

**NEGOTIATION SESSION: CONFEDERATED SALISH AND KOOTENAI
TRIBES, UNITED STATES, AND MONTANA RESERVED
WATER RIGHTS COMPACT COMMISSION
JUNE 17, 2002**

**KWATAKNUK BEST WESTERN RESORT
9:00 a.m. Polson, Montana**

- I Introduction/Opening Remarks/Meeting Protocol
- II Claims Examination Working Group Report
- III Interim Plan Working Group Report
- IV Technical Working Group Report
 - a Progress report
 - b Work plan
- V Next Steps
- VI Public Comment
- VII Closing and Adjourn

* Breaks/Lunch will be taken as needed

Water Rights Negotiation Meeting
Hosted by the Confederated Salish and Kootenai Tribes
At KwaTukNuk, Polson, Montana
July 17, 2002

Data and Technical Workgroup discussion

Partial Transcript

Clayton Matt One of the work group's setup at the last negotiation session was the data and technical workgroup At that time, one of the reasons for that is to begin to get a workgroup together that can assess available data to apply to the negotiation problem we have The problem we are faced with is that almost all of the available data right now is Tribal data The Tribe agreed to share its data We also established a process for sharing that data And we are beginning to follow that process

At the workgroup discussions we had, we had a meeting and at that meeting we explained some of the background and how we developed some of the data that we gave to the state The first set of data that we transferred is the natural flow data that is hydrologic natural flow data that goes into the HYDROSS model for the Jocko area of the Reservation that was given over That was done on March 26th On June 6th we received a list of questions from the state about that data There was a field trip conducted by the technical staff, hydrologists, of the three parties on June 19th

Then recently on July 1st we received a letter from the state, which poses some additional questions Since its so early, since its so recent that we received that letter we don't have complete analysis and a complete answer but we do have an initial response for you at this time

Our initial response is as follows First of all we intend to provide an answer to the request for the additional hydrologic information We will review that the questions that you pose in there about that hydrologic information are an extension of an understanding of the hydrology data that we have already provided As such we think that we need to complete the understanding and the questions and answers from hydrologic data before we can move on to the next major data set We'd like to do that

The letter also gives a limited conditional acceptance of the hydrologic data I think if we can move a little further down the road in our understanding of the hydrologic data we would like to achieve a greater level of acceptance We acknowledge that certain changes may come out of the modeling process but we should be able to achieve a basic acceptance of the data and the methods of developing that data early on in the process and if we could come to some understanding and find a way to accomplish that once we get through that process with one set of data and we will have a better understanding of what level of acceptance we're looking for and I think we can move through that much more rapidly more quickly

That's our position That's where we're at today with our response and we look forward to discussing this more also at the work group level and getting on with getting you answers to your questions

Water Rights Negotiation Meeting
Hosted by the Confederated Salish and Kootenai Tribes
At KwaTukNuk, Polson, Montana
July 17, 2002

Confederated Salish and Kootenai Tribes
Montana Reserved Water Rights Compact Commission
United States

Start the meeting at 9 00 AM
Lunch Break 12 00 Noon
Resume meeting 1 00 PM

Opening Prayer and Song 9 00 AM

Opening statements

Work Group presentations and discussion

Administration Workgroup / Interim Plan

Data and technical Workgroup

Claims Examination Workgroup

Public Comment

Concluding remarks and summary

Water Rights Negotiation Meeting
Hosted by the Confederated Salish and Kootenai Tribes
At KwaTukNuk, Polson, Montana
July 17, 2002

Federal Negotiating Team

Chris Kenney
Rich Aldrich
Cheryl Willis
Scott Miller
David Harder
Bernie Burnham
Robert Grace

CSKT Negotiating Team

Clayton Matt
Rhonda Sweaney
Maggie Good
Lloyd Ervin
Ron Trehan
Pat Pierre
Red Shirt Guy
Next to Red Shirt Guy

State Negotiating Team

Chris Tweeten
Susan Cottingham
Anne Yates
Tara DePuy
Cindy Younkin
Bill Tash
Candy West

Opening Prayer and Song 9 00 AM

Opening Statements

Clayton Matt First some background for those of you that haven't been following our water rights negotiation meetings or the public meetings we've been having around the reservation. The purpose of these negotiations is to settle the water rights for the Confederated Salish and Kootenai Tribes. Throughout the reservation tribal water rights are extensive and pervasive and they exist on and off the reservation in the form of aboriginal and reserved water rights. They include surface water and ground water, consumptive and non-consumptive, and are based on past, present and future uses and are

Internal minutes and transcription not reviewed by other parties

supported by volumes of historical, cultural, legal and scientific information that the tribe has developed over the years

At the last negotiation session we introduced a proposal and from a tribal perspective that proposal is still on the table. Certainly there hasn't been agreement between the parties about the proposal itself but from a tribal perspective that proposal is still on the table. There are some copies of that available here today and if you don't get one and you want one let us know and we'll get that out to you.

To summarize the proposal very quickly in three main points, one main point of the proposal is that the United States owns the water in trust on behalf of the CSKT on the reservation. The tribes recognize that there are existing junior water users throughout the reservation. The question is how do we accomplish both of those goals. And our proposal states that we would like to develop a comprehensive Tribal water administration plan that recognizes Tribal ownership of the resource and recognizes existing uses and it notes that we are a long ways from finalizing that. We've got some things to talk about today that take us a step in the direction towards getting to those solutions. I think you'll be interested in hearing some of our discussion today.

Since the last negotiation session the Tribe has been very active on two main fronts. First of all we've held a series of public meetings around the reservation and we've been active in work group discussions that we'll talk about later this morning. We've held public meetings at Pablo at Two River School on April 2, Charlo at Charlo High School on April 7, Polson here at the KwaTukNuk on May 1, Arlee, Arlee High School on May 15, Hot Springs at Hot Springs High School on May 29, Elmo at the Kootenai Cultural Center on May 21, and recently at the Ronan High School in Ronan on July 11. During this time period we also met with the local democratic committee at their request, the Polson Rotary Club at their request and sat in on a meeting between the Compact Commission staff and the Flathead Resource Organization that was held during that interim as well.

The last negotiation session we set up three work groups. One to discuss administration issues, one to discuss claims examination issues and one to discuss data and technical issues. Those three work groups have been active since our last negotiation session. We'll make reports today. All three parties, State, tribal and federal, are represented on those work groups. That's all I have for now for my opening statement and I'll turn it over to Chris Tweeten to make any opening remarks.

Chris Tweeten: Thank you Clayton. First of all let us express our appreciation for the opportunity to be here with you today and for the hospitality you have shown not only today but in all of our business with the Reservation to meet with folks to talk about these issues. We really appreciate the open mindedness and hospitality that we've been met with as we've come to the reservation to talk about water rights.

At the negotiation session we did have some discussion regarding the Tribes proposal as Clayton has just outlined it. On behalf of the State team I indicated that we did not

believe that that proposal would serve as an acceptable outline of a final settlement but we agreed with the Tribes and the United States that discussions should go forward and try to find some middle ground that would meet all the needs of all the parties and we're happy to report that the working groups that have been established have been meeting and the purpose that I think we're going to accomplish today is we're going to report to the members of the public and to discuss the meetings of the working groups and what the working groups have accomplished since we last sat around the table in February

We remain optimistic that progress is possible and that an agreement is possible and we continue to think it is going to take a considerable amount of time to get there as you hear what the working groups have been engaged in. We're here for another purpose as well and that is to hear what the members of the public have to say about these issues in particular about the information that we're going to be presenting to you this morning. So we'll listen very attentively about what you have to say as we have consistently throughout this process and hopefully proceed down the road toward reaching an agreement.

Chris Kenney: Good morning. I would extend my appreciation to the Tribe and the folks in the Flathead and Mission Valley area, we always enjoy coming out here to visit you. We're glad to be here and we're glad to have another negotiation session. I think all I would offer is that we see progress from the working groups particularly in terms of all the individuals beginning to develop good working relationships. I am firmly of the opinion and believe that the success of this negotiation as in any negotiation ultimately turns on the ability of all the parties to not only find common cause from each other but to eventually understand that the outcome is a function of everybody seeing their future together and so what we'll be doing in this session today and what we'll be trying to do in the future is to try to build upon what I see as a improving a working relationship within the subgroups and within the larger group and hopefully that is going to take us where we want to go. Thanks, Clayton.

Clayton Matt: Thank you. That concludes our opening remarks and we'll move on to the work group presentations portion of the agenda.

Claims Examination Work Group Discussion

Clayton Matt: We had some discussion here just before we started and I'm not interested in necessarily changing the agenda, I don't think we'll change anything but there is a request, Chris Kenney, to not start with the administration work group and to start with one of the others and actually end with the administration work group discussion so that the overhead slides can be used at that time and we'd go into the public comments. I guess I have no, unless there is some particular objection from the team I have no particular objection with that.

Chris Kenney: I think that's probably a good idea actually now that you have approached it.

Clayton Matt Okay If we are going to go with some another order I suggest we go with the reverse order and start with the claims examination work group discussion As we set up our discussion today we agreed that the State would make the initial comments on this today and we would have some comments and then Chris, I'm sure the Federal Team will want to make some comments then as well

Susan Cottingham One of the work groups we set up in February we call the claims examination workgroup Let me give a little bit of background about what that means

These negotiations are designed to settle the Federal Reserved Water Rights of the CSKT Tribes The other major part of the States water adjudication is the Water Courts efforts to quantify and prioritize all the State based water users who filed claims in the water adjudication process for all water use prior to 1973 when the water use act was established That process has been ongoing in many other water basins throughout the State, it has not yet started up here in the Flathead area and there have been a lot of questions about how it might get started and what might happen

The Water Court has focused on basins around the State that have not involved reservation basins because they've given us the deference to start really trying to come up with a negotiated settlement and then work in a parallel way to quantify the State based water uses Obviously there are a lot of existing water uses up here that have filed claims under that Water Court process and we all three parties understand that that at some point needs to get started

We've had two meetings of this claims examination working group One in which DNRC presented a very comprehensive description of how DNRC (DNRC is the Department of Natural Resources and Conservation, their the ones by law that work under the direction of the water judge and do all the claims examination of these many claims that were filed) goes about doing these claims examinations There is a claims examination manual that has been adopted by the court to guide DNRC in this and they go through a very detailed process where they look at each individual claim and look at all the details and elements of that claim priority date and place of use and submit reports to the Water Court so that at the time the Water Court finally issues a decree in the basin that's effected them, people have an understanding of what exactly these claims are and whether there is any concerns about them

The parties, as I said, have met a couple times We know that, I think we all agree that this needs to be done At the last meeting, the Tribe proposed that we move forward with the classic DNRC claims examination We had some information about how long that might take One of the main concerns is that we actually have to petition the Water Court to tell DNRC to go ahead with that claims examination and so at some point we have to be talking to the judge about that and whether he is willing to go forward with that

The other major concern of course is resources How do we fund the people that actually are going to be doing this? Over the past ten or fifteen years, DNRC has gone from

having 20 or 30 folks working in claims examination to I think about 7 or 8. Their resources have been really stricken down and all those folks are busy working in other areas. So the State is taking a hard look internally at what we could do to come up with resources. As you know, we're facing a special session of the legislature that is going to have to cut \$45 million from the State budget in addition to what has been cut already. So that's a real difficulty. The Tribes proposed that perhaps the Federal Team, the federal government, could help share in those costs. I'll let the Federal government speak to whether they can do that.

So we're really sort of in a quandary. We know this has to go forward, we know it's an important part of the adjudication but right now it is not clear whether the State or the federal government is going to have the resources to put into this. The parties are trying to come up with some creative ideas about how we could fund this. We'll be continuing to work on that and I think at some point we agreed that we would probably need to talk to the Judge and see whether he would be willing, if we were to come up with the resources, to go ahead and order the claims examination in this area. We've gotten a lot of feedback from folks in the public, saying, "get started," "this should be a priority." We recognize it should be. But with dwindling State resources and potential furloughs and all kinds of things, it's really hard to know what we're going to do. We're working with the Kalispell Field Office and talking to them and I think we'll continue to talk with the Federal Team and see if there's some way we could come up with a way to get this started. One of the ideas would be since we're starting to do some of the tech work in the Jocko drainage as far as the hydrology and such, that maybe we could begin the claims examination there. There are a little under 500 claims there, it's not so massive as some of the other basins, and maybe we could put some resources towards that.

That's a fairly brief summary, there hasn't been a huge amount of work done. We're really trying to put our heads together to figure out how we can go forward with that. We know it needs to happen. Clayton, if you have anything else you want to say about clarifying your proposal from last time?

Clayton Matt: Susan covered very briefly the history of the claims that were filed that individuals were required to file throughout the State. Some of those claims are still outstanding. The process began in 1979 and for those of you who have been able to attend some of the public meetings that we held around the reservation, I've used some of the State maps to demonstrate the progress that's been made in that and even that process is making slow progress. It just takes time.

But there are thousands of claims here that are yet to be examined on the reservation and we understand that the State is obligated by State law to examine the claims. We put together a proposal in our work group to talk about how we could have a role in this process. We essentially proposed that we be able to observe and participate by reviewing the examination on an ongoing basis. We proposed and offered a limited waiver of sovereign immunity as part of our proposal. The other thing we proposed was to offer some money from the United States. We were told there is no federal money at this time to do that.

However, I think that in the larger sense since I understand it is a State obligation, we really encourage the State to seek that funding. We realize that funding is tight across the board but for something like this State obligation there may be a public role in this as well and I think that's maybe where we're headed at the next legislative session. If there is not funding made available now to get this started, we need funding to get this started and during our discussion trying to wedge out funding we got a good picture of the kind of detailed assessment of the staffing that is going to be required to get this done so we have a sense of that from the State. We really encourage you to move forward and try as hard as we can to get the funding. I think we want to move the negotiations on and we can move them on, we believe, in other areas but that particular area is something that is going to have to get started because it also is going to take a number of years to accomplish that. Estimates are anywhere from 5 to 8 years depending on the amount of money and the number of staff that we can put to it. We also agree or at least discussed, that we would like to consider starting the claims examination process in a portion of the reservation, namely the Jocko because that is where a lot of where our other work is focused right now. If we could parcel out some of the work then that might make it more palatable in terms of funding. Maybe we can get some of that work done over a period of time. Looking at chunks of the reservation might also help in those considerations.

That is really all I have, Chris. If the Federal Team would like to respond to that, that's where we're at.

Chris Kenney: One thing I've always appreciated about Clayton Matt is his generous nature. But it's true, the United States doesn't have any money. Our concern I think falls across a number of fronts. As a matter of negotiation our belief is that fundamentally what we're trying to do is understand the level and extent of non-Indian water use on the reservation so you can make reasonable judgments and informed decisions about how you're going to analyze and understand the impacts of the water rights negotiation.

Why that has to be a part of the formal claims examination process I guess falls us at a certain level. We understand that that process is in place and we understand that it has an institutional legitimacy that is valuable to everybody concerned. And it is my understanding that some examination processes have been conducted in other water rights negotiations, any water rights negotiation, in the State of Montana. But to my knowledge, under no circumstances has it ever been done to completion to satisfy the negotiations. I could be informed further on that.

When you start talking about the claims examination process you're talking about an adjudication process, I won't bore you with the details but suffice it say that the ability of the United States to bring funding to that exercise because of the character of the exercise is very difficult. We go to different areas of the Department of the Interior's program in order to help support the technical activities and negotiations and we do it under different statutory authority and report. One of the things we don't do under the reclamation law for instance is we don't fund things remotely associated with litigative type structure. We

don't have any money this year to do anything like that even if we thought we could I know the BIA doesn't because our funding is very limited

So we find ourselves institutionally and legally very difficult to participate in what is in its essence a legal process One of the things we're asking and one of the things that I think would be helpful is to have the working group talk about different ways to satisfy the goal of what I think is ultimately trying to understand the character of the water use across the reservation To the extent that we can do that without having direct linkage or even remote linkage between the claims examination process that's the obligation of the State, which we believe it is, and what we need to do to fulfill our needs to understand what we're dealing with in terms of water use we're willing to discuss that We're looking for options The reports that I get back and what I've heard, I'm not too sure we have fully explored that

The second piece, if we put all of that aside and just talk about the claims examination process, I'm trying to figure out who really understands this process I've got estimates of anywhere from fifteen to one year That is sort of hard to pin down I think it is probably not that misunderstood but if we take a look at the resources that are needed to compress depending on how much of the claims examination exercise we want to go through to inform ourselves and the resources we need to compress, that it doesn't look like an inconsequential amount of resources I'm not sure we'll do it in a time frame that fulfills what my goal and expectations are We know that water rights negotiations take four to five years even in the best of circumstances That has been my experience in the number of years that I have worked in the department But if we accept everything that Susan said about the State of Montana and their resources and we accept that it takes anywhere from 12 to 15 years, I keep hearing different numbers, for one person to do all this stuff We assume we can cut that down by adding people without trying to figure where the money is I guess I just have some concerns that we're trying to tie ourselves to a process that ultimately dictates how we do everything else

I guess what that all distills down to is I would like to see the working group address the larger issue and see what we can do to find maybe a rainbow of different options so we can take a look and figure out how to ultimately find that goal and that is to get some kind of understanding of what the overall water use is on the reservation so we can put it together in some kind of a puzzle or pattern that will allow us to come to some mutual agreement

Susan Cottingham Chris, I think you're right I don't think claims examination has ever gone to completion to totality on any reservation and we have come to settlements without it Certainly there is a way for the technical folks to take a look as a whole as a broad brush what the existing uses are out there We did talk about that internally the other day, about what work we can do with aerial photos I don't think anybody is saying we have to go forward and complete this in order to have a good picture It is going to have to be done at some point anyway and if it can be meshed with what we're doing here it might make sense We've also talked to the DNRC about if the parties did come

up with some joint technical work would that be useful in the claims examination and they said yes

The other thing I want to clarify for the folks here - in the governor's budget process the DNRC did ask for additional personnel for this and the governor's office did not approve it. The DNRC is keenly aware of the desire of folks to move forward with it and did make a proposal but the governor's office was talking no new proposals because of the impending budget crisis. I think we'll have to come up with different ways to get started analyzing what is out there so it can be useful for negotiations but I think the State is also committed to try to figure out how we could get started perhaps as Clayton said in the Jocko with a parallel claims examination to see how different that might end up being than what we might come up with.

Chris Kenney: One of the things I would offer is that we do have a lot of work that we've done on the Jocko. Putting aside all these institutional procedural sort of issues, if we could focus on that maybe that gives us time to look at different options. My concern is that I don't want to be bound by any process that artificially slows us up because we can't find other things. That is one of my ultimate concerns.

Clayton Matt: I think ultimately we've looked at the work group, which I think did a fair job of looking at some of the options. I think recently we've had some internal discussion and think we want to go back and take a look at some of the options, but the position right now is to try to accomplish this process to get the best information we can that answers the questions about the quantities of the claims to get some better understanding of those. I think that if the claims examination process has to go forward and if we make an estimate and the claims examination process goes forward and the estimate is wrong in one direction or the other I think where we're at is we need to take a hard look at that and try to really understand our risk and of course individual water users are going to want to understand their risk in that as well. I think it is worth looking at what the options are but I think that is where we are at right now is wanting to try to get moving on with that so we're not throwing the discussion of options out the window but we'd really like to see the claims examination move forward and I think this is just one element of our negotiations and in that process I see that this could possibly slow up that element of the negotiation but wouldn't necessarily need to slow up the entire negotiation process. We've many other things to discuss so I think we can continue to move and see where we go.

Chris Tweeten: One other question I direct to the United States, I don't know what the situation is with this negotiation but in other negotiations in which we've been involved we came to find out that while we were sitting at the table negotiating the settlement of the Tribal water right claims the Justice Department was at the same time spending substantial sums of money developing a case for litigation and I understand your position that the Department of Interior doesn't have responsibility for funding litigation or legal type inquires, what about the Justice Department? You have your litigators sitting at your left there, I was just wondering is there an expenditure going on at this time for

development of litigation background information and if so can some of that money be diverted to provide some assistance in getting this technical work done?

David Harder The Interior Department provides that money to be spent to develop the BIA's case There isn't any special pot of Justice Department money

Chris Tweeten That only answers half my question Is some of that money currently being expended on the development of a litigation case? If so, can any of that money be diverted to assist in these negotiations?

Rich Aldrich Yes, we are spending money developing the litigation case and that money is appropriated and allocated specifically for that purpose and we can't change the use of it

Chris Tweeten I understand from what Chris Kenney said that Interior views this as litigation Now what you're saying apparently is that Justice views this as negotiation and therefore it falls in the middle and neither one of you has the ability to assist in the funding Is that what I understand?

Rich Aldrich No, I don't think that is what Chris Kenney said I think that Chris said that with Bureau of Reclamation money, they have to be very careful that they don't interfere with the conduct of litigation and he would be uncomfortable with doing that In fact, he probably does not have the authority to use Bureau of Reclamation funding for these kinds of purposes I don't see that that is necessarily an inconsistent, Chris We are funding to the extent that we can through our litigation contracts Some negotiation assistance and when we provide a contractor or a federal employee to attend one of these work group meetings or as we did in Crow and Fort Belknap with existing water uses That funding is coming through the various processes that we have specifically aimed at either negotiation or litigation

Clayton Matt Obviously, funding is an issue and I hope we can continue at least the funding discussion to further this

A couple of things, one I'd like to get to the point where in terms of the summary of this at the end, what are we going to accomplish after we leave here today? Certainly the Tribe will go back and discuss among itself what the benefits are of doing something short of the claims examination and come back with some sort of response on that reaction to that

But Chris Kenney earlier asked a question about who understands this process and what it's going to cost and I thought we understood pretty well after some of the discussion we had at one of our meetings So I think the State has got a pretty good handle, Susan or Chris, do you want to respond to any of our understanding of what it takes to accomplish that?

Susan Cottingham DNRC did give us some very good numbers and again the one year would be for one person working on the Jocko That is what they estimated For the whole two basins it is more like five to nine years with two FTE's working on it

I wanted to get back to a point that Clayton made which is what if the claims examination comes up with some different numbers than the technical folks come up with broad brush That's happened with every negotiation we've had and we've had to talk about that because these negotiations don't determine the individual claims only the Water Court can do that and what we have had to do is come up with some mutually acceptable numbers about what the existing State based water rights are within those boundaries and come up with some general understandings of that using our technical staff, aerial photos and so forth And we can do that We can do that with your help if you can give us the information you have on the Jocko and I would suggest at some point maybe both the claims examination and the technical work groups could get together and brainstorm that because there is a convergence there because if we are working on the HYDROSS water model for the Jocko we are going to need to understand so we have an input of what the existing demand for water is out there I think there are some ways that we could continue to look at how we could fund the claims examination There is going to be various ways to get there I guess I would emphasize that that sort of dynamic that you mentioned, Clayton, has been there in all the negotiations because of the precise way that the Water Court oversees the claims versus what we might take a look at as a chunk of irrigated acreage from what our technical folks tell us I certainly understand your concerns about it and I think we can still keep working through both technical and claims examination working groups and see if we can come up with maybe using the Jocko as a sample watershed if we can get some claims examination started there, and also do sort of the broader brush technical analysis We've purchased the aerial photos and we've gotten started on that I'm sure you guys have that already If we could start exchanging that information maybe we could see our way clear as to how to go down that road

Clayton Matt We'll go back and look at options We're going to talk about data here in a minute but its pretty clear to us that the State, and I think you acknowledged in the past, at this point has very limited data to no data on the Flathead that really can contribute to these negotiations The Tribe has a boatload of data, we are beginning the process of sharing some of that data but we also view one of the contributions of the State to these negotiations is to be able to provide the data that comes out of claims examination so it is effectively part and parcel part of the database that will have to be used So we really encourage you to find the funding to get it done If it is a public funding we're talking about the public can participate I think in trying to urge additional funding, so I think there is a role for the public to play there We encourage you to think about that and talk to the appropriate people to urge that funding Anything else?

At this point we understand that claims examination happens at some point in time Our position is right now we'd like to see it get started but it needs to be funded and we will look at options for making estimates of claims but the Tribe understands that there is a risk associated with that and I think the public needs to understand what the potential risk is associated with that I think we can move on

Chris Kenney We are agreed that we will tell the work group go back and take a look at other stuff, let them define what that is Did we say that?

Clayton Matt Yes, I think we did and I think we're also taking it a step further back in that the Tribe needs to take a look at the proposal it requested of the State in terms of funding If we're not going to do claims examination then what are we going to do? I think we need to take a hard look at that, and then we will be bringing that to the workgroup

Chris Kenney The definition of what that means would be helpful If it is something other than what the State defines it as

Clayton Matt Yes The next item we want to go onto then is the data and technical work group and I think we agreed that we'd start with that

Data and Technical Workgroup Discussion

Clayton Matt One of the work group's setup at the last negotiation session was the data and technical workgroup At that time, one of the reasons for that is to begin to get a work group together that can assess available data to apply to the negotiation problem we have The problem we are faced with is that almost all of the available data right now is Tribal data The Tribe agreed to share its data We also established a process for sharing that data And we are beginning to follow that process

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Our initial response is as follows First of all we intend to provide an answer to the request for the additional hydrologic information We will review the questions that you pose in there about that hydrologic information being an extension of an understanding of the hydrology data that we have already provided As such we think that we need to complete the understanding and the questions and answers from hydrologic data before we can move on to the next major data set We'd like to do that

The letter also gives a limited conditional acceptance of the hydrologic data. I think if we can move a little further down the road in our understanding of the hydrologic data we would like to achieve a greater level of acceptance. We acknowledge that certain changes may come out of the modeling process but we should be able to achieve a basic acceptance of the data and the methods of developing that data early on in the process. If we could come to some understanding and find a way to accomplish that once we get through that process with one set of data and we will have a better understanding of what level of acceptance we're looking for and I think we can move through that much more quickly. That's our position. That's where we're at today with our response and we look forward to discussing this more also at the work group level and getting on with getting you answers to your questions.

Susan Cottingham: Thanks, Clayton. Let me just clarify for the folks here that I think the reason for the letter was it was our understanding that the Tribal folks wanted us to sign off on each set of data as we got it. I think our technical folks were reluctant to say this is all well and good let's get the next block because as you all know, you're going to have to look at this whole thing as a whole when all the information is put together. We're impressed with what we've have gotten so far and I think actually the technical folks had some really good meetings in June to look at that. I think both the State and federal folks understand that the Tribe has developed the HYDROSS model. I don't think either one of us, and I can let Chris speak for his team, feel that it is worth the time and money and effort for us to develop our own models and then we have three different computer models with different assumptions and we have to start all over. So that is why we have asked the Tribe to share its HYDROSS model. I wouldn't say that there is no other data available except for the Tribes'. There's certainly plenty of data out there and we have info and quite frankly we have started to compile our own information. We've been attending meetings on the Kerr Dam drought plan, we've been talking to the BIA about what information they might have. We can do all that, I think the point we made was that it would certainly take a shorter amount of time if we can work from the basic technical work that the Tribes' have done and then the three parties can work on those and work on the assumptions and keep on refining it and then we can start doing different model runs together so that everybody is working from the same page. We do have data to offer, I don't think we ever said we don't. We have all the claims that are in the system, we have a lot of GIS work. I think we're willing to do that. What we think we should do is sort of have the technical work group take the next step down the path on the HYDROSS but also try to come up with an overall work plan. We talked about that a couple of years ago for the technical work so that we have we're going to start with hydrology, we're going to then look at aerial photos of irrigated lands, we're going to look at land status, we're going to look at instream flow needs, we're going to look at project operations, whatever those different elements are. I think it would be very worthwhile for the three technical groups to get together to come up with a roadmap of what we're going to do with the technical work so the people can see what the different elements are. That is how we would like to proceed. We're encouraged by what we've done so far and we would like to keep that going. Again, I want to emphasize it's not like we don't have any information but certainly we have not put the resources and the years into developing our own HYDROSS model for the Flathead. All we're saying is that I think it would be much

more expedited if we could work from the good work the Tribe has done, get whatever technical work the feds have and we can put ours in too. I think that will just be a much quicker process and I think that serves the negotiations better to do it that way. So I think we just keep that technical working group working as quickly as we can, getting through each set as they are given to us and seeing how we can come up with some better numbers if that's what we need to do. We think we have made a good start.

Chris Kenney: The only thing that I want to say is to make the point I've made with the Tribe earlier and I'll make it again here and leave it. My experience, and I think it is a relevant experience, is when negotiations begin to come together the first thing that you try to do in order to build a successful negotiation is to build consensus and agreement on what you are talking about and how you're going to talk about it. Particularly the science and technical stuff because it tends to lend itself to the ability to get agreement on that issue when other issues are much more intractable and much more nuanced. What the federal government has spent the last three or four years talking with the Tribe about, you deal with that in the context and we appreciate the context of changing understandings about the propriety of that information and whether its confidentiality is protected or not because of Klamath and other cases and stuff in FOIA. We appreciate and understand that.

The federal government believes that we're getting to the point now where a mutually reinforcing team has got to come together to do that. The United States has put a lot of resources into the HYDROSS model that the Tribe has, and we have been privy to parts of it but not privy to all of it yet just because by virtue of the fact that we do not have the opportunity, but it's the opportunity that is frustrating in that, because of protecting that information, just the logistics of sharing information, getting work back and forth, communication becomes very difficult and does not lend itself to developing a comfort level so you can talk about all these differences. So what I have suggested to the Tribe, and requested of them, is that they go back and re-evaluate, given where we've come over the last year or so with negotiations and discussions, where they are with that information and see if we can't find a different way.

The United States' preference has always been, we've articulated this in the past, is to put what we know on the table, get all the parties together with our differing understanding of the technologies and science and try to find something we all mutually agree on so with that consensus we have a foundation on which we can deal with the more intractable problems that we know are down the line.

We've made that request, the Tribe has heard that and we're just awaiting that. Otherwise we'll try to continue to contribute to the work groups. I'm trying to find as many resources and put people on point to get that stuff done as rapidly as possible and will continue to do that.

Clayton Matt: The Tribe agreed to share data. Let's make that clear and that happened after the last negotiation session and that is happening. We need to move down the process of finding a comfort level here at the Tribes as well so we can get to the point

where we can do this more rapidly and more efficiently In the first instance, our goal is to get all the inputs to the Jocko model to you and then get to the model So we want to get to that as quickly as we can as well In terms of re-evaluating the Tribal process, we will discuss it but until the Tribe changes its position and its role - you eluded to the Klamath case which has gotten a freedom of information act request out there involving this process which makes it very difficult for us as you well know

Now in terms of other information that the federal team has had, the federal team has looked at and approved the Jocko model and all of the data associated with that and looked at and seen all the other data that the Tribe has developed and that process has been ongoing for some time You've looked at and gone through the same review process of the hydrologic data and all the other input data for the Camas model, the second model that was developed so there has been some progress there As we know, some of that progress slowed down because of the FOIA process that has now impacted us but we are continuing to share data just more carefully and more directly, but it is happening But we intend to get back to the table here The Tribal team will get back to the table here soon to discuss the additional information, the additional questions the State has of the hydrologic data so we can get on with the next set That is our goal We appreciate the comment

Unless you have anymore to add or any other questions or comments on the data sharing, we're going to continue that We have to respond now to a letter that was sent to us You have our initial response and that's generally the direction we'll go from the Tribal perspective Anything else on this side, Chris? Anything else on this side? Okay

Administration and Interim Plan Work Group Discussion

Clayton Matt Next item on the agenda, the administration work group discussion, is , probably going to be the most interesting you'll hear today At the last negotiation session, the Tribe was asked to consider discussing an interim administration and we set up the two work groups and brought that question back to the Tribal Council and the Tribal Council agreed and since that time we have held several work group sessions to discuss interim administration The report you're going to hear is based on those work groups discussions since our last negotiation session and it is probably the most progress of any of the groups that we're made to date We're going to do a little song and dance here, I'm not sure who's going to sing and who's going to dance but I'll introduce Tribal attorney John Carter will provide part of the presentation for this discussion and Anne Yates, attorney for the Compact Commission has an overhead that she'll use and some discussion and then we'll have some discussion at the end of that about the outline and if you aren't aware, the outline that we're going to present is now available for the public to read It's on the table outside Please take one or two, we've made several copies so if you don't have copies, please get them and I should have provided more copies to the rest of the team

John Carter Thank you My name is John Carter, I'm an attorney for the Tribes I have been working on water rights with the Tribes for quite some years now I'd like to explain a little of the background and process that led to the one page outline that you all have in front of you or is available at the front desk But before I do that, I'd like to make a comment made during the break I was visiting with Candy West from the Attorney General's office and she said that it looks like progress is being made, slowly but surely I think that's quite true The single page outline that you have in front of you has ten elements for an interim agreement There is agreement between the working groups on nine out of ten of those That's a ninety percent average and that's not too bad given the nature of State Tribal relations overall

I'll discuss a little bit of background and the process of the outline and note that the outline is just that, that it's not flushed out with detail, it speaks to central points for an interim administration agreement The process evolved from the last formal negotiation in February, and subsequent to that period of time the State, the Tribes and the United States agreed to put together small working groups to discuss informally the possibly for coming to grips with an interim water management plan for the reservation And it's just that an interim plan would try to fill gaps during the course of the longer-term negotiation I think the charge of the working groups was pretty clear that it's not to try to solve all problems but it's to address need in the interim The reason we have to work at something like this is because Montana State law has twice been found inadequate to permit most if not all new water uses on the reservation Simply put, the State cannot continue its permitting practices that it has in the past So there is, at present, by and large no State permitting on the reservation, though of course there is continued development, continued population expansion

The process began in earnest in March The working groups of the State, the Tribes and the United States met to see if there really was the ability to come to agreement on aspects of an interim plan In fact the groups met informally about five times and it's my understanding that each working group after it met collectively reported back to their respective Tribal, State and Federal Teams to keep everyone current as to what's going on Additionally, there were several telephone conferences between working group members during that period of time from March till the present

The working group initially looked at what everyone wanted to see in an interim agreement What fundamental considerations should be contained in an agreement, and they focused on four One, that an interim agreement should be enforceable in a reasonable manner Two, and I for lack of a better word, I'll use the term "turf protection" we're dealing with three sovereign governments here all of which have various interests at stake all of which have various claims to water So the effort was to the degree possible to preserve and protect everyone's turf The third consideration and given the discussions you've heard today you might chuckle a little bit is simplicity The hope was to make it simple but again we're dealing with three different governments, three different issues, and three different bodies of law claiming water as well as fairly innumerable court cases defining the relative powers of each And the fourth

consideration that generally an interim agreement would cause no impediment to long-term negotiation and final resolution of all problems between the three governments

So those are the basic considerations that the working groups focused on Enforceability, turf protection, simplicity and no impediment to the long term compact finalization The groups also decided to focus on real problems and figure real solutions to real problems, to find a framework in which to address solutions to real problems And during the course of that time we had information from technical folks from the Tribes and from the State and from the United States and it appears that there are approximately 45 to 50 State-based new applications for water use on the reservation and someplace between one to three applications for changes of existing water use on the reservation Those numbers may not be exact but they're in that neighborhood

The working groups also acknowledged that we cannot solve all problems and answer all concerns within the constraints of an interim agreement That really is in fact the purpose of the final water rights negotiation and compacting to bring finality to all questions and concerns Finally, we noticed that there is an existing State law impediment to an interim water administration agreement And that is found in 85-2-708 of the Montana Codes Annotated That was an issue of discussion for a long period of time And what that statute basically says is that an interim water administration agreement must preserve the right of the State to rely upon the criterion that it relies upon for issuance of permits and it splits lines on jurisdictional bases The conclusion ultimately of the teams is that the limitations in that statute real or imagined may in fact be a problem and we might have to address that in legislation, but I'm getting a little bit ahead of myself on that

As it became clear in these discussions with the working groups that there was some common ground, this was in March I believe, the State of Montana asked the Tribes to place, voluntarily, two cases that they have presently in the State Court system on stay The basis for that request was that it would allow a freer forum for negotiation between the parties The Tribes did that They accepted the request of the State of Montana and moved jointly with the State to place a Montana Supreme case that they had filed on stay and also to place on stay a State district court case dealing with changes of existing use on stay There were applications by the State and the Tribe to both courts to do that The stated reason for both parties was to cool down the atmosphere a little bit and allow unimpeded negotiation The Montana Supreme Court denied the motion and left that case alive it is pending today and it raises serious questions again of State authority to permit particularly ground water but also permitting generally

The issue that's live before the district court and that was put on stay at the request of the parties addressed questions whether or not the State of Montana had any authority to authorize changes of existing use within the reservation The State District Court did put that case on stay at the joint request of the State and the Tribes However, that stay expired on July 1, I believe Neither court has issued a decision in either case however

I won't get into the details of this outline, Miss Yates will do that with the benefit of an overhead and run you through the nine out of ten points that the State and the Tribes

agree on. But I would like to summarize just a couple of points. The agreement speaks to the use of ground water only, not to surface water. If implemented the agreement would authorize single-family domestic uses, municipal uses, and community development of ground water. It provides for an administration system to be jointly between the State and Tribes for all applications under the framework within the reservation. And it would provide for due process for all persons who apply or those who object, to be for a limited term, to be renewable and probably have an escape valve in it if either party felt the need to get out of it.

What's central from my standpoint for my part of this presentation is that eight out of the nine points are agreed to but they are outline form and the details have yet to be fleshed out. If the negotiation teams accept this proposal that would be the next step for the working groups to attempt to flesh this out and bring it back once again for the teams to review.

I'd like to make two final points. The proposal allows for a reasoned and controlled development of new water use on the reservation during the compact negotiation process, which it is referred to be fairly complicated and fairly time consuming. Without an interim agreement of this nature right now there is no new water use development on the reservation. Should something like this agreement move forward that would authorize limited types of new water use development. What that means to the person on the ground is that if this agreement moves forward if somebody wants to build a house, they can drill a well, water their yard, irrigate a garden. If someone wants to build a cluster of houses they can make application for a community well for similar purposes. If a municipal well runs dry the city or the town can get a new well. Cities, towns, schools, hospitals and churches will have water if they need it. However as I mentioned earlier in my discussion, to make this work it may need a legislative amendment to 85-2-708 and that's where I believe the public and the State Legislators here particularly and throughout the State could benefit this process significantly by supporting a local solution to a local problem. If the agreement is to move forward it is the opinion of the State in discussion and we certainly will abide by their opinion on that that there is a need for legislative fix from their perspective to allow it to move forward. The Tribe is not so similarly constrained by that aspect of state law but we would certainly be more than willing to assist in fostering legislation that authorize such an agreement.

And I close with a quote from the Montana Water Court which just approved the final compact for the Rocky Boys Reservation after quite a few years of negotiation and discussion between many of the state people and many of the Federal people here. And what the Water Court said is that "the negotiation process allows for creative solutions to intractable problems in complicated areas of law." And with that note I would hand off the balance of this presentation to Miss Yates to discuss the details of the outline.

Anne Yates: Thanks, John. I'm always encouraged when I hear you quote the Montana Water Court. For you folks that don't know me, I'm Anne Yates and I'm counsel to the Compact Commission for the Flathead negotiation. What I'd like to do right now is walk you through the outline of the interim proposal that we've had today.

As John emphasized, this is an outline. We have brought it forward for the full teams to consider and also for the public to consider. We are extremely interested in knowing what the public thinks about the different elements of this proposal.

OUTLINE OF PROPOSAL FOR INTERIM WATER ADMINISTRATION ON THE FLATHEAD INDIAN RESERVATION

1. The State and the Tribes would enter into a memorandum of understanding that defines a system of interim administration of water on the Reservation, to be jointly operated, pending final resolution of the Tribes' aboriginal and reserved water rights.

This would be an agreement between the State and the Tribes. The United States would not be a party to this agreement. This would be a license process.

2. The Tribes and the State would develop a joint application form for new water use on the Flathead Indian Reservation.

3. The Tribes and the State would create a decision-making body, a review board, to be composed of State and Tribal personnel with technical expertise in water use and administration.

Again, as John emphasized, we have not worked out details of how this process would work because we want to know we have agreement from all folks on the general propositions contained in the proposal.

4. The review board would review all Tribal and non-Tribal applications for new water use on the reservation. Review of new use applications would be based on yet-to-be-determined criteria and process derived from state and Tribal law and practice. All applications would be publicly noticed and an opportunity to object would be available. Due process would be provided to the applicant and persons with standing to object.

Now, from the State's perspective, the criteria that we're looking to is the criteria that is currently embodied in state law. Those are the type of things we're interested in. The Tribe, as yet, has not determined what kind of criteria that they're interested in.

As far as due process, for the applicant and persons with standing to object, persons with standing to object means that if you live in another drainage and you don't have any water use or any property or any interest near surrounding the particular application, you don't have standing to object. It's not going to be an open-ended forum for objections, you have to have an interest before you can object.

5 Interim water administration would be limited to ground water sources and would not include new surface water uses

What we heard from folks when we were talking to the public is that they were interested in ground water development. We're also constrained by a case that came out of the Montana Supreme Court that's referred to later on in the outline as the Ciotti case. It dealt with permitting of surface water uses on the reservation and the state was told it did not have the authority to do that.

6 Allowable new uses would be limited to single-family domestic wells and to municipal and community well development. As yet we don't have a definition of those types of wells but that would be one of the details that we would work out.

The review criteria would reflect a simplified review process with lesser degree of scrutiny for single-family wells than for municipal and community wells. We realize that there are going to be many more single-family wells than will be applications for municipal and community wells. In fact most of the applications that John was talking about for new water use on the reservation, those aren't actually applications for permits. Those are folks who drilled wells for their houses and are coming in for notices of completion.

7 Wells that would have been subject to State law prior to the Montana Supreme Court decision in Ciotti but that were completed without compliance and wells drilled after Ciotti but prior to the execution of the interim memorandum of understanding, would be allowed if they satisfy the criteria for the classes of licensed wells.

What that means is if you drilled your well before Ciotti came out and you never went in and got your notice of completion or if you drilled a well after Ciotti came out during this void of administration on the reservation you could come in and if your well meets the criteria that are to be established, you would get a license for that well under this process.

8 Upon completion of the review under paragraph 4 (that was the joint State and Tribal review), and upon approval of the application, a joint Tribal/State license would be issued to the successful applicant containing appropriate terms and conditions relating to ground water use under the license.

That would be similar to what goes on today. When you have a permit and certain conditions are placed on your permit.

9 A record system would be developed to preserve all information pertaining to applications under this interim administration on the Reservation to preserve a license recipient's relative status.

That means that you would get a priority date.

10 Yet to be resolved inclusion or exclusion of changes to existing uses.

The State is very interested in hearing the public's input on this issue. The State feels that it is a very important issue to this interim plan. We would like to see changes available under this interim process and we want to know what folks think about that.

As far as implementing this process, as John alluded to, it would probably take legislation. It would take legislation. We are awaiting the Supreme Court's decision in a case which involved a ground water permit and our feelings are that the Supreme Court is going to come back and say the DNRC does not have the authority to issue ground water permits pending resolution of the Tribes' aboriginal and reserved water rights claims. That would pretty much shut down all permitting on the reservation. In addition, we have state law criteria that we are obligated to follow and this license process would depart from that somewhat. More in form than substance because the State would be looking to the same kind of criteria for issuing changes and new water right uses that it looks to now.

One other point that I want to make on the changes is that by definition under state law, which is what the state would be looking to in this process, a change in water use cannot increase consumption. That's why we feel it is a very important point to this process because it wouldn't increase consumption and we believe that folks should have the right to make changes in their existing water uses.

I also want to point out, there aren't many change applications pending. As you folks know, back in 1999, the city of Polson applied for a change and from what I understand, that's almost complete. There is a change that's pending in District Court and then there are also two changes filed by the city of Charlo. I'm not aware of any other change applications that are pending. So we are looking at a big issue, but in practical effect, we only have three recent applications. So that is something to consider, also.

Another thing to emphasize is that both State and Tribal uses are going to be subject to this process. So if the Tribes want to come in and put in a new use, they will be subject to this process also and go to the joint State and Tribal review. That is a very important point and we fully appreciate the Tribes' cooperation in that point.

Susan Cottingham: Maybe we could start with any questions or observations from the negotiating teams and then we could open it up to questions from the public. If there are none or if we've answered them all then we could go to public comment. We realize that you've just gotten this outline. We're not trying to get final public comment today, obviously it needs to be digested. As the parties continue to work, if you could give us feedback, we would really appreciate that. It's very important because as Anne said, if we have to go to the legislature and get state statutes changed we're going to need public support and we're going to need legislative support.

Maybe just the negotiators could start off if they had any other observations and then we could open it to questions from the audience.

Clayton Matt I anticipate a question and answer session here today so I would appreciate the comments during the comment period but if we have additional discussion we need to have them on the teams I'd appreciate that That would be my take on this

Chris Kenney I don't really have any questions of substance per se

Clayton Matt I was asking whether or not we want to open it up to public question and answer session We have a public comment period and I'd rather stick to that if we can just agree to that I think we need to have some discussion about this among the parties

Chris Kenney Until your last statement, my thought was this is the last thing on the agenda I don't know what we have that suggests any other business we have My thought to State and to you is if we're efficient and expeditious we can say whatever we've got to say about this and go ahead and go into the public comment period and the differential is not so much that I don't think it is an issue Nothing on the agenda suggests we can't go straight into public comment and we can talk about it It's a distinction without a difference

Clayton Matt Do you want to answer questions?

Chris Kenney About this?

Clayton Matt Yes

Chris Kenney Sure I don't know what I'm talking about so [laughter]

Clayton Matt That will make it real easy

Chris Kenney I rest my case

Clayton Matt We've had the presentation Anything from the Federal Team we would like to Let me ask if there are any final remarks from the presenters John, did you want to

Any comments from the Federal Team on this?

Chris Kenney I hope so I want to take this opportunity to congratulate the team I think that they just need to be congratulated because I think this is remarkable progress This is an indication of what happens when if you have an issue you get everybody in the room and they work through the issues and lay it on the table and tear it apart and put it back together again I applaud the efforts and would hasten to have them focus and go back, I would encourage the public to get back I don't know what the United States can do in the State legislative process We would look for an opportunity to be as helpful and supportive as we could

Clayton Matt We're moving right along today So if there are no other comments from the group here at this point

I think that we are very encouraged and the Tribal Council is very impressed with the progress that was made with the interim administration work group discussions We're happy to make this presentation today and we hope you take the outline away, look at it, read it, ask some questions As is suggested here, what we'll try to do is accommodate a request to allow for some questions from the audiences well today We'll limit the questions at this point to the administration outline For the questions you have, we'd like you to put those questions to us either individually or put them in writing, public questions, verbal questions, today

We'll try to move into the public comment period and if we want to have questions and answers on the outline my only suggestion then is that you make your questions direct We will not have all the answers today Do you agree with that? We will do the best we can today to answer some of your questions We will not get into a debate on this, legal debate, technical debate We will try to answer your questions the best we can So if there are no other comments from either of the teams on that, we will now move into the public comment period and if you have a question on the outline, please do ask it and we will try to be as direct as we can

Public Comment Period

Mike Hutchin Lake County Commissioner On behalf of Lake County, I think this is a start but it also precipitates a lot of questions I came up with two I think the most pressing one to me on behalf of most residents here is the one that Anne referred to in the State it was not authorized by the Supreme Court What if there are any remedies should the Supreme Court decision come down stopping any negotiations in effect? If there are any remedies I'd like to know what those are, the District Court litigation, whatever that might be I know there is a pile of lawyers in here so I suppose we will get ten, twelve or fifteen different answers I would like to hear something along those lines

My second question if under the agreement it says that due process and a license is issued, would the license have the same standing as a water use permit?

Anne Yates The first question talking about whether or not something would come down in the Supreme Court that would stop negotiations there is nothing that would stop negotiations unless the parties just walked away from the table But we will have to take a look at what the Supreme Court has to say about what can and cannot be done on the reservation The State is not optimistic so that's why we're already thinking you're going to have to go to legislation

The second one was on what kind of status do you get with a license Early on, we talked about what would happen to the water uses that were authorized under this interim process At that time we were talking that we would try to figure a way for these to ripen

into State based water use. The status of that right now is uncertain, it came up early on and then we started focusing on other parts of the actual process. It's my understanding that we would try to have these licenses ripen into State based water use and then Tribal uses. Is that correct?

Clayton Matt: I don't think we've defined that.

John Carter: As someone pointed out, there's a boatload of lawyers in here. We haven't finally resolved those questions but that's one of the many, many details that we've stressed throughout the course of this presentation, that's not been finally or for that matter, conditionally resolved. What's clear from the outline though is that there is intent from all parties to maintain relative statuses. What that finally comes out to mean will be those details that have yet to be worked out. I think its item number nine. The effort will be to preserve and license recipients of status. At that's records to their legal priority date. What that comes out to be remains to be seen.

Vernon Finley: I have a couple of comments that lead up to my question. The first comment is and I think I have a little bit of historical, little bit of history behind my concern. About 500 years worth, about the trustworthiness of the non-Indian side of this agreement. I have some concerns about this.

From the time that the first settlers told the Indians that they came in peace to more localized version in the fifties about giving up jurisdiction to the State to provide equal treatment of our citizens in State, city and county courts. Which was totally incorrect. Which when we look back at the history of that agreement when we realize the unequal treatment that the Tribe has received on the part of the State and if you want to get more relevant to water, we have the issues of on the upper part of the Flathead River the State allowing raw sewage to go straight into the Flathead River and the Berkley pit. Then as a demonstration of the States ability to protect water in this area I think there is a little bit of history behind my concerns about the states ability to be able to protect water. I'm very concerned about that. That leads to my question, which is. Before this agreement, before this moves forward, my question is what is the number how many state, how many Tribal people are sitting on this review commission or board? How many? Personally I think that the state has no say on the reservation. That for us to ask permission of the state for anything on the reservation is totally bogus. I'm disappointed in the negotiating team for selling out our sovereign rights here. We should be informing the state what we're going to do. Not giving them equal say in what we're doing, especially with water, and especially in areas where they have shown historical incompetence in those very areas. But before we even talk about and if we're going to proceed on with this then before we even talk about it lets see numbers. The Tribe has to have at least a two-to-one advantage for the approval of the water, of the water rights. At the very least at best we should be just informing the state about what we're going to do. Thank you.

Clayton Matt: We don't have a final solution to the answer on how many.

Vernon Finley Then I think it has to be a part of this, a part of this proposal before it moves forward

Clayton Matt I think that to make it clear that all of the detail behind this is not part of this yet What's important is that we have conceptually some ideas about how we can try to move forward and I think we had some very serious discussions among the team about the very questions that Vernon points out and I think there is some very serious consideration here as well in terms of not just the numbers but the fact that this is an interim agreement

I started off my comments this morning by saying that our proposal is still on the table We have not backed away from that proposal and if you read our proposal and if you look at my comments earlier this morning, it talks about the outline of that proposal and how we believe that the water on the reservation is owned by the United States in trust for the Confederated Salish and Kootenai Tribes That is still our position How we move through this in terms of an interim administration is yet to be finally resolved This is not an agreement, this is a proposed agreement The work groups are presenting this to the negotiation teams here to get some consensus on moving forward and developing the detail for this That is when we'll get the answers to questions like the numbers At least today, we don't have an answer to the question on numbers but your comment is well taken at least from the Tribal perspective I appreciate that

Don McMillan Resident of Polson, starting April 1 We have a home under construction so we're affected by this interim water agreement

First of all, I'd like to thank the parties involved I feel there appears to be a very sincere interest to resolve the issue This is very difficult and I'd like to express my thanks of what I consider is real progress

I have two points that I'd like cleared up, they may not be able to be cleared up but in the spirit of your proposal its not clear to me number one is the interim water right a transferable water right? Will it ever become permanent? Can it be transferred with the sale of a home?

The second question is that, the best way to phrase the question I think is an example Ten years from now if you come to some negotiation settlement, are both parties stating they will honor this interim water right and it will go with the agreement or is that stale and undefined?

Anne Yates Those are really good questions As to the first one, would the interim water license be transferable We haven't specifically discussed that It would be the States position that it would be transferable We realize that folks need a level of assurance, banks need documents, they need to have proof that they have authorization to use the water so it would be the States position that these interim licenses would be transferable

As to the second question, I think, what these licenses would ripen into, it can safely be said that there is concurrence that it ripen into some kind of water right. That these licenses would not be abandoned once a compact settlement is reached. Does that answer your question?

We do realize that people want to sell their homes, they want to transfer property and we realize the documentation of water use is an absolute necessity.

George Marshall Tribal Member I have a coalition of members of the Tribe, members of other Tribes and non-members. My question is on the interim ground water sources for commercial use. I noticed you have single family, municipal, wells to protect and issue to municipalities. I would like this to include also commercial uses to be included in this so we can go forward on the reservation and develop some of our resources. Is there any way that we can get commercial uses written into this also so it can go forward? Thank you.

Clayton Matt We'll consider your comment. At this time commercial use is not considered that's why it's not written into that part of the document so it's defined only as generalized as we've defined it here. I'll take your comment and consider it.

Anne Yates I do want to make just one brief point. The State would like to see commercial uses as part of this interim process.

David DeGrandpre Director of planning for Lake County I'd like to make just one point that addresses the second sentence in number six of the outline and discusses review criteria for single-family wells as opposed to community or multi-family wells.

If the current population rates we've experienced for the last ten years or so continue, we're likely to see over the next five years approximately 3,000 residents in the Lake County portion of the reservation. Those residents can locate either within cities and towns or within the outlying areas of Lake County. The outlying areas of course have things like wildlife habitat, wetlands, cost borne service in terms of road maintenance and things like that. My concern is that by making it easier to build single-family residences, you're going to encourage a certain development pattern that will impact some of the resources that maybe we want to try to protect.

My suggestion is that the committees consider making multi-family and community type wells easier to develop. I don't try to limit single-family residential development but at the same time my suggestion is that there be a way whether it's through an expedited review period or reduced costs or some sort of incentive to encourage multi-family or community type wells and therefore not have a more spread out development pattern that has greater impact on local resources.

Richard Eggart Dixon I'd like to address a couple of concerns I have about the interim agreement. I think that currently, the state licensing process for wells does not take into account the ability of a watershed to maintain its current uses. The State process allows

drilling to go first and then and a permit sought afterwards I think the process should be reversed I think the permits should be based on the availability of water before a new permit is issued I think another consideration that isn't taken into account in the current license process is the cumulative effects of several wells and other natural streambed recharge and things like that I think that all these cumulative effects ought to be taken into account before a permit is allowed

A part of the long-term compact I would like to state that I strongly support the Tribes position Thank you

John Brueggeman State Representative from House District 74, Polson and western Lake County I'm glad to see we have a proposal for an interim agreement My only question is under item number ten, yet to be resolved, I'd like to know from the Tribal and State perspectives, what are the issues or problems that both negotiating teams have with changes to existing uses I think that's going to be a pretty important part of the interim agreement, should we reach one

Anne Yates I like this question We don't have any problem with changes

Clayton Matt We've come a long way in trying to develop an interim agreement I think the important part of this is that you recognize that there is conceptual agreement on the nine points that are on the table right now The Tribe has come a long way in making some decisions in getting here We were first asked at the last negotiation session to consider the interim agreement Without such an agreement, there is nothing Zero Consider that

With such an agreement, we can try to move something forward, we can try to fill in the gaps and try to find a way to move some things forward while we define the long term administration plans for the reservation The interim plan is not intended to solve all problems It will not solve all the problems We do not intend to go into an interim administration plan to solve all the problems This is not the administration plan for the reservation for all time This is interim, this is temporary We will define a water administration plan for the reservation that will be permanent This is not

When we first began discussions over the interim administration plan then we were first faced with an issue that John raised, 708, I'll refer to it as state statute that really put a roadblock, we believe, in our discussions in trying to find a way to move forward We came back with a proposal to try to get around that We appreciate the States acceptance of some of our ideas We had to be creative We tried to find a solution to get around that and we think that some of this proposal reflects that

In our discussions, we started off by talking about a very narrow focus on some very limited number of problems throughout the reservation for interim purposes At this time, as was discussed by both the Tribal and the State attorney, there are only a few problems out there that we really need to address However in the discussions, the Tribal Council agreed to expand into something that is a lot broader than just a narrow focus on a few

problems throughout the reservation to just try to get us by So we took another step Then the Tribe agreed to a request to the stays on the two cases So in each instance, the Tribe has been very supportive of getting this process, accommodating this and trying to get to some kind of agreement and we know have conceptual agreement on nine points I think that's the important part It was a Tribal Council decision at this point it is their position that the changes, the limited number of changes that we're looking at out there right now that we would have to address a very small number

Second, the kind of problems that we do see in the very limited number of changes that we have discussed can be addressed and can be dealt with There is a solution to each of those problems by applying steps one through nine in this proposal So anything we do in this proposal can provide a solution to someone who needs the resource So there is a solution there Changes aren't necessary to facilitate that solution That's the analysis we've made of it at this point

Rick Smith Lake County Resident I would first like to thank the Compact Commission for having the hearing in Polson I hope all the meetings in the future can be here It is certainly more convenient for the residents I would also like to thank the Compact Commission for this conceptual interim agreement I would hope that you would approve it I ask the technical committees to continue to work on it and refine it and go into details A lot of work has been done and a lot of progress and I'd like to thank everybody that has been involved with it

I do have a question, point number four on how the review will take place What if the State and the Tribes had very different criteria? How would that review process work if you look at very different perspectives for it? Thank you

Clayton Matt We could play "what if" games all day and I think we'll cross that bridge when it comes I don't know that we're going to have different criteria I think that's something that the technical teams, legal teams are going to have to hammer out I think that we have looked at what the initial criteria are for under State law and the technical components of that and all of that So it's a good place to start and we're going to start by looking at that and if we have anything additional to add its not going to come out until we have at least conceptual agreement on it So if we have conceptual agreement on it then that shouldn't be a problem

Well at that point, since we accommodated a request to take questions and during the comment period I guess we didn't actually finalize and say the negotiation parties agree in concept to continue to develop the details of this proposal Do we have agreement on that? To develop the details and bring the details back to the next session?

Chris Tweeten Clayton, speaking from the State side want to continue the process and work on filling in those details because we realize the public can't really understand how this is going to work until we flush out the proposal with the details So we certainly need to continue to do that As far as agreement is concerned, as we indicated at the last meeting that we had, final agreement from the state side comes from the governor's

office. When we come up with a proposal that is agreeable on the negotiation team we will advocate as strongly as we can for the approval of that and the presentation at the legislature if that's what it takes. At the level we're at now I think the consensus of those nine points exist. You have to understand we're not the last word on the State side just as you're negotiating team is not the last word on the Tribal side.

Chris Kenney: From the United States perspective, obviously we've been on this team and we're not going to be signatory to a large extent for our own reasons. When we were in Missoula last, the condition that the state set was this is important. We recognize the importance of it and the State said it was important to deal with this crisis in order to facilitate negotiations. I think we have substantially done that. I would argue that we need to go ahead and finish what's been started. There is no reason not to take advantage of the good work that's been done.

Clayton Matt: The work groups will do that then. We appreciate that. We will take all the comments that were made here today very seriously and take a hard look at them. With that can we move onto some closing remarks?

Closing Remarks and Summary

Clayton Matt: To summarize under the claims examination work, the Tribes will discuss options and bring some of that discussion back to the work groups in terms of how we approach claims examination but it's our position that claims examination needs to move forward. We believe there's a public role to play in trying to help get some funding for the state to move forward with the claims examination and in our process we'd like to focus on the Jocko, I think we talked about that at the technical group, if that would help facilitate the narrowing of the funding issue that might help to continue with that.

On the data side, the Tribe will consider its method of sharing data but at this point I think as long as we're making progress. Our goal is to get in the Jocko basin, get through all the data, accept as we can, get to the model and get moving on with the discussion of the model. That is our goal and we've made some progress and we'd like to continue to make progress.

The administration, I think we just talked about the outline. We'll take the outline back to the working group and begin to develop the details of each of the points that are here. We understand there needs to be some legislative approval and therefore public support of this and so urge you take a real close look at this and follow this and provide that public support, public support is needed for concluding some sort of an interim agreement because the Tribe has spent a lot of money over the years developing the data and we will be providing that data and we will share our data carefully as we go through the process. We urge the State to find the money to contribute to claims data to this process. That's going to be an important component to that and we believe there is a role for the public to play.

We want to get through this interim process and get on with the long-term discussions. We haven't begun that. We don't think that needs to be held up any further. We should begin those discussions but we've been very busy with this process and we'd like to get done with it so we can get on with the longer-term discussions.

Claims examination is an important part of that and it's going to be important not only for Tribal understanding of what the resource is but it's going to be important for the public's understanding in developing greater certainty of claims you filed and that's important information to this process. We look forward to that. Those are the summary and concluding remarks that I have.

Chris Tweeten: I don't really have anything to add in terms of substance to what Clayton has outlined. I think that is a good summary of what we talked about this morning and of the tasks that lie ahead for us. I just want to emphasize, as most of the people in this room know, there is a long, long history of dispute between Tribal members and non-Tribal members on this reservation with respect to water. The history of cooperation and agreement on that subject is in contrast, very short. I think we're moving in a direction of reaching, what I think is going to be a historical first step in getting the Tribes and the State together on an approach to water and I'm encouraged by the progress that has been made. I think we need to continue to exert ourselves to keep that momentum going and to get the interim agreement done and take it to the legislature. Let's take it to the legislature and let's get it passed. Let's move on to the other issues that confront us but I don't think necessarily they need to divide us any further.

Chris Kenney: I don't think I have anything to add, either except work, work, work, work. Let's do work. We've gotten started, it's time to do work. That's it.

Clayton Matt: I will say that we need money, money, money, money. With that our next meeting we tentatively scheduled or agreed to schedule our meetings at regular intervals about four times a year. It's been a little longer than a quarter than when we last met but I think I'd like to try to at least keep the idea going that within about three to four months we're going to have our next meeting. So without pinning down a date, does that look like an idea that we can stick with?

Chris Kenney: Yes, that's great.

Clayton Matt: Very good. We're just about ready to finish and I see a couple of hands in the audience. Are these comments?

Don McMillan: When scheduling meetings, I'd be interested if you feel you're going to be able to meet again or the interim water group is going to be able to make some kind of final proposal that you'll accept that you can be before the legislature to get it passed in this legislature.

Clayton Matt: That is the goal. The regular session not the special session. Meeting adjourned.



Water Rights Negotiation Meeting
Hosted by the Confederated Salish and Kootenai Tribes
At KwaTukNuk, Polson, Montana
July 17, 2002

Federal Negotiating Team

Chris Kenney
Rich Aldrich
Cheryl Willis
Scott Miller
David Harder
Bernie Burnham
Robert Grace

CSKT Negotiating Team

Clayton Matt
Rhonda Sweaney
Maggie Good
Lloyd Ervin
Ron Trehan
Pat Pierre
Red Shirt Guy
Next to Red Shirt Guy

State Negotiating Team

Chris Tweeten
Susan Cottingham
Anne Yates
Tara DePuy
Cindy Younkın
Bill Tash
Candy West

Opening Prayer and Song 9 00 AM

Opening Statements

Clayton Matt First some background for those of you that haven't been following our water rights negotiation meetings or the public meetings we've been having around the reservation. The purpose of these negotiations is to settle the water rights for the Confederated Salish and Kootenai Tribes. Throughout the reservation tribal water rights are extensive and pervasive and they exist on and off the reservation in the form of aboriginal and reserved water rights. They include surface water and ground water, consumptive and non-consumptive, and are based on past, present and future uses and are

Internal minutes and transcription not reviewed by other parties

supported by volumes of historical, cultural, legal and scientific information that the tribe has developed over the years

At the last negotiation session we introduced a proposal and from a tribal perspective that proposal is still on the table. Certainly there hasn't been agreement between the parties about the proposal itself but from a tribal perspective that proposal is still on the table. There are some copies of that available here today and if you don't get one and you want one let us know and we'll get that out to you.

To summarize the proposal very quickly in three main points, one main point of the proposal is that the United States owns the water in trust on behalf of the CSKT on the reservation. The tribes recognize that there are existing junior water users throughout the reservation. The question is how do we accomplish both of those goals. And our proposal states that we would like to develop a comprehensive Tribal water administration plan that recognizes Tribal ownership of the resource and recognizes existing uses and it notes that we are a long ways from finalizing that. We've got some things to talk about today that take us a step in the direction towards getting to those solutions. I think you'll be interested in hearing some of our discussion today.

Since the last negotiation session the Tribe has been very active on two main fronts. First of all we've held a series of public meetings around the reservation and we've been active in work group discussions that we'll talk about later this morning. We've held public meetings at Pablo at Two River School on April 2, Charlo at Charlo High School on April 7, Polson here at the KwaTukNuk on May 1, Arlee, Arlee High School on May 15, Hot Springs at Hot Springs High School on May 29, Elmo at the Kootenai Cultural Center on May 21, and recently at the Ronan High School in Ronan on July 11. During this time period we also met with the local democratic committee at their request, the Polson Rotary Club at their request and sat in on a meeting between the Compact Commission staff and the Flathead Resource Organization that was held during that interim as well.

The last negotiation session we set up three work groups. One to discuss administration issues, one to discuss claims examination issues and one to discuss data and technical issues. Those three work groups have been active since our last negotiation session. We'll make reports today. All three parties, State, tribal and federal, are represented on those work groups. That's all I have for now for my opening statement and I'll turn it over to Chris Tweeten to make any opening remarks.

Chris Tweeten: Thank you Clayton. First of all let us express our appreciation for the opportunity to be here with you today and for the hospitality you have shown not only today but in all of our business with the Reservation to meet with folks to talk about these issues. We really appreciate the open mindedness and hospitality that we've been met with as we've come to the reservation to talk about water rights.

At the negotiation session we did have some discussion regarding the Tribes proposal as Clayton has just outlined it. On behalf of the State team I indicated that we did not

believe that that proposal would serve as an acceptable outline of a final settlement but we agreed with the Tribes and the United States that discussions should go forward and try to find some middle ground that would meet all the needs of all the parties and we're happy to report that the working groups that have been established have been meeting and the purpose that I think we're going to accomplish today is we're going to report to the members of the public and to discuss the meetings of the working groups and what the working groups have accomplished since we last sat around the table in February

We remain optimistic that progress is possible and that an agreement is possible and we continue to think it is going to take a considerable amount of time to get there as you hear what the working groups have been engaged in. We're here for another purpose as well and that is to hear what the members of the public have to say about these issues in particular about the information that we're going to be presenting to you this morning. So we'll listen very attentively about what you have to say as we have consistently throughout this process and hopefully proceed down the road toward reaching an agreement.

Chris Kenney: Good morning. I would extend my appreciation to the Tribe and the folks in the Flathead and Mission Valley area, we always enjoy coming out here to visit you. We're glad to be here and we're glad to have another negotiation session. I think all I would offer is that we see progress from the working groups particularly in terms of all the individuals beginning to develop good working relationships. I am firmly of the opinion and believe that the success of this negotiation as in any negotiation ultimately turns on the ability of all the parties to not only find common cause from each other but to eventually understand that the outcome is a function of everybody seeing their future together and so what we'll be doing in this session today and what we'll be trying to do in the future is to try to build upon what I see as a improving a working relationship within the subgroups and within the larger group and hopefully that is going to take us where we want to go. Thanks, Clayton.

Clayton Matt: Thank you. That concludes our opening remarks and we'll move on to the work group presentations portion of the agenda.

Claims Examination Work Group Discussion

We had some discussion here just before we started and I'm not interested in necessarily changing the agenda, I don't think we'll change anything but there is a request, Chris Kenney, to not start with the administration work group and to start with one of the others and actually end with the administration work group discussion so that the overhead slides can be used at that time and we'd go into the public comments. I guess I have no, unless there is some particular objection from the team I have no particular objection with that.

Chris Kenney: I think that's probably a good idea actually now that you have approached it.

Clayton Matt Okay If we are going to go with some another order I suggest we go with the reverse order and start with the claims examination work group discussion As we set up our discussion today we agreed that the State would make the initial comments on this today and we would have some comments and then Chris, I'm sure the Federal Team will want to make some comments then as well

Susan Cottingham One of the work groups we set up in February we call the claims examination workgroup Let me give a little bit of background about what that means

These negotiations are designed to settle the Federal Reserved Water Rights of the CSKT Tribes The other major part of the States water adjudication is the Water Courts efforts to quantify and prioritize all the State based water users who filed claims in the water adjudication process for all water use prior to 1973 when the water use act was established That process has been ongoing in many other water basins throughout the State, it has not yet started up here in the Flathead area and there have been a lot of questions about how it might get started and what might happen

The Water Court has focused on basins around the State that have not involved reservation basins because they've given us the deference to start really trying to come up with a negotiated settlement and then work in a parallel way to quantify the State based water uses Obviously there are a lot of existing water uses up here that have filed claims under that Water Court process and we all three parties understand that that at some point needs to get started

We've had two meetings of this claims examination working group One in which DNRC presented a very comprehensive description of how DNRC (DNRC is the Department of Natural Resources and Conservation, their the ones by law that work under the direction of the water judge and do all the claims examination of these many claims that were filed) goes about doing these claims examinations There is a claims examination manual that has been adopted by the court to guide DNRC in this and they go through a very detailed process where they look at each individual claim and look at all the details and elements of that claim priority date and place of use and submit reports to the Water Court so that at the time the Water Court finally issues a decree in the basin that's effected them, people have an understanding of what exactly these claims are and whether there is any concerns about them

The parties, as I said, have met a couple times We know that, I think we all agree that this needs to be done At the last meeting, the Tribe proposed that we move forward with the classic DNRC claims examination We had some information about how long that might take One of the main concerns is that we actually have to petition the Water Court to tell DNRC to go ahead with that claims examination and so at some point we have to be talking to the judge about that and whether he is willing to go forward with that

The other major concern of course is resources How do we fund the people that actually are going to be doing this? Over the past ten or fifteen years, DNRC has gone from

having 20 or 30 folks working in claims examination to I think about 7 or 8. Their resources have been really stricken down and all those folks are busy working in other areas. So the State is taking a hard look internally at what we could do to come up with resources. As you know, we're facing a special session of the legislature that is going to have to cut \$45 million from the State budget in addition to what has been cut already. So that's a real difficulty. The Tribes proposed that perhaps the Federal Team, the federal government, could help share in those costs. I'll let the Federal government speak to whether they can do that.

So we're really sort of in a quandary. We know this has to go forward, we know it's an important part of the adjudication but right now it is not clear whether the State or the federal government is going to have the resources to put into this. The parties are trying to come up with some creative ideas about how we could fund this. We'll be continuing to work on that and I think at some point we agreed that we would probably need to talk to the Judge and see whether he would be willing, if we were to come up with the resources, to go ahead and order the claims examination in this area. We've gotten a lot of feedback from folks in the public, saying, "get started," "this should be a priority." We recognize it should be. But with dwindling State resources and potential furloughs and all kinds of things, it's really hard to know what we're going to do. We're working with the Kalispell Field Office and talking to them and I think we'll continue to talk with the Federal Team and see if there's some way we could come up with a way to get this started. One of the ideas would be since we're starting to do some of the tech work in the Jocko drainage as far as the hydrology and such, that maybe we could begin the claims examination there. There are a little under 500 claims there, it's not so massive as some of the other basins, and maybe we could put some resources towards that.

That's a fairly brief summary, there hasn't been a huge amount of work done. We're really trying to put our heads together to figure out how we can go forward with that. We know it needs to happen. Clayton, if you have anything else you want to say about clarifying your proposal from last time?

Clayton Matt: Susan covered very briefly the history of the claims that were filed that individuals were required to file throughout the State. Some of those claims are still outstanding. The process began in 1979 and for those of you who have been able to attend some of the public meetings that we held around the reservation, I've used some of the State maps to demonstrate the progress that's been made in that and even that process is making slow progress. It just takes time.

But there are thousands of claims here that are yet to be examined on the reservation and we understand that the State is obligated by State law to examine the claims. We put together a proposal in our work group to talk about how we could have a role in this process. We essentially proposed that we be able to observe and participate by reviewing the examination on an ongoing basis. We proposed and offered a limited waiver of sovereign immunity as part of our proposal. The other thing we proposed was to offer some money from the United States. We were told there is no federal money at this time to do that.

However, I think that in the larger sense since I understand it is a State obligation, we really encourage the State to seek that funding. We realize that funding is tight across the board but for something like this State obligation there may be a public role in this as well and I think that's maybe where we're headed at the next legislative session. If there is not funding made available now to get this started, we need funding to get this started and during our discussion trying to wedge out funding we got a good picture of the kind of detailed assessment of the staffing that is going to be required to get this done so we have a sense of that from the State. We really encourage you to move forward and try as hard as we can to get the funding. I think we want to move the negotiations on and we can move them on, we believe, in other areas but that particular area is something that is going to have to get started because it also is going to take a number of years to accomplish that. Estimates are anywhere from 5 to 8 years depending on the amount of money and the number of staff that we can put to it. We also agree or at least discussed, that we would like to consider starting the claims examination process in a portion of the reservation, namely the Jocko because that is where a lot of where our other work is focused right now. If we could parcel out some of the work then that might make it more palatable in terms of funding. Maybe we can get some of that work done over a period of time. Looking at chunks of the reservation might also help in those considerations.

That is really all I have, Chris. If the Federal Team would like to respond to that, that's where we're at.

Chris Kenney: One thing I've always appreciated about Clayton Matt is his generous nature. But it's true, the United States doesn't have any money. Our concern I think falls across a number of fronts. As a matter of negotiation our belief is that fundamentally what we're trying to do is understand the level and extent of non-Indian water use on the reservation so you can make reasonable judgments and informed decisions about how you're going to analyze and understand the impacts of the water rights negotiation.

Why that has to be a part of the formal claims examination process I guess falls us at a certain level. We understand that that process is in place and we understand that it has an institutional legitimacy that is valuable to everybody concerned. And it is my understanding that some examination processes have been conducted in other water rights negotiations, any water rights negotiation, in the State of Montana. But to my knowledge, under no circumstances has it ever been done to completion to satisfy the negotiations. I could be informed further on that.

When you start talking about the claims examination process you're talking about an adjudication process, I won't bore you with the details but suffice it say that the ability of the United States to bring funding to that exercise because of the character of the exercise is very difficult. We go to different areas of the Department of the Interior's program in order to help support the technical activities and negotiations and we do it under different statutory authority and report. One of the things we don't do under the reclamation law for instance is we don't fund things remotely associated with litigative type structure. We

don't have any money this year to do anything like that even if we thought we could I know the BIA doesn't because our funding is very limited

So we find ourselves institutionally and legally very difficult to participate in what is in its essence a legal process One of the things we're asking and one of the things that I think would be helpful is to have the working group talk about different ways to satisfy the goal of what I think is ultimately trying to understand the character of the water use across the reservation To the extent that we can do that without having direct linkage or even remote linkage between the claims examination process that's the obligation of the State, which we believe it is, and what we need to do to fulfill our needs to understand what we're dealing with in terms of water use we're willing to discuss that We're looking for options The reports that I get back and what I've heard, I'm not too sure we have fully explored that

The second piece, if we put all of that aside and just talk about the claims examination process, I'm trying to figure out who really understands this process I've got estimates of anywhere from fifteen to one year That is sort of hard to pin down I think it is probably not that misunderstood but if we take a look at the resources that are needed to compress depending on how much of the claims examination exercise we want to go through to inform ourselves and the resources we need to compress, that it doesn't look like an inconsequential amount of resources I'm not sure we'll do it in a time frame that fulfills what my goal and expectations are We know that water rights negotiations take four to five years even in the best of circumstances That has been my experience in the number of years that I have worked in the department But if we accept everything that Susan said about the State of Montana and their resources and we accept that it takes anywhere from 12 to 15 years, I keep hearing different numbers, for one person to do all this stuff We assume we can cut that down by adding people without trying to figure where the money is I guess I just have some concerns that we're trying to tie ourselves to a process that ultimately dictates how we do everything else

I guess what that all distills down to is I would like to see the working group address the larger issue and see what we can do to find maybe a rainbow of different options so we can take a look and figure out how to ultimately find that goal and that is to get some kind of understanding of what the overall water use is on the reservation so we can put it together in some kind of a puzzle or pattern that will allow us to come to some mutual agreement

Susan Cottingham Chris, I think you're right I don't think claims examination has ever gone to completion to totality on any reservation and we have come to settlements without it Certainly there is a way for the technical folks to take a look as a whole as a broad brush what the existing uses are out there We did talk about that internally the other day, about what work we can do with aerial photos I don't think anybody is saying we have to go forward and complete this in order to have a good picture It is going to have to be done at some point anyway and if it can be meshed with what we're doing here it might make sense We've also talked to the DNRC about if the parties did come

up with some joint technical work would that be useful in the claims examination and they said yes

The other thing I want to clarify for the folks here - in the governor's budget process the DNRC did ask for additional personnel for this and the governor's office did not approve it. The DNRC is keenly aware of the desire of folks to move forward with it and did make a proposal but the governor's office was talking no new proposals because of the impending budget crisis. I think we'll have to come up with different ways to get started analyzing what is out there so it can be useful for negotiations but I think the State is also committed to try to figure out how we could get started perhaps as Clayton said in the Jocko with a parallel claims examination to see how different that might end up being than what we might come up with.

Chris Kenney: One of the things I would offer is that we do have a lot of work that we've done on the Jocko. Putting aside all these institutional/procedural sort of issues, if we could focus on that maybe that gives us time to look at different options. My concern is that I don't want to be bound by any process that artificially slows us up because we can't find other things. That is one of my ultimate concerns.

Clayton Matt: I think ultimately we've looked at the work group, which I think did a fair job of looking at some of the options. I think recently we've had some internal discussion and think we want to go back and take a look at some of the options, but the position right now is to try to accomplish this process to get the best information we can that answers the questions about the quantities of the claims to get some better understanding of those. I think that if the claims examination process has to go forward and if we make an estimate and the claims examination process goes forward and the estimate is wrong in one direction or the other I think where we're at is we need to take a hard look at that and try to really understand our risk and of course individual water users are going to want to understand their risk in that as well. I think it is worth looking at what the options are but I think that is where we are at right now is wanting to try to get moving on with that so we're not throwing the discussion of options out the window but we'd really like to see the claims examination move forward and I think this is just one element of our negotiations and in that process I see that this could possibly slow up that element of the negotiation but wouldn't necessarily need to slow up the entire negotiation process. We've many other things to discuss so I think we can continue to move and see where we go.

Chris Tweeten: One other question I direct to the United States, I don't know what the situation is with this negotiation but in other negotiations in which we've been involved we came to find out that while we were sitting at the table negotiating the settlement of the Tribal water right claims the Justice Department was at the same time spending substantial sums of money developing a case for litigation and I understand your position that the Department of Interior doesn't have responsibility for funding litigation or legal type inquires, what about the Justice Department? You have your litigators sitting at your left there, I was just wondering is there an expenditure going on at this time for

development of litigation background information and if so can some of that money be diverted to provide some assistance in getting this technical work done?

David Harder The Interior Department provides that money to be spent to develop the BIA's case There isn't any special pot of Justice Department money

Chris Tweeten That only answers half my question Is some of that money currently being expended on the development of a litigation case? If so, can any of that money be diverted to assist in these negotiations?

Rich Aldrich Yes, we are spending money developing the litigation case and that money is appropriated and allocated specifically for that purpose and we can't change the use of it

Chris Tweeten I understand from what Chris Kenney said that Interior views this as litigation Now what you're saying apparently is that Justice views this as negotiation and therefore it falls in the middle and neither one of you has the ability to assist in the funding Is that what I understand?

Rich Aldrich No, I don't think that is what Chris Kenney said I think that Chris said that with Bureau of Reclamation money, they have to be very careful that they don't interfere with the conduct of litigation and he would be uncomfortable with doing that In fact, he probably does not have the authority to use Bureau of Reclamation funding for these kinds of purposes I don't see that that is necessarily an inconsistent, Chris We are funding to the extent that we can through our litigation contracts Some negotiation assistance and when we provide a contractor or a federal employee to attend one of these work group meetings or as we did in Crow and Fort Belknap with existing water uses That funding is coming through the various processes that we have specifically aimed at either negotiation or litigation

Clayton Matt Obviously, funding is an issue and I hope we can continue at least the funding discussion to further this

A couple of things, one I'd like to get to the point where in terms of the summary of this at the end, what are we going to accomplish after we leave here today? Certainly the Tribe will go back and discuss among itself what the benefits are of doing something short of the claims examination and come back with some sort of response on that reaction to that

But Chris Kenney earlier asked a question about who understands this process and what it's going to cost and I thought we understood pretty well after some of the discussion we had at one of our meetings So I think the State has got a pretty good handle, Susan or Chris, do you want to respond to any of our understanding of what it takes to accomplish that?

Susan Cottingham DNRC did give us some very good numbers and again the one year would be for one person working on the Jocko That is what they estimated For the whole two basins it is more like five to nine years with two FTE's working on it

I wanted to get back to a point that Clayton made which is what if the claims examination comes up with some different numbers than the technical folks come up with broad brush That's happened with every negotiation we've had and we've had to talk about that because these negotiations don't determine the individual claims only the Water Court can do that and what we have had to do is come up with some mutually acceptable numbers about what the existing State based water rights are within those boundaries and come up with some general understandings of that using our technical staff, aerial photos and so forth And we can do that We can do that with your help if you can give us the information you have on the Jocko and I would suggest at some point maybe both the claims examination and the technical work groups could get together and brainstorm that because there is a convergence there because if we are working on the HYDROSS water model for the Jocko we are going to need to understand so we have an input of what the existing demand for water is out there I think there are some ways that we could continue to look at how we could fund the claims examination There is going to be various ways to get there I guess I would emphasize that that sort of dynamic that you mentioned, Clayton, has been there in all the negotiations because of the precise way that the Water Court oversees the claims versus what we might take a look at as a chunk of irrigated acreage from what our technical folks tell us I certainly understand your concerns about it and I think we can still keep working through both technical and claims examination working groups and see if we can come up with maybe using the Jocko as a sample watershed if we can get some claims examination started there, and also do sort of the broader brush technical analysis We've purchased the aerial photos and we've gotten started on that I'm sure you guys have that already If we could start exchanging that information maybe we could see our way clear as to how to go down that road

Clayton Matt We'll go back and look at options We're going to talk about data here in a minute but its pretty clear to us that the State, and I think you acknowledged in the past, at this point has very limited data to no data on the Flathead that really can contribute to these negotiations The Tribe has a boatload of data, we are beginning the process of sharing some of that data but we also view one of the contributions of the State to these negotiations is to be able to provide the data that comes out of claims examination so it is effectively part and parcel part of the database that will have to be used So we really encourage you to find the funding to get it done If it is a public funding we're talking about the public can participate I think in trying to urge additional funding, so I think there is a role for the public to play there We encourage you to think about that and talk to the appropriate people to urge that funding Anything else?

At this point we understand that claims examination happens at some point in time Our position is right now we'd like to see it get started but it needs to be funded and we will look at options for making estimates of claims but the Tribe understands that there is a risk associated with that and I think the public needs to understand what the potential risk is associated with that I think we can move on

Chris Kenney We are agreed that we will tell the work group go back and take a look at other stuff, let them define what that is Did we say that?

Clayton Matt Yes, I think we did and I think we're also taking it a step further back in that the Tribe needs to take a look at the proposal it requested of the State in terms of funding If we're not going to do claims examination then what are we going to do? I think we need to take a hard look at that, and then we will be bringing that to the workgroup

Chris Kenney The definition of what that means would be helpful If it is something other than what the State defines it as

Clayton Matt Yes The next item we want to go onto then is the data and technical work group and I think we agreed that we'd start with that

Data and Technical Workgroup Discussion

Clayton Matt One of the work group's setup at the last negotiation session was the data and technical workgroup At that time, one of the reasons for that is to begin to get a work group together that can assess available data to apply to the negotiation problem we have The problem we are faced with is that almost all of the available data right now is Tribal data The Tribe agreed to share its data We also established a process for sharing that data And we are beginning to follow that process

At the work group discussions we had, we had a meeting and at that meeting we explained some of the background and how we developed some of the data that we gave to the State The first set of data that we transferred is the hydrologic natural flow data that goes into the HYDROSS model for the Jocko area of the Reservation That was done on March 26th On June 6th we received a list of questions from the State about that data There was a field trip conducted by the technical staff, hydrologists, of the three parties on June 19th

Then recently on July 1st we received a letter from the State, which poses some additional questions Since it's so early, since it's so recent that we received that letter we don't have complete analysis and a complete answer but we do have an initial response for you at this time

Our initial response is as follows First of all we intend to provide an answer to the request for the additional hydrologic information We will review the questions that you pose in there about that hydrologic information being an extension of an understanding of the hydrology data that we have already provided As such we think that we need to complete the understanding and the questions and answers from hydrologic data before we can move on to the next major data set We'd like to do that

The letter also gives a limited conditional acceptance of the hydrologic data. I think if we can move a little further down the road in our understanding of the hydrologic data we would like to achieve a greater level of acceptance. We acknowledge that certain changes may come out of the modeling process but we should be able to achieve a basic acceptance of the data and the methods of developing that data early on in the process. If we could come to some understanding and find a way to accomplish that once we get through that process with one set of data and we will have a better understanding of what level of acceptance we're looking for and I think we can move through that much more quickly. That's our position. That's where we're at today with our response and we look forward to discussing this more also at the work group level and getting on with getting you answers to your questions.

Susan Cottingham: Thanks, Clayton. Let me just clarify for the folks here that I think the reason for the letter was it was our understanding that the Tribal folks wanted us to sign off on each set of data as we got it. I think our technical folks were reluctant to say this is all well and good let's get the next block because as you all know, you're going to have to look at this whole thing as a whole when all the information is put together. We're impressed with what we've have gotten so far and I think actually the technical folks had some really good meetings in June to look at that. I think both the State and federal folks understand that the Tribe has developed the HYDROSS model. I don't think either one of us, and I can let Chris speak for his team, feel that it is worth the time and money and effort for us to develop our own models and then we have three different computer models with different assumptions and we have to start all over. So that is why we have asked the Tribe to share its HYDROSS model. I wouldn't say that there is no other data available except for the Tribes'. There's certainly plenty of data out there and we have info and quite frankly we have started to compile our own information. We've been attending meetings on the Kerr Dam drought plan, we've been talking to the BIA about what information they might have. We can do all that, I think the point we made was that it would certainly take a shorter amount of time if we can work from the basic technical work that the Tribes' have done and then the three parties can work on those and work on the assumptions and keep on refining it and then we can start doing different model runs together so that everybody is working from the same page. We do have data to offer, I don't think we ever said we don't. We have all the claims that are in the system, we have a lot of GIS work. I think we're willing to do that. What we think we should do is sort of have the technical work group take the next step down the path on the HYDROSS but also try to come up with an overall work plan. We talked about that a couple of years ago for the technical work so that we have we're going to start with hydrology, we're going to then look at aerial photos of irrigated lands, we're going to look at land status, we're going to look at instream flow needs, we're going to look at project operations, whatever those different elements are. I think it would be very worthwhile for the three technical groups to get together to come up with a roadmap of what we're going to do with the technical work so the people can see what the different elements are. That is how we would like to proceed. We're encouraged by what we've done so far and we would like to keep that going. Again, I want to emphasize it's not like we don't have any information but certainly we have not put the resources and the years into developing our own HYDROSS model for the Flathead. All we're saying is that I think it would be much

more expedited if we could work from the good work the Tribe has done, get whatever technical work the feds have and we can put ours in too. I think that will just be a much quicker process and I think that serves the negotiations better to do it that way. So I think we just keep that technical working group working as quickly as we can, getting through each set as they are given to us and seeing how we can come up with some better numbers if that's what we need to do. We think we have made a good start.

Chris Kenney: The only thing that I want to say is to make the point I've made with the Tribe earlier and I'll make it again here and leave it. My experience, and I think it is a relevant experience, is when negotiations begin to come together the first thing that you try to do in order to build a successful negotiation is to build consensus and agreement on what you are talking about and how you're going to talk about it. Particularly the science and technical stuff because it tends to lend itself to the ability to get agreement on that issue when other issues are much more intractable and much more nuanced. What the federal government has spent the last three or four years talking with the Tribe about, you deal with that in the context and we appreciate the context of changing understandings about the propriety of that information and whether its confidentiality is protected or not because of Klamath and other cases and stuff in FOIA. We appreciate and understand that.

The federal government believes that we're getting to the point now where a mutually reinforcing team has got to come together to do that. The United States has put a lot of resources into the HYDROSS model that the Tribe has, and we have been privy to parts of it but not privy to all of it yet just because by virtue of the fact that we do not have the opportunity, but it's the opportunity that is frustrating in that, because of protecting that information, just the logistics of sharing information, getting work back and forth, communication becomes very difficult and does not lend itself to developing a comfort level so you can talk about all these differences. So what I have suggested to the Tribe, and requested of them, is that they go back and re-evaluate, given where we've come over the last year or so with negotiations and discussions, where they are with that information and see if we can't find a different way.

The United States' preference has always been, we've articulated this in the past, is to put what we know on the table, get all the parties together with our differing understanding of the technologies and science and try to find something we all mutually agree on so with that consensus we have a foundation on which we can deal with the more intractable problems that we know are down the line.

We've made that request, the Tribe has heard that and we're just awaiting that. Otherwise we'll try to continue to contribute to the work groups. I'm trying to find as many resources and put people on point to get that stuff done as rapidly as possible and will continue to do that.

Clayton Matt: The Tribe agreed to share data. Let's make that clear and that happened after the last negotiation session and that is happening. We need to move down the process of finding a comfort level here at the Tribes as well so we can get to the point

where we can do this more rapidly and more efficiently. In the first instance, our goal is to get all the inputs to the Jocko model to you and then get to the model. So we want to get to that as quickly as we can as well. In terms of re-evaluating the Tribal process, we will discuss it but until the Tribe changes its position and its role - you eluded to the Klamath case which has gotten a freedom of information act request out there involving this process which makes it very difficult for us as you well know.

Now in terms of other information that the federal team has had, the federal team has looked at and approved the Jocko model and all of the data associated with that and looked at and seen all the other data that the Tribe has developed and that process has been ongoing for some time. You've looked at and gone through the same review process of the hydrologic data and all the other input data for the Camas model, the second model that was developed so there has been some progress there. As we know, some of that progress slowed down because of the FOIA process that has now impacted us but we are continuing to share data just more carefully and more directly, but it is happening. But we intend to get back to the table here. The Tribal team will get back to the table here soon to discuss the additional information, the additional questions the State has of the hydrologic data so we can get on with the next set. That is our goal. We appreciate the comment.

Unless you have anymore to add or any other questions or comments on the data sharing, we're going to continue that. We have to respond now to a letter that was sent to us. You have our initial response and that's generally the direction we'll go from the Tribal perspective. Anything else on this side, Chris? Anything else on this side? Okay.

Administration and Interim Plan Work Group Discussion

Clayton Matt: Next item on the agenda, the administration work group discussion, is probably going to be the most interesting you'll hear today. At the last negotiation session, the Tribe was asked to consider discussing an interim administration and we set up the two work groups and brought that question back to the Tribal Council and the Tribal Council agreed and since that time we have held several work group sessions to discuss interim administration. The report you're going to hear is based on those work groups discussions since our last negotiation session and it is probably the most progress of any of the groups that we've made to date. We're going to do a little song and dance here, I'm not sure who's going to sing and who's going to dance but I'll introduce Tribal attorney John Carter will provide part of the presentation for this discussion and Anne Yates, attorney for the Compact Commission has an overhead that she'll use and some discussion and then we'll have some discussion at the end of that about the outline and if you aren't aware, the outline that we're going to present is now available for the public to read. It's on the table outside. Please take one or two, we've made several copies so if you don't have copies, please get them and I should have provided more copies to the rest of the team.

John Carter Thank you My name is John Carter, I'm an attorney for the Tribes I have been working on water rights with the Tribes for quite some years now I'd like to explain a little of the background and process that led to the one page outline that you all have in front of you or is available at the front desk But before I do that, I'd like to make a comment made during the break I was visiting with Candy West from the Attorney General's office and she said that it looks like progress is being made, slowly but surely I think that's quite true The single page outline that you have in front of you has ten elements for an interim agreement There is agreement between the working groups on nine out of ten of those That's a ninety percent average and that's not too bad given the nature of State Tribal relations overall

I'll discuss a little bit of background and the process of the outline and note that the outline is just that, that it's not flushed out with detail, it speaks to central points for an interim administration agreement The process evolved from the last formal negotiation in February, and subsequent to that period of time the State, the Tribes and the United States agreed to put together small working groups to discuss informally the possibly for coming to grips with an interim water management plan for the reservation And it's just that an interim plan would try to fill gaps during the course of the longer-term negotiation I think the charge of the working groups was pretty clear that it's not to try to solve all problems but it's to address need in the interim The reason we have to work at something like this is because Montana State law has twice been found inadequate to permit most if not all new water uses on the reservation Simply put, the State cannot continue its permitting practices that it has in the past So there is, at present, by and large no State permitting on the reservation, though of course there is continued development, continued population expansion

The process began in earnest in March The working groups of the State, the Tribes and the United States met to see if there really was the ability to come to agreement on aspects of an interim plan In fact the groups met informally about five times and it's my understanding that each working group after it met collectively reported back to their respective Tribal, State and Federal Teams to keep everyone current as to what's going on Additionally, there were several telephone conferences between working group members during that period of time from March till the present

The working group initially looked at what everyone wanted to see in an interim agreement What fundamental considerations should be contained in an agreement, and they focused on four One, that an interim agreement should be enforceable in a reasonable manner Two, and I for lack of a better word, I'll use the term "turf protection" we're dealing with three sovereign governments here all of which have various interests at stake all of which have various claims to water So the effort was to the degree possible to preserve and protect everyone's turf The third consideration and given the discussions you've heard today you might chuckle a little bit is simplicity The hope was to make it simple but again we're dealing with three different governments, three different issues, and three different bodies of law claiming water as well as fairly innumerable court cases defining the relative powers of each And the fourth

consideration that generally an interim agreement would cause no impediment to long-term negotiation and final resolution of all problems between the three governments

So those are the basic considerations that the working groups focused on Enforceability, turf protection, simplicity and no impediment to the long term compact finalization The groups also decided to focus on real problems and figure real solutions to real problems, to find a framework in which to address solutions to real problems And during the course of that time we had information from technical folks from the Tribes and from the State and from the United States and it appears that there are approximately 45 to 50 State-based new applications for water use on the reservation and someplace between one to three applications for changes of existing water use on the reservation Those numbers may not be exact but they're in that neighborhood

The working groups also acknowledged that we cannot solve all problems and answer all concerns within the constraints of an interim agreement That really is in fact the purpose of the final water rights negotiation and compacting to bring finality to all questions and concerns Finally, we noticed that there is an existing State law impediment to an interim water administration agreement And that is found in 85-2-708 of the Montana Codes Annotated That was an issue of discussion for a long period of time And what that statute basically says is that an interim water administration agreement must preserve the right of the State to rely upon the criterion that it relies upon for issuance of permits and it splits lines on jurisdictional bases The conclusion ultimately of the teams is that the limitations in that statute real or imagined may in fact be a problem and we might have to address that in legislation, but I'm getting a little bit ahead of myself on that

As it became clear in these discussions with the working groups that there was some common ground, this was in March I believe, the State of Montana asked the Tribes to place, voluntarily, two cases that they have presently in the State Court system on stay The basis for that request was that it would allow a freer forum for negotiation between the parties The Tribes did that They accepted the request of the State of Montana and moved jointly with the State to place a Montana Supreme case that they had filed on stay and also to place on stay a State district court case dealing with changes of existing use on stay There were applications by the State and the Tribe to both courts to do that The stated reason for both parties was to cool down the atmosphere a little bit and allow unimpeded negotiation The Montana Supreme Court denied the motion and left that case alive it is pending today and it raises serious questions again of State authority to permit particularly ground water but also permitting generally

The issue that's live before the district court and that was put on stay at the request of the parties addressed questions whether or not the State of Montana had any authority to authorize changes of existing use within the reservation The State District Court did put that case on stay at the joint request of the State and the Tribes However, that stay expired on July 1, I believe Neither court has issued a decision in either case however

I won't get into the details of this outline, Miss Yates will do that with the benefit of an overhead and run you through the nine out of ten points that the State and the Tribes

agree on. But I would like to summarize just a couple of points. The agreement speaks to the use of ground water only, not to surface water. If implemented the agreement would authorize single-family domestic uses, municipal uses, and community development of ground water. It provides for an administration system to be jointly between the State and Tribes for all applications under the framework within the reservation. And it would provide for due process for all persons who apply or those who object, to be for a limited term, to be renewable and probably have an escape valve in it if either party felt the need to get out of it.

What's central from my standpoint for my part of this presentation is that eight out of the nine points are agreed to but they are outline form and the details have yet to be fleshed out. If the negotiation teams accept this proposal that would be the next step for the working groups to attempt to flesh this out and bring it back once again for the teams to review.

I'd like to make two final points. The proposal allows for a reasoned and controlled development of new water use on the reservation during the compact negotiation process, which it is referred to be fairly complicated and fairly time consuming. Without an interim agreement of this nature right now there is no new water use development on the reservation. Should something like this agreement move forward that would authorize limited types of new water use development. What that means to the person on the ground is that if this agreement moves forward if somebody wants to build a house, they can drill a well, water their yard, irrigate a garden. If someone wants to build a cluster of houses they can make application for a community well for similar purposes. If a municipal well runs dry the city or the town can get a new well. Cities, towns, schools, hospitals and churches will have water if they need it. However as I mentioned earlier in my discussion, to make this work it may need a legislative amendment to 85-2-708 and that's where I believe the public and the State Legislators here particularly and throughout the State could benefit this process significantly by supporting a local solution to a local problem. If the agreement is to move forward it is the opinion of the State in discussion and we certainly will abide by their opinion on that that there is a need for legislative fix from their perspective to allow it to move forward. The Tribe is not so similarly constrained by that aspect of state law but we would certainly be more than willing to assist in fostering legislation that authorize such an agreement.

And I close with a quote from the Montana Water Court which just approved the final compact for the Rocky Boys Reservation after quite a few years of negotiation and discussion between many of the state people and many of the Federal people here. And what the Water Court said is that "the negotiation process allows for creative solutions to intractable problems in complicated areas of law." And with that note I would hand off the balance of this presentation to Miss Yates to discuss the details of the outline.

Anne Yates: Thanks, John. I'm always encouraged when I hear you quote the Montana Water Court. For you folks that don't know me, I'm Anne Yates and I'm counsel to the Compact Commission for the Flathead negotiation. What I'd like to do right now is walk you through the outline of the interim proposal that we've had today.

As John emphasized, this is an outline. We have brought it forward for the full teams to consider and also for the public to consider. We are extremely interested in knowing what the public thinks about the different elements of this proposal.

OUTLINE OF PROPOSAL FOR INTERIM WATER ADMINISTRATION ON THE FLATHEAD INDIAN RESERVATION

1. The State and the Tribes would enter into a memorandum of understanding that defines a system of interim administration of water on the Reservation, to be jointly operated, pending final resolution of the Tribes' aboriginal and reserved water rights.

This would be an agreement between the State and the Tribes. The United States would not be a party to this agreement. This would be a license process.

2. The Tribes and the State would develop a joint application form for new water use on the Flathead Indian Reservation.

3. The Tribes and the State would create a decision-making body, a review board, to be composed of State and Tribal personnel with technical expertise in water use and administration.

Again, as John emphasized, we have not worked out details of how this process would work because we want to know we have agreement from all folks on the general propositions contained in the proposal.

4. The review board would review all Tribal and non-Tribal applications for new water use on the reservation. Review of new use applications would be based on yet-to-be-determined criteria and process derived from state and Tribal law and practice. All applications would be publicly noticed and an opportunity to object would be available. Due process would be provided to the applicant and persons with standing to object.

Now, from the State's perspective, the criteria that we're looking to is the criteria that is currently embodied in state law. Those are the type of things we're interested in. The Tribe, as yet, has not determined what kind of criteria that they're interested in.

As far as due process, for the applicant and persons with standing to object, persons with standing to object means that if you live in another drainage and you don't have any water use or any property or any interest near surrounding the particular application, you don't have standing to object. It's not going to be an open-ended forum for objections, you have to have an interest before you can object.

5 Interim water administration would be limited to ground water sources and would not include new surface water uses

What we heard from folks when we were talking to the public is that they were interested in ground water development. We're also constrained by a case that came out of the Montana Supreme Court that's referred to later on in the outline as the Ciotti case. It dealt with permitting of surface water uses on the reservation and the state was told it did not have the authority to do that.

6 Allowable new uses would be limited to single-family domestic wells and to municipal and community well development. As yet we don't have a definition of those types of wells but that would be one of the details that we would work out.

The review criteria would reflect a simplified review process with lesser degree of scrutiny for single-family wells than for municipal and community wells. We realize that there are going to be many more single-family wells than will be applications for municipal and community wells. In fact most of the applications that John was talking about for new water use on the reservation, those aren't actually applications for permits. Those are folks who drilled wells for their houses and are coming in for notices of completion.

7 Wells that would have been subject to State law prior to the Montana Supreme Court decision in Ciotti but that were completed without compliance and wells drilled after Ciotti but prior to the execution of the interim memorandum of understanding, would be allowed if they satisfy the criteria for the classes of licensed wells.

What that means is if you drilled your well before Ciotti came out and you never went in and got your notice of completion or if you drilled a well after Ciotti came out during this void of administration on the reservation you could come in and if your well meets the criteria that are to be established, you would get a license for that well under this process.

8 Upon completion of the review under paragraph 4 (that was the joint State and Tribal review), and upon approval of the application, a joint Tribal/State license would be issued to the successful applicant containing appropriate terms and conditions relating to ground water use under the license.

That would be similar to what goes on today. When you have a permit and certain conditions are placed on your permit.

9 A record system would be developed to preserve all information pertaining to applications under this interim administration on the Reservation to preserve a license recipient's relative status.

That means that you would get a priority date.

10 Yet to be resolved inclusion or exclusion of changes to existing uses

The State is very interested in hearing the public's input on this issue. The State feels that it is a very important issue to this interim plan. We would like to see changes available under this interim process and we want to know what folks think about that.

As far as implementing this process, as John alluded to, it would probably take legislation. It would take legislation. We are awaiting the Supreme Court's decision in a case which involved a ground water permit and our feelings are that the Supreme Court is going to come back and say the DNRC does not have the authority to issue ground water permits pending resolution of the Tribes' aboriginal and reserved water rights claims. That would pretty much shut down all permitting on the reservation. In addition, we have state law criteria that we are obligated to follow and this license process would depart from that somewhat. More in form than substance because the State would be looking to the same kind of criteria for issuing changes and new water right uses that it looks to now.

One other point that I want to make on the changes is that by definition under state law, which is what the state would be looking to in this process, a change in water use cannot increase consumption. That's why we feel it is a very important point to this process because it wouldn't increase consumption and we believe that folks should have the right to make changes in their existing water uses.

I also want to point out, there aren't many change applications pending. As you folks know, back in 1999, the city of Polson applied for a change and from what I understand, that's almost complete. There is a change that's pending in District Court and then there are also two changes filed by the city of Charlo. I'm not aware of any other change applications that are pending. So we are looking at a big issue, but in practical effect, we only have three recent applications. So that is something to consider, also.

Another thing to emphasize is that both State and Tribal uses are going to be subject to this process. So if the Tribes want to come in and put in a new use, they will be subject to this process also and go to the joint State and Tribal review. That is a very important point and we fully appreciate the Tribes' cooperation in that point.

Susan Cottingham: Maybe we could start with any questions or observations from the negotiating teams and then we could open it up to questions from the public. If there are none or if we've answered them all, then we could go to public comment. We realize that you've just gotten this outline. We're not trying to get final public comment today, obviously it needs to be digested. As the parties continue to work, if you could give us feedback, we would really appreciate that. It's very important because as Anne said, if we have to go to the legislature and get state statutes changed, we're going to need public support and we're going to need legislative support.

Maybe just the negotiators could start off if they had any other observations and then we could open it to questions from the audience.

Clayton Matt I anticipate a question and answer session here today so I would appreciate the comments during the comment period but if we have additional discussion we need to have them on the teams I'd appreciate that That would be my take on this

Chris Kenney I don't really have any questions of substance per se

Clayton Matt I was asking whether or not we want to open it up to public question and answer session We have a public comment period and I'd rather stick to that if we can just agree to that I think we need to have some discussion about this among the parties

Chris Kenney Until your last statement, my thought was this is the last thing on the agenda I don't know what we have that suggests any other business we have My thought to State and to you is if we're efficient and expeditious we can say whatever we've got to say about this and go ahead and go into the public comment period and the differential is not so much that I don't think it is an issue Nothing on the agenda suggests we can't go straight into public comment and we can talk about it It's a distinction without a difference

Clayton Matt Do you want to answer questions?

Chris Kenney About this?

Clayton Matt Yes

Chris Kenney Sure I don't know what I'm talking about so [laughter]

Clayton Matt That will make it real easy

Chris Kenney I rest my case

Clayton Matt We've had the presentation Anything from the Federal Team we would like to Let me ask if there are any final remarks from the presenters John, did you want to

Any comments from the Federal Team on this?

Chris Kenney I hope so I want to take this opportunity to congratulate the team I think that they just need to be congratulated because I think this is remarkable progress This is an indication of what happens when if you have an issue you get everybody in the room and they work through the issues and lay it on the table and tear it apart and put it back together again I applaud the efforts and would hasten to have them focus and go back, I would encourage the public to get back I don't know what the United States can do in the State legislative process We would look for an opportunity to be as helpful and supportive as we could

Clayton Matt We're moving right along today So if there are no other comments from the group here at this point

I think that we are very encouraged and the Tribal Council is very impressed with the progress that was made with the interim administration work group discussions We're happy to make this presentation today and we hope you take the outline away, look at it, read it, ask some questions As is suggested here, what we'll try to do is accommodate a request to allow for some questions from the audiences well today We'll limit the questions at this point to the administration outline For the questions you have, we'd like you to put those questions to us either individually or put them in writing, public questions, verbal questions, today

We'll try to move into the public comment period and if we want to have questions and answers on the outline my only suggestion then is that you make your questions direct We will not have all the answers today Do you agree with that? We will do the best we can today to answer some of your questions We will not get into a debate on this, legal debate, technical debate We will try to answer your questions the best we can So if there are no other comments from either of the teams on that, we will now move into the public comment period and if you have a question on the outline, please do ask it and we will try to be as direct as we can

Public Comment Period

Mike Hutchin Lake County Commissioner On behalf of Lake County, I think this is a start but it also precipitates a lot of questions I came up with two I think the most pressing one to me on behalf of most residents here is the one that Anne referred to in the State it was not authorized by the Supreme Court What if there are any remedies should the Supreme Court decision come down stopping any negotiations in effect? If there are any remedies I'd like to know what those are, the District Court litigation, whatever that might be I know there is a pile of lawyers in here so I suppose we will get ten, twelve or fifteen different answers I would like to hear something along those lines

My second question if under the agreement it says that due process and a license is issued, would the license have the same standing as a water use permit?

Anne Yates The first question talking about whether or not something would come down in the Supreme Court that would stop negotiations there is nothing that would stop negotiations unless the parties just walked away from the table But we will have to take a look at what the Supreme Court has to say about what can and cannot be done on the reservation The State is not optimistic so that's why we're already thinking you're going to have to go to legislation

The second one was on what kind of status do you get with a license Early on, we talked about what would happen to the water uses that were authorized under this interim process At that time we were talking that we would try to figure a way for these to ripen

into State based water use. The status of that right now is uncertain, it came up early on and then we started focusing on other parts of the actual process. It's my understanding that we would try to have these licenses ripen into State based water use and then Tribal uses. Is that correct?

Clayton Matt: I don't think we've defined that.

John Carter: As someone pointed out, there's a boatload of lawyers in here. We haven't finally resolved those questions but that's one of the many, many details that we've stressed throughout the course of this presentation, that's not been finally or for that matter, conditionally resolved. What's clear from the outline though is that there is intent from all parties to maintain relative statuses. What that finally comes out to mean will be those details that have yet to be worked out. I think its item number nine. The effort will be to preserve and license recipients of status. At that's records to their legal priority date. What that comes out to be remains to be seen.

Vernon Finley: I have a couple of comments that lead up to my question. The first comment is and I think I have a little bit of historical, little bit of history behind my concern. About 500 years worth, about the trustworthiness of the non-Indian side of this agreement. I have some concerns about this.

From the time that the first settlers told the Indians that they came in peace to more localized version in the fifties about giving up jurisdiction to the State to provide equal treatment of our citizens in State, city and county courts. Which was totally incorrect. Which when we look back at the history of that agreement when we realize the unequal treatment that the Tribe has received on the part of the State and if you want to get more relevant to water, we have the issues of on the upper part of the Flathead River the State allowing raw sewage to go straight into the Flathead River and the Berkley pit. Then as a demonstration of the States ability to protect water in this area I think there is a little bit of history behind my concerns about the states ability to be able to protect water. I'm very concerned about that. That leads to my question, which is. Before this agreement, before this moves forward, my question is what is the number how many state, how many Tribal people are sitting on this review commission or board? How many? Personally I think that the state has no say on the reservation. That for us to ask permission of the state for anything on the reservation is totally bogus. I'm disappointed in the negotiating team for selling out our sovereign rights here. We should be informing the state what we're going to do. Not giving them equal say in what we're doing, especially with water, and especially in areas where they have shown historical incompetence in those very areas. But before we even talk about and if we're going to proceed on with this then before we even talk about it lets see numbers. The Tribe has to have at least a two-to-one advantage for the approval of the water, of the water rights. At the very least at best we should be just informing the state about what we're going to do. Thank you.

Clayton Matt: We don't have a final solution to the answer on how many.

Vernon Finley Then I think it has to be a part of this, a part of this proposal before it moves forward

Clayton Matt I think that to make it clear that all of the detail behind this is not part of this yet What's important is that we have conceptually some ideas about how we can try to move forward and I think we had some very serious discussions among the team about the very questions that Vernon points out and I think there is some very serious consideration here as well in terms of not just the numbers but the fact that this is an interim agreement

I started off my comments this morning by saying that our proposal is still on the table We have not backed away from that proposal and if you read our proposal and if you look at my comments earlier this morning, it talks about the outline of that proposal and how we believe that the water on the reservation is owned by the United States in trust for the Confederated Salish and Kootenai Tribes That is still our position How we move through this in terms of an interim administration is yet to be finally resolved This is not an agreement, this is a proposed agreement The work groups are presenting this to the negotiation teams here to get some consensus on moving forward and developing the detail for this That is when we'll get the answers to questions like the numbers At least today, we don't have an answer to the question on numbers but your comment is well taken at least from the Tribal perspective I appreciate that

Don McMillan Resident of Polson, starting April We have a home under construction so we're affected by this interim water agreement

First of all, I'd like to thank the parties involved I feel there appears to be a very sincere interest to resolve the issue This is very difficult and I'd like to express my thanks of what I consider is real progress

I have two points that I'd like cleared up, they may not be able to be cleared up but in the spirit of your proposal its not clear to me number one is the interim water right a transferable water right? Will it ever become permanent? Can it be transferred with the sale of a home?

The second question is that, the best way to phrase the question I think is an example Ten years from now if you come to some negotiation settlement, are both parties stating they will honor this interim water right and it will go with the agreement or is that stale and undefined?

Anne Yates Those are really good questions As to the first one, would the interim water license be transferable We haven't specifically discussed that It would be the States position that it would be transferable We realize that folks need a level of assurance, banks need documents, they need to have proof that they have authorization to use the water so it would be the States position that these interim licenses would be transferable

As to the second question, I think, what these licenses would ripen into, it can safely be said that there is concurrence that it ripen into some kind of water right. That these licenses would not be abandoned once a compact settlement is reached. Does that answer your question?

We do realize that people want to sell their homes, they want to transfer property and we realize the documentation of water use is an absolute necessity.

George Marshall Tribal Member I have a coalition of members of the Tribe, members of other Tribes and non-members. My question is on the interim ground water sources for commercial use. I noticed you have single family, municipal, wells to protect and issue to municipalities. I would like this to include also commercial uses to be included in this so we can go forward on the reservation and develop some of our resources. Is there any way that we can get commercial uses written into this also so it can go forward? Thank you.

Clayton Matt We'll consider your comment. At this time commercial use is not considered that's why it's not written into that part of the document so it's defined only as generalized as we've defined it here. I'll take your comment and consider it.

Anne Yates I do want to make just one brief point. The State would like to see commercial uses as part of this interim process.

David DeGrandpre Director of planning for Lake County I'd like to make just one point that addresses the second sentence in number six of the outline and discusses review criteria for single-family wells as opposed to community or multi-family wells.

If the current population rates we've experienced for the last ten years or so continue, we're likely to see over the next five years approximately 3,000 residents in the Lake County portion of the reservation. Those residents can locate either within cities and towns or within the outlying areas of Lake County. The outlying areas of course have things like wildlife habitat, wetlands, cost borne service in terms of road maintenance and things like that. My concern is that by making it easier to build single-family residences, you're going to encourage a certain development pattern that will impact some of the resources that maybe we want to try to protect.

My suggestion is that the committees consider making multi-family and community type wells easier to develop. I don't to try to limit single-family residential development but at the same time my suggestion is that there be a way whether it's through an expedited review period or reduced costs or some sort of incentive to encourage multi-family or community type wells and therefore not have a more spread out development pattern that has greater impact on local resources.

Richard Eggart Dixon I'd like to address a couple of concerns I have about the interim agreement. I think that currently, the state licensing process for wells does not take into account the ability of a watershed to maintain its current uses. The State process allows

drilling to go first and then and a permit sought afterwards I think the process should be reversed I think the permits should be based on the availability of water before a new permit is issued I think another consideration that isn't taken into account in the current license process is the cumulative effects of several wells and other natural streambed recharge and things like that I think that all these cumulative effects ought to be taken into account before a permit is allowed

A part of the long-term compact I would like to state that I strongly support the Tribes position Thank you

John Brueggeman State Representative from House District 74, Polson and western Lake County I'm glad to see we have a proposal for an interim agreement My only question is under item number ten, yet to be resolved, I'd like to know from the Tribal and State perspectives, what are the issues or problems that both negotiating teams have with changes to existing uses I think that's going to be a pretty important part of the interim agreement, should we reach one

Anne Yates I like this question We don't have any problem with changes

Clayton Matt We've come a long way in trying to develop an interim agreement I think the important part of this is that you recognize that there is conceptual agreement on the nine points that are on the table right now The Tribe has come a long way in making some decisions in getting here We were first asked at the last negotiation session to consider the interim agreement Without such an agreement, there is nothing Zero Consider that

With such an agreement, we can try to move something forward, we can try to fill in the gaps and try to find a way to move some things forward while we define the long term administration plans for the reservation The interim plan is not intended to solve all problems It will not solve all the problems We do not intend to go into an interim administration plan to solve all the problems This is not the administration plan for the reservation for all time This is interim, this is temporary We will define a water administration plan for the reservation that will be permanent This is not

When we first began discussions over the interim administration plan then we were first faced with an issue that John raised, 708, I'll refer to it as state statute that really put a roadblock, we believe, in our discussions in trying to find a way to move forward We came back with a proposal to try to get around that We appreciate the States acceptance of some of our ideas We had to be creative We tried to find a solution to get around that and we think that some of this proposal reflects that

In our discussions, we started off by talking about a very narrow focus on some very limited number of problems throughout the reservation for interim purposes At this time, as was discussed by both the Tribal and the State attorney, there are only a few problems out there that we really need to address However in the discussions, the Tribal Council agreed to expand into something that is a lot broader than just a narrow focus on a few

problems throughout the reservation to just try to get us by So we took another step Then the Tribe agreed to a request to the stays on the two cases So in each instance, the Tribe has been very supportive of getting this process, accommodating this and trying to get to some kind of agreement and we know have conceptual agreement on nine points I think that's the important part It was a Tribal Council decision at this point it is their position that the changes, the limited number of changes that we're looking at out there right now that we would have to address a very small number

Second, the kind of problems that we do see in the very limited number of changes that we have discussed can be addressed and can be dealt with There is a solution to each of those problems by applying steps one through nine in this proposal So anything we do in this proposal can provide a solution to someone who needs the resource So there is a solution there Changes aren't necessary to facilitate that solution That's the analysis we've made of it at this point

Rick Smith Lake County Resident I would first like to thank the Compact Commission for having the hearing in Polson I hope all the meetings in the future can be here It is certainly more convenient for the residents I would also like to thank the Compact Commission for this conceptual interim agreement I would hope that you would approve it I ask the technical committees to continue to work on it and refine it and go into details A lot of work has been done and a lot of progress and I'd like to thank everybody that has been involved with it

I do have a question, point number four on how the review will take place What if the State and the Tribes had very different criteria? How would that review process work if you look at very different perspectives for it? Thank you

Clayton Matt We could play "what if" games all day and I think we'll cross that bridge when it comes I don't know that we're going to have different criteria I think that's something that the technical teams, legal teams are going to have to hammer out I think that we have looked at what the initial criteria are for under State law and the technical components of that and all of that So it's a good place to start and we're going to start by looking at that and if we have anything additional to add its not going to come out until we have at least conceptual agreement on it So if we have conceptual agreement on it then that shouldn't be a problem

Well at that point, since we accommodated a request to take questions and during the comment period I guess we didn't actually finalize and say the negotiation parties agree in concept to continue to develop the details of this proposal Do we have agreement on that? To develop the details and bring the details back to the next session?

Chris Tweeten Clayton, speaking from the State side want to continue the process and work on filling in those details because we realize the public can't really understand how this is going to work until we flush out the proposal with the details So we certainly need to continue to do that As far as agreement is concerned, as we indicated at the last meeting that we had, final agreement from the state side comes from the governor's

office. When we come up with a proposal that is agreeable on the negotiation team we will advocate as strongly as we can for the approval of that and the presentation at the legislature if that's what it takes. At the level we're at now I think the consensus of those nine points exist. You have to understand we're not the last word on the State side just as you're negotiating team is not the last word on the Tribal side.

Chris Kenney: From the United States perspective, obviously we've been on this team and we're not going to be signatory to a large extent for our own reasons. When we were in Missoula last, the condition that the state set was this is important. We recognize the importance of it and the State said it was important to deal with this crisis in order to facilitate negotiations. I think we have substantially done that. I would argue that we need to go ahead and finish what's been started. There is no reason not to take advantage of the good work that's been done.

Clayton Matt: The work groups will do that then. We appreciate that. We will take all the comments that were made here today very seriously and take a hard look at them. With that can we move onto some closing remarks?

Closing Remarks and Summary

Clayton Matt: To summarize under the claims examination work, the Tribes will discuss options and bring some of that discussion back to the work groups in terms of how we approach claims examination but it's our position that claims examination needs to move forward. We believe there's a public role to play in trying to help get some funding for the state to move forward with the claims examination and in our process we'd like to focus on the Jocko, I think we talked about that at the technical group, if that would help facilitate the narrowing of the funding issue that might help to continue with that.

On the data side, the Tribe will consider its method of sharing data but at this point I think as long as we're making progress. Our goal is to get in the Jocko basin, get through all the data, accept as we can, get to the model and get moving on with the discussion of the model. That is our goal and we've made some progress and we'd like to continue to make progress.

The administration, I think we just talked about the outline. We'll take the outline back to the working group and begin to develop the details of each of the points that are here. We understand there needs to be some legislative approval and therefore public support of this and so urge you take a real close look at this and follow this and provide that public support, public support is needed for concluding some sort of an interim agreement because the Tribe has spent a lot of money over the years developing the data and we will be providing that data and we will share our data carefully as we go through the process. We urge the State to find the money to contribute to claims data to this process. That's going to be an important component to that and we believe there is a role for the public to play.

We want to get through this interim process and get on with the long-term discussions. We haven't begun that. We don't think that needs to be held up any further. We should begin those discussions but we've been very busy with this process and we'd like to get done with it so we can get on with the longer-term discussions.

Claims examination is an important part of that and its going to be important not only for Tribal understanding of what the resource is but its going to be important for the public's understanding in developing greater certainty of claims you filed and that's important information to this process. We look forward to that. Those are the summary and concluding remarks that I have.

Chris Tweeten: I don't really have anything to add in terms of substance to what Clayton has outlined. I think that is a good summary of what we talked about this morning and of the tasks that lie ahead for us. I just want to emphasize, as most of the people in this room know, there is a long, long history of dispute between Tribal members and non-Tribal members on this reservation with respect to water. The history of cooperation and agreement on that subject is in contrast, very short. I think we're moving in a direction of reaching, what I think is going to be a historical first step in getting the Tribes and the State together on, an approach to water and I'm encouraged by the progress that has been made. I think we need to continue to exert ourselves to keep that momentum going and to get the interim agreement done and take to the legislature. Let's take it to the legislature and let's get it passed. Let's move on to the other issues that confront us but I don't think necessarily they need to divide us any further.

Chris Kenney: I don't think I have anything to add, either except work, work, work, work. Let's do work. We've gotten started, it's time to do work. That's it.

Clayton Matt: I will say that we need money, money, money, money. With that our next meeting we tentatively scheduled or agreed to schedule our meetings at regular intervals about four times a year. It's been a little longer than a quarter than when we last met but I think I'd like to try to at least keep the idea going that within about three to four months we're going to have our next meeting. So without pinning down a date, does that look like an idea that we can stick with?

Chris Kenney: Yes, that's great.

Clayton Matt: Very good. We're just about ready to finish and I see a couple of hands in the audience. Are these comments?

Don McMillan: When scheduling meetings, I'd be interested if you feel you're going to be able to meet again or the interim water group is going to be able to make some kind of final proposal that you'll accept that you can be before the legislature to get it passed in this legislature.

Clayton Matt: That is the goal. The regular session not the special session. Meeting adjourned.

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