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Report on the Dehcho Process

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Summary

AiP Negotiations

On May 30, federal negotiators tabled a proposal for an Agreement-in-Principle (AiP) as a basis for negotiating a final agreement to end the Dehcho Process. The federal offer is based on the 1990 Dene/Metis comprehensive land claim agreements, with elements of the Tlicho comprehensive land claim final agreement added. Canada continues to take the position that its' negotiators only have a mandate to negotiate a comprehensive land claim agreement comparable to other agreements in the NWT and based on land selection.

At the January, 2006 Leadership meeting in Trout Lake, the DFN leaders reaffirmed that they would not negotiate an agreement based on land selection. Instead, the DFN have continued to propose an agreement based on public government and shared stewardship of all lands and resources in the Dehcho.

Land Use Plan

The Dehcho Land Use Plan is now in its final phase, requiring approval from the DFN, Canada and the GNWT. The Plan must first be approved by the DFN and then will be submitted to Canada and the GNWT for approval and implementation.

The Plan was supposed to have been finalized in February, 2006, however some DFN Leaders at that time requested an extension in order to allow for further input into the Plan. Following further consultations with DFN communities, the Plan was expected to be approved at the May 31 Leadership meeting in Ft. Liard. At that time, however, PKFN requested additional changes in the Plan. The Leaders then passed a resolution approving the Plan "in principle" subject to the amendments sought by PKFN and ratification by the Kakisa Assembly.

Interim Agreements

Over the past eighteen months we have seen the erosion and violation of interim agreements between the DFN and Canada. Canada has violated the IMA provision requiring community consent for new prospecting permits, and has informed DFN that they intend to continue violating the IMA in the future. Canada has also refused to honour Article 12 of the 2005 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 violation of Article 4 of the Settlement Agreement.

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 high degree of control over lands and resources. In many ways, 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 DFN began litigation to challenge Canada’s decision to impose the *Mackenzie Valley Resource Management Act (MVRMA)* on the Dehcho and to impose an environmental review process for the Mackenzie Gas Project in which the DFN would not have any role in appointing the review panel. The negotiations on the Settlement Agreement to end the litigation addressed some Dehcho Process issues.

Negotiations on an AiP formally resumed in the fall of 2005.

AiP Negotiations

Canada's Position

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.

In February, 2006 the DFN leadership reaffirmed that they will not negotiate a comprehensive land claim agreement based on land selection. When he met Minister Prentice in April, Grand Chief asked that Canada give its negotiators a mandate to negotiate a shared stewardship agreement instead of a typical comprehensive claim.

On May 30, the federal negotiators informed the DFN again that they have no mandate to negotiate anything other than a comprehensive land claim agreement based on land selection. At the same time they tabled an "offer" to settle the Dehcho Process on terms "comparable" to other comprehensive land claims agreements in the NWT. The federal offer would give the DFN ownership of about 17% of their traditional territory and \$104 million paid over 15 years. If the DFN decide to negotiate based on this offer it is likely that the land quantum would be increased to approximately 25% of the Dehcho territory.

The DFN Position - 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.

Some steps towards this goal have already been taken. The Dehcho IMA also established the *Dehcho Land Use Planning Committee*. The DLUPC 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 DLUPC 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 (DRMA)* which would regulate the use and protection of lands and resources, under the authority of the Dehcho government.

The Future of AiP Negotiations and the Dehcho Process

The DFN will have to make a critical decision over the next year: whether to hold to the “no land selection” policy and continue to promote shared stewardship of the whole Dehcho territory, or negotiate an agreement similar to the Tlicho comprehensive land claim agreement, with ownership of approximately 25% of the territory and limited self-government in those “Dehcho title” lands.

If the DFN decides to hold to its long-standing position against land selection, it will be necessary to develop a very ambitious and aggressive strategy to convince Canada to change its’ position. In our view, this will probably require more than merely conventional lobbying tactics.

The DFN negotiating team intends to undertake intensive community consultations in the second half of this year in order to gain broad input into the options and choices facing the Dehcho. Following these consultations we will report to the Leadership and seek a clear mandate for future AiP negotiations.

Dehcho Constitution

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.

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.

It is important to note that the work to date in developing a Dehcho constitution has been based on the assumption that the Dehcho will not negotiate a land selection based comprehensive land claim agreement with Canada. The draft constitution under development is based upon the concept of shared stewardship and public government. If the DFN decide to change course and negotiate an agreement based on land selection, the constitution may have to be significantly revised as it will only apply on selected Dehcho title lands.

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 will not 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

Last year the DFN and Canada signed a Settlement Agreement to end the DFN legal actions challenging the *MVRMA* and the exclusion of the DFN from the agreement which established the Joint Review Panel for the Mackenzie Gas Project. Article 12 of the Settlement Agreement requires INAC to refer any applications for land use permits under the *MVRMA* 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. This is a clear violation of the Settlement Agreement.

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 MGP¹. This violates Article 4 of the Settlement Agreement which requires that Canada consult

¹ 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.

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 fiduciary obligations to consult with affected First Nation communities before taking action which could impact on Aboriginal or Treaty rights.

The DFN may decide to sue the Minister claiming that: (a) Article 4 of the Settlement Agreement has been violated by their exclusion from the consult-to-modify process; and (b) regardless of the Settlement Agreement, First Nations must be included in the MVRMA's 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. There have already been very extensive consultations with DFN communities over the past five years and the Plan was supposed to have been approved by March 31, 2006, but the deadline for Plan approval was delayed by two months to May 31 to allow for an additional two months of consultations. On May 31, PKFN advised the DFN that they required additional changes in the Plan before they would support it. The May 31 Leadership meeting then passed a resolution approving the Plan "in principle" subject to the amendments sought by PKFN and ratification by the Kakisa Assembly.

Oil and Gas Exploration

The 2003 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 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. These discussions with Canada have not progressed.

If agreement cannot be reached 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.

However, all of these discussions may be irrelevant if ADK proceeds with a new exploration cycle on Canada's terms, as seems likely. In that case Canada may have little incentive to agree to innovative new terms and conditions for exploration in other parts of the Dehcho.

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. The 2005 Settlement Agreement contains a clause

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 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 KFN’s Treaty Land Entitlement (TLE) claims which seek additional reserve lands, and issues concerning the status of the Town of Hay River. Sam Gargan represents the DFN negotiating team on the KFN working group.

The settlement proposal recently tabled by Canada states that it is Canada’s position that the KFN will be able to sign either a Treaty Land Entitlement (TLE) claim agreement with Canada, or the Dehcho Process final agreement, but not both. If they choose the Dehcho Process they will not have a reserve but instead will have a share of Dehcho title (fee simple) lands.

Obviously, the people of KFN will have some important decisions to make in the near future.

Nahanni Park and the PAS

The DFN continue to push for the protection of the entire South Nahanni watershed as a high priority. Currently approximately 85% of the watershed is protected through the 2003 interim land withdrawals agreement with Canada.

The DFN also continue to support the Protected Areas Strategy (PAS) as a way of protecting sensitive lands which have not yet been protected through the interim land withdrawals agreement or through the draft Dehcho land use plan.

Jonas Antoine represents the DFN in these initiatives. He will provide a more detailed report.

Training / Capacity Building

The negotiations team is working to develop a plan for training and capacity building to ensure that DFN members are capable of taking advantage of employment opportunities which may result from implementing a Dehcho final agreement. Although a final agreement is probably still several years away, we want to give DFN members every opportunity to be ready to take on new jobs when the Dehcho territory finally becomes, once again, self-governing.

West Point First Nation

WPFN have asked the negotiating team to work with them on a strategy to secure additional land for their community. The current land base is far too small to allow for any new housing or economic development. The negotiations team will explore options for achieving the goals of WPFN through a Dehcho final agreement, or through other means, such as legal action.

Appendix A

What Would 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 of 39,000 square kms, subject to existing third party rights. In order to achieve ownership of subsurface mineral rights, the Tlicho accepted a lower cash quantum in their 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 \$225 million, paid over 15 years.

Current land withdrawals in the Dehcho territory under the 2003 land withdrawal agreement with Canada total approximately 100,000 square km.