

MEMORANDUM

TO: CSKT Minute Files; Susan Cottingham; Jay Weiner; Sonja Hoeglund
FROM: Joan Specking, RWRCC
RE: CSKT Minute Summary from September 30, 2009 Negotiating
Session, Polson, Montana, 9 a.m., KwaTaqNuk Resort
DATE : September 30, 2009

Chair: RWRCC

Agendas (**Attachment 1**) were available.

1. Opening Prayer (Opening Prayers are not recorded)

Chairman James Steele, Jr. said they recognize that their Reservation was opened up to settlement but it is also their homeland per the 1855 Hellgate Treaty. They have a draft proposal that recognizes this. He said he appreciates the great work of the technical and legal teams getting that aspect of the negotiations accomplished.

2. Introductions (**Attachment 2, sign in sheet**)

3. Opening Statements

Dorothy Bradley chaired the meeting for the RWRCC and welcomed everyone to the meeting; she thanked the political leaders who worked so hard for this, and the legal community and advisors who help them understand the framework they work in; the technical experts who help visualize the complexity of water and geography, soils and rocks and engineering; she thanked the elders from whom they all learn so much, and the members of the public who sit through the meetings. She said she always leaves with a sense of accomplishment and that they are moving forward not backward and she has been very impressed with the quality of work they hear about.

Duane Mecham noted the new administration, the new Secretary of the Interior, and the new federal team. In recent months he discussed negotiations with the Secretary's counselors and with folks from the Secretary's office who oversee Indian water rights settlements. Letty Belin who was involved in Southwestern water issues has been asked to chair their Indian Water Rights Working Group. He was able to brief her on some of the issues they are working on and she has expressed a commitment to this effort. David Hayes, deputy secretary, is who she reports to. Duane hopes to walk through any questions later in the meeting regarding how the federal team will proceed.

4. Technical / Legal Working Group Update

Duane said Seth was going to provide an update. He noted that the concept of a joint technical team was embraced early on by the State and Tribal teams and by the Federal team as well but without resources. At the beginning of the effort all of the federal experts were involved in litigation due to the pending date they were required to file their claims. With the extension they have time and funding for their experts to be actively involved in the Technical Team.

Seth Makepeace said he would walk through some items to review; he noted he is speaking for the joint technical team. Yesterday they had a productive meeting of the three groups and they took some time to look at where they have been including progress made on priorities and how to keep the momentum going during the fall and winter and how to bring priorities to a working conclusion so they can move on to the next aspect of the technical work. It turns out there is quite a bit to be done including a complex overlay of surface and groundwater. They have many interests to be considered. He said he would update them with a reminder of their policy backdrop.

He said they are trying to work in a unique setting of unitary administration which is a blending of the state, Tribal and federal law that would be embodied in an ordinance. They are not only interested in unitary administration but they see the water resources as a unitary resource; they see surface, groundwater and wetlands as interactive and they are trying to craft technical work that respects that interaction and respects existing uses but is protective of all those resources. That is also a challenge and they are still working on it. An early backdrop the technical team was given is to try to protect existing verified uses on the Reservation and that is a fundamental element they are still working on; to protect existing verified uses within the different priority date classes and how to craft a shared shortage procedure for water tight years and dry years and how to equitably share shortages in dry years. Those are some of the main backdrops they work with. One of the most significant baseline elements they work with now, and the state is making tremendous strides here, is mapping distribution of existing uses on the Reservation. They have to have the fundamental base-line and without it they can't make a lot of progress in a lot of areas. They have the irrigated land base which is a tremendous existing use; they have the federal irrigation project and private irrigation. They have mapped and are updating irrigated land and they will develop by late spring a 2009 version of irrigated land so the compact will have the most updated version.

Regarding the claims examination of pre-1973 state-based water rights; the DNRC adjudication staff is making quite a bit of progress. They understand by the end of December or in January that they will have a physical map base of the permits that they can bring with the claims and irrigated land base and start to understand the distribution of permits on the Reservation. There is a distribution of lands called Secretarial lands on the Reservation; the Tribe has mapped a distribution of secretarial ditches and lands on the Reservation which has been sent around. They are working on understanding groundwater use on the Reservation and will map all of the municipal and commercial wells and to the best of the data bases ability, they will try to map domestic wells that are in the DNRC and Tribal data bases. There are wells that are not in the data bases.

The federal irrigation project is the largest water user on the Reservation at approximately 127,000 irrigated acres with numerous reservoirs and they are able to accurately map the irrigated land base on the Reservation. They are working with the federal team to do a tract by tract use of water on the project, where they divert water from their point of diversion, and the source of the water supply. There is some uncertainty as to how they will be able to achieve that at this point. They are working on the BIA trying to get the information put together.

Regarding the effort to protect existing verified uses, the Tribes have expressed that there is an existing stream flow pattern and the Tribes have said there will be no further diminution of the stream flows. They are trying to develop management modeling tools so they can predict and manage stream flows to match the historical pattern. They call that Level 1 Stream Flow work. There has been a lot of work in Jocko and Mission valleys in developing the tools so they can look at snow pack conditions, predict the water year and specify a stream flow that would mimic an historical pattern and allow existing diversions to proceed. NRCS has the latest snow pack forecasts which they are refining and trying to improve as this procedure is only as good as the understanding of the snow pack conditions in a water year. Those are available on the State of Montana NRCS website.

Another activity that has been going on is looking at what the actual water use of the irrigation project is. The last meeting they had a fairly in depth presentation on evapotranspiration – the demand of the crops for water. The technical team agrees that the evapotranspiration study is extremely valuable. The state has completed the field part of a canal seepage study on the larger canals and they will have a write up on that study. In the Jocko Valley on the main feeder canal, “K” Canal, the irrigation project and the Tribes were able to get funding to line approximately 9,000 feet of that canal. The lined section of the Canal corresponds to where the state had a measurement loss section so they have that data set and next year after lining they will remeasure and be able to see what kind of water savings or efficiency upgrades have occurred from that project. All of this work is related to the irrigation project; irrigation return flows; the whole reservoir system and water use system for irrigated lands have been encapsulated in the computer HyDross Model for the Jocko, Little Bitterroot and Mission valleys. They are taking the model through one iteration to bring the baseline condition up to a platform of 2008 mapping and they will have baseline models on a monthly time-step to understand the irrigation project and the value of water through the project and the return flow patterns. They are also integrating the irrigated lands into groundwater so the interplay between surface irrigation and groundwater shows return flows. These are significant undertakings that take a lot of time. One value of a model is demonstrating the understanding of a physical system and another value is to model scenarios. If they want to increase the efficiency of the irrigation project by 10 or 20% they would modify the computer model scenarios and look at their understanding of what it would be – and say what a change would do to surface and groundwater budgets.

The BOR continues to work on the Hungry Horse modeling effort. In the next couple of months they should have scenarios modeled for that; they were looking at drafting water from Hungry Horse to supplement the water supply on the Reservation, and also drafting a natural flow diversion from the Flathead River (the water always stays above the minimum flow required, and then looks to the upstream reservoirs in severely dry years). When they look at that work they look at the whole Columbia basin system and how the federal hydropower system comes in to play.

They have lakes and wetlands work going on to try to quantify or understand the water use requirement for the wetlands on the Reservation. There is a really diverse wetland community with a water demand.

They have background work going on about groundwater which is proceeding at a rapid rate but they don't plant to queue that up for the technical teams until later in the spring when they have the story more developed and they can start to get that work into the mix.

They have developed a fairly extensive list of tasks for the technical team, assigned people to those tasks, assigned priorities and are developing work plans for the priority tasks. They have carved out smaller technical groups that will work on irrigation, Level 2, groundwater and lakes and wetlands issues. They will meet as a formal technical group after some of the work is done and then, present it to the team.

Seth asked if anyone had questions. Someone asked if the work done by NRCS is Reservation specific and Seth said they asked them for specific forecasting on smaller streams which are in representative hydrologic regions on the Reservation.

Regarding the modeling on Hungry Horse, someone asked when BOR might be done with that. Seth said the new BOR employee doing the modeling thinks in the next 8 weeks she will have the modeling scenarios completed. Then there is a wrap up and review period so they are hoping to have it in the next several months. He said that is important as many of the options they have would be easier to get through with supplemental water.

Someone asked about predicting stream flows and what the duration is. Seth said the Level 1 modeling they are doing is a daily hydrograph for the year of interest. They are working with a 1992 to current period of record which they think represents some of the extreme wet and dry conditions over the past 100 years. They think their data set is representative of the last century's conditions. The way they handle climate change is something different. The HyDross models are looking at 1982 to 2000...they have the most robust data set starting in 1992; it is peer reviewed within the technical teams and each period of record studied might vary; they are looking to get the longest period of record they can. Jay Weiner said another thing they are doing, and why mapping current uses is so critical, is to address the uncertainties from year to year...of snow pack and water use and stream systems that are not constant. Existing uses have had varying amounts of water available over time and one of the things that would be built into the administrative mechanism of the compact are provisions to manage shortages and drought. How they will do that still needs to be worked on.

Someone said when they talk about snow pack a cool spring would make a difference; if it's a warmer spring the snow will melt more quickly. Is the management tool flexible for a particular season? Seth said the compact will require a lot of inputs, financial and staffing, to make it work because they are trying to get variable stream flows down the streams and sharing shortages so the parties will have to have hydrologists and people watching it. In a March time period they will project a water supply condition and then they will rerun the tools as often as needed and adapt to changing conditions that occur as water proceeds. It will be active water management. Jay said they talked a lot in the meetings about Level 1 hydrographs. The hydrograph is a really important concept for addressing variability.

Someone asked if there is information regarding various canals throughout the Reservation and if someone would have a higher percentage of loss – will that be

available? He asked how they prioritized K Canal over others. Seth explained that one of the goals of the canal seepage study is to take the 9 or 10 measurement sites then use geology soil conditions and canal conditions and extrapolate that information out. There is well over 1000 miles of canal on the Reservation so they will have to extrapolate the information out to other places.

Jon Sinrud (?) – asked about using Hungry Horse to supplement water in dry years on the Reservation....Seth said the model is detailed and it has calibration points throughout the basin that go all the way down to the falls on the Idaho border, and they look at change all along it, in Flathead Lake and in Hungry Horse Reservoir – they will spot deviations in existing conditions and the number of dry years this might occur and that goes into the hopper. He was asked about looking at prior appropriation rights so an individual does not lose their water rights and Seth explained that the model does not look at individual water rights and it is important to understand that this group is convened to settle the CSKT reserved water rights which have the oldest priority date in the basin. Clayton Matt explained that what is being modeled are potential releases from Hungry Horse, not additional diversions of water from stream flows under existing conditions. Jay said they are looking at Hungry Horse to back-stop additional diversions that might come out of the Flathead mainstem once it's on the Reservation so by the time it's on the Reservation it has already passed through the upper Flathead Valley. They are not talking about changing those stream flow conditions; they are talking about additional water out of Hungry Horse. The volumes of water they are talking about are comparatively miniscule when laid against the volume of water in the Flathead River. He explained some of the legal issues between downstream and upstream states.

Someone asked if all the information being discussed was on line and Seth said anyone is welcome to come and talk to them but it wasn't all on the web at this time. He explained that the parties try to present the information in these meetings and that there is not an information officer to talk to the community.

5. Question and Answer Period

John Carter noted that there has been a lot going on in Congress lately on the Crow water rights settlement and the current disposition of the U.S. toward Tribal Water settlements. Duane explained the recent hearing on the Crow legislation and heard the administration say there remained concerns with the legislation but that they continue to work to resolve those concerns. He said here they are seeking to keep compact development and federal legislation development hand in hand and make sure if there is an issue for the federal team that it can be coordinated with the state and Tribes. Susan said there was a difference in the federal attitude toward the legislation from last year. They went out of their way to not oppose the settlement. In Crow they had a year of fighting with the State of Wyoming. In this case they will be cognizant of the Columbia basin but shouldn't be naïve enough to think there won't be downstream issues. She said there are about 4 compacts going through Congress right now. Generally they were encouraged by the federal position.

Duane said the Dept. of Interior will have the leadership of Indian water rights matters meet this fall. Given that this is an active negotiation at the meeting he will walk through a significant background and policy and issue explanation. He will be explaining the unitary management proposal to the new federal team.

Someone asked about a timeline and Duane said there is now a leadership team in place; they have had statements supporting the settlement activities in general; he hopes to have something to report at the next negotiating session after his meeting with leadership. He said there is a lot of momentum. Jay said it is easier to get federal buyoff on some policy changes than it is on funding. He said the federal team members at the table often aren't empowered to make decisions like the state and Tribal team members are.

Paul Brown, City of Kalispell, said it appears the Commission is following three different tracks: One is to build a hydrologic model of the basin, a second is to actually create a draft ordinance, and the third track is seeking additional water rights at Hungry Horse reservoir. The original task the Commission had was to draft an ordinance addressing the shared water right. Over the next four years he thinks the Commission needs to focus more on that and that the modeling of the system could be done later after the Commission sunsets, as could seeking additional water rights. If they don't, he thinks four years will go by and they will be seeking an additional four years. What is being done to create, update and finalize the draft ordinance? Jay said the three tracks identified are accurate. He explained that the Commission and DNRC are working together to look at the draft ordinance that the Tribes initially put together to look at how new changes in state law impact the ordinance. That process is ongoing and they hope to have formal comments to report back in the next two months. The bigger picture alluded to in terms of the allocation effort is a good thing to be thinking about. He explained that the ordinance is interdependent on the water rights and what water rights are being protected; they need to have a picture of water use on the Reservation. The priority of the technical group is to come as close as they can to an accurate depiction of water use on the Reservation. At the end of the day the statutory task of the Commission is to negotiate a quantification of the Tribe's water rights. The goal is to reach a settlement with the Tribes. The unitary administration proposal is what they are currently seeing as the most plausible grounds for reaching a settlement. In the course of the negotiations, if other paths open up they would also look at those.

Nikos Pastos, Center for Water Advocacy, said there is a lot of interest and scrutiny from Tribes in western states. He noted that their water rights started before the Treaty and his mother asked him to state that the Treaty is more than a reference point; it existed before the state of Montana. As far as unitary management they want the traditional subsistence cultural values emphasized first and always; proper flows for hunting, fishing, recreation and human health. They are concerned about shared jurisdiction and have questions about how the negotiations affect instream flows for further industrial development and have concerns about other processes with the Flathead Indian Irrigation Project. They know that the parties have been working diligently and they want to express respect for the state and the feds, especially the Tribal negotiators, but this is Tribal land and they have a Treaty. Regardless of how many have moved in and have uses, the Tribes have always shared their water. Very simply, the Traditional uses of the water are primary here and they will continue to assert their original rights to the water. He thanked everyone.

7. Public Comment

Rory Horning asked if Jay would give at the next meeting a report in the changes in the 2009 legal system regarding water and how they affect people. Jay said Candace West gave a report at the July meeting as to changes in the Water Use Act in the 2009 legislature. He is hoping that at the next meeting in November, he will have state comments on the draft ordinance which will take those legal changes into consideration.

Someone wanted to express appreciation to the those who...earlier in the spring there was a requirement regarding people putting social security numbers on documents and it was appealed to Washington DC....agreed with the Joint Board not to require individual social security numbers – she thanked whoever was responsible.

8. Other

Duane gave an update on the lower Columbia River interests. The Corps of Engineers and the BOR operate several dams and the power is marketed by Bonneville Power Administration. Those three agencies worked with the US Fish & Wildlife Service to come up with a fish plan called a Biological Opinion, which the State of Oregon, Nez Perce Tribe and some environmental groups oppose in ongoing litigation. Judge Redden has indicated that he thinks the current plan is very close and he asked the new administration to review the plan. A report was sent to him on September 15th. Anyone interested can contact Duane or Jay. The report supported the 2008 Biological Opinion but added to it. They agreed to initiate the first stages of studies to evaluate whether or not four Corps dams on the lower Snake River should be removed to assist Snake River salmon stocks. This would not happen unless Snake River stocks were trending downward. Environmental groups in Oregon are not pleased with the report or the endorsement of the 2008 Biological Opinion and the Judge is allowing them to express their concerns. He can rule on this at any time.

9. Set Next Negotiating Session

9 am, November 18, 2009 and the Federal team will chair.

9 am, December 16, 2009 and the Tribes will chair

10. Closing Comments by the Negotiating Team

James Steele, Jr. said he appreciated the team, the audience and the students. From the Tribal perspective they are intent on seeing the negotiations through. He mentioned the statement made by Nikos Pastos that regardless of the situation of the land on the Reservation, they always worked well with community members and members of the Reservation in spite of opposition. He said the CSKT are not just another special interest or racial group; that comment has been made – and he said it is a fact that they are a sovereign nation because of a Treaty. He noted the commerce clause in the U.S. Constitution which mentions Indian Nations. That is why they are there; they have a homeland. From a Tribal perspective that is why they are tough negotiators. He doesn't necessarily believe that the other Tribes got a good deal with their settlements; and CSKT will make sure this is right for their people. They won't rush through this. He wants to take the time to do things right and make sure they know what's in the water rights negotiations. They know as Indian people that when the Treaty was signed that wasn't all of it. They have to make sure the words are right. That's why they have the technical teams and he appreciated Seth's presentation. He said he appreciated the honor and privilege from his people and his council for

allowing him to be the Chairman; he thanked the state's team and Duane, and Chuck the FIIP superintendent.

Pat Pierre said they have been coming to the table for a lot of years and have accomplished very much. He is in agreement with the gentleman who said there were four years left and asked if they would get something done in four years. He reiterated what the Tribal Chairman said about moving into this slowly because they want to make sure that if something is signed it is something that is good for the people and there are generations yet to come and they need to have the land and water and resources off of this piece of land to live on. He said he wanted to talk a little bit about the spiritual part of this thing. Some of them go to church, some do not but some are in church every day. They look at the earth as something that is sacred; they look at the water that flows as sacred; the mountains, forests and rivers. Right now they are hauling away dirt a truckload at a time, tons and tons of rock and that's not right. The property all belongs to one creator and they are entrusted to take care of it. It still is a Reservation, it still has boundaries and it's still Indian country. At the last meeting they had a talk about how they lost the whole nation and the Reservations are now tiny dots on the map where the federal government put them to live. There were treaties signedevery time the Indian people seem to stand up and get in the way the legislature or Congress will make a law to overcome them. They make laws to suit themselves. There is no law in the State or federal government enacted by first coming to the tribal people for consultation. And so they will make a law today to have a settlement of water rights and if they fight over the water they may not have anything to fight over quick. If they fight over land pretty soon there'll be no land to fight over. He asked them to consider what they can do to protect what they have. Are they individually responsible to take care of resources? Some of them are not Tribal members but they live on the Reservation and they need to take care of what they have. The final settlement they come up with is going to be for the people of this particular Reservation. Some may not agree but he does not care. They have a responsibility, each and everyone. They can come to the session every month and voice their opinions. What will they wind up with after the next four years? Will people go back and ask the governor for another extension? He said he is not pushing for a settlement by a long shot but they will make sure everybody is satisfied with what they come up with. As long as he has a voice he will talk because everyone is concerned. Whether people are Tribal members or not they live on the Reservation and have to comply with the laws. Everything was provided by mother earth. They have to take care of the earth and all its resources because if they don't they will self destruct because of greed....you call this the land of the free and they have not got to that point yet. His fellow elders ask why they even come to the table and talk about water....let's learn to take care of it. He said he was very pleased to see students from Two Eagle and said they are learning. He said everyone is concerned and has a responsibility. He said people should get up to the microphone and say something constructive.

Dorothy thanked everyone who was working on the project.

Meeting adjourned.