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## **Chief Negotiators Report on the Deh Cho Process**

**June 13, 2002**

### **Summary**

Since May, 2001, negotiations have focused on implementing the Interim Measures Agreement, especially identifying lands to be protected through land withdrawals, and negotiating an Interim Resource Development Agreement (IRDA) which will provide for Deh Cho First Nations to receive a share of resource revenues from development in the Deh Cho prior to a final agreement. In addition, there have been preliminary discussions and workshops on a Deh Cho Aip.

Negotiations were suspended by Canada on April 11, 2002 as a result of a legal action filed by K'atodehechee First Nation (Hay River) Reserve), against Canada. No negotiations have been held since the March 25-28, 2002 session in Ft. Simpson.

At the time that negotiations were suspended the key issues being addressed at the negotiating table were land withdrawals and the Interim Resource Development Agreement (IRDA). Recently, Canada has agreed to resume some negotiations, but Canada will not sign any new agreements on land withdrawals or resource development until the legal action is resolved.

### **Discussion**

In April, 2002, negotiations were suspended by Canada as a result of a legal action filed by the K'atodehechee First Nation (Hay River Reserve), against Canada. In their claim, the K'atodehechee claim that they are sovereign nation within their territory and that therefore the Canada Labour Relations Code does not apply. The FN filed the court claim in an attempt to prevent band employees from certifying a union. A majority of the band's employees have indicated that they wish to form a union and have it certified (recognized) by the Labour Relations Tribunal. The Public Service Alliance of Canada (PSAC) is assisting the band employees in their efforts to certify their union local.

The federal government has a well known policy of not negotiating with First Nations if the First Nations decide to go to court to resolve disputes which are being addressed in negotiations. In this case, Canada feels that the issues which the K'atlodechee is raising in its legal challenge (whether federal or First Nation's law apply within the Deh Cho territory) are the very same issues which are being negotiated in the Deh Cho Process.

The Grand Chief and I have discussed the Hay River union issue with Nycole Turmell, the President of the Public Service Alliance of Canada (PSAC). Ms. Turmell has indicated that she is willing to go to the Deh Cho to meet with the Deh Cho Leadership and with Chief Martel. She has also indicated that PSAC is prepared to discuss the concerns of the Chief and Council of K'atlodechee, but so far the band has not agreed to meet with the union.

Ms. Turmell also stressed that the request for a union has come from the Dene employees of the reserve. PSAC's view is that the Dene employees of the band have the right to join a union and to be represented by the union if that is their wish. At this time, a majority of the band's Dene employees have bought union membership cards and have stated that they wish to be represented by PSAC in their dealings with their employer (the band).

On May 9, Canada's Chief Negotiator informed the DCFNs that as long as the DCFNs are actively seeking to resolve the issue of the K'atlodechee legal action, Canada will not suspend negotiations; however Canada will not sign any agreements. This means that as long as discussions are continuing between the DCFN's and the Public Service Alliance of Canada (PSAC) to resolve the K'atlodechee FN's concerns, Canada will continue negotiating with the DCFNs, but will not sign agreements on land withdrawals or resource development.

At this time the Chief and Council of K'atlodechee FN have not responded to the union's request for a meeting to discuss their concerns.

If the HRR claim is not resolved, Canada will not finalize negotiations on land withdrawals and the Interim Resource Development Agreement. The Deh Cho Process will remain in limbo. This means that there will probably be no land withdrawals, no resource development agreement, and no resource revenue sharing.

There are at least four options for the DCFNs to consider in this situation:

## **Options**

- 1. The K'atlodechee FN could hold discussions with their employees and the union in an attempt to reach an understanding.**

The national President of the union has written to the Chief and Council of K'atodehechee FN inviting them to discuss any concerns which the Chief and Council may have concerning the union instead of proceeding with their legal claim against Canada. The Chief and Council have not responded to the union's request to meet.

- 2. The DCFNs could attempt to sue the federal government to attempt to force them to return to the negotiating table while the K'atodehechee continues with it's court claim.**

In my view, this is not likely to be successful. Furthermore, it will be a long, expensive process. In the meantime, there will be no negotiations. Even if the DCFNs were successful in obtaining a court order forcing Canada to negotiate, this would not do anything more than get Canada to come to the table. It could result in Canada taking more hard-line positions at the negotiating table than it currently takes on many issues.

- 3. The K'atodehechee could withdraw it's legal action, or promise to hold it in abeyance, and ask that the issue of jurisdiction over labour relations be addressed in the Deh Cho Process negotiations.**

The K'atodehechee FN could then attempt to obtain an interim stay order from a court, suspending the application for certification of the union pending the completion of the Deh Cho Process. There is no guarantee this would be successful.

This option has been presented to K'atodehechee and their lawyers, but they have not yet responded to it. Canada's negotiators have indicated that this solution would probably result in a resumption of negotiations if it were accepted by K'atodehechee.

- 4. The K'atodehechee could withdraw from the Deh Cho Process.**

This might allow for the K'atodehechee to continue their legal action and, possibly, allow the Deh Cho Process to resume. This option would require the re-negotiation of the Deh Cho Framework Agreement and Interim Measures Agreement to remove references to the K'atodehechee. I believe that this could be done without too much difficulty. It is likely that Canada would resume negotiations with the DCFNs if K'atodehechee is no longer part of the Deh Cho Process, but it should be noted that there is no guarantee of Canada returning to the table.

### **Recent Developments**

The Grand Chief and I have discussed this issue with Nycole Turmell, the President of the Public Service Alliance of Canada (PSAC). Ms. Turmell has indicated that she is willing to go to the Deh Cho to meet with the Deh Cho Leadership and with Chief Martel. She has

also indicated that PSAC is prepared to discuss the concerns of the Chief and Council of K'atlodehechee and is prepared to be flexible.

However, Ms. Turmell also stressed that the request for a union has come from the Dene employees of the reserve and that PSAC will not abandon them. PSAC's view is that the employees have the right to join a union and to be represented by the union if that is their wish. At this time, a majority of the band's employees have bought union membership cards and have stated that they wish to be represented by PSAC in their dealings with their employer (the band).

### **Dogrib/ Deh Cho Boundary/ Overlap**

Grand Chief Nadli met with Dogrib Grand Chief Joe Rabesca in Yellowknife on March 18 and June 10, 2002. It appears that they have reached a tentative agreement on a boundary line which would include all the the Horn Plateau and Birch Lake area within the Deh Cho territory, but would allow the Dogribs to continue traditional harvesting up to the co-called "Monfwi line".

If the tentative agreement is acceptable to the affected Deh Cho communities, the negotiating team will meet with Dogrib negotiators to work out the details of the agreement and then bring it back to the affected communities for approval.

### **Interim Resource Development Agreement (IRDA)**

Before negotiations were suspended, Canada and the DCFNs had been working towards the interim agreement required by s. 44 of the Deh Cho Interim Measures Agreement.

With respect to resource revenue sharing, Canada's negotiators have indicated that they are 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. 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 resource development agreement 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 \$2million of resource royalties received by the federal government in the Mackenzie Valley.

These funds would total approximately \$ 1-\$3 million per year. The DCFNs could access the funds for economic development projects.

In return for these funds, Canada wants a commitment from the DCFN to open up some new lands for oil/gas exploration within a year of signing the IRDA. Also, Canada continues to push the Deh Cho to join the Inter-Governmental Forum (IGF).

The DCFNs Leadership have indicated that Canada's offer is not acceptable because it would see any revenue from new oil/gas developments in the Deh Cho going directly to Canada, with the Deh Cho receiving only a share of the total resource in the Deh Cho going directly to Canada, with the Deh Cho receiving only a share of the total resource revenue collected by Canada from the Whole Mackenzie Valley. It is essential that we have agreement from Canada that a fair share of revenue from new oil/gas developments in the Deh Cho.

Grand Chief Nadli has recommended to the Leadership that, unless there is serious movement from Canada on this issue, the DCFNs should identify a parcel of land which we are prepared to open for exploration, and we will issue a call for a Proposals inviting oil and gas companies to bid for the right to explore the parcel. All revenues from any gas or oil wells in the new parcel would be divided between the Deh Cho First Nations and the company which has been given the exploration rights.

### **Land Withdrawals**

Land withdrawals are the primary land protection measure in the Interim Measures Agreement. Since signing the IMA in May, 2001, Canada and the DCFNs have been 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.

Withdrawal negotiations initially progressed well. In March negotiations stalled over Canada's refusal to withdraw certain environmentally sensitive lands. During the March 25-28 negotiations, Canada agreed to withdraw some of the disputed lands, including Redknife Hills, the Wood Buffalo Bison Sanctuary and some of the Mackenzie River watershed. However, Canada still has not agreed to withdraw a buffer around the Mackenzie River, or the Blackwater Lake watershed north of Wrigley. When negotiations resume on June 19. We will continue to push for protection of these areas.

### **Agreement-in-Principle Negotiations**

Before negotiations were suspended, the parties had agreed that negotiations towards an Aip should begin with a series of workshops. The workshops will be facilitated by Peter Russel and would serve to clarify the parties' positions on the contents of a Deh Cho Aip and final agreement. The following negotiations workshops have been held or will be held:

April 15-16-Governance-Ft. Simpson

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

May 21-24-Lands and resources-Trout Lake

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

September-Financing/ resource revenues- Nahanni B. /Wrigley

The first workshop was held April 15-18 in Ft. Simpson. Peter Russel has produced a draft report which has been circulated.

The second workshop was held in Trout Lake May 21-24 focusing on lands and resources issues. The negotiating team has produced a draft Options Paper based on the discussions in the workshop.

### **Conclusion/Recommendations**

1. Negotiations on land withdrawal and interim resource revenue sharing have resumed after being suspended in April, but Canada will not sign any agreement until the legal action has been resolved. The legal action by the K'atodechee must be resolved before any negotiations on land withdrawals or interim resource revenue sharing can be completed.
2. The Grand Chief recommends that unless Canada is prepared to agree to a fair sharing of revenue from new oil and gas developments which occur in the Deh Cho prior to a final agreement, the DCFNs should identify a parcel of land which they are prepared to open for exploration and then issue a call for Proposals inviting oil and gas companies to bid for the right to explore the parcel. All revenues from any gas or oil wells in the new parcel would be divided between the Deh Cho First Nations and the company which has been given exploration rights.
3. It is important that the DCFNs decide which powers over lands and resources will be exercised by a regional Deh Cho government and which powers will be exercised by local community governments. Please see the Options Paper included in the Assembly packages.

## **Deh Cho Process-Background**

The "Deh Cho Process" is the on-going negotiations between Canada and the Deh Cho First Nations. The goal of the negotiations will be the primary (main) government of the Deh Cho and it will be a government for all residents of the Deh Cho, whether they are Dene or non-Dene. Most importantly, the Deh Cho government will have jurisdiction (legal control) over the lands and resources of the Deh Cho territory.

In 1900 and 1921-22 the Dene of the Deh Cho signed Treaties 8 and 11 with the Crown. The elders who were present when these treaties were negotiated have always stated that there was no discussion of selling land or surrendering or extinguishing title to land. They were treaties of peace and friendship between the Dene and Canada. According to the Deh Cho First Nations, therefore, the First Nations are still the legal owners of all land in the Deh Cho. However the government Canada believes that it bought the land and resources of the Deh Cho from the Dene when it signed the treaties.

As a result of these different interpretations of the Treaties it is not clear whether Canada or the First Nations are the legal owners of the land, or the First Nations have the legal right to manage the land. This uncertainty about who has legal control over the land needs to be cleared up through negotiated agreements because it has prevented economic development.

In the 1980's there was an attempt to negotiate an agreement for the whole Mackenzie Valley to resolve the issue of whether Canada or the Dene own the land. The Dene/Métis claim negotiations of the 1980's provided for a cash payments and First Nations' ownership of small blocks of "settlement lands". In return, the First Nations had to agree extinguish title to most of their land. The draft final agreement was

### **The 21 Common Ground Principles**

During the early 1990's there were several attempts to re-start negotiations between Canada and the DCFN. These attempts failed because Canada continues to insist that any negotiations must take place under to extinguishment and the sale of Dene lands.

Finally, in the fall of 1997, Canada accepted a proposal by the DCFN to appoint a "Ministerial Envoy" Professor Peter Russell was then appointed by the Minister of DIAND as an Envoy, with a mandate to meet with the communities of the Deh Cho and with federal officials, to determine whether there was enough common ground between the 2 sides to begin negotiations. Russell produced a report which recommended that Canada and the DCFN begin negotiations on the basis of 21 principles of common ground. These

21 principles were accepted by the DCFN and Canada in early 1999 and both sides agreed to begin negotiations.

### **The Deh Cho Process Negotiations-Phase 1**

Negotiations began in September, 1999 in Ft. Simpson. Since then negotiating sessions have been held in communities in the Deh Cho. Between 1999 and early 2001 the negotiations focused on negotiation of 2 important: preliminary" agreements:

1. An Interim Measures Agreement which recognizes a role for First Nations in decision making on lands and resources issue in the Deh Cho. The interim Measures Agreement will last until a final agreement is reached. A final agreement will replace the interim measures with a Deh Cho government which will have jurisdiction over Deh Cho lands and resources.

2. A Framework Agreement to guide Phase II negotiations. The Framework Agreement states the objectives of the Phase II negotiations, identifies the parties to the Phase II negotiations, and set the agenda for negotiations.

The Framework Agreement and Interim Measures Agreement were signed on May 23, 2001 in Ft. Simpson.

### **Interim Measures Agreement**

The Deh Cho Interim Measures Agreement includes the following provisions:

No oil or gas exploration will take place without First Nations' consent. No new forestry permits or licenses will be issued without FN support.

The DCFN Elders have directed that any system of land and resource management must be based upon a land use plan for the entire Deh Cho. We will not extinguish title to any lands or sell any land or divide the Deh Cho into small blocks of land. Thus, the Deh Cho Interim Measures Agreement is based upon land use planning. A joint Land Use Planning Committee has been set up to develop a draft land use plan for the Deh Cho. The plan will have to be approved by the DCFN and Canada. The land use plan will provide that some lands will be "withdrawn" in order to protect them from mineral staking or industrial development during the negotiations towards a final agreement. The 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. The land use plan will not address issues of "ownership" of land – it will only regulate the use of land.



The Interim Measures Agreement also provides for the establishment of a 3 member Deh Cho Land and Water Panel which will have responsibility for issuing land and water use permits. One member of the Panel will be appointed by the Minister of DIAND after being nominated 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. Applicants for land or water use permits are 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. Once a land use plan has been approved by the DCFN and Canada, it will be binding on the Land and Water Panel. The Panel will be set up as a temporary measure, until a Deh Cho Resource Management Authority can be set up under a final agreement.

The IMA also provides Canada and the DCFN will also negotiate an Interim Resource Development to promote development by ensuring that Deh Cho communities benefit from any royalties or taxes collected from any new oil/gas developments or mines established on Deh Cho lands prior to a final agreement. Canada and the DCFN have also set up a joint "Consensus Team" to jointly manage Nahanni Park.

However, the news is not all good. There are some weaknesses in the IMA. Despite several attempts at the negotiating table, we were unable to get a commitment from Canada that First Nations will be consulted prior to any mineral staking. Canada also refused to include a commitment in the IMA that no federal Crown lands will be sold or leased without the support of the First Nations. The IMA only requires that First Nations be "consulted" prior to any sales or leases.

Also, we still have some tough negotiations ahead on interim land withdrawals and on a resource revenue sharing agreement. Those negotiations will be bi-lateral (Canada and the DCFN). There has never been an interim withdrawal process like the one which will occur in the Deh Cho, which will be based on a land use plan for the whole region. Also, Canada has never previously negotiated an interim resource development agreement. These negotiations will break new ground and will probably be complex and difficult.

### **Framework Agreement**

The Framework Agreement signed on May 23, 2001 is based upon the 21 Common Ground Principles. The Framework Agreement provides that the objective of the negotiations is to produce an Agreement in Principle (AIP) within 5 years, followed by a final agreement. The AIP and final agreement will provide for the recognition of a Deh Cho government, which will be a public government based on Dene laws and customs, and the primary government for residents of the Deh Cho. The Deh Cho government will govern the land and provide most services in the Deh Cho, including education, health, housing and social services. The DCFN Negotiating Team has also stressed in all of our meetings with Canada and the GNWT that the DCFN will never agree to extinguish title to any land or sell any land in the Deh Cho.

The purpose of the Deh Cho Process is to build upon the existing treaties by clarifying the roles and responsibilities of Canada, the Deh Cho First Nations and the GNWT in governing the land and people of the Deh Cho. Treaty negotiations should be bilateral – between the DCFN and the federal Crown. Clause 3 of the Framework Agreement therefore states that some of the negotiations will be bilateral: Before negotiations begin on any subject matter (e.g. Resource revenue sharing, education etc...) there will be a workshop at which the DCFN will present the Dene position on Treaties 8 and 11 and explain why some of the negotiations should be bilateral. The Elders will play a key role in this process. A decision will then be made, on a case-by-case basis, as to whether negotiations will be tri-lateral (3 parties) or bilateral (2 parties). The GNWT will not be involved in negotiations unless they currently have an interest or jurisdiction which would be affected by the negotiations.

The boundaries of the Deh Cho territory will also be identified in Phase II negotiations. Canada's negotiators have stated that it will be their position 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 the Deh Cho territory in B.C., Alberta and the Yukon, it will be necessary to file separate claims.