

# MEMORANDUM

To: Susan Cottingham, Staff Director, RWRCC  
From: Sonja Hoeglund, Project leader and Stan Jones, Hydrologist, RWRCC  
Subject: Notes from CSKT Negotiating Session on February 7, 2002  
Date: February 18, 2002

## Summary:

The federal government, Tribes, and the State agreed to set aside the Tribes' jurisdictional Proposal (i.e. they own all the water and should administer all of the water) and agreed to set up three, possibly four, working groups. These groups are:

1. Administration – to develop options for administration of water rights on the Reservation;
2. Technical – to study the hydrology on the Reservation; and
3. Claims examination – to discuss options for commencing claims examination of State-based users on the Reservation.

The Tribes tentatively agreed to a fourth working group on developing an interim plan for the administration of water on the Reservation pending negotiation of a compact. This group must first be approved by the Tribal Council. The working groups are charged with bringing options and recommendations to the full negotiating teams. While the Tribes' jurisdictional Proposal may still be presented to the working groups, the State indicated that such a proposal would not meet the State's goal of developing a compact that would be accepted by the majority of the persons affected, could be passed by the Montana Legislature, and could be passed by Congress. The Parties will meet again in May or early June and will continue to meet quarterly thereafter.

## Notes from the meeting:

A negotiation session between the Confederated Salish and Kootenai Tribes, the Federal negotiating team, and the Montana RWRCC was held on February 7, 2002 at Ruby's Inn in Missoula.

The meeting was called to order by chairman Chris Kenney at approximately 9:00 a.m. Introductions were made.

- Representing CSKT were Clayton Matt, Rhonda Swaney, Kevin Howlett, Ron Trahan, Joel Clairmont, Maggie Good, Joel Irvine, Patrick Pierre, Daniel Decker, Ignace Couture, Francis Auld, and others.
- Representing the federal team were Chris Kenney, David Harder, Cheryl Willis, Norbert Ries, Bernard Burnham, and others.
- Representing the Compact Commission were Chris Tweeten, Tara DePuy, Bill Tash, Cindy Younkin, Candace West, Susan Cottingham, Anne Yates, and Sonja Hoeglund and others.

Opening remarks were made by Chris Kenney, Pat Pierre, and Clayton Matt, and Chris Tweeten.

Kenney outlined basic negotiation procedures agreed to by the Parties. Negotiation teams from each party will negotiate for their constituents. This will require a commitment of time and resources. It is important to understand that this is a very early stage in the negotiations in which issues are being defined, and it will take time to find resolution of those issues.

Pierre gave a historical sketch from the Tribes' point of view. He said that spiritual laws once guided his people, now non-Indian laws have subdued the Indian people. He said nobody asked the Indian people to help make the laws, and the earth suffers for what has been done. Soon there will be no more to take. He stressed that all must work together, that man made laws have put the Indian down, and that those who have possession should maintain possession.

Matt welcomed the audience to the homeland of the CSKT. He stressed that their homeland extended beyond the Reservation. He asked the participants to ask questions and help come up with solutions.

Tweeten gave a brief history of compacts negotiated by the State. He stressed that keeping the public informed and involved is a high priority to the State. He noted that the compact would eventually have to be accepted by the State legislature, Congress, and the water court, so this is a very early stage of a process that can take many years. He said that negotiation is much preferred to litigation, and illustrated that Wyoming spent many years and millions of dollars to litigate a settlement, and is still trying to work out the administration of that settlement.

Kenney endorsed both the State and the Tribal comments. He noted that the federal negotiating team was established to help carry out the Secretary of Interior's trust responsibility. He noted that a purpose of this third negotiation session is to establish meeting protocol, provide clarification, develop trust, and give the participants an opportunity to get their "sea legs".

Susan Cottingham explained that the Commission has learned the importance of getting procedural matters settled early, otherwise negotiations can become sidetracked. Therefore, the Parties have developed a memorandum of understanding (MOU) to establish procedural guidelines. The MOU was signed in 1998. She reviewed some of the important aspects of the MOU.

1. Meetings will be chaired on a rotating basis between the groups, and the chair may select the location for the meeting. (When it is the State's turn to select the location, the State agreed to have the meetings on the Reservation);
2. Negotiation sessions are open to the public and will be recorded;
3. Technical information that is exchanged between the groups cannot be used in litigation;
4. Press releases will be made jointly, and each party will inform the others if the press contacts them;
5. Sub-committees will be appointed to carry out technical work;
6. Only the three Parties (State, Tribes, and federal team) will participate directly in the negotiation and each will represent its own constituencies.

Cottingham noted that the other Parties have expressed concern when the State attempted to meet separately with its constituents and did not provide public notice of those meetings. The State feels that it should be able to meet with its constituents without contacting the Tribes.

Matt said the Tribes understand the spirit of the MOU, and requested that the Tribes continue to be notified in the spirit of the MOU.

Kenney said they recognize the State needs to meet with its constituents. There is a need to remain flexible. He stressed that the press is always looking for something to say, and that is a useful vehicle for this group to communicate with the public. He said that, when speaking to the public on behalf of the group, it must be done shoulder to shoulder.

Tweeten said that this is the stage for getting issues together, both Tribal and non-Tribal, and that public input will be received and considered. We must consider a long-term horizon.

Matt made a presentation of the Tribes' Proposal (Proposal of June 2001). He said this is the first opportunity to sit down and discuss their Proposal face-to-face since it was submitted. The Tribes desire to negotiate rather than litigate its reserved aboriginal water rights. He stressed that the negotiations are not about the existence of these rights, but about their quantity and use. The Tribes wanted to break their presentation down into three parts: 1. Why the Proposal; 2. The Proposal itself; and 3. Questions asked by the State regarding the Proposal.

1. Why the Proposal: The basis for these rights is 10,000 years of residence, customs, and use. Matt explained that State and Federal law support the existence of these rights. They have over 20 years of hydrologic and fisheries studies, along with other historical and future use data. He stressed that nothing is being given to the Tribes, the rights already exist. Surface water, groundwater, past use, present use, and future use are all components of that right.

2. The Proposal itself: Matt said that the Tribes recognize there are extensive junior uses on the Reservation, but that the Tribes have no obligation to subordinate. He said the Tribes has demonstrated its willingness and ability to protect its resources, and referred to its management of fish and wildlife, water quality, shoreline, and other resources. He said water should be managed as a unitary resource, and that their Proposal would produce greater certainty to all users. He said that it was the most reasonable, responsible, and prudent device. It accounts for aboriginal rights, junior users, the unitary resource, and defines and protects existing senior and junior users.

3. Questions asked by the State: Matt handed to Tweeten and Kenney a written document that he said would begin to answer the questions previously asked to the Tribes by the Commission (letter of November 16, 2001). He said that, although the document does not give specific detailed answers, it categorizes the questions into 10 points corresponding to the Tribes' Proposal that will be answered in the negotiation process and that each element of the Proposal is open to negotiation. He proposed establishment of a working group to continue working on the 10 points.

The Commission asked for a break to caucus.

*20-minute break and caucus*

After the break, Kenney said the Feds would reserve judgment until they have more information and can examine possible solutions.

Tweeten explained that the Tribes had presented their Proposal a year and a half ago, and that the State had responded with a list of questions. He said that since the Proposal was submitted, it had been the sole focus of discussions and public comment. The State considered the Tribes' Proposal very carefully, and concluded that a compact with Tribal administration as its basis would not lead to a workable compact. The Tribes' jurisdictional Proposal would not meet the State's goal to have a compact that could be passed by the Montana legislature and Congress and make it through the Water Court process. He said the State agrees with the issues identified by the Tribe, but believes that the Proposal actually distracts from getting at the issues. Therefore, Tweeten said that the State's response is to propose that the Tribes remove their Proposal (that the Tribes own all the water) and go back to a "blank sheet of paper".

Tweeten said another issue that had not been identified by the Tribes is the subject of the need for an interim arrangement to deal with water permitting. Some water

development must go on, but is not currently being allowed. He pointed out that the community of Charlo needs to upgrade its water system, and has plans and funding in place, but cannot proceed without a water rights permit. There must be a joint system in place to allow water development while the compact is being negotiated. He stated that the Commission is ready to devote resources to these issues and hopefully the other Parties are ready to move forward.

Kenney said the Feds agree with the Tribes' position and with the State in principle that we need to take the jurisdictional Proposal off the table. He believes there are a number of possible solutions to the 10 issues. The Tribes could continue to bring up their ideas in the process.

Matt said that nothing in the Tribes' Proposal says that the State must concede in order for the negotiations to move ahead.

Tweeten proposed establishment of at least three working groups:

1. technical working group to deal with hydrology and water availability issues;
2. administrative working group to deal with permitting and other legal and administrative issues for long-term management of water on the Reservation;
3. interim management working group to deal with development of an interim plan for management on the Reservation;

Tweeten pointed out that the State was never sure from the Proposal whether it precluded negotiations from moving ahead. He reiterated that it is the State's view that the jurisdictional framework proposed by the Tribes would not pass the State Legislature, Congress, or the Water Court, and would no doubt lead to litigation.

Matt responded that the Tribes' position will stand, however it is willing to move ahead. The three work-groups can proceed to discuss the issues in the outline, as long as the State understands that the Tribes have not conceded.

Tweeten said that the Tribes can propose what they want, but that the State position is that the Proposal will not work as long as the Tribes ask for exclusive Tribal jurisdiction. There could be joint management, however.

Matt said okay, as long as the State does not speak of exclusive State jurisdiction. He called for creative solutions and stated that the Tribes have the right to claim every drop of water and are not required to subordinate their rights.

Tweeten said that the State never asks Tribes to administer their own rights and look the other way, but the systems must dovetail together. He agreed that creative solutions are needed.

Matt proposed a fourth working group:

4. verification of claims and the exchange of data.

He recognized that claims examination is part of the adjudication process, not the compact, but that claims verification might help the compact negotiations.

Kenney said the Feds would withhold opinion on the four working groups.

The Tribes asked for a break and caucus.

*30-minute break and caucus*

Matt stated that the Tribes' Proposal represents a good balance and we can proceed to talk about it as we move into the four working groups. Matt responded to the Proposal for four working groups. He said that the interim administration group would require approval of the Tribal Council. He stressed the need to clearly define the job of the working groups.

Kenney suggested establishing one working group to deal with administrative issues, including interim management.

Tweeten agreed that a combined group would be okay, and that the State is pleased that the Tribes are willing to take the Proposal for an interim management working group to the Tribal Council.

Matt said the Tribes, for now, would prefer two separate groups, interim plan and administration.

Kenney stressed the need for communication between the groups, and thought that might naturally happen if some of the same personalities were in both groups. He would not expect the working groups to make decisions or come to conclusions, but to bring alternatives and recommendations to the decision makers. There would be a chair for each group and equitable representation by all Parties.

Tweeten said that working groups "propose", and the decision makers "dispose".

Matt agreed with the ground rules that were mentioned, but said the groups should be addressed one at a time.

Tweeten said the administrative groups would identify the issues that affect administration, permitting, dispute resolution, etc., and would propose ways to deal with them in an orderly manner.

Matt agreed.

Kenney said that there are a number of models for administration and the working group could come to a reasonable consensus and bring back options to the full teams.

Tweeten said that past compacts called for parallel administration, along with a method to dovetail the two systems. But the State is not closed to other ideas.

Matt stressed that openness and creativity are needed. He asked for the opportunity to talk to his Tribal Council, and estimated it would take about 2 weeks to a month. If they approve, then the working groups could be chartered by conference call.

Matt went on to discuss the data sharing working group. He said the Tribes would prefer to begin by sharing basic hydrologic data that they used in development of a hydrologic model.

Cottingham agreed it would be best to start with hydrologic data, and asked if they would share the model itself.

Matt said they would begin with a "show and tell" presentation, and would not share the model itself, at least at first. That might come later, along with other data.

Tweeten said it would be the objective of the group to arrive at an "agreed set of facts".

Both Matt and Kenney agreed.

Matt went on to discuss the claims examination group. He asked what kind of information the State would share.

Cottingham answered that the State has extensive information on existing claims that have been filed in the adjudication. The information includes GIS data layers on points of diversion and place of use, land ownership, etc. The technical staff should scope out what is available then decide how to fill in the gaps.

Matt said an additional goal of the data team would be scoping.

Kenney said the group would bring to the decision makers a consensus on where the water is and how it is used.

Cottingham explained what the State means by the term "claims examination". While the negotiations deal specifically with Tribal reserved water rights, all water rights are affected. Under the State adjudication, SB76 required a 1982 filing of all water rights in Montana. Those claims will be adjudicated by the water court, not by this process. Prior to adjudication, water court directs DNRC to examine each claim in terms of amount, date, location, and so on, and differences are sorted out later by the water court. It is a lengthy process. Examination of Lake County claims has not yet been ordered by the water court. The adjudication is a parallel process to this process. She pointed out that a complete claims examination might help with compact negotiations by giving a better understanding of how much existing water use there is. The working

group might petition the water court, and talk to DNRC on how long it would take to do the examinations.

Matt said the legal administrative team should talk about that and explore options.

Tweeten said it may be difficult to convince the water court to start the examinations because they have other priorities.

Kenney asked if that was the only option.

Cottingham said that is the preferred option. The Commission could examine the claims, but it is best to have DNRC do it because they have the authority. The three Parties petitioned the water court on the Crow negotiations, and they accelerated examination on Pryor Creek. The results gave the Tribe and Feds a comfort level on the examination process.

Tweeten said that the claims database in itself is not enough, because some people filed inflated claims. The claims examination process will not give a final number until the water court adjudicates, but it would help to get a good handle on water use.

Cottingham stressed that the examination is only a first step, followed by a decree and an objection process. It would be best to ask the water court to proceed with the examination, but to not proceed with the decrees until the compact process is completed.

Kenney expressed frustration at the uncertainty whether the water court would even agree to start the examinations.

Matt suggested that the working group look at the issues and come back with options.

#### *Lunch break*

After lunch, Matt reviewed the ground rules:

1. working groups are not the decision makers; they will present alternatives and recommendations to the decision makers;
2. a chairperson will facilitate each group;
3. there will be equal representation on each group;
4. the administrative group will identify administrative issues and make recommendations;
5. the technical group will identify a common set of data and will scope out other data needs and make recommendations;
6. the claims verification group will be a combined legal/technical group, and will look at options and make recommendations.
7. parties will select representatives for each group and will inform the other parties in a conference call in about two weeks.



Matt agreed to put the ground rules in writing.

Public Comment Period:

Kenney reviewed the public comment ground rules: comments should be framed as comments, and questions will be considered comments, not to be answered at this time. Give name, use microphone, and keep comments to two minutes.

Don McMillan, Delta Utah. Plans to retire in Polson, and is concerned about how long it would take before he can drill a well for his home. He has been forced to hold back from building.

Mike Hutchins, Lake County Commissioner. Pleased with the success of this meeting so far. Stressed need for an interim management agreement. Economic viability and neighborhood relations are at stake. He gave five goals for the negotiations:

1. develop the interim agreement as soon as possible, with the management as close to status-quo as possible;
2. the agreement should be date-certain, preferably 3 to 5 years;
3. meet more frequently, preferably quarterly;
4. develop a public information plan, and use the media, county commissioners, and other existing groups to help; and
5. seize the opportunity to show "we are good neighbors and can get good results".

Dave Shapel, St. Ignatius -- submitted written comments. He stressed that working groups should be open to the public.

(Kenney noted that the working groups won't be publicly noticed, but that it would be acceptable for members of the public to observe. Tweeten said that meetings won't have formal agenda like this one. Meetings might be by telephone conference, or technical experts standing over a computer screen. He agreed that the public can watch, but might not get much out of it.)

Kevin Schomer, local water well contractor -- stressed that the social ramifications of decisions be considered. He said hostility in past generations has trickled down to the kids. Need to learn to work together.

Mike Grende, landowner, Big Arm -- Concerned about Tribes' Proposal, afraid that the Tribes may be trying to take his water without a democratic process or condemnation action. Said he might sue for loss of property value.

Louie Adams -- Described past water rights disputes on a ditch that passes through his property near Ravalli Creek. He said that his grandmother told him that the Indians

have survived "because there are too many good people to let the Indians go under." He said that is still the case.

Leroy LaBennick (sp? -- not on signup list), Hot Springs --- He said that a well dug near Tribes' RV park bathhouse dried up the water source, and is concerned about another well being drilled right now, when all water development is supposed to be on hold. He presented a copy of a Missoulian article stating that no water rights are being given out on the Reservation.

Stephen Small Salmon, Ronan -- Water is sacred to Indians. He has fought for water rights since 1975. He said the group needs to take the time it needs to do it right. Learn to work together.

Octave Finley, Pablo -- He stressed the need to work together and come up with 50-50 solutions, not 70-30. He used to be in the military, now home, but can't get help from either side. He said a half-breed is not acceptable to either side.

Laura Gregory, Arlee (not on signup list) -- She is new to Montana, bought property in 1980, and wants to be a good steward. She is concerned about the negative rhetoric she has heard the past few years, and is happy to hear the positive comments made today.

Jack Dunn, Big Arm -- He represents a small water users association, and is afraid of the Tribes' Proposal because he would have no vote in their government, no voice in the decisions. Concerned about property rights.

Lance Staub, Kalispell -- He is in the home lender and real estate business, and plans to move to Polson. He said people need assurance about their water rights. Water users need representation in some manner.

Jamie Seely, Hot Springs -- White people fear losing water, keeping people informed will reduce the fear.

James Pettit, Ronan -- He said he is part Indian and an American. We are all related. He is a property owner and said the bigger issue is property ownership that is guaranteed by the Constitution. Constitution does not distinguish race, but race has become an issue here. He said this is a State's rights issue and that the federal government shouldn't be involved. He said that a person does not have to be Indian to hold the land sacred.

Warren Lee Buckskin Shell (sp? not on signup list?) -- He said his people have been here since the beginning of time. Said he is afraid the treaty is being tampered with by the State. They have enough already, "What next, the air?"

John Wilson, city engineer for Whitefish – stressed the need for interim process to help communities like Charlo. Also concerned about effect of negotiations on upstream water rights.

Octave Finley -- One place on the Reservation that still has good clear water to drink is down at the pumping plant.

Melissa Michelle (not on signup sheet?) – asked the group to uphold the Constitution and respect Treaty Law. She went to school in Ronan and did not learn about Treaty Law. We should slow down on subdivisions. Described past discrimination on local water system.

Unknown (name spoken in native language) – would like to know which water is being negotiated, yesterday's, today's, or tomorrow's.

Public comments closed.

#### Final Comments:

Kenney said that a quarterly meeting schedule would be resumed, and suggested the next meeting be in May or early June.

Matt said there is a long journey ahead to educate the people and overcome fear. He said the Tribes are an easy target, and pointed out that the Tribes began water negotiations in 1855. He stressed again that nothing in the Tribes' Proposal says that anything is being taken away from anyone. Regarding ownership, he said the State makes the claim that they own the water. Regarding future meeting notices, he asked that there be no deadline on the comment period, unless there is a compelling reason. The Tribes want to avoid litigation, but is not afraid of it.

Tweeten said he was very encouraged at the progress made in this meeting, and felt a foundation has been laid for further action. He hopes the press came to the same conclusion.

Kenney endorsed and reiterated those comments. He thanked the Tribe, the State, and the audience for their cooperation.

#### Attachments:

1. agenda
2. signup sheet
3. MOU
4. written comments submitted during the meeting
5. Tribes' listing of Commission's questions in November 16, 2001 letter.