

# Chief Negotiator's Report on the Deh Cho Process

May 13, 2003

## Summary

Phase I of the Deh Cho Process is now complete. The Interim Measures Agreement and Framework Agreement signed on May 23, 2001 will be in place until a Final Agreement is negotiated. In addition, the Deh Cho First Nations and Canada recently signed an Interim Resource Development Agreement (IRDA) and a package of land withdrawals which will protect harvesting areas, environmentally sensitive areas, watersheds and cultural and sacred areas from development during the negotiations towards a Final Agreement. These interim (temporary) agreements give the Deh Cho First Nations a high degree of control over their lands and resources while negotiations are proceeding on the key issues of jurisdiction and ownership of lands and resources.

We are now set to begin Phase 2 of the Process: negotiations towards an Agreement-in-Principle, which will lead to a Final Agreement. It will likely take between 3 – 5 years to complete Phase 2. The Deh Cho Final Agreement will identify the powers of the Deh Cho First Nations' governments and the powers of the federal government and the GNWT. The Framework Agreement signed in May, 2001 makes it clear that the primary (main) government will be the Government of the Deh Cho.

A negotiating session will be held May 23-25 in Ft. Liard to begin discussions on the lands and resources components of an AiP. This session will be facilitated by Tom Nesbitt. Tom is a lawyer and land use planner based in B.C. I recommend that Leaders and Elders make an effort to attend this important session in order to ensure that there is a strong Dene and Metis perspective on lands and resources.

## Interim Land Withdrawals

The Interim Measures Agreement signed in May, 2001 set out four key guidelines for identifying what lands can be considered for withdrawal:

- a) *lands harvested for food and medicinal purposes;*
- b) *culturally and spiritually significant areas;*
- c) *lands which are ecologically sensitive; an*
- d) *watershed protection*

In the Deh Cho Process, interim land withdrawals have nothing to do with "land selection" or ownership of land. Withdrawals simply ensure that certain lands are protected during the negotiations towards a final agreement. Deh Cho negotiators consulted Deh Cho community members over the past 6 years and gathered the most complete information they could to identify lands that should be withdrawn.

Land withdrawal negotiations were completed on April 11, 2003 and maps have been initialled by the negotiators. The initialled maps reflect the direction given by the Leadership at the February Leadership meeting in Wrigley. A federal Order in Council will be issued within one or two months to make the withdrawals legally effective.

Withdrawn lands will be set aside by a federal Order in Council until negotiations on a final agreement are complete. Lands which are not withdrawn will not necessarily be open for development. The Interim Measures Agreement signed in 2001 ensures that the support of affected communities will be required for any new oil/gas exploration or commercial forestry in those areas.

On lands where both the surface and sub-surface are withdrawn, no mining claims can be registered or land leases or new commercial forestry licenses issued. Existing interests, such as mining claims that are already registered, would not be affected.

On lands where only the sub-surface (underground) is withdrawn, commercial forestry and outfitter lodges will be permitted, but other industrial activity (staking, mining, oil/gas etc...) will be prohibited.

The negotiating team is producing a poster to distribute to all Deh Cho communities to explain the interim land withdrawals.

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

Section 44 of the Deh Cho Interim Measures Agreement signed in May, 2001 says:

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.

On April 17, the DCFN and Canada signed the Interim Resource Development Agreement, known in Dene as *Duh Gogha Ndeh ts;eh Saamba Holeh Ts'ehk'eh Eleh Seegots'eleh*.

The purpose of the IRDA is to ensure that the Deh Cho benefits from resource development in the Deh Cho territory and participate in economic development opportunities while a final agreement is being negotiated. The agreement outlines a process for community involvement in oil and gas development and for the negotiation of impact benefit agreements before major mining projects are approved.

It is important to note that the IRDA does not require the Deh Cho to open any new lands for exploration. In fact, it does not require the DCFN to do anything except talk with Canada for the next year about whether there will be new oil/gas exploration. The IRDA says the DCFN and Canada "share the objective" that new exploration will happen, but the IRDA also says we need to negotiate the terms and conditions for any new exploration before any new exploration happens. The negotiations on terms and conditions will happen over the next 12 months. We have stated that these negotiations must include parcel sizes, pre-bid qualifications, and criteria for selecting winning bidders.

If Canada does not agree to satisfactory terms and conditions, the Deh Cho can walk away from the IRDA without any penalty and no new lands will be opened. It is important to remember that the IRDA does not replace the Interim Measures Agreement (IMA) signed in May, 2001. Under the IMA, Deh Cho First Nation communities still have a veto over any new exploration. If you do not want new exploration, there will not be any. Also, under the IMA, we can control the size of the parcels to be explored and we reserve the right to veto any new exploration if Canada insists on exploration parcels that are unacceptably large.

In my view, the Deh Cho should not agree to open up any new lands unless a very substantial share of profits and royalties stay in the Deh Cho and the Deh Cho is able to control the size of exploration parcels. If the 10 Deh Cho communities are united and strong on this point, we can win this issue and negotiate strong terms and conditions for any new exploration.

As for how economic benefits from any new developments will be shared amongst Deh Cho communities, that will have to be agreed internally by the Leadership. It certainly seems logical to me that the most affected communities should receive the largest share of benefits, but hopefully the Leadership will be able to come to agreement on this as soon as possible.

## **Proposed Oil / Gas Exploration Strategy**

Although Canada's position on interim resource revenue sharing has been disappointing, the 2003 Winter Leadership meeting in Wrigley decided to ratify the IRDA, and then work together over the next year to ensure that any new exploration in the Deh Cho is led by a Deh Cho based company, in partnership with a private oil and gas company. This would ensure that the Deh Cho receives a share of profits from any new oil/gas developments, instead of just a small share of federal royalties. It will also be important to ensure that any new exploration takes place only on parcels of land which are approved by the DCFNs.

In order to accomplish this, it is important for the Deh Cho to work together on a joint strategy for new exploration. The first step would be to identify one or two parcels of land on which the DCFN is prepared to support exploration. The next step, as Grand Chief Nadli has suggested, is for the DCFN to issue a Request for Proposals (RFP) in Alberta and Texas, inviting companies to submit bids to the DCFN.

### **Steps**

1. Identify parcels of land for exploration;
2. Issue RFP;
3. Negotiate revenue-sharing with a company or companies on specific parcels of land and establish commitment for maximum exploration expenditures to win exploration licenses under CPRA;
4. Possibly establish a joint-venture company;
5. Negotiate pre-bid qualifications with DIAND;
6. Submit DCFN resolution to DIAND supporting rights issuance on specific parcel, subject to pre-bid qualifications which include a requirement that the winning bidder have a revenue sharing agreement with DCFN;
7. Win exploration licence to specific parcel by committing maximum exploration expenditures.

There is no guarantee that the DCFN-supported company is not outbid in securing the exploration licence from DIAND. However, the risk could be reduced by having revenue-sharing agreements with several companies.

## **Other Issues:**

### **Intergovernmental Forum (IGF)**

Canada, the GNWT and the Aboriginal Summit have recently begun negotiations toward a framework agreement which will guide negotiations on the transfer (devolution) of provincial-like powers to the GNWT and Aboriginal governments. The IGF process is also addressing resource revenue sharing.

The Summit, Canada and the GNWT are now negotiating a framework agreement which will guide the IGF negotiations.

I attended the IGF negotiations as an observer on January 29-30 in Toronto. While at the negotiations a member of the federal negotiating team gave me a copy of a document titled "Confidential – Canada's Requirements for a Framework Agreement on NWT Devolution". This document, dated January 23, 2003, contains several troubling federal "requirements", including:

- any devolution of legislative authority will be to the Legislature of the NWT;
- administration and control of public lands and waters will be transferred to the Commissioner of the NWT, except for certain excluded lands; and
- any new regime for management of oil and gas must be similar to regimes elsewhere in Canada.

These "requirements" will be negotiated through the IGF and have serious implications for the Deh Cho Process.

I recommend that the DCFN participate in the IGF, as an independent party, on an interim basis in order to ensure that Deh Cho interests are protected. It should be made clear that the DCFNs' participation in the IGF is without prejudice to our position that the Deh Cho Process should be the main forum for discussion devolution and resource revenue sharing in the Deh Cho.

## **Agreement-in-Principle (AiP) Negotiations**

Under the Framework Agreement, the Deh Cho First Nations, the Government of Canada and the GNWT have agreed to work toward an Agreement-in-Principle (AiP) in five years. Early in negotiations, the DCFN stresses that we are looking for a final agreement that is based on land management, not land selection. This approach is new to land and resource negotiations in Canada.

The parties have agreed to work towards a General Agreement-in-Principle (GAIP) as a step towards an AIP. Unlike an AIP, which is very detailed, a GAIP would be designed to address, in broad terms, the major elements of a final agreement.

To begin identifying what elements will be dealt with in the GAIP, a governance workshop was held in Fort Simpson in April, 2002. A nother workshop was held in Trout Lake in May on land management issues. Peter Russell facilitated both workshops and his reports are available through the DCFN office.

We attempted to hold a governance workshop in Ft. Providence in March, but it was not well attended.

The negotiating team has produced a draft Discussion Paper on possible **governance models** outlining how a public government based on Dene laws and customs will work. The Discussion Paper is based on past Assembly and Leadership resolutions, the Deh Cho Declaration, and the Deh Cho Proposal. We are now preparing a draft general Agreement-in-Principle which I expect to present to the Spring Leadership meeting in Jean Marie River in May. If the Leadership approves of the draft, we will present it at the negotiations in Trout Lake on May 24.

## **KFN Litigation**

As everyone knows, Canada took the position during the past year of negotiations that it would not sign any new agreements with the DCFN unless KFN withdrew or amended its legal challenge in which KFN wishes to prevent its employees from having the right to belong to a union and bargain collectively with the band. A few days before the scheduled signing of the IRDA, Chief Fabian advised us that the KFN Chief and Council would be recommending to the KFN membership that KFN pull out of the Deh Cho Process. In response, Canada said that it would sign the IRDA, but only if KFN were removed from the agreement.

At the last minute, Minister Nault changed his mind and agreed to sign the IRDA with KFN included, even if KFN intends to continue its legal challenge.

KFN Chief Roy Fabian has recently advised me that KFN that intends to stay in the Deh Cho Process. We will need to schedule a negotiating session to discuss terms of reference and funding for the KFN Working Group which will focus on issues unique to KFN and report to the main table.