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MEMORANDUM

TO: CSKT Negotiating Team; Jay Weiner, Susan Cottingham, Sonja Hoeglund, Bill Greiman, Stan Jones, CSKT Files  
FROM: Joan Specking  
RE: September 25, 2008 CSKT Negotiating Session, Tribal Council Chambers, Pablo  
DATE: September 25, 2008

Chairman: Chris Tweeten  
Agenda (Attachment 1)

1. **Opening Prayer**  
Opening Prayers are not recorded.
2. **Introductions**  
See sign-in sheet (Attachment 2)
3. **Opening Statements**

Chris Tweeten asked for opening statements from the parties. Chairman James Steele thanked the state and federal parties for their participation; also noted he appreciated public appreciation and the beautiful day that they have.

Duane Mecham thanked Chris and said they look forward to discussions today with activities on many fronts and they will have a presentation focusing on Columbia Basin issues and will give an overview designed for the entire audience and before the question and answer period they will talk about some other technical matters.....Several of the federal people, including Rich Aldrich, were attending. (HARD TO HEAR).

Chris said from the State perspective he hoped it would be a good meeting for the purpose of negotiating and . His intention is to go through and demonstrate some of the technical issues they are working on and Duane will talk about Hungry Horse and irrigation projects and Jay will talk about the unitary management proposal. They have received some feed back from the other state agencies and they will go through that; Jay also has a diagram kind of puts it in perspective as to where they stand now and shows the relationship between all the issues that remain to be settled for a compact to be put together. He asked Duane if they could move agenda item 5 on Hungry Horse to be the next item on the agenda.

5. **Review of Hungry Horse Issues**

Duane brought several handouts (Attachment 3) and used a monitor to illustrate his presentation. He did not have enough handouts for everyone so he asked people to share. They have addressed, or at least acknowledged that a key issue to work through is their evaluation of whether Hungry Horse can serve as a water resource for resolving the water right claims that they are negotiating. They initiated last fall a process that is now bearing fruit – they asked the

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BOR to evaluate using Hungry Horse to about 100,000 AF to be brought into the Reservation; this would allow other sources on other parts of the Reservation to be used for instream flows and to shore up existing agriculture/irrigation. No one has endorsed any of the proposals, in fact there isn't really a proposal. They see this as an evaluation as to whether this can be a source for the settlements. Wendy Christianson is working closely with BOR staff and the BOR and other parties had a conference call last week where the modeling exercise was discussed. They are hopeful that they can be prepared for next month's meeting to share in detail that modeling exercise. Today he wants to start in general terms and talk through the evaluation of Hungry Horse. Obviously, Hungry Horse is in Montana and at the same time is part of the Columbia Basin. (A map was put up – **Attachment 3**) Congress in 1902 authorized the Reclamation Act and under that Act the Secretary of the Interior had the authority to go throughout the West, initiate and build Reclamation projects primarily for irrigation. As time went on it became apparent that these projects could also serve municipal needs and flood control needs. At the same time projects became more expensive and harder for the costs to be recouped by the federal government from the project beneficiaries. Beginning in the 1930s Congress took back some of that power and said if you want new projects Congress needed to approve them. One handout is a compilation of Congressional authorizations for Hungry Horse. (**Attachment 4**). Those are for reference. On the first page, which is the initial authorization for Hungry Horse, about halfway through the first paragraph it states “for the purpose of irrigation and reclamation of arid lands; for controlling floods and improving navigation, regulating the flow of the South Fork of the Flathead River, for the generation of electric energy, and for other beneficial uses primarily in the State of Montana but also in downstream areas, the Secretary of the Interior is authorized and directed to proceed as soon as practicable with the construction, operation and maintenance of the proposed Hungry Horse dam...” With those magic words Reclamation and the Interior Department had the authority to go forward and construct the dam, which of course they did. Note there were several purposes, but in particular though, the language regarding the states, “...beneficial uses primarily in the State of Montana but also in downstream areas...” A big component of Hungry Horse operations is flood control and also power generation. Flood control benefits accrue all the way down the river to Portland from Hungry Horse and that certainly is one of the benefits Congress was contemplating when it authorized this project and indicated that there would be downstream benefits from Hungry Horse. The other parts of those authorizations direct that the project is to be administered under Reclamation Laws; that's a series of laws - some are general and some specific to projects – but all of them put Reclamation projects 1) under State law authorizations for water rights and 2) hydropower generation from those dams is sold in the regions and Congress recoups many of the costs of those projects through hydropower sales. The chart for Hungry Horse shows it has about 3 million usable storage acre feet (**Attachment 5**) and it shows information about the amount of hydro-electric power generation that can be provided from Hungry Horse. He thought it would be helpful to have that information about Hungry Horse and about some of the other dams in the region. Congress, under Reclamation Laws...the standard way to have access to the waters by entering into contract with Reclamation. To date there has been no entity that has entered into a contract with Reclamation to use stored water at Hungry Horse. Nonetheless, that does not mean the project stays empty until someone decides they want a contract for some of the water. The project has been operated for benefits, historically for hydropower as he mentioned, and flood control and more recently, Hungry Horse has been brought into the Columbia Basin as the management of all federal dams, both Corp of Engineering and Reclamation dams with salmon fishing benefits. He talked about

Reclamation's role in managing Hungry Horse and referred to the map. Hungry Horse is at the very head of the basin coming down through Flathead and through Kerr Dam so they already have some issues associated with the management of coordinating those two facilities operations. Jumping to the broader basin, he showed the Corp of Engineer dams and there is a series of dams that are licensed by Federal Energy Regulatory Commission and are private dams primarily for hydropower. The BOR has two large dams in the Columbia Basin: Grand Coulee and Hungry Horse. In addition, on the Snake River, tributary to the Columbia, are several Reclamation dams and large Reclamation projects. They probably won't have time to touch much on those but they are an important component to this whole picture.

Starting in the 1930s, Congress established a new agency called the Bonneville Power Administration. That agency was directed to market and distribute federal power from the large federal hydropower facilities. So now there are three federal agencies: Reclamation; the Corp, which built most of these dams on the mainstem of the Columbia and the lower Snake River; and Bonneville Power which markets the power generated at Corp and Reclamation facilities. Beginning in the 1950s those three agencies decided they would operate Hungry Horse, Libby in Montana; Dworshak in Idaho, and all the federal dams in Washington and along the Snake and Columbia near the border of Oregon. There are about 13 dams total that are managed as one unit called the federal Columbia River Power System. That allowed better federal flood control coordination and better hydropower coordination and generation. The three agencies have a long history of working together operating those facilities, again including Hungry Horse. In the early 1990s, after several decades of the three agencies running those facilities jointly, Congress understood that there were problems on the mainstem Columbia and Snake Rivers for anadromous fish, primarily passage upstream and downstream past Corp of Engineer dams. Those Corp of Engineer dams were built with fish passage. There are four on the mainstem and four on the lower Snake. Up here at Grand Coulee and Chief Joseph fish passage is blocked. But for the basin, primarily, the Snake River up to Hell's Canyon, Salmon River and Clearwater River in Idaho; all of the mainstem Columbia River up to Grand Coulee; tributaries such as Yakima, Walla Walla, Umatilla, still had anadromous fish runs but through the 1980s those were diminishing and Congress in 1980 passed authorization for BPA to use some of the money collected from rate payers to help mitigate the impacts of the dams to assist with the restoration of some of these fish runs. That funding is substantial and has been greatly increased in the past few years. The key point there is that BPA, with this new authority, sought to improve fish runs in a way that they would not be listed under the Endangered Species Act. This did not quite work. In the early 1990s petitions from Indian tribes were submitted to NOAA Fisheries, bringing in the Endangered Species Act which brings in another whole set of issues. NOAA Fisheries, headquartered in Seattle, concluded that several of the fish runs on the Columbia and Snake were in such a depleted state that they did require to be listed under the ESA. He said he would talk through quickly the implications of that. He had mentioned the Corp, Bonneville and Reclamation coming to collective running of the hydropower dams in the Columbia system. When the fish were listed by NOAA Fisheries, several federal requirements kicked in. One key one is in section 7 of the ESA and it states that a federal agency cannot jeopardize the continued existence of a species that has been listed for protection under the ESA. What does that mean? They have two decades of experience dealing with that language in that section. It was designed to, when the ESA was first passed, it was designed to ....the thought process Congress had was ....they had federal agencies out there building new dams, building new roads, they are

constructing new highways...let's as they go forward and deal with their new projects, have them make sure they do those new projects in a way that doesn't impede the recovery of these listed species. But the statute has been applied to new projects or new activities like a new timber harvest but it's also going to apply to the ongoing operations, federal projects like hydropower or irrigation facilities. So that means even though the dams were built well before the passage of the ESA, Reclamation and the Corp as they operate these dams the agencies have to comply with section 7. To do that, beginning in the early 1990s, NOAA Fisheries and the three agencies initiated consultations. These consultations, designed to come up with a plan usually called a Biological Opinion – and to get a comprehensive look the parties agreed that they would consult on the operation of all 13 of the federal Columbia River Power System dams. They evaluated the effects of all those dams as one collective operation. That meant there was a hard look at what the operations did and what could be improved to assist the survival and recovery of 8 or 9 or even more listed salmon or steelhead runs in the Columbia. The primary way that was done was to look at two things: 1) How can they get the fish up and down the river past the Corp of Engineer dams. Fish passage became a huge issue and an extensive issue because one of the key ways to get juvenile fish past the dams was to allow them to go over the spillway so they didn't go through the turbines. However, if water goes over the spillways it doesn't generate power so that is a cost that meant there would be less hydropower for Bonneville to market and get revenues for. 2) The other big measure was to look at upper basin facilities: Grand Coulee, Libby, Dworchak in Idaho, and of course Hungry Horse, and say; if there was more water when juvenile fish are migrating downstream we could improve their conditions and improve their survival. So bottom line, the Corp and Reclamation working with NOAA basically reconfigured how they operated these storage facilities in order to provide flow augmentation for salmon downstream. The bottom line for Hungry Horse and Libby is that a significant portion of the storage behind those facilities is now reserved to be sent down the river to be in the river where the fish are migrating at key times of their migration, so even though salmon could never come this high in the basin and could not come above Grand Coulee, the federal facilities in the upper basin are looked to, to provide water for flow augmentation. The ESA listings brought in new players: Idaho, Washington and Oregon which manage their respective fisheries resources and include the management of anadromous fish resources. Those three states have a high interest in how the federal government is managing its dams. Tribes in the basin – there are Tribes in the lower part of the basin have a treaty very similar to the CSKT treaty that reserves to them the right to fish and hunt off Reservation. Through other litigation, they had been reserved a set amount of the harvest of fish that come up the Columbia River. The four Tribes that have treaty fishing rights are Warm Springs, Umatilla in Oregon, Yakama in Washington and Nez Perce in Idaho. They collectively seek to also manage fishery resources in the basin both for harvest and recovery. There are several environmental groups whose primary mission is to improve rivers and fishery resources. So with all of those interests and activities there is litigation. The litigation in the early 90s was brought by Governor Anders in Idaho who felt federal agencies – the Corp, the BOR and Bonneville Power - weren't doing enough for fish. A federal judge agreed and they redid the Biological Opinion in the mid 1990s. At that point even more flow augmentation was dedicated to come from Grand Coulee and Hungry Horse. Those plans got them to the early 2000s when at that point the Biological Opinions had expired and the new ones were found to be inadequate - one was done in 2000 and 2003 which Judge Redden of Oregon district court found to be inadequate. They finished one in 2004 and found out that from his perspective it was very inadequate and the federal agencies were ordered to redo it

and redo it in collaboration with states and Tribes. Mr. Measure and others have had the occasion to enter into those collaborative discussions which lasted about 2 years. The collaboration allowed the governments in the basin to focus on each respective government's interest; to bring it to the table; to try to get a collaborative approach as to how federal dams should be operated. They weren't 100% successful but several tribes and states are supporting the new biological opinion which was issued earlier this year. Those who don't support it have evoked it and they are again in litigation. Through the collaboration Montana has a more active voice as to how Hungry Horse would be operated. If this biological opinion survives the litigation it will be the plan for the next 10 years. It is the plan they are evaluating (they've brought in all the conditions that were in the Biological Opinion) whether Hungry Horse can be a resource for this settlement and also not disrupt all the arrangements they made in the Biological Opinion for how Hungry Horse would be operated.

There was a question regarding the natural flow out of Hungry Horse – Duane said it is a substantial amount of Hungry Horse around 1 million per peak. The Tribal component was 130,000. What is the projection of drawdown? Duane said they are talking about drawing it down to a certain elevation (3550) by a certain date – the end of September. In 20% dry years it would be drawn down to 3540. It isn't set in specific acre-feet. The goal is to factor in flood control and then have the elevation of Hungry Horse up to a certain level, basically full, by June. In June through August or September it is drawn down and the water is released from Hungry Horse and sent down the system to release below Grand Coulee for fish flows. It is a significant amount. They are talking about taking that operation being a given and then seeing what additional waters could be used from Hungry Horse.

Susan Cottingham asked Duane to address Montana fish issues. Duane said they see in the upper basin that it's important that there is an ESA; anadromous fish are listed; it's important that they work toward their recovery but at the expense of resident fish has been a key conflict that actually the collaboration had the past couple years and gave them an opportunity to address that they also need to protect local fish such as bull trout. There is an operation and Biological Opinion for bull trout at Hungry Horse. In some of the information they provide for next month

Chris asked the other parties to open the floor to public questions regarding Hungry Horse.

Bruce Measure, NW Power Planning Council, asked to clear up the issue of Hungry Horse operation and what they are proposing for the next operating season. The flood control operations require that they save as much water as possible in April and May, up to the end of June ...beginning July 1 they start putting water down the river as quickly as they can ostensibly to provide flows and spill for anadromous fish and in the past has required the top twenty feet of the pool by the end of August. In the most recent biological opinion Montana with others argued they think it is a poor operating for the fish and reservoirs and rivers and they were able to secure a position where in all but the 20% driest years- they would be able to reduce the pool by 10 feet and only by the end of September, not by the end of August. That is one of the issues still in contention and there were a number of plaintiffs in the previous Biological Opinion suit including four of the the lower river Tribes (Umatilla, Warm Springs, Nez Perce and Yakama). Three of those Tribes have since agreed to the new Biological Opinion. The Nez Perce Tribe has not. 43:09

Duane explained how the parties are aligned in litigation and to tie into Bruce's update, in past challenges arrayed against the federal agencies were the State of Oregon, many, many environmental groups, 4 and sometimes one or two other Tribes in the lower basin arguing against biological opinions. In this collaboration, the alignment is considerably different. Three of the four Columbia River states are supporting in with Oregon still opposing; three of the four lower basin Tribes are supporting it; other Tribes have become more active in the litigation; the Colville Tribes in Washington and CSKT have come back as participants; ...intervening... State of Montana is active in litigation and Jay has just joined the team and Jay said Montana is an intervenor; the State of Montana and the Tribes are both in a position of working together. Washington is increasing its participation in defense of the biology.

Someone asked about the sturgeon which were resident in the Kootenai River and what the Corp is doing to help the fish. Duane was not active in that; but in general that is another problem, to seek a balance between downriver fish like salmon and upriver resident fish which need improvement. Bruce 48:09 fish in Idaho also another part – balance between salmon and steelhead and because the Kootenai river starts in Canada and flows down to the U.S.; across into Idaho; that creates another level of complexity; because the water in the Libby storage dam, used for State purposes, and Hungry Horse in the early winter and middle winter flows for salmon and steelhead in July and August and they neglected for the most part to provide any flows for the sturgeon and bull trout in July, August, and September. 49:50. divided waters...shut off water at end of August....

Gerald Mueller, facilitator for the Clark River River Basin Task Force very interested in what happens with Hungry Horse. Caused static in the past by the last legislature appropriating money to pay the BOR to do a study to determine how the 30,000 acre-feet if it were released would effect.... So there are two tracks going; the state and the other track is the Task Force – they are working together They talked about the difference between 20 and 10 foot drawdown; how much of 120,000 acre-feet would be drawdown? 52:49 Someone said there is 25,000 acre-feet per foot of drawdown at Hungry Horse. Actually when they run through the BOR modeling should have those numbers in detail hopefully next month. CSKT and BOR are keeping apprised of modeling. Hard to hear. 54:06

Someone said the dam obviously created an unnatural setting; so now they are looking at possibly....the lower basin will require a certain number of acre-feet ( ) and his question is, as this comes down setting this unnatural state; after they have flood control and fish and several players in this; is it going to be a senior right to this water when there is tough times; are there going to be damages due to impact - because of the requirements down stream will there be settlements proposed? Regarding the model, he was wondering if there are other models that have been considered and will they be pushing this model because of dollars? Duane said the model done by BOR and will be reviewed by BPA, the state and the Tribes to assure they were using proper assumptions and to improve the chances of it working out and to give them a good picture. As to impacts or causing other damages they are seeking to take that into account in this evaluation and the first question is can they do this additional withdrawal from Hungry Horse without disrupting existing operations primarily built into the new biological opinion. If there are significant impacts they will have to determine whether those impacts can be overcome; or they

are such that it's not a viable solution for Hungry Horse or other water users in the basin. Because none of the water is contracted for in Hungry Horse they know they aren't impacting other water users in the basin. He talked about Idaho as an illustration and said a lot of the water used in Idaho is where they are attempting to operate dams to protect fish that no longer come up that high. Those facilities have all their water in contract with irrigation or cities; there is very little flexibility unless someone can rent someone else's space. They don't have that with Hungry Horse as no third party has a contract with BOR. Now as they go forward with the Clark Fork evaluation there will be interested in the future possibly to secure some of that storage. They at least avoid that issue at this time. Duane said because there are no contracts, they do not have senior water right issues with Hungry Horse – they have instead upstream vs. downstream use of that storage. Even though the water that is currently dedicated in the existing bio opinion to assist down river fish isn't a water right per se; it is a federal obligation that has to be met; there are potential ways to adjust that obligation but that would trigger a lot of big issues. The gentleman who asked the question said he is trying to put this into their negotiations; so in negotiations do they set this aside and earmark this? Duane said that is a good question for the entire group. Good strides in evaluation - At some point they will get to the point where – in these basin-wide collaborations – to get a less onerous and better operation of Hungry Horse from the regional/Montana perspective. A question will arise that there may be some additional control of Hungry Horse that goes below that...this is what the model will help them sort out...fisheries point of view or flood control point of view Montana would have to evaluate that – 1:02 There is also the issue if a certain amount of water is viable to the settlement – security to the Tribe. They have done that in many other settlements – used Reclamation storage water for the Tribes. The gentleman said he does not see this being settled in the sunset time left. Chris said Jay is dying to show his diagram....1:04

Bruce said, with respect to the BOR and the ESA – take a look at the handout on the Organic Act, the primary purpose is for it to be utilized for Montana – look at the primacy cause better uses for the State of Montana and the Tribes.

Rhonda said 1:05 on work we did, and again in negotiations mentioned by the gentleman from Reclamation and when we got into negotiations, about Montana's operations overall, initially it was put on the table – we made sure that working groups so Tribe had equal vote in process....people ...first time Tribe and Montana had a voice. Previous to that...several organizations they worked real hard to get where they are – water and operations in Libby would ...in this region...never identified at that point whether it was state or Tribal or a joint effort and now that included in the bylaws the turn around and a big piece of work...secondly involves in their program \_\_\_\_process right now coming up...right now current year So I think we are in a better position coming up the Columbia, water rights misconception on a lot of people that when they got onto that council that there were treaty tribes – doesn't know which tribes they were ....there are tribes with the same treaty – the lower Columbia Tribes and Kootenai was very active as was mentioned - now our tribe is getting involved in that situation... One thing that help neutralize the problems that came out of the negotiations on that report is that Tribes.....have now agreed to work with...Nez Perce in Oregon wanted to point that out that they at least at this point have better access to the operation of the water in Montana ...and what they used....our science – council used the water operations and they came to the conclusion that it was so minimal that they couldn't even come up with a water amount..... one ESA fish listed

that is more important than another ....more money that will come from a lot of different sources ....come to a balance hopefully will help negotiations.

Chris thanked Rhonda and the others for being there and providing more information about Hungry Horse. He said Jay would explain how Hungry Horse fit together with the other issues in the negotiations.

Jay Weiner said the slide he put together touches on how the pieces of the water rights settlement, what they are and how they fit together (ATTACHMENT \_\_\_\_\_), and then from a timing and tactic perspective how they fit. The graphic shows what he sees as the critical pieces of the compact: quantification of the Tribes senior water rights and the scheme for how they will be administered. The proposal that the Tribes made to the State ...the administration piece will be written up in the compact itself and then there is the ordinance which is a draft the Tribes prepared for the State to respond to with comments. So the compact has two critical pieces: quantification of senior rights and the administration of the water right; supplied in the ordinance. How Hungry Horse fits in is one of the critical questions. Whether they get access to additional water for the settlement and how that water would actually be used to facilitate the settlement are two questions in context with Hungry Horse. Hopefully by next month they will have model results from BOR to look at quantifies of water that might be available and when it might be available as the timing of a drawdown is one of the things they will focus on as to when they can get their hands on Hungry Horse water and that will help impact the discussion of what it can be used for in context of the settlement. Hungry Horse, as Duane, Bruce and Rhonda covered ties into local operation of the entire Columbia River system and the litigation on Montana's end and as Gerald pointed out it also ties into the Clark Fork Task Force and DNRC effort to get additional mitigation water for Western Montana. Mitigation water is the result of a Montana court decision talking about the interrelationship between surface and ground water. When the parties get to a compact it will need to be approved by the state legislature, the Tribes and Congress, which will probably include a large amount of funding and authorization for the use of Hungry Horse which is part of the compact ratification legislation. There is the question the Steven's treaty Tribes have put forward and certainly have the right to off-reservation water use particularly for hunting and fishing claims. The Compact Commission has not dealt with the off-reservation issues before and are not quite sure how they will be dealt with in the context of compact negotiations, but they recognize that the resolution of the Tribe's off-reservation claims is not a critical component of the settlement. So – they have quantification of on-reservation claims; administration of on-reservation water use; the off-reservation claims; the interrelationship with Hungry Horse. Then on the left hand side of the chart they have the issues that relate to the irrigation project. Right now there are ongoing discussions regarding the transfer of the management of that irrigation project from BIA control to a cooperative management entity comprised of representatives of the Tribes and the Flathead Joint Board of Control. Those discussions are going on independently of the compact negotiations; however, the Project is the largest consumptive user on the Reservation. How the water right for the Project and how it is managed and administered is an issue which is going to interface with the compact. Whether a Project water right is quantified in the compact or separately is something they will need to discuss but it is certainly an issue they need to look at; how the management inside the Project relates to the overarching management of water on the Reservation and the compact and



the ordinance is something else that needs to be looked at. That is another set of issues relating to the negotiations but similar to Hungry Horse and the operation of the Columbia River system also has a life of its own. The joint legal and technical groups have discussed in previous meetings and the critical thing the Tribe's have proposed to us and that we are engaging with is how do they go about coming up with a practical water management system; one that recognizes the significant senior right the Tribe's have and the Tribe's desire to protect and enhance instream flows that also satisfies a very important point to the State which they appreciate the Tribe's have recognized, is the protection of existing the water users. The joint technical group has been looking at using flow data the Tribes have shared with the State to look at the flow data to figure out in a scientific method what uses on the reservation are and how to use flow information to create an administration scheme that provides legal protection and provides practical management scenario to be administered by water management board; water engineer and ditch riders and how all that fits in. They have had really good meetings and have recently received more flow data from the Tribes on the Mission and Little Bitterroot in addition to the work on the Jocko. The technical group continues to work on refining on what they can do with that technical data so they can come up collectively with what they hope will be a practical management plan. That management plan would likely be used to inform both how they go  
1:17 three quantification in the compact and also how that water right on the Reservation would get \_\_\_\_\_ goes back to the interface with the Tribal ordinance. If the compacts they have done with other Tribes in Montana, each varied, but have general uniformity in their drafting. Definitions are Article II; Article III is quantification and Article IV is generally administration. The take-away from this is that there are a lot of moving parts and they need to figure out how to get the pieces together.

Chairman Steele said he appreciated Jay and his visual help and he'd like to take it with him to get people to support an extension of the sunset of the Commission. Someone noted that Jay said this is a unique situation and he is assuming that's why this is the last Reservation and they want to get it right. Just, any stretch of the imagination shows there is a lot on the table and they may have to concede to some kind of an extension. He didn't want to put Jay on the spot but looking at the scenario they have to be realistic because they do want to get it done. There are a lot of questions and it's not that easy. It has been stagnant but now they are at the table and they are moving forward. 1:21

#### **4. Discussion of Unitary Management Proposal**

Clayton Matt said the CSKT provided the State and the U.S. and the public with the Tribe's latest draft version 8 or 10 weeks ago, and last month they were expecting comments and the State needed more time so they are here today to hear from the State. The Tribe and U.S. received the State comments Tuesday afternoon and they clearly haven't had time to look at them. They will be looking at them and coming up with a strategy and time frame for giving their comments. He said he would look forward to the State's overview. Chris thanked the Tribal council for the time and effort putting the proposal together and evaluating things in it and \_\_\_\_\_ our efforts to work with the State agencies as well .....little bit of time to finish but he is sure they can move forward. Clayton said it was clear the State is still doing some review and so there wouldn't be a big reaction yet. Chris said Jay would explain the process they have been going through the past several months.

Jay said it is clear they are trying to do something different than they have done on prior compacts; previous compacts incorporated dual administration and they are now working on joint administration. One of the reasons they are moving at the pace where they will take the time to look at thing is that this is something different; they are committed to engage with the Tribe's proposal and trying to find ways to make it work if they can but it raises a lot of questions for them as to how some of these things will work as there is no ready-made template for it. As they look at this they go back to first principles, saying they will build a water administration system and how will it work both in principle and how will those principles be implemented in practice. Those are different and interrelated steps. There is a comment that they are still working with DNRC's water resources division who are still looking at the portions of the ordinance dealing with the practical portion of the implementation. One of the reasons for that is that DNRC has a lot of experience implementing state law, some positive, some negative. It is an opportunity to build something new and taking more time to come back with more practical comments in chapters two and four of the Ordinance, they provide micro comments and are still trying to get a clear vision of the macro level to get a clear vision that they can really talk about how this can work in practice. The theory, the joint administrative system that protects the existing users and the Tribe's senior right on the reservation they like; – the question is how they make up for it in practice and that is a complicated thing yet the complication is reflected in the Tribe's ordinance and in many of the questions the State has asked. As Rhonda said in July when it was presented as a first draft – this is a work in progress. That is the context in which their comments generally need to be understood. They have significant micro comments: multiple definitions; terms used inconsistently, those types of mechanical things, but the bigger picture of how to make it work, is something that DNRC is spending a significant staff resource on rather than just saying it won't work and sending it back. One of the more complicating matters regarding administering the water rights in practice is related to with how the water rights are defined. The Level 1 hydrographs need to be further refined during the course of work the joint technical team is doing. There is interrelationship between the work that needs to go forward on a technical level which goes into the guts of the compact in terms of the water rights quantification and administration scheme which the ordinance will then cover. They aren't doing any of them in a vacuum. They can't move one piece at a time. Many comments say we don't know how something will work but that's not to say they won't work. They need to work through internally and have discussions with a negotiating team to bring them back together in a package. That is an overview that led to comments and hopefully the spirit in which they will be received. The next step he would encourage is for the lawyers to set down and look at where to take it based on the comments so far then as DNRC and the Commission are able to refine comments they can do those as well...so that they move all the individual pieces they will have a product. 1:31

Duane said the federal team with receipt of State comments they plan to get up to speed on that whole set of materials; they don't expect the level of input the State has...he appreciates and understands Jay's points – think they are at a state they should have the attorney's sit down in a couple sessions.

Clayton asked if they have any more comments they can make for the negotiating team to understand and for the membership? Jay said the overarching comment is that they appreciate

the amount of work the Tribes put in and they are committed to trying to find a way to make the Tribe's proposal work; that is their goal the comments are geared toward that and about ways it can be approved. They don't have the materials for the public to go through line by line right now; certainly it's a public document. Clayton asked if they intend to make the draft with their comments available to the public. Jay said under Montana state law it is public. Clayton said the original draft presented is on their website and they could offer to put this on the website. Jay said they can talk about how to make the heavily redlined document available to the public as it is not very user friendly. Clayton said they want to offer to make it available and Jay said the Commission could also put it on their website. Jay stressed that this is very much a work in progress. John Carter said he would need at least a month to go through comments and suggests that the lawyers and anyone else who wants to and they should set a date to go over it.

Susan asked if anyone else from the table had comments about this document (Chris had stepped out).

## **6. Other Technical/Legal Items for Discussion**

Clayton said he understands that the State will go over one of the technical items and then remind other of the over view.

Stan Jones went over the technical work going on in between negotiating sessions. He noted that the canal seepage study is just one part of what the joint technical team has been working on but it is something they can explain with a short presentation. They have been preparing for it this year and would implement it next irrigation season. It has benefits both pre compact and post compact as far as the implementation of the compact goes. The objectives are to characterize seepage losses on several of the canals and laterals on the Project. This will be a supplemental to the data collection the Tribe has for the purpose of helping to characterize the water lost. They will identify opportunities for water savings, and as a very big benefit of helping the State to be familiar with canal operations and how things work on the Project. The procedure is to measure the flow in and out of 10 or 15 reaches around the Project and the difference between inflow and outflow is the water loss of canal seepage. It sound simple but it gets very complicated. They had to go out there this year and identify reaches which is a segment or length of a canal and has to be long enough to where you can actually see the losses and because there is a certain amount of error in the measurements. There is a lot of inflow and turnouts within ever mile of canal. They also try to identify places with easier access. They have not done any on the Camus yet but have done some on the Mission and the Jocko. He showed examples on the K Canal in the Jocko and one of the laterals is the K14 lateral and each of those has turnouts to be measured. The procedure they use to measure is a flume or weir or if they don't have those they use a flow meter which indicates the flow. He showed how a stream is divided into segments and the velocity of points measured. They also have to go to every turnout and if there is no measuring device in place they have to do the same procedure in every turnout. They are also planning to put in continuous recording water sensors which are electronic devices. They are put inside a small pipe with holes and a staff gage on the outside that is driven into the bottom of the canal. They may be working on putting these in this fall – anytime the ground is not frozen – so the study is ready to go next spring. Turnouts are common so they will install flumes or weirs in some of the locations; where weirs already exist they find a few will need to be upgraded. He

showed photos of these already installed and said they are a simple way of measuring flows. The schedule is that during this irrigation season they have been working on site selection and design and a little pilot data collection. They saw pretty considerable losses in one site and in another canal there was very little loss and that is kind of what they expect; also during the rate of irrigation season the rate of seepage loss will vary and they want to capture that data. This fall they will do site set up and put in measuring devices and will also enter into a contract to collect the data next year. During the 2009 irrigation season they will do collection then they will do analysis. He thanked the people from the project for taking them around and for helping site selection.

Chris asked if anyone had questions. Someone asked if this was purely seepage loss or if it takes into consideration pluses or minuses of the effect on groundwater. Stan said there will be information they will be able to infer regarding groundwater, potential effects on wells and wetlands in addition to seepage losses. It will give some idea of the losses and how they might affect other uses. It was asked why the seepage would vary? Stan explained it depends on the types of soils it is flowing through as to whether it will seep a lot or not. It also has to do with past management – it might look like there is gravel on the bottom but underneath it might have clay that prevents it from leaking. It can vary depending on the season as well; one spot can vary month to month, for example more when water is first put in it can be soaked up rapidly; also it can relate to consumptive uses later in the year by cottonwoods and willows type vegetation along the canal. The problem with something like this is it is pretty site specific but by looking they can better understand the processes involved and how it might affect groundwater and wells and also investments in the future for Project improvements. Terry \_\_\_ asked a question regarding if they sealed all the canals, it very well could have an impact on wetlands, and other settings; it is going to an issue. Jay said one of the reasons they are interested in doing with the canal seepage study as focused on in negotiations is that the water on the reservation serves many uses as it possibly can and some of the things they have talked about are improved efficiencies, but they want to make sure they don't do something with a lot of unintended consequences for example, there are wetlands with value and they don't want to dry those up; there is return flow that diverted, might give better irrigation use but might change some other use due to less return flows later which changes the pattern of water distribution. There are all kinds of things they need to attend to so they are making the kinds of decisions they collectively need to make to figure out how water allocation is going to work; to figure out how they will move from existing conditions to future betterment conditions to satisfy the Tribe's desire for instream flows and other uses. Chris responded that in answer to the question about the interaction between canal seepage and the wetlands and things like that, they are in a situation of "first do no harm" – clearly before they take a position they want to know what the relationship is regard the cultural and regional settings don't get impacted by the canals, and so that is something hydrologists have to study, for example; how much of a wetland comes from seepage in the canals, once they know that they can at least understand better.(1:52)

Clayton said the presentation and the questions show that the study is important to the settlement discussions and future management discussions. In the latest settlement discussions they can't help but point out that the study won't be completed on the ground until 2009 and that is additional information that they will be bringing to the governor's office and legislature as justification for extending.

Seth Makepeace provided a summary of the technical work. The way he thinks of it as a hydrologist is as a piece of the water budget on the Reservation. The Tribes over the last 30 years have invested their resources understanding their water resources on the Reservation; all surface and groundwater budgets and studies have only scratched the surface of the canal seepage. They have miscellaneous information that indicates that canal seepage is a significant piece of both surface water budget and groundwater budget and the wetland and riparian area water budget. The State is providing a real contribution of technical work and it will become input into the surface water modeling tools and the groundwater tools the Tribes are investing heavily into. He encourages the State team to chime in. He thought the meeting 10 days ago in Helena was pretty productive and they covered a lot of ground in quantification; water management issues being intertwined with the unitary management ordinance. He'll talk about the next step for them on the Hungry Horse model. The Tribes put forth a conceptual idea of a level 1 hydrograph that protects existing uses, one of the prime uses being instream flow. They put that forward and are continuing to work on that. It complicates the management of water because seasonable variability of flow requires the management side to achieve the variable flow through the year. Instream flow was something the Tribe's fought for and will be in the quantification. They are talking about water management and the unitary ordinance – they hear there has to be certainty in the quantification numbers. The State is doing a lot of work using Tribal data and they are working productively. They summarized in the meeting that a set of water management rules have to reflect year to year variability which is trick of itself. They have to reflect a peak flow magnitude of duration in streams that have that. It is spring flow runoff and has a lot of habitat, cultural and ecological attributes and is another tenant they want to see achieved. Then there needs to be a method to account for surplus and deficit within years and between years. If they set a quantification target and set of rules and then give more water to irrigators or Tribes than is envisioned, there needs to be a track and balance of that within years and between years. This is a way to deal with uncertainty; if they make a mistake. Also, sharing water during extended droughts and how do they do that? That came out as part of the minimal set of water management rules that need to come forward. Initially, in the Jocko basin the Tribes proposed over 60 quantification points to be protected on the Reservation. That is a lot of points and it scares water managers because you have to monitor and achieve compliance at that point. They now have a concept of primary and secondary points which are key water management points so they have a hierarchy built in if they aren't done right at the primary node they will be done right at the secondary point. That was the minimum set they felt needed to go with the water management rules. Regarding Hungry Horse, they are very much looking forward to the BOR modeling team sending an interactive tool to look at the model from 1929 to the current period. Then they will be able to pose good questions.

Duane said he appreciates the State and the Tribe bringing together all the interested components of their governments.

Chris opened the next agenda item.

## **7. Question and Answer Period 2:06**

Rory Horning..... primarily at this point Article IV of the compact – ongoing negotiations, with regards to the management of water, in the constitution, the state manages the water. Where is the constitutionality coming in as to how this management system will fit and how will they deal with the constitutionality. Chris Tweeten said the constitution doesn't say that; the constitution says that the water owned by the state for the benefit of the people and obviously The constitution doesn't say anything about management and the legislature decides how the water in the state will be managed. The compact will put a proposal before the legislature that will contain a piece saying how the water will be managed; and what authority will decide whether the unitary management or something else will be appropriate to manage the water. As a lawyer it is his duty to make sure the constitution is there. Rory said he meant that it is the state's responsibility to manage it for all the citizens and are they going to turn it over to someone else? Chris said they haven't reached agreement on what it will look like and as a lawyer it is his opinion that the legislature has the authority to come to agreement with the tribes as to how to manage the water and that is what they are trying to do.

Nancy\_\_\_\_\_, from the city of Polson. She and her husband own property that shares a well with adjacent property owners; it is not registered in the county court house. She doesn't know what recourse they have at this point, knowing about negotiations going on. Chris passed the question to Jay, who explained they should first check with the DNRC Regional Office in Kalispell to make sure it's not filed there as everything was not filed in the courthouse, particularly post-1973 would have been filed in the adjudication. In terms of how they propose to deal with those wells that are out there that were drilled after the State lost the ability to permit new wells on the Reservation, they have worked very closely trying to create what they are calling in the draft ordinance the amnesty filing to recognize the wells for those people who attempted to file to the best of their ability and those who drilled wells and lodged notice of completion with DNRC which DNRC was not allowed by the state Supreme Court to process and to get those wells recorded with the priority date of development of the well, but to also have an amnesty filing period of a certain amount of time to allow people to come and have wells registered because they are uses on the ground, and those would have a priority date of the amnesty period. There would be a process to register and bring into the system all of those uses that actually exist. It is not anyone's goal to cut people off from their wells. For management purposes they want them to be registered so management knows what they are. Clayton said Jay's answer was good as to starting with checking with DNRC records; and also to go through the draft ordinance as a proposal and consider \_\_\_\_\_ for individuals who haven't filed and also look at relative to 2:13 can't hear him.

\_\_\_\_\_ here representing himself; following for a long time; appreciate the comments; he is sure somebody here \_\_\_\_\_ other people here serving. I was a Project water user....can't hear 2:14 \_\_\_\_\_ word user – he is a citizen who is concerned and have been for a long time. Every time a group like this gets together somebody wins and loses. He sees why looking at this graphic. There should be another block up there that says citizen users and no one represents him. Hardly anybody knows about this meeting and what it is. The remedy for that is that people should be more broadly informed, especially those who are more directly affected. Some organizations have something they call information and education and assign that as a responsibility to somebody. ....when all this comes together and goes back to the legislature....most of us aren't going to be informed. A short time and they are not informed. His question is, is there a part of

this compact commission assigned the responsibility of informing the public = right now you aren't doing a very good job. Susan said he made some good points. She explained that these are very complicated negotiations and by the time something goes to the legislature there will be an opportunity to comment. They have a 600-700 mailing list. They will have public meetings before this goes to the legislature and are still looking at some other public education. The Hungry Horse thing is an example. In all their other compacts they have quite a few public meetings. They could try to get some broad information to the public. It is difficult because you want to get information to the public but at this point they don't even have final outlines to bring forward. Before the legislature there will be public meetings noticed in the papers; and there will be briefings with local legislators. If anyone wants to get on the mailing list they can be added to it as well. Clayton said these negotiations have been going on for a long time and they are all public; those are advertised. In addition the Tribal government has been having meetings for its tribal membership. In the current situation they are also working on a website to publish – they have the official Tribal website on which the current proposal is available now but they are developing a more comprehensive water rights information website to provide background; more general public information as well as the documents. That will be available within the next month they hope, for anyone with access to the internet. People are welcome to contact the negotiating parties and have comments heard in between the meetings as well. With regards to the boxes and chart, he said early on the Tribal council recognized all the existing users on the Reservation and included in the proposal recognition and protection of existing users on the Reservation. That is a lot of the process they are going through to identify the existing Tribal users on the Reservation and the uses that were uses filed as state based uses. They are going through a very expensive process to recognize and protect those uses. That is also associated with some of the technical work they are doing. They 2:21 can't hear Chris added that it is not anybody's intention to reach a compact in respect to the seepage study and associated groundwater and wetlands, it is not going to be anybody's intention here to do anything that will affect water rights in the Flathead River which is a tremendous resource to the Tribes and to the State and its people. He said they are certainly cognizant of that fact as they move ahead in the negotiations.

Chairman James Steele 2:23