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Memorandum

To: Susan Cottingham, Staff Director
Reserved Water Rights Compact Commission

CC: Jay Weiner, Attorney RWRCC

From: John Tubbs, Administrator
DNRC, Water Resources Division

Date: 2/21/2008

Re: CSKT Negotiations: Decision Points

In an effort to facilitate coordination for the negotiations of the water rights compact with the Confederated Salish and Kootenai Tribe (CSKT), the Department of Natural Resources and Conservation, Water Resources Division (DNRC) has developed a list of what it believes to be important decision points or sideboards for the State negotiators. The list is not intended to be an absolute prohibition but rather a list of points at which time the Reserved Water Rights Compact Commission (RWRCC) staff should consult with the DNRC before moving forward to commit to a State position. The list is preliminary and general. The list may continue to evolve as the negotiations progress. Also included are preliminary goals that the Department supports and believes the State negotiators should pursue. The side boards are generally as follows:

- 1) DNRC is bound by the Montana Constitution's open government requirement. Any discussion of potential unitary management method must also provide for open government and access to information.
- 2) DNRC is bound by the Water Use Act. The compact should mirror as existing law, procedures and exceptions for new permit and change applications. Issues that must be discussed in particular are, but are not limited to, deviations from the current burdens of proof, determination of "adverse effect," and any procedure other than a change authorization under Mont. Code Ann. §85-2-402 for use of reserved water rights outside the exterior boundaries of the Reservation.

- a. Holders of state law based rights need to be able to come to DNRC to address their concerns.
- b. Administration cannot be exclusively by tribal ordinance
- 3) Reserved rights should be within the Reservation boundaries.
- 4) The goal should be to protect all existing state law based rights, including permits and exempt rights.
 - a. Consider subordination of reserved rights.
 - b. Address the status of existing non-compliant exempt wells, i.e. drilled and in-use, but no filing with DNRC due to the moratorium.
- 5) A goal is to provide for a single-family domestic well exemption for a water right.
- 6) Reserved rights should be defined as to total volume, i.e. a "no call" provision is problematic.
- 7) Encourage the progress of the on-reservation claims examination order.
- 8) Technical data should be developed and analyzed jointly by the team as a whole.
- 9) The issue of expanded acreage of the Flathead Irrigation Project should be addressed. If it is not, there is a potential change issue for the DNRC after the Compact is final, which could very controversial.
- 10) Discuss with DNRC any agreement on off-reservation water marketing before agreeing to it.
- 11) DNRC needs to review any proposed storage before any agreement is made.
- 12) Ground water is a unitary source. Do not differentiate between hydrologically connected ground water and non-hydrologically connected ground water
- 13) Any controlled ground water area issue needs to be discussed with DNRC.

We look forward to working with the RWRCC on this complicated and challenging negotiation. Please don't hesitate to give me a call if you have any questions or concerns.