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Dehcho Process

Chief Negotiator's Report – May, 2010

Background

The Dehcho Process began in 1999 with the intention of negotiating an agreement which would recognize a Dehcho public government which would have ownership and jurisdiction over all lands and resources in the Dehcho Territory. In 2001 a Framework Agreement and Interim Measures Agreement were signed, and in 2003 the DFN and Canada agreed to package of interim land withdrawals to protect sensitive lands during the negotiations process, as well as an agreement to jointly manage and Nahanni National Park Reserve and to expand the boundaries of the Park to protect the Nahanni watershed. An Interim Resource Development Agreement (IRDA) was also signed in 2003.

Executive Summary

The 2009 Assembly passed a resolution allowing AiP negotiations based on land selection and Canada's Comprehensive Claims policy to take place concurrently with negotiations to modify the draft land use plan, while stating that the highest priority for negotiations will remain the completion, approval and implementation of the Interim Land Use Plan.

The draft Interim Land Use Plan will soon be submitted to the main table for negotiations on several very important items. At this time there is still no commitment from Canada to implement the Plan when it is completed, despite their commitment in the 2005 Settlement Agreement to implement the Plan "as soon as possible" after its completion.

AiP Negotiations

Background to AiP Negotiations

After completion of the agreement on interim land withdrawals and the signing of the IRDA in 2003, the DFN and Canada began negotiations towards a non-binding AiP on land ownership, resource management and governance. DFN negotiators insisted on negotiating an AiP based on shared stewardship of the entire Dehcho Territory, as mandated by the Dehcho Proposal, not land selection. Initially Canada agreed to consider the shared stewardship model, but in 2005 federal negotiators stated clearly that they had instructions only to negotiate an agreement based on land selection under the Comprehensive Claims policy.

Since 2005, Canada has consistently said that it will only negotiate a Comprehensive Land Claim agreement with the Dehcho which is “comparable” to other agreements in the NWT. Under Canada’s “comparable” formula, the DFN could end up owning between 39,000 and 60,000 square kilometres of the Dehcho Territory, depending upon how the DFN interests are compared to other settlement areas. DFN would also be able to nominally participate in management of lands throughout the rest of the Dehcho territory through nominations to the Mackenzie Valley Land and Water Board and the Mackenzie Valley Environmental Impact Review Board. As well, the traditional harvesting rights of DFN members would be preserved on all Crown lands throughout the Dehcho territory.

Based on their comparisons between the Dehcho and the Tlicho, Canada’s negotiators say their current mandate does not allow them to agree to a land quantum of more than 39,000 sq km, which would mean that Canada would own the remaining 176,000 sq km. Any increase to that mandate will require the approval of Cabinet.

The November, 2006 Special Assembly gave DFN negotiators a mandate to “explore” a land selection agreement. This limited mandate was reaffirmed at the 2007 Annual Assembly, which also directed that the DFN continue to stress the importance of compliance with existing agreements with Canada, especially agreements in which Canada promised to implement the completed Land Use Plan (LUP). This mandate was expanded by the 2008 and 2009 Assemblies, so that DFN negotiators now have a mandate to negotiate, not just ‘explore’, an agreement based on land selection.

Last year the main table established a working group called the Legal Technical Committee (LTC). The LTC is comprised of the parties’ lawyers and technical advisors and has a mandate to draft AiP chapters for discussion and negotiation at the main table. The LTC does not negotiate – it simply produces draft AiP chapters which identify the areas where the parties agree and disagree so that the main table can focus discussions on those areas. The DFN is represented on the LTC by legal counsel Chris Reid, and Chris is assisted by Laura Pitkanen.

Current AiP Negotiations

Currently AiP negotiations are addressing the following subjects:

Jurisdiction Over Dehcho Ndehe

The lands which would be “selected” or retained by the Dehcho under a final agreement would be known as “Dehcho Ndehe”. The DFN have proposed that the Dehcho Government, which would consist of both a regional government and local community governments, would have extensive powers over the lands and resources of Dehcho Ndehe. Canada has not responded to the DFN proposal.

Jurisdiction Outside of Dehcho Ndehe - DCRMA

The DFN have proposed that the Dehcho Government and Canada would have shared management and administration of surface and subsurface lands and resources in the Dehcho Settlement Area, including land use planning, environmental assessment, and

regulatory approval. The management and administration of lands and resources in Dehcho Ndehe and off Dehcho Ndehe will be the responsibility of the Dehcho Resource Management Authority (DCRMA). The DCRMA would operate independently of the *MVRMA* and consolidate land use planning, permitting and environmental assessments in a single body.

For transboundary purposes, the functions of the DCRMA would be harmonized with the Mackenzie Valley Environmental Impact Review Board (MVEIRB) and the Mackenzie Valley Land and Water Board (MVLWB), established under the *Mackenzie Valley Resource Management Act*.

Last year the Minister of INAC agreed to give his negotiators instructions to explore the DFN proposal for a consolidated system of resource management based on the DCRMA model. However, federal officials advised us that Canada was not prepared to begin any negotiations on a DCRMA until they completed an internal review of Neil McCrank's 2008 report on the NWT regulatory system. McCrank was critical of the *MVRMA* and the complex system of multiple boards managing natural resources in the NWT. The DFN have expressed the same concerns, however the DFN have recommended establishing a stand-alone DCRMA to manage natural resources in the Dehcho while McCrank instead recommended consolidating resource management in an NWT-wide regime.

The chief negotiators agreed to establish a working group to begin discussions on how natural resources will be managed in the Dehcho after a final agreement. The DFN tabled a draft position paper on this subject, which Canada and the GNWT have not yet responded to. The working group has not yet been established.

Minister Strahl has recently announced that Canada will implement most of the McCrank recommendations and he has appointed a chief negotiator to represent Canada in negotiations with First Nations and the GNWT.

It is not in the interests of the DFN to be drawn into a new, parallel negotiating process addressing the management of natural resources in the Dehcho Territory. We recommend that the DFN not participate in any discussions with Canada on the regulatory regime outside of the Dehcho Process.

General Provisions

We drafted and presented a General Provisions chapter which addresses the status of existing treaties, the nature of the Dehcho Agreement, the geographical extent of the current negotiations, and *certainty*, amongst other provisions. We can see a very clear reluctance on the part of Canada to discuss this chapter in any detail at this time, which is consistent with their general preference to deal with General Provisions (particularly *certainty*) at the end of negotiations.

Harvesters' Compensation

This chapter would provide a "strict liability" regime for compensating harvesters who are negatively impacted by industrial development. In other NWT land claim agreements

only trappers have access to the compensation provisions of this chapter. In the draft tabled by the DFN, all harvesters, including those who harvest berries and other plants, would have access to the streamlined compensation process.

The DFN proposal also provides for the establishment of a Traditional Activities Advocate who would issue annual reports on the state of harvesting and traditional activities in the Dehcho Settlement Area. The reports would identify threats and potential threats to harvesting activities and will make recommendations to Developers and the appropriate Governments for reducing, mitigating or eliminating such threats.

Canada and the GNWT continue to take the position that the range of harvesting activities covered by this chapter should be narrowed to cover trapping only. They have not yet provided any substantive response to our proposal for a Traditional Activities Advocate.

Expropriation

Land claim agreements normally include a chapter which recognizes that Canada and the GNWT can expropriate land owned by First Nations' governments if it is necessary for public purposes and cannot be avoided. First Nations are compensated when their land is expropriated.

The DFN have tabled a draft AiP chapter on Expropriation which includes expropriation powers for the Dehcho Government, which would allow the Dehcho Government to expropriate Crown land in certain circumstances, in addition to recognizing the authority of Canada and the GNWT to expropriate in some circumstances. Federal negotiators have advised that their mandate does not allow them to agree to the Dehcho Government having power to expropriate Crown land under any circumstances.

Canada and the GNWT are only prepared to recognize the authority of the Dehcho Government to expropriate interests within Dehcho Ndehe which were granted by the Dehcho Government.

Wildlife Harvesting

A draft chapter tabled by DFN negotiators would recognize Dehcho Dene harvesting rights throughout the Settlement Area (asserted Dehcho territory) and recognize the exclusive jurisdiction of the Dehcho Government over harvesting within Dehcho Ndehe (selected lands). It would also ensure access to harvesting sites by Dehcho Dene and the right to build cabins as necessary.

This chapter would also recognize the joint authority of both the Dehcho Government and the GNWT to manage and protect wildlife outside of Dehcho Ndehe. Canada and the GNWT insist that the GNWT should have jurisdiction over wildlife management throughout the NWT, with Aboriginal governments participating in administrative and advisory renewable resources boards. This is the model found in other northern land claims agreements.

Further, Canada and the GNWT want the Dehcho Agreement to recognize the authority of the GNWT to take any measures “related to” conservation, public health or safety. The DFN proposal would only allow the GNWT to take measures restricting the harvesting rights of Dehcho Dene when “demonstrably necessary”.

Migratory Birds

A draft chapter tabled by DFN negotiators would recognize Dehcho Dene migratory birds harvesting rights throughout the Settlement Area. It would also recognize that Canada retains authority to manage and protect migratory birds and their habitat, in consultation with the Dehcho Government.

Access

The draft chapter on access to Dehcho Ndehe by persons who are not Dehcho Citizens is long and very complex. It was drafted by federal lawyers and more than 70 footnotes were added to indicate DFN issues and concerns to be addressed by the main table.

Under other comprehensive land claims agreements Canada has the jurisdiction to enact legislation governing access by non-Natives to First Nations’ settlement lands (selected lands), after consulting with the affected First Nations government. We have proposed that the Dehcho Government have exclusive authority to legislate terms and conditions for non-Dene access to Dehcho Ndehe, after consulting with Canada.

This chapter was discussed briefly at the December, 2009 session in Edmonton, but has not yet been the subject of any negotiations. We are awaiting federal feedback on our proposals.

Education

The GNWT has provided draft chapters on early childhood education, post-secondary and adult education, in addition to the K-12 chapter provided earlier. The drafts provide that the Dehcho Government would have jurisdiction over early childhood education, kindergarten to grade 12 education and the certification of teachers, but this jurisdiction would not include the development of the curriculum framework, or setting the requirements for grade 12 graduation, which would remain under GNWT jurisdiction.

Violet Jumbo has been assigned to review these chapters with input from communities. She will report back to us when her review is complete.

Tree Harvesting

The GNWT tabled a draft which has been discussed by both the LTC and the main table. Under the draft chapter the Dehcho Government would own trees on Dehcho Ndehe and would have the right to harvest trees for personal and subsistence use throughout the Settlement Area outside of Dehcho Ndehe.

Commercial tree harvesting will be addressed in a separate chapter.

We are awaiting a new draft from the GNWT. We are also awaiting feedback and direction from the DFN leadership as to what further concerns should be expressed from our side.

Plant Harvesting

Same as Tree Harvesting.

Dispute Resolution

The GNWT tabled a draft Dispute Resolution chapter at the November, 2009 LTC meeting. This chapter is somewhat legalistic, but it is relatively non-contentious. It was discussed at the December main table session and will be revised by the GNWT following their internal review of that discussion.

Eligibility and Enrolment

DFN tabled a draft AiP chapter which would ensure that all Dehcho Dene, including all “non-status” Dene and Metis who are descendants of Dehcho Dene, will be eligible to be enrolled as Dehcho Citizens and vote in the ratification vote on the tentative final agreement. This chapter would also provide for appeals in cases where applications are rejected.

Canada has proposed to produce a Preliminary Voters List by using band membership lists, and then have more complete enrolment lists produced based on those initial lists. The DFN negotiators have rejected Canada’s proposal and instead propose that all eligible persons, including Dene, go through the process of applying for enrolment.

Ratification

This chapter is substantially complete.

Economic Measures

The GNWT tabled a draft chapter which does not include any provisions relating to federal support. We are awaiting Canada’s contribution to this chapter.

Upcoming AiP Drafting

Parks

A technical working group has been established to draft a Parks chapter in the Dehcho Process AiP. The AiP will address the final status of the Park Reserve and clarify the rights and jurisdictions of the DFN and Canada with respect to the Park.

Governance

DFN lawyer, Chris Reid, is drafting a chapter on Governance, which will outline the structures and authorities of the Dehcho Government. It will be discussed at the upcoming main table sessions.

Language, Culture and Heritage - Bernadette Norwegian has researched these subjects and is in the process of compiling information which Chris and Laura will use to produce a draft AiP chapter, initially for internal discussion, and eventual tabling.

Mineral Royalties and Subsurface Resources – Given the sensitivity of these issues vis-à-vis the DFN's move away from a 'no land selection' mandate, and the historic positions taken by the DFN with respect to resource royalties, we recommended DFN's LTC members be directed to draft this chapter (or chapters), but only after we have had a federal response to the DFN position on jurisdiction over lands and resources.

As well main table discussions have also included brief discussions on taxation, culture and heritage, Métis issues and capacity building.

Land Use Plan

The tri-partite LUPC was established by the IMA in 2001 and submitted a complete Land Use Plan in spring, 2006. The Plan was approved by the DFN at the 2006 Assembly, but Canada then refused to approve the Plan, despite their promise in the Settlement Agreement signed in 2005 to approve the Plan as soon as possible after its completion.

In April, 2007 the DFN and Canada agreed to a new work plan for the LUPC to revise the Plan approved by DFN in 2006. Canada and the GNWT changed their appointees on the Committee and Mike Nadli replaced Herb Norwegian as Chair of the Committee. The DFN are still represented on the Committee by Petr Cizek and Tim Lennie. The LUPC is now working on significant changes to the Plan approved by the DFN in 2006.

At this point there is still no assurance that the Interim Land Use Plan will be implemented by Canada after it is completed. In fact, Canada continues to say that they will not implement the Plan until the DFN approve an AiP based on land selection.

The GNWT position is even more extreme, and continues to change dramatically from month to month. Last year, after seven years of saying nothing on this issue, the GNWT informed the DFN that they would not approve any land use plan unless the DFN agree that at least 30% of any "Dehcho settlement lands" selected through the Dehcho Process are selected from areas zoned as Conservation Zones in the land use plan. The GNWT also wants significant amendments to the IMA as a condition of approving the Plan.

The Planning Committee continues to work on very significant revisions to the Interim Land Use Plan. Most of the revisions have been proposed by Canada and the GNWT to permit industrial activity in conservation zones, change "special management zones" into "special development zones" which permit industrial activity, and generally make the Dehcho more open to development than it would be under the Plan approved in 2006.

Issues which cannot be resolved by the Committee will be brought to the Main Table for negotiation.

The LUPC have indicated that they will soon be sending the draft Interim Plan to the Main Table with several very important issues still to be resolved by negotiators.

Interim Resource Development Agreement (IRDA)

The IMA provides that no new petroleum exploration licenses will be issued by INAC in the Dehcho without the support of affected DFN communities.

The 2003 Interim Resource Development Agreement (IRDA) provides that the DFN will receive an annual share of the resource royalties collected by Canada in the NWT. In return, the DFN agreed to use best efforts to reach agreement with Canada on terms and conditions for new petroleum exploration licences. In discussions in 2003 and 2004 no progress was made because Canada refused to consider any of the terms and conditions proposed by the DFN.

In the Settlement Agreement signed in 2005 to end the DFN legal challenge to the *MVRMA* and the process for reviewing and approving the MGP, it was agreed that consultations on terms and conditions for new petroleum exploration would address: exploration parcel sizes, air and water emission standards, restrictions on seismic cut lines and cash bonus bidding. These discussions with Canada have not progressed.

On February 16, 2009, the Grand Chief received a letter from INAC which threatens to terminate the IRDA, along with the annual royalty payouts to the DFN, if there is no agreement by September 2009 to allow a new cycle of petroleum exploration.

If agreement cannot be reached with Canada on terms and conditions for new exploration licenses the DFN may consider moving on their own to initiate a competitive bidding process to determine appropriate terms and conditions for new exploration.

In April, 2009 the Leadership passed a resolution calling for a renewed effort by both the DFN and Canada to find agreement on terms and conditions for a new petroleum exploration cycle. Negotiations with INAC on terms and conditions will be led by a working group appointed by the Leadership. No meetings have yet been scheduled.

In a teleconference on August 7, 2009 the working group members instructed Chris Reid to begin discussions with INAC. Accordingly, Chris held a meeting with INAC officials in Ottawa on September 10, 2009. At that meeting we confirmed that:

- the DFN remain committed to the objective of having a new petroleum exploration rights issuance cycle as soon as possible;
- as set out in the IRDA, in order to meet this objective it is necessary for INAC and the DFN to jointly develop terms and conditions for the right issuance; and
- DFN remain committed to working in good faith to find common ground on terms and conditions.

We also asked INAC to provide us with a written response to DFN concerns regarding:

- exploration parcel sizes;
- air and water emission standards; and
- restrictions on seismic cut lines.

Following the September, 2009 meeting the Grand Chief wrote to Minister Strahl confirming that the DFN are prepared to hold discussions on terms and conditions for new exploration. To date we have received no response to the GC's letter.

Nahanni National Park Reserve

NNPR boundary was expanded last year to cover approximately 91% of the watershed. The portion of the watershed which will not be within the new Park Reserve boundaries will remain protected by the IMA, although they will be open to mineral staking. Much of these lands outside the new Park Reserve boundaries are known to have high mineral potential and could also be owned by the DFN after a final agreement and land selection if they have not been staked by prospectors.

Discussions between DFN and Parks Canada are ongoing on issues related to the implementation of the expansion. For example, the Park has an expanded budget and is hiring additional staff, and it is expected that the Consensus Team will have additional funds to carry out their duties.

ADK

In July 2008, Canada, the Acho Dene Koe First Nation and the GNWT signed a framework agreement to enter into comprehensive land claim negotiations outside of the Dehcho Process.

The DFN Chief Negotiator wrote to Canada's Chief Negotiator on February 23, 2009, outlining the DFN position on the removal of ADK from agreements negotiated through the Dehcho Process, including the Framework Agreement, IMA and IRDA. Canada responded on April 21, 2009 by indicating that they see no need to negotiate ADK's removal from the Dehcho Process and related agreements.

The DFN continue to say that the existing agreements should be amended to remove ADK.

SKDB and NBDB are working together to negotiate a boundary agreement with ADK. Peter Redvers has been retained to assist them in their negotiations. The negotiations are proceeding very slowly because ADK initially refused to negotiate with the two communities jointly, and because ADK has had difficulty keeping a chief negotiator.

Upcoming

The next main table session will be held May 18-20 in Ottawa.