
Chief Negotiator's Report on the Deh Cho Process

**Meeting with Federal Officials
September 17-18, 1999 - Fort Simpson**

September 22, 1999

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The meeting in Fort Simpson was called for the purpose of having DIAND officials present Canada's views on the issues which will be addressed in Phase I of the Deh Cho Process. Those issues are:

1. Interim Protection
2. Framework Agreement
3. Funding for DCFN participation in the process.

I. INTERIM PROTECTION

The DCFN has taken the position that an Interim Protection Agreement must be negotiated before substantive (Phase II) negotiations will begin. An interim measures agreement would withdraw and protect some Deh Cho lands from development pending the negotiation of a final agreement recognizing Deh Cho First Nations' jurisdiction over the land. An Interim Protection Agreement should also provide for joint First Nations / DIAND decision making on lands and resources issues as a temporary measure, pending the completion of the Phase II negotiations.

Robin Aitken, DIAND's Chief Negotiator outlined Canada's position on interim measures: interim measures must work within existing federal legislation, including the *Territorial Lands Act* and the *Canada Mining Regulations*. Amendments to federal laws to formally recognize Deh Cho jurisdiction will only occur through Phase II negotiations. Interim measures would also be without prejudice to the parties' positions during Phase II negotiations.

Aitken stated that Canada is prepared to issue an Order in Council which would withdraw some Deh Cho lands from development during negotiations. The withdrawals would be subject to existing third party interests. It would be necessary to come to an agreement with Canada on criteria for withdrawals. In my view, the DCFN should push for the criteria to be as broad as possible, to protect harvesting areas, in addition to important rivers, cultural and spiritual sites, and ecological sites. At this point, DIAND is only proposing to protect significant cultural and spiritual sites.

With respect to approving applications for land use permits on lands which are not withdrawn, DIAND proposes that the Interim Protection Agreement create a tri-partite "mini-panel" which would have authority for approving applications for land use permits in the Deh Cho. DIAND proposes that the mini-panel be comprised of three members: one appointed by the Deh Cho, one by Canada, and a Chair appointed by the Mackenzie Valley Land and Water Board (MVLWB), which is created by Part IV of the MVRMA.

DIAND also proposes that the DCFN appoint a representative to the MVLWB and a representative to the **Mackenzie Valley Environmental Impact Review Board (MVEIRB)**. The MVEIRB has responsibility for screening proposals for development which could potentially impact the whole Mackenzie Valley. Aitken stressed that Canada "understands the Deh Cho position on the MVRMA process", but DIAND believes that it could be used as a temporary measure to assist in developing the DCFN's capacity for land and resource management.

In my opinion, the "mini-panel" is a very good start. It is quite similar to the types of co-management arrangements usually found in final agreements. It goes well beyond anything Canada has previously considered in interim protection agreements. However, the DCFN should recommend that a neutral Chair be appointed by Canada and the DCFN, not by the MVLWB.

Participation in the MVEIRB and MVLWB, however, is potentially dangerous. There is a risk that interim participation in the MVRMA process might become permanent if the DCFN is not careful to maintain its position on the MVRMA's lack of legitimacy. Participation in the MVRMA process could be done on an interim (temporary) basis without prejudicing the DCFN's position, provided the DCFN is clear that any involvement is only a temporary measure, but I recommend that the DCFN not accept DIAND's proposal at this time. This proposed interim measure might be worth a second look if DIAND provides assurances that it is totally without prejudice to the DCFN's goal in Phase II: complete jurisdiction over Deh Cho lands and resources.

Significantly, DIAND is also proposing to respect the Deh Cho moratorium on oil and gas exploration without community support. While this could be a very significant part of an interim measures package, it must be more than merely a "gentlemen's agreement". It should be clearly spelled out and included in the text of an Interim Protection Agreement.

DIAND also proposes to freeze the issuance of **prospecting permits** without community support. A prospector's permit provides the holder with exclusive rights to explore large areas and to stake claims within that area. This part of the interim measures package would be greatly improved if DIAND also undertook not to record (register) any new **mineral staking** claims without community support. This would be difficult to do under the existing *Mining Regulations*, but it is certainly not impossible.

DIAND also stated that Canada wishes to see the GNWT participate in the process. Without the GNWT's participation, interim measures will not address forestry or municipal lands.

RECOMMENDATIONS

1. That the DCFN accept in principle the "mini-panel" proposal, but with a Chair appointed jointly by Canada and the DCFN. Further, the mini-panel must be more than merely an "advisory" committee. It must have a lead role in deciding whether or not land use permits are issued.
2. That the DCFN agree in principle that criteria should be developed for withdrawal (by Order in Council) of lands requiring protection. The DCFN's view is that this process should be part of an overall land use planning strategy which identifies three "zones" of land within each First Nation's territory.
3. That the DCFN reject, at this time, any participation in either the MVLWB or the MVEIRB.
4. That the DCFN reject any role for the GNWT in negotiations or agreements on lands and resources.
5. That the DCFN seek Canada's assurance that the moratorium on oil and gas exploration will be included in the text of the Interim Protection Agreement.
6. That an Interim Protection Agreement include a moratorium on mineral staking without community support, in addition to a moratorium on the issuance of prospector's permits.
7. That an Interim Protection Agreement provide assurances that the Deh Cho First Nations will have sufficient funding to fully participate in the "mini-panel" and to undertake all necessary land use planning and mapping work.

II. Framework Agreement

A Framework Agreement will guide the Phase II (substantive) negotiations. The Framework Agreement will state the objectives of the Phase II negotiations, identify the parties to the Phase II negotiations, and set the agenda for negotiations.

DIAND briefly addressed its' position with respect to the contents of a Framework Agreement. While there will probably be broad areas of agreement between Canada and the DCFN on the objectives of the negotiations (the 21 Principles) and the agenda for negotiations, it will clearly be difficult to reach an agreement on who the parties to the negotiations will be.

DIAND continues to insist that the GNWT must be a party to the Framework Agreement and a full party to all Phase II negotiations. Aitken stressed that Canada will not negotiate on behalf of the GNWT and that certain issues (ie. health, education, social services) which Canada regards as matters of GNWT jurisdiction will therefore not be on the table unless the GNWT is at the table. Aitken also proposed that the DCFN Leadership meet with the GNWT in order to find out what the GNWT would bring to the table if it were a party.

Despite DIAND's position, I believe that it may be possible to achieve a Framework Agreement without the GNWT as a party. The DCFN could propose a Framework Agreement which has a limited "priority agenda" consisting of issues which could be addressed bilaterally between Canada and the DCFN, without the involvement of the GNWT. The priority agenda would focus on lands and resources but probably would not include health, social services or education. The Agreement would also contain a commitment by both Canada and the DCFN to continue exploring options for entering into negotiations on those issues, without prejudice to either party's position with respect to the involvement of the GNWT.

A commitment to proceed to negotiations on the priority agenda (lands and resources) while temporarily shelving other issues would have the added advantage of keeping the negotiations process small enough and focussed enough to allow for full community involvement in the process. In my view it will be very difficult to maintain community involvement in the process if the negotiations become a huge process in which numerous issues are negotiated simultaneously by various teams of negotiators. Such huge, complex negotiations processes usually end up being driven by a small group of technicians, rather than by the communities.

RECOMMENDATIONS

1. That the DCFN continue to insist that the GNWT should not be a party to any negotiations concerning lands or resources.
2. That the DCFN propose a two-party (Canada / DCFN) Framework Agreement which would contain a brief priority agenda (lands and resources and other matters currently under federal jurisdiction), together with a commitment by the parties to revisit the issue of GNWT involvement once an agreement in principle is reached on the priority agenda items.
3. That the DCFN invite the GNWT to provide the DCFN with a detailed, written position paper, setting out exactly what they would bring to the table if they were a party. After receiving such position paper, the DCFN might consider meeting with the GNWT, outside of the negotiations process.

III. FUNDING

DIAND's officials outlined three types of funding which could be accessed by the DCFN:

- i) Negotiations Preparedness Funding - This is a new funding program which is intended to help First Nations prepare for negotiations. It is grant funding which can be used for community consultations (such as the Leadership Workshop) and for the recruitment and training of a Negotiating Team. The DCFN has applied for, and expects to receive, \$400,000 from this fund during the current fiscal year.
- ii) Self-Government Funding - This funding is also in the form of grants rather than re-payable loans. This funding can be accessed by the DCFN for up to a maximum of four years. However, it may be difficult for the DCFN to fully access these funds if the GNWT is not a party to the negotiations, since these funds are intended to finance negotiations on many of the issues (education, health and social services etc...) which Canada refuses to negotiate without the GNWT's involvement. If the Framework Agreement does not include a commitment to address those issues soon, DIAND might refuse to provide full self-government funding.
- iii) Loan Funding - Presently, this is still Canada's only policy for funding negotiations on lands and resources issues. First Nations which finance their negotiations through loans are expected repay those loans out of the cash component of a settlement. I pointed out to DIAND officials that the DCFN considers this policy offensive and simply a means of controlling the negotiations process. I also pointed out that the Deh Cho First Nations are clear that there will not be any "land sales" in this process - the entire Deh Cho territory must remain intact. Therefore, there may not be any "cash component" in a final agreement to deduct loan re-payments from. DIAND responded that the loans are only re-payable if there is a settlement. If the DCFN refuses to sign a final agreement, the loans would not be repayable.

If Canada can be persuaded to sign a Framework Agreement which commits the parties to address only a short list of "priority" items at this time, it may be possible to avoid loan funding. Grant funding from the Self-Government Negotiations Fund and the Negotiations Preparedness Fund should be sufficient for at least three years, if the negotiations process is kept relatively small and manageable. As noted above, I believe that it is in the DCFN's interests, for several reasons, to avoid large negotiations on many issues at once.

RECOMMENDATIONS

1. That an application for Self-Government funding be submitted.
2. That the DCFN endeavour to avoid the need for loan funding by keeping the negotiations process limited to a few agenda items at a time.