



DEHCHO FIRST NATIONS

BOX 89, FORT SIMPSON, NT X0E 0N0
Ph: (867) 695.2610 Toll Free: 1.866.995.3748
Fax: (867) 695.2038
EMAIL: admin@dehcho.org



Dehcho Process Report – November 25, 2011

Summary

Negotiations on traditional harvesting, governance issues, and other subjects to be included in an AiP, proceeded slowly but steadily over the past year, but Canada continues to refuse to negotiate anything related to the management of lands and resources pending the completion of the federal review of the MVRMA by John Pollard.

AiP Negotiations

Background to AiP Negotiations

The Dehcho Process began in 1999 with negotiations on both a framework agreement and an interim measures agreement. In 2001, the DFN, Canada and the GNWT signed a framework agreement which sets out an agenda and timetable for negotiations towards an AiP and a final agreement. The Framework Agreement says that the Dehcho Agreement (final agreement) will **not** replace Treaties 8 & 11, but will “**clarify and build upon the existing treaties**”.

Canada will only negotiate a Comprehensive Land Claim agreement with the Dehcho which is “comparable” to other agreements in the NWT. Under a “comparable” formula, the DFN would own between 34,000 and 70,000 square kilometres of the Dehcho Territory, depending upon how DFN interests are compared to other settlement areas and how many communities remain part of the Dehcho (the original offer was approximately 46,000 sq km, which was reduced to 39,000 sq km when ADK left the Dehcho and will be further reduced if KFN leaves). DFN would also participate in management of lands throughout the rest of the Dehcho territory through the Mackenzie Valley LWB and the MVEIRB and traditional harvesting rights of DFN members would be preserved on all Crown lands throughout the Dehcho territory.

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.

AiP negotiations have progressed on chapters addressing harvesting rights, but have been very slow in other areas. Canada has so far not responded to the

DFN proposal, tabled in September, 2009, for Dehcho Government jurisdiction over lands and resources. Likewise, Canada is not yet prepared to negotiate resource management issues, access by non-Dene to Dehcho lands, or expropriation.

Current AiP Negotiations

Wildlife Harvesting and Trapping

The Dehcho Agreement will recognize the right of all Dehcho Dene to hunt, fish, trap and gather plants throughout the entire traditional territory of the Dehcho First Nations, not only on selected lands. The draft AiP chapter on Wildlife Harvesting says:

- W.1.1 Dehcho Citizens have the right to Harvest all species of Wildlife, including Furbearers, throughout the area shown in the map attached as Appendix A at all times of the year.
- W.1.2 Dehcho Citizens have the exclusive right to harvest Furbearers in Dehcho Ndehe and Dehcho community lands at all times of the year. This right does not preclude others from harvesting Furbearers in Dehcho Ndehe or Dehcho community lands with the consent of the Dehcho Government.

The map which will be attached as Appendix A will show that harvesting rights continue throughout the entire Dehcho traditional territory, also known as “asserted territory”. In addition, Dehcho Dene will have the exclusive right to trap on selected lands (Dehcho Ndehe).

As for jurisdiction over wildlife management and harvesting, the DFN have proposed that the Dehcho Government will have exclusive jurisdiction over wildlife on selected lands (Dehcho Ndehe). The GNWT (supported by Canada) suggests that it should have jurisdiction throughout the NWT, including the Dehcho. Their rationale is that since animals migrate, it is essential that a single central government manage wildlife throughout the NWT.

- W.1.5 Within Dehcho Ndehe the Dehcho Government retains the authority to manage and conserve Wildlife and will exercise that authority in a manner that is consistent with the Dehcho Agreement. On Dehcho community lands, local Dehcho community governments retain these authorities.¹

¹ GNWT prefers co-management throughout the Dehcho Settlement Area.

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 assist harvesters in making compensation claims and 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 oppose our proposal for a Traditional Activities Advocate, on the grounds that the Dehcho Government alone should represent harvesters. The GNWT has recently indicated that it would agree to having a TAA who would make recommendations to all governments, as long as the position is created and fully funded by the Dehcho Government.

Land Ownership and Resource Management

The Dene versions of Treaties 8 and 11 say that the Dene agreed to share their lands and resources with non-Dene settlers, in exchange for assistance with health, education and housing. The original Dehcho Proposal would have produced an agreement based on “shared stewardship”, in which Canada and the DFN would jointly own and manage the entire Dehcho territory, rather than dividing it through land selection. Although it may not be ideal, land selection is seen by some Dene as an alternative means of sharing lands and resources, and is therefore consistent with the treaties.

Even in a land selection model there is no intention of surrendering or giving up a Dene role in managing lands and resources throughout the Dehcho traditional territory. Through land use planning and the Dehcho Resource Management Authority the Dehcho Dene would continue to participate in the management of lands and resources throughout the entire Dehcho traditional territory. The DFN have proposed a “stand alone” DCRMA, outside of the MVRMA, which would manage lands and resources throughout the Dehcho Territory.

Canada has proposed a Dehcho Resource Management Authority which would only give advice to boards and agencies. Under Canada’s proposal, the Mackenzie Valley Resource Management Act would apply throughout the Dehcho territory and the Dehcho Government would appoint a member to the

Land and Water Board and to the Environmental Impact Review Board operating under that Act.

Governance

In 2010, DFN tabled a lengthy chapter on Governance which outlines the structures and authorities of the Dehcho Government. It has been briefly and will be the subject of further discussion.

DFN negotiators require direction on the structure of the Dehcho Government (DG.1.3), particularly whether the Dehcho Government should have an equal number of representatives from all communities, or weighted representation, which would give larger communities more representatives than smaller communities, or an electoral district (riding) system in which regional government representatives are directly elected to represent their constituents.

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 throughout the DFN traditional territory, called the Dehcho Settlement Area. This would include joint land use planning, environmental assessment, and regulatory approval. The management and administration of lands and resources within 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*.

In 2009 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, Canada refused to begin any negotiations on a DCRMA until INAC completes an internal review of McCrank's 2008 report on the NWT regulatory system and INAC completes internal discussions. 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.

Early in 2010 the Minister of INAC announced that Canada will implement most of the McCrank recommendations and appointed John Pollard to represent Canada in consultations with First Nations and the GNWT. Those discussions are underway now, primarily in Yellowknife. In our view, if the DFN remain intend

on establishing a DCRMA which is not governed by the MVRMA, 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. Any discussions with Canada on the regulatory regime should take place within the Dehcho Process.

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 would have extensive powers over the lands and resources of Dehcho Ndehe.

Canada has provided only a few preliminary comments to date. They have so far refused to negotiate jurisdiction over lands and resources, arguing that they must wait until the Pollard process of implementing the McCrank Report is complete.

Expropriation

NWT land claim agreements include provisions allowing Canada and the GNWT to expropriate land owned by First Nations’ governments if it is necessary for public purposes. First Nations are compensated when their land is expropriated.

In early 2010, DFN tabled a draft AiP chapter on Expropriation 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.

DFN negotiators have agreed to remove Dehcho Government’s power to expropriate Crown land and private lands from the draft AiP chapter, but suggested that these powers could be recognized in another chapter of the AiP.

Another significant issue to be addressed is Ex.2.7:

Ex.2.7 Where determined by the Dehcho Government, lands acquired by the Dehcho Government in exchange for expropriated lands will, whenever possible, be contiguous with Dehcho Ndehe.²

² Consistent with Tlicho 20.4.1, although Canada notes that “it is important to note that this clause was acceptable in Tlicho because they selected one contiguous block of land, equal surface and subsurface. Also, the language in Tlicho is that the expropriating authority shall offer available lands that are adjacent to Tlicho lands. Key words here being ‘offer’ and ‘available’. Dehcho’s 2.6

Canada probably will continue to object to a requirement for exchanged lands to be contiguous, unless DFN select single block of contiguous lands, like Tlichó. Canada also objects to the phrase “whenever possible”, as this bar is virtually impossible to meet.

Education

The DFN position is that in Treaties 8 and 11 Canada promised to provide free education for Dehcho Dene so that they could have the opportunity to learn skills which would allow them to compete for jobs in the emerging economy. The Dehcho Proposal calls for multi-year block funding for health, education and housing in recognition of the commitments made in the Treaties.

The DFN have proposed that the Dehcho Government should have jurisdiction over the development and approval of curriculum, the setting of standards for graduation, and the hiring of school staff, including teachers. The GNWT initially agreed that the Dehcho Government would have jurisdiction in some areas, but they insisted on having jurisdiction over the “curriculum framework”.

Recently the GNWT changed their position. They now agree to recognize Dehcho jurisdiction over K-12 education, including over curriculum, including core curriculum. It should be noted that there is no guarantee that diplomas issued by a completely independent Dehcho high school would be recognized by post-secondary institutions outside of the Dehcho.

Access

The draft chapter on access to Dehcho Ndehe by persons who are not Dehcho Citizens 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.

does not have either of those, therefore limiting the possibility of finding suitable replacement lands.”

Certainty

There would be no “extinguishment” of Treaty or Aboriginal rights or title in the Dehcho AiP or final agreement. However, Canada expects the DFN to either agree that all the rights and jurisdiction which the Dehcho have are fully set out in the Dehcho Agreement, or that they will not assert or exercise any rights not set out in the Agreement.

Canada has proposed Certainty clauses based on the Tlicho model. If the Tlicho certainty model is used, the DFN would agree that if there are any Aboriginal or Treaty rights which are not set out in the final land claim and governance agreement, they will not be exercised. The agreement will be binding on all DFN members. This is known as the “non-assertion” model. If the non-assertion model is used, DFN must also agree that if a court declares that the non-assertion clauses are not legally effective any rights, DFN will cede, release and surrender any rights which are not set out in the Agreement.

We have tabled an alternative Certainty chapter which would *modify* existing Treaty and Aboriginal rights so that they are fully set out in the Dehcho Agreement. This model would not require any commitment to cede, release and surrender, since it is clear that all DFN s. 35 rights are fully set out in the Agreement.

Preamble and Recognition of Dehcho Métis

We have prepared a draft Preamble which is based on the Dehcho Declaration of 1993. The draft Preamble has not yet been discussed at the negotiating table and Canada has not responded to it. We propose to add wording which would note the special circumstances and history of Dehcho Metis.

Land Use Plan

The Planning Committee continues to work on very significant revisions to the Interim Land Use Plan, but their work is almost complete. 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 soon 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.

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.

SKDB and NBDB attempted to negotiate a boundary agreement with ADK, and sought consultations with Canada before the ADK process proceeds to the signing of an AiP. The attempt at negotiations was terminated by ADK, but Canada continued to refuse to consult prior to the signing of an AiP. SKDB and NBDB have taken legal action seeking an order requiring Canada to consult with them before signing an AiP. The case was heard this week in Calgary and we are awaiting a decision from the Court.

Edehzhie

The DFN entered into the PAS in the 1990s on the understanding that it would lead to the permanent protection of at least part of the Edehzhie. Since 2002 an Order-in-Council had protected Edehzhie from mineral staking and exploration through a withdrawal of the subsurface. The OiC was renewed in 2007 and renewed again in 2008.

In a meeting with the Minister of INAC in May, 2010, the DFN were assured that the interim withdrawal would be extended to at least October, 2012. However, on October 28, 2010 Canada allowed the subsurface withdrawal to expire, leaving the entire Edehzhie open to mineral staking, exploration and mining. The DFN were not consulted.

After Canada failed to respond to letters asking for protection to be continued, the DFN launched an application for judicial review in November, 2010. The application asks the court to rule that Canada broke its agreement with DFN when it unilaterally terminated subsurface protection and opened Edehzhie to mining.

The case was scheduled to be heard in Yellowknife during the week of Nov. 7, but was adjourned to allow time for the parties to negotiate. Lawyers met in Yellowknife on Nov. 7 but it now appears that Canada has no genuine interest in resolving the dispute. We recommend re-scheduling the hearing for as soon as possible in 2012.

Next Steps

Negotiations sessions will be held by teleconference Nov. 29-30 and Dec. 13-15.