

## MEMORANDUM

TO: Susan Cottingham, Jay Weiner, Sonja Hoeglund, CSKT Negotiating Team; CSKT Minute Files  
FROM: Joan Specking  
RE: Draft CSKT Minute Summary from October 03, 2007 Negotiating Session, Missoula, Montana  
DATE October 11, 2007

Chair: Chris Tweeten

Agenda (Attachment 1)

### **1. Introduction, Prayer and Opening Statements**

A prayer and song were presented.

Chris Tweeten explained that this negotiating session regards the settlement of reserved water rights for the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation.

Introductions were made.

The Tribal Chairman, James Steele, said they are looking forward to negotiations. He reported that they are slowly moving forward in talks with the Joint Board of Control regarding the FIIP management. He is hopeful that somewhere along the line there will be a convergence. The federal team chair did not have a statement at that time. Chris Tweeten said the Tribe has laid before the Commission an outline for a possible approach for settling the claims and the Commission is looking at that and the respective staffs have been conferring about it. Chris said he is pleased to hear that discussions between the JBC and Tribe are proceeding and he agreed that at some point the two issues will overlap and he is hopeful they can keep discussions moving on a parallel track to integrate those two issues and come up with a comprehensive approach to the irrigation issue on the Reservation.

### **2. Status and discussion of State and Federal positions on the acceptability of the Tribal proposal as forming the basis of negotiations and explanation of elements.**

Chris explained that this topic involves some feed back from the state and federal team on the proposal and that an explanation of elements would come from the Tribe. He started with the State's view on the proposal which he said focused on water and seemed to be very positive. Staff, from both parties, has been jointly discussing provisions of the proposal. At this stage the Commission is not prepared to state with finality that the framework the Tribe has laid out is in whole or in part the framework upon which the final agreement will be built, however, having heard the proposal they don't see any provisions they view as being unacceptable that have been brought out in staff to staff discussions. The Commission is prepared to continue to analyze the Tribal proposal and see how the framework applies to the facts they are gathering in staff to staff discussions. That is not to say that matters may arise which will require deviation from the

Tribe's proposal in whole or in part. They will learn a lot more about the proposal as they go forward. For now they are prepared to analyze the Tribe's proposal and use it as a basis for discussions at this point but aren't prepared today to offer a commitment that it will or will not be acceptable as a final template for how the agreement will go forward. They are encouraged by the direction the proposal goes and want to study and learn more about it.

Chris reported that they have three new commissioners including Dorothy Bradley, Gene Etchart, and Dan Belcourt. They are still short one appointment. The team for this negotiation is complete and includes Senator Bill Tash, Chris Tweeten, Dorothy Bradley and Dan Belcourt. To clarify internal operating procedures, he explained that between three and five members may be assigned to a team, however, all members of the Commission are welcome to attend and participate in negotiating sessions.

It was asked if the Commission could send a letter to the Tribal Council identifying the negotiating team members and Chris agreed and said it would also be good to have a letter from the federal team identifying their members. Also he agreed to identify the staff technical members giving support to the negotiations.

James said they are a long ways from an outcome to these negotiations but takes from the comments that there are no deal breakers at this point and that what they present is a basis for discussion - Chris said that for now they will use the Tribe's proposal as a basis for discussions.

Duane Mecham, federal team leader, said they have had deliberations within the federal group. The U.S. is encouraged that the elements they will look at as the trustee – such as does the proposal ensure that water resources, present and future, of the Tribe are met. The proposal also would acknowledge the valid existing rights that folks have on the reservation which is a critical element to successful settlements. They have begun to examine administration aspects of the proposal such as how to clarify and nail down the tribal sovereignty over Tribal water resources and how that gets hammered out. Any administration proposal needs to ensure there is a viable water right decree meeting McCarran amendment standards and their experience with the Montana process is that it should be well taken care of. They also need to make sure that the federal government's responsibilities to protect legitimate water interests of Indian allottees on Reservation are met through the ultimate settlement. They don't perceive anything in the proposal that would cause problems for them to meet the federal responsibility. They are prepared to discuss aspects of the proposal dealing with potential water sources such as Hungry Horse. He indicated that the federal team has extremely limited funding and contributions need to be tied directly to resolution of the claims.

Chris suggested it might be helpful to get a brief recap of the Tribal proposal for those who weren't at the meeting in July. He also said a written articulation of the proposal might be helpful for the public.

Clayton said there are a number of elements they are already starting to talk about; acknowledging that litigation is expensive and time consuming, and the State of Montana as they understand it won't represent the individual water users in a litigation setting. Existing consumptive use is 96% irrigation and, they are looking for unitary administration on the

Reservation. The Tribes would recognize valid existing verified uses under a process that's already been started by the State examining those claims. That leaves them in negotiations discussing protections and they haven't defined that specifically but it will come out of legal and technical discussions. He looks forward to hearing some of the discussion on some of the administrative issues. On reservation rights would be under a unitary administration; they have also discussed.....can't hear.....

Susan Cottingham added that they are all looking at the Jocko River for an initial template. That is where the claims examination has started. Clayton said they began their discussions there...forming a template or model of how they approach the rest of the reservation - much of the technical work is reservation-wide. They see it being brought together at some point in the end. Chris said they agree that nothing is settled until everything is settled so at some point the parties will have to go drainage by drainage to talk about what is acceptable and what is not but at the end it will be a comprehensive settlement. Clayton asked to clarify that the Commission has all of its team and said the Tribal team consists on paper of the entire Tribal Counsel; cultural representation; resource department, preservation office and lands are represented.

### **3. Status and update on Legal Team discussions on administration issues.**

Clayton said the issue on administration will be front and center legally...they have just initiated some of those discussions by the legal team, and they also had some discussions with the state and federal teams while at the conference in Spokane.

John Carter gave his presentation as follows, first calling attention to several maps; the first of the 1.3 million acre reservation. He noted the complexity of the reservation politically, socially and legally which has led to litigation over the years. The BIA irrigation project serves about 130,000 acres of both allotted lands and homestead lands. There are several jurisdictions that apply on the reservation: Tribal, federal and state. Within the federal there are several including the BIA, the U.S. Fish and Wildlife Service and a little BOR. The compacts which have been made with other reservations have a few problems when it comes to the complexity of the Flathead Reservation. The past compacts have broken out administration on a land status or individual status basis; the Tribes deal with the Tribal and the State deals with the state. But when there is checkerboard land intermixed and a stream running through, the ability to administer based on a fence line gets very complicated. The CSKT thinks there is a better way. On the Crow reservation there are three different governments who administrate for water: the Crow Tribe, the United States for the federal project land and the State for the non-Indian people on the reservation. During the courses of the discussions, no party could agree on which court to take disputes. It's a "race to the courthouse" to settle disputes. So there is no certainty and no finality ultimately in the existing compacts.

The Flathead reservation was heavily allotted per the Flathead Allotment Act of 1904, which did three principle things for water rights. Prior to the Flathead Allotment Act the reservation was entirely owned by the Tribe itself. There were no non-Indian inholdings. The Flathead Allotment Act directed that individual Indian people would be allotted tracts of land for their own personal use. After all Indians were allotted their lands, "surplus lands" were opened

for homesteading (non-Indian entry). It also directed that the federal government build a large irrigation project for the benefit of the Indian people on the Reservation. It is clear from the Congressional Record that Congress thought about ¾ of the service of the Project would go to Indian people. As time went by a lot of allotments went into non-Indian ownership. The second map demonstrates the area of the irrigation project: Camus, Mission Valley and Jocko Valley (where the State and Tribes are focusing their efforts now) Most of the problems on the reservation also appear in the Jocko watershed so it's a good framework to start from. He pointed out the allotted lands now owned mostly by non-Indians; and the Indian owned lands and the homestead lands mostly owned by non-Indian people. They are bound by case law out of 9<sup>th</sup> Circuit and the *Colville* cases which say regardless of who owns the allotted land today it carries the priority date of the reservation, which is 1855 in this case. Case law which won't be liked is the *U.S. vs. Henderson* off of the Spokane Reservation. That says non-Indians picking up homestead lands on the reservation do not get the Tribe's senior priority date; they get a date under state law when they put water to beneficial use on their land. The terms of the Flathead Allotment Act are clear: no non-Indian could enter the reservation and get homestead land prior to 1910 so the oldest priority date that anyone can claim under existing case law is 1910. Here is the benefit to negotiations: if they go to court and litigate these questions it's pretty safe (one last fact: approx 50% of the land serviced by the project is allotted land; 50% homestead land) to say half of the non-Indian people will get the junior priority date and in years of shortage no water; those who hold allotments will get the senior priority date. That is the risk of litigating. The Tribes and the U.S. and the State talked about this; recognizing that the Project utilizes approximately 95% of the surface water and in light of the fact that transfer is moving forward. If they go to litigation each person making a claim to water will have to defend it themselves. There will be a lot of expense. One concept they have discussed is a uniform priority date – unitary priority date for the project, unitary management. It would be a reservation-wide system. They have been talking with the legal technical staff. This will require public information; getting Tribal and State fisheries experts together to discuss fisheries claims; discussing what to do in short-water years and discussing possible shared shortages; possible closed basins to further appropriations; groundwater management and appropriation; Hungry Horse for future uses and more.

Clayton noted they spent several years discussing interim administration and some of the features of that discussion might be taken advantage of in the future.

Chris Tweeten said he wanted to make clear that the state has still not committed to the idea that what was described is a functional system that will be acceptable and he emphasized that the State has dealt with other checker boarded reservations. He said it was glossed over that the principle administrative feature of the other compacts is alternative dispute resolution. Those compacts don't finally settle the issue of which courts the disputes will go to but the reason is that the issue has proven to be intractable. A race to the court house has been replaced with Compact Boards to which disputes are taken and they are available locally to take disputes between state-based and Tribal water rights users. The first was done in Fort Peck compact and there has not been a single instance where a dispute has been taken to a compact board.

Jay Weiner reiterated that the State has made no commitment that this is the road to go down and in the staff to staff discussions they have been trying to get a better handle on the

details of the proposal and what concepts like unitary administration or shared shortage might mean. He said there is possibly some elegance in utility to having the Project share a priority date but that does not address what to do with all the other water users on the Reservation and how their existing uses will be protected. If that is along the lines of what the Tribe has proposed or if it's other methods used in other compacts, the State is interested in seeing how that plays out. At the staff level they are interested in ramifications of the big picture concepts presented by the Tribe.

Chris said that it is an issue regarding how to deal with water users outside the Project and whether users outside the Project are dealing with a 1910 as opposed to an 1855 priority right. Trying to understand how those rights will interact with the Project rights – how likely there will be disputes like that – the parties don't know the answer to those questions yet but they do need to know the answers.

John Carter said they have discussed how to resolve this as well as an approximate 4% consumptive use. They talked about the possibility of individual agreements or basin agreements. They aren't wed to the system yet either but it seems like one way to encompass a lot of the complexity– there is no right answer but as long as they can work in the technical groups and hash things out he hopes they can figure it out. Chris said they are open to those discussions and are anxious to see how it goes. As Jay said there is a certain elegance and simplicity to the proposal. Susan said that is why the transfer talks and administration are so important - as it will give everyone on the Project a comfort level.

#### **4. Status and update on groundwater technical data needs and options for funding.**

Clayton said they would probably throw some of this back to the federal team - the issue of groundwater is significant on the Reservation but less well known. They need more data. The last technical team meeting they talked about a previous proposal they put to the federal team for funding and they need to put that forth again and talk about it. They want to talk about how they can find what the data needs and resources are and get it done. Chris said they share the view that the more good data they have on the groundwater the better they can understand it. In discussions they have as a legal issue it is not yet clear regarding the status of federal reserved water rights and groundwater.

Duane Mecham said regarding groundwater funding process – the focus on federal funding up until a few months ago was on litigation. With new productivity on settlement discussions and entering a new fiscal year – they will use money to supplement or support the settlement as much as they can. It's timely to have a request at this time. The federal process is not fast, but he hopes they can get some answers by the end of the year.

Clayton asked if Duane meant they would tap into some litigation funds set aside. Mecham said it is not per se identified as litigation money but it is a pot and they will have to judge their flexibility to shift the money to the settlement. Susan said there is competent staff to deal with groundwater hydrology issues – the feds can look at what money they may have; the Commission has some contracted services money they may be able to put towards it. Chris said they have had some success in using their own staff in working on this kind of data and should

talk about putting staffs together and making the best use of their talents from the analysis side. Chris said they want to be cooperative with the other parties. Clayton said the Tribal Council has already begun to dedicate funds and the Tribal staff has already spent many years working on it so they are ready to accept any contribution or help but they are proceeding.

**5. Status of discussions about the possibility of land transfers as part of the water settlement.**

Clayton said they want to include the possibility of using land transfers in their discussions, and noted that the Commission has had experience with that. He said there may be options for multi party discussions – the question being generally whether there are lands that could be made available that could contribute to the settlement, in particular state land, but federal also. The Tribe is in discussions with the State on some other land trade issues. They want to try to engage that discussion here and see how it might work. They would like to hear from the State and the United States on that issue. Chris said they are interested in talking about the land trade issue but people need to know that there are statutory and constitutional prohibitions on donation of land as part of a settlement. State lands must be exchanged at market value – requirements are that there be equivalent value and acreage. Within the framework of those provisions, they are continuing those discussions with the Tribes and can do that in the context of settlements. Final decisions for the State would be made by the State Land Board. He said their experience has convinced them that the transfer proposals can be complicated due to vested interests attached to the use of state and federal lands such as access to recreational lands. It would require consultation with the public as part of discussions. Susan said for general understanding as to why the issue is on the agenda, in other settlements they talk about contributions to settlement and in some settlements the federal government has offered federal lands as part of an overall contribution to a tribal settlement. It may not necessarily be part of the water settlement but might be part of the overall final settlement package for the Tribes; the federal government may be willing to identify part of the lands that might be available.

Duane Mecham said they have no constitutional prohibition against land trades and it is an element of the contribution and would have to be approved by Congress. The United States is very open to exploring this and they have had good initial discussions in their technical sessions. They are waiting to see which other federal agencies they may discuss this with. Clayton pointed out that most of the surrounding lands are Forest Service and Chris asked if they were going to discuss this would someone from the Forest Service be attending – Duane said yes. Chris said probably the sooner they could attend the better it would be.

**6. Status of discussions about options and processes for including Hungry House water in the settlement.**

Chris said there have been conversations between the Tribe, the United States and the State about this in the past and suggested it might be helpful to have a background.

Clayton said most of the discussions have happened in recent months, driven by the prospect of .... And also sort of in the same vein as land transfers – that it might be a tool to help in the settlement process. In settlements he is aware of, there is almost always an element to

bring additional water resources to alleviate need. At the last technical team meeting they talked about the technical teams going to Boise to meet with the BOR and talk about options, ideas and processes.

Chris said when water is short people look at storage and all five tribal settlements involve allocations of stored water. They have experience allocating stored water upstream from reservations as part of the solution to resolving Tribal claims for federal reserved water rights. They have not ever recognized that the upstream storage rights are federal reserved rights; but some compacts provided that allocations of stored water can be accepted in satisfaction of claims for federal reserved water rights. He hopes they won't get into the fundamental legal question about stored water being federal reserved rights. They could look at discussing whether stored water in Hungry Horse might lead to a practical solution. It might provide an opportunity to bring additional water into the basin, provide water for mitigation of impacts and provide water for the Tribe if that becomes an issue they talk about. John Carter asked what sort of security has been provided the Tribes if the stored water isn't a federal reserved right. Chris said there have been contracts entered into or contemplated in some of the compacts and the Congressional legislation can provide stored federal water. The compact discussions have provided an allocation out of storage and Congressional legislation makes it available. Generally the BOR has the water right for storage and a contract makes it available to the Tribe.

Susan said the legislature authorized DNRC to begin discussing with BOR potential available water out of Hungry Horse Reservoir. There has been concern over the years regarding the senior water rights of VISTA downstream. There is a specific process the BOR uses to analyze those issues and it is generally lengthy. The Clark Fork folks understand the discussion of water allocation to the Tribe is proceeding. The Hungry Horse drawdown issue is implicated in Salmon River lawsuits – the Governor's office and the Power Conservation Council have been active in that. The State wants to keep people apprised of what they are discussing. Montana representatives have said that anything agreed to in these discussions be vetted through the state team involved in those issues. DNRC is still committed to going forward with that analysis but it may be a longer process than a compact. There will be keen interest in the amount of water talked about as part of a settlement.

Duane Mecham said when they were walked through the Tribal proposal it occurred to him, having worked with other Reclamation issues in the Columbia Basin, that they needed to emphasize early and often exploration of Hungry Horse as a source of water. Working with Norbert Ries they have discussed this element with the regional director of BOR in Boise (Hungry Horse is part of that region), Bill McDonald. He is supportive of them holding staff sessions – they are looking at Boise in October. It would be helpful if the Tribes were prepared to discuss a range of water needs that could be served by Hungry Horse – how it's currently used, how it might be used in the future, etc. Norbert said they were looking at October 16<sup>th</sup> or 18<sup>th</sup> to have a meeting in Boise. Duane wondered if there is a need to broaden the scope of potential water source evaluations.

**7. Status of discussions about a proposal to digitize the Flathead Irrigation Project land classification and land assessment records.**

Clayton said they tend to hope this would be a federal contribution and digitizing the information makes sense for analysis and for whatever management scheme is used. Duane said they have had this discussion with the Tribe in technical talks. The need is acknowledged and they have just received a proposal from one of their BIA contractors which they will look at and make sure it works with the other two parties. Susan added that the Commission staff has grappled with this issue on the Milk River and has experience dealing with difficulties of assessment records and land records so if they could run it past the other parties there may be suggestions as to how to simplify the project.

(Chris let people know a sign-in sheet was going around.)

#### **8. Status of joining U.S. Fish and Wildlife Service (FWS) with the Tribes on the Reservation.**

Chris noted there is a FWS member on the federal team although Megan Estep clarified that it is not official yet. Chris said he hopes it becomes official promptly. Clayton said the Bison Range and its ancillary properties are on the reservation and he hoped to hear some from Duane about bringing discussions closer together. The U.S. is negotiating separately on the water rights for the federal properties. Clayton said there are many complicated issues, some involving secondary and primary easements on Tribal land which also happen to involve the FIIP. They would like to have justification to seek a way to try to bring these discussions together. Chris said they have indicated early on that they are amenable to joining the two discussions together to the extent that the other parties think that's feasible. Duane said the federal team has just begun to explore the proposal and they want to have synergy and effective governance over these issues. He said he understands that it would be the Refuge having federal reserved water rights issues. They have had an initial discussion with FWS folks and FWS has had some discussion with the State. They don't have a definitive answer and need to have a few more discussions about it. Jay said one of the key reasons they see for potential consolidation is that there are FWS lands on the reservation that are acquired lands without reserved rights but certainly the FWS has an interest on how water on those lands will be handled – for those pieces and the efficiency of the overall process even aside from the Bison Range they are pleased to have FWS on the team. They do think consolidation makes a lot of sense. Chris said that was illustrated for the Commission on the Forest Service negotiations where there were some non-reserved federal water right issues; the federal agencies want to make sure any state-based rights they have are protected

#### **9. Public Comment**

Chris explained that they planned to conduct meetings on the reservation in the future although they could not find a location for this meeting. Clayton reiterated that they attempted to get a place on the reservation but could not and thanked the Commission for trying. He asked people commenting to state their names for the record.

**Gerald Mueller, facilitator for Clark Fork River Basin Taskforce**, a water planning group: He said the Clark Fork Task Force has had an interest in the use of Hungry Horse water to address needs of the Clark Fork, which does not have water reserved for future uses. There are



constraints from senior holders which pose risk to junior users. They have been urging DNRC to look into the use of Hungry Horse water. It was at their urging that the legislature passed legislation addressing changes in state water marketing statutes. The Taskforce has heard from Tribal spokespersons that there may be a better way than going through the long BOR contracting process and they are encouraged to hear that. They want to make sure the interests in the basin relating to future water availability are coordinated with what the negotiators are doing. They are very encouraged to hear that there is a discussion going on in this context.

**Richard Erb, member of the Charlo Moiese Volunteer Fire Department:** They have a large district and they have thought about putting wells around the district; how would this be dealt with in the context of the negotiations? They now get water mainly from the Charlo well. How will they in the future deal with a community like Charlo and their access to water in the future and ability to expand the well for a fire department and other public needs?

Chris Tweeten said when previously talking about an interim water plan one of the things they discussed was making groundwater available through a permitting process. He said the compact would deal with groundwater and provide a method whereby it could be managed. In the context of those discussions, wells for municipal and fire would be dealt with. Clayton said they look forward to including in the process how they deal with existing and future uses of groundwater throughout the reservation. Chris said all the parties are aware of the need to deal with new allocations of groundwater as part of the ultimate resolution. He said administration deals with existing water and allocation of future uses of ground and surface water.

**Kathleen Schulte representing the NW Association of Realtors:** Would like to offer an invitation to use their meeting space if there isn't space on the reservation, free of charge, with seating for 130 in Kalispell. They have a mission to help protect private property rights and a goal is to keep the public informed. They would like to help with that effort and they have a fund set aside they would like to use to help inform the public about property issues. Chris thanked her for her offer.

**Jim Elliott, state representative for the SW portion of the reservation:** He is the chairman of the Water Policy Interim Committee for the State of Montana and they are looking into the relationship between ground and surface water off the reservation. He offered his assistance to people. Chris said there will be some opportunity to use that information.

**Meeting Schedule:** Susan said it is the U.S. turn to chair the next meeting. Chris said there will be further staff to staff discussions regarding tasks talked about in this meeting. Clayton said they would look at something about three months from now for a negotiating session and the technical group would be talking prior to that. They tentatively settled on December 12, 2007 for the next negotiating session.

Meeting adjourned.