

MEMORANDUM

TO: CSKT File

DATE: November 3, 2009

RE: CSKT RWRCC Team and MOU Group Meeting

Introductions were made. Sign in sheet (Attachment 1) Dave McAlpin on phone.

Susan Cottingham suggested the Team hold the next negotiating session on December 9, 2009 rather in November. The change in schedule is approved by the Tribe and Susan will talk to Duane Mecham about it. There will be a conference call today with the federal and Tribal teams at 2pm.

Susan said that Duane has been marshalling federal officials to see if they can make some decisions in “real time” and to make sure they are participating if they are grappling with thorny issues for example on the unitary ordinance, rather than letting the state and the Tribes wrestle with it and the feds coming in later. These officials include Pam Williams and Letty Belin. The federal team has hired Ed Sheets who was a facilitator for the Nez Perce settlement to help move the process along. They all hope to start getting down to” nitty gritty” issues on the unitary ordinance, protect of existing users, etc. and Duane also wants to lay out a timeline to get certain things done. The state held an internal to discuss Hungry Horse issues.

Dave McAlpin asked if they still waiting for the federal team to be in place? Susan explained that they are; but there is a working group and Pam Williams is working on it –as is Mike Connor the new commissioner of reclamation; and David Hayes, an Under Secretary of the Interior. There are four settlements moving through Congress including the Crow. It is a good effort by Duane to try to get the attention of federal officials and let them know that this will need a high level of attention in coming years. Dave asked if we have confidence they will not flip on us regarding the issues being worked on? Susan said no, but Duane is trying to make sure this doesn’t happen. They have been working on the Crow federal bill for over a year and new issues come up all the time.

I Hungry Horse

Jay Weiner explained that a coordination meeting was held yesterday with the people working on the Columbia River litigation in Portland. The Federal Columbia River Power System (FCRPS) consists of 13 federally owned dams all along the river. It requires an incidental “take” (of salmon) authorization from operators for the system to run under the Endangered Species Act. National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (NOAA Fisheries Service) must do a Biological Opinion (BiOp) every 10 years. He explained the litigation over the BiOp which over the years was challenged and struck down, for example, the 2004 second BiOp was struck down very quickly which led to collaboration between Washington, Idaho, Montana, the Confederated Salish & Kootenai Tribes, the Colville Tribes, the Yakama Tribes, and lower river Oregon tribes. They have been working together and fish accords came out of an MOU done with pretty much all the sovereigns except the Nez Perce and the State of Oregon. Montana’s interest is for bull trout and other native species neglected due to focus on the lower river. Montana, along with the other parties is trying to defend the last BiOp from challenge. Judge

Redden asked federal officials to take a look at the BiOp and they came back in mid September and said they approved. Part of the reason the BiOp is being opposed by Oregon and the Nez Perce is that they want four dams on the Snake River taken out, and they did not agree with the federal assessment. Another status conference is scheduled in Portland on November 23rd. The parties are hoping there will be a decision by the end of the year. They think looking at Hungry Horse as a source of water is important but it is best not to interfere with the litigation. The CSKT asked to have various scenarios where Hungry Horse water could be used looked at. BOR did a series of model runs looking to take about 250,000 af out of Hungry Horse directly. The technical teams asked the BOR to look at pulling water out of the mainstem of the Flathead River and backing that up with water from Hungry Horse. They probably won't see results of modeling until Redden issues his ruling.

Susan asked how the second scenario differs from the first scenario in terms of using Hungry Horse water. Jay said right now a fair amount of water comes out of Hungry Horse with scheduled releases. A second idea is to see if they can skim off the top to take water for CSKT – and take that water out of the Flathead River. If there are shortages the modeling would look at how much water would have to come out of Hungry Horse to make up the differences. The BOR has looked at 20 feet from full pool to a max of 10 feet from full pool. 25,000 ac would be as much as 10 feet of draft. They don't want to submarine what the Fish Wildlife and Parks has done or mess with the lower river releases.

Chris Tweeten noted regarding the decisions as how to nuance the modeling...there is a question as to who will make the decision as to which most needs to be weighed among state agencies including FWP, DNRC, RWRCC and the AGs office. Ultimately if they can't present a unified front the governor's office will have to make the call. There are a lot of different balls in the air the parties need to proceed with carefully and need to proceed without conflict internally.

Mike McLain said looks like some things were piled on and in consequence the model might be conflicting with the operating scheme. Jay said Leslie Stillwater (BOR) began modeling work in 2007 and had to look at prior operating schemes rather than the new one, and therefore, parameters were not as clear. Mike said we might have a more clear idea about the parameters after the November 23rd status conference. Chris said that regardless of the desire to keep all the elements on a level playing field there will be substantial other elements weighing in and we will be under a lot of pressure from other states to make a decision.

Jay said what we can't afford to do is say we have to keep water in Hungry Horse but then that we want additional water coming out. The Columbia River interests really align with the FWP fisheries piece – we don't want to mess with mainstream amendments. Jay has some ideas as to how to work the same water for both purposes. Susan said they have always looked at nearby reservoirs to help with extra water (when negotiating) but this is the most complicated. She said no matter how much we satisfy the downstream users, they will still have a sword to hang over our heads when this goes to Congress.

Chris talked about the two reservoirs Hungry Horse and Flathead Lake as water sources. Jay said Flathead Lake is dicey and people become concerned when lake levels change. It is operated under its own management plan. They need to look at how much of the settlement water they want to use can be stored in Flathead Lake rather than looking at other

infrastructures. If they were able to take water from the mainstem of the Flathead River during winter there would be a lot less impact to the system. A follow-up question for the model is how Flathead Lake interacts with this. The 125,000 ac ft number came from looking at how many acres of the Flathead Indian Irrigation Project (FIIP) could be served by the Flathead mainstem and a question is whether that is too big a number. They currently are trying to figure out what conceivable alternatives might be.

Dan Belcourt noted that a court case in the 9th circuit will probably take another couple of years – so how does this fit into the time frame of negotiations?

Susan said she thinks that DNRC has a contract with attorney James Litchfield and she asked who to talk to about having them do some work. Anne Yates doesn't know who the contracting entity is; however, Chris thinks it's probably the AG's office that has the contract as they were paying all the costs for the Columbia River litigation.

Mike McLane explained that the Clark Fork Task Force formed through legislation when Racicot was governor and that the group was tasked to look at water management and future water supply on the Clark Fork river system. Most of the plan was adopted by the DNRC state water plan but not all of it. One concept was for the state to look at Hungry Horse water supplies with the primary focus on trying to keep hydro power and downstream folks whole and allow more leasing, etc. Folks in Flathead were pushing for Montana to look at this harder. Legislation was passed directing DNRC to meet with the BOR which responded that if they wanted a small contract BOR would write one for 25,000 af for 20 years. Now they consume about 250,000 af of water out of Clark Fork (WHO DOES?) Another bill was carried to get funding for DNRC to do cost allocations with BOR doing the work and DNRC paying for it (DID THIS PASS I'M ASSUMING SO)....There are issues about what a new use should cost for water out of the system and it gets more and more complicated as it goes along. Anne Yates said there have been some changes in the BOR modeling that DNRC needs to look at. Jay pointed out that if they are looking at taking more water from Flathead or Hungry Horse to replace water used on the Reservation that the water will flow west from the Reservation.

II. Off –Reservation Rights

Jay explained why the negotiating parties need to put so much attention on this and talked about the Stevens Treaty rights which generally have language giving Tribes rights to hunt and fish in their “usual and accustomed places”. This is a strong claim for them to be able to hunt and fish off-Reservation. Were the state to litigate such claims it would have arguments to make over size and location of rights. It is the policy of the Compact Commission to negotiate federal reserved water right claims, and they are trying to figure out if there is a basis for settlement. They have asked the CSKT to hold off putting a proposal on the table in case it will stop the negotiations. At the staff level they have had conversations about it, and with the MOU group also, the question being if there is a proposal they can put together to make to the Tribes for a good faith offer to settle their claims. He has had some conversations with John Carter as to locations where aboriginal right might be claimed including the Bitterroot, Clark Fork and Kootenai basins. With that as background he explained some issues surrounding the former Mill town dam.

The map Bill handed out is one Sonja did titled “current and proposed instream flows in Western Montana”. As displayed in the Forest Service negotiations the current level of instream flow protections is likely not adequate. Some of the other maps distributed look at land ownership patterns and look at who might be impacted. Mill Town is critical because it is a fairly senior right in the middle of the Clark Fork system and one the Tribes have identified and reached out through the Natural Resources Damages Program (NRDP). It is clearly something they are focused on and Mill Town presents a series of complicated issues for the state to grapple with.

Mike McLane explained that the Mill Town water rights will move to the state as part of transaction of NRD and superfund settlement. The deed was supposed to be signed months ago. It appears to him that an underlying concept is that the state is accepting the land around the dam which will then become a park. Some focus of the Commission is to look at changing that from a non-consumptive hydro instream flow use to a non-consumptive fisheries instream flow right. Who in the state would end up owning it has not been decided but Fish Wildlife and Parks has been mentioned. One concept he has looked at is management with drought or minimum flow targets for various parts of basins that instream flows come into. Those are being operated as FWP minimum flow rights – for fish where they are trying to share shortages but protect fisheries. With these rights they might look at extending these operations other places in the basin so drought low-flow planning could be used on, for example the Little Blackfoot River. On the Clark Fork and Blackfoot above Mill Town they have instream flow just under 2000 cfs. The level at Mill Town would be pretty adequate fishery flow for feeding and movement. If you compare that to water that is available it's only in the very drought years that those targets are not met. Most years you would not be in conflict with existing users in the basin. There are 300 folks in the basin that are junior to Mill Town. A legal issue that could come up is that Mill Town never made a call so some say it would no longer be an enforceable call because they sat on the right and lost it. It is an interesting legal argument that someone might raise. Mike is not convinced that Mill Town is a potential argument. The state is part of the settlement as part of North Western's liabilities as part of the NRD settlement. The NRD program thinks FWP is the ideal entity to hold onto that water right. If they were to handle it to FWP and FWP didn't have value in it, they would give it to someone else.

Susan asked why they are talking about this in this context and Jay explained that it is a fairly senior right with the ability to provide instream flow protections. He asked if there a way to give the Tribes a seat at the table? An advantages would be if including Mill Town in the settlement it could help Montana not go through the DNRC change process. It would depend on the settlement. Mike said that DNRC hydrologists worked looking at future power demands that went through every dam on the Clark Fork system and made forecasts related to consumption of water. He suggested that the team look at that report and document. Chris said if it is Land Board land the rest of this is idle chit chat because they will have a whole process to go through. He asked if the water right be taken separate from the land? Mike noted it has not been conveyed yet. There could be options within the settlement agreement if the state has accepted the assets but the state has not signed the agreement. He said if this can move there is the potential to create instream flow protections; this could put management of water for fish at the table. It is only in the low years that there will be a discussion of management and it might be useful to make a water user plan to share storages or a drought plan. It would bring the Tribe and FWP to similar

places. Jay asked about ways to use the Mill Town right to push people into a drought management process and said there are several different directions they could take this in. Susan said the political question will be dominant and if they give Tribe equal standing, what happens in a drought year when the Tribes want enforcement and DNRC can't enforce it – in all practical ways how will this work. Chris said FWP thought acquisition of MT right and using it like this is a neat idea and that there is nothing to say they can't come up with instream reservations co-owned by the Tribe and FWP and set them up on a percentile flow basin with contemporary priority dates – selling it to Tribes that it will have impact on development in the basin and is meaningful for fisheries. It might be simplest and least politically challenged for the basin.

Dorothy expressed concern about the time frame. Regarding off-reservation issues maybe could get all interesting brains together and write down the options and make a recommendation to the Team. Chris noted that Duane would also like to get all decision makers together.

Jay said it would not work to separate the off-reservation issues because they are working on on-reservation issues that the Tribe wants. What they have been talking about regarding Mill Town and FWP – the big picture political piece is the same for all that. One thing the Tribes cannot get is a water quality piece. If there is a way to offer them a seat at the water quality table, which no other tribe has gotten; if there was a way DEQ could do this it might help the political issues.

Jay talked about the Stevens treaties and the other tribes who have such rights; for example the Washington shellfish and fisheries issues gave tribes a rRight to water to sustain a fishery. Still open question as to what level of fishery there would be.

Art Noonan said at FWP they have already been contacted by Clark Fork people saying the minute FWP gets Mill Town water, they immediately want hearings. (Upper Clark Fork Steering Committee.)

Susan said if early next year the CSKT puts a proposal on table and they want instream flows in all streams in western Montana people will come unglued and it could be a major meltdown in the negotiations. They are worried about the bigger risk of having a Tribal thing on the table that shuts everything down. The off-Reservation claims are unique (in Montana) and people will meltdown at this notion so the question is how to contain it. If there is something they can take to the governor's office with a state proposal it will help. In the near future they need to elevate these discussions to see if Mill Town is something to talk about. Anything they do will cause headaches for DNRC because this is new and something never done in Montana. Having this fit the easiest way for DNRC will be good to talk about. She said they grappled with same issues with the Forest Service. They could not agree that the Forest Service had instream flows but used a system where they could come to the state and get water reservations. Jay said that's why they have been looking at land status. The Flathead, Swan, federal land, state lands and Plum Creek lands are smaller than having 4000 individual landowners and the land status is technical work they are continuing to pursue. Dan Belcourt noted that the Tribe is going through an election next year. Jay said that is important regarding timing. Art mentioned that when Mill Town hits Fish, Wildlife and Parks, folks will be focused on it. Mike said the water users in the Clark Fork basin have a

big fear of the unknown. When they look at fish issues, because hydro already plays a big role, their risk doesn't change – to the extent that you can say what the right down below is at maximum and it is a dual use for fish – so less than 20% of the time there is conflict. It has the potential to give water users more security and certainty and then they can manage for certainty and most of the time they won't be in huge conflict. Tribal interests are part of their Stevens right – he asked how Fish, Wildlife and Parks get a seat at the table and if they can do that through the compact.

Robert from DEQ thinks that from the environmental perspective there is a beneficial aspect to providing more certainty for instream flows. Beneficial uses of water also include drinking water and irrigation. Regarding TMDL, looking at ways to maintain instream flows could be very beneficial. DEQ is interested but how they can participate is still unclear.

Susan said that right now Flathead has treatment as state (TAS) status on the reservation. Robert explained that they identify stream reaches not meeting water quality standards and then EPA looks at them. The TMDL efforts are currently focused in western Montana and the whole western part has issues identified, some worse than others. Dan asked if there is the ability to have the Tribes apply standards to off-reservation water. Jay asked if that would be something DEQ could live with, if it can be pulled together. Mike asked if the Tribes would then look at DEQ and ask for standards to be enforced? They don't mind co-owning a water right but are not interested in abrogating their management responsibilities. Jay said they are looking for what parameters in which they can discuss this? If Fish, Wildlife and Parks or the Tribes could make a call in a certain situation could there be standing to have DEQ do enforcement? If the Tribe and the state are co-owners does it affect the Tribes' way to deal with quality and quantity, i.e., would they have the same standing as any water right owner? Jim Madden said the owners will be told by the compact what their right is and how they can enforce it. Susan asked if a state water user have a right to get involved in water quality issues. Chris said they already have that standing. Jim Madden said they could identify a reservation use as including quantity. Any citizen can complain and the Tribe can complain. Mike noted that in water reservations such as Yellowstone and Missouri the DEQ is granted a water right for quality purposes, and they might look at the same standards in the Clark Fork.

Susan said they could ask the staff to do a memo to outline some of this stuff and also give it to the governor's office to make sure they aren't going down a route they are uncomfortable with. She asked Jay about timing as to when they might get a proposal together – JW said he does not have a timeline and he had wanted to take it to this level and see where they can go next. He suggested taking it back to the staff level with Mike McLane and Robert ____ from DEQ and with DNRC to get some sense of when it could be put together.

III. Unitary Administration

Chris gave a brief overview, explaining that the Commission had a go-ahead from the governor's office to discuss this and generally figure out what it means. To the staff it means working on the conjunctive management of surface and ground water and joint management administration by a joint entity. On the joint administration the Tribes did the first draft and the state is trying to get comments back to them, which Candy West has agreed to do. Candy will look at legislative changes in the Water Use Act to inform her comments and she will

filter them through DNRC and the Commission. They will have questions to be answered at the political level. For example, the Tribes are not happy with the state's abandonment laws. State law may have a burden on the objector to show a period of non-use and then abandonment; it is not clear. The Tribes would like to automatically have the burden shift to the water right holder. It can't be finalized in the ordinance until they know what the state will do politically. Susan thought they told Rhonda that they would try to get a response back by the next negotiating session in December.

Susan said there are some larger issues that will create bumps in the road there may be a difference of opinion as to what "unitary" means. Jay said in a reasonable definition of "unitary" they think state and Tribal rights would be unitarily managed. A question is if the Tribes want a block of water to manage, how would that fit in? There are significant questions about what sort of groundwater development is possible – where the water is going to come from for new development and who is going to get to develop it.

Susan said she has been worried because she wondered why they would put a unitary thing forward which would say that all water, Tribal or non-Tribal would be managed by this board. Dorothy said they should put those things out to the Tribes and ask if they have a mutual understanding. Chris said there should be a discussion behind the scenes and Dorothy agreed – and said they can't have the definition change part of the way through negotiations. Jay previously flagged the issue for John Carter and said maybe it needs to involve higher team members than himself and Carter. Susan agrees with Dorothy – if they are looking at apples and oranges they need to know. Jay said from the perspective of the ordinance they proceed with the assumption that they are writing the rules of the road for consumption and a question is whether or not Tribes get to allocate a pot of water that is set aside and how future development can be authorized. As a separate conversation, are the Tribes thinking there is a pot of water not subject to provisions of ordinance. Mike asked if that would be a deal killer. Chris said the question of whether they have the right or not would be in the compact and the involved parties could take it to the unitary administration board and argue about it. He also said there is the question of where the governor's office wants to go with this. Dorothy said she said she would rather not discuss this with the governor's office until we have the Tribe's response. Jay reminded the team that for CSKT this is a council driven process. Dorothy said it would be nice to know at least what their legal people are thinking. Chris suggested talking to Carter about what unitary means and about a block of tribal water and what this might mean and that it is potentially a deal breaker for the state in terms of unitary management with the question being how the block fits into the administrative process. Jay said he is uncomfortable to putting a number to this yet as there is no idea where the water will be coming from. Chris said they need to know what they are talking about before they talk about quantification and source. Jay said he doesn't totally agree as he thinks there are a couple of ways to get at this – and that the source itself could have ramifications. A question is whether they will impose something that looks like what state law requires – basically pushing all development to exempt wells. Chris asked if unitary apply both ways or only to state law rights and if so unitary is down the tubes.

Jay said one thing to think about is surface and groundwater interaction and what it will look like. Unless they set out to create a system that formally favors community wells or at least makes them possible they will be left with an exempt well problem. It's an issue in the

ordinance that folks need to be attuned to. Tom Schultz asked about the issue of exempt wells and whether or not they could have an exempt community system in the compact? He asked if they could have a better system out there that has overall less impact than having exempt wells everywhere. Jay said he has not thought about solutions yet. Tom said they have been thinking about this in some other arenas and perhaps it could set a framework for other state law. Susan asked if there is a sense from the Tribe about what they want to use future water for and Bill Greiman replied that it is wells. Jay's sense is that it is because all Tribal settlements here get future water. Jay said hopefully John Carter is taking it back to his team to talk about it. Susan suggested circling back with Carter and asking him if he has taken it to his folks and if he can after their election and say we aren't anxious to move forward without knowing. Chris said at some point he and Jay should sit down with Carter and Rhonda and discuss it perhaps around the time of the next negotiating session.

Susan asked if Jay wanted to talk about junior state-based water users. Jay said it is an internal issue re joint management, single resource, and sharing resources. One thing that has become clear on the system at least on the Mission and the Jocko they can get their brains around how they can split shortages. He noted the issue of junior irrigators – those junior to FIIP with either an 1855 or 1909 date. Bill Greiman said there are 300 or 400 individuals. He also noted the importance of the BIA's redesignation process. Jay said in all likelihood the FIIP will come out being under the Tribal water right. FJBC is talking to CSKT about it. Anne said she was thinking of historic beneficial use and they may run into problems bringing them into the project. Would sharing shortages be internal to the project rather than having the administrative entity deal with them? Bill explained that redesignation is the formal process that BIA goes through to re-look at the land base, look at who uses water and who does not, and it is the process for setting assessments. Jay pointed out that the Zuni water settlement includes legal land descriptions. Chris asked if the current turn over agreement include redesignation? Bill said no one knows yet. Jay said the current turnover is supposed to be a month away and the problem continues to lie with Interior signing the contract. Chris asked why we don't know what it says and Jay said he would check it out.

Jay asked about the question of non-project juniors who could be brought in fairly easily – of the 400, 100 drop away if they are rolled into project and 300 would be left. Could they be included in the ordinance through an administrative system moving away from first in time, first in right – or do what they did on Cut Bank Creek and Milk and say best of luck and if water flows they can take it. Could they negotiate for a “no-call” for non-irrigation purposes? Chris said the Blackfeet option won't work for the CSKT and that the legislature will have to pass something that people won't get upset about. Bill noted that this is irrigation and that there will be other wells, etc. Chris said they have a group of water users that will fall out of the system and they need to find some way to fix that. Mike reminded them that there were people developing water rights using the inefficiencies of existing systems. For some folks they were grabbing water that was there when they could get it. They may have better access to water now than project users do. They may be way out of priority but maybe no one else can use the water. Jay said the practical versus legal/political issue is different. In other works, are we prepared to do something different than first in time/first in right enforcement? Chris said they won't be doing that with respect to Tribal uses. It might have to be modified with respect to junior users. Mike asked what existing joint board users think? Bill said their opinion is that they are using the water already and it would be better if they were paying their fees and getting the same share of water with assessed taxes on their acres.

Bill said Sonja will make a detailed map of these users and Chris said the number may not be so high so the problem will be easier to solve.