

Chief Negotiator's Report on the Deh Cho Process

FAKED
(3/3/02)

March 5, 2002

Recommendations to Leadership

1. That the DCFN retain legal counsel to begin a court challenge to the "streamlined" environmental assessment process for the Mackenzie Valley pipeline.
2. That the DCFN continue to hold observer status only in the Aboriginal Summit and the Inter-Governmental Forum until more progress is made in resource revenue sharing negotiations in the Deh Cho Process.
3. That the DCFN continue to refuse to approve the use of Deh Cho land for new oil / gas exploration or a pipeline until Canada has agreed to an interim resource revenue sharing agreement, and the other terms and conditions set out in the Wrigley Special Assembly resolution.
4. That the DCFNs establish a small technical working group to negotiate with the oil / gas industry on terms and conditions for new exploration in the Deh Cho, including impact benefits.

Discussion

Negotiating sessions were held in Ft. Simpson in January, 2002 and in Ottawa in February. The Ft. Simpson session focussed on the Interim Resource Development Agreement proposed by the DCFNs. The Ottawa session focused on funding and work plans for the 2002-03 fiscal year.

The sessions also addressed the following issues:

- a) Dogrib / Deh Cho Boundary / Overlap
- b) Resource revenue sharing

- c) The process for an environmental assessment for a Mackenzie Valley Pipeline
- d) The Inter-Governmental Forum (IGF)

Dogrib / Deh Cho Boundary / Overlap

Immediately following the November 13, 2001 meeting between the Deh Cho and Dogrib negotiating teams, the DCFN negotiating team drafted a new offer to the Dogribs. The new offer consists of a boundary line which would include all of the Horn Plateau and Birch Lake area within the Deh Cho territory, but would allow the Dogribs to continue traditional harvesting up to the so-called "Monfwi line". We have advised the Dogrib negotiators that the DCFNs do not see any point in any further meetings unless the Dogribs first respond to the latest Deh Cho proposal in a way which shows some flexibility. We require their response in writing:

The Dogribs have still not responded to the DCFNs' November 13, 2001 proposal for resolving the overlap, but there may be movement soon. Grand Chief Joe Rabesca has invited Grand Chief Nadli to meet in Yellowknife March 18.

Resource Revenue Sharing

Section 44 of the Deh Cho Interim Measures Agreement 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.

Revenue from Deh Cho Oil and Gas

The DCFNs tabled a draft IRDA at the September negotiating session in Ft. Providence. The draft IRDA calls for:

- equal sharing by Canada and the DCFN of all revenue (royalties, taxes, and access fees) from any new development of Deh Cho oil and gas;
- Canada and the DCFNs to jointly identify 1 or 2 areas within the Deh Cho where oil and gas exploration will be approved as soon as possible;
- Canada and the DCFNs will establish pre-bid qualifications to ensure that any new oil/gas exploration in the Deh Cho benefits Deh Cho communities and minimizes environmental and social impacts; and
- Canada and the DCFNs will establish a joint Steering Committee to coordinate implementation of the IRDA and liaise with the Deh Cho Economic Development Corporation.

Canada's negotiators have indicated that they may now be prepared to discuss sharing of revenue from Deh Cho oil and gas, and an additional share of resource revenue from other parts of the NWT, as part of a final agreement. This was not part of Canada's position when we met in July in Hay River. It must be noted, however, that this is only a proposal to discuss these items as part of a final agreement, not as part of an interim resource development agreement.

In an interim agreement, however, Canada's offer is:

"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 first \$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 for the Deh Cho interim resource development agreement is virtually identical to the wording contained in the Gwich'in and Sahtu final agreements. It provides for FNs receiving a small share of federal royalties from resource development in the entire NWT (approximately \$1 - \$3 million per

year). However, 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. The only difference is that the DCFN would be in this position through an interim agreement, whereas the other regions had to obtain a share of royalties through their final agreements. The federal proposal would almost certainly force the DCFNs to negotiate most resource revenue sharing issues through the Inter-Governmental Forum (IGF).

We advised Canada that this proposal is unacceptable because it does not reflect the uniqueness of the Deh Cho Process. We require an equitable sharing of revenues from Deh Cho oil and gas before agreeing to any further oil/gas exploration in the Deh Cho. At the Yellowknife session we proposed the following as a compromise (instead of 50/50 sharing of revenue from new developments in the Deh Cho):

Option 1

In any call for bids in respect of petroleum exploration on lands within the Deh Cho territory, the sole criterion for choosing the successful bidder will be the royalty which the bidding company is committed to paying to the Deh Cho First Nations in respect of any petroleum extracted from said lands, over and above the royalty paid to Canada pursuant to the *Frontier Lands Petroleum Royalty Regulations*.

Or:

Option 2

In any call for bids in respect of petroleum exploration on lands within the Deh Cho territory, the sole criterion for choosing the successful bidder will be the land fee (or cash bonus) which the bidding company is committed to paying to the Deh Cho First Nations.

The federal negotiators have considered the DCFN proposal and discussed it internally in Ottawa. They have advised that Canada is not prepared to move on this issue at this time, but they are prepared to fast-track the resource revenue sharing portion of our AiP negotiations.

Environmental Assessment for a Mackenzie Valley Pipeline

The Special Assembly at Wrigley stated that certain conditions must be met in order for the DCFNs to give their approval of any pipeline crossing Deh Cho territory. One of the conditions is:

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.

Since November, 2000, a series of meetings has been held in order to develop a "streamlined" environmental assessment process. The meetings have been attended by officials representing the Mackenzie Valley Environmental Impact Review Board (MVEIRB), Mackenzie Valley Land and Water Board (MVLWB), the National Energy Board (NEB), Canadian Environmental Assessment Agency (CEAA), DIAND and the GNWT. The meetings were held in secret and the Deh Cho was never invited to participate. When we learned of the secret meetings in June, 2001, the DCFN demanded to be fully included. This has not happened.

Canada agreed in July that the DCFN could participate in the secret streamlining process, but only in a very minor way. The DCFNs' nominee for appointment to the Mackenzie Valley Land and Water Board and the MVEIRB (Jonas Antoine) has been allowed to attend 2 meetings of the process, but there has been no funding for consultations with Deh Cho communities or to retain a technical advisor. Meanwhile, the secret meetings have continued and the process is now almost complete, except for "public consultation".

On October 1, 2001, Grand Chief Nadii wrote to Minister Nault to advise that the DCFNs believes that Canada has a fiduciary obligation to ensure that the DCFNs are full participants in this process, at least to the same extent as the northern claimant regions which have established Boards under the MVRMA. The DCFNs expect to participate as equals in every stage of every environmental assessment of a proposed pipeline. We also require immediate

funding in order to begin preliminary environmental assessments and to participate fully in the process of setting up the environmental assessment process.

We met on November 16 in Yellowknife with DIAND officials, including Lorne Tricoteaux. We again explained our position: that the secret meetings should be suspended immediately and then a new streamlining process can begin with the DCFN as a full participant. The officials listened, but had no response.

In my view, the exclusion of the DCFN from the process which began over a year ago to set up a streamlined environmental assessment may be a breach of Canada's fiduciary obligations towards the DCFNs. The November, 2001 Leadership meeting decided to seek 3 independent legal opinions on the legal options available to the Deh Cho to challenge the validity of any process for an environmental assessment which comes out of the secret negotiations over the past year.

The legal opinions have now been received and all 3 lawyers believe that the DCFNs have a good chance of success if Canada proceeds to implement the Cooperation Plan without negotiating with the DCFNs. One lawyer (Jeff Rath) believes that a challenge could be brought to the Cooperation Plan itself, while the other 2 (Louise Mandell and Daryn Leas, believe that the DCFNs should wait until a decision is made by the Minister to implement the Cooperation Plan. I agree with this suggestion and I recommend that continue trying to engage DIAND and the NEB in negotiations on the proper form for an environmental assessment. If these attempts fail and DIAND pushes ahead to implement the Cooperation Plan, a legal challenge should be brought immediately.

Land Withdrawals

Land withdrawals are the primary land protection measure in the Interim Measures Agreement. Canada and the DCFNs are now negotiating 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.

At the negotiating session in July, 2001 on the Hay River Reserve 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 initial federal response to the DCFN proposal was extremely cautious. At the July session 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.

At the Ft. Providence session, Canada agreed that the withdrawal negotiations should be based "primarily" on documented evidence and that they should accomplish a "coarse" level land use plan which will identify Development Zones and protected areas. We then agreed to establish a Lands Working Group, comprised of Herb Norwegian and Petr Cizek plus 2 federal appointees, to begin withdrawal negotiations. It was also agreed that the Lands Working Group will conduct its negotiating session in Deh Cho communities and will report back to the main negotiating table. A work plan was adopted for the Lands Working Group. It is estimated that the withdrawal negotiations will take approximately 1 year to complete.

The Lands Working Group has now held several meetings and its work initially progressed well. Unfortunately, negotiations have stalled recently over Canada's refusal to withdraw certain environmentally sensitive lands. (See

correspondence between myself and federal Chief Negotiator Robin Aitken and Herb Norwegian's report on withdrawal negotiations.

The Inter-Governmental Forum (IGF)

Canada continues to urge the DCFNs to join the Aboriginal Summit and the IGF. Canada wants the IGF to be the main forum for negotiating devolution and resource revenue sharing.

We have advised Canada that the DCFNs currently see no reason to become part of the IGF because devolution and resource revenue sharing are issues to be negotiated through the Deh Cho Process. We advised that the DCFNs will need to see significant progress in their Process, especially on resource revenue sharing, before considering joining the IGF.

Canada has agreed to consider drafting a statement of principles setting out the position it will take in the IGF negotiations.

Agreement-in-Principle Negotiations

The parties have tentatively agreed that negotiations towards an AiP should begin with a series of workshops. The workshops would be facilitated by Peter Russel and would serve to clarify the parties' positions on the contents of a Deh Cho AiP and final agreement. It is suggested that the following negotiations workshops be held over coming months:

April 15-16 - Governance - Ft. Providence

April 17-18 - Jurisdictions / Programs and Services - Ft. Providence

May 21-24 - Lands Issues - Trout Lake

May 25-28 - Resource Management - Ft. Liard / JMR

June 21-24 - Financing / resource revenues - Nahanni B. / Wrigley

Conclusion / Recommendations

1. That the DCFN retain legal counsel to prepare a court challenge to the "streamlined" environmental assessment process for the Mackenzie Valley pipeline.

2. That the DCFN continue to hold observer status only in the Aboriginal Summit and the Inter-Governmental Forum until more progress is made in resource revenue sharing negotiations in the Deh Cho Process.
3. That the DCFN continue to refuse to approve the use of Deh Cho land for new oil / gas exploration or a pipeline until Canada has agreed to an interim resource revenue sharing agreement, and the other terms and conditions set out in the Wrigley Special Assembly resolution.