

Chief Negotiator's Report on the Deh Cho Process

Bilateral Discussions - November 4-6/99 Fort Providence

The November 4-6 meeting in Fort Providence was the second bilateral (two-party) negotiating session. (The first was held in Fort Simpson, September 17-18). The meeting in Fort Providence was attended by Grand Chief Michael Nadli, Assistant Negotiator Herb Norwegian and myself. This report is intended to highlight the main issues which arose at the meeting. A full transcript of the meeting is available from the DCFN office upon request.

I. INTERIM MEASURES

I) Background

The DCFN has taken the position that an Interim Measures 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 Measures 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.

Canada's position on interim measures is that 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 over lands and resources will only occur through a final agreement, at the end of Phase II negotiations. Interim measures would be without prejudice to the parties' positions during Phase II negotiations.

II) Canada's Position on Interim Measures

At the September 17-18 meeting, Canada's negotiators 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. With respect to approving applications for land use permits on lands which are not withdrawn, DIAND proposes that the Interim Measures Agreement create a three member "mini-panel" which would have authority for approving applications for land use permits in the Deh Cho. The mini-panel would have one member appointed by the Deh Cho, one by Canada, and a Chair appointed by the Mackenzie Valley Land and Water Board (MVLWB).

Unless the GNWT is a party to an Interim Measures Agreement, the mini-panel would not have jurisdiction over land use permits for forestry or for use of municipal lands (Commissioners Lands).

DIAND is also proposing to respect the Deh Cho moratorium on oil and gas exploration without community support.

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. Robin Aitken, DIAND's Chief Negotiator, 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.

The proposed "mini-panel" is similar to the types of co-management arrangements usually found in final land claim agreements rather than in interim measures. It is certainly better than anything Canada has previously considered in interim measures agreements, however 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, if it is clear that any involvement is only a temporary measure. DIAND would have to provide assurance that any interim use of the MVRMA is temporary and is totally without prejudice to the DCFN's goal in Phase II: complete jurisdiction over Deh Cho lands and resources.

III) DCFN's Position

At the November 4-6 meeting, I tabled a proposal for interim measures which was approved by a Leadership teleconference on November 2. I proposed an Interim Measures Agreement based on the following principles:

- i) Canada would agree not to issue any leases or land use permits, or register any mineral claims, without the consent of affected First Nations;
- ii) The DCFN will, in consultation with DIAND, develop a land use plan for the Deh Cho which will identify lands which will be withdrawn entirely (surface and sub-surface), lands which will be partially withdrawn (sub-surface only), and lands (called "development zones") which will be open for development;

- iii) Canada and the DCFN would agree to be bound by the land use plan developed by the DCFN; and
- iv) Canada and the DCFN will review the MVRMA in the context of Phase II negotiations and may decide to integrate some aspects of the Deh Cho resource management regime into it.

Under the proposal which I tabled in Fort Providence, there would be no need to use the MVRMA in an Interim Measures Agreement. The MVRMA would only be used in the Deh Cho if the DCFN agrees in Phase II negotiations to use some parts of it (ie. for approval of projects which could have impacts outside of the Deh Cho). Also, there would be no need for any immediate land withdrawals since no permits or leases could be issued without First Nations' consent. Land withdrawals would occur later, on the basis of the regional land use plan which would be developed by the DCFN.

Canada's negotiators have indicated that the DCFN proposal "will probably not be acceptable", although they are prepared to agree that no permits will be issued for oil and gas exploration without First Nations' consent. With respect to mineral staking, they are not prepared to interfere in an Interim Measures Agreement with what they see as the "right" of prospectors to stake any land and thereby acquire "rights" to develop those lands. They are prepared to discuss this in Phase II.

Also, Canada's negotiators indicated that they do not see an alternative to using the MVRMA as the legal basis for an Interim Measures Agreement. I responded that if DCFN accepted using the MVRMA on an interim basis, it would have to be clearly understood that the DCFN will never accept the entire MVRMA as a final agreement.

I also advised Canada's negotiators that if some Deh Cho lands are "withdrawn" in an Interim Measures Agreement in order to protect them during the Phase II negotiations, it must be understood that the DCFN will never agree to "land selection" or the establishment of "reserves" of any kind. I reiterated that the DCFN will not conclude a final agreement which does not provide for regional and local Deh Cho governments having jurisdiction over the entire Deh Cho territory. Anything less would be inconsistent with the Deh Cho Proposal and the Deh Cho Declaration.

Canada's negotiators have promised to give a full response to the DCFN proposal at the next negotiating session (probably in December).

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.

The DCFN negotiating team tabled a draft Framework Agreement on November 4. The DCFN's proposed Framework Agreement is bi-lateral (Canada and the DCFN would be the only parties) and is essentially based upon the 21 Common Ground Principles. The next day (Nov. 5) we received Canada's initial response.

Robin Aitken described the DCFN's proposed Framework Agreement as "a very good start" and gave a few preliminary comments on the DCFN proposal. He promised to provide a detailed response at the next negotiating session in December. Most significantly, Aitken expressed no serious concerns with the proposed statement of the objectives of the Phase II negotiations:

"2.1 The objective of the negotiations will be an agreement, or series of agreements, which build upon the existing Treaties by clarifying the roles, jurisdiction(s) and responsibilities of the parties in governing and providing services to the lands and people of the Deh Cho region. The parties intend that the negotiations will result in a public government in the Deh Cho region, based upon Dene laws and customs, which will be the primary government responsible to deliver programs and services to all residents of the Deh Cho."

The above statement of objectives is taken from the 21 Principles. Aitken stated that Canada will probably accept this as the stated objectives of the negotiations, but that the GNWT might not. (In my November 12 letter to Rick Bargery of Premier Antoine's office, I asked him to advise as to whether the GNWT would support this statement of objectives. The GNWT has been asked to respond to my letter by November 26).

Canada 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.

The 21 Principles

I believe that some DCFN Leaders may be under the impression that Canada has fully accepted all of the 21 Common Ground Principles. However, it is important to note that DIAND has never fully accepted them. Robin Aitken stated again in Ft. Providence that DIAND's position is simply that it agrees with some of the Principles, and that it will "agree to discuss the 21 Principles in the negotiations". Thus, Canada may not agree to an explicit endorsement of the 21 Principles in the Framework Agreement. Aitken advised that Canada will agree to "address" the 21 Principles in the Framework Agreement, but will not necessarily agree to the content of all of the Principles. I have asked the federal negotiators to address this issue in detail at our December negotiating session.

III. Boundaries

The boundaries of the Deh Cho territory do not need to be finally identified in Phase I negotiations. That can be a subject for Phase II negotiations. However, you should be aware that Canada's negotiators stated in Ft. Providence that it will be their position in Phase II that the northern boundary of the Deh Cho should not include the territory of the Tulita Mountain Dene. It is Canada's position that the Mountain Dene are parties to the Sahtu Agreement.

Also, for the purposes of an Interim Measures Agreement it will be necessary to adopt a "working definition" of the boundaries of the Deh Cho. This would be the boundary within which a Deh Cho Interim Measures Agreement applies. It is my view that this "working definition" of the Deh Cho boundary can and should be set out in an Interim Measures Agreement without prejudice to the position that might be taken later, either in Phase II negotiations or in litigation.

Herb Norwegian addressed the boundary issue on behalf of the Deh Cho Negotiating Team in Fort Providence. He explained how the Deh Cho position on its boundaries was arrived at and advised that efforts to reach an agreement with the Dogribs have progressed very well over the past year. Herb is optimistic that an agreement with the Dogribs will be reached.

With respect to Deh Cho territory in B.C., Alberta and the Yukon, it is Canada's position that it may be necessary to file separate claims. In B.C. in particular, there is a claims process which Canada is a party to. Canada is unable, according to its policies, to discuss treaty or Aboriginal title issues in B.C. outside of the B.C. treaty negotiations process. The ADK and Trout Lake will need to be consulted on this issue. It may be advisable to put the governments of B.C. and Alberta on notice that it is the Deh Cho position that Treaties 8 and 11 confirmed Deh Cho First Nations' jurisdiction over parts of those provinces.

IV. Hay River Reserve

The federal negotiators also raised an important issue which will need to be addressed in Phase II negotiations. As you know, the Deh Cho Proposal calls for the establishment of a public government throughout the Deh Cho territory. On the surface, this goal appears to be inconsistent with the concept of parcels of "reserve" land within the Deh Cho territory. It is my understanding that the Hay River First Nation has stated that it intends to keep its reserve. It is not clear to me at this time how the continued existence of reserves after the signing of a final agreement can be consistent with the concept of a Deh Cho public government having jurisdiction over the entire Deh Cho territory. The Hay River First Nation will need to address this issue during Phase II negotiations.

V. Nahanni National Park

Representatives of Parks Canada addressed the meeting on November 5 and 6. Parks Canada is interested in expanding Nahanni National Park to include the entire south Nahanni watershed. We responded by advising that ultimately the Park should be included in the territory governed by Deh Cho First Nations government. In the interim, the Park could be co-managed by First Nations and Parks Canada.

The affected First Nations, particularly Nahanni Butte should provide the Deh Cho Negotiating Team with direction on this issue.

VI. Horn Plateau and Mills Lake - Protected Areas Strategy

A group of four Deh Cho communities (LKFN, DGGDC, PKFN and JMR) have been working towards the protection of the Horn Plateau and Mills Lake areas under the new PAS. Prior to the November 4-6 negotiating session, we were notified by Bill Carpenter that some DIAND officials (including some members of Canada's negotiating team) had approached the World Wildlife Fund with a proposal to protect these areas under land withdrawals in an interim measures agreement, rather than through the PAS.

I advised Canada that the DCFN would prefer to let the PAS process continue. The PAS is apparently progressing well whereas there is no guarantee at this early stage of the Deh Cho Process negotiations that an Interim Measures Agreement will ever be reached. The PAS appears to be a better option at this time.

VIII. Intergovernmental Process

The federal negotiating team outlined their view of the proposed Intergovernmental Process. According to Canada (and apparently this is also the view of the GNWT), the Intergovernmental Process is concerned with addressing issues of common concern to all governments in the NWT, including financing of self-government and resource revenue sharing. According to Canada and the GNWT, these are issues which cannot be effectively addressed within a single region such as the Deh Cho, but need to be addressed in forum which includes all First Nations and governments in the NWT. Both Canada and the GNWT would very much like to see the DCFN become actively involved in developing an Intergovernmental Process.

I disagree. I believe that the DCFN should be very cautious about participation in the proposed Intergovernmental Process. In my view, the Deh Cho Process is unique, and all of the issues which Canada and the GNWT wish to address in the Intergovernmental Process can be addressed in the Deh Cho Process. I am particularly concerned that the primary goal of the Intergovernmental Process might be to gain access to potential revenues from oil and gas in the Deh Cho. If the DCFN does participate in the Intergovernmental Process, it must be careful not to undermine its position on keeping oil and gas revenues in the Deh Cho. I recommend that the DCFN participate in the Intergovernmental Process only to the extent necessary to monitor it and keep abreast of any attempts to address the "sharing" of Deh Cho oil and gas revenues.