

DRAFT MEMORANDUM

TO: CSKT Negotiating Team; Jay Weiner, Susan Cottingham, Sonja Hoeglund, Bill Greiman, Stan Jones, CSKT Files
FROM: Joan Specking
RE: Draft Summary of November 19, 2008 CSKT Negotiating Session, Tribal Council Chambers, Pablo
DATE: November 21, 2008

Chairman: James Steele
Agenda (**Attachment 1**)

1. Opening Prayer

Opening Prayers are not recorded.

2. Introductions

See sign-in sheet (**Attachment 2**)

3. Opening Statements

Clayton Matt asked for opening statements from the parties. Chris Tweeten said they were glad to be back to talk about where they stand, continue moving forward and to present some information; they look forward to having discussions and continuing to make progress. Chairman Steele welcomed everyone, said they have been at this awhile and it looks good and hopefully they can get this over with in a fashion that makes everyone happy. Chuck Courville, BIA, explained that Duane Mecham could not be at the meeting due to some other negotiations and he said they are glad to be there and will keep on going. Clayton welcomed everyone and said they will continue to have monthly meetings and include in their prayers that they will still continue to have monthly meetings after the next legislative session.

4. Discussion of Unitary Management Proposal

Clayton explained that the unitary management proposal was put on the table by the CSKT and that the CSKT, the United States, and the State have been exchanging ideas on the draft document that is out for public review on the State and the CSKT website.

Jay Weiner said since the last negotiating session in October they have had a series of legal meetings with himself, Rhonda Swaney, John Carter, Duane Mecham and David Harder. There has been participation from DNRC staff working their way through the latest draft trying to identify some questions they have and ways they think it can be approved, and talking about some issues they think need to be elevated from the legal/technical level to a negotiating team and negotiating session level. The document control is being done by Rhonda Swaney who will be integrating the various comments after which they will have a new draft to release to the public. The goal is to have that circulated internally in the next couple weeks

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and have a new draft on the websites prior to the December negotiating session. They are looking at issues ranging from where burdens of proof should lie to bigger picture issues as to how a unitary management plan would synch up with off-Reservation enforcement issues. There are a host of questions technically and procedurally from a water management view and what sort of issues need to be addressed in the body of the compact proper before they can be finalized in an ordinance to implement the compact.

5. Other Technical/Legal Items for Discussion

Clayton asked if there were technical reports from the Commission and said Seth would be there to give an update. Seth said they are thinking about complex issues. They have protection of existing uses which they are calling Level 1 Hydrographs. The State has done a nice job of modeling that process. They have an early December meeting with the Natural Resource Conservation Service (NRCS) who will be developing very comprehensive snow forecasting tools at about five sites and hopefully they will be able to do five sites per year. He said this will be a beneficial thing for all parts of water management on the Reservation whether it be water rights or irrigation water management separately. The State hydrologist kind of pushed that button and they got a favorable response. River forecasting has become a very valuable tool. For those familiar with last month's report on Hungry Horse modeling, the Bureau of Reclamation has committed to the next step of work on that and soon he will be talking to them on the phone about the mechanics. They have modeled a diversion of water out of Hungry Horse Reservoir and one of the updates they are preparing for is to look at modeling natural flows out of the Flathead River with utilization of Hungry Horse only as a last resort during driest years. They will execute that work and provide the technical groups with a written summary. That work is proceeding pretty well and that sums up where they are at this time. They had an aggressive period of work this fall and they will step into it again shortly.

Jay added that from the State technical side they are continuing to churn through the extensive flow data the Tribes have shared with them so they can continue to develop and refine some of the Level 1 Hydrographs. They have the Jocko and have shared it with the Tribes and are now working on the Mission and the Little Bitterroot and to see if the "unitless representational hydrograph" as previously explained by Bill Greiman, continues to hold as a viable tool in those drainages. They will share that data with the Tribes as they generate it. The forecasting piece Seth talked about is a critical part and they are developing the hydrographs based on historic streamflow records the Tribes have gaged over the years. They want to be able to work with NRCS and the federal team is putting money on the table to help with the forecasting which they want to use to "truth" the hydrographs, i.e., going back to look at how water management might go in a certain year and to be sure the hydrograph approach is viable. One of the goals is to have the hydrographs and forecasting tools to a state that they can affectively use them during the

next irrigation season side by side with how water management is actually going to be done and to get some real-time data. He also noted the more than 1050 hours put in by DNRC personnel on post-1973 permit verification for the negotiations. They are continuing to look at permits issued to make sure the use of the permits is the same as the terms under which the permits were issued. That is so they all understand what the actual use of the water is and so the Compact Commission and the Tribes can live up to the commitment they've made to protect valid existing uses. Also ongoing is the claims examination of pre-1973 filed claims. The DNRC is having teams look at claims in 76L and 76LJ. They are having some conversations about getting the process done as efficiently as possible and about making sure they can get as much useful data about existing irrigation uses for the adjudication and for the negotiations. The Commission is also beginning to develop the canal seepage study and some equipment is being purchased. Chris Tweeten clarified that hydrographs are streamflow management tools, used in order to figure out how existing rights fit with Tribal rights; how streams flow and to predict how they flow under various assumptions. The technical teams need the information to determine how various combinations of Tribal instream flows and non-Tribal irrigation use are going to fit together and what the impacts will be. They are looking at quantification and how it will have an impact on existing uses both Tribal and non-Tribal. Bill Tash noted the Sno-Tel snow measurements and how important they are to irrigation water supplies later in the season. Chuck Courville said he went out 3 weeks ago with Stan Jones and located about 19 sites for the canal seepage study and said they will be committed to putting in some of those flow meters before next irrigation season for the study.

John Carter said they have heard about progress to date and talked about how to tie it together into addressing the next step the Tribal and State technical and legal teams have been discussing and to put it on the table. Initial discussions were about the proposed unitary management. The question is what they administer and Level 1 and Level 2 hydrographs address a lot of that. The Level 1 hydrographs address essentially what's going on at this time and existing Tribal and non-Tribal consumptive and non-consumptive uses. The Level 1 hydrographs paint a picture of what is going on today and establish a baseline from which to protect current existing uses, Tribal and non-Tribal instream flows, etc. Future uses and the ability to improve water availability have been mentioned several times. The Tribe's proposal addresses two approaches; the Level 1 approach which is under way. Level 2 is the next step up; what the Tribe itself would like to see in conjunction with the federal and state negotiators to address future needs for Reservation uses such as instream flows, lakes, reservoirs and future consumptive uses. With the footing well in place in administrative framework and the science and methodologies for developing Level 1 hydrographs, they believe it is time to put Level 2 on the table and begin trying to figure out how to address that. The Tribal legal/technical team met last week and would like to sit down

with the State technical people and put a proposal or discussion on the table as to how to start discussing Level 2 hydrographs such as how they feel about improved efficiencies in the Project and on the ground; how they supplement existing water supplies; engineering, etc. They would like to move on to that without diminishing the ongoing efforts on the administrative framework and Level 1 Hydrographs. Basically it is to move and decide how they shape the future of the deferred Tribal claims and other claims for water on the Reservation. They would like to get together with the State and federal technical/legal teams and brainstorm how to best achieve what they perceive the appropriate level of hydrograph.

Jay said that sounds reasonable and they should talk about scheduling.

Susan asked what the timing is on the next Hungry Horse modeling run by the next negotiating session. Seth said he did not believe they would have it.

6. Question and Answer Period

Rory Horning asked to have them define a discreet site visit. Jay said it is when DNRC contacts a land owner and goes out to look at the water use on the property. They are all scheduled in advance and claimant contact is made by phone. Jay said these have been done in the past and prior to 1992 the Department routinely came out to verify permits. It is the usual process where claimant contact is the first and most important step. It is always done with contacting the claimants. It is critical that it is done in conjunction with permit holders and land owners.

7. Other

Jay said he has been in discussion with Megan Estep of the U.S. Fish and Wildlife Service regarding National Bison Range water rights. In the past they noted that DNRC has examined the claims filed by the FWS for the Bison Range and this summer the FWS went out to look at the claims and the Tribe has reviewed the claims. At the present, FWS is working with DNRC claims examination to discuss any issues DNRC may have raised regarding the filed claims and his hope is that they can shortly take the claims and work them into a draft compact that they will have public negotiating sessions for and they are hoping to do the first one in conjunction with the next CSKT negotiating session in December. He hopes they can go from one to the other that day. One thing they have discussed in the past is making sure that any compact they do with the NBR will fit administratively with the administrative system in the CSKT negotiations. They recognize that the Tribes have an immediate interest in these negotiations; they expect to have the Tribes involved and circulate drafts to them as soon as they are available and take Tribal concerns and input into the negotiations so they are sure they are doing something that makes sense to the Tribes and fits with the vision of water rights on the Flathead. The NBR claims are comparatively small,

relatively discrete and straight forward and something they can take to the legislature in 2009. For purposes of discussions with the Tribes they have a lot of moving parts and doing the NBR is a way to fix one of the smaller variables they have. As all of the negotiations they will be transparent to the public and none of it goes to the legislature without public comment. Chris Tweeten said they agreed some time ago rather than negotiate the NBR out separately like other FWS sites they agreed it would be negotiated in a parallel way with CSKT negotiations for water allocations on the Reservations. In several areas of their discussions they have various tracts going on with regards to the water rights discussions; irrigation project CME and the National Bison Range, are examples. Clayton said this has previously been a subject of discussion and to confirm Chris's and Jay's comments there is conceptual agreement between the CSKT and the State of Montana on the relationship between the CSKT and NBR negotiations and how the NBR negotiations will be folded into the Tribal settlement and the Unitary Management Agreement.

8. Public Comment

Clayton said they have been in negotiations a long time and they appreciate the public's time and attendance. There was no public comment.

9. Set Next Negotiating Session Date

The next meeting was set for Wednesday, December 17, 2008, with the RWRCC chairing it.

10. Closing Comments by the Negotiating Teams.

Chris said from the State's side of the table they have heard comments folks made in past meetings about lack of apparent progress and he understands the appearance that things aren't getting done especially in a short meeting like this. They are trying very hard to make sure that whatever agreement they reach has a solid base and facts from around the Reservation. He said he appreciates the patience the members of the public have with respect to the pace of the negotiations. Progress is being made in gathering needed information and as Jay's chart showed there are other issues they have not yet discussed and there will be hurdles to be jumped before an agreement is ready. Chuck Courville said he would give Duane an update and is looking forward to working with Stan out in the field. Chairman Steele thanked everyone for traveling for a short meeting and let them know again that if they have any questions call the Tribe. Clayton said that these are complicated matters and they need to take the time necessary to work through all the details and they have only one chance at it and it is their future. Generations have talked about this and this might be the time they come to a substantive agreement. Complicating factors make this time consuming; irrigation project involved in a transfer process; on and off reservation issues to discuss; many uses to work through to protect; a complicated administrative scheme and adding to that there is the looming potential for litigation on the Reservation. They are all trying to extend the date of the Commission to continue negotiations; if it isn't extended the Tribe must file claims with the Water Court within six months. They urge the parties to continue to keep negotiations going in the process. In that

same vein they noted there is a Commission meeting the following day in Helena. Chris said there is a nine member Commission and in the 1980s it decided to break up into negotiating teams. They have a team set up for the CSKT. In addition the Commission as a whole meets periodically to update the members. They review various negotiations, administration of Commission staff, pending legislation, the status of remaining compacts, and talk about Congressional implementation issues. Lately they have been trying to meet on a quarterly basis. They are open meetings and the public is welcome to come; the CSKT has attended the Commission meetings.

Meeting adjourned.