Alternatives North

February 28, 2014

Doug Schauerte
Committee Clerk
Standing Committee on Priorities and Planning
Legislative Assembly of the Northwest Territories
P.O. Box 1320
Yellowknife NT X1A 2L9

Re: Submission on New Laws on Lands, Waters and Resources

Dear Mr. Schauerte

Please consider this letter as our submission, barring additions opportunities for comment, on the proposed laws to transfer responsibility for public lands, waters and resources to the Government of the Northwest Territories (GNWT) as requested in advertisement in the February 10, 2014 issue of *News/North*. We would ask that you distribute this submission to all the Members of the Legislative Assembly and we encourage its posting to the Assembly website. We would ask that copies of any other submissions be sent to us.

In checking the website for the Legislative Assembly, the only devolution related Bills available to the public at this point, consist of the following:

- Bill 1—Reindeer Act;
- Bill 2—Archaeological Sites Act;
- Bill 3—Surface Rights Board Act;
- Bill 10—NWT Lands Act; and
- Bill 11—Petroleum Resources Act.

We understand that the NWT Lands and Resources Devolution Agreement requires mirror legislation to be passed for a least two other federal acts (*NWT Waters Act* and *Canada Oil and Gas Operations Act*) but these have yet to be tabled. There are also at least three other pieces of legislation required by the NWT to implement devolution and there is no indication as to when this will happen.

We support the call of the Standing Committee for some measure of public involvement, although a full review by the appropriate Committees with an opportunity for a public hearing is still our preference and what many citizens have come to expect.

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Need for a Public Review Process and Schedule

The Premier and Cabinet have often said "devolve and evolve" without offering a clear roadmap to improve resource management in the public interest. While the federal government has focused on a so-called Regulatory Improvement Initiative, and business interests have advocated a "red tape" review to reduce duplication and regulatory burden, Alternatives North proposes a sustainability review of all of the new legislation. This type of review could be combined with a broader public review but considers guiding principles such as transparency, accountability, consistency with co-management of resources in other sectors and regions, and equity (amongst regions, social class, and future generations). This would be entirely consistent with and would logically follow the recently adopted Land Use and Sustainability Framework.

We also recommend that there be a schedule for the review of all the devolution legislation. After hearing for years from the territorial government about how the federal government did not manage our resources as well as we could, it is time ensure that the same mistakes are not repeated in mirror legislation. We should not and cannot settle for anything less than a clear and unequivocal commitment to a scheduled and principled review of this new legislation.

We will limit our specific comments on the devolution legislation to Bills 3, 10 and 11 as follows:

Bill 3—Surface Rights Board Act

Alternatives North prepared a written brief and participated in the House of Commons Standing Committee on Aboriginal Affairs and Northern Development review of Bill C-47, the NWT Surface Rights Board Act. We also made a written submission to the Senate Committee that reviewed the Bill. We attach our written submission (as an appendix to this letter) to the Senate Committee as all of those concerns and issues are still relevant for Bill 3 now before our legislature.

In summary our concerns and issues are as follows:

- We question the need for this legislation as there are provisions in existing legislation and land claims agreements for dispute resolution related to surface rights;
- If a Surface Rights Board is deemed necessary, it should have the authority to deny access;
- Municipal governments should have the ability to prohibit mineral staking within their boundaries and the Board's jurisdiction within municipal boundaries should not include the power to override the wishes of municipal governments;
- The remaining parts of an integrated resource management system, namely environmental audit and land use planning, should be completed before this legislation is brought into force;
- The Board should have the ability to require financial security to ensure compliance with Board orders and to shift the burden of proof and risks to the developer rather than the surface rights holder;
- The Board should reflect a co-management model where Aboriginal and public governments each appoint half of the members;
- The Board should have the ability to sets its own rules of procedure rather than excluding the public interest; and

- The regime should not apply in those regions where Aboriginal land rights have not been recognized or settled.

Bill 10—NWT Lands Act

Need to ensure mandatory closure plans and financial security, as is currently the case in the *Commissioner's Lands Act* (see s. 3.1). This change to that Act only came about in 2011 as a result of the regular Members and was not a government initiative. There should be a similar provision in the NWT Lands Act.

There should also be a mandatory requirement for a closure and reclamation plan for any lands that are leased pursuant to either legislation.

It was the practice of AANDC to keep public surface land leases secret unless the consent of the lease holder was given. There is no requirement in the legislation to do this and in the interest of open and accountable management of public lands, leases should be a matter of public record. It us our preference that there be a clause in the Act that requires disclosure of leases in their entirety or even better, posting to a public internet website.

The Bill contains provisions (s. 57(3)) to allow Cabinet alone to decide to move the administration and management of public lands between the *Commissioner's Lands Act* and the proposed NWT Lands Act. There are similar provisions for Cabinet alone to transfer lands from the NWT Lands Act to the *Commissioner's Lands Act*. It is not clear why this authority is necessary or desirable. This would enable Cabinet to allow developers to avoid putting up financial security or other more restrictive provisions of one piece of legislation or regulations over the another. Such authority is not in the public interest. In the longer term, there should be one piece of legislation to administer and manage all public lands to ensure a coordinated and effective management regime.

There are two aspects of the proposed NWT Lands Act that also require public review but the details of which are set in regulation rather than the legislation itself. Firstly, royalty and fees are set in regulation and should be reviewed to ensure an adequate return to the public. Without reviewing all the details here, it is safe to say that royalties and fees have been set at a very low level when compared to many other jurisdictions in Canada and around the world. Secondly, the regime to administer mineral rights disposition is free entry where mining is considered the best and highest use of the land, despite other users or owners or inherent value of the land. Many other jurisdictions have begun to move away from free entry, including Ontario and Quebec. Even Nunavut is currently implementing map staking. We do not administer oil and gas rights in a free entry system and much can be learned from that nomination and bid system. A public review of the free entry system in the NWT is long overdue.

Bill 11—Petroleum Resources Act

We are alarmed with the recently announced decision by Cabinet that the regulation of petroleum resources will be handled internally by the Department of Industry, Tourism and Investment. There was no public debate or opportunity for input to examine the various options that may have been available. This is a fundamental change in public policy that demands public discussion.

We are very concerned with the lack of capacity and lack of experience in managing oil and gas resources within GNWT. The National Energy Board regulated these activities in the past. While we have observed that this Board was located in Calgary and had little openness for anything other than the largest project, at least it was a publicly accountable institution that has hundreds of staff people including experts in many different fields. We are of the firm view that oil and gas decisions and management should be taken out of the political realm and placed with an independent board. A co-management approach with the Aboriginal governments would help to ensure transparency and accountability.

As we stated above on the NWT Lands Act, there needs to be a clear requirement for mandatory financial security to cover all aspects of oil and gas operations in the NWT. This is especially true in terms of accidents, malfunctions and spills. The National Energy Board has started to reconsider its approach to these difficult issues and we could learn much from that experience.

There should also be clear requirements for a coordinated approach to closure and reclamation between oil and gas regulatory and land and water regulatory systems. This is necessary to ensure there is fairness for operators and protection for the public and the environment.

We are very concerned with the public accountability and representativeness of the Environmental Studies Management Board. The only people eligible to sit on the Board are government employees and individuals nominated by oil and gas interest owners (s. 70(3) and 70(4)). It is hard to understand how such a restriction serves the public interest and this part of the Bill deserves a serious review to ensure there is greater accountability and representativeness.

As we stated above with regard to mining, royalty and fees for oil and gas are set in regulation and should be reviewed to ensure an adequate return to the public. It is safe to say that royalties and fees have been set at a very low level when compared to many other jurisdictions in Canada and around the world. There is a need for a public review of the royalty and fees regime to ensure fair return to the public purse. This review should include consideration of the bid system where the current approach is based on work bid criterion, rather than a cash bid or other criteria that would better serve our communities and the environment.

Thank you for the opportunity to present our concerns with the proposed devolution legislation and we look forward to further opportunities to participate in a public review.

Sincerely,

Kevin O'Reilly
Alternatives North

Appendix—AN Submission to Senate Committee on Bill C-47

Alternatives North

April 28, 2013

Lynn Gordon
Committee Clerk/Greffière du comité
Standing Senate Committee on Energy, the Environment and Natural Resources
The Senate/Le Sénat
1053 Édifice Chambers Building, 40 rue Elgin Street
Ottawa ON K1A OA4

Re: Submission on Bill C-47 (Northwest Territories Surface Rights Board Act)

Dear Ms. Gordon:

Thank you for the invitation to submit a written brief on Bill C-47. Please accept this letter as our submission on the *Northwest Territories Surface Rights Board Act* which is now before the Standing Committee on Energy, the Environment and Natural Resources as part of its consideration of Bill C-47.

Should the Committee decide to travel to Yellowknife to obtain further views on the bill, we would be pleased to present our submission and to answer any questions. We appeared before some members of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development (AANO) during its meeting in Yellowknife on January 24, 2013.

It is notable that all of the legislative amendments proposed by the opposition parties reflecting the positions of northern Aboriginal organizations and civil society were rejected and voted down by the Conservative majority on the AANO Committee at the clause-by-clause review held on 7 and 12 February 2013. Seven specific amendments were proposed by the NDP to the NWT Surface Rights Board Act to restrict the jurisdiction of the Board on municipal lands, allow the Board to deny access, specifically authorize the Board to grant access by air only, and to require financial security. The Liberals proposed adding a clause that would require a five-year review of the Act. All opposition amendments were defeated or ruled inadmissible.

To be clear, there were never any public opportunities for comment on the drafting of this bill and Alternatives North was not invited to participate in the drafting process. Our comments are based on our members' extensive experience with northern resource management, a review of previous meetings of the Standing Committee on Bill C-47 and a review of land claims agreements. We do not have access to legal counsel and are not in a position to offer alternative language. We raise our concerns in the spirit of

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democratic participation and in an effort to ensure both sustainable development and a co-management approach to northern resource management.

Background Information on Alternatives North

Alternatives North was established 20 years ago and functions as a social justice coalition and non-profit society, based in Yellowknife and operating in the Northwest Territories. Within our ranks are representatives of churches, labour unions, environmental organizations, women and family advocates, seniors and anti-poverty groups. Alternatives North is an active volunteer organization with a well established history of constructively engaging with other stakeholders and government agencies on various issues of concern. We have a proven track record of securing resources for research and bringing people together to work towards practical solutions.

Although we have no paid staff or office, we have intervened effectively in environmental assessments such as that for the Mackenzie Gas Project and the Giant Mine. We were also instrumental in advocating for a NWT anti-poverty strategy that is now under development. We have commented on policy related to resources and economic development for the NWT, including recent efforts to streamline or deregulate the integrated resource management system established through northern land claims agreements.

Concerns with the Legislative Process

We are concerned with two legislative aspects of Bill C-47. Firstly, the misleading and incorrect short title of the overall bill, "Northern Jobs and Growth Act", bears no relation to its content. Neither the word "jobs" nor the word "growth" appears anywhere in the actual bill. "Employment" only appears in the bill in relation to employees of the Nunavut Planning Commission. The bill should more properly be called something like "Northern Land Claims Implementation Act".

Secondly, while we strongly support long overdue implementation of various provisions of northern land claims agreements, we do not believe that placing several different implementation provisions in one bill is the proper approach. This makes amendments and meaningful debate difficult at best. We would have much preferred for separate bills for each land claim area to allow better consultation and opportunities for improvement.

Substantive Comments on the Bill

<u>Need for NWT Surface Rights Board?</u>

There is really no need for a NWT Surface Rights Board as there are provisions already in place for the adjudication of surface rights and access in existing laws, regulations and agreements as follows:

- Mining rights as dealt with through the *Northwest Territories and Nunavut Mining Regulations* (see s. 70-72 where a dispute resolution process is already outlined for entry on to occupied lands to prospect and locate mineral claims);
- Oil and gas exploration rights as dealt with under the *Canada Oil and Gas Operations Act* (see s. 5.01(2)(b) where arbitration of any dispute with a surface rights holder is required);
- Mining or oil and gas rights on or access across Aboriginal lands through various land claims agreements (see Gwich'in Land Claims Agreement s. 6.2.1(b)(ii), Sahtu Dene-Metis Land Claims Agreement s. 6.2.1(b)(ii), Tlicho Agreement s. 6.5, Inuvialuit Final Agreement s. 18) where dispute over surface rights and access are to be handled through arbitration panels or processes.

The NWT Surface Rights Board Act will create uncertainty, duplicate and overlap with existing regulations and authorities, cost taxpayers more, impose additional administrative burdens and serve little practical purpose as few if any disputes are likely to be referred to this body. Why fix something that is not broken?

Recommendation 1: A NWT Surface Rights Board would duplicate and overlap with existing provisions for surface rights and access disputes resolution. As such, there is no need for this legislation and it should be withdrawn.

Entrenching Free-Entry and Changing the Balance of Power

The NWT Surface Rights Board Act will set up a process for awarding access and compensation for commercial purposes on Aboriginal, Crown and privately owned lands in the NWT. A right of access is established and only terms and conditions can be placed on such access, including compensation. In other words, if this Act is passed as written, access cannot be denied. This will further entrench the free-entry approach to mineral rights disposition in the NWT, an approach that Alternatives North rejects.

Surely we have evolved in our thinking beyond believing that mining and oil and gas development is the highest and best use of land that should supersede all other uses, while other users and uses can be compensated through money alone. The recent decision of the Yukon Court of Appeal (Ross River Dena Council vs. Government of the Yukon) and legislative changes in other jurisdictions, including Ontario, show that free-entry is really an antiquated, unfair and unsustainable rights disposition process. We should not further entrench this system in the NWT.

Recommendation 2: If the Act is not withdrawn, it should be amended to grant the Surface Rights Board the power to deny access if appropriate.

It appears that the right of access for commercial purposes even applies in built-up areas like Yellowknife where someone could stake mineral claims on private property and then get access and destroy homes and private businesses in the process (see s. 2, non-designated land definition and s. 69). The Gwich'in and Sahtu land use plans do not

apply to lands within municipal boundaries. This Act, if not withdrawn, should not apply within municipal boundaries and should allow municipalities to avoid disputes by prohibiting mineral rights acquisition within their boundaries .

Recommendation 3: The Act should not apply within municipal boundaries and municipalities should have the ability to prohibit mineral rights acquisition within their boundaries.

We acknowledge that a surface rights adjudication process is consistent with what was contemplated in the NWT comprehensive land claims agreements. However, a surface rights process can only be appropriate once the integrated resource management system required through land claims agreements is actually fully implemented. Full implementation of an integrated resource management system would include: legally binding land use plans, fully resourced co-management boards with timely appointments, sound environmental assessment, land and water regulation, effective state of the environment reporting, and audits that resulted in improvements in to the environment and communities. In the absence of a fully functioning and balanced integrated resource management system, a surface rights process as contemplated in this bill would create an unjust power imbalance between proponents and impacted communities.

Much work remains to be done for full implementation of the integrated resource management system in the NWT in a timely and fair fashion, including additional financial resources. The two NWT Environmental Audits conducted pursuant to the *Mackenzie Valley Resource Management Act* provide the most helpful and relevant guides as to how all of this can be accomplished, yet the federal government has not responded to these reports from 2005 and 2010.

Given that there have been no surface rights disputes that have been arbitrated under the Gwich'in, Sahtu or Tlicho land claims agreements, and the lack of such cases across the North, we wonder whether there is any urgent need for such legislation.

Recommendation 4: Before devoting any further resources to the implementation of a Surface Rights Board, the federal government must fully implement the provisions of the *Mackenzie Valley Resource Management Act* and respond in a meaningful manner to the 2005 and 2010 NWT Environmental Audits.

<u>Types of Surface Access and Financial Security</u>

Although the bill does not spell out what type of access may be contemplated through access orders issued by the NWT Surface Rights Board, we are very concerned that this may be interpreted in a way that always leads to surface access by means of roads (see s. 50(3) "a suitable route" and s. 69 where access order on non-designated lands must cover transportation of minerals). Once road access is provided, it is difficult if not impossible to prevent other users from similar access and this often results in permanent damage to wildlife and/or habitat, or unanticipated consequences. We recognize that air access may

in some cases be more costly, but this may be a necessary trade-off to protect and preserve the rights of land users and surface rights owners.

Recommendation 5: It is very important that access be interpreted broadly to include air-only access through the use of helicopters, fixed wing aircraft or lighter-than-air craft.

Recommendation 6: The bill should explicitly allow the Board to deny access if it is deemed too damaging, or to restrict access to air-only during certain time periods.

The Board is not allowed to ask for or require financial security to ensure compliance with its orders (see s. 56(2) and s. 71(2)). This is likely to present an enforcement problem, especially with regard to reclamation requirements that the Board may require (see s. 56(1)(a)(vi) and s. 71(1)(a)(vi)). This shortcoming should be rectified.

Recommendation 7: The Board should be given the power to require financial security to ensure compliance with Board orders and to shift the burden of proof and risks on to a private developer rather than surface rights holders and the public.

Surface Rights Board Not Consistent with Co-Management Model

Throughout most of the northern land claims agreements, there is an exchange of rights: Aboriginal title and rights are exchanged for defined rights of participation in resource management and decisions, and in some cases, self-government authority. Where boards or authorities are established, a co-management model is usually adopted where public governments (most often federal and territorial governments) nominate and/or appoint half of the members, and the other half are nominated, and in some cases actually appointed by, Aboriginal governments. This is certainly the case for the Mackenzie Valley Environmental Impact Review Board, the Mackenzie Valley Land and Water Board, the Gwich'in Land Use Planning Board, the Sahtu Land Use Planning Board and the regional land and water boards.

The spirit and intent of the land claims agreements would seem to suggest that the co-management model should be applied to a NWT Surface Rights Board. Prior to this legislation being adopted, any disputes under the Gwich'in and Sahtu land claims agreements, including those related to surface rights on Aboriginal owned lands, were referred to arbitration panels that were also established pursuant to the co-management model (see Gwich'in Land Claims Agreement s. 6.2.1(b)(ii) and Sahtu Dene-Metis Land Claims Agreement s. 6.2.1(b)(ii)). Surely the provisions of the land claims agreements set the floor for what we might accomplish, rather than the ceiling.

We acknowledge that there are residency requirements for some regional panels of the proposed surface rights board (s. 13) and that officials from Aboriginal Affairs and Northern Development Canada have stated that the Minister may contemplate

nominations from Aboriginal governments or through a public process (see testimony of Camille Vezina at AANO Standing Committee Meeting #52 December 3, 2012), but this is not the same as a co-management model.

We understand that a co-management approach has been adopted for the Yukon surface rights board (see 9(2) of the *Yukon Surface Rights Board Act*).

> **Recommendation 8: Should this bill proceed, a co-management model should be applied to the NWT Surface Rights Board where Aboriginal governments—either separately or collectively—appoint half the members of a NWT Surface Rights Board.**

Fairness Issues

According to the proposed Act a hearing process is to be set up to require the NWT Surface Rights Board to hear only from the party exercising a right of access and the party that owns or occupies the land (see s. 39). There can be no other parties to the process, and thus no room or ability for public interest organizations or other individuals to express views, concerns or provide information or expert opinions that the Board should consider and may even find helpful. This is not the case for the Yukon (see s. 29 of the *Yukon Surface Rights Board Act* where Ministers and other interests can be parties) or even the arbitration panels that currently have jurisdiction over surface access disputes in the Sahtu and Gwich'in settlement areas where other parties can be heard upon agreement of the relevant panel (see Gwich'in Land Claims Agreement s. 6.3.4(b) and Sahtu Dene-Metis Agreement s. 6.3.4(b)). We believe it is procedurally unfair to restrict access to the NWT surface rights process so narrowly.

> **Recommendation 9: At a minimum, the Board should have the discretion to hear from those other than the parties to the dispute, or simply leave the process open to others to make written representations that the Board will then consider.**

The surface rights regime spelled out in the bill would apply in all areas of the NWT, even if no land rights agreements are in place (see s. 2 definition of non-designated lands and s. 4). Those Aboriginal governments that have no settlements or agreements covering their rights appear to have little or no ability to access the process to set terms and conditions or receive compensation, without proving occupancy. We believe this to be unfair. Of course, we also believe that the federal and territorial governments need to place a higher priority on recognizing and negotiating these outstanding rights in a fair and timely fashion. We also note that the determination of compensation on non-designated lands discriminates against Aboriginal peoples outside of the established settlement areas in that access compensation does not have to consider the effects on wildlife harvesting, cultural attachment, and peculiar or special value of the land (see s. 74(2)). Clearly this is unacceptable and seems likely to be subject to a constitutional challenge at some future point.

Recommendation 10: The surface rights regime in the Act should not apply in areas of the NWT where no land rights agreement is in place.

Thank you for the opportunity to present our concerns with the bill.

Sincerely,

Alternatives North

References

December 3, 2012 AANO Committee Meeting #52 (AANDC Staff make presentations only)
http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=41&Ses=1&DocId=5909571&File=0#Int-7829308

December 5, 2012 AANO Committee Meeting #53 (Government of Nunavut appears)
http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5919360&Language=E&Mode=1&Parl=41&Ses=1

December 10, 2012 AANO Committee Meeting #54 (NTI, Minister and staff appear)
http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5932238&Language=E&Mode=1&Parl=41&Ses=1

December 12, 2012 AANO Committee Meeting #55 (Yukon Government appears)
http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5940942&Language=E&Mode=1&Parl=41&Ses=1

February 12, 2013 AANO Standing Committee #60
http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5977481&Language=E&Mode=1&Parl=41&Ses=1

Bill C-47 Northern Jobs and Growth Act (Part 2 Northwest Territories Surface Rights Board Act) http://www.parl.gc.ca/content/hoc/Bills/411/Government/C-47/C-47_1/C-47_1.PDF

Canada Oil and Gas Operations Act http://laws-lois.justice.gc.ca/eng/acts/O-7/FullText.html

Gwich'in Land Claims Agreement
http://www.collectionscanada.gc.ca/webarchives/20071125165653/http://www.ainc-inac.gc.ca/pr/agr/gwich/gwic_e.pdf

Inuvialuit Final Agreement
http://www.collectionscanada.gc.ca/webarchives/20071125181720/http://www.ainc-inac.gc.ca/pr/agr/inu/wesar_e.pdf

Mackenzie Valley Resource Management Act http://laws-lois.justice.gc.ca/PDF/M-0.2.pdf
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http://www.aadncaandc.gc.ca/eng/1100100027504/1100100027505

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News Release on Ontario's New Mining Act. December 16, 2009. http://news.ontario.ca/mndmf/en/2009/12/ontarios-new-mining-act.html

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Tlicho Agreement http://www.aadnc-aandc.gc.ca/eng/1292948193972/1292948598544

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Yukon Surface Rights Board Act http://laws-lois.justice.gc.ca/PDF/Y-4.3.pdf