



Negotiating the Dehcho: Protecting Dene Ahthít'e¹ through Modern Treaty-Making

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This memo is a high-level summary of my research. It is not a full account of my argument or recommendations. I simply introduce my topic and survey its main points and themes. The full report will be available in October, 2019 through the Gordon Foundation's Jane Glassco Northern Fellowship website. Please refer to the full report for comprehensive context and recommendation development. Thank you to my mentor, Larry Innes, and my cohort of Fellows—without their support, encouragement, and thoughtful teachings this research would not be possible.

Introduction

The Dehcho Dene, Government of the Northwest Territories (GNWT) and Canada must harmonize their competing visions of law and governance through nation-to-nation partnership and treaty federalism. This research modestly describes the positions of each party, identifies areas of mutual understanding, and analyzes potential compromises and opportunities going forward. Three primary sources inform my analysis: the spirit of Treaty 8 and 11; lessons from the success of Edézhzié, the first Indigenous Protected Area in the Dehcho region; and Canada's *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*.²

Background Context

Negotiations began in 1999.³ The *21 Common Ground Principles* and subsequent *Dehcho First Nations Framework Agreement* established the overarching goal of recognizing a Dehcho "government based on Dene laws and customs, and other laws agreed to by the parties".⁴ The *Dehcho First Nations Framework Agreement* sets out the guiding principles, objectives, roles, and other negotiating specifics. By 2017, many terms were tentatively reached on governance, justice, culture and language, marriage, adoption and child welfare, social housing, income

¹ Dene Ahthít'e "means the ongoing relationship between Dene and the land as expressed through the Dene way of life, including language, customs, traditions, historical experiences, spiritual practices, and laws." As cited in the "Agreement Regarding the Establishment of Edézhzié," October 11, 2018, <https://dehcho.org/docs/Edézhzié-Establishment-Agreement.pdf>.

² Canada, Justice Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, (Ottawa, 2018), <https://www.justice.gc.ca/eng/csj-sjc/principles.pdf>.

³ Dehcho First Nations, *Dehcho Process Annual Report*, last modified June 2008, accessed July 15, 2019 https://dehcho.org/docs/DFN_Negotiations_Process_Report_2007-2008.pdf. See also: Dhara Philpot, *Crown Consultation in the NWT: A Case Study to Establish a Consultation Working Group in the Dehcho Region* (Master's Dissertation, March 31, 2010), 47-48.

⁴ "The Deh Cho First Nations Framework Agreement," May 23, 2001, https://www.eia.gov.nt.ca/sites/eia/files/dfn_framework_agreement.pdf. The Agreement is based on the *21 Principles of Common Ground*, the result of Peter Russell's Special Ministerial Envoy in 1997.



assistance, and more.⁵ Land quantum and resource management terms remain outstanding. DFN has recently stated its desire to put lands and resources negotiations on hold while other aspects of the agreement are implemented.⁶

Negotiating Positions of the Parties

DFN's latest position consists of three terms⁷:

- 1) Canada must establish a Dehcho Resource Management Authority (DCRMA);
- 2) Dehcho Ndehe (the settlement lands) must include at least 50,000 square kilometres of surface and subsurface lands subject to 100% DFN control; and
- 3) Outside Dehcho Ndehe, joint land use planning between DFN and government, guided by the negotiated Dehcho Land Use Plan (DLUP).

The above offers reflect the GNWT's position:⁸

- 1) The settlement area should be between 42,000 to 48,000 square kilometres;
- 2) The settlement lands may include either surface and subsurface rights or surface rights only with a generalized interest in the subsurface of the settlement area; and
- 3) Resource royalties from Crown lands in the Mackenzie Valley are possible but depend on the direction taken to 1.

The GNWT has expressed that all parties want regional land use plans, which would include implementing an approved Dehcho Land Use Plan. The GNWT and Canada are open to the DCRMA as part of the integrated system of resource management in the Mackenzie Valley.

Policy Recommendations for Negotiators

1) The DFN compromise: accepting land selection and pursuing sovereignty goals within the GNWT's legislative and administrative scheme

⁵ "Dehcho First Nations Agreement in Principle" (Rolling Draft, Version #41, January 3, 2017), accessed July 15, 2019, <https://dehcho.org/docs/50-ROLLING-DRAFT-AIP-VERSION-DATED-JANUARY-3-2017-2-1.pdf>. The 2017 rolling draft is the most recent version available online. As I am not privy to negotiators' discussions surrounding the specific provisions within this draft, I cannot claim that it represents the most accurate and recent representation of the agreement between the parties.

⁶ Alex Brockman, "Dehcho First Nations put land issues aside – for now – in land-claim talks with Ottawa, NWT", CBC, <https://www.cbc.ca/news/canada/north/dehcho-first-nations-land-negotiations-1.5193005> (June 27, 2019).

⁷ *Dehcho Process Negotiating Team Report*, last modified June 2017, accessed July 15, 2019, <https://www.liidliikue.ca/sites/default/files/Dehcho%20Process%20Update%20-%202017%20Assembly%20package.pdf>, 2-3.

⁸ Interview with Fred Talen, Director of Negotiations, Department of Executive and Indigenous Affairs, Government of the Northwest Territories, May 9, 2019. I am grateful for his time and assistance in clarifying the GNWT's position in the negotiations.

If DFN accepts a land offer within the GNWT's offer range, it can still assert sovereignty in the Dehcho Region in other ways.⁹ Provided the GNWT and Canada compromise on policy and procedure design under the co-management regime, Dehcho law can influence co-management processes by directing the DCRMA's recommendations, meaning DFN will shape resource management in its traditional territory while allowing the GNWT to preserve its legislative regime.¹⁰ In turn, DFN could press for authority over the DCRMA's operating procedures so that, over time, they mirror the co-governance model seen in the Edézhíe Management Board. With conscientious refinement, the DCRMA could grow into the EMB's likeness through consensus decision-making and reliance on Dene laws and values.

2) The GNWT and Canada compromise: accepting Dehcho policy design in resource management in exchange for legal certainty

The GNWT and Canada could jointly-ratify a Governance Protocol (GC) with DFN for shared governance in resource management. GC terms could enshrine commitments to giving equal weight and consideration to Dehcho law in resource management throughout the Dehcho region.¹¹ The protocol could simply take the Edézhíe Management Board as precedent and commit to working with DFN to adapt the DCRMA's policies and procedures to mirror the EMB operations. Guided by the Dehcho Land Use Plan, the DCRMA's recommendations could, over time, introduce meaningful reliance on Dehcho law in land and water, land use planning, and environmental assessment processes, especially where decisions are made through consensus between the DCRMA and the relevant Minister.

3) Constitutional Dialogue: Capturing the Spirit of the Treaties through the Principles Respecting the Government of Canada's Relationship with Indigenous Peoples

If the relationship between the DCRMA and the relevant Minister demands consensus in decision-making, the arrangement fulfills the principle of free, prior and informed consent, a

⁹ For a leading example of how this may be possible, see John Borrows' discussion of Nisga'a law application in the context of the modern Nisga'a Final Agreement. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 96. Borrows argues that the Nisga'a Final Agreement includes important provisions recognizing and asserting Nisga'a law. *Ibid.*, 99.

¹⁰ The Mackenzie Valley Land and Water Board (MVLWB) comprises several regional panels that regulate the use of land and water and the deposit of waste by issuing Land Use Permits and Water Licenses. These panels each have their own jurisdiction. They include the Gwich'in Land and Water Board, the Sahtu Land and Water Board, and the Wek'eezhii Land and Water Board. See the Mackenzie Valley Land and Water Board, "Co-Management: Our role in Integrated Resource Management Under the *Mackenzie Valley Resource Management Act (MVRMA)*," accessed July 15, 2019, <https://mvlwb.com/content/co-management>. The DCRMA would become integrated under this system as another regional panel. Where the DCRMA's decisions and/or recommendations are grounded in Dehcho Law, Dehcho law influences this overall process.

¹¹ See Naomi Metallic and Janna Promislow, "Realizing Aboriginal Administrative Law" in *Administrative Law in Context*, eds Colleen M Flood and Lorne Sossin (Emond: Toronto, 3rd ed, 2018), 130. Metallic and Promislow observe that while it is easy enough to assert that Indigenous law should play a role in decision-making and judicial review, what this looks like in practice, how it is incorporated, and ultimately how it is adjudicated where disputes arise is more difficult to discern.



core principle espoused by *Canada's 10 Principles* document. Such a relationship can be created through the policies and procedures that govern the parties' decision-making process. For example, the Minister currently issues "Policy Directions from the Minister" that bind co-management boards. This could be replaced with "Co-Governance Protocols" that commit the parties to consensus, reducing opportunities for unilateral ministerial discretion.

As it stands, the AiP achieves many of *Canada's 10 Principles*, but greater work is needed to fulfill *Principle 6, meaningful engagement with Indigenous peoples that aims to secure their free, prior and informed consent* and *Principle 8, a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development*. My above recommendations go some way towards fulfilling these goals.

Conclusion

Although compromise and flexibility will be required, workable solutions need not force either party to abandon their deeply held and sometimes conflicting worldviews. Collaborative co-governance arrangements can blend these perspectives without subordinating either one.

These suggestions, which include moving towards a model of consent in resource management and sincere engagement with Indigenous law in the decisions of co-management boards, simply reflect the momentum and dominant tide of resource management narratives in Canada. Implementation is possible without overhauling all progress to-date on the AiP or the territory's legislative and policy resource management scheme.