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REPORT ON THE DEHCHO PROCESS OCTOBER 2013

Summary

Negotiations on self-government have proceeded steadily, but negotiations related to the management of lands and resources or land ownership are extremely slow. Canada and the GNWT refuse to negotiate the powers and authorities of a stand-alone DCRMA, and insist that DFN accept the MVRMA as the main legal instrument for managing lands and resources throughout the Dehcho territory.

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.

Recently, the GNWT adopted a radical change in its position on land ownership. They now demand ownership and control of 90% of all “open” lands in the Dehcho (45% of the entire Dehcho territory) after implementation of a Dehcho land use plan and land selection. This is a major threat to DFN interests.

In November, 2012, the Grand Chief met with the Minister of AANDC in Yellowknife. They discussed a possible deal to bridge the large gaps between the DFN and Canada on land ownership and jurisdiction over resources. DFN proposed a bilateral side table with Canada to address these key issues. Canada has not yet responded to the Grand Chief’s proposal and has not yet appointed members to the proposed side table.

In a meeting earlier this year with the Grand Chief, the Minister of RWED agreed to recognize Dehcho jurisdiction over wildlife on Dehcho Ndehe. The GNWT has since reneged on this agreement.

In December the parties will hold a workshop on governance issues to discuss possible models of government for the regional Dehcho Government and Dehcho Community Governments.

AiP Negotiations

Land Quantum

Canada has tabled an offer which would recognize Dehcho fee simple ownership of about 39,000 sq km. By comparison, 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.

Land Ownership and the GNWT

The Dehcho territory covers approximately 214,000 square km. Approximately 48% of this area is protected through the combined effects of interim land withdrawals, Nahanni National Park Reserve and Edehzhie. This means that approximately 111,000 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.

Last year the GNWT announced that they now demand that 45% of the entire Dehcho territory after devolution and the finalization of land selection under a Dehcho final agreement remain "open" Crown lands. They intend to give these open Dehcho lands away to oil companies and mining companies in exchange for tiny royalty payments. 45% of 214,000 is about 96,000.

If the GNWT and private corporations own 96,000 sq km of open lands, the DFN will be left with only about 15,000 sq km of open lands (111,000 – 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 15,000 sq km of open land for development, the Dehcho Government could never generate enough revenue to provide essential services.

It is worth noting that the GNWT did not mention its position regarding ownership of more than 86% of open land until very recently. It was never mentioned during the 1999-2001 negotiations on the Framework Agreement, nor during the land use planning process which began in 2001. They also did not mention it during the renegotiation of the LUPC's terms of reference in 2007.

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.

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.

In our most recent main table session, Canada suggested that they would be prepared to recognize a minimal sort of DCRMA which would be responsible for land use planning.

Water Rights

Canada recently tabled it's proposed chapter on water rights. Two key provisions:

11.1.1 Subject to other provisions in the Dehcho Agreement, the Dehcho First Nations, the Dehcho Government and Dehcho Citizens have the exclusive right to use Water and deposit Waste in waters on or that flow through Dehcho Ndehe when such waters are on or flowing through Dehcho Ndehe.

11.1.2 Subject to any use of Water, deposit of Waste or activity authorized by law, including by an authorization issued by the MVLWB or by another compentent authority, the Dehcho First Nations, the Dehcho Government and Dehcho Citizens have the right to waters that are substantially unaltered in quality, quantity and rate of flow when such waters are on, adjacent to, or flow through Dehcho Ndehe

While these two clauses at first appear to recognize substantial Dehcho water rights, it is important to understand that "...activity authorized by law..." (authorized by the MVLWB) would prevail over Dehcho water rights.

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.

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. 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 Dehcho Ndehe and shared jurisdiction throughout the rest of the 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.

In a recent meeting the Minister of RWED agreed to recognize Dehcho jurisdiction over wildlife on Dehcho Ndehe. The GNWT has since reneged on this agreement.

Traditional Activities Advocate

In the draft Harvester Compensation chapter we have proposed to establish the position of Traditional Activities Advocate, who would assist harvesters in achieving just compensation when their trap lines, berry patches, or other resources are damaged by industry. The TAA would also issue annual reports on the state of harvesting and traditional activities in the Dehcho. 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. At first they opposed the TAA on the grounds that the Dehcho Government alone should represent harvesters. They have since changed their rationale and now simply claim that the Dehcho Agreement “should not create positions” such as the TAA.

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.¹

Although no reason has been provided, Canada continues to object to a requirement for exchanged lands to be contiguous. Canada also objects to the phrase "whenever possible", as this bar is very difficult to meet.

Dehcho Government

The draft AiP would recognize a regional Dehcho Government which would own Dehcho Ndehe and whose powers will be set out in the Dehcho Agreement. The Dehcho Government would be comprised of representatives chosen by each Dehcho Community, as well as a Grand Chief.

The powers of the Dehcho Government would include:

- selling or leasing parcels of Dehcho Ndehe, including sub-surface resources;
- management of trees and plants;
- full jurisdiction over K-12 education;
- early childhood education, post-secondary and adult education;
- child and family services;
- marriage and adoption;
- culture and language;
- traditional healing practises;
- income assistance;
- wills and estates;

¹ 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."

- business licensing;
- control of intoxicants and liquor;
- other matters set out in the Dehcho Agreement.

We are also seeking jurisdiction over subsurface resources and wildlife on Dehcho Ndehe, but do not have agreement on these matters.

DFN have proposed that both the Dehcho Government and Community Governments be comprised of a House A and a House B. House A will be responsible for making laws on matters that are Treaty related and/or Section 35 rights and will be comprised only of Dehcho Dene members of the Dehcho Government. House B will be responsible for making laws and regulations of a public nature, which affect both Dene and non-Dene residents of the Dehcho. House B will include all members of the Dehcho Government, both Dene and non-Dene.

Community Governments

The Agreement will recognize local community governments in each Dehcho community. Each community will own its' community lands (surface only) and will have jurisdiction over local matters, including:

- sales and leases of community lands;
- land use planning and zoning;
- municipal services;
- community roads;
- control of intoxicants and liquor;
- other matters set out in the Dehcho Agreement.

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. Early in 2012 the LUPC have indicated that they would soon send 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.

At this time, Chief Joachim Bonnetrouge remains Chair of the LUPC. The federal seat on the LUPC remains vacant.