

Chief Negotiator's Report on the Deh Cho Process

**Meeting with Federal Officials
January 24-26 - Hay River**

February 2, 2000

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Bilateral Discussions - January 24-26, Hay River Reserve

The January 24-26 meeting in Hay River was the third bilateral (two-party) negotiating session. (The first was held in Fort Simpson, Sept. 17-18; the second was in Ft. Providence, Nov. 4-6, 1999). The meeting in Hay River was attended by myself, Assistant Negotiator Herb Norwegian, Chief Karen Thomas, and Elders Jim Thomas and Daniel Sonfrere. Band Councilors from the Acho Dene Koe and Hatlodehechee First Nations also attended and Leona Louie attended to provide administrative support. Bob Reiter, legal counsel to the ADK also attended.

This report is intended to highlight the main issues which were discussed at the meeting. Minutes of the meeting, and/or a full transcript of the meeting, are available from the DCFN office upon request.

I. INTERIM MEASURES

i) Background

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 First Nations' jurisdiction over the land. An interim measures agreement should also provide for a strong role for First Nations in decision-making on lands and resources issues as a temporary measure, pending the completion of the Phase II negotiations.

Canada's position is that interim measures agreements 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.

Proposed Interim Measures Agreement

Both Canada and the DCFN negotiators have now tabled proposed interim measures agreements. The following is a summary of the areas of common ground and differences between the Deh Cho position and Canada's position on the main interim measures issues:

Land Withdrawals

Canada is prepared to issue an Order in Council which would withdraw some Deh Cho lands from development during negotiations. Canada's position is that the withdrawals would be subject to existing third party interests.

The Deh Cho position is that lands and waters to be withdrawn should be identified through a land use planning process. (See paragraph 11 of draft agreement). Canada has not rejected this idea in principle, but has questions about how 3rd party interests would be affected and how a Deh Cho Land Use Plan

would affect the jurisdictions of authorities such as the MVLWB.

Co-Management

With respect to approving applications for land use permits on lands which are not withdrawn, both Canada and the DCFN have agreed in principle that the Interim Measures Agreement could create a three member Panel which would have authority for approving applications for land use permits in the Deh Cho. The 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). The DCFN has stated that the Chair should either be a person who is acceptable to both the DCFN and Canada.

The Panel will not have jurisdiction over the sale or leasing of lands - only the issuance of land and water use permits. DIAND will continue to sell and lease land in the Deh Cho, subject to a consultation requirement (see below).

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

Participation in the MVLWB 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 and without prejudice to the DCFN's goal in Phase II: complete jurisdiction over Deh Cho lands and resources.

Consultations

The federal draft agreement would require DIAND to consult with affected First Nations on a few decisions (the creation of new Parks) which will not be under the jurisdiction of the Deh Cho Panel. Canada has not, however, proposed that the DCFNs be fully consulted on all decisions which would remain under DIAND jurisdiction under interim measures.

In our view, DIAND should be required to negotiate in good faith to address the concerns raised by First Nations before any permits are issued or land is sold or leased. (see definition of "consultations" in DCFN draft agreement). Those negotiations should also, in some cases, include negotiation on royalties and compensation for Deh Cho communities whose lands are affected. Canada has not yet responded to our proposed definition of "consultations".

Oil and Gas Exploration

Canada has agreed to make a commitment in the interim measures agreement to respect the Deh Cho moratorium on oil and gas exploration without community support.

The Mackenzie Valley Resource Management Act (MVRMA)

Part 4 of the MVRMA will become law on April 1, 2000, despite the objections of the DCFN. Part 4 establishes the Mackenzie Valley Land and Water Board (MVLWB) as well as smaller regional Boards or Panels of the MVLWB. The MVLWB will have jurisdiction to grant land and water use permits for projects which could have impacts throughout the Mackenzie Valley. The smaller regional Boards will have jurisdiction to issue permits for projects and developments which will only have impacts within a particular region. The proposed 3 member Deh Cho Land and Water Panel would be one such regional Board. Other regional Boards will be established in the Gwichin and Sahtu regions. The Chair of the Deh Cho Panel would sit on the MVLWB, in addition to sitting as the Chair of the Deh Cho Panel.

The DCFN could also appoint a representative to the Mackenzie Valley Environmental Impact Review Board (MVEIRB). The MVEIRB has responsibility for screening proposals for development which could potentially have environmental impacts on the whole Mackenzie Valley.

Nahanni National Park

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. Nahanni Butte First Nation has indicated that it wishes to assume co-management of the Park as soon as

possible. Nahanni Butte is also interested in expanding Nahanni National Park to include the entire south Nahanni watershed. Parks Canada has no problem "in principle" with either proposal, but it is not yet clear whether we will be able to agree on what "co-management" means. Parks Canada is currently working on a Management Plan to govern the Park for the next 5 years. They intend to finish the Plan by June 30, 2000. In our view the Management Plan should be jointly written by the DCFN, Nahanni Butte and Parks Canada, as a first step towards co-management of the Park.

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.

Canada and the DCFN have each tabled draft Framework Agreements. The DCFN's proposed Framework Agreement is bilateral (Canada and the DCFN would be the only parties) and is essentially based upon the 21 Common Ground Principles.

The DCFN proposed framework agreement states that the following are 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.”

Canada’s proposed framework agreement has a much more general statement of the objectives of the negotiations:

“The objective of the negotiations is to complete the Deh Cho final agreement in order to set out rights relating to land, resources and self-government.”

The GNWT, although it is not a party to the negotiations, has indicated that it has no problem with the DCFN’s statement of objectives.

The GNWT

Canada continues to insist that the GNWT must be a party to the Framework Agreement and a full party to all Phase II negotiations. Canada will not negotiate on behalf of the GNWT and certain issues (ie. health, education, social services, forestry, municipal lands) which Canada regards as matters of GNWT jurisdiction will therefore not be on the table unless the GNWT is at the table.

At the January 20-22 workshop in Yellowknife, the DCFN Leadership decided attempt to negotiate a Political Accord with

the GNWT which would address the DCFN's concerns with respect to the participation of the GNWT in the Deh Cho Process. The Leadership also decided to appoint a working group to negotiate the Accord. The working group consists of the Grand Chief, Chief Rita Cli, Elder Leo Norwegian, myself, Assistant Negotiator Herb Norwegian and Peter Russell, the former Ministerial Envoy.

A proposed Accord has now been drafted by the working group and has been sent to the Premier and Jim Antoine for their comments.

III. Boundaries / Overlap

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, Canada's negotiators have stated 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. This "working definition" of the Deh Cho boundary can 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.

With respect to Deh Cho territory in B.C., Alberta and the Yukon, 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. It is not yet clear, however, whether the ADK wishes the DCFN to pursue these issues on its' behalf, or whether it wishes to pursue these issues on its' own.

IV. 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 a 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.

The DCFN should be very cautious about participation in the proposed Intergovernmental Process. 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.