DFN Chief Negotiator's
Report on the Dehcho Process

January 23, 2008

This report is intended to provide DFN members with an update on developments in Dehcho Process negotiations since the June, 2007 Assembly.

Executive Summary

AiP Negotiations

Exploratory discussions towards an Agreement-in-Principle, which will guide negotiations towards a Dehcho Agreement (final agreement) based on land selection, are underway. Presently DFN negotiators only have a mandate to explore an agreement based on land selection, but not to negotiate. DFN have tabled draft chapters for an Agreement-in-Principle. Federal negotiators tabled a partial draft AiP on June 4, 2007 and have indicated that they will table several more proposed chapters at our next meeting.

DFN negotiators have proposed that exploratory discussions focus on a short list of priority items, including:

- land quantum
- exclusive law making authorities of Dehcho governments
- ownership and law making authority outside of Dehcho settlement lands
- eligibility and enrolment
- implementation of Land Use Plan
- honouring treaty promises
- effect of Dehcho final agreement on Treaties 8 and 11

We have tabled proposed AiP chapters on each of these areas.

Land Use Plan

The tri-partite LUPC which was established by the IMA in 2001 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 have changed their appointees on the Committee and Mike Nadli has replaced Herb Norwegian as Chair of the Committee. The LUPC is now working on amendments to the Plan approved by the DFN in 2006.

At this point, even if a revised Plan is approved by the DFN and Canada this year, there is no assurance that it will be implemented by Canada. In fact, Canada continues to say that they will not implement the Plan until the DFN approve an AiP based on land selection. The DFN will still have to work hard to have the revised Plan implemented whether or not progress is made towards an AiP.

Agreement-in-Principle (AiP) Negotiations

Canada says that it will only negotiate a comprehensive land claim agreement with the Dehcho which is "comparable" to other agreements in the NWT, based on land selection. Under a "comparable" formula, the DFN could end up owning between 47,000 and 70,000 square kilometers of the Dehcho Territory, depending upon how the DFN are compared to other settlement areas.

The November, 2006 Special Assembly gave DFN negotiators a mandate to "explore" land selection. The Assembly also directed that the DFN continue to stress the importance of compliance with existing agreements between the DFN and Canada, especially agreements in which Canada promised to implement the completed Land Use Plan (LUP).

Canada's negotiators have recently informed us that their mandate does not allow them to agree to a land quantum of more than 47,000 sq km. The Crown would own the other 168,000 square kilometers of the Dehcho Territory. DFN members would continue to have Treaty harvesting rights throughout the Dehcho Territory, but Dehcho communities would only have self-government over their selected lands. Canada might agree to a land use planning process throughout the Territory, which would give the DFN some influence over Crown lands outside of their settlement areas.

DFN negotiators have developed AiP chapters Dehcho government jurisdictions, justice, eligibility and enrolment, final agreement implementation, management of lands and resources, and Metis issues.

Federal negotiators have so far tabled very little, but they have made several comments on the DFN positions tabled during our exploratory discussions, including the following:

- At the November, 2007 session in Yellowknife, Canada tabled its bottom line of 46,800 square km. The DFN tabled its bottom line in November: 70,000 square km.
- Canada will not agree to use the term "retained" lands instead of "selected" lands;
- Lands which are not selected by the DFN will not be "shared" lands – they will be Crown lands;
- Canada does not accept that a Dehcho government will have any areas of exclusive jurisdiction. Instead, they will negotiate provisions which state that, in some areas, Dehcho laws may be paramount over federal or territorial laws dealing with the same subject as the Dehcho law ; and

Recent Developments in AiP Discussions

Attached as *Appendix A* is a brief paper on land quantum issues. The paper quotes extensively from the Report of the Royal Commission on Aboriginal Peoples in support of our argument that any Dehcho Agreement based on land selection must provide for a large land base.

Also attached are copies of documents tabled by the parties since the 2007 Assembly.

The Dehcho Land Use Plan

The Interim Measures Agreement signed by the DFN, Canada and the GNWT in 2001 established the Dehcho Land Use Planning Committee. Canada and the GNWT were full, equal partners in the development of the Plan and were consulted throughout the Planning Process. The Planning Committee staff worked very hard to develop a Plan which has been praised by public interest groups and land use planning experts all over Canada as an outstanding model of cooperation that balances the interests of conservation and development. The complete Dehcho Land Use Plan was approved by the DFN at the 2006 Assembly.

The Land Use Plan which was approved by the 2006 Assembly would protect 61% of the Dehcho from oil and gas development and 69% would be protected from mining. These areas would be protected for traditional uses.

Canada informed the DFN on October 26, 2006 that they will not implement the Land Use Plan until Canada and the DFN have reached a land selection AiP in the Dehcho Process based on land selection, including land quantum and financial issues.

In the spring of 2007 DFN and Canada made some compromises which will allow the Plan to be revised so that it is acceptable to Canada and the GNWT, but some major issues have still not been resolved. Canada agreed to a work plan which would allow a revised Plan to be approved (but not necessarily implemented) by the summer of 2008.

There is still no commitment by Canada to implement the Plan, despite their promise in article 13 of the 2005 out-of-court Settlement Agreement to implement it as soon as possible after its completion. If the Land Use Plan is not approved and implemented, the interim land withdrawals which were agreed to in 2003 could expire in October, 2008, leaving all Dehcho lands exposed to sale, lease and development.

We have stressed that our mandate requires that Canada must comply with its commitments to approve *and* implement the Land Use Plan as soon as possible.

Metis Issues

The Dehcho Metis are full partners in the Dehcho Process. They have made several suggestions as to how their interests can be protected through an AiP. The draft AiP to be considered by this Assembly defines "Dehcho Dene" broadly to include all persons with ancestors who were Dene and who lived in or occupied land in the Dehcho Territory prior to the signing of Treaty 11.

The AiP also says: "The Dehcho Agreement will ensure that any legal distinctions or program access distinctions between Dehcho Dene on the basis of *Indian Act* status are eliminated."

As an example of the DFN commitment to this objective the negotiating team proposed inclusive eligibility and enrolment provisions which would make spouses of all Dehcho Dene, whether they are status or non-status, eligible for enrolment as beneficiaries under a Dehcho Agreement.

Next Steps

The next negotiating session is scheduled for in Feb. 4-8 in Hay River. It will focus on AiP negotiations.

Appendix A

Principles to Guide Dehcho Land Selection Negotiations

The 1976 **Dene Nation** proposal for an AiP included the following:

"The Dene, as aboriginal people, have the right to retain ownership of so much of their traditional lands, and under such terms, as to ensure their independence and self-reliance, traditionally, economically and socially, and the maintenance of whatever other rights they have, whether specified in this agreement or not."

RCAP - VOLUME 2 - Restructuring the Relationship

PART TWO
Chapter 4 - Lands and Resources

6.3 A New Approach to Lands and Resources

The ***Report of the Royal Commission on Aboriginal Peoples*** includes the following recommendations for land selection negotiations:

2.4.1

The Commission recommends that federal policy and all treaty-related processes (treaty making, implementation and renewal) conform to these general principles:

…

Federal policy and treaty processes must conform to a number of specific principles relating to lands and resources: Aboriginal nations must be provided with sufficient territory to foster economic self reliance and cultural and political autonomy; traditional Aboriginal territories should be defined as falling into one of several categories of jurisdiction to foster mutual coexistence; third-party interests must receive protection in negotiations; and parties must reach interim relief agreements that protect Aboriginal lands and resources during negotiations.

<u>Providing sufficient territory to foster economic self-reliance and cultural and political autonomy</u>

A major objective of treaty making and treaty implementation and renewal is to facilitate Aboriginal economic self-reliance, cultural autonomy and self-government. To accomplish this, Aboriginal nations must have more territory and rights of access to resources than they do now under Canadian law. Without adequate lands and resources, Aboriginal nations will be pushed to the edge of economic, cultural and political

extinction. This is as true for nations that have yet to enter into treaty with the Crown as it is for those that are party to historical treaties.

2.4.2

The Commission recommends that federal, provincial and territorial governments, through negotiation, provide Aboriginal nations with lands that are sufficient in size and quality to foster Aboriginal economic self-reliance and cultural and political autonomy.

2.4.4

If parties to negotiations wish to establish a per capita formula or a ceiling as part of a framework agreement, that is certainly their prerogative. Governments should not impose such a formula or ceiling as a precondition for negotiations. This is unnecessary, because the amount of land available for selection will vary by region and local circumstances. Where the territory is extensively populated, for example, it may be appropriate for the Crown to provide a limited amount of land plus sufficient funds to enable the Aboriginal party to purchase additional land from willing third parties.

2.4.5

The Commission recommends that negotiations on the amount and quality of additional lands, and access to resources, be guided by the

(a) size of the territory that the Aboriginal nation traditionally occupied, controlled, enjoyed, and used;

(b) nature and type of renewable and non-renewable resources, including water, that the Aboriginal nation traditionally had access to and used;

(c) current and projected Aboriginal population;

(d) current and projected economic needs of that population;

(e) current and projected cultural needs of that population;

(f) amount of reserve or settlement land now held by the Aboriginal nation;

(g) productivity and value of the lands and resources and the likely level of return from exploitation for a given purpose;

(h) amount of Crown land available in the treaty area; and

(i) nature and extent of third-party interests.

Aboriginal nations require not only more territory, but also territory of value. In the past, governments often tried to limit the lands available for reserve selection to those that were of least value to other interested parties.

2.4.6

The Commission recommends that in land selection negotiations, federal, provincial and territorial governments follow these principles:

(a) No unnecessary or arbitrary limits should be placed on lands for selection, such as

(i) the exclusion of coastlines, shorelines, beds of water (including marine areas), potential hydroelectric power sites, or resource-rich areas;

(ii) arbitrary limits on size, shape or contiguity of lands; or

(iii) arbitrary limits on the ability of the Aboriginal nation to purchase land in order to expand its territory.

(b) Additional lands to be provided from existing Crown lands within the territory in question.

(c) Where parties are seeking to renew an historical treaty, land selection not be limited by existing treaty boundaries (for example, the metes and bounds descriptions contained in the post-Confederation numbered treaties).

(d) Provincial or territorial borders not constrain selection negotiations unduly.

(e) Where Crown lands are not available in sufficient quantity, financial resources be provided to enable land to be purchased from willing third parties.

The Commission believes that the principles outlined in recommendations 2.4.1 to 2.4.6 must be given a status that gives all parties the expectation of stability, continuity and accountability. We are acutely aware that negotiating appropriate reallocation of lands and resources and land-sharing agreements will be the work of a generation. If the required trust is to be generated and sustained over this process, stability and accountability are essential.

Categorizing traditional territories to foster coexistence

We propose that negotiations aim to categorize traditional territories in three ways to identify, as exhaustively and precisely as possible, the rights of each party with respect to lands, resources and governance.

On lands in a first category (Category I lands), full rights of ownership and primary jurisdiction over lands and renewable and non-renewable resources, including water,

would belong to the Aboriginal nation in accordance with the traditions of land tenure and governance of the nation in question. Category I lands would comprise any reserve and settlement lands currently held by the nation and, selected in accordance with the factors listed in recommendation 2.4.5, any additional lands necessary to foster economic self-reliance and cultural and political autonomy. On such lands, Aboriginal relationships with the land could be recognized and systems of land tenure and governance implemented more or less in their entirety. For example, Aboriginal people commonly regard their lands and resources as a collective heritage or property. Tenure can be on the basis of an extended family, community or nation, and there might be customary limits and controls on the use, transfer, and alienation of lands and resources. An Aboriginal nation would be free to structure its relationship with Category I lands in accordance with its world view, perhaps by building in legal obligations to serve as stewards for future generations. It could opt for provisions enabling it to grant future interests to third parties in the form of conventional resource leases or permits.[372]

On lands in a second category (Category II lands), a number of Aboriginal and Crown rights concerning lands and resources would be recognized by the agreement, and governance and jurisdiction would be shared among the parties. Category II lands would form a portion of the traditional territory of the Aboriginal nation, determined by the degree to which Category I lands fostered self-reliance.

For example, if lands allocated in Category I were insufficient to provide the means for substantial self-reliance for the Aboriginal nation and its citizens, that nation would obtain a larger share of the revenues generated by taxation or royalties from economic activity on Category II lands. Co-jurisdictional and co-management bodies could be empowered to manage the lands and direct and control development and land use. Rights to traplines and fishing sites could be recognized in accordance with Aboriginal tenure systems and could coexist with Crown rights of mineral exploration, in accordance with provincial or territorial law. Co-jurisdiction refers to an institutional arrangement that allows for representation on a nation-to-nation basis, whereas co-management refers to an institutional arrangement that is more local in nature, allowing for representation of local Aboriginal and non-Aboriginal communities. Both types of regime should be based on the principle of parity of representation among parties to the treaty. Mutual recognition would allow for revenue sharing based on identified benefits flowing from Aboriginal and Crown rights recognized and affirmed by the agreement. In terms of existing uses, Category II lands are already shared lands. Agreements negotiated according to the principles proposed here would give legal force and effect to these uses, in a way that reflects the fundamental rights — and not necessarily the economic and demographic power — of each party.

On lands in a third category (Category III lands), a complete set of Crown rights with respect to lands and governance would be recognized by the agreement, subject to residual Aboriginal rights of access to historical and sacred sites and hunting, fishing and trapping grounds, Aboriginal participation in national and civic ceremonies and events, and symbolic representation in certain institutions. These lands would likely constitute the largest of the three categories and consist of the majority of Crown lands in the area

covered by the treaty, all municipal lands, and most other organized local jurisdictions such as townships or local improvement districts (especially where these consist of settled agricultural or industrial lands). Even on lands in this category, however, some Aboriginal rights could be recognized to acknowledge Aboriginal peoples' historical and spiritual relationships with such lands. For example, Aboriginal people, as a matter of protocol, could serve as diplomatic hosts at significant events of a civic, national or international nature that take place on their territory.

Category I lands will provide the maximum degree of autonomy for Aboriginal people. They will provide for coexistence rather than sharing and minimize the need for harmonization and co-operation. Category II lands will require shared jurisdiction and management. As a general rule, both the expansion of the Aboriginal land base through Category I selections, and security of access to resources on public lands and joint management of these resources on Category II lands, will be necessary to achieve self-reliance and self-government. Although the appropriate mix in any particular situation should be determined by the parties, selection negotiations should seek to maximize the amount of Category I lands available to the Aboriginal nation, and the amount selected should result in a significant increase of territory under Aboriginal control.

This tripartite categorization of land should not be insisted on at the expense of reaching agreement on ownership, use, and access rights concerning features of the environment and common resources not separable by land categories, (for example, flowing waters, fish, some migratory species, and animals with large ranges, such as caribou). In respect of these, the appropriate approach would be to negotiate institutional mechanisms to allow for resource sharing, regardless of location. Concerning fish specifically, an arrangement respecting shared allocation and governance should be negotiated, independent of riparian, coastline, or water bed ownership. Major fisheries would be shared and co-managed as a whole, without regard to land categories. Existing caribou management boards (see Appendix 4B) provide a model of how this might be done. Similarly, some water rights might be allocated through a co-management regime that includes all categories of land.

This tripartite categorization of lands should be employed in a manner consistent with the models of governance discussed in Chapter 3. In particular, and along the lines suggested by the nation-based model of government, we propose that an Aboriginal nation exercise primary and paramount legislative authority on Category I lands, shared legislative authority on Category II lands, and limited, negotiated authority on Category III lands.

APPLICATION OF RCAP RECOMMENDATIONS TO THE DEHCHO PROCESS

The principles outlined above should be applied to the following facts in determining an appropriate land quantum for the Dehcho:

1. There are twelve communities in the Dehcho. Traditionally they have been highly autonomous, and continue to be so today. Each community's unique needs and characteristics must be considered.

2. Some of the areas of the Dehcho with the greatest potential for petroleum and mineral development must be protected in order to achieve Canada's national interests in protecting the ecological integrity of the territory and the survival of Dene traditional practices. The DFN should not be punished in land selection negotiations for having pushed for agreements to protect such areas in advance of land selection negotiations. On the contrary, Canada should support the DFN concept of selecting lands primarily for economic development while working cooperatively with the Dehcho to achieve national objectives through land use planning, the PAS and national parks.

3. To the extent that lands are selected because of their value as traditional harvesting territories, culturally significant or ecologically sensitive areas, the quantum must reflect that large areas are required for traditional practises, and that these areas should allow for significant growth in the population of Dehcho Dene in the future.

4. The Dehcho seek to achieve economic self-reliance through a Dehcho Agreement. The quantum of land available for selection should reflect this principle, even if it means a lower cash component in the Agreement.

5. Economic development opportunities in the Dehcho are primarily in the petroleum sector. This industry generally insists on having secure access to very large exploration and development properties. This could lead to large areas of Dehcho title lands being effectively alienated to private interests. This factor suggests that quantum should be increased to reflect that large parts of Dehcho title land will likely be surrendered to private interests in the future.

6. The Dehcho population is young and growing quickly. Land quanta should reflect the need to have sufficient lands for a Dehcho population which will be much higher in the future than it is now.

7. Selected lands must be contiguous. While Dehcho communities are highly automomous, they also stress that they are One House. There are strong ties of kinship, culture and traditional land use. These factors support the development of a Dehcho land base which consists of interconnected communities.