be useful?

Adrian Boyd: Up around Baker Lake they were worried about uranium mining. So we said, no uranium mining, but go ahead and explore.

Petr Cizek: We can't split exploration from development without getting into the same problems with the Canada Mining Regulations that the Gwichin got into.

Malcolm Robb / David Livingstone: If you want to control mining, you do so through exploration. If you don't allow exploration you won't get a mine.

Other Definitions:
Jane McMullen: The land use definitions are unclear and are used differently in different areas of the Plan. They should be in the zoning section to be clear about what is permitted or restricted. "Timber harvesting" or "forest management" may be better than "forestry" depending on the context of the particular section of the Plan.

Heidi Wiebe: The new definition the GNWT provided for tourism is very broad and not tied to the regulatory system, whereas our current definition is. That is inconsistent with what you just said.

Jane McMullen: You use "tourism" differently when referring to the land use zones than when you talk about tourism more broadly in some of the terms. Maybe you need two different definitions – one for land use and one for general depending on what is restricted or what is being promoted.

8. **Any other concerns stated in a party's recent written submissions that were intended to reflect legal issues, which the party's counsel wishes to explain.**

None.

Next Steps:
Adrian Boyd: Thanks to the GNWT for submitting new comments. We are proceeding with revisions. The Committee is meeting next on April 27th by teleconference to review all of the input and revisions to date and to see where we are.

David Livingstone: If you need more from us, let us know.

Jane McMullen: Same for us.

David Livingstone: We have the one action item around S. 35 which Phillip will draft.

Jane McMullen: We have an offer on the table to work with the Committee on further revisions.

Carolyn Laude: When we discussed Item #5, we talked about some kind of discussion between the Parties.

Adrian: I believe we have received some good input here today. It's enough for us to be able to draft something up.

Jonas Antoine: I'm looking at the table Malcolm gave us. We have a concern with nuisance staking. If they don't get a showing in EX-4 can they still proceed to EX-5?

David Livingstone: You need to be clear between prospecting permits, licenses and activities. Once they stake a claim, they have to do work and get a land use permit to do that work to maintain the claim and look for more information. But at anytime, they are welcome to pull out and move on.

Chris Reid: Despite everything that was said, I am optimistic.

David Livingstone: I want to thank the Committee and apologize for the delays.

Jane McMullen: Thanks for everything.

Meeting Adjourned: Approximately 3:45.