

**DFN LEADERSHIP**  
**March 7-9, 2006 – Ft. Simpson**

**Report on the Dehcho Process**

**Executive Summary**

AiP negotiations are once again at a crossroads. Canada continues to take the position that its' negotiators only have a mandate to negotiate an agreement based on land selection. At the January, 2006 Leadership meeting in Trout Lake, the DFN reaffirmed that they will not negotiate an agreement based on land selection. Instead, the DFN continue to propose an agreement based on public government and shared stewardship of all lands and resources in the Dehcho.

Over the past year we have witnessed the erosion of interim agreements between the DFN and Canada. Canada has blatantly violated the IMA provision on prospecting permits and refused to honour Article 12 of last year's Settlement Agreement, which requires INAC to refer permit applications to environmental assessment upon request by affected DFN communities. Canada has also refused to include affected Dehcho communities in the "consult-to-modify" process with MVEIRB in connection with Imperial Oil's winter work in preparation for the MGP.

The Dehcho Land Use Plan is now in its final phase, requiring approval from the DFN, Canada and the GNWT. In view of the objections raised by Canada and the GNWT there will need to be a concerted effort by the DFN if the Plan is going to be approved and implemented.

**Background**

Dehcho Process negotiations began in September, 1999. A Framework Agreement, which guides negotiations towards an AiP, and an Interim Measures Agreement were signed in May, 2001. The Framework Agreement says that the Dehcho Process will result in an agreement recognizing a "government based on Dene laws and customs, and other laws agreed to by the parties". The Dehcho government will be the "primary government" for all residents of the Dehcho.

The Dehcho Interim Resource Development Agreement (IRDA) and Interim Land Withdrawal Agreement were signed in April, 2003.

These interim agreements give DFN communities a degree of control over lands and resources. In many cases, the IMA provides DFN communities with more control over their lands and resources than they would have under a typical land claim final agreement.

Following the signing of these agreements, negotiations towards an Agreement-in-Principle began. In the summer and fall of 2003 Canada, the DFN and the GNWT tabled options papers outlining proposals for the lands and resources components of an AiP. The DFN proposals were based on position papers adopted at the 2003 and 2004 Assemblies, focusing on the mandate and structure of a Dehcho Resource Management Authority.

Throughout the fall of 2003 and first half of 2004 AiP discussions proceeded very slowly, as the expected legal action over the exclusion of the DFN from the environmental assessment of the Mackenzie Gas Project overshadowed all Dehcho Process issues. In September, 2004 the DCFN began litigation to challenge Canada's decision to impose the *Mackenzie Valley Resource Management Act (MVRMA)* on the Deh Cho and to impose an environmental review process for the Mackenzie Gas Project in which the DCFN would not have any role in appointing the review panel. Canada responded by canceling Dehcho Process negotiating sessions, but the Process was never formally suspended. In fact, the negotiations on the Settlement Agreement to end the litigation addressed some key Dehcho Process issues.

### **AiP Negotiations**

AiP negotiations resumed in September, 2005. At the November, 2005 negotiating session in Ft. Providence, Canada's negotiators informed the DFN that there is "no support" in Ottawa for the unique type of final agreement which the DFN seeks, based on a Dehcho public government having jurisdiction over the entire Dehcho territory. Instead, they tabled a proposal to negotiate a conventional comprehensive claim final agreement, based on land selection, similar to the Gwichin and Sahtu agreements, but in some ways less than what the Dene obtained in those agreements.

### **Shared Stewardship / Public Government**

The DFN rejected the final agreement which resulted from the failed Dene/Metis negotiations for many reasons, but mainly because that agreement would "chop up" the land into selected blocks owned by First Nations with the remainder being Crown land owned by Canada. The *Mackenzie Valley Resource Management Act (MVRMA)* was developed and implemented to fit within this model.

The DFN have a long-standing policy, affirmed in the Dehcho Declaration, the Dehcho Proposal and numerous Assembly resolutions, of opposing comprehensive claims settlement models based on "land selection". It is intended that the Dehcho government will have jurisdiction over the entire Dehcho territory, for all residents of the Dehcho.

The DFN are in the process of developing a constitution which will describe how the government of the territory will be structured, how it will be chosen, and how it will function. The constitution will also describe how the residents of the Dehcho, both Dene and non-Dene, will relate to their government and how powers will be divided between local community governments and the regional Dehcho government.

Some steps towards this goal have already been taken the Dehcho IMA also established the *Dehcho Land Use Planning Committee*. The DCLUPC can be seen as an institution of public government. It is comprised of 2 Dehcho appointees, one federal appointee and one GNWT appointee, plus a Chair agreed to by the parties. The DCLUPC has a mandate to develop a draft land use plan for the entire Dehcho territory, not just selected parcels. The plan must then be approved by the DFN and Canada before it is implemented. A Dehcho final agreement could incorporate land use planning for the whole territory. It would also recognize a *Dehcho Resource Management Authority* (DCRMA) which would regulate the use and protection of lands and resources, under the authority of the Dehcho government.

In order to avoid land selection and keep the Dehcho territory intact, it will be necessary to give non-Dene settlers who meet the residency requirements set out in the final agreement a role in electing the government of the Dehcho. This is why the government of the Dehcho would be called a “public government” – because it will be a government for all residents of the Dehcho, not just for Dene and Metis.

## **Status of Interim Agreements Between Canada and the DFN**

### Prospecting Permits

Section 39 of the Interim Measures Agreement (IMA) says no new prospecting permits will be issued without the support of affected DFN communities. Last year the DFN were advised by Ethel Blondin-Andrew that Canada now feels that it cannot honour s. 39 of the IMA. She also promised that Canada would write to the DFN to explain why it would no longer honour s. 39 but no such letter has yet been received.

In December, 2005 the Mining Recorder wrote to several DFN communities to inform them that it had received applications for 37 permits in the Dehcho territory. On January 19, 2006 the full DFN Leadership wrote to advise the Mining Recorder that they do not support the issuance of those permits, as required by the IMA. On February 1 the permits were issued. Canada claims that it obtained consent to issue the permits through a series of emails exchanged between INAC and DFN staff in November, 2005.

A Ministerial Appeal has been filed under the *Canada Mining Regulations*. We do not expect the appeal to be successful as previous appeals have been rejected on the grounds that prospecting permits do not affect any treaty rights and DFN communities therefore “lack standing” to challenge the permits. If the appeal filed recently is also rejected, legal action may be considered.

In the meantime, the DFN have taken the position that the permits are illegal and that any mineral staking which occurs without the support of affected communities will also be considered illegal.

## Settlement Agreement

Article 12 of last year's Settlement Agreement, which requires INAC to refer permit applications to environmental assessment upon request by affected DFN communities. In December, 2005 K'agee Tu FN attempted to refer an application by Paramount Resources for authorizations for six new wells in the Cameron Hills to environmental assessment after the MVLWB had refused to make the referral. INAC refused to make the referral requested by K'agee Tu, without providing any reasons for the refusal. In our view, this is a clear violation of the Settlement Agreement signed last year.

In another development since signing the Settlement Agreement last summer, Canada has refused to include affected Dehcho communities in the "consult-to-modify" process with MVEIRB in connection with Imperial Oil's winter work in preparation for the MGP<sup>1</sup>. In our view, this violates Article 4 of the Settlement Agreement which requires that Canada consult with affected DFN communities before making any decisions related to the MGP. Apart from the Settlement Agreement, it is also a breach of Canada's and the MVEIRB's fiduciary obligations to consult with affected First Nation communities before taking action which could impact on Aboriginal or Treaty rights. At the request of DAS, the DFN began a legal action last week against the MVEIRB challenging the exclusion of DAS communities from the consult to modify process. This legal action is intended to determine whether Canada and the MVEIRB have a legal obligation to include affected communities in the consult-to-modify process under the MVRMA.

DFN may decide to also sue the Minister in a separate legal action which would claim that Article 4 of the Settlement Agreement has been violated by their exclusion from the consult-to-modify process.

## Land Use Plan

The Dehcho Land Use Plan is now in its final phase, requiring approval from the DFN, Canada and the GNWT. In view of the objections raised by Canada and the GNWT there will need to be a concerted effort by the DFN if the Plan is going to be approved and implemented. There have already been very extensive consultations with DFN communities over the past five years but the deadline for Plan approval has been delayed by two months to May 31 to allow for an additional two months of consultations.

## Oil and Gas Exploration

The Interim Resource Development Agreement (IRDA) requires consultations between Canada and the DFN on terms and conditions for a new cycle of oil and gas exploration

---

<sup>1</sup> Under the *Mackenzie Valley Resource Management Act (MVRMA)* an environmental assessment results in the MVEIRB issuing "recommendations" to the Minister of INAC. If the Minister does not accept the recommendations he may initiate a "consult to modify" process under s. 130 of the *MVRMA*. In this process the *MVRMA* provides that consultations must take place between the Minister and the MVEIRB before the recommendations are modified, but the Act says nothing about whether FN communities should be included in these consultations.

in the Dehcho territory. In the Settlement Agreement signed last year it was agreed that these consultations would address the following issues: exploration parcel sizes, air and water emission standards, restrictions on seismic cut lines and cash bonus bidding.

Canada and the DFN negotiations on terms and conditions for new oil and gas exploration following the signing of the Settlement Agreement. These discussions with Canada remain very slow. If agreement with Canada on terms and conditions for new exploration licenses the DFN may wish to consider moving on their own to initiate a competitive bidding process to determine appropriate terms and conditions for new exploration.

### Land Withdrawals

During interim land withdrawal negotiations between 2001 and 2003 PKFN decided to pursue a different approach to land protection, using the PAS. When the PAS failed to deliver results PKFN asked to re-open the May, 2003 land withdrawals agreement between Canada and the DFN. Last year's Settlement Agreement contained a provision requiring negotiations on land withdrawals for the PKFN territory. Agreement in principle has now been reached on a package of land withdrawal in the PKFN traditional territory. The agreement will create buffer around Blackwater Lake and other key lakes and rivers and will become part of the DFN land withdrawals package signed in May, 2003.

### KFN Working Group

The KFN working group is a "side table" created by the Dehcho Process main table. Its mandate is to address issues which primarily affect the KFN, including specific claims and issues concerning the status of the Town of Hay River. Sam Gargan represents the DFN negotiating team on the KFN working group.

West Point FN has requested a seat on the KFN working group in order to address their concerns relating to land selection in the Town of Hay River, commercial fishing in GSL and relocation of the West Point community.

## Appendix A

### What Would the DFN Get Under a Land Selection / Comprehensive Claims Model?

So far, all land claim settlements in Canada have been based on land selection. This means that First Nations “select” lands which they will own in fee simple. Lands which are not selected by First Nations are wholly owned by Canada. It is crucial to note that land selection agreements often only give First Nations ownership of the *surface* of the land, while Canada retains ownership over the *sub-surface* - and all petroleum and minerals. The Tlicho agreement provides for surface and subsurface ownership, subject to extensive existing third party rights. In order to achieve ownership of subsurface mineral rights, the Tlicho accepted a lower cash quantum in their final agreement.

If the DFN is considering negotiating a land selection agreement rather than an agreement based on public government of the whole Dehcho territory, it may be useful to examine existing comprehensive claims agreements.

There are an almost infinite number of variables which could affect the cash and land quanta. Rather than trying to produce hundreds of possible models we suggest using only the following key variables:

- amount of land claimed (for the Dehcho it's 215,000 square km): and
- beneficiary population (we are using an estimate of 4,500 for the Dehcho - this may be a little high as there is likely some double counting of Metis, some of whom are on band lists as well as being members of Metis Locals).

We can also use the following assumptions in predicting what a Dehcho agreement based on land selection might look like:

- the amount of land and cash in the Dehcho final agreement will not be affected by the self-government or resource revenue sharing arrangements in the agreement;
- the economic value of land in the Dehcho is essentially the same as that in the Tlicho territory: and
- all land selected by the Dehcho will include both surface and subsurface ownership.

If we assume that a Dehcho land selection agreement would most closely resemble the Tlicho final agreement, we can predict that the Dehcho would end up with a maximum of 60,000 square kms of land (surface and subsurface) and \$135 million. (Current land withdrawals total approximately 100,000 square km).