



# **DEHCHO FIRST NATIONS**

**BOX 89, FORT SIMPSON, NT X0E 0N0**  
**Ph: (867) 695.2610 Toll Free: 1.866.995.3748**  
**Fax: (867) 695.2038**  
**EMAIL: [admin@dehcho.org](mailto:admin@dehcho.org)**

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## **Report on Dehcho Process**

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### **Summary**

Negotiations on harvesting, governance, and other subjects to be included in an AiP, have proceeded slowly but steadily, but no negotiations on anything related to the management of lands and resources or land ownership have yet occurred. Canada continues to insist that DFN accept the MVRMA as the main legal instrument for managing lands and resources and refuse to negotiate the powers and authorities of a DCRMA.

Some issues remain deadlocked because Canada and the GNWT refuse to accept DFN positions on resource management, jurisdiction over renewable resources, expropriation, control over access to Dehcho lands by non-Dene and the relationship of Dehcho community governments to the GNWT.

The GNWT has recently adopted a radical change in its position and now demands ownership of 45% of all Dehcho lands after implementation of a Dehcho land use plan and land selection. This is a major threat to DFN interests.

### **AiP Negotiations**

#### Land Ownership and Devolution

The Dehcho territory covers approximately 214,000 square km. Approximately ½ of this area is protected through the combined effects of interim land withdrawals, Nahanni National Park Reserve and Edehzhie. This means that approximately 107,000 sq km are “open” for development. It is expected that the proportion of open lands to conservation lands will remain roughly the same after implementation of a LUP and completion of the Edehzhie PAS.

Canada has tabled an offer which would recognize Dehcho fee simple ownership of about 36,000 sq km. DFN negotiators have said that the Dehcho land quantum should be at least 70,000 sq km. Regardless of whether the Dehcho own 36,000 or 70,000 sq km, or some amount in between 36,000 and 70,000, it is clearly in the interests of the Dehcho to select all or most of lands from lands which have high economic development potential rather than conservation lands.

The GNWT has recently demanded to own 45% of the Dehcho territory after devolution and the implementation of a land use plan and the finalization of land selection under a Dehcho final agreement. They intend to give Dehcho lands away to large multi-national oil companies and mining companies in exchange for tiny royalty payments. 45% of 107,000 is equal to about 96,000. If the GNWT and corporations own 96,000 sq km of open lands, the DFN will be left with only about 11,000 sq km of open lands. The remainder of the Dehcho's quantum of 36,000 would have to be comprised of conservation lands.

Clearly, the GNWT position is a major threat to DFN interests. It is worth noting that the GNWT did not mention its position regarding ownership of 45% of the Dehcho until very recently. It was never mentioned during the 1999-2001 negotiations on the Framework Agreement, nor was it ever mentioned during the land use planning process which began in 2001. Nor did they mention this policy in 2006 or 2007 during debate on the draft land use plan or the negotiation of new terms of reference for the Land Use Planning Committee

#### Land and Water Management – DCRMA or MVRMA?

Since the start of the Dehcho Process, the DFN have proposed that the Dehcho Government and Canada would have shared management and administration of surface and subsurface lands and resources throughout the DFN traditional territory, called the Dehcho Settlement Area. This would include joint land use planning, environmental assessment, and regulatory approval. The management and administration of lands and resources within Dehcho Ndehe and off Dehcho Ndehe will be the responsibility of the Dehcho Resource Management Authority (DCRMA). The DCRMA would operate independently of the *MVRMA* and consolidate land use planning, permitting and environmental assessments in a single body.

For transboundary purposes, the functions of the DCRMA would be harmonized with the Mackenzie Valley Environmental Impact Review Board (MVEIRB) and the Mackenzie Valley Land and Water Board (MVLWB), established under the *Mackenzie Valley Resource Management Act*.

In the 2005 Settlement Agreement which ended the DFN legal challenge to the *MVRMA*, Canada committed to negotiations on the powers and responsibilities of a stand alone DCRMA. In 2009 the Minister of INAC agreed to give his negotiators instructions to explore the DFN proposal for a consolidated system of resource management based on the DCRMA model.

However, Canada has since refused to begin any negotiations on a DCRMA.

Over the past year, the DFN leadership reaffirmed that the DFN intend to establish a DCRMA which is not governed by the *MVRMA*. We continue to insist that Canada honour the commitments made in the 2005 Settlement Agreement,

and by the Minister in 2009, and immediately begin negotiations on a stand-alone DCRMA.

### Access

In the draft Access chapter tabled by Canada, non-Dene will have extensive rights to access and use lands owned by the Dehcho, and Canada will have jurisdiction to enact legislation governing access by non-Natives to Dehcho settlement lands (selected lands), after consulting with the Dehcho Government. In response, we have proposed that the Dehcho Government will have exclusive authority to legislate terms and conditions for non-Dene access to Dehcho Ndehe, after consulting with Canada.

This chapter was discussed briefly at a few sessions, but has not yet been the subject of any serious negotiations. We are still awaiting federal feedback on our proposals.

### Wildlife Harvesting and Trapping

The Dehcho Agreement will recognize the right of all Dehcho Dene to hunt, fish, trap and gather plants throughout the entire traditional territory of the Dehcho First Nations, not only on selected lands. The draft AiP chapter on Wildlife Harvesting says:

- W.1.1 Dehcho Citizens have the right to Harvest all species of Wildlife, including Furbearers, throughout the area shown in the map attached as Appendix A at all times of the year.
- W.1.2 Dehcho Citizens have the exclusive right to harvest Furbearers in Dehcho Ndehe and Dehcho community lands at all times of the year. This right does not preclude others from harvesting Furbearers in Dehcho Ndehe or Dehcho community lands with the consent of the Dehcho Government.

The map which will be attached as Appendix A will show that harvesting rights continue throughout the entire Dehcho traditional territory. In addition, Dehcho Dene will have the exclusive right to trap on selected lands (Dehcho Ndehe).

Regarding jurisdiction over wildlife management and harvesting, the DFN have proposed that the Dehcho Government will have exclusive jurisdiction over wildlife on selected lands (Dehcho Ndehe).

- W.1.5 Within Dehcho Ndehe the Dehcho Government retains the authority to manage and conserve Wildlife and will exercise that authority in a manner that is consistent with the Dehcho Agreement. On

Dehcho community lands, local Dehcho community governments retain these authorities.<sup>1</sup>

The GNWT says that it should have jurisdiction throughout the NWT, including the Dehcho. They argue that, since animals migrate, it is essential that a single central government manage wildlife the NWT.

The draft AiP also provides that the right to harvest can be limited by the GNWT through legislation, if necessary, for purposes of conservation or public safety, and without consultation in cases of emergency.

### Harvesters' Compensation

This chapter would provide a “strict liability” regime for compensating harvesters who are negatively impacted by industrial development. In other NWT land claim agreements only trappers have access to the compensation provisions of this chapter. In the draft tabled by the DFN, all harvesters, including those who harvest berries and other plants, would have access to the streamlined compensation process.

The DFN proposal also provides for the establishment of a *Traditional Activities Advocate* who would assist harvesters in making compensation claims and issue annual reports on the state of harvesting and traditional activities in the Dehcho Settlement Area. The reports would identify threats and potential threats to harvesting activities and will make recommendations to Developers and the appropriate Governments for reducing, mitigating or eliminating such threats.

Canada and the GNWT continue to take the position that the range of harvesting activities covered by this chapter should be narrowed to cover trapping only. They oppose our proposal for a Traditional Activities Advocate, on the grounds that the Dehcho Government alone should represent harvesters. The GNWT has recently indicated that it would agree to a TAA who would make recommendations to all governments, as long as the position is created and fully funded by the Dehcho Government.

However, if the TAA is appointed solely by the Dehcho Government, it will have little or no influence over the GNWT and Canada. We have therefore proposed that, at a minimum, the TAA will be appointed by the Dehcho Government after consulting Canada and the GNWT.

### Tree Harvesting

The GNWT tabled a draft which has been discussed by both the LTC and the main table. Under the draft chapter the Dehcho Government would own trees on

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<sup>1</sup> GNWT prefers co-management throughout the Dehcho Settlement Area.

Dehcho Ndehe and would have the right to harvest trees for personal and subsistence use throughout the Settlement Area outside of Dehcho Ndehe.

Canada and the GNWT oppose setting out any commercial harvesting rights in the Dehcho Agreement.

We are awaiting feedback and direction from the DFN leadership as to what further concerns should be expressed from our side.

### Expropriation

NWT land claim agreements include provisions allowing Canada and the GNWT to expropriate land owned by First Nations' governments if it is necessary for public purposes. First Nations are compensated when their land is expropriated. The DFN have proposed restrictions on the power of expropriation so that the size of Dehcho Ndehe (selected lands) could not be reduced and requiring that compensation for expropriation should always take the form of land rather than cash. Both Canada and the GNWT argue that they need more flexibility to expropriate when necessary, and they have rejected these DFN proposals.

Another significant issue to be addressed is Ex.2.7:

Ex.2.7 Where determined by the Dehcho Government, lands acquired by the Dehcho Government in exchange for expropriated lands will, whenever possible, be contiguous with Dehcho Ndehe.<sup>2</sup>

Canada probably will continue to object to a requirement for exchanged lands to be contiguous, unless DFN select single block of contiguous lands, like Tlicho. Canada also objects to the phrase "whenever possible", as this bar is very difficult to meet.

### Governance

In 2010, DFN tabled a lengthy chapter on Governance which outlines the structures and authorities of the Dehcho Government. It has been discussed briefly and will be the subject of further discussion.

DFN negotiators require direction on the structure of the Dehcho Government (DG.1.3), particularly whether the Dehcho Government should have an equal number of representatives from all communities, or weighted representation, which would give larger communities more representatives than smaller

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<sup>2</sup> Consistent with Tlicho 20.4.1, although Canada notes that "it is important to note that this clause was acceptable in Tlicho because they selected one contiguous block of land, equal surface and subsurface. Also, the language in Tlicho is that the expropriating authority shall offer available lands that are adjacent to Tlicho lands. Key words here being 'offer' and 'available'. Dehcho's 2.6 does not have either of those, therefore limiting the possibility of finding suitable replacement lands."

communities, or an electoral district (riding) system in which regional government representatives are directly elected to represent their constituents.

### Community Governance

DFN negotiators have prepared a draft AiP chapter on the governance of community lands. In some ways it is similar to the Tlicho model, but in other ways is unique. For example, while Tlicho community governments are implemented through GNWT laws, the Dehcho proposal would recognize community governments through the Dehcho Agreement and through implementation legislation, not through ordinary territorial legislation. The draft chapter would also recognize the right of Dehcho communities to choose their leadership through traditional Dene customs rather than through elections.

DFN communities will each have their own constitution, which can be developed with the assistance of DFN staff.

### Education

The DFN position is that in Treaties 8 and 11 Canada promised to provide free education for Dehcho Dene so that they could have the opportunity to learn skills which would allow them to compete for jobs in the emerging economy. The Dehcho Proposal calls for multi-year block funding for health, education and housing in recognition of the commitments made in the Treaties.

The DFN have proposed that the Dehcho Government should have jurisdiction over the development and approval of curriculum, the setting of standards for graduation, and the hiring of school staff, including teachers. The GNWT initially agreed that the Dehcho Government would have jurisdiction in some areas, but they insisted on having jurisdiction over the “curriculum framework”. However, they now agree to recognize Dehcho jurisdiction over K-12 education, including over curriculum.

It should be noted that there is no guarantee that diplomas issued by a completely independent Dehcho high school would be recognized by post-secondary institutions outside of the Dehcho. The Dehcho Government would have to negotiate agreements with other jurisdictions for the recognition of diplomas issued by an autonomous Dehcho school system.

### Preamble and Recognition of Dehcho Metis

We have tabled a draft Preamble which is based on the Dehcho Declaration of 1993. In addition to outlining the DFN position on treaties and the inherent right of self-government, the draft includes wording which would note the special circumstances and history of Dehcho Metis.

### Certainty

There will be no “extinguishment” of Treaty or Aboriginal rights or title in the Dehcho AiP or final agreement. However, Canada expects the DFN to either agree that all the rights and jurisdiction which the Dehcho have are fully set out in the Dehcho Agreement, or that they will not assert or exercise any rights not set out in the Agreement.

Canada has proposed Certainty clauses based on the Tlicho model. If the Tlicho certainty model is used, the DFN would agree that if there are any Aboriginal or Treaty rights which are not set out in the final land claim and governance agreement, they will not be asserted or exercised. The agreement will be binding on all DFN members. This is known as the “non-assertion” model. If the non-assertion model is used, DFN must also agree that if a court declares that the non-assertion clause is not legally effective, DFN will cede, release and surrender any rights which are not set out in the final Agreement.

We have tabled an alternative Certainty chapter which would *modify* existing Treaty and Aboriginal rights so that they are fully set out in the Dehcho Agreement. This model would not require any commitment to cede, release and surrender, since it is clear that all DFN s. 35 rights are fully set out in the Agreement. However, it should be noted that if this Certainty model is used, Canada may not agree to include a “faint hope” clause which allow for the remote possibility of later amending the final agreement to include “new” rights not related to lands or resources.

Federal negotiators have said that they expect the DFN to choose either the Tlicho non-assertion model for certainty, including the commitment to cede release and surrender any rights which are not constrained by the non-assertion commitment, or the modification model, in which all rights are fully set out in the final agreement.

### **Next Steps**

The next negotiation session will be held Nov. 7-9 by video teleconference.

## **Appendix A**

### **Edehzhie**

The DFN entered into the PAS in the 1990s on the understanding that it would lead to the permanent protection of at least part of the Edehzhie. Since 2002 an Order-in-Council had protected Edehzhie from mineral staking and exploration through a withdrawal of the subsurface. The OiC was renewed in 2007 and renewed again in 2008. However, on October 28, 2010 Canada allowed the subsurface withdrawal to expire, leaving the entire Edehzhie open to mineral staking, exploration and mining.

After Canada failed to respond to letters asking for protection to be continued, the DFN launched an application for judicial review in November, 2010. The application asks the court to rule that Canada broke its agreement with DFN when it unilaterally terminated subsurface protection and opened Edehzhie to mining.

In December, 2011 Canada issued a new OiC which restored subsurface protection for the part of Edehzhie which would form the permanent NWA boundaries under the recommendations of the EWG, which the DFN leadership approved in 2009. This area is approximately 57% of the Candidate Area.

In January, 2012 Canada served a motion to dismiss the case on the grounds that it is moot. The Oct., 2010 OiC which is challenged in the case was rescinded and replaced by the December, 2011 OiC which restored sub-surface protection to that part of Edehzhie which would form the permanent NWA boundaries under the recommendations of the EWG, which the DFN leadership approved in 2009. Since the 2010 OiC has been repealed, the federal motion to dismiss for mootness may succeed.

The DFN offered to consent to Canada's mootness motion, which would end the litigation, on condition that Canada agree to pay all or some of the costs incurred by DFN in the litigation to date. Canada refused this offer and the mootness motion was argued on March 5. The Court's decision was released in September. The DFN won the motion, so the case remains active and will soon be set for the main hearing. In dismissing Canada's motion, the Court said

If the judicial review application is terminated, the portion of Edehzhie which remains outside of the current OiC would not be legally protected from exploration or mining. However, it can still be protected through other means. For example, DFN could issue a statement that it will not permit any staking or exploration without the consent of affected communities, and will take both legal action and direct action (ie. removing claim stakes) to prevent any such



exploration. Similar declarations by DFN in the past have been effective in deterring staking.

### **Land Use Plan**

The Planning Committee has completed major revisions to the Interim Land Use Plan. Most of the revisions were demanded by Canada and the GNWT, to permit industrial activity in conservation zones, change “special management zones” into “special development zones” which permit industrial activity, and generally make the Dehcho more open to development than it would be under the Plan approved by DFN in 2006.

The LUPC have indicated that they will soon be sending the draft Interim Plan to the Main Table with several very important issues still to be resolved by negotiators. Federal negotiators have said that the draft ILUP will go through an extensive internal review before they will be prepared to discuss it with DFN.