

## DRAFT MEMORANDUM

TO: CSKT Negotiating Team; Jay Weiner, Susan Cottingham, Sonja Hoeglund, Bill Greiman, Stan Jones, CSKT Files  
FROM: Joan Specking  
RE: Draft Summary of December 17, 2008 CSKT Negotiating Session, KwaTaqNuk Resort, Polson  
DATE: December 17, 2008

Chairman: Chris Tweeten  
Agenda (Attachment 1)

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

CSKT Chairman James Steele made his opening statement for the Tribe and thanked people for the public interest in the negotiating sessions. He said equates the process to watching grass grow, yet it affects all people on the Reservation directly and indirectly. To him it is one of the most important negotiations going on in the water rights arena. One thing he hears from people out on the street he would reply to by saying Indians do pay taxes. The Tribes are one of the largest taxpayers in Lake County with nearly \$200,000 per year in property taxes. The Tribes are a very important part of the community. The agreement made in 1855 was with Isaac Stevens, the governor of the Territory of Washington when Montana was not yet a state and Lake County was not formed. He said this is the homeland of the Salish Kootenai Pondera people and he explained that the Salish people were forcibly removed from the Bitterroot Valley by gunpoint and the Kootenai people have had interactions and fights with the government and military also. They did not fight the United States with guns but they gave up a large chunk of what is now Western Montana. What they do here with the water rights includes an important spiritual aspect. Some people say the Tribes will take all the water away and that's not true. That comment was made back in 1988 when the Tribes had to fight John Melcher of the U.S. Senate when he put a rider on a bill to keep the Tribes from managing Mission Valley Power. He said if the Tribes were as vindictive as some people like to make them to be there would be a lot of people without electrical power today. With that, he said he appreciated everyone being there and wished all a Happy New Year.

U.S. Federal Team chair Duane Mecham thanked Chris and said he would save most of his information for updates as they go through the agenda. He pointed out that there is an afternoon meeting regarding settling the reserved water rights for the National Bison Range. Fairly early-on in the process the federal team was asked if the CSKT and NBR efforts could be coordinated and with the help of Meg Estep (FWS) there was a resolve on the federal side to work those two issues together. He said they are looking forward to the State legislative session and any activity that comes out of that and noted that John Chaffin was at the Commission meeting to let the State know the federal governments thoughts. He did not have updates for the administration other than there is a good transition team in place who are familiar in the water rights process and are interested in being fully briefed.

Chris Tweeten said from the perspective of the State's negotiating team they are pleased to be there to sit down and talk about the issues. He hoped they would end up with an agreement useful to everyone and they look forward to a productive discussion.

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

Jay Weiner said they are continuing to work through comments they have had on the Tribe's most recent draft of the ordinance. The parties have agreed to look at a collaborative management process. The basic idea is that they are talking about a State-Tribal management process for all the water on the Reservation. When they talk about the Unitary Management Proposal that is what they are talking about. As many know, the Tribe's proposed an initial draft of what would be a Tribal law ordinance that would need to be paralleled in State law. They had an initial draft of that in July and spent several months with the Tribes, the Commission, and DNRC looking at that draft. The Tribes put a lot of work into it and there were a lot of policy concerns and significant issues of water management raised. The State continues to explore the ramifications of the proposal and how they might be able to put something together that's acceptable to the Tribe's goals and to the State of Montana. They have done a series of legal discussions and are awaiting a revised draft from the Tribes reflecting comments the State has made and they hope that when they have a revised draft that they will release it to the public as well as a list of critical policy questions.

Rhonda Swaney said the draft is under internal review and they hope to give it to the State as soon as possible.

Chris said the unitary management is something they are doing from the ground up and there are a lot of things they need to work through. They will then reduce the concepts to writing which is a difficult process. They will have another iteration of the document for folks to look at in the future.

#### **5. Other Technical/Legal items for Discussion**

Jay said it is important regarding the Level 1 and Level 2 Hydrographs to remember that the hydrographs are curves. The Level 1 describes actual water use on the Reservation. They have roughly 60 gaging points and they are looking to try to make sure that the curves take into account all the data available to them. They believe if the curves are in place as accurate descriptors, from the Commission's perspective, it is a tool they can use to protect existing water users and from the Tribe's perspective it helps establish some baseline protections for fishery and other ecological purpose flows. In the 1980s, in court, the Tribes won the right to establish a series of interim instream flow levels on many Reservation streams. They were constant volumes over the course of the year which is not optimum for fish biology. The Level 1 descriptive curves reflect the actual volumes over the course of a year. The technical teams want to continue to refine the Level 1 curves to make sure they are describing things correctly. Along with crunching the flow data the Tribes have generated, staff members from the Commission and the Tribes sat down with the NRCS to talk about forecasting. One of the things they hope to do with the Level 1 Hydrographs is to turn them into practical management tools so there are on-the-ground adaptive management strategies taking into account the variable conditions of a water year. They need to incorporate the forecasting into that. With the NRCS tools they hope to have the model in place to run along side usual operations so they can field test where they are in development of

the curves. It is a significant technical challenge to make sure that the stream data, irrigation data, fisheries data and forecasting fit together. They do not yet have a completed project to show but a lot of work is going into it.

A discussion began recently about what the Level 2 Hydrograph curves should look like. The difference is that the Level 1 curves are the Tribe's efforts to be responsive to the State's goal of protecting existing users. Under current conditions they do not fully reflect what the Tribes believe to be appropriate stream flow levels nor does the hydrograph fully account for future uses that the Tribes would like to develop for consumptive and non-consumptive uses. The purpose of trying to develop the Level 2 curves is to look at what the level of the Tribes future development would be. The reason for the negotiations is that the Tribes have significant senior but yet unquantified water rights. They will look at high priority streams, management changes, infrastructure changes, the introduction of new water from Hungry Horse, and looking at federal funding sources to make some of these things possible. The interface between the Level 1 and Level 2 Hydrographs and the collaborative management is that ultimately they are talking about having a State-Tribal entity to administer the water rights. Hungry Horse is a whole new set of complications – there are many pieces in play and they continue to work at a staff and technical level. They want to make sure the technical work provides a strong foundation for policy decisions, etc. to be made in the legal and political arena. That is why this is time consuming and slow-going endeavor.

Clayton said Seth Makepeace, the Tribal hydrologist, will talk some more about the technical work. Seth explained that a hydrograph is simply a flow volume moving down a waterway each day or seasonally and that they may be characterized many ways as an available tool. He said they have talked about efforts in the Jocko Valley and now they have broadcast their efforts into the Mission and Little Bitterroot Valleys and are looking preliminarily at those results. He clarified that the Level 1 flows and the protection of existing condition flows do not support spring freshets or ecology in numerous streams and represent a significant compromise to the Tribal resource and the Level 2 flows are a way for the Tribes to secure their future uses. Regarding Hungry Horse Reservoir modeling, the BOR hydrologic engineering modeler came with her initial modeling results. That model had a fundamental assumption that new water would come out of Hungry Horse Reservoir. They have taken that work and in January/February will model an alternative scenario where the water is a natural flow diversion out of the Flathead River that only looks to Hungry Horse Reservoir in years of significant drought. It is a different modeling scenario to look at. He recently visited with the DNRC folks and said they have invested well over a half of a "man-year" to field verify irrigation permits (113 post-1972 irrigation permits). Now they are mailing initial findings to land owners and once they are complete with land owner agreements they will be available on the internet. The next step will be to look at Fish and Wildlife and other large depletions. Regarding the canal seepage study, the State has finalized selection of reaches and has started to purchase equipment and will be contracting with an engineering type consultant for the work in the spring. He added that the Portland office has already run some forecasts which will be placed on the NRCS website in Montana and then they become an institutional part of NRCS workload. The forecasts will be seasonal, starting in March, and there will be peak flow day and daily forecasts also. They will also produce a low-flow forecast in the south fork of the Jocko where there are instream flow compliance issues. He noted they had an opportunity to look at the RWRCC mapping of existing

uses and they are putting significant energy into remapping irrigated lands, comparing them to tax base and irrigation project assessment records and understanding what is happening on the ground in irrigated areas.

Chris Tweeten said the reason all the technical work gets done, is that to balance the Tribal needs against the protection of existing uses they need technical data about what water is available on the Reservation to divide up. He said both parties benefit if both water uses can be sustained and that the State and the Tribes benefit from protecting fisheries. From the State's perspective, maintaining the economy of the area by protecting irrigated agriculture in the valley is important. If they were to litigate the claims the division of the water would be a zero sum situation. In negotiating they can find ways to adjust the interests of both sides to divide up a resource without one side taking something away from the other. He said that's why it is so important to make accurate decisions to get this done and that the technical staffs are extraordinarily competent and hardworking. He hopes folks will be patient while they get the work finished.

Duane Mecham said he would endorse Chris's perspective on this effort. He noted regarding Hungry Horse that on the federal side they are trying to stay coordinated with all federal entities with an interest; they will be working with the U.S. Fish & Wildlife Service and they have shared with the Bonneville Power Administration the first modeling run and they will be sharing the subsequent modeling run.

Clayton Matt said the CSKT takes these negotiations very seriously and among the priorities the Tribal Council has to juggle they have made a great effort to do two things: 1) represent themselves at the meetings by the majority of the Council attending and 2) with regard to protecting instream flows and the economy of the county it was the Tribal Council that made it clear that there is an interest there and it was the Tribal proposal that suggested protecting existing uses and all the claims and permits made that they are verifying - they are doing that in a good faith attempt to that end. That goes a long way toward protecting the local economy. Another example of the Tribal effort to make this work is the Tribal element of the proposal to defer Tribal future uses which is part of the Level 1 and Level 2 Hydrograph discussions. The question then is how they get to the Level 2. Jay listed off a list of future use components which he thinks are right.

## **6. Question and Answer Period**

Chris noted there was a microphone set up in the middle of the room for questions to the Teams.

Ron Trahan asked when they started the National Bison Range negotiations and said he thought the waters up above there were priority. Chris Tweeten said the U.S. Fish & Wildlife Service manages the NBR and the Commission has negotiated with them for reserved water rights on other units. Early in the process they agreed at the Tribe's request that it would be appropriate to defer discussions of the NBR until they could be taken up in the context of the broader discussions with the CSKT. Through discussions with the Tribes it now appears to both sides that it's appropriate to move forward with discussions on the NBR. The consumptive uses on the NBR are fairly limited and their instream uses include animal watering – from the Commission perspective it does not look like any of those will make a huge difference as to how they

negotiate the reserved rights of the Tribes. They are prepared to go forward with discussions on the NBR so the agenda is attached.

Clayton said that the Tribal Council wanted to make sure that the NBR water rights were somehow folded into the Tribal settlement. The draft that is out there now apparently looks pretty good according to the attorneys in describing the way the water rights for the NBR will be folded into the administrative plan in the Tribal settlement.

Duane said he endorsed everything said so far. The federal side did take up the request and committed to having close coordination for these two compact efforts. On the administration front, in terms of an intersection with the two efforts, they have been able to confirm with the FWS that if there is a compact with the CSKT and a unitary management arrangement, that the administration of the NBR's water rights would be under that ordinance.

Chris said the draft for the Bison Range proposal is posted on the Commission's website.

## **7. Other**

Chairman Steele said he wanted to clarify that regarding existing uses there are a number of Tribal members involved in agriculture as a profession and he would like to remind everyone that there is a Tribal constituency involved in agriculture and that's part of recognizing the existing uses. The other thing he wanted to touch on is the talk and debate about issues relating to the extension. Senator Juneau has been kind enough to put that forward and they are in the process of finding cosponsors for the legislation to extend the Commission sunset. With comments that Jay and Seth had made on water forecasting starting in January for most of 2009, in his mind it seems logical to have an extension of the sunset. His concern is that they have been on a tour of sorts to get an extension and they have a letter of support from Flathead County which they appreciate; a letter from the FJBC; the City of Polson; City of Missoula; the State Tribal Relations Committee, and he thinks they have one from Missoula County. They are going to be soliciting a letter from Sanders County. He said as they talk about the bill specifically they are getting various messages from the State; various policy folks said they would be supportive after the election; Chris mentioned that the previous stand of the State was to not support an extension. Chairman Steele is wondering if the State would be supportive of an extension; in light of the water forecasting schedule and purchasing of equipment is occurring to do that also. At this point, he said they have a meeting with the governor set up on January 6<sup>th</sup> and the extension will be one of the topics of discussion. He asked when they could get a consistent comment from the State of Montana as to whether they are officially supportive of an extension; and he recognized that it is tough asking the legislators or governor's office – the governor's office was indicated to him as the official voice of the State and officially he has not heard from the governor but the governor's staff has said not to worry about it. He is trying not to worry about it and they are going to gather support in the community. The Tribe's commitment to getting information is clear; they offered the Tribal website to put information out for the community. They have met with the NW Realtor's Association in Kalispell and a lot of folks. He would appreciate from the State knowing if there is a desire to see support for an extension; if there will be an extension – he would appreciate knowing it and the public would appreciate knowing it. It would be nice to not have to fight the State on this as they did in the last session. He said they will be soliciting the governor's support and he would appreciate the Commission

visiting with the governor and encouraging his support. The details of the extension bill then get into whether they are planning on supporting four years or two years. He has heard that there is a desire to limit the legislation to the Flathead compact and not include Turtle Mountain allotments in eastern Montana. He expects they will be looking for letters of support from the other Tribes – the Blackfeet compact will be presented in this legislative session. He will also be encouraging the Montana-Wyoming Leaders Council to support an extension. With that, he said he would appreciate an answer from Chairman Tweeten as to whether the governor plans to support an extension and if so, what number of years. If not, why not, and he would appreciate comments on that.

Chris Tweeten went back two years to when legislation was introduced to extend the Commission and the position was that there was no interest in prematurely ending negotiations on a compact but that it was premature to talk about extending the Commission when they weren't close enough to the sunset date to understand if an extension was necessary to complete the job. He said two years back there was no way to predict whether the sunset would impede the completion of the job or not. As the work was done in the last two years, and everyone can see a tremendous amount of progress was made, what they have done is isolate the issues that need to be worked on and much scoping and technical work has been done. He disagrees with Chairman Steele regarding the governor's position opposing an extension. The issue was not whether or not the extension was a good or bad idea; the issue was timing. A lot of energy was expended on the extension issue but the State has never changed its position that there was no desire to pull the plug on negotiations on an arbitrary date and as the deadline for the sunset approached they would have a much better picture of whether an extension was necessary and how long it would need to be. The third moving piece in the extension discussion has to do with whether it should be extended only for the CSKT negotiations, and the fourth piece has to do with claim filing in the unlikely event that negotiations are unsuccessful. The filing deadline issue is not simple and has to do with deadlines for the water adjudication as set by the legislature. An interim deadline of 2015 was set with the plan to finish the adjudication by 2020. In talking to DNRC, concerns have been raised as to how long the claim filing deadline should be extended. The Commission has been meeting with the governor's office and discussing these things all along. The governor is prepared to say that he does not oppose in concept an extension but he is not prepared at this point to commit to supporting any particular combination of these moving pieces at this point and they think Senator Juneau's bill will probably be the vehicle that produces an extension if the legislature is willing to agree to one. The governor does not want to see the negotiations terminate and his office is not going to oppose an extension. He and his staff look forward to having discussions with Senator Juneau about some of the issues. That is a status report on the Commission's side and he would be happy to answer any questions.

Terry Pitts, Councilman, noted that Chris said there were four issues there and an extension only to the CSKT and he is wondering why they wouldn't go case by case instead of pitting one Tribe against another...Chris said they are not pitting any Tribe against another. They have finished negotiations and the other compacts are in various stages to go before Congress or the legislature. From the State's perspectives the compacts are finished and the question that needs to be grappled with is whether a broad-based extension that is open ended will invite disputes about whether other compacts can be reopened. They need to evaluate the dangers of that. Chris said he thought he had explained the governor's position which is that he wants an extension bill

he can support and he is not opposed to an extension. He is not prepared at this time to offer his unqualified support to Senator Juneau's bill because there are these moving pieces that need to be nailed down. There is no reason to think that is not going to happen before the bill is heard in the legislature. The bill has been pre-introduced already so the hearing on the bill will come early. The way these matters ordinarily get settled involve discussions with the bill sponsor and the governor and his staff will want to have those discussions with Senator Juneau in a matter that nails them down with respect to the State's concerns and addresses all the issues in a way that's satisfactory to the governor. He is not ready to commit to that now although he is ready to commit to the idea that an extension is a good idea in principle and he's not going to oppose it. Chris said he hoped he explained things more clearly and that without speaking directly for the governor he is optimistic that all the issues will be nailed down so the bill will go forward with the governor's support but they do not know that at this stage.

Terry Pitts said they do not have the full picture and they need to get this right. As Chris stated they need a lot of technical data and they hope folks will be patient. He is confident that everyone will be working toward that with the governor.

Clayton said among the moving parts Chris listed, what about implementation and if the sunset bill is made CSKT specific does that potentially put other Tribes in a position of being not so likely to support an extension for CSKT. He noted most of the other Tribes are or will be in implementation and asked what is anticipated in regard to the implementation component. He asked Chris to address the issue for clarification. Chris said the Commission's position with respect to that has not changed – the budget that was adopted two years ago provided for a transition plan to move from negotiations to implementation and that is in the governor's budget now. There is a contingency plan that has been discussed; they have talked about it with the Tribes before and none of that has changed. In the event the extension goes through the intention is to basically reverse the change that was made two years ago from negotiation to transition and go back to negotiations. They have talked to the governor's budget director and he is prepared to implement it if the sunset date gets moved and everybody recognizes that if there is an extension the budget will be adjusted accordingly. With respect to issues with the other Tribes, all of the Tribes have approved some form of a compact to go through the Congressional ratification process. All of those compacts involve some sort of approval by the Tribal Council or by a referendum and several are awaiting Congressional ratification. The Commission's position is that that they have agreement with those Tribes so they don't see a reason any of those Tribes would oppose an extension limited to CSKT. There are differing opinions among some Tribal members but the Commission does not want to give the idea that those compacts are anything other than finished as far as the negotiating teams are concerned. The governor has not taken any position yet with regards to that and they will have discussions on that.

Duane Mecham asked if part of the issue with other Tribes is, if they don't have a federally legislated confirmation of their agreements, are they facing a filing deadling? Would their concern be more with the filing deadline? He is wondering if other Tribes would have an issue with the length of a filing deadline as opposed to the scope of the negotiations. Without federal legislation the United States on behalf of those Tribes may be in the position of having to file claims even though the State has approved the compact. Chris said the Commission consider themselves to be in continuing negotiations with those Tribes who have compacts before

Congress for ratification. They do not view the filing deadline as being imminent while compacts are submitted to Congress and Chris does not see a reason to be concerned about that issue. Ultimately if Congress does not enact a compact bill and the deadline set by the legislature is approaching, the legislature will have to reconsider that deadline. If the time comes, an arrangement would have to be made to extend the filing deadline while the compact bill moves through Congress.

Duane said they had Michael Bogert at a meeting several months ago and he endorsed in that session the unitary management and Hungry Horse discussions and the federal team is looking for a letter from him confirming his support for those approaches. In October, Duane distributed the “federally preferred language” for dealing with waivers and the settlements anticipate the federal government and the Tribes will waive their water rights in exchange for their settlement provisions. The waiver language comes out of a lot of legislative activity in Congress. They urge that the parties actively discuss this among themselves. They received comments from the Tribes and they are looking at those and he anticipates a discussion of the scope and effectiveness of waivers. On occasion they have talked about federal litigation based in federal district court in Oregon which is the challenge under the ESA for the federal dam compliance with the ESA. As of that day the legislation has been fully briefed. The plaintiffs have requested additional flow augmentation out of Hungry Horse and the U.S. will be filing their objection to that injunction motion in February. Chris said an impediment that has come up in the Crow and Blackfeet legislation is the waiver issue where it came up at a late date. The idea of getting the waiver language hammered out before a bill goes to Congress he thinks is a great idea and they look forward to discussing it.

## **8. Public Comment**

Ron Trahan said he had a concern regarding the sunset and he asked if the public knows what their risks are if the sunset occurs. His understanding is that the people will have to take the filing issue up themselves. He would like to see more public information about it. Chris said they discussed that one of the benefits of negotiating is that they get to settle more than a quantity of water. If one of the parties withdraws the issue will go to the water court where the only issue will be the quantification of the right and the priority date. The water court will not take up administration or balance the needs of those on the reservation. They have had those discussions in a lot of these sessions and he thinks there is a pretty good level of understanding by the public. One thing he thinks will go forward is the opportunity to have some meetings with the public on a personal level. In the past they have had Open House forums where people can talk about various issues. The Tribes and the State anticipate that education sessions will go forward before they have a compact during 2009. Susan clarified regarding non-Tribal claims in the adjudication that those claims would still go forward through the adjudication whether they have a compact or not; they won't all be wrapped up in a compact. In this process the Commission is settling the Tribe's water rights and doing it in a way that protects existing users. They understand they need to go up and have meetings with people. Ron asked if there was a place people could call to ask questions. Chris said they can call Commission staff; look at the website, and can even call the Kalispell regional office with some questions. Clayton thanked Ron and said the CSKT has continued to make the point that while all claims will go to the Montana water court some day, there will be a significant difference if they have a settlement that protects those claims or if they don't have a settlement. That is the big difference; if there is not a settlement people will be



defending their claim in Montana water court against the Tribal claim. In this process, CSKT has offered to protect existing uses. Chairman Steele said the Council has met with the realtors and other agencies; he also noted the State has put a lot of information on their website and the CSKT has also. They are open to visiting with people on that issue and would be glad to answer questions. Ron said he would like to see the media at the meetings and see something in the paper. Chris said the Commission mails notice of meetings to hundreds of people. Chris said they would love to see the media do more coverage on the issue. They do get good coverage from the local papers.

#### **9. Set next Negotiating Session Date**

The next meeting was set tentatively for Wednesday, January 28, 2009. The United States will chair the meeting. Chris noted that they had discussed having the next session in Helena due to legislative commitments, and asked if the Tribe would consider that. Clayton said he routed the information to the Tribal Council and said they will talk about it at the next meeting.

Carol Lankford asked if they could invite the governor to the negotiating session. Chris said they generally have senior members of the governor's staff present but given the governor's schedule it could be difficult. Clayton asked who would invite him and Chris said an invitation from the Chairman and the Council may be best. It was asked if the meeting date could be on an earlier Wednesday in January and Chris said it would be best due to the mailing schedule if it could be nailed down a couple of weeks in advance.

#### **10. Closing Comments by the Negotiating Teams**

Chairman Steele said Merry Christmas and Happy New Year to the teams and everyone, and he is looking forward to lots of changes in Washington D.C. He gave his appreciation for public participation. Duane said Happy Holidays to everyone. Chris said it would be great if they could have a gift for the community in the form of a compact next Christmas. They are encouraged with the pace things are going. He is confident that no one has the desire to end the discussions as long as they are going in a productive direction.

Meeting Adjourned.