

Chief Negotiator's Report on the Deh Cho Process

July 31, 2001

A negotiating session was held July 9-11, 2001 on the Hay River Reserve. The meeting was attended by myself, Chiefs Pat Martel, Judy Kotchea and Leon Konisenta, Negotiator Herb Norwegian, lands and resources advisor Petr Cizek, and several HR reserve community members and elders. This report is intended to highlight the main issues which were discussed at that meeting.

Executive Summary

This was the first Phase 2 negotiating session following the signing on May 23 of the Framework Agreement and Interim Measures Agreement. The meeting was intended to address the following issues:

1. Hay River Reserve Specific Claims
2. Land Withdrawals
3. Interim Resource Development Agreement, including resource revenue sharing and terms and conditions for Mackenzie Valley Pipeline
4. Tabling of parties' positions on an Agreement-in-Principle
5. Implementation of the IMA

The session on the HR reserve consisted mainly of the DCFNs negotiating team explaining our position on land withdrawals, resource revenue sharing and the jurisdictions of a Deh Cho government which would be recognized in an AiP. The federal government also outlined its position on these issues, although in much less detail than the Deh Cho position. The positions tabled by Canada on these issues was very disappointing.

1. Hay River Reserve Specific Claim

The Hay River Reserve decided to hold this part of the meeting "in camera". Although the federal negotiators, including Robin Aitken, were allowed to stay for this part of the meeting, the DCFNs negotiating team was asked to leave the room. We therefore have nothing to report on this part of the meeting.

2. Land Withdrawals.

Land withdrawals are the primary land protection measure in the Interim Measures Agreement. Canada and the DCFNs must now negotiate an agreement which will identify lands to be protected from development through an Order in Council of the federal government. Lands which have been withdrawn can not be sold, staked or leased for development. They are to be protected for traditional uses.

We advised Canada that in our view, the purpose of the withdrawal negotiations should be to identify lands in the Deh Cho which will be designated as "Development Zones". Development Zones will be areas which are identified through land use mapping as being areas where there is little or no traditional use, but high development potential. These Development Zones could be fast-tracked for oil / gas exploration, or other economic development, provided suitable benefits and revenue sharing agreements have been negotiated with affected communities. All lands not identified as Development Zones would be withdrawn.

We also explained that it is the DCFNs view that the identification of Development Zones should be based solely on documented evidence such as job creation needs, resource potential, environmental sensitivity, and traditional land uses. The DCFNs will provide Canada with digital and hard copies of the natural resource data contained in the Deh Cho Atlas. Canada, in turn, should provide the DCFNs with any other relevant information which Canada may possess.

The federal response to the DCFN proposal was extremely cautious, but not entirely negative. They stated that it is still Canada's view that withdrawal

negotiations should begin with an assumption that all lands are open and that lands to be withdrawn will be agreed upon in the negotiations. They promised to discuss and consider the DCFNs proposal and respond at the next negotiating session.

In the meantime, we agreed that it is too soon to begin negotiating to identify lands for withdrawal since there is no agreement yet on how to approach these negotiations.

3. Interim Resource Development Agreement (IRDA)

Section 44 of the IMA provides:

44. Upon the signing of this Agreement, Canada and the Deh Cho First Nations will enter into negotiations for the purpose of concluding an agreement regarding resource development. The objective of the agreement will be to foster resource development in the Deh Cho territory and to accrue benefits from Canada to the Deh Cho First Nations in the interim of a Deh Cho Final Agreement. Subjects for negotiations may include federal resource royalties, the geographic scope of the agreement and its relation to the Deh Cho Final Agreement.

We advised Canada that the DCFNs position on implementing s. 44 is based upon DCFN Assembly and Leadership resolutions:

At the 2000 Assembly in Kakisa, the DCFN unanimously decided that the following conditions must be met before there will be any further resource development in the Deh Cho. Many of these conditions could be attached as terms and conditions to an exploration rights issuance (pre-bid qualifications). Others, such as land use planning and resource revenue sharing, will require negotiated agreements between the DCFN and Canada.

1. Land Use Planning - Authorizations and leases for oil and gas exploration and other resource development will only be issued for those parts of the Deh Cho Territory which have been identified by Deh Cho communities. Areas which First Nation communities decide must be protected will be off-limits for exploration or development.

2. **Resource Revenue Sharing** - Presently, all royalties and taxes and lease payments and license fees collected from oil and gas companies are paid to Canada. We require an interim resource revenue sharing agreement to ensure that a reasonable and fair share of royalties and other revenues stay in the Deh Cho to benefit our communities. This agreement must also provide for a significant Deh Cho role in setting royalty rates and other revenue collection rates.
3. **Environmental Monitoring** - Deh Cho First Nations must have an equal role with Canada in monitoring the environmental impacts of any developments. A formal process of environmental monitoring must be established through an agreement between Canada and the DCFNs.
4. **Community Impact Benefit Agreements** - All affected communities are entitled to negotiate impact benefit agreements before their support is given for any major project. Impact benefit agreements will include the following:
 - the creation of community business development fund to provide loan funding for local entrepreneurs;
 - training programs;
 - community infrastructure funding to ensure that the community has the capacity to benefit from development and mitigate negative impacts;
 - business contracting arrangement - local businesses should be given first priority in joint ventures and supply contracts;

Canada must commit not to issue authorizations until impact benefit agreements have been reached with affected Deh Cho communities.

5. Minimization of Negative Social Impacts

Authorizations and / or leases issued by Canada should include the following terms and conditions:

- compensation for hunters and trappers - this will only be necessary if communities decide to allow exploration in an area which is used for hunting or trapping. Payments would be made to affected harvesters according to a payment schedule agreed to in advance;
- support for drug and alcohol programs - to prevent increases in substance abuse;
- funding for day care and elder care facilities - these facilities will increase the capacity of working-age community members to work in the oil and gas industry;

6. Dispute Resolution - Arbitration

Industry, Canada and the DCFN must establish a process for resolving disputes with respect to fulfillment of pre-bid conditions. A binding arbitration process is needed.

Terms and Conditions for a Mackenzie Valley Pipeline

We also advised Canada that the DCFN Leadership has clearly stated that the terms and conditions for approval of any pipeline crossing Deh Cho territory must be included in the Interim Resource Development Agreement. (see March 9 and May 17, 2001 Leadership resolutions). We informed Canada that the DCFNs Leadership has decided that they will support construction of a pipeline on the following conditions:

1. **Support of Harvesters**

The Deh Cho harvesters who have used the pipeline corridor must support the pipeline. The DCFNs will not support pipeline construction unless the harvesters support it.

2. **Full Deh Cho Participation any Environmental Assessment**

The DCFNs must be fully involved in any environmental approval as an equal with the government of Canada. It is not enough to merely be "consulted" or to be an "intervenor" in an environmental assessment conducted under the MVRMA or the Canadian Environmental Assessment Act. The DCFNs must therefore also be a full participant in the discussions which are currently underway on the development of a Framework for the Environmental Assessment and regulatory review.

3. **Access Fees**

Agreement must be reached on access fees for the use of Deh Cho lands for the pipeline right-of-way, or on a formula for calculating access fees.

4. **Resource Revenue Sharing**

Agreement must be reached between Canada and the DCFNs on the sharing of revenues (royalties, taxes, license fees etc...) from the development of oil / gas reserves in the Deh Cho. If these issues are to be resolved through the IGF, then there must be agreement in the IGF process on the Deh Cho share of all NWT resource revenues before the Deh Cho will support construction of a pipeline.

5. **Impact Benefit Agreements (IBAs)**

There must be agreement on the general contents of community impact benefit agreements. Specific IBAs would be negotiated by affected communities on a community-by-community basis once the general terms have been agreed to in the IRDA.

Canada's Response:**(i) Impact Benefit Agreements**

Canada did not respond to the DCFNs' proposal that no major economic projects should be approved by Canada unless developers have entered into impact benefit agreements with affected Deh Cho communities, but they promised to respond in detail at the next negotiating session.

(ii) Resource Revenue Sharing

On resource revenue sharing, Canada proposed the following:

"Upon signing of the IRDA, the DCFNs would be eligible for a sum of money based on the following formula:

- (a) a percentage of the \$2 million of resource royalties received by the federal government in the Mackenzie Valley; and
- (b) a percentage of any additional resource royalties received by the federal government in the Mackenzie Valley

The sum would be paid out upon the effective date of the Deh Cho Final Agreement."

The federal proposal is virtually identical to the wording contained in the Gwichin and Sahtu final agreements. It provides for FNs receiving an extremely small share of royalties and it does not address the issue of the DCFNs' share of royalties from development in the Deh Cho, nor does it provide for any DCFNs role in setting royalty rates. The federal proposal would essentially mean that the DCFNs would be in the same position as the Gwichin and Sahtu with respect to revenue sharing.

We advised Canada that this proposal is completely unacceptable. It does not reflect the fact that the Deh Cho Process will not result in the sale of any land, nor does it reflect the fact that DCFNs intend to establish a public

government which will be the primary government for all residents of the Deh Cho.

The federal negotiators advised that they will discuss this issue further and respond again at the next negotiating session.

(iii) Pipeline

Canada acknowledged the DCFNs' position but did not respond in detail, except on one point: Canada agreed that the DCFN could participate in the process to establish a streamlined environmental assessment process for a Mackenzie Valley Pipeline. The DCFNs' nominee for appointment to the Mackenzie Valley Land and Water Board and the MVEIRB (Jonas Antoine) will be invited to attend the next meeting of this process, to be held in Ottawa, August 14-15, along with a technical advisor.

4. Agreement-in-Principle

The DCFNs' position on the essential ingredients for an Agreement-in-Principle are set out in the Deh Cho Proposal. We presented the Proposal to the negotiating table and answered questions regarding the Proposal. In summary, the Proposal states that the Deh Cho AiP must clearly provide for the recognition of a Deh Cho government which will be a public government, and the primary government for all residents of the Deh Cho.

Canada's opening position on the elements of an AiP is extremely vague and general, however 3 items should cause serious concern. According to Canada:

1. "The Deh Cho agreement in principle should respect the requirement for one central government in the NWT with certain core powers;
2. devolution of responsibility for lands and resources should take place through territory-wide negotiations (the Inter-Governmental Forum); and

3. any Deh Cho resource revenue sharing agreement should be "commensurate" with other NWT models, taking into account population.

We have advised the federal negotiators that we require clarification of these statements. It must be made clear that the federal objective is consistent with the Framework Agreement which states that the objective of the Deh Cho Process is the recognition of a Deh Cho government as "the primary government" for residents of the Deh Cho. It must also be accepted by Canada that any Deh Cho final agreement must be unique and not based on any other NWT "models" for devolution or resource revenue sharing. The federal negotiators have promised to clarify their position at the next negotiating session.

Conclusion - Next Steps

The federal position tabled at the Hay River session was very disappointing. It appears that their objective is a Deh Cho final agreement which is very similar to existing land claim models. It is also clear that they wish to see the Deh Cho negotiations integrated into the Inter Governmental Forum. That process, in my view, is primarily aimed at entrenching the GNWT as the primary government of the NWT, and in preventing First Nations from receiving a fair share of resource revenues. Over the coming months we will see whether the federal position on these issues will be flexible, or whether they are strongly committed to a conventional land claim process in the Deh Cho.

The next negotiating session will be held September 4-7 in Trout Lake.