



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: dcfn@dehcho.org



Dehcho Process Report – June, 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.

Negotiations were temporarily postponed between November, 2010 and February, 2011 while Canada reviewed the court filings concerning the impacts of the ADK comprehensive claim on SKDB and NBDB, and the legal proceedings launched by DFN in response to Canada's decision to open Edehzhie to mining and exploration. Negotiations resumed in February after it was decided that the legal proceedings would have no impact on AiP negotiations.

The draft Interim Land Use Plan will soon be submitted to the main table for negotiations on several very important items. The new draft Plan has been revised to reflect the demands of Canada and the GNWT and is very different from the Plan approved by the DFN in 2006.

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”**.

Signing the Framework Agreement in 2001 did not change the Treaty relationship of the DFN with Canada. In fact, the Framework Agreement emphasizes that a Dehcho final agreement will recognize a Dehcho public government “based on Dene laws and customs, and other laws agreed to by the parties”, which will be the primary government for all residents of the Dehcho territory. Canada and the GNWT will continue to play a role in governing the

Dehcho, but the Dehcho Government will be the primary government for the Dehcho.

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. We have tabled a draft AiP chapter on the jurisdictions of the Dehcho Government on non-lands and resources issues.

Current AiP Negotiations

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 agree that all the rights and jurisdiction which the Dehcho will exercise will be exhaustively (totally) set out in the Dehcho Agreement. For Canada, this Certainty and finality is essential.

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.

Preamble and Recognition of Treaty 8 and Treaty 11

The continuing significance of the original treaties can be referred to in the Preamble, or “whereas” clauses. 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.

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

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.

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

Most issues relating to Migratory Birds have now been resolved. Two issues remain to be addressed:

1. Re: footnote 6: DFN concern is whether Dene harvesting rights in Alberta or Yukon under Treaty 11 would be affected by the Dehcho Agreement. We have proposed wording in draft General Provisions chapter on the territorial application of the Dehcho Agreement. Canada has not responded. In our view, we can address the possibility of provincial licenses for harvesting within the Alberta portions of Treaty 11 after Canada responds to proposed GP wording on the territorial application of the final agreement.
2. If no commercial harvest of migratory birds is allowed, what about small scale selling of meat or birds? We propose to address this issue on the understanding that Canada agrees that small scale, or incidental, sale of meat and parts of birds would be permitted.

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.

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.

Community Governance

DFN negotiators have prepared a draft AiP chapter on the governance of community lands. In some ways it is similar to the Tlicho model, but in other ways is unique. For example, while Tlicho community governments are implemented through GNWT laws, the Dehcho proposal would recognize community governments through the Dehcho Agreement and through implementation legislation, not through ordinary territorial legislation. The draft chapter would also recognize the right of Dehcho communities to choose their leadership through traditional Dene customs rather than through elections.

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.

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 Neil 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 as chief federal negotiator to represent Canada in negotiations with First Nations and the GNWT. In our view, 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 any discussions with Canada on the regulatory regime should take place within the Dehcho Process.

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

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.

The DFN have also proposed multi year block funding.

Parks

² Consistent with Tlichó 20.4.1, although Canada notes that "it is important to note that this clause was acceptable in Tlichó because they selected one contiguous block of land, equal surface and subsurface. Also, the language in Tlichó is that the expropriating authority shall offer available lands that are adjacent to Tlichó 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."

A technical working group was established last year to draft a Parks chapter for the 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 managing the Park. Currently the Park Reserve is managed jointly by a Consensus Team.

Although they have representatives on both the Consensus Team and technical working group which is drafting the AiP chapter on Parks, NBDB has proposed that it should be a separate party and signatory to any agreement concerning the Park. No decision has been made on this matter.

Eligibility and Enrolment

Two key issues are currently under discussion:

1. DFN have 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. DFN negotiators have rejected Canada’s proposal and instead propose that all eligible persons, including Dene, go through the process of applying for enrolment.

2. Canada has proposed that persons who are members of DFN “bands” should be entitled to be enrolled as Dehcho Citizens, regardless of whether they have any Dene ancestry and without the need to apply in a community acceptance process. This proposal would mainly benefit non-Dene women who acquired *Indian Act* status as “Indians” prior to the 1985 amendments to the *Indian Act*. In response, DFN proposed that all spouses of Dehcho Dene, whether “status” or “non-status”, should be eligible for enrolment as Citizens.

Canada has now proposed that only those women who acquired status prior to 1985 and who remain married to the spouses would be eligible for enrolment as Citizens. In our view this could still unfairly exclude some persons who married non-status Dene and therefore never acquired status.

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.

Canada and the GNWT oppose setting out any commercial harvesting rights in the Dehcho Agreement. If any commercial tree harvesting rights are protected they will be addressed in a separate chapter.

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 in 2009, which has now been revised by the GNWT following their internal review of that discussion. The new draft is longer, more complex. Only the parties to the final agreement (Canada, the GNWT and the DFN) would have access to the dispute resolution process. Individual DFN members would not be able to use the mediation and arbitration provisions.

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.

Language, Culture and Heritage

We have tabled a chapter last year setting out the powers and responsibilities of the Dehcho Government, Canada and the GNWT regarding the protection and promotion of Dene Zhatie and the preservation of cultural and heritage resources. The chapter is undergoing internal work before it will be tabled again.

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.

Land Use Plan

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. The LUPC is now completing 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 more extreme. In 2009, 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, 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 have 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 stalled because ADK intransigence and Canada’s refusal 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.

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 litigation has no impact on Dehcho Process negotiations, which have now resumed.

Next Steps

During the summer the LTC will continue to work and hold meetings. Negotiation sessions will resume in September.