

Chief Negotiator's Report on the Deh Cho Process

Negotiating Session with Federal Officials March 29-31, West Point

April 10, 2000

ISSUES

The following issues emerged at the March 29-31 negotiating session at West Point. These issues need to be addressed by the DCFN Leadership:

1. Should the GNWT be allowed to participate in the Deh Cho Process before they have answered the DCFN's questions about their role in the Process?
2. Should land withdrawals be based on Dene land use planning principles, even though such a process will take at least a year to identify lands for withdrawal?
3. Should a joint working (DCFN - Canada) group be set up immediately to begin look at the issue of Nahanni Park co-management and expansion?
4. Should the DCFN submit a claim in B.C. and the Yukon in order to begin the process of addressing the rights of the ADK and Trout Lake in those areas? If so, how should the DCFN participate in those negotiations?

Executive Summary

a) Interim Measures

Progress has been made on an interim measures agreement with Canada. We have now agreed to the establishment of a 3 member Deh Cho Land and Water Panel which will have jurisdiction over the issuance of land and water use permits. One member of the Panel will be appointed by the DCFN. The other 2 will be appointed by the Chair of the Mackenzie Valley Land and Water Board, in consultation with the DCFN.

The Panel will be set up under the MVRMA as a temporary measure, until a Deh Cho Resource Management Authority can be set up under a final agreement. Applicants for land or water use permits will be required to consult with First Nations before their application for a permit is submitted to the Panel. Also, the Panel will conduct further consultations with affected First Nations after an application has been submitted.

So far, no funding has been committed for First Nations' participation in the consultations. This issue still needs to be addressed by Canada.

We have also agreed that a land use plan will be developed for the Deh Cho. A land use plan will provide that some lands will be "withdrawn" in order to protect them from sale or lease or development during the negotiations. A land use plan will also provide that some lands, to be identified by First Nations will be opened up for development and exploration, provided that First Nations are partners in the development.

Progress was also made on an interim measures agreement for Nahanni Park. Canada has now agreed to our proposal to immediately establish a joint working group to review and approve a 5 year management plan and to begin negotiations on an interim co-management agreement. Our proposal was tentative and requires the support of the DCFN Leadership.

b) Framework Agreement

Unfortunately, no further progress was made at West Point on a Framework Agreement. The major outstanding issue which stands in the way of signing a framework agreement is the GNWT. The GNWT has still not responded to the issues set out in the Political Accord which was sent to them by the DCFN in January. They have refused to answer our questions about their role in the Deh Cho Process and have refused to say whether they would support an interim measures agreement by refraining from issuing forestry permits without First Nations consent. They have also refused to answer my questions about what the GNWT sees as the goals / objectives of the Deh Cho Process.

So far, the GNWT has only provided vague statements to the effect that they "respect the treaty relationship between Canada and the Dene / Metis of the Deh Cho, but they have refused to be specific about what issues they view as being strictly bilateral. For example, they have refused to say whether they expect to be involved in negotiations on issues around resource revenue sharing.

BACKGROUND

The March 29-31 meeting in West Point was the fifth bilateral negotiating session since the Deh Cho Process began in September, 1999. (The first session was held in Fort Simpson, Sept. 17-18, 1999; the second was in Ft. Providence, Nov. 4-6, 1999; the third in Hay River, January 24-26, 2000; the fourth in Ft. Simpson March 10-12, 2000). The meeting in West Point was attended by myself, Assistant Negotiator Herb Norwegian, Elders Jim Thomas, DCFN land use planning consultant Petr Cizek, and several member of the West Point community.

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. Audio recordings are also available, in Slavey or English.

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.

Land Withdrawals (Sales and Leases of Deh Cho Lands)

Canada is prepared to issue an Order in Council which would withdraw some Deh Cho lands from sale or lease during negotiations. The withdrawals would be subject to existing third party interests. In other words, anyone who currently has a right to occupy or use those lands would continue to have the same rights after the lands are withdrawn, but no one else would be able to buy or lease those lands once they are withdrawn.

The Deh Cho position is that lands and waters to be withdrawn should be identified through a land use planning process. (See draft interim measures agreement). Canada has now accepted 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. There are also still outstanding issues about who will make up the Planning Committee and who the Planning Committee will report to. Funding for the development of the plan is also still an issue which has not been resolved.

Land and Water Use Permits

Canada and the DCFN have agreed that the *Mackenzie Valley Resource Management Act (MVRMA)* could be used on an interim (temporary) basis to establish a three member "Deh Cho Land and Water Panel" which would have authority for approving applications for land use permits and water use permits in the Deh Cho. The Panel would have one member appointed by the Deh Cho, and two members appointed by the Mackenzie Valley Land and Water Board (MVLWB), in consultation with the DCFN.

The DCFN Leadership has decided that it will use the MVRMA process on an interim (temporary) basis, as part of an interim measures agreement, without prejudice to the DCFN's goal in the Deh Cho Process: complete jurisdiction over Deh Cho lands and resources.

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 have the power to sell and lease land in the Deh Cho which is not withdrawn, subject to a consultation requirement (see below).

Also, unless the GNWT is a party to an Interim Measures Agreement, the Panel may not have jurisdiction over land use permits for forestry or for use of municipal lands (Commissioners Lands). We have asked the GNWT whether they would agree not to issue any forestry permits or approve sales or leases of municipal lands without First Nations' consent, but they have not responded.

Consultations

An interim measures agreement will require that First Nations be consulted prior to any decisions to issue land use permits or to sell or lease lands in the Deh Cho. "Consultations" must be much more than the type of "consultations" which DIAND currently conducts with First Nations.

We have proposed that applicants to the Deh Cho Land and Water Panel for land or water use permits be required to consult with affected First Nations before they submit an application for a permit.

With respect to sales and leases of lands, we propose that there be good faith negotiations with affected First Nations before any lands are sold or leased. 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 proposal.

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 First Nations' support.

Nahanni National Park Reserve

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.

On March 3, 2000, however, Canada tabled a new draft interim measures agreement which contained no commitment to negotiate an interim co-management arrangement for the Park. Instead, Canada's March 3 proposal only contained a commitment to negotiate a "co-operative" management arrangement as part of a Deh Cho final agreement. We have indicated to Canada that an interim co-management arrangement for the Park is very important and that the March 3 proposal was completely unacceptable.

At the March 29-31 negotiating session in West Point, Parks Canada officials indicated that they have no problem "in principle" with the DCFN proposal. We proposed that a joint working group be appointed to immediately begin work on drafting and approving a 5 year management plan for the Park. The management plan could look at both co-management and Park expansion.

Canada agreed to our proposal, but advised that they are not yet able to provide any funds for the working group.

Although there is not yet any funding for the Nahanni Park working group, I recommend that the DCFN immediately appoint members to the proposed working group and set up a meeting with Parks Canada officials to begin work on the 5 year management plan. I recommend that the DCFN representatives on the working group be:

- Chief Peter Marcellais
- Herb Norwegian
- Petr Cizek

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.

There is no substantial agreement between Canada and the DCFN on the wording of a Framework Agreement. The major obstacle is the GNWT. The GNWT has still not responded to the issues set out in the Political Accord which was sent to them by the DCFN in January. They have refused to answer our questions about their role in the Deh Cho Process and have refused to say whether they would support an interim measures agreement by refraining from issuing forestry permits without First Nations consent. They have also refused to answer my questions about what the GNWT sees as the goals / objectives of the Deh Cho Process.

So far, the GNWT has only provided vague statements to the effect that they "respect the treaty relationship between Canada and the Dene / Metis of the Deh Cho, but they have refused to be specific about what issues they view as being strictly bilateral. For example, they have refused to say whether they expect to be involved in negotiations on issues around resource revenue sharing.

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.”

The GNWT has refused to say whether it supports this 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 was drafted by the working group and was sent to the Premier and Jim Antoine for their comments on February 2. On March 16, members of the working group met with officials representing the GNWT. The GNWT officials proposed an Accord which is fundamentally different from the Accord proposed by the DCFN. The Accord proposed by the GNWT is very general and does not address the DCFN's concerns about GNWT participation in the Deh Cho Process. The GNWT officials at the March 17 meeting also indicated that they would prefer to address the DCFN's specific concerns at the negotiating table, with federal officials present.

At the March 29-31 negotiating session, the GNWT observers were given an opportunity to speak. We had indicated to them that we expected them to address the DCFN's concerns. Unfortunately, they did not. Instead, they simply repeated the same "motherhood" statements which have been said in previous letters from Jim Antoine.

Under the circumstances, I recommend that the GNWT not be invited to send observers to any further meetings of the Deh Cho Process, until they have answered the questions which were put to them in November and again in the Political Accord in January.

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.

With respect to Deh Cho territory in B.C., Alberta and the Yukon, it will 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 would 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.