



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



Report on the Dehcho Process

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Summary

Negotiations on harvesting, governance, and other subjects to be included in an AiP, have proceeded slowly but steadily, but no negotiations on anything related to the management of lands and resources or land ownership have yet occurred. Canada continues to insist that DFN accept the MVRMA as the main legal instrument for managing lands and resources and refuse to negotiate the powers and authorities of a DCRMA.

Some issues remain deadlocked because Canada and the GNWT refuse to accept DFN positions on resource management, jurisdiction over renewable resources, expropriation, control over access to Dehcho lands by non-Dene, and the relationship of Dehcho community governments to the GNWT.

The GNWT has recently adopted a radical change in its position and now demands ownership of 45% of all Dehcho lands after implementation of a Dehcho land use plan and land selection. This is a threat to DFN interests.

On November 16, the Grand Chief met with Minister Duncan in Yellowknife. They discussed possible arrangements to bridge the large gaps between the DFN and Canada on ownership and jurisdiction over lands and resources. Canada has not yet responded to the Grand Chief's proposal.

AiP Negotiations

Land Ownership and Devolution

The Dehcho territory covers approximately 214,000 square km. Approximately ½ of this area is protected through the combined effects of interim land withdrawals, Nahanni National Park Reserve and Edehzhie. This means that approximately 107,000 sq km are "open" for development. It is expected that the proportion of open lands to conservation lands will remain roughly the same after implementation of a LUP and completion of the Edehzhie PAS.

Canada has tabled an offer which would recognize Dehcho fee simple ownership of about 39,000¹ sq km. DFN negotiators have said that the Dehcho land quantum should be at least 70,000 sq km. Regardless of whether the Dehcho own 39,000 or 70,000 sq km, or some amount in between 39,000 and 70,000, it is clearly in the interests of the Dehcho to select all or most of lands from lands which have high economic development potential rather than conservation lands.

The GNWT has recently demanded to own 45% of the Dehcho territory after devolution and the implementation of a land use plan and the finalization of land selection under a Dehcho final agreement. They intend to give Dehcho lands away to large multi-national oil companies and mining companies in exchange for tiny royalty payments. 45% of 214,000 is equal to about 96,000.

If the GNWT and corporations own 96,000 sq km of open lands, the DFN will be left with only about 11,000 sq km of open lands (107,000 – 96,000). The remainder of the Dehcho's quantum of 39,000 sq km would have to be comprised of conservation lands, which cannot be leased or developed without putting sensitive ecological areas, watersheds and harvesting areas at risk. With only 11,000 sq km of open land for development, the Dehcho Government could never generate enough revenue to provide essential services. It would be economically crippled, while the GNWT would receive royalties from the sale of more than 80% of "open" land in the Dehcho.

Clearly, the GNWT position is a major threat to DFN interests. It is worth noting that the GNWT did not mention its position regarding ownership of more than 80% of open land in the Dehcho until very recently. It was never mentioned during the 1999-2001 negotiations on the Framework Agreement, nor was it ever mentioned during the land use planning process which began in 2001. Nor did they mention this policy in 2006 or 2007 during debate on the draft land use plan or the negotiation of new terms of reference for the Land Use Planning Committee.

The 2012 Annual Assembly unanimously adopted a resolution which demands that the GNWT drop its' offensive land grab policy before the DFN will engage in any further discussions with them on lands and resources. The DFN position is consistent with the Framework Agreement signed in 2001, which provides that negotiations on treaty issues, such as land ownership, would be bilateral negotiations between Canada and the DFN, with GNWT as an observer.

¹ If ADK and the Ft. Liard Metis are included, Canada's offer is approximately 46,000 sq km. It is worth noting that the Tlicho have title to about 39,000 sq km under their agreement. The DFN population is approximately 50% greater than the Tlicho Dene population which was the primary factor in determining their land quantum.

Land Quantum

As noted above, Canada has tabled an offer which would recognize Dehcho fee simple ownership of about 39,000 sq km. The Tlicho have title to about 39,000 sq km under their agreement. The DFN population is approximately 50% greater than the Tlicho Dene population which was the primary factor in determining their land quantum. Furthermore, the Dehcho population is distributed through 11 communities, across a much larger territory. For all these reasons, DFN negotiators have said that Canada's land quantum offer to the Dehcho should be at least 70,000 sq km.

It will be important in any negotiations on land quantum to be able to produce solid evidence of the populations of Dehcho communities. It would be helpful if all DFN communities would provide the negotiating team with their membership numbers.

Land and Water Management – DCRMA or MVRMA?

Since the start of the Dehcho Process, 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 the 2005 Settlement Agreement which ended the DFN legal challenge to the *MVRMA*, Canada committed to negotiations on the powers and responsibilities of a stand alone DCRMA. 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 has since refused to begin any negotiations on a DCRMA.

Over the past year, the DFN leadership reaffirmed that the DFN intend to establish a DCRMA which is not governed by the *MVRMA*. We continue to insist that Canada honour the commitments made in the 2005 Settlement Agreement, and by the Minister in 2009, and immediately begin negotiations on a stand-alone DCRMA.

Access

In the draft Access chapter tabled by Canada, non-Dene will have extensive rights to access and use lands owned by the Dehcho, and Canada will have jurisdiction to enact legislation governing access by non-Natives to Dehcho settlement lands (selected lands), after consulting with the Dehcho Government. In response, we have proposed that the Dehcho Government will 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 a few sessions, but has not yet been the subject of any serious negotiations. We are still awaiting federal feedback on our proposals.

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. In addition, Dehcho Dene will have the exclusive right to trap on selected lands (Dehcho Ndehe).

Regarding 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).

- 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.²

² GNWT prefers co-management throughout the Dehcho Settlement Area.

The GNWT says that it should have jurisdiction throughout the NWT, including the Dehcho. They argue that, since animals migrate, it is essential that a single central government manage wildlife the NWT.

The draft AiP also provides that the right to harvest can be limited by the GNWT through legislation, if necessary, for purposes of conservation or public safety, and without consultation in cases of emergency.

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. The DFN have proposed restrictions on the power of expropriation so that the size of Dehcho Ndehe (selected lands) could not be reduced and requiring that compensation for expropriation should always take the form of land rather than cash. Both Canada and the GNWT argue that they need more flexibility to expropriate when necessary, and they have rejected these DFN proposals.

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.³

Canada probably will continue to object to a requirement for exchanged lands to be contiguous, unless DFN select single block of contiguous lands, like Tlicho. Canada also objects to the phrase "whenever possible", as this bar is very difficult to meet.

Certainty

There will 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

³ 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 does not have either of those, therefore limiting the possibility of finding suitable replacement lands."

agreement, they will not be asserted or 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 clause is not legally effective, DFN will cede, release and surrender any rights which are not set out in the final 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. However, it should be noted that if this Certainty model is used, Canada may not agree to include a “faint hope” clause which allow for the remote possibility of later amending the final agreement to include “new” rights not related to lands or resources.

Federal negotiators have said that they expect the DFN to choose either the Tlicho non-assertion model for certainty, including the commitment to cede release and surrender any rights which are not constrained by the non-assertion commitment, or the modification model, in which all rights are fully set out in the final agreement.

Next Steps

The next negotiation session will be held this week (Dec. 10-12) by video teleconference.

Appendix A

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. However, on October 28, 2010 Canada allowed the subsurface withdrawal to expire, leaving the entire Edehzhie open to mineral staking, exploration and mining.

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.

In December, 2011 Canada issued a new OiC which restored subsurface protection for the part of Edehzhie which would form the permanent NWA boundaries under the recommendations of the EWG, which the DFN leadership approved in 2009. This area is approximately 57% of the Candidate Area.

In January, 2012 Canada served a motion to dismiss the case on the grounds that it is moot. The Oct., 2010 OiC which is challenged in the case was rescinded and replaced by the December, 2011 OiC which restored sub-surface protection to that part of Edehzhie which would form the permanent NWA boundaries under the recommendations of the EWG, which have only partially been adopted.

The DFN offered to consent to Canada's mootness motion, which would end the litigation, on condition that Canada agree to pay all or some of the costs incurred by DFN in the litigation to date. Canada refused this offer and the mootness motion was argued on March 5. The Court's decision was released in September. The DFN won the motion, so the case remains active and will soon be set for the main hearing.

In dismissing Canada's motion, the Court called Canada's action "*...clearly questionable, particularly in light of the applicants' asserted Aboriginal and treaty rights and title to the Edehzhie area, which attracts the honor of the Crown.*" The Court also said clearly that "*Until the entire eight step NWT PAS process is complete, interim protection to the entire Candidate Area should remain in place.*"

The hearing on the judicial review application is now tentatively scheduled for March 5-8, 2012 in Yellowknife.

Land Use Plan

The Planning Committee has completed major revisions to the Interim Land Use Plan. Most of the revisions were demanded 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 by DFN in 2006.

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. Federal negotiators have said that the draft ILUP will go through an extensive internal review before they will be prepared to discuss it in detail with DFN. Some preliminary main table discussions have been held on the ILUP.