

# Report on the Deh Cho Process

April 26, 2004

## Summary

Main table negotiating sessions were held in Yellowknife March 9-10 and in Wrigley, April 7-8. In addition, the Grand Chief and members of the negotiating team met with Minister Andy Mitchell on March 17 in Yellowknife and with the Deputy Minister in Ottawa on April 16. Chief Negotiator Georges Erasmus and Legal Counsel Chris Reid also met with senior funding officials in Ottawa on March 22.

Main table negotiations focussed on the lands and resources components of an Agreement-in-Principle (AiP), as well as terms and conditions for new oil and gas exploration, and options for including the DCFN in the environmental assessment of the proposed Mackenzie Valley pipeline.

The negotiating team is also working with the Constitutional Working Group to develop a General Agreement-in-Principle and a draft Deh Cho constitution. A joint workshop of the negotiating team and the PWG was held at Fisherman Lake April 20-23.

## Agreement-in-Principle (AiP) Negotiations

### Land Title / Certainty

Under the Framework Agreement, the Deh Cho First Nations and Canada have agreed to work toward an Agreement-in-Principle (AiP) in five years. The parties have also agreed to first develop 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. It is hoped that a General AiP will be developed by the end of 2004.

The 2003 Assembly in Kakisa approved two papers presented by the negotiating team to guide negotiations on a General AiP. The papers outline **governance models** for a public government based on Dene laws and

customs. The Discussion Papers are based on past Assembly and Leadership resolutions, the Deh Cho Declaration, and the Deh Cho Proposal. These papers were discussed at the Trout Lake session in August and the Ft. Simpson session in September, 2003 and have been discussed at subsequent sessions.

We continue to stress that the DCFN Leadership and Assemblies have consistently rejected the comprehensive claims model of "land selection" to resolve the issue of title to land. We have told the federal negotiators that the Deh Cho First Nations are not prepared to discuss "land selection". Therefore, we must find other options for providing the "certainty" which we all want. So far, we have presented two options: Canada must either agree to recognize full Deh Cho ownership of all lands and resources in the Deh Cho territory through a "Crown in Right of the Deh Cho" (as set out in the Deh Cho Proposal), or they must agree to recognize "co-ownership" or "co-stewardship" of the whole territory.

Since the federal negotiators have indicated that recognition of full Deh Cho ownership of all lands and resources is a "non-starter" for Canada, and since land selection and extinguishment are non-starters for the Deh Cho, we have pushed the federal negotiators to respond positively to the option of "shared ownership" or "shared stewardship" of the lands and resources of the Deh Cho which was adopted by the 2003 Assembly. Federal negotiators have informed us that they are seriously considering this option, but that they expect strong resistance from some sections of the federal bureaucracy, partly because they do not understand it.

### Jurisdiction / Decision-Making

The 2003 Assembly adopted a paper titled "Draft – Deh Cho First Nations Agreement-in-Principle". This paper is intended to be the Lands and Resources component of a General AiP. The paper outlines how a Deh Cho Resource Management Authority would function to govern and manage lands and resources throughout the Deh Cho under a Deh Cho final agreement. The DCFN negotiating team tabled this paper at the August and September, 2003 sessions and explained it to the federal and GNWT negotiators.

The proposed Deh Cho Resource Management Authority would be community based and have authority throughout the Deh Cho territory, not

just on “selected” lands. It is based on holistic integration of all the components of lands and resources management, including land use permits, renewable and non-renewable resources, land use planning, environmental assessments, and sales and leases of land. The 10 communities which comprise the Deh Cho would be strongly involved in decision-making and in implementation and enforcement.

Canada’s response the DCFN’s proposed Deh Cho Resource Management Authority has so far not been positive, but they also have not rejected our position paper outright. Although they continue to propose full integration of the Deh Cho under the Mackenzie Valley Resource Management Act (MVRMA), they have been told repeatedly that this is not an option for the Deh Cho. We believe that the federal negotiators understand our position quite well and realize that they need to give very serious consideration to the model which the DCFN has proposed. However, it will probably be necessary to lobby the Minister of DIAND and also the senior officials to whom the federal negotiators report. Lobbying efforts have begun, including the March, 2004 meeting with the Minister and a meeting in Ottawa with the Deputy Minister on April 16, 2004.

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

#### Terms and Conditions for New Oil and Gas Exploration

On April 17, 2003 the DCFN and Canada signed the Interim Resource Development Agreement. 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 IRDA does not require the Deh Cho to open any new lands for exploration. It says that 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 target date for agreement on terms and conditions for new exploration is April 17, 2004 – 12 months after the signing of the IRDA.

In a letter given to former Minister Nault in August, 2003, the DCFN proposed the following terms and conditions for a new cycle of exploration:

Cash bonus bidding. We proposed that the next round of bidding for exploration licenses in the Deh Cho territory be based on the “cash bonus” bid criterion, rather than a work commitment criterion. The successful bidder in any new cycle of bids for exploration licenses in the Deh Cho would be the company which offers to pay the highest cash bonus to the Minister, to be held in trust for the Deh Cho First Nations.

The cash bonus bidding system is based on free market principles and has been used successfully in Alberta for several years. It has the potential to generate new revenue which would benefit the people of the Deh Cho. The unusually high yield from wells drilled in the Liard region of the Deh Cho over the past few years, and the southern Deh Cho’s close proximity to Alberta and B.C., indicate that the cash bonus bidding system is very well suited to the Deh Cho territory.

We indicated that the Deh Cho would be prepared to see a cash bonus bid criterion used on a pilot project basis for a new cycle of exploration, and that the Deh Cho is also prepared to discuss conditions which would link the payout of the cash bonus revenue collected by Canada on behalf of the Deh Cho to a Deh Cho final agreement, although we would prefer to have immediate access to any revenue resulting from cash bonus bids. In either case, it is DCFNs intention to use any funds generated from resource development in the territory to finance the delivery of programs and services for Deh Cho residents.

Community Impact Benefit Agreements. We proposed that the highest bidder in any new cycle of exploration license bidding be required to negotiate impact benefit agreements with affected Deh Cho communities within 30 days (or 60 days) of being named the highest bidder. Impact benefit agreements would address environmental monitoring and mitigation, employment and contracting opportunities, social impacts, and compensation for impacts on traditional harvesters. If the company with highest cash bonus bid is unable to reach agreement with the affected communities within the specified time, the next highest bidder would be given the opportunity to negotiate impact benefit agreements. This process would continue until a company has concluded agreements with affected communities.

Parcel Selection. We advised Canada that the DCFN expects to be directly involved in selecting the parcels which will be opened for exploration under

any new licenses issued in respect of Deh Cho lands. This is necessary in order to ensure that environmentally sensitive lands are protected (not all environmentally sensitive lands will be protected by interim land withdrawals) and to ensure that the Deh Cho's interest in having exploration and development occur at a gradual, sustainable pace are protected.

#### Progress in Negotiations on Oil/Gas – Canada's Response

At their meeting in August, 2003 Minister Nault advised Grand Chief Norwegian that Canada is prepared to consider any options which do not require immediate changes in legislation. The Minister and the Grand Chief agreed to appoint a Working Group to negotiate draft terms and conditions for new exploration licenses, with each side appointing members to the Working Group. The Working Group was mandated to negotiate as a side table of the Deh Cho Process, reporting to the main table, and to present draft proposals to the DCFN Leadership and Canada by April, 2004.

The Deh Cho members of the Working Group are: Chief Floyd Bertrand, Councillor Julien Landry and Sam Gargan. Petr Cizek is technical advisor to the Deh Cho members of the Group.

At a session held in January, 2004 in Ft. Simpson, the Deh Cho members of the Working Group tabled a more detailed position based on the 3 points outlined in the Grand Chief's letter to Minister Nault.

At this time, Canada has not agreed to any of the Deh Cho's demands.

Canada argues that it cannot require companies to negotiate IBA's as a pre-bid qualification because this would contradict federal legislation which requires that a single bid criterion be used to select companies for exploration licenses.

Canada has indicated that it is prepared to consider using cash bonus bidding for a future (2005) cycle of exploration licenses, but it will retain any revenue collected. We have informed Canada that this is unacceptable – the Deh Cho must receive a fair share of any revenue collected from Deh Cho oil and gas extraction.

Canada's negotiators have also rejected our proposal to have Deh Cho communities select exploration parcels on the grounds that it "cannot dictate

to companies where to explore”. Canada has, however, agreed that the DCFN will be involved in the selection of larger exploration “blocks” within which companies will choose parcels to bid on.

The negotiations had reached an impasse by March.

Grand Chief Norwegian and Minister Andy Mitchell met in Yellowknife on March 18, 2004. At that meeting they agreed to continue negotiating past the April 17 anniversary date of the signing of the IRDA. The Grand Chief pressed the Minister to give his negotiators instructions to compromise and take a fresh look at whether their legislation allows for more flexibility. The Minister agreed.

We have been informed that Canada’s negotiators are seeking approval for a new paper with a new federal position. At this time, we have not yet received Canada’s new position.

### **KFN Working Group**

The terms of reference for the KFN Working Group have been approved by both Canada and the KFN in January, 2004. The KFN members of the Working Group are Chief Fabian and KFN Band Manager Brenda MacDonald. Assistant Negotiator Sam Gargan represents the DCFN on the Working Group.

The KFN Working Group has now held several meetings. Sam Gargan and Chief Fabian will provide the Leadership with reports on the progress of the Working Group.

### **Pipeline Environmental Assessment**

At the December, 2003 session in Hay River we tabled a draft Memorandum of Understanding for a joint panel environmental assessment of the proposed Mackenzie Valley pipeline. Grand Chief Norwegian has also sent the proposed MoU to the appropriate federal ministers and to the other agencies which would have to be parties to the MoU.

The Deh Cho’s proposed MoU incorporates most of the recommendations of the Cooperation Plan, but improves on the Cooperation Plan and the other draft MoU’s currently under discussion by including all affected regions in

the review process, bringing the National Energy Board into a unified process, and incorporating current best practises for environmental assessments.

There has not yet been any formal response to the Deh Cho's proposed MoU. However, when Minister Mitchell met with Grand Chief Norwegian in March, he agreed with our suggestion that a separate table should be established to allow the Deh Cho PWG to negotiate inclusion of the DCFN in the Cooperation Plan. We asked that all of the parties to the Cooperation Plan be brought together to negotiate.

A meeting was held April 20 in Yellowknife, facilitated by DIAND. Unfortunately, DIAND failed to bring all of the necessary parties to the table and those who did attend did not have a mandate to negotiate. Instead, the session consisted entirely of "information sharing", but no negotiations.

We advised the participants at the meeting that the DCFN will not attend another meeting until the other parties are prepared to negotiate the Deh Cho's inclusion in the environmental assessment process.

### **Bernier**

In October, 2003 the Minister of the Environment appointed Vincent O'Donnell, a Montreal lawyer, to investigate the DCFNs' allegations that the Cooperation Plan developed for the environmental assessments of the pipeline project is seriously tainted because of the involvement of Paul Bernier, Vice-President of the Canadian Environmental Assessment Agency. Paul Bernier is the husband of Maureen Bernier who staked mineral claims near Ft. Simpson in 1998. Last year it became clear that those mineral claims closely coincide with the route of the proposed pipeline.

O'Donnell submitted his report on his investigation to CEAA in January, but it was not released to the DCFN and to the public until April 7. CEAA has promised to release the report "once the government has decided what action to take in light of the report."

The report concluded that Maureen Bernier did not really own the mineral claims. According to O'Donnell, she held them in trust for a company which her sister does consulting work for. The report does not name either Mrs. Bernier's sister or the company which allegedly owns the mineral claims. O'Donnell also states in his report that "at a point in time" he

became aware that his wife's name appears on the mineral claims as the "owner" of the claims, but it does not say at what point in time this happened.

In addition to the above, there are many factual and legal mistakes in O'Donnell's report. Despite this, we recommend that the DCFN continue to focus on the main issue: the DCFN exclusion from the Cooperation Plan, rather than focusing on Bernier.