



# DEHCHO FIRST NATIONS

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## Chief Negotiator's Report

### Dehcho Process - February 2012

#### Summary

Negotiations on harvesting, governance issues, 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.

The draft Interim Land Use Plan will soon be submitted to the main table for negotiations on several very important items. The new draft Plan has been revised to reflect the demands of Canada and the GNWT and is very different from the Plan approved by the DFN in 2006.

#### AiP Negotiations

##### Background to AiP Negotiations

The Dehcho Process began in 1999 with negotiations on both a framework agreement and an interim measures agreement. In 2001 Framework Agreement sets out an agenda and timetable for negotiations towards an AiP and a final agreement. The Framework Agreement says that the Dehcho Agreement (final agreement) will not replace Treaties 8 & 11, but will “clarify and build upon the existing treaties”.

Canada will only negotiate a Comprehensive Claim agreement with the Dehcho which is “comparable” to other agreements in the NWT. Under a “comparable” formula, Dehcho communities would own between 34,000 and 70,000 square kilometres of the Dehcho Territory, depending upon how DFN interests are compared to other settlement areas and how many communities remain part of the Dehcho (the original offer was approximately 46,000 sq km, which was reduced to 39,000 sq km when ADK left the Dehcho and will be further reduced if KFN leaves). Under Canada’s offer, Dehcho communities would also participate in management of lands in the rest of the Dehcho territory through the Mackenzie Valley LWB and the MVEIRB, and traditional harvesting rights of DFN members would be preserved on Crown lands throughout the territory.

AiP negotiations have progressed on chapters addressing harvesting rights, but have been very slow in other areas. Canada has so far not responded to the

DFN proposal, tabled in September, 2009, for Dehcho Government jurisdiction over lands and resources. Likewise, Canada has not yet been prepared to negotiate resource management issues, access by non-Dene to Dehcho lands, or expropriation.

## **Current AiP Negotiations**

### 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, also known as “asserted territory”. In addition, Dehcho Dene will have the exclusive right to trap on selected lands (Dehcho Ndehe).

As for 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). The GNWT (supported by Canada) suggests that it should have jurisdiction throughout the NWT, including the Dehcho. Their rationale is that since animals migrate, it is essential that a single central government manage wildlife throughout the NWT.

- 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>

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

### 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.

### Land Ownership and Resource Management

The Dene versions of Treaties 8 and 11 say that the Dene agreed to share their lands and resources with non-Dene settlers, in exchange for assistance with health, education and housing. The original Dehcho Proposal would have produced an agreement based on “shared stewardship”, in which Canada and the DFN would jointly own and manage the entire Dehcho territory, rather than dividing it through land selection. Although it may not be ideal, land selection is seen by some Dene as an alternative means of sharing lands and resources, and is therefore consistent with the treaties.

Even in a land selection model there is no intention of surrendering or giving up a Dene role in managing lands and resources throughout the Dehcho traditional territory. Through land use planning and the Dehcho Resource Management Authority the Dehcho Dene would continue to participate in the management of lands and resources throughout the entire Dehcho traditional territory. The DFN have proposed a “stand alone” DCRMA, outside of the MVRMA, which would manage lands and resources throughout the Dehcho Territory.

Canada has proposed a Dehcho Resource Management Authority which would only give advice to boards and agencies. Under Canada’s proposal, the Mackenzie Valley Resource Management Act would apply throughout the Dehcho territory and the Dehcho Government would appoint a member to the

Land and Water Board and to the Environmental Impact Review Board operating under that Act.

### Governance

In 2010, DFN tabled a lengthy chapter on Governance which outlines the structures and authorities of the Dehcho Government. It has been 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 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.

### Jurisdiction Over Dehcho Ndehe

The lands which would be “selected” or retained by the Dehcho under a final agreement would be known as “Dehcho Ndehe”. The DFN have proposed that the Dehcho Government would have extensive powers over the lands and resources of Dehcho Ndehe.

Canada has provided only a few preliminary comments to date. They have so far refused to negotiate jurisdiction over lands and resources, arguing that they must wait until the Pollard process of implementing the McCrank Report is complete.

### Jurisdiction Outside of Dehcho Ndehe - DCRMA

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 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 refused to begin any negotiations on a DCRMA until INAC completed an internal review of Neil McCrank's 2008 report on the NWT regulatory system and INAC completes internal discussions.

Early in 2010 the Minister of INAC announced that Canada will implement most of the McCrank recommendations and appointed John Pollard to represent Canada in consultations with First Nations and the GNWT. Those discussions are underway now, primarily in Yellowknife. As I said in my reports to you last year, if the DFN remain intent on establishing a DCRMA which is not governed by the MVRMA, it is not in the interests of the DFN to be drawn into a new, parallel negotiating process addressing the management of natural resources in the Dehcho Territory, either independently or a part of a coalition with settled regions which have already accepted the MVRMA in their land claim agreements. Any discussions with Canada on resource management should take place within the Dehcho Process.

Furthermore, the DFN should 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.

#### Preamble and Recognition of Dehcho Metis

We have prepared a draft Preamble which is based on the Dehcho Declaration of 1993. The draft Preamble has not yet been discussed at the negotiating table and Canada has not responded to it. We propose to add wording which would note the special circumstances and history of Dehcho Metis.

#### 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.

In early 2010, DFN tabled a draft AiP chapter on Expropriation which would allow the Dehcho Government to expropriate Crown land in certain circumstances, in addition to recognizing the authority of Canada and the GNWT to expropriate in some circumstances. Federal negotiators have advised that their mandate does not allow them to agree to the Dehcho Government having power to expropriate Crown land under any circumstances.

Canada and the GNWT are only prepared to recognize the authority of the Dehcho Government to expropriate interests within Dehcho Ndehe which were granted by the Dehcho Government.

DFN negotiators have agreed to remove Dehcho Government's power to expropriate Crown land and private lands from the draft AiP chapter, but suggested that these powers could be recognized in another chapter of the AiP.

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 virtually impossible to meet.

### 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".

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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."

Recently the GNWT changed their position. They now agree to recognize Dehcho jurisdiction over K-12 education, including over curriculum, including core 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.

### 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 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. If any commercial tree harvesting rights are protected they will be addressed in a separate chapter.

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

### Access

The draft chapter on access to Dehcho Ndehe by persons who are not Dehcho Citizens was drafted by federal lawyers and more than 70 footnotes were added to indicate DFN issues and concerns to be addressed by the main table.

Under other comprehensive land claims agreements Canada has the jurisdiction to enact legislation governing access by non-Natives to First Nations' settlement lands (selected lands), after consulting with the affected First Nations government. We have proposed that the Dehcho Government 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 the December, 2009 session in Edmonton, but has not yet been the subject of any negotiations. We are awaiting federal feedback on our proposals.

### Certainty

There would 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 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 clauses are not legally effective any rights, DFN will cede, release and surrender any rights which are not set out in the 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 “faint hope” provisions which allow for the remote possibility of later amending the final agreement to include “new” rights not related to lands or resources.

### **Land Use Plan**

The Planning Committee continues to work on very significant revisions to the Interim Land Use Plan, but their work is almost complete. Most of the revisions have been proposed 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 in 2006.

Issues which cannot be resolved by the Committee will soon be brought to the Main Table for negotiation. 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.

### **ADK**

In July 2008, Canada, the Acho Dene Koe First Nation and the GNWT signed a framework agreement to enter into comprehensive land claim negotiations outside of the Dehcho Process.

SKDB and NBDB have attempted to negotiate a boundary agreement with ADK, and sought consultations with Canada before the ADK process proceeds to the signing of an AiP. The attempt at negotiations stalled because ADK intransigence and Canada’s refusal to consult prior to the signing of an AiP. SKDB and NBDB have taken legal action seeking an order requiring Canada to consult with them before signing an AiP. The case was heard in Federal Court in Calgary in November and the parties are now awaiting the Court’s decision.

## **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.

In a meeting with the Minister of INAC in May, 2010, the DFN were assured that the interim withdrawal would be extended to at least October, 2012. However, on October 28, 2010 Canada allowed the subsurface withdrawal to expire, leaving the entire Edehzhie open to mineral staking, exploration and mining. The DFN were not consulted.

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 restores subsurface protection for that 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 which was protected from 2002 until October, 2010.

Lawyers for Canada have now 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 unless DFN file a motion to amend the application for judicial review to challenge the Dec., 2011 OiC.

The GC has instructed DFN lawyers to engage in consent to Canada's mootness motion, which would end the litigation, after first attempting to obtain a commitment from Canada to pay all or some of the costs incurred by DFN in litigation to date.

If the judicial review application is terminated, either on consent or as a result of Canada winning the mootness motion, 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

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direct action (ie. removing claim stakes) to prevent any such exploration. Similar declarations by DFN in the past have been effective in deterring staking.

**Next Steps**

The next negotiation sessions will be held Feb. 14-16 by video-conference.