

MEMORANDUM

Minutes of Confederated Salish & Kootenai Tribe Negotiating Session
September 13, 2000, Helena

Chair: Chris Tweeten

Flathead Negotiating Session
Eagles Manor, Helena, Montana
Wednesday, September 13, 2000

All Present at Negotiating Table:

Chris Tweeten, State Negotiating Team Chairman
Susan Cottingham, State Negotiating Team
Faye Bergan, Legal Counsel for State Negotiating Team
Tara Dupuy, State Negotiating Team
Gene Etchart, State Negotiating Team
Aimee Grmoljez, Legal Counsel for Governor's Office

Fred Matt, CSKT Negotiating Team Chairman
Patrick Pierre, CSKT Negotiating Team
Jami Hamel, CSKT Negotiating Team
Lloyd Irvine, CSKT Negotiating Team
Darryl Dupuis, CSKT Negotiating Team
Dan Decker
Clayton Matt
Kevin Howlett, CSKT Negotiating Team
Rhonda Sweeny, CSKT Negotiating Team
Francis Auld, CSKT Negotiating Team
Robb Hunter, CSKT Managing Attorney

Chris Kenney, Federal Negotiating Team Chairman
? Robert Grace, Bureau of Reclamation, Federal Negotiating Team
Scott Miller, Solicitor's Office, Federal Negotiating Team
Bernie Burnham, Bureau of Indian Affairs, Federal Negotiating Team
David Harder, Department of Justice, Federal Negotiating Team
Cheryl Willis, Fish and Wildlife Service, Federal Negotiating Team

I. Opening Prayer & Drum

II. Welcome/Opening Statement/State

Chris Tweeten: State has been doing water right discussions over the last 20 years with varying degrees of success but we have always developed trust between the negotiation teams. This is essential for success in bringing a compact to the legislature, to congress and for implementation.

We still have a ways to go to achieve this. If we can develop a level of trust and cooperation between all parties, the state will do what is necessary to get this to the legislature and to Congress.

III. Opening Statement Tribe/Federal Negotiating Team

Fred Matt: Water is sacred for our people. There is commitment, dedication and spirit here and we are committed to do what is necessary.

Patrick Pierre: We have a different perspective on water resources, land and aboriginal territory. Water is not only utilitarian but medical substance for the good health of people. This resource is not a battleground; we want streams protected because as time goes on, they may become polluted. They need to stay pristine and we need water to heal. Negotiations are totally unnecessary because water is God-given. It is placed on earth for health. There are three elements we cannot live without, water, earth and air. And a fourth perspective is spirituality. Let's not turn this into litigation on a battleground and instead work together. There is no surplus of water. Every drop has a purpose. To us it is precious and sacred. This is the only state where it is still free and beautiful. People want to put claims on surface and ground water; we do not separate these waters. Once again we are crowded into a corner [figuratively and literally]

Chris Kenney: There is a long tradition in federal government that negotiated settlements are preferred settlement all settlements are unique. We are committed to work toward getting negotiated settlement and look for the unique solution for this unique circumstance.

IV. Presentation by Department of Natural Resources & Conservation (DNRC) claims examination process.

Faye Bergan: We use factual information of existing uses on the reservation non-Indian uses in particular background on how state does claims examinations will be topic of presentation. 1973 was the water use act, the adjudication of water rights and permitting process. In 1979 the water court created the Reserved Water Rights Compact Commission and centralized water right records in Helena. All water users had to file for their claims in 1982; stock and domestic claims were optional. The statute for reserved water rights was suspended for negotiations to quantify water rights. Should the Reserved Water Rights Compact Commission reach a sunset date or the tribe terminates, the United States has 6 months to file their claim in the water court. There are 85 basins in the Water Court, and it stays away from basins in and around reservations. The water court is the body to issue an order to the DNRC to begin the examination process.

Presentation by Tracey Turek and Judy on what the DNRC does and where they get an order from the judge. First, an order is issued to the DNRC. Second, we go through pre-exam procedures to familiarize ourselves with the area and order the hard copy files from archives in Helena. Thirdly, a strategic plan is developed and is dependent upon the size of available staff and local knowledge of the area. Next, we gather resources and verify the information submitted to us in the claims examination form. Verification uses aerial photography, water resource surveys, historical data, and old court decrees and old district court cases. Then we do a windshield tour of the basin and are now beginning to use GIS to map water rights. Next, we pull all claim files in the basin, which should include claim form and map. Then evaluate if the

claim is consistent with historic use. We made sure it is the correct claim form, either domestic, stock, irrigation or other form. All information is entered into the computer and an examination worksheet is filled out by examiner. We verify if what they claim is actually irrigated using historic data, water resource surveys, photos and USGS quads. We map what is claimed and map what photo shows as irrigated and can overlay water resource survey. Largest discrepancies are on irrigated land in which case we must contact the claimant (hopefully the records are up – to – date otherwise have to go to court house and find the new landowner). If claimant agrees with DNRC examined acres then claimant amends his/her claim or supplies us more information to support claim. If DNRC and claimant do not agree on examined acres for example, DNRC issues a remark statement and all is entered into central database.

Judy Jeniker: DNRC prepares a summary report for the Water Court. There are 43 review indices per basin that look for specific things including missing dates, dates after June 30, 1973 unreasonable flow rates and fisable volume analysis. This review may involve revisiting original claim forms a contacting claimant. This report is presented to the Water Court and unless there is more clarification asked for by Water Court, the judge tells DNRC to issue a decree.

Rich Aldrich: U.S. is the largest claimant and objection in the claims examination process. We want to see that the claim is filed and decreed as verified and not decreed what was necessarily claimed. The Water Court complies all abstracts and the claimants in the basin are noticed. Each claimant receives a copy of abstract and it is posted in public places as well. If the decree is as claimed (DNRC only issuing remark statements) an objector has 180 days to file an objection. Objector does not have to adversely affect. Notice of objection goes out to the basin and allows a counter objection within 60 days. Water Court refers disputes to water masters who may go to trial but 90% are resolved by settlement. Once objections are resolved, the water master issues a proposed decision and the Water Court issues a final decree. If the basin has not dealt with reserved water rights then judge should not issue a final decree.

Robb Hunter: What is the relevance and how does this process apply to what we are doing in these negotiations?

Rich Aldrich: The compact settlement is noticed by Water Court and objection process dealt with before a final decree. Judge cannot change the settlement.

Faye Bergan: How we use the exam process now and in the past. Current water use is needed by the State because claims contain errors or exaggerations. The Fort Peck agreed to protect a certain volume of water or acres for example. We were assisted by the DNRC to do a claim examination process on the Milk River for Fort Belknap. This is better than doing it ourselves and we also hate to duplicate efforts. DNRC information is more reliable and trusted by the Water Court and the public. On Blackfeet Water Court is reluctant to do an examination because it cannot get the preliminary decree stage so the Compact Commission is doing its own examination.

Robb Hunter: There are many interests at stake here and you're saying you get info from this claims exam that helps in the negotiation process, how are all those interests actually

incorporated into an examination process that gives you info that will allow us to continue forward with negotiation?

Faye Bergan: We are asking for protection for non-Indian water uses and claims exam gives us the most current data as to what those uses are, what level of protection will be needed or what would be impacts to a water user.

Robb Hunter: What about Tribal Interests?

Faye Bergan: What we will talk about this afternoon is all of the technical work that the parties will do upon entering into negotiation and your question would fall into the technical work that we do. This is just about claims examination.

Robb Hunter: If we were to follow through with the process you are outlining now, what does that mean in reality? Are we going to stop these sessions so the teams can get together and actually go out and start doing some ground work, taking into account all the interests involved here? So we wouldn't get back together for a negotiation session for 6 months to a year, maybe two years down the road. How does this play out?

Chris Tweeten: We bring to the table a level of protection and Tribes are reluctant to settle unless they have a good understanding of what those uses are and not relying on the claim forms. The relevance is what level of protection you are willing to offer. This is settlement, not litigation; a simple number will not do here.

Clayton Matt: Where the Compact Commission does an examination, the Water Court does a claim examination anyway. What if these are different, how are they rectified?

Faye Bergan: The Compact Commission does not adjudicate water rights. In a settlement, a level of protection is provided and this is different in each compact.

Chris Tweeten: Done on a case by case basis so all parties have a comfort level with what is out there. We come up with an estimate of existing uses and the Water Court may come up with something different and that the risk we may have to take.

Susan Cottingham: Fort Belknap claimed the natural flow. We looked at the impact of the Fort Belknap claim and tried to mitigate the effects.

Clayton Matt: In presentation, they referred to a lack of resources. Are you getting more resources?

Susan Cottingham: Depends on how the parties agree on an approach. For example there are 296 claims in the Jocko we can begin there, do the hydross and see if the Water Court can order the DNRC or not for claims examination.

V. Break for lunch

Chris Tweeten: We will move agenda item VII to the present and VI will come after.

VII. Other Issues for Discussion

[the following is a partial transcript]

Fred Matt: Reiterate comments, what makes this process kind of difficult for us and one of the common mistakes that is made is Indian People, Tribes, Reservations are put into the same basket and we have always felt and feel we have a unique status. We do things uniquely just in the ways that the CSKT would do them. The process that we want to put on the table kind of comes from that and it's a unique way of addressing these things that we're going to have to address over the next two years. With that, I've asked Kevin if he would give an overview statement that I'd like him to read and turn it over to Rhonda.

Kevin Howlett: Before lunch, we had a lot of references to what's been done in other places [garbled] That being what it is we wanted to get an understanding being the Salish and Kootenai Nation, not the Rocky Boy or Crow or whatever, and that there are significant differences but we are, but what we are about here is our homeland and our water and stopped to pray this morning, is fundamental. So with that I'd like to just read this statement relative to the introduction of the process.

In over the past two decades, the Salish and Kootenai Tribes have expended an enormous amount of resources, gathered data to prepare ourselves for defense of our homeland, for defense of our waters future. We fully understand the complexity of the situation but what we don't understand, and I believe I speak for our government, and don't accept is the process that you've outlined. By your own words this is a negotiation setting. We feel we ought to be able to put our prospectus on the table. We think that that prospectus will provide us, provide the current users of water and provide for future generations with a little more stability and therefore certainty than is currently there. We certainly recognize the anguish that people have of trying to understand our water rights. Again, we believe that this process that we will outline for you is a way to begin to find solutions and I think they are in our best interests and certainly in the best interests of our future generations that we approach this with understanding that our commitment is to our cultural, environmental and governmental purposes and preservation of our homeland. Without getting into a lot of detail on that, we look forward to this presentation and knowing that it is a departure from what we had previously planned with the state [garbled] and this is what we going to go forward with.

Rhonda Sweeny: We heard before lunch the approach used on other reservations in compact negotiations with the verification of the non-Indian water claims, technical information, protection of non-Indian water uses [garbled] quantification of and a settlement which may involve water development to satisfy some senior water right. We don't believe that approach will work on Flathead for a number of reasons. Those reasons include the fact that we have a Stevens Treaty; the only Tribe in Montana with a Stevens Treaty and what that treaty does is guarantee on and off reservation water use. Those water rights go back to time immemorial.

We're west of the hydrologic divide in Montana. Because of that, we're dealing with different quantities of water, certainly water on the Flathead, which is in excess of that which is on the eastern half of the divide. And while we argue about water a lot, I don't believe that anybody on Flathead Reservation has ever gone without water. On Flathead, because we argue a lot, there's been litigation today about the extent and kinds of water rights we may expect. There's also been litigation on the types of resources that we have. And those resources are part of water rights.

We have a very large non-Indian population on our reservation but the tribe owns the vast majority of the land base on the reservation and the vast majority of the resources. And we have higher levels of anxiety about water rights on the reservation as evidenced by the number of suits brought on irrigation and other water related issues. On our reservation, the tribes have worked diligently to [garbled], while you have been negotiating other compacts, to gather information about water on the reservation, about water uses on the reservation, about water quantity on the reservation.

We have achieved a good understanding of the complexity of water rights on our reservation and they are complex. After that complexity are things like the kinds of aboriginal or time immemorial water rights. The fact that we have a Reservation established in 1855 before the state achieved statehood. The fact that we have two separate allotment acts. The fact that we have a Federal Indian irrigation project that we've built over a 50-year period. The fact that we have a variety of homestead patents [garbled] hill sites and town sites [garbled] authorized by legislation. The fact that we have secretarial water rights, hydropower sites, hydropower reserves, water use from [garbled] issued by irrigation projects, [garbled] Walton rights, Anderson rights and so forth. It's a very complex water issue, very contentious. We understand the levels of anxiety people have relating to these complex issues.

And after many hours of discussion, hours of thought, and hours of [garbled], we would like to respond to the traditional approach taken by the state and offer an alternative to the negotiation process. The Tribe's would recognize and protect current verifiable uses, claims, permits and certificates in the Tribal Water Code based on two assumptions. Number one, all on-reservation waters will remain Tribal and number two, the Code would recognize prior appropriation. Secondly, the provisions of the water code would be the subject of negotiation. We feel like this approach is a very natural, a very fair, a very simple concept with many benefits for everyone and there are others on the tribal team who I'd like to call on at this time to talk about these benefits as well as some of the problems related to [garbled].

Clayton Matt: My portion of this, my job here is to talk a little bit about some things that help justify this proposal and I think when I'm done I think it's actually going to go back to Rhonda and then I think back to Dan. Before I say anymore I think we acknowledge a lot of people here in the audience also want to acknowledge another group of people in the audience and we have said things about future generations. But we have brought the future generation with us today and many of the young people who are here, and as we proceed through these negotiations, believe me if you think we are tough negotiators wait till you have to face these guys. That's probably where we learned a lot of our negotiation skills. Going back to a little bit of the discussion we had this morning and maybe getting into some of the technical discussion that we kind of changed the agenda around We did have the opportunity to have a technical team

meeting in Pablo here on August 23rd and we were glad to host all of the members of the Compact Commission technical team and we also had members of the federal technical team present at that meeting. One thing that I want to point out regarding that session that helps feed into this process we are talking about is simply the idea that and expand to on the idea that Rhonda mentioned that we have been working on this process for a long time We have been gathering data for a long time and during that session on the 23rd, the technical team had an opportunity to see that and hear that and I'm sure that they reported that to you but I just wanted to remind you that some of the things we talked about that day.

First of all, for the last fifteen years at least, because it involved extensive hydrology throughout the reservation, looking at both surface water and ground water, with that has formed a basis of information that is being put into an extensive hydrologic model that model was also presented, an element of that model was also presented at that technical team meeting. For many years we have been studying fish and fisheries on the reservation.

[end partial transcript]

Clayton Matt: We had a technical team meeting with all the members of the Compact Commission technical team and members of the federal technical team. We have been working on data for a long time and the Commission team found out the extent of the Tribal work. We presented the joint projects in progress, future use studies, Walton project, and continuing off-reservation work among other things. These lead to the justification of what we are presenting.

Rhonda Sweeny: The Shoreline Protection Board for Flathead Lake has issued permits for over a decade. We have also issued permits on lands in other aquatic environments. We have hunting and fishing agreement. The Tribe has made this effort for protecting resources on the reservation for everyone. We invite public participation in other aspects of administration and processes.

Dan Decker: The tribal government takes responsibility for everyone and considers all residents. We would not cut anybody off. We manage the reservation as a whole. We do not want a process that leaves anybody out. Negotiation does not make sense because the Compact Commission figures out the Tribal water right based on seniority, measuring water rights and those that are junior are left out. If adjudicating Tribal reserved rights makes more tension perhaps a unitary management approach for the State and water resources on the reservation. The state, protecting certain water rights, may be disagreed with by the tribe. An operation by the Tribal government would be similar to the fish and wildlife agreement, which is a sovereign agreement to manage our resources. This would protect permits, claims, certificates and protects irrigators. Our 1855 claim is under federal law rights and not state based. This does not pertain to off-reservation uses, only on-reservation uses and provides an opportunity to build rather than fight. Bringing claims under Tribal Code would cost the state less and the Tribe would take on the responsibility and the burden.

Fred Matt: Think about this process and discuss it. Look at a future date for getting back together.

Chris Tweeten: When the agenda for the meeting was being set, it was suggested by the Tribe to put a proposal on the table. We wanted the proposed in advance so we will not discuss it at this time. Will you put your proposal in writing? I don't understand how this proposal negates the need to gather technical information as we usually do. It seems there is a great deal of technical work done and we need a fact-based handle of water use on the reservation. We have to take this proposal to the public and get their input by scheduling a number of public meetings prior to a formal response to the Tribe.

Dan Decker: I hope the Compact Commission understands we were not sand bagging you. If this is something that causes more anxiety then we don't want that. We recognize that there will be technical work to do. We want a more holistic process than what the state does in protection and quantification before a Compact. We do not have the proposal in writing but will do so.

Chris Tweeten: Claims examination does not have to precede negotiation. They can be ongoing. We have not said that claims are to be protected, just what is actual water use. Giving us the proposal in advance would eliminate a misunderstanding not as you state which is the opposite.

Chris Kenney: The Tribe is in keeping with its rights and this proposal is worthy of merit and the State should give it serious consideration. When would the State be able to hold a public meeting?

Chris Tweeten: We neither accept nor reject the proposal. With regard to public meetings, the upcoming legislative session will take up a good deal of our time (Fort Belknap) so maybe after that, in the spring. It will also take time for you to respond to our requests for clarification.

John Carter: With regards to new permits on the reservation, the Tribe has challenged the DNRC in issuing of new permits on the reservation. We request the Compact Commission to intercede in this process. How can the State still issue permits and try to negotiate at the same time?

Chris Tweeten: We will take that into consideration. Agenda item VI is premature to discuss given the proposal that has been put on the table.

Faye Bergan: Tribe has done a lot of technical work and we want to catch up. We need this level of technical work and can get it one of two ways, share data or start from the beginning. What is the possibility of the Tribe sharing its technical data in order to get the process started? We need to do technical work for any proposal.

Robb Hunter: Mark Roscoe came to the reservation and committed state resources to get this done.

Amiee Gromljev: The Governor is putting together a budget right now and I will bring your request back to the Governor.

Robb Hunter: The Governor may be unclear about what resources are needed and we cannot answer for the Compact Commission what resources they may need.

Susan Cottingham: Depends on whether the Tribe shares data with us. Also, staffing is a complex issue.

Fred Matt: I'm confused because the Governor and Susan say they are short of resources. The Governor said he would commit resources so why is it so hard for you to ask the Governor for more resources?

Susan Cottingham: Staff positions are not budgeted in the cycle and if there would be more staff this would take time to advertise, hire and train them. We will take the issue to the Commission and the Governor.

Chris Kenney: We agree to focus on some hydrologic issues without committing to new hires since the U.S. is going into a new fiscal year. I believe that commitment would be sufficient.

Kevin Howlett: I want the State to hold public meetings because the state needs to be on-board. You committed to negotiation meetings four times a year.

Chris Tweeten: Calls a break for caucus.

Fred Matt: We will have the proposal to you by November 1, 2000 and given the time frame on the legislature, can we meet in December?

Chris Tweeten: December will not work because the staff time is committed to Fort Belknap compact in legislature. Also, the state is not ready to give a formal response without clarification which would take more than a month. State cannot respond without going to the public for input. We will go to the public in the spring. In the meantime you can give us the proposal and we will work on clarification. To what extent will you share data?

Fred Matt: If there was a meeting in December we would give technical information at that meeting.

Chris Tweeten: Can you exchange technical data on a staff – to – staff basis?

Fred Matt: You have committed to public meetings

Chris Tweeten: We have agreed to quarterly meetings but now the playing field has changed, in light of your proposal.

Chris Kenney: Lets get some milestones decided on. The hydrology will apply no matter what and I can put people on it as early as January 20th. We need technical issues as a baseline. Lets keep the dialog going and add something to that process.

Kevin Howlett: What data we release to you hinges on your response and your willingness to look in another direction.

Chris Tweeten: You want us to follow process

Kevin Howlett: There are certain things in our proposal that need to be shared and we will decide what is applicable at the time.

Chris Tweeten: When you submit proposal add what technical data you want and need to share.

Dan Decker: The Compact Commission has offered to exchange information so send us the type of data sets that are relevant to the process and in a usable format. We are not saying we will not sure data.

Robb Hunter: I agree with Chris Kenney in we need to keep the dialog open. What would be the timeline for the Compact Commission?

Chris Tweeten: After the legislature adjourns; we can meet in late April or early May. You can get us your proposal by November 1 then exchange clarification. This would take till November 30. Then you will need time to respond to our questions. After public meetings we can respond to you in mid-May to early June. We can keep the dialog going with the technical teams, have the technical teams share data in December.

Chris Kenney: Okay

Fred Matt: Okay

Chris Tweeten: The state and the U.S. agree that formal minutes and/or transcript are not necessary and there will be no exchange. I will send out a letter outlining timeline and a copy of the tapes.

Fred Matt: Agree

Chris Kenney: Agree

VIII. Public Comment