

RESERVED WATER RIGHTS COMPACT COMMISSION CONFERENCE
SALISH AND KOOTENAI TRIBES
FIRST NEGOTIATING SESSION
November 19, 1984

GORDON McOMBER: To begin with, my name is Gordon McOomber. I am chairman of the Reserved Water Rights Compact Commission. On my left is Urban Roth, who is our special counsel. I should tell you that I've been on the job two years, and prior to that, Henry Loble was both chairman and chief negotiator for the Commission. So, when Henry Loble ran for judgeship and was elected, it has taken two people to replace him; I as the chairman and Urban as the chief negotiator. Mr. Dan Kemmis, also a member of the Commission from the beginning, I believe. Dan is now speaker of the house for at least another few weeks or so. Marcia Rundle, our new attorney, who replaced Peter Stanley, who many of you know. Senator Jack Galt, who also has been on the Commission from the beginning. And Scott Brown, program chairman/manager for the Commission. I know I'm going to be embarrassed on this because I am the only one that can read the writing. I went to school in Canada.

URBAN ROTH: Then it should be better than it is.

GORDON McOMBER: Do you wish to introduce your people, Dan, or Jim, Mr. Pablo, or whoever?

DAN DECKER: I am Dan Decker, and I am currently one of the local counsel for the Tribes. To my right is counselman Mickey Pablo. To my left is Jim Goetz, who has been employed as legal counsel on the water rights efforts. To the back side of the room, one of our technical people is Peg Trochell. Our hydrogologist, lead hydrogologist, Tom Bateridge, who leads up our

water resources program. To Tom's left is Rhonda Camel, who is a rights protection officer for the agency. To Rhonda's left is Bob Delk, who is the area rights protection officer. To his left is Clayton Matt, our water administrator. On this side of the room is Roger Thomas, who is one of the field solicitors in the Billings area.

GORDON McOMBER: Okay, thank you, Mr. Decker.

DAN DECKER: I forgot Diane, can't forget Diane. Diane Campbell, who is taking minutes.

GORDON McOMBER: Well, we were here last summer, and following that meeting you agreed to come back into the negotiations, which pleased us very much. Now, I understand your issue with the Kerr Dam has been resolved, which gives you a little more time, I think Dan indicated. I'd like to start by telling you that our problem with the Fort Peck Tribe has been resolved to the point that they have come back into negotiations. We had a very successful two-day meeting in Billings last week with that Tribe. We are meeting with them again the first of January. We are very hopeful that we can pick up about where we left off before and work towards a mutually satisfactory agreement for both the state and that Tribe. I trust you received the copy of that Memorandum of Understanding signed by the Commission, the Governor, the Attorney General, and the Department of Natural Resources. Mr. Pablo, are you aware of that? Or Dan?

DAN DECKER: Yes.

GORDON McOMBER: I trust also that puts to rest the fears of any that might be concerned that we weren't communicating on a continuing basis with those agencies. We had a little problem

with that, as you are well aware. We are of the opinion now that we have it completely under control and a situation such as that will never happen again. You sent us, I believe, a list of your negotiating team and we reciprocated with ours, and I will quickly run through that again. The negotiating team will be made up of a chairman, vice-chairman, Scott Brown, program manager, Marcia Rundle, unit attorney, and special counsel, Urban Roth. Mr. Roth will be the chief spokesman for the Commission. If we don't agree with what he is saying or we have a question, we'll pull his sleeve and caucus and make a decision and come back and talk to you. But once we get into negotiations, Mr. Roth will be doing the talking. We're sorry today that representatives of the Governor's office and the A.G.'s office of Natural Resources couldn't make it. They have a pretty full schedule with the Legislature coming up. As indicated in the Memorandum of Understanding, they will be involved in our negotiations and in our strategy meetings and will be kept up to date on everything we do, so they will know exactly where they are. Now, following the agenda here, the second issue . . . well, I'm getting ahead of myself. Do you have anything to say, Dan, or Mr. Pablo?

JIM GOETZ: No, I think we can go on with whatever you've got in mind.

GORDON MCOMBER: Okay, well we both . . . very well then, thank you . . . we both were of the opinion that the legislation authorizing the Commission should be extended for a couple of years. Legislation has been drafted and Senator Galt and Senator Joe Mazurik, who are also on the Commission, will prefile it so

it will be ready to go when the session starts. There is an Interim Committee on Indian Affairs. That committee has drafted legislation also, which is a little different from ours. It is our understanding that that will be introduced also. I would tell you that several of the other Tribes have indicated interest in the continuation of the Commission. The Governor supports it, and about every one we know supports the continuation of that legislation. Do you have comment on it at this time?

JIM GOETZ: What are the differences between the Galt bill and the other bill that is drafted by the Interim Indian Committee?

GORDON McOMBER: Marcia, would you run through that for him?

MARCIA RUNDLE: There are, the Commission bill basically extends the period of negotiations for two years. It also adds a section on reporting, that the Commission would report periodically to the water court on our progress in negotiations. And there is an additional provision that unless Tribes are negotiating by the July 1, 1985 deadline, they would not be able to commence negotiations after time. And there is a provision that if negotiations were terminated, they could be reinstated within, I believe, a 30-day or 60-day period. Is that right, Scott?

SCOTT BROWN: Well, the provision reads that if a letter of termination is submitted by either party, and that submitting party wishes to retract that statement before the termination date, which is a 30-day period from the time the letter is sent until termination date takes place, this new legislation will allow a retraction of that statement. But once terminated, then that's final.

MARCIA RUNDLE: Then in contrast to that, the amendments of the Select Committee on Indian Affairs provide, I think there are three basic differences. One is that it adds some language to clarify the status of a compact once it's ratified. It proposes that a compact would be entered into the preliminary decree for informational purposes only, and also that it would be entered into a final decree without alteration. The other provision is that it would allow . . . this is six-month probably, Scott, instead of 60 days, it changes to six months.

SCOTT BROWN: The extension, yes.

MARCIA RUNDLE: . . . the extension for . . .

SCOTT BROWN: If the negotiations are terminated, as it stands now, 60 days after the termination date, which is effectively 90 days after the submission of a letter, then the Tribes or the federal agency involved are required to file with the State. The Interim Committee has requested that that grace period be extended to six months following the termination date, so it's actually 30 days plus the 60 days or the six months, which ever is adopted by the Legislature.

GORDON MCOMBER: I could leave you copies. Any of you happen to bring an extra . . .

MARCIA RUNDLE: I didn't bring any extras, no.

SCOTT BROWN: Weren't you sent copies?

DAN DECKER: No, I didn't receive a copy of your . . .

MARCIA RUNDLE: I don't think so, Scott. We sent some in request to . . .

DAN DECKER: When we met in Helena, I requested some, but I didn't receive a copy of the Commission bill.

GORDON McOMBER: A word of explanation, the legislative fiscal analyst's office considered, well first they approved the funding for another two years, and then they considered the introduction of a bill, and Dan had spoken to them, I guess, last Thursday or Friday, and then I did. They feel the job's done, taken care of, so they are not going to introduce one, but that explains the letter from the fiscal analyst.

MARCIA RUNDLE: Scott, was there one other . . .

SCOTT BROWN: (inaudible) federal congressional . . .

MARCIA RUNDLE: Oh, it adds language that congressional ratification would be sought only if legally necessary, and we're not real clear about it, what the, well, we're pretty clear about what the implications are, but not what the effects may or may not be of that clause.

GORDON McOMBER: At least one tribe has indicated interest in removing the requirement for congressional ratification. It's in our statute and I guess we haven't, we're open on that as far as I know, waiting for input on that question.

JIM GOETZ: Let me ask, it's a little off the point of the agenda, but I think pertinent. That is the legal question of enforceability of a compact once one is negotiated and approved by the Legislature. My question is, has your staff done legal research on that question? For example, if a non-Indian water rights holder challenges it on due process or on other grounds, and if so, whether you would be willing to share with us the research, because one of the things we are looking at down the pike is, even if we can make an agreement with the state, whether that might not be upset by an individual water holder.

URBAN ROTH: Jim, we haven't discussed that particular

aspect, that is, the funding, the joint funding of defending the compact against a due process or some other similar constitutional attack. We're aware and certainly we have discussed the fact that any compact can be the subject of litigation. The fact that you legislate that it is final doesn't of course, as we know, remove all legal impediments or challenges. And with regard to that, we have never discussed taking a position on it. As a matter of fact, you are the first one to bring that up to my knowledge as far as joint funding of a defense. Am I articulating what you have asked correctly?

JIM GOETZ: Well, I wasn't suggesting joint funding of a defense, I am just wondering if you have done any research on that question because I am . . .

URBAN ROTH: You mean the due process?

JIM GOETZ: Yes, I am interested in where we stand, should we spend a lot of time and ultimately reach an agreement, how defensible that is.

URBAN ROTH: Well, with regard to the procedural due process the potential objectors get notice, but as far as the legislation is concerned, we don't anticipate permitting any modification of any compacts within the comprehensive adjudication process. So that if someone has a due process claim, it's going to survive, I suspect, the adjudicatory process. With regard to whether or not the due process claim would have some viability, I guess you could speculate on that, you know, as much as you could about how many angels there are on the top of a pin. There are good and substantial reasons why it's not going to pass muster. There are good and substantial reasons why, I suppose, a due process claim

might survive the compact process. But to, I guess, be pessimistic from the inception that it wouldn't pass constitutional muster, I don't think is particularly profitable. Do you perceive some reason why it wouldn't survive constitutional muster if we compacted? I mean, you know, there are other interstate compacts that have survived.

JIM GOETZ: Yes. Now I don't particularly, except that in my general reading on the subject, one of the nagging questions out there is, how binding can the state be on individual water users through the vehicle of negotiation? In other words, how survivable is your compact going to be when individuals out there challenge it? I am just querrying, I am not anticipating a challenge, but that seems to be one of the lurking problems and I just wondered if there had been some substantive research done on it.

URBAN ROTH: No, but it seems to me that that's something that could be negotiated to survive a challenge like that. I would just throw out some suggestions and certainly they are not meant as proposals, but as long as we are conceptualizing here I will put this out. That would be a savings clause. That would be the first thing that you would want, i.e., if some particular provision of the compact was held unenforceable or unconstitutional, it would not effect the remainder of the compact, so long as the compact as a whole would be administered and enforced according to its intent. The second one would be that as to any particular provision of the compact that was declared unconstitutional or unenforceable, the parties could mutually agree to renegotiate that particular portion and unless the parties agreed, the compact would be subject to renegotiation

after that particular portion.

GORDON McOMBER: Scott, let me you, do you recall this question arising previously?

SCOTT BROWN: Well, yes it has in Missoula (inaudible). We have not discussed it for some time. It wouldn't be well for me to try to recall what was discussed. Dan, you remember some of these discussions about the paribus patria aspect of the Commission acting on behalf of water users and then the Legislature acting on behalf of . . .

DANIEL KEMMIS: I don't think that we've ever come to anything like what we felt was a conclusive answer on the subject. Some of us, at least, have continued to feel that its . . . given the fact that in adjudication of the scope of the statewide adjudication here you really have got to anticipate that everything that can be raised will be raised and, therefore, we have to anticipate that some water user somewhere is going to challenge the authority of the Commission and the state to have negotiated away any of their rights. One of the things that I think needs to be done to hedge against that at least is to at least allow for the raising of those due process issues at some stage during the procedure. Presumably, that might be where objections are raised to the preliminary decree, to at least allow that question to be raised and answered. If there were a way to seek declaratory judgment, clear it away ahead of time, that might be fine, but how you get over just issuability issues, I'm not sure.

URBAN ROTH: The thing is, Dan, and perhaps Jim is thinking of this, with regard to the legislation that the interim

committee has proposed, as I understand it, it would be incorporated into a preliminary decree but incorporated into a final decree without any change. While you have given them at least notice, which would satisfy one aspect of procedural due process, you haven't given them a form for substantive due process and I'm not sure that we can do that. That might make the enabling legislation vulnerable.

DAN KEMMIS: But can't we lessen the prospect of that at least in part by either implicitly or explicitly saying that if people have due process questions of the kind that Jim is raising, that at least those can be raised before the water court at the time the preliminary decree is entered. That that form of objection, at least would . . . we're not going to cut people off from that objection. One way or another, they're going to have their day in court, and it seems to me that we strengthen our due process position by making it clear that the raising of those due process issues is possible at the time the preliminary decree.

URBAN ROTH: But what you are saying is you are going to broaden the scope of the legislation, the enabling legislation to at least acknowledge those kinds of questions?

DAN KEMMIS: I don't know if we would need to, or if it would just be implicit that it could be done. I think we should look pretty carefully at the language of the proposal so that we clearly are not cutting off that possibility.

URBAN ROTH: Well, I think it is a problem, Gordon, with regard to enabling legislation that, and that concerned me when the final decree would go in unchanged. As a matter of legislative fiat, I think that type of legislation could very

well create some constitutional questions where you just flatly say, "Yes, we're going to give you notice, but you can't do anything about it."

JIM GOETZ: But on the other hand, if you give them notice and allow them to contest a negotiated settlement, give them a meaningful opportunity, then are we in the middle of adjudicating the whole question of Indian water rights behind the State?

GORDON McOMBER: That's the question.

JIM GOETZ: That's why I raise the issue of whether you have looked very carefully at, because I don't think either side wants to spend a whole lot of time on this if the end result is going to be upset.

URBAN ROTH: I can tell you, Mr. Goetz, that a former staff attorney did considerable research on that in response to a question from Henry Loble, and I'm sure Marcia we have that in the file somewhere. But again I go back on your memory, Jack and you other people, I believe it was the position of the Commission that the water court was not going to amend the compact once it has been approved.

GORDON McOMBER: But I don't, that I don't know.

URBAN ROTH: Do you wish to comment further on that?

JIM GOETZ: No, I don't think we are going to resolve that here by any means. It's just something that is of concern to us and I am sure concern to you that we ought to keep in mind.

URBAN ROTH: Are you going to do any definitive study on the question, or are we just going to leave it, or what?

(Laughter)

URBAN ROTH: I guess what I'd like to know is, is this going

to be an impediment to negotiations? And if it is going to be an impediment, then perhaps we ought to deal with it or agree to deal with it in some way. If it's just something that is kind of a nagging doubt, that's something else.

JIM GOETZ: Now I guess we feel that negotiations are worth pursuing. Anything you do, of course, entails some legal risks, and something as complicated as this, so that's not going to be an impediment to our sitting down and talking about it. But I had hoped that you had looked at the question and could give us a dispositive answer. I guess the answer to that is, "no."

URBAN ROTH: I'm not prepared to give you a dispositive answer. Marcia, are you going to climb Mount Olympus on that one?

MARCIA RUNDLE: No thank you.

DAN KEMMIS: Could I just make one suggestion?

URBAN ROTH: Go ahead, Dan.

DAN KEMMIS: If in fact we do have any legal research, I wonder if we could look it over and find out whether we see any problem with sharing it with . . .

URBAN ROTH: Yes, I think implicit in what we are saying is that Marcia is going to dig down through the dusty archives and find that opinion, or whatever it is, and distribute it among us here anyway. And then the next opportunity we have, we'll probably discuss it. Marcia, maybe you can dust it off and give us the benefit of your thoughts on it.

GORDON McOMBER: Victor _____ did it.

SCOTT BROWN: Yes, Vic _____ did some research, but I do recall and I think Senator Galt will also recall, at least we came to pretty much the same conclusions.

DAN KEMMIS: Which were what?

SCOTT BROWN: There are some risks there.

GORDON McOMBER: Well, in your letter from Chairman Felsman, he indicated that you were interested in discussing a joint approach to presenting this legislation to a Legislature. Did you, I guess before we get to that bottom line question there, had you an interest? Had you looked at this question on the gratification? As I said, it's new to me and we're, we haven't taken a position on it.

DAN KEMMIS: You mean the issue of whether Congress needs to ratify it or shouldn't have? We haven't taken a look at that, so I guess we are not prepared to speak on that. In terms of a joint effort, we favor extension of the time period because we don't think that we can complete the negotiations by July 1, 1985. The balance of the legislative proposals, I don't, we haven't really talked about, so I can't really speak on those, and the other issue, I guess, is whether a joint effort is needed. It may actually be counter productive for us to come in and support the legislation, but it sounds like it's pretty well supported anyway, so there shouldn't be any problem with that passing, should there?

DAN KEMMIS: And not only that, I think that we're not just looking at getting this legislation passed, but kind of laying favorable groundwork in the legislature about everything that we are up to here. And I think that the moral support that we have from the Tribes saying that we're at least working well enough together to want to extend the life of the Commission is going to have some impact on down the road. I think it will be

worthwhile.

GORDON McCOMBER: Well, I guess to follow what you are saying, Dan, it wouldn't look very good if the Legislature never heard from it at all.

JIM GOETZ: Is there some kind of mechanism then we can set up for notification as to committee hearings and that type of thing that . . .

JACK GAULT: You bet, that will be taken care of. I'll notify Scott and Scott will immediately notify all interested people.

JIM GOETZ: Okay, we'll designate a person or two here then that could coordinate that legislative effort and then they can coordinate with Scott on this.

SCOTT BROWN: Excuse me, Dan. You never did receive copies of the suggested legislation, proposed legislation that the Interim Committee on Indian Affairs proposed?

DAN DECKER: I've got copies of the Interim Committee's legislation, but not of the Commission's proposal.

MARCIA RUNDLE: I thought we gave you some when you met with us?

DAN DECKER: I don't remember going through it. I know we discussed it that day and what to do, was going to happen, but I don't remember seeing . . .

SCOTT BROWN: When I get back to the office I'll send you a copy of that, or do we have an extra copy?

MARCIA RUNDLE: No, I don't.

(Inaudible discussion)

URBAN ROTH: Could I sort of summarize what has been agreed to here then, is that the Tribes favor extension of the time

period and that the Tribes will, after they study the legislation, express approval of the extension to the Committee and to the Legislature. Scott will notify the Tribal representative as to the Committee hearings on the legislation and if it appears appropriate, you'll have someone express the Tribe's position on that. Is that sort of a summary?

JIM GOETZ: Yes, I want it made clear that we haven't had really the opportunity to discuss the other provisions. I don't see off hand any problem with those, but . . .

URBAN ROTH: I understand. But the general concept . . .

JIM GOETZ: Of the extension, yes.

GORDON McOMBER: Okay then, moving along to the next item, Item 3, Technical, Historical and Legal Information needed. At this time, Urban, I'd like you to pick up the ball.

URBAN ROTH: Well, with regard to the negotiation of any compact with any Federal Reservation or Indian Reservation, we would have to have a data base from which to start talking, it seems to me. And from what I've learned in the last couple of years, I believe the Tribes have retained several technical people to assist them in obtaining some of this data base. The state, of course, has some of that information. Scott's people have some of it, the DNRC have some of it. And generally the way the Commission has approached that subject in the past, and I don't speak from personal knowledge, except with regard to some of the Tribes and the federal agencies with whom we've met since I've come on line, our policy is one basically of an open door policy. Scott and his staff are willing to share the information they have. We would like to have the same commitment by you

folks that you will share the information you have. Certainly with regard to legal information, whatever legal positions you take, we'd appreciate receiving a memorandum or whatever you are relying upon for a particular position. Perhaps we can be convinced that you are right and we are wrong if indeed we are on opposite sides of the fence on that particular issue. We have some historical information, but one of the areas I never got into when I was involved in litigation was the secretarial rights. I understand there is sort of a dearth of information on that as far as the rights themselves, so that is one area I think Scott would like some more information on. I believe, Scott, you indicated you actually have a copy of one secretarial right.

SCOTT BROWN: Well, I have seen a copy of it. We no longer find it, and I am beginning to think now it was because I had seen one which belonged to a person on the Reservation, but . . .

URBAN ROTH: But he quickly retrieved it and didn't give it back.

JACK GAULT: Are they a matter of record anywhere?

URBAN ROTH: That, I don't know. We did quite a bit of study in your Tribal records back a few years and I just don't recall seeing anything on secretarial water rights. I can remember timber and things like that, but I don't recall the secretarial water right. In addition, you know you have two law suits pending, one by the United States, and one by the Tribes that at least affect the Flathead Reservation. In the United States complaint, they're requesting reserved water rights for the National Bison Range, the various wildlife refuges. Do you anticipate trying to incorporate them or deal with them, if they are located on the Flathead Reservation, within a compact with

the Tribes or do you perceive those as independent negotiations between the Reserved Water Rights Commission and the federal agencies? I don't know if you have given that any thought.

JIM GOETZ: On that latter question, we haven't considered that, so I'll make a note on it and we will discuss it and let you know.

URBAN ROTH: It's sort of a footnote to that, if indeed you do consider that as a part of these negotiations, then we would need similar data from the federal agencies with regard to what they perceive their reserved water rights are in regard to those particular federal reservations within the Flathead Reservation.

JIM GOETZ: What, let me ask you, what is the status on the, you're conducting compact negotiations with the feds now?

URBAN ROTH: Yes, we are, with both the National Park Service and the Forest Service.

JIM GOETZ: And what have they indicated about the data?

URBAN ROTH: Well, we haven't discussed those three reservations that fall on the Flathead Indian Reservation. We have discussed Glacier Park, with the National Park Service. We've discussed the Lolo, and is it the Flathead National Forest in principal, with the Forest Service. They have absolutely no problem in giving us data. It's been slow coming, I guess is our only comment. Isn't that true, Scott? That still persists today, it's kind of slow coming, isn't it?

SCOTT BROWN: We're expecting that they will be finished with their studies for the entire state by the end of this month, or certainly by the end of the year.

URBAN ROTH: That's within sort of the time frame. They

indicated perhaps by the end of October, I think, in their meeting and so a month or two isn't too bad. Basically, Jim, I think I can represent that other than the . . . Rocky Boy did not indicate that they were going to share data with us. They want to get back to us on that and I don't think they have yet. But other than them, I don't think that any of the Tribes have indicated they have any resistance to sharing data and information. It was just our preliminary meeting with Rocky Boy, and they didn't want to commit themselves to that until they studied the problem. I don't think we anticipate any problem, but I don't want to say that every Tribe has agreed to just open their data bases to us. Most of them have, and certainly the federal agencies have.

JIM GOETZ: We have, well certainly I'm not going to commit to do that here today, I mean at least we are going to want to look at that question, and I think that counsel would want to deal with that. The problems . . . we are in the process of compiling data, which we were initially doing in anticipation of an adjudication. Things that we have to consider on this are the question of if the negotiations break down, have we lost some advantage by essentially making all of our data available? There is the obvious other question, and that is in terms of leverage in negotiation, information makes a great deal of difference as you well know, and we just have to decide among ourselves, and we haven't done that, but we will look at it, whether we want to pursue these negotiations, based on holding our cards close to the vest or whether we want to go for the open door policy. But we will be willing to consider it and get back to you.

URBAN ROTH: Well, I guess the Commission (inaudible) in

Montana in essence, has faced that same problem. And it's bothered me just a bit that some of the information that's developed could be used to prejudice the state in the event of litigation. By the same token, I think it shows the good faith of the state and their efforts to reach agreement, that they have so far been willing to share data and not play games, at least as far as the data is concerned. It's possible, and we might consider this, Jim, that perhaps we enter into an agreement, a side agreement, where the parties would stipulate that that the information would not be admissible in any litigation in the event the negotiations broke down, except if the party originating the information decided to use it in subsequent litigation. And that these are considered negotiations pursuant to Rule 407 or 408 of the Montana Rules of Evidence, and that any information disseminated in these negotiations would be considered clothed by the negotiations rule and would not be admissible into evidence, something like that. And I frankly have been concerned in that perhaps the state hasn't protected themselves as well as they might with regard to subsequent litigation, if indeed the negotiation process broke down. So that's a concern you might put thoughts together on. We'd like some proposal on that if you have one.

JIM GOETZ: Do you have any budget at all for technical work, that is the Commission itself? And secondly, I guess, is might that be something that would be addressed in the upcoming Legislative session? The reason I ask that is because we can envision certain joint projects, that is, where we might from a technical standpoint, be able to agree that there is information

that is needed that neither side has, that is expensive to get. My understanding is, for example, that aerial photographs of the, during the summer, during the irrigation season should be taken to establish present water usage, and something like that. What I am wondering out loud is whether there might be some of those types of endeavors that might be undertaken jointly?

URBAN ROTH: I guess I'd have to defer to Scott if he wants to talk about that. Or do you want a caucus on it?

SCOTT BROWN: Well, we have done that, Peg knows very well, we have done that. We don't have a great deal of money to undertake these kind of studies, but that is something that we have done on other reservations, and at least with respect to that one suggestion, I think it's a good suggestion.

JIM GOETZ: Well, we'd prefer that you do it and just give us the information.

(Laughter)

SCOTT BROWN: It works that way, too. That has been done, because there is information you have that we would have to go out and collect, so we are speaking in generalities here, and if you don't mind me making a suggestion, the technical people representing each party have often, at some point after the first or second set of discussions, been a little more specific about what kinds of studies might be needed, and what is available. That is what I would like to propose, if that's all right, that within the next month or two, technical people could discuss possibilities and present to you and to Mr. Roth, suggestions for those studies that should be done and some kind of time schedule, and as best we can, an estimate of cost.

URBAN ROTH: Seems to me at some point, Jim, that you have

to at least be willing to do this to get a finger on what . . .

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JIM GOETZ: Well, I like Scott's suggestion of having the technical people get together and discuss areas that might need to be explored in terms of development of information, and presenting a fairly defined set of matters. In other words, Urban, your policy on open door as a broad principle, I think will meet some resistance with the Tribal Council. We are, as you well know, coming into these negotiations very cautiously. I think more progress might be made if we could talk in terms of definite areas of technical information where we might be able to share or not share or conduct joint endeavors if we don't have the information.

URBAN ROTH: So what you are suggesting is that your folks draw up a laundry list of information you need and our folks draw up a laundry list of information they need, and they meet and try to define with more specificity precisely what's needed?

JIM GAULT: Yes. Maybe . . . I think we ought to caucus on that maybe, Dan.

DAN DECKER: Possibly.

JIM GAULT: Why don't we caucus for a short while. I don't know if you want to do that now, or . . .

URBAN ROTH: Fine.

DAN DECKER: Why don't we do it now?

(Caucus)

JIM GAULT: Sorry to keep you waiting so long. What we would like to do is have the technical people get together with your people and see what information needs to be developed and

see if there can be joint effort on that, and discuss the sharing of information. We want to approach that very cautiously, but we are certainly willing to talk about that, but I think it should be done through the technical people in the first instance, rather than have an open door agreement that you suggest.

URBAN ROTH: And also, perhaps areas of joint concern? Okay?

GORDON McOMBER: These things, you know, this information is for the most part going to be needed before we can approve a compact, because some of that is basic information and you have to have it.

URBAN ROTH: I suspect a lot of it is available, but it's a lot easier if each side is willing to give it to the other with the least amount of effort. Are we ready to move on?

JIM GOETZ: Yes, I think so.

URBAN ROTH: Okay. We would like to discuss the lawsuit that you have pending with the State of Montana. We know that you are going to meet with the State tomorrow with regard to that litigation. We also know that on May 2, 1984, Dan, you took a pretty hard line with regard to negotiating that lawsuit. At least, that is what has been told to us, and perhaps you perceived the State as taking a hard line. But, what do you intend to do with that lawsuit, or do you want to open up on that?

JIM GOETZ: Well, I'm not sure what we intend to do with that. Let me set the context for this. On May 2nd we met and among other things, the possibility emerged that we might be able to negotiate through the rubric of that lawsuit on various issues that we are talking about here with the Compact Commission. At

that time, of course, we weren't talking to the Compact Commission. It looked like a possible avenue for reaching some agreement, so that seemed intriguing to both sides, and we thought about it. It seems at this point that there is no sense trying to settle that lawsuit to embrace the kind of issues that we are dealing with here. We are going to deal with these issues with the Compact Commission and it seems that that is where the issues ought to be. So that leaves that possibility, I think that excludes that possibility of any substantial negotiations on that suit. So it seems like it leaves the possibility of proceeding with the lawsuit, staying it, or dismissing it without prejudice. And that is what we are talking about now. We're not leaning toward proceeding with it, I mean we, as long as we are in negotiations with you people, it seems like there is no percentage, from our standpoint in going ahead with a federal lawsuit. But we frankly haven't made up our minds beyond that what we want to do with it, but we will be talking . . . who will we be talking with?

?: Leo Berry.

JIM GOETZ: . . . Leo Berry tomorrow in Missoula. We will be talking with Leo Berry on . . .

GORDON McOMBER: Oh, that meeting is going to be in Missoula?

JIM GOETZ: Yes, with Leo and Helena McClay and . . .

URBAN ROTH: What time was that, Chris?

JIM GOETZ: What time is that meeting?

?: 10:30.

URBAN ROTH: Well, just as you have some suspicions and

uneasiness, why, I guess we perceive that perhaps, you know, you are maybe using the Compact Commission or the negotiating process as a sort of a leverage in the lawsuit, and the lawsuit as leverage on the Compact Commission. I guess, you know, I'd like to see that lawsuit dismissed, or something done with that so that it looks as if, at least superficially, that you are greedy and not that you can't go ahead and file the lawsuit again the next day after you dismiss it. At least it gives a superficial patina to the negotiating process.

JIM GOETZ: Well, I'd like to see Greeley dismiss his lawsuit against the water courts, too. I mean, I could simply parrot the comments you've made about this suit. Certainly we had our suspicions when we decided to get back into the negotiations and then all of a sudden Greeley files against the water courts and doesn't even notify the Tribes.

URBAN ROTH: By the way, I did notify the Tribes that the suit was coming.

JIM GOETZ: Yes, I know, that's how we found out it.

URBAN ROTH: The reason was is the Commission felt that they had to keep their credibility up, that they had some obligation. I called Evelyn Stevenson and specifically advised her of what was coming, as I did all of the other Tribes that I could get a hold of, some I couldn't get a hold of, but certainly the effort was made.

JIM GOETZ: We appreciate that. I think Greeley probably in retrospect thinks he should have notified the Tribes himself. But in any event, you can see our point. I mean, we will do . . . we've got to make a decision on the lawsuit and we are going to beat on that after this meeting, meet with them tomorrow. But I

can't tell you what we are going to do in it.

GORDON McOMBER: Will it be all right with you if Marcia sat in on that meeting tomorrow with . . .

JIM GOETZ: Yes, we don't have any problem with that. It's at 10:30 at the Glacier Building; probably meet at Helena McClay's office. They have a conference room upstairs in that building.

URBAN ROTH: Well, we are certainly interested, and vitally so, in the disposition of that lawsuit, because we do think it has a profound impact upon what we are doing here.

JIM GOETZ: Do you have any problem with our staying the lawsuit?

URBAN ROTH: I guess I do. We haven't discussed it. We can have a caucus about it, but in principal, yes, I do. It seems to me that the Tribes should be willing to fish or cut bait. Either they are going to litigate or they are not going . . . they are going to attempt in good faith to negotiate, realizing that litigation is always an option. After dismissal of the lawsuit, you can always, as I say, two hours later you can go in and file it again. At least we should have some definitive signal from the Tribes that they really are approaching negotiations with an idea of perhaps resolving some of these basic issues.

JIM GOETZ: Do you have a number of acre-feet in mind you want to give us for dismissal of that suit?

(Laughter)

URBAN ROTH: I didn't know that we gave you anything. Every time I've argued against the Tribes, why, we are not giving you anything, you have reserved it already.

JIM GOETZ: Well, I want to put it in a manner that would be receptive to you.

(Laughter)

URBAN ROTH: No, we are not going to negotiate on it. I'm telling you in principal what I feel should be done with it, and I guess I feel strongly about that. I guess, probably we've, unless you have something else to say about that lawsuit, why, we can move on.

JIM GOETZ: Yes, we will meet with them tomorrow and we will, as I say, we are meeting this afternoon.

URBAN ROTH: You mentioned . . .

DAN KEMMIS: Excuse me.

URBAN ROTH: Excuse me, go ahead, Dan.

DAN KEMMIS: Since it is in Missoula, if I get an opportunity to drop by, that won't be a problem?

JIM GOETZ: I think we better caucus.

(Laughter)

DAN KEMMIS: I'm sure. I knew I'd stir up a hornet's nest with that suggestion.

(Laughter)

JIM GOETZ: No, we don't have a problem.

DAN KEMMIS: Okay.

URBAN ROTH: Off-Reservation, you mentioned that you would like to talk about off-Reservation water rights. What are you proposing there? I guess initially we haven't made a decision as to whether we consider those reserved water rights, per se, despite U.S. v. Adaire and I guess that's what you are looking at as far as off-Reservation rights are concerned. Some sort of an instream flow for ancestral fishing rights or something like

that.

JIM GOETZ: That's right. We want to know what your position is in terms of whether you recognize the Tribe's interest in the off-Reservation streams.

URBAN ROTH: I don't think we are prepared to tell you what our position is, but I guess initially we haven't even taken a position as to whether they are appropriately labeled reserved water rights or whether U.S. v. Adaire is sort of an anachronism, or what. For example, he specifically seemed to say in the opinion that those were not Winter doctrine rights. The other reserved rights dated from the inception of the establishment of the Reservation, whereas the Court seemed to hold that the off-Reservation rights might have some prior priority date.

JIM GOETZ: Well, we obviously have a strong interest in the off-Reservation rights, so we want you to take that up. I mean, we consider those as part of the Compact Commission negotiations. So we want, we ask you to take those up and let us know what your position is going to be on those. Probably the first question obviously has to be whether the Commission will recognize the off-Reservation interests of the Tribe, and then if the Commission does, then we have to work out a format for dealing with those, similar to what we are doing with the on-Reservation. Have any other Tribes raised this issue?

URBAN ROTH: No.

JIM GOETZ: So this is the first time you have dealt with it?

URBAN ROTH: Not all Tribes have off-Reservation rights.

GORDON McOMBER: (inaudible) . . . briefly previously just in

passing. I've read in some of the transcripts, I think Henry commented on it, to the extent . . .

SCOTT BROWN: The only thing that I can think of is that there are some lands outside of today's Crow Reservation boundaries that are what is commonly called the seeded strip, and they have been remaining in the Tribe's hands or perhaps their allotments. There are some questions about whether or not the water rights are associated with (inaudible) any other suggestions (inaudible) similar situation.

JIM GOETZ: Well, in any event, it seems to me that in a future meeting, once we have your position, and if you are in agreement with us that there are suitable subjects for discussion in these compact negotiations, then we probably shouldn't address the format in terms of technical information.

URBAN ROTH: I guess by the same token, as long as we are getting to substantive issues, will the Tribes recognize excess waters or surplus waters on the Flathead Reservation? What is their stance with regard to existing users? Will they consider bifurcated administration? You know, these are of vital concern obviously to the State of Montana. So, you know, I shouldn't repeat what your position is, but I guess my perception of the position taken by Mr. Decker before is that every drop of water on the Reservation or touching the Reservation belongs to the Tribes, and that you intend to administer every single drop of water that touches on the Reservation. All you perceive as the function of the Compact Commission is to quantify those drops of water. If that is your position, we would like to know it as soon as possible, because that doesn't leave very much to negotiate by.

JIM GOETZ: In that context, what do you mean by surplus waters?

URBAN ROTH: Water not presently appropriated and put to beneficial use.

JIM GOETZ: Okay, so you, in other words, I get the impression from Leo Berry's letter of September 13th that he is defining surplus waters in a different way.

URBAN ROTH: This is just an off-the-cuff. I look at surplus waters as those waters not presently put to beneficial use by anyone.

JIM GOETZ: Well, that, by the way, is my interpretation, or was generally my interpretation, but he seems to, well let me quote from his letter of September 13th, second paragraph, "Initially there are two issues that the state needs to know the Tribe's position on in order to proceed with settlement possibilities in this case. First, the Tribes take the position in their complaint that their reserved water rights are essentially open-ended and that there are no 'non-reserved' or 'surplus' waters on the Reservations." I'll stop the quote at that point. I get the impression that he seems to think that surplus waters are any waters over and above Indian reserved waters, so there is a real confusion in terminology there.

URBAN ROTH: Well, I think that if you wanted, as a sort of a subclassification that surplus waters would include waters that are non-reserved also. I think in negotiating reserved water rights, implicit in it is how much is reserved, and are there any non-reserved rights in addition to being surplus.

JIM GOETZ: Okay, he goes on to say, and let me quote this

so we have the context, "It is the State's position that the Tribe's reserved water rights must be quantified taking into consideration among other things, anticipated future uses of the Tribes. After this quantification, any unquantified water would be 'surplus' or non-reserved waters. It seems to me that you need to, under his scenario, that you need to do the quantification before you can address that question. I mean, we are starting with the proposition that all waters are reserved waters of the Tribe, but I think we are here to negotiate on that question.

URBAN ROTH: Well, we anticipated that you were and that's why I put it right out on the table. There is no sense beating around the bush. I understand that is your initial position, but I guess the question is whether, and you have answered it, whether or not you are going to negotiate about that, and whether you are willing to negotiate with regard to subordinating to existing uses; whether or not you are willing to, let's say, talk about a water bank for non-Tribal member development, etc. Things of this nature, it seems to me, are subjects of deep concern to the state.

JIM GOETZ: Well, we are realistic enough to appreciate the fact that those issues are going to be the subject of negotiation and we wouldn't be here if we didn't recognize that, so . . .

URBAN ROTH: I appreciate that.

JIM GOETZ: . . . you know, we are going to discuss those. When you talk about a water bank, it raises an interesting issue, and that is, whether there might be, as a subject of this negotiation, the possibility of water development projects.

URBAN ROTH: Jim, I guess, I think I can speak for the

Commission in this respect that basically we don't foreclose any subject that deals with reserved water rights from discussion. Even with regard to the off-Reservation rights, we are willing to listen to your position even if we take a position that we don't believe is appropriate for a compact. So, to answer your question, we are willing to listen to a proposal, study it, and come back with an answer.

JIM GOETZ: Along those lines, it seems to me maybe to make it a little more specific, that we might reach a position where the Tribe feels that it has x amount of reserved waters. They seem inconsistent to you with the rights of existing users, and realistically there is that kind of conflict, but that conflict may be able to be resolved through the funding of water development projects. See what I'm driving at? Has this issue been raised at all with respect to the other negotiations?

URBAN ROTH: Yes, it has, and the problem you face as soon as you talk about, I guess, joint or water development projects is funding. Whether you can realistically project what the Legislature or the Tribes, or the B. A. or anyone else is going to do with regarding to funding water projects. So, initially they have. If you are going to define the projects, then you have that initial problem. But just putting in language that some projects can be jointly developed, or something like that, probably doesn't have as much initial resistance.

JIM GOETZ: On the . . .

URBAN ROTH: We've discussed it. To answer your question, yes, we have discussed it.

JIM GOETZ: On the bifurcated administration question, the

Tribe's position is that it has the authority to regulate waters on the Reservation. Again, it's like your approach to off-Reservation rights. We are willing to listen to anything you have to say on that, and consider it. We consider it to be a legitimate subject of negotiation. It does occur to me that we can negotiate quantification in theory without resolving the regulatory jurisdiction issue.

URBAN ROTH: Yes, you can. I guess the problem is that some of the fundamental reasons for entering into a compact are being overlooked. Seems to me that the parties should attempt to resolve, and as far as possible, as many of the issues that can foment litigation in the future as they possibly can. Maybe in a last ditch effort reach a compact, quantification might be the only thing that you could agree upon, but I guess I would perceive that as somewhat of a failure if we are not able to tackle and resolve some of the other issues. Because litigation is expensive, I think destructive of good relations, makes lawyers rich, but clients poor, so on and so forth. I would say that we shouldn't look at that as what we are trying to achieve here initially anyway. Let's not limit ourself to just quantification, let's look at all the plethora of issues and see whether or not we can reach agreement on most of them or some of them. That's what the Commission, I think, is looking at, rather than just a narrow view of what our role is here. The way I perceive it is, people can always litigate, but . . .

JIM GOETZ: I agree with that. I think we want to talk about . . .

URBAN ROTH: . . . I think it's harder to negotiate and reach agreement, but in the long run I think you have achieved a

heck of a lot more if you can reach agreement.

JIM GOETZ: What did you do on your initial Fort Peck agreement on administration?

URBAN ROTH: Well we have that joint board, which really wasn't viable because it wasn't practical. What ever kind of administration you agree upon, it seems to me you have deal with what water situations . . . farmer A with a head gate problem, or somebody cutting somebody's water off, and you have to be able to get to some kind of a forum very quickly and resolve that before your crops dry up, or whatever it is. So, that particular joint board did not resolve that kind of a problem; it wasn't practical, it wasn't speedy. As you well know in water litigation in the state, you do have a forum that you can go to and you can get relieve, you can get a ditch writer or commissioner or something else appointed to resolve those disputes and basically the rights of the party are reserved through the adjudicative process. Whatever we decide upon, both parties, it seems to me, have an interest in a practical and speedy type of resolution process. It can't be so cumbersome that it isn't practical. As far as I know, the water courts of the state have been rather neutral as far as their racial orientation is concerned. I don't foresee them as being bent one way or the other. Some of our notions of inequality I don't think are realistic today. As I say, the State has an administrative setup right now that is in place and usable and satisfy the practical and speedy requirements.

JIM GOETZ: Okay.

URBAN ROTH: One position we have taken, Jim, is with regard

to the Tribal right per se, the amount of water that is required, or which is recognized as required to satisfy the primary purposes of the Reservation, that the Tribes have the full authority to allocate that among its members or its licensees, lessees or whatever. We have recognized this and I think you know that. So there is no sense in telling you that we haven't been receptive to that kind of an approach. Disputes among Tribal members should be resolved in their Tribal forum. We have taken as a conceptual approach.

JIM GOETZ: In other words, disputes between Tribal members even where they are not talking about reserved waters?

URBAN ROTH: Well, no, just reserved waters, that's all we are talking about. If they are appropriative rights, then I think they properly belong in the state forum.

JIM GOETZ: Anything else on Item 5 that you can think of?

URBAN ROTH: No. I guess we would like something more from you, you know, identify . . . you should be prepared to start identifying streams. And if you have done any work on it, what kind of an instream level are you talking about? But you may want to wait until we have taken a position as to whether that is a negotiable subject.

JIM GOETZ: Yes, I think that would be the appropriate order.

URBAN ROTH: Okay.

DAN KEMMIS: Excuse me just a second, Urban.

URBAN ROTH: Sure, Dan.

DAN KEMMIS: Could I just speak to you folks?

(Break)

URBAN ROTH: Jim, going back to that off-Reservation

subject, Dan has, I think, made a very cogent observation, and that is that before the Commission can really take a position on that, they have to know the scope of the problem. Is it all of Western Montana, all of Montana, you know, how far reaching is the . . .

JIM GOETZ: What do you mean "problem"?

(Laughter)

URBAN ROTH: Should we take in Idaho?

(Laughter)

URBAN ROTH: So, I think maybe we ought to know what streams you are talking about. I think you can do that, and to what extent, how far up the stream, you know. Is it public domain? Are you claiming these on private fee lands, state lands, or just federal public domain, unoccupied? So if you could scope the question before us before the next meeting, we would appreciate it.

JIM GOETZ: Well, I think we . . .

URBAN ROTH: Give us time, you know, for the Commission to get together on it.

JIM GOETZ: We can within fairly broad outlines. You know, I don't know that we are going to be prepared to talk about how far up the stream, or public domain, or that type of thing, but, you know, we can give you an idea of the streams that we . . .

URBAN ROTH: You could probably give us at least a conceptual idea of where you feel these ancestral hunting and fishing rights still exist, can't you?

JIM GOETZ: Well, basically Western Montana, if that is going to do you much good.

URBAN ROTH: Well, are you contending that they exist on private fee lands? Do you contend that they exist on state-owned lands or just federal public domain land? I think you can differentiate between types of land ownership where you think these exist.

JIM GOETZ: Well, we will see what we can get to you on that.

URBAN ROTH: Okay. Then the last item is the schedule of information, and I am not sure what you meant by that. Is that the same thing as technical, historical and legal, or does it kind melt into what Scott's going to do?

GORDON McCOMBER: Partially. It's everything. Schedule of meetings and development of all information that is needed to arrive at a conclusion. (inaudible) . . . technical information as well as . . .

URBAN ROTH: I guess part of that we had discussed, Scott, and your technical people getting together, and they will be getting back with regard to the type of information. Then there will be decisions made as to what can be exchanged, and I guess a schedule will have to await the second one. But if we can expedite that without a formal meeting, I think it would help both parties. And then the last thing would be, what do you perceive each party should do before the next meeting, and when should we meet next, and does it appear that the process can be a viable process, all of that lumped into one? My perception is that you are looking forward to negotiations as perhaps a method by which water problems can be resolved, and you are willing to enter into viable negotiations toward that end. If so, how do we start getting this thing into shape so that we can proceed?

JIM GOETZ: Well, what do you suggest? If you are asking when the next meeting should be set, you know, we can talk about that. I think we have got, I don't know if we want to wait and see how long it takes the technical people to get together and get back to the respective sides, but we have various questions such as this last one on off-Reservation, which we are going to address.

URBAN ROTH: And we, too, to some extent, but we need more information from you.

JIM GOETZ: And we are going to be in a position, we will know more tomorrow, as you will, about the federal lawsuit.

GORDON MCOMBER: Well, I can tell you what we have been doing. We review the transcript and then put together a laundry list. We do and the Tribe does . . . (inaudible) . . . communication there . . . (inaudible) . . . we visibly discuss what should be approved in the next meeting. May new thoughts will arise in a day or two.

URBAN ROTH: Jim, have you seen our, what we call our 1984 Proposal to the Fort Peck Tribes?

JIM GOETZ: No.

URBAN ROTH: I suggest, Scott, would you make that available to Dan, and to Jim? Do you want us to send one over to you, Micky, or will one to Dan be enough, and you can make what ever copies you need?

(inaudible discussion)

URBAN ROTH: All right. Why don't you take a look at that. We've put a lot of thought into it. See if that provokes any thoughts on your part besides, "Hell no."

(Laughter)

SCOTT BROWN: Dan, don't you have a copy of it?

DAN DECKER: Yes, I have a copy.

SCOTT BROWN: I'll send Jim one. I'll send a couple of copies.

GORDON MCOMBER: That indicates the Commission's position on those issues as of that time, of course. That draft has been accepted by the Fort Peck people and, of course, is subject to change, but it does indicate the position of the Commission at the time it was written.

JACK GAULT: As it applies to that one Reservation?

URBAN ROTH: As it applies to that one Reservation. It's not meant as a precedent, but at least it's an outline of subject matter.

GORDON MCOMBER: Urban, what would you think of adopting the same procedure we did with the last Tribe, that is, review the proceedings of the meeting, compare notes and then get back together?

JIM GOETZ: You are going to have the transcript typed up, I take it?

SCOTT BROWN: Yes, it takes about a week to have it typed up and usually about two weeks to have it printed. I'm sorry that it can't be available faster than about two to three weeks, but that's the best I can do.

JIM GOETZ: And once that's available, then what do you do, kind of draw up a list of what you think should be on the next agenda?

GORDON MCOMBER: And communicate, basically.

JIM GOETZ: That sounds reasonable.

GORDON McOMBER: I should tell you that, probably you know that we have spent nearly the last two years communicating with the Tribes, getting them to talk to us, and now that we have accomplished that, we have six of the seven Tribes that we are dealing with, we do have a scheduling problem. We are going to have to establish a calendar and try and get things lined up in a way that will accommodate as many people as possible. We have had some comments from the federal people, as well as state people, that we have called meetings too quickly. So, it is our intention to lay out a schedule and basis, so what I am saying is, it won't be right away. We just want to have time within the next month or even probably two to keep working on this.

JIM GOETZ: So we are looking at maybe the end of January or thereafter as the next meeting?

GORDON McOMBER: I'd say anyway, that long.

JIM GOETZ: I just want to find out when the Senate Ag Committee meets and we will set it then.

(Laughter)

GORDON McOMBER: Well, if we could do that and you could communicate with . . . we'll go through the same process then, Scott as we have been doing with the Crow, and get back together then.

SCOTT BROWN: May I suggest that we would communicate with our parties, but Urban . . . (inaudible). . . setting up an agenda.

URBAN ROTH: The thing about it is, Jim, we want your participation in setting up an agenda. We don't want to say, "This is the agenda." We want you to give us your input, because

otherwise the negotiating process is too one-sided. We want your thoughts, and Dan's thoughts, and Mr. Feldman's thoughts as to what you want to talk about at these meetings, because we are interested in getting this thing moving. If you just leave it sort of fuzzy, or too fuzzy, then it seems to me you are not making any progress.

JIM GOETZ: I like the idea of reviewing the transcript and then making up an agenda list, each of us, and then getting together and talking about . . .

(End of Tape 1, Side 2)

DAN KEMMIS: . . . get together.

JIM GOETZ: Yes, my understanding was that they would get together informally between now and the next meeting some time.

SCOTT BROWN: I would think that would help your development of an agenda, so I will talk with Tom and Kate . . . (inaudible) agree to do that and we can set up a meeting, hopefully before Christmas, to help you with an agenda.

GORDON MCOMBER: Okay, there are a few other things we should touch on. The open meeting law we had. Do you have problems with the press being involved, ordinary citizens walking in and being involved?

JIM GOETZ: No, we will want to take it up with the Council, but I don't think we have any problems with that.

GORDON MCOMBER: We are pretty severely restricted under state law. I think . . .

(Laughter)

URBAN ROTH: As Goetz well knows.

JIM GOETZ: That's why I said I didn't have any problem with it.

GORDON McOMBER: The policy that has been adopted with other Tribes is that we let anyone in unless the Tribe doesn't want them in. As far as news handling, we haven't issued press releases. We are, on occasion, asked for comments. We make them of a general nature. We do not mention generally specific Tribes, so if that is all right with you . . .

JIM GOETZ: That's fine with us.

GORDON McOMBER: The cost of transcripts, we rotate this. We have with the other Tribes. We pay the expense one time, the Tribe pays it the other, or split it. We generally have just split it down the middle.

SCOTT BROWN: I think essentially split it today with Diane's help.

GORDON McOMBER: And the chairmanship, we traditionally have rotated, too. We handle it one time and you handle it the next time, if that's agreeable.

URBAN ROTH: So, Mr. Fallsman, we would expect or his designee to chair the next meeting.

JIM GOETZ: Yes, that's fine with us.

GORDON McOMBER: One more thing. It's understood, it should be understood that the people doing the technical work, the conclusions they arrive at are subject to approval by the entire Commission. Legislature delegated that responsibility to the Commission. (inaudible) great length. It should be understood that everything everyone does is subject to the final approval of the Commission. Is that a good understanding of what we are going to do?

JIM GOETZ: Now, on that last point, we are in the same

position with respect to the Tribal Council, of course, too. I want that understood. We are subject to going back to the Tribal Council for approval and ratification of what we do as well as our technical people.

GORDON McOMBER: Anything else?

URBAN ROTH: I guess maybe just to expand on your last thought. Reid Chambers used the word "conceptualize" and that's what I perceive we are doing, is putting out concepts and trying to develop positions and things like that, rather than concrete proposals at this stage. Is that your perception?

JIM GOETZ: Yes.

GORDON McOMBER: Okay then. I guess we are ready adjourn. We would like to use your room here for a little bit. Is that all right with you?

?: Certainly.

?: Sure

GORDON McOMBER: Okay, if no one has anything else today, we stand adjourned.

RESERVED WATER RIGHTS COMPACT COMMISSION CONFERENCE
SALISH AND KOOTENAI TRIBES
FIRST NEGOTIATING SESSION
November 19, 1984

GORDON McOMBER: To begin with, my name is Gordon McOmber. I am chairman of the Reserved Water Rights Compact Commission. On my left is Urban Roth, who is our special counsel. I should tell you that I've been on the job two years, and prior to that, Henry Loble was both chairman and chief negotiator for the Commission. So, when Henry Loble ran for judgeship and was elected, it has taken two people to replace him; I as the chairman and Urban as the chief negotiator. Mr. Dan Kemmis, also a member of the Commission from the beginning, I believe. Dan is now speaker of the house for at least another few weeks or so. Marcia Rundle, our new attorney, who replaced Peter Stanley, who many of you know. Senator Jack Galt, who also has been on the Commission from the beginning. And Scott Brown, program chairman/manager for the Commission. I know I'm going to be embarrassed on this because I am the only one that can read the writing. I went to school in Canada.

URBAN ROTH: Then it should be better than it is.

GORDON McOMBER: Do you wish to introduce your people, Dan, or Jim, Mr. Pablo, or whoever?

DAN DECKER: I am Dan Decker, and I am currently one of the local counsel for the Tribes. To my right is counselman Mickey Pablo. To my left is Jim Goetz, who has been employed as legal counsel on the water rights efforts. To the back side of the room, one of our technical people is Peg Trochlell. Our hydrogologist, lead hydrogologist, Tom Bateridge, who leads up our

water resources program. To Tom's left is Rhonda Camel, who is a rights protection officer for the agency. To Rhonda's left is Bob Delk, who is the area rights protection officer. To his left is Clayton Matt, our water administrator. On this side of the room is Roger Thomas, who is one of the field solicitors in the Billings area.

GORDON McOMBER: Okay, thank you, Mr. Decker.

DAN DECKER: I forgot Diane, can't forget Diane. Diane Campbell, who is taking minutes.

GORDON McOMBER: Well, we were here last summer, and following that meeting you agreed to come back into the negotiations, which pleased us very much. Now, I understand your issue with the Kerr Dam has been resolved, which gives you a little more time, I think Dan indicated. I'd like to start by telling you that our problem with the Fort Peck Tribe has been resolved to the point that they have come back into negotiations. We had a very successful two-day meeting in Billings last week with that Tribe. We are meeting with them again the first of January. We are very hopeful that we can pick up about where we left off before and work towards a mutually satisfactory agreement for both the state and that Tribe. I trust you received the copy of that Memorandum of Understanding signed by the Commission, the Governor, the Attorney General, and the Department of Natural Resources. Mr. Pablo, are you aware of that? Or Dan?

DAN DECKER: Yes.

GORDON McOMBER: I trust also that puts to rest the fears of any that might be concerned that we weren't communicating on a continuing basis with those agencies. We had a little problem

with that, as you are well aware. We are of the opinion now that we have it completely under control and a situation such as that will never happen again. You sent us, I believe, a list of your negotiating team and we reciprocated with ours, and I will quickly run through that again. The negotiating team will be made up of a chairman, vice-chairman, Scott Brown, program manager, Marcia Rundle, unit attorney, and special counsel, Urban Roth. Mr. Roth will be the chief spokesman for the Commission. If we don't agree with what he is saying or we have a question, we'll pull his sleeve and caucus and make a decision and come back and talk to you. But once we get into negotiations, Mr. Roth will be doing the talking. We're sorry today that representatives of the Governor's office and the A.G.'s office of Natural Resources couldn't make it. They have a pretty full schedule with the Legislature coming up. As indicated in the Memorandum of Understanding, they will be involved in our negotiations and in our strategy meetings and will be kept up to date on everything we do, so they will know exactly where they are. Now, following the agenda here, the second issue . . . well, I'm getting ahead of myself. Do you have anything to say, Dan, or Mr. Pablo?

JIM GOETZ: No, I think we can go on with whatever you've got in mind.

GORDON McOMBER: Okay, well we both . . . very well then, thank you . . . we both were of the opinion that the legislation authorizing the Commission should be extended for a couple of years. Legislation has been drafted and Senator Galt and Senator Joe Mazurik, who are also on the Commission, will prefile it so

it will be ready to go when the session starts. There is an Interim Committee on Indian Affairs. That committee has drafted legislation also, which is a little different from ours. It is our understanding that that will be introduced also. I would tell you that several of the other Tribes have indicated interest in the continuation of the Commission. The Governor supports it, and about every one we know supports the continuation of that legislation. Do you have comment on it at this time?

JIM GOETZ: What are the differences between the Galt bill and the other bill that is drafted by the Interim Indian Committee?

GORDON MCOMBER: Marcia, would you run through that for him?

MARCIA RUNDLE: There are, the Commission bill basically extends the period of negotiations for two years. It also adds a section on reporting, that the Commission would report periodically to the water court on our progress in negotiations. And there is an additional provision that unless Tribes are negotiating by the July 1, 1985 deadline, they would not be able to commence negotiations after time. And there is a provision that if negotiations were terminated, they could be reinstated within, I believe, a 30-day or 60-day period. Is that right, Scott?

SCOTT BROWN: Well, the provision reads that if a letter of termination is submitted by either party, and that submitting party wishes to retract that statement before the termination date, which is a 30-day period from the time the letter is sent until termination date takes place, this new legislation will allow a retraction of that statement. But once terminated, then that's final.

MARCIA RUNDLE: Then in contrast to that, the amendments of the Select Committee on Indian Affairs provide, I think there are three basic differences. One is that it adds some language to clarify the status of a compact once it's ratified. It proposes that a compact would be entered into the preliminary decree for informational purposes only, and also that it would be entered into a final decree without alteration. The other provision is that it would allow . . . this is six-month probably, Scott, instead of 60 days, it changes to six months.

SCOTT BROWN: The extension, yes.

MARCIA RUNDLE: . . . the extension for . . .

SCOTT BROWN: If the negotiations are terminated, as it stands now, 60 days after the termination date, which is effectively 90 days after the submission of a letter, then the Tribes or the federal agency involved are required to file with the State. The Interim Committee has requested that that grace period be extended to six months following the termination date, so it's actually 30 days plus the 60 days or the six months, whichever ever is adopted by the Legislature.

GORDON McOMBER: I could leave you copies. Any of you happen to bring an extra . . .

MARCIA RUNDLE: I didn't bring any extras, no.

SCOTT BROWN: Weren't you sent copies?

DAN DECKER: No, I didn't receive a copy of your . . .

MARCIA RUNDLE: I don't think so, Scott. We sent some in request to . . .

DAN DECKER: When we met in Helena, I requested some, but I didn't receive a copy of the Commission bill.

GORDON McOMBER: A word of explanation, the legislative fiscal analyst's office considered, well first they approved the funding for another two years, and then they considered the introduction of a bill, and Dan had spoken to them, I guess, last Thursday or Friday, and then I did. They feel the job's done, taken care of, so they are not going to introduce one, but that explains the letter from the fiscal analyst.

MARCIA RUNDLE: Scott, was there one other . . .

SCOTT BROWN: (inaudible) federal congressional . . .

MARCIA RUNDLE: Oh, it adds language that congressional ratification would be sought only if legally necessary, and we're not real clear about it, what the, well, we're pretty clear about what the implications are, but not what the effects may or may not be of that clause.

GORDON McOMBER: At least one tribe has indicated interest in removing the requirement for congressional ratification. It's in our statute and I guess we haven't, we're open on that as far as I know, waiting for input on that question.

JIM GOETZ: Let me ask, it's a little off the point of the agenda, but I think pertinent. That is the legal question of enforceability of a compact once one is negotiated and approved by the Legislature. My question is, has your staff done legal research on that question? For example, if a non-Indian water rights holder challenges it on due process or on other grounds, and if so, whether you would be willing to share with us the research, because one of the things we are looking at down the pike is, even if we can make an agreement with the state, whether that might not be upset by an individual water holder.

URBAN ROTH: Jim, we haven't discussed that particular

aspect, that is, the funding, the joint funding of defending the compact against a due process or some other similar constitutional attack. We're aware and certainly we have discussed the fact that any compact can be the subject of litigation. The fact that you legislate that it is final doesn't of course, as we know, remove all legal impediments or challenges. And with regard to that, we have never discussed taking a position on it. As a matter of fact, you are the first one to bring that up to my knowledge as far as joint funding of a defense. Am I articulating what you have asked correctly?

JIM GOETZ: Well, I wasn't suggesting joint funding of a defense, I am just wondering if you have done any research on that question because I am . . .

URBAN ROTH: You mean the due process?

JIM GOETZ: Yes, I am interested in where we stand, should we spend a lot of time and ultimately reach an agreement, how defensible that is.

URBAN ROTH: Well, with regard to the procedural due process the potential objectors get notice, but as far as the legislation is concerned, we don't anticipate permitting any modification of any compacts within the comprehensive adjudication process. So that if someone has a due process claim, it's going to survive, I suspect, the adjudicatory process. With regard to whether or not the due process claim would have some viability, I guess you could speculate on that, you know, as much as you could about how many angels there are on the top of a pin. There are good and substantial reasons why it's not going to pass muster. There are good and substantial reasons why, I suppose, a due process claim

might survive the compact process. But to, I guess, be pessimistic from the inception that it wouldn't pass constitutional muster, I don't think is particularly profitable. Do you perceive some reason why it wouldn't survive constitutional muster if we compacted? I mean, you know, there are other interstate compacts that have survived.

JIM GOETZ: Yes. Now I don't particularly, except that in my general reading on the subject, one of the nagging questions out there is, how binding can the state be on individual water users through the vehicle of negotiation? In other words, how survivable is your compact going to be when individuals out there challenge it? I am just querrying, I am not anticipating a challenge, but that seems to be one of the lurking problems and I just wondered if there had been some substantive research done on it.

URBAN ROTH: No, but it seems to me that that's something that could be negotiated to survive a challenge like that. I would just throw out some suggestions and certainly they are not meant as proposals, but as long as we are conceptualizing here I will put this out. That would be a savings clause. That would be the first thing that you would want, i.e., if some particular provision of the compact was held unenforceable or unconstitutional, it would not effect the remainder of the compact, so long as the compact as a whole would be administered and enforced according to its intent. The second one would be that as to any particular provision of the compact that was declared unconstitutional or unenforceable, the parties could mutually agree to renegotiate that particular portion and unless the parties agreed, the compact would be subject to renegotiation

after that particular portion.

GORDON McOMBER: Scott, let me you, do you recall this question arising previously?

SCOTT BROWN: Well, yes it has in Missoula (inaudible). We have not discussed it for some time. It would't be well for me to try to recall what was discussed. Dan, you remember some of these discussions about the paribus patria aspect of the Commission acting on behalf of water users and then the Legislature acting on behalf of . . .

DANIEL KEMMIS: I don't think that we've ever come to anything like what we felt was a conclusive answer on the subject. Some of us, at least, have continued to feel that its . . . given the fact that in adjudication of the scope of the statewide adjudication here you really have got to anticipate that everything that can be raised will be raised and, therefore, we have to anticipate that some water user somewhere is going to challenge the authority of the Commission and the state to have negotiated away any of their rights. One of the things that I think needs to be done to hedge against that at least is to at least allow for the raising of those due process issues at some stage during the procedure. Presumably, that might be where objections are raised to the preliminary decree, to at least allow that question to be raised and answered. If there were a way to seek declaratory judgment, clear it away ahead of time, that might be fine, but how you get over just issuability issues, I'm not sure.

URBAN ROTH: The thing is, Dan, and perhaps Jim is thinking of this, with regard to the legislation that the interim

committee has proposed, as I understand it, it would be incorporated into a preliminary decree but incorporated into a final decree without any change. While you have given them at least notice, which would satisfy one aspect of procedural due process, you haven't given them a form for substantive due process and I'm not sure that we can do that. That might make the enabling legislation vulnerable.

DAN KEMMIS: But can't we lessen the prospect of that at least in part by either implicitly or explicitly saying that if people have due process questions of the kind that Jim is raising, that at least those can be raised before the water court at the time the preliminary decree is entered. That that form of objection, at least would . . . we're not going to cut people off from that objection. One way or another, they're going to have their day in court, and it seems to me that we strengthen our due process position by making it clear that the raising of those due process issues is possible at the time the preliminary decree.

URBAN ROTH: But what you are saying is you are going to broaden the scope of the legislation, the enabling legislation to at least acknowledge those kinds of questions?

DAN KEMMIS: I don't know if we would need to, or if it would just be implicit that it could be done. I think we should look pretty carefully at the language of the proposal so that we clearly are not cutting off that possibility.

URBAN ROTH: Well, I think it is a problem, Gordon, with regard to enabling legislation that, and that concerned me when the final decree would go in unchanged. As a matter of legislative fiat, I think that type of legislation could very

well create some constitutional questions where you just flatly say, "Yes, we're going to give you notice, but you can't do anything about it."

JIM GOETZ: But on the other hand, if you give them notice and allow them to contest a negotiated settlement, give them a meaningful opportunity, then are we in the middle of adjudicating the whole question of Indian water rights behind the State?

GORDON MCOMBER: That's the question.

JIM GOETZ: That's why I raise the issue of whether you have looked very carefully at, because I don't think either side wants to spend a whole lot of time on this if the end result is going to be upset.

URBAN ROTH: I can tell you, Mr. Goetz, that a former staff attorney did considerable research on that in response to a question from Henry Loble, and I'm sure Marcia we have that in the file somewhere. But again I go back on your memory, Jack and you other people, I believe it was the position of the Commission that the water court was not going to amend the compact once it has been approved.

GORDON MCOMBER: But I don't, that I don't know.

URBAN ROTH: Do you wish to comment further on that?

JIM GOETZ: No, I don't think we are going to resolve that here by any means. It's just something that is of concern to us and I am sure concern to you that we ought to keep in mind.

URBAN ROTH: Are you going to do any definitive study on the question, or are we just going to leave it, or what?

(Laughter)

URBAN ROTH: I guess what I'd like to know is, is this going

to be an impediment to negotiations? And if it is going to be an impediment, then perhaps we ought to deal with it or agree to deal with it in some way. If it's just something that is kind of a nagging doubt, that's something else.

JIM GOETZ: Now I guess we feel that negotiations are worth pursuing. Anything you do, of course, entails some legal risks, and something as complicated as this, so that's not going to be an impediment to our sitting down and talking about it. But I had hoped that you had looked at the question and could give us a dispositive answer. I guess the answer to that is, "no."

URBAN ROTH: I'm not prepared to give you a dispositive answer. Marcia, are you going to climb Mount Olympus on that one?

MARCIA RUNDLE: No thank you.

DAN KEMMIS: Could I just make one suggestion?

URBAN ROTH: Go ahead, Dan.

DAN KEMMIS: If in fact we do have any legal research, I wonder if we could look it over and find out whether we see any problem with sharing it with . . .

URBAN ROTH: Yes, I think implicit in what we are saying is that Marcia is going to dig down through the dusty archives and find that opinion, or whatever it is, and distribute it among us here anyway. And then the next opportunity we have, we'll probably discuss it. Marcia, maybe you can dust it off and give us the benefit of your thoughts on it.

GORDON McOMBER: Victor _____ did it.

SCOTT BROWN: Yes, Vic _____ did some research, but I do recall and I think Senator Galt will also recall, at least we came to pretty much the same conclusions.

DAN KEMMIS: Which were what?

SCOTT BROWN: There are some risks there.

GORDON McOMBER: Well, in your letter from Chairman Felsman, he indicated that you were interested in discussing a joint approach to presenting this legislation to a Legislature. Did you, I guess before we get to that bottom line question there, had you an interest? Had you looked at this question on the gratification? As I said, it's new to me and we're, we haven't taken a position on it.

DAN KEMMIS: You mean the issue of whether Congress needs to ratify it or shouldn't have? We haven't taken a look at that, so I guess we are not prepared to speak on that. In terms of a joint effort, we favor extension of the time period because we don't think that we can complete the negotiations by July 1, 1985. The balance of the legislative proposals, I don't, we haven't really talked about, so I can't really speak on those, and the other issue, I guess, is whether a joint effort is needed. It may actually be counter productive for us to come in and support the legislation, but it sounds like it's pretty well supported anyway, so there shouldn't be any problem with that passing, should there?

DAN KEMMIS: And not only that, I think that we're not just looking at getting this legislation passed, but kind of laying favorable groundwork in the legislature about everything that we are up to here. And I think that the moral support that we have from the Tribes saying that we're at least working well enough together to want to extend the life of the Commission is going to have some impact on down the road. I think it will be

worthwhile.

GORDON McCOMBER: Well, I guess to follow what you are saying, Dan, it wouldn't look very good if the Legislature never heard from it at all.

JIM GOETZ: Is there some kind of mechanism then we can set up for notification as to committee hearings and that type of thing that . . .

JACK GAULT: You bet, that will be taken care of. I'll notify Scott and Scott will immediately notify all interested people.

JIM GOETZ: Okay, we'll designate a person or two here then that could coordinate that legislative effort and then they can coordinate with Scott on this.

SCOTT BROWN: Excuse me, Dan. You never did receive copies of the suggested legislation, proposed legislation that the Interim Committee on Indian Affairs proposed?

DAN DECKER: I've got copies of the Interim Committee's legislation, but not of the Commission's proposal.

MARCIA RUNDLE: I thought we gave you some when you met with us?

DAN DECKER: I don't remember going through it. I know we discussed it that day and what to do, was going to happen, but I don't remember seeing . . .

SCOTT BROWN: When I get back to the office I'll send you a copy of that, or do we have an extra copy?

MARCIA RUNDLE: No, I don't.

(Inaudible discussion)

URBAN ROTH: Could I sort of summarize what has been agreed to here then, is that the Tribes favor extension of the time

period and that the Tribes will, after they study the legislation, express approval of the extension to the Committee and to the Legislature. Scott will notify the Tribal representative as to the Committee hearings on the legislation and if it appears appropriate, you'll have someone express the Tribe's position on that. Is that sort of a summary?

JIM GOETZ: Yes, I want it made clear that we haven't had really the opportunity to discuss the other provisions. I don't see off hand any problem with those, but . . .

URBAN ROTH: I understand. But the general concept . . .

JIM GOETZ: Of the extension, yes.

GORDON McOMBER: Okay then, moving along to the next item, Item 3, Technical, Historical and Legal Information needed. At this time, Urban, I'd like you to pick up the ball.

URBAN ROTH: Well, with regard to the negotiation of any compact with any Federal Reservation or Indian Reservation, we would have to have a data base from which to start talking, it seems to me. And from what I've learned in the last couple of years, I believe the Tribes have retained several technical people to assist them in obtaining some of this data base. The state, of course, has some of that information. Scott's people have some of it, the DNRC have some of it. And generally the way the Commission has approached that subject in the past, and I don't speak from personal knowledge, except with regard to some of the Tribes and the federal agencies with whom we've met since I've come on line, our policy is one basically of an open door policy. Scott and his staff are willing to share the information they have. We would like to have the same commitment by you

folks that you will share the information you have. Certainly with regard to legal information, whatever legal positions you take, we'd appreciate receiving a memorandum or whatever you are relying upon for a particular position. Perhaps we can be convinced that you are right and we are wrong if indeed we are on opposite sides of the fence on that particular issue. We have some historical information, but one of the areas I never got into when I was involved in litigation was the secretarial rights. I understand there is sort of a dearth of information on that as far as the rights themselves, so that is one area I think Scott would like some more information on. I believe, Scott, you indicated you actually have a copy of one secretarial right.

SCOTT BROWN: Well, I have seen a copy of it. We no longer find it, and I am beginning to think now it was because I had seen one which belonged to a person on the Reservation, but . . .

URBAN ROTH: But he quickly retrieved it and didn't give it back.

JACK GAULT: Are they a matter of record anywhere?

URBAN ROTH: That, I don't know. We did quite a bit of study in your Tribal records back a few years and I just don't recall seeing anything on secretarial water rights. I can remember timber and things like that, but I don't recall the secretarial water right. In addition, you know you have two law suits pending, one by the United States, and one by the Tribes that at least affect the Flathead Reservation. In the United States complaint, they're requesting reserved water rights for the National Bison Range, the various wildlife refuges. Do you anticipate trying to incorporate them or deal with them, if they are located on the Flathead Reservation, within a compact with

the Tribes or do you perceive those as independent negotiations between the Reserved Water Rights Commission and the federal agencies? I don't know if you have given that any thought.

JIM GOETZ: On that latter question, we haven't considered that, so I'll make a note on it and we will discuss it and let you know.

URBAN ROTH: It's sort of a footnote to that, if indeed you do consider that as a part of these negotiations, then we would need similar data from the federal agencies with regard to what they perceive their reserved water rights are in regard to those particular federal reservations within the Flathead Reservation.

JIM GOETZ: What, let me ask you, what is the status on the, you're conducting compact negotiations with the feds now?

URBAN ROTH: Yes, we are, with both the National Park Service and the Forest Service.

JIM GOETZ: And what have they indicated about the data?

URBAN ROTH: Well, we haven't discussed those three reservations that fall on the Flathead Indian Reservation. We have discussed Glacier Park, with the National Park Service. We've discussed the Lolo, and is it the Flathead National Forest in principal, with the Forest Service. They have absolutely no problem in giving us data. It's been slow coming, I guess is our only comment. Isn't that true, Scott? That still persists today, it's kind of slow coming, isn't it?

SCOTT BROWN: We're expecting that they will be finished with their studies for the entire state by the end of this month, or certainly by the end of the year.

URBAN ROTH: That's within sort of the time frame. They

indicated perhaps by the end of October, I think, in their meeting and so a month or two isn't too bad. Basically, Jim, I think I can represent that other than the . . . Rocky Boy did not indicate that they were going to share data with us. They want to get back to us on that and I don't think they have yet. But other than them, I don't think that any of the Tribes have indicated they have any resistance to sharing data and information. It was just our preliminary meeting with Rocky Boy, and they didn't want to commit themselves to that until they studied the problem. I don't think we anticipate any problem, but I don't want to say that every Tribe has agreed to just open their data bases to us. Most of them have, and certainly the federal agencies have.

JIM GOETZ: We have, well certainly I'm not going to commit to do that here today, I mean at least we are going to want to look at that question, and I think that counsel would want to deal with that. The problems . . . we are in the process of compiling data, which we were initially doing in anticipation of an adjudication. Things that we have to consider on this are the question of if the negotiations break down, have we lost some advantage by essentially making all of our data available? There is the obvious other question, and that is in terms of leverage in negotiation, information makes a great deal of difference as you well know, and we just have to decide among ourselves, and we haven't done that, but we will look at it, whether we want to pursue these negotiations, based on holding our cards close to the vest or whether we want to go for the open door policy. But we will be willing to consider it and get back to you.

URBAN ROTH: Well, I guess the Commission (inaudible) in

Montana in essence, has faced that same problem. And it's bothered me just a bit that some of the information that's developed could be used to prejudice the state in the event of litigation. By the same token, I think it shows the good faith of the state and their efforts to reach agreement, that they have so far been willing to share data and not play games, at least as far as the data is concerned. It's possible, and we might consider this, Jim, that perhaps we enter into an agreement, a side agreement, where the parties would stipulate that that the information would not be admissible in any litigation in the event the negotiations broke down, except if the party originating the information decided to use it in subsequent litigation. And that these are considered negotiations pursuant to Rule 407 or 408 of the Montana Rules of Evidence, and that any information disseminated in these negotiations would be considered clothed by the negotiations rule and would not be admissible into evidence, something like that. And I frankly have been concerned in that perhaps the state hasn't protected themselves as well as they might with regard to subsequent litigation, if indeed the negotiation process broke down. So that's a concern you might put thoughts together on. We'd like some proposal on that if you have one.

JIM GOETZ: Do you have any budget at all for technical work, that is the Commission itself? And secondly, I guess, is might that be something that would be addressed in the upcoming Legislative session? The reason I ask that is because we can envision certain joint projects, that is, where we might from a technical standpoint, be able to agree that there is information

that is needed that neither side has, that is expensive to get. My understanding is, for example, that aerial photographs of the, during the summer, during the irrigation season should be taken to establish present water usage, and something like that. What I am wondering out loud is whether there might be some of those types of endeavors that might be undertaken jointly?

URBAN ROTH: I guess I'd have to defer to Scott if he wants to talk about that. Or do you want a caucus on it?

SCOTT BROWN: Well, we have done that, Peg knows very well, we have done that. We don't have a great deal of money to undertake these kind of studies, but that is something that we have done on other reservations, and at least with respect to that one suggestion, I think it's a good suggestion.

JIM GOETZ: Well, we'd prefer that you do it and just give us the information.

(Laughter)

SCOTT BROWN: It works that way, too. That has been done, because there is information you have that we would have to go out and collect, so we are speaking in generalities here, and if you don't mind me making a suggestion, the technical people representing each party have often, at some point after the first or second set of discussions, been a little more specific about what kinds of studies might be needed, and what is available. That is what I would like to propose, if that's all right, that within the next month or two, technical people could discuss possibilities and present to you and to Mr. Roth, suggestions for those studies that should be done and some kind of time schedule, and as best we can, an estimate of cost.

URBAN ROTH: Seems to me at some point, Jim, that you have

to at least be willing to do this to get a finger on what . . .

(End of Tape 1, Side 1)

JIM GOETZ: Well, I like Scott's suggestion of having the technical people get together and discuss areas that might need to be explored in terms of development of information, and presenting a fairly defined set of matters. In other words, Urban, your policy on open door as a broad principle, I think will meet some resistance with the Tribal Council. We are, as you well know, coming into these negotiations very cautiously. I think more progress might be made if we could talk in terms of definite areas of technical information where we might be able to share or not share or conduct joint endeavors if we don't have the information.

URBAN ROTH: So what you are suggesting is that your folks draw up a laundry list of information you need and our folks draw up a laundry list of information they need, and they meet and try to define with more specificity precisely what's needed?

JIM GAULT: Yes. Maybe . . . I think we ought to caucus on that maybe, Dan.

DAN DECKER: Possibly.

JIM GAULT: Why don't we caucus for a short while. I don't know if you want to do that now, or . . .

URBAN ROTH: Fine.

DAN DECKER: Why don't we do it now?

(Caucus)

JIM GAULT: Sorry to keep you waiting so long. What we would like to do is have the technical people get together with your people and see what information needs to be developed and

see if there can be joint effort on that, and discuss the sharing of information. We want to approach that very cautiously, but we are certainly willing to talk about that, but I think it should be done through the technical people in the first instance, rather than have an open door agreement that you suggest.

URBAN ROTH: And also, perhaps areas of joint concern? Okay?

GORDON McCOMBER: These things, you know, this information is for the most part going to be needed before we can approve a compact, because some of that is basic information and you have to have it.

URBAN ROTH: I suspect a lot of it is available, but it's a lot easier if each side is willing to give it to the other with the least amount of effort. Are we ready to move on?

JIM GOETZ: Yes, I think so.

URBAN ROTH: Okay. We would like to discuss the lawsuit that you have pending with the State of Montana. We know that you are going to meet with the State tomorrow with regard to that litigation. We also know that on May 2, 1984, Dan, you took a pretty hard line with regard to negotiating that lawsuit. At least, that is what has been told to us, and perhaps you perceived the State as taking a hard line. But, what do you intend to do with that lawsuit, or do you want to open up on that?

JIM GOETZ: Well, I'm not sure what we intend to do with that. Let me set the context for this. On May 2nd we met and among other things, the possibility emerged that we might be able to negotiate through the rubric of that lawsuit on various issues that we are talking about here with the Compact Commission. At

that time, of course, we weren't talking to the Compact Commission. It looked like a possible avenue for reaching some agreement, so that seemed intriguing to both sides, and we thought about it. It seems at this point that there is no sense trying to settle that lawsuit to embrace the kind of issues that we are dealing with here. We are going to deal with these issues with the Compact Commission and it seems that that is where the issues ought to be. So that leaves that possibility, I think that excludes that possibility of any substantial negotiations on that suit. So it seems like it leaves the possibility of proceeding with the lawsuit, staying it, or dismissing it without prejudice. And that is what we are talking about now. We're not leaning toward proceeding with it, I mean we, as long as we are in negotiations with you people, it seems like there is no percentage, from our standpoint in going ahead with a federal lawsuit. But we frankly haven't made up our minds beyond that what we want to do with it, but we will be talking . . . who will we be talking with?

?: Leo Berry.

JIM GOETZ: . . . Leo Berry tomorrow in Missoula. We will be talking with Leo Berry on . . .

GORDON MCOMBER: Oh, that meeting is going to be in Missoula?

JIM GOETZ: Yes, with Leo and Helena McClay and . . .

URBAN ROTH: What time was that, Chris?

JIM GOETZ: What time is that meeting?

?: 10:30.

URBAN ROTH: Well, just as you have some suspicions and

uneasiness, why, I guess we perceive that perhaps, you know, you are maybe using the Compact Commission or the negotiating process as a sort of a leverage in the lawsuit, and the lawsuit as leverage on the Compact Commission. I guess, you know, I'd like to see that lawsuit dismissed, or something done with that so that it looks as if, at least superficially, that you are greedy and not that you can't go ahead and file the lawsuit again the next day after you dismiss it. At least it gives a superficial patina to the negotiating process.

JIM GOETZ: Well, I'd like to see Greeley dismiss his lawsuit against the water courts, too. I mean, I could simply parrot the comments you've made about this suit. Certainly we had our suspicions when we decided to get back into the negotiations and then all of a sudden Greeley files against the water courts and doesn't even notify the Tribes.

URBAN ROTH: By the way, I did notify the Tribes that the suit was coming.

JIM GOETZ: Yes, I know, that's how we found out it.

URBAN ROTH: The reason was is the Commission felt that they had to keep their credibility up, that they had some obligation. I called Evelyn Stevenson and specifically advised her of what was coming, as I did all of the other Tribes that I could get a hold of, some I couldn't get a hold of, but certainly the effort was made.

JIM GOETZ: We appreciate that. I think Greeley probably in retrospect thinks he should have notified the Tribes himself. But in any event, you can see our point. I mean, we will do . . . we've got to make a decision on the lawsuit and we are going to beat on that after this meeting, meet with them tomorrow. But I

can't tell you what we are going to do in it.

GORDON MCOMBER: Will it be all right with you if Marcia sat in on that meeting tomorrow with . . .

JIM GOETZ: Yes, we don't have any problem with that. It's at 10:30 at the Glacier Building; probably meet at Helena McClay's office. They have a conference room upstairs in that building.

URBAN ROTH: Well, we are certainly interested, and vitally so, in the disposition of that lawsuit, because we do think it has a profound impact upon what we are doing here.

JIM GOETZ: Do you have any problem with our staying the lawsuit?

URBAN ROTH: I guess I do. We haven't discussed it. We can have a caucus about it, but in principal, yes, I do. It seems to me that the Tribes should be willing to fish or cut bait. Either they are going to litigate or they are not going . . . they are going to attempt in good faith to negotiate, realizing that litigation is always an option. After dismissal of the lawsuit, you can always, as I say, two hours later you can go in and file it again. At least we should have some definitive signal from the Tribes that they really are approaching negotiations with an idea of perhaps resolving some of these basic issues.

JIM GOETZ: Do you have a number of acre-feet in mind you want to give us for dismissal of that suit?

(Laughter)

URBAN ROTH: I didn't know that we gave you anything. Every time I've argued against the Tribes, why, we are not giving you anything, you have reserved it already.

JIM GOETZ: Well, I want to put it in a manner that would be receptive to you.

(Laughter)

URBAN ROTH: No, we are not going to negotiate on it. I'm telling you in principal what I feel should be done with it, and I guess I feel strongly about that. I guess, probably we've, unless you have something else to say about that lawsuit, why, we can move on.

JIM GOETZ: Yes, we will meet with them tomorrow and we will, as I say, we are meeting this afternoon.

URBAN ROTH: You mentioned . . .

DAN KEMMIS: Excuse me.

URBAN ROTH: Excuse me, go ahead, Dan.

DAN KEMMIS: Since it is in Missoula, if I get an opportunity to drop by, that won't be a problem?

JIM GOETZ: I think we better caucus.

(Laughter)

DAN KEMMIS: I'm sure. I knew I'd stir up a hornet's nest with that suggestion.

(Laughter)

JIM GOETZ: No, we don't have a problem.

DAN KEMMIS: Okay.

URBAN ROTH: Off-Reservation, you mentioned that you would like to talk about off-Reservation water rights. What are you proposing there? I guess initially we haven't made a decision as to whether we consider those reserved water rights, per se, despite U.S. v. Adaire and I guess that's what you are looking at as far as off-Reservation rights are concerned. Some sort of an instream flow for ancestral fishing rights or something like

that.

JIM GOETZ: That's right. We want to know what your position is in terms of whether you recognize the Tribe's interest in the off-Reservation streams.

URBAN ROTH: I don't think we are prepared to tell you what our position is, but I guess initially we haven't even taken a position as to whether they are appropriately labeled reserved water rights or whether U.S. v. Adaire is sort of an anachronism, or what. For example, he specifically seemed to say in the opinion that those were not Winter doctrine rights. The other reserved rights dated from the inception of the establishment of the Reservation, whereas the Court seemed to hold that the off-Reservation rights might have some prior priority date.

JIM GOETZ: Well, we obviously have a strong interest in the off-Reservation rights, so we want you to take that up. I mean, we consider those as part of the Compact Commission negotiations. So we want, we ask you to take those up and let us know what your position is going to be on those. Probably the first question obviously has to be whether the Commission will recognize the off-Reservation interests of the Tribe, and then if the Commission does, then we have to work out a format for dealing with those, similar to what we are doing with the on-Reservation. Have any other Tribes raised this issue?

URBAN ROTH: No.

JIM GOETZ: So this is the first time you have dealt with it?

URBAN ROTH: Not all Tribes have off-Reservation rights.

GORDON McOMBER: (inaudible) . . . briefly previously just in

passing. I've read in some of the transcripts, I think Henry commented on it, to the extent . . .

SCOTT BROWN: The only thing that I can think of is that there are some lands outside of today's Crow Reservation boundaries that are what is commonly called the seeded strip, and they have been remaining in the Tribe's hands or perhaps their allotments. There are some questions about whether or not the water rights are associated with (inaudible) any other suggestions (inaudible) similar situation.

JIM GOETZ: Well, in any event, it seems to me that in a future meeting, once we have your position, and if you are in agreement with us that there are suitable subjects for discussion in these compact negotiations, then we probably shouldn't address the format in terms of technical information.

URBAN ROTH: I guess by the same token, as long as we are getting to substantive issues, will the Tribes recognize excess waters or surplus waters on the Flathead Reservation? What is their stance with regard to existing users? Will they consider bifurcated administration? You know, these are of vital concern obviously to the State of Montana. So, you know, I shouldn't repeat what your position is, but I guess my perception of the position taken by Mr. Decker before is that every drop of water on the Reservation or touching the Reservation belongs to the Tribes, and that you intend to administer every single drop of water that touches on the Reservation. All you perceive as the function of the Compact Commission is to quantify those drops of water. If that is your position, we would like to know it as soon as possible, because that doesn't leave very much to negotiate by.

JIM GOETZ: In that context, what do you mean by surplus waters?

URBAN ROTH: Water not presently appropriated and put to beneficial use.

JIM GOETZ: Okay, so you, in other words, I get the impression from Leo Berry's letter of September 13th that he is defining surplus waters in a different way.

URBAN ROTH: This is just an off-the-cuff. I look at surplus waters as those waters not presently put to beneficial use by anyone.

JIM GOETZ: Well, that, by the way, is my interpretation, or was generally my interpretation, but he seems to, well let me quote from his letter of September 13th, second paragraph, "Initially there are two issues that the state needs to know the Tribe's position on in order to proceed with settlement possibilities in this case. First, the Tribes take the position in their complaint that their reserved water rights are essentially open-ended and that there are no 'non-reserved' or 'surplus' waters on the Reservations." I'll stop the quote at that point. I get the impression that he seems to think that surplus waters are any waters over and above Indian reserved waters, so there is a real confusion in terminology there.

URBAN ROTH: Well, I think that if you wanted, as a sort of a subclassification that surplus waters would include waters that are non-reserved also. I think in negotiating reserved water rights, implicit in it is how much is reserved, and are there any non-reserved rights in addition to being surplus.

JIM GOETZ: Okay, he goes on to say, and let me quote this

so we have the context, "It is the State's position that the Tribe's reserved water rights must be quantified taking into consideration among other things, anticipated future uses of the Tribes. After this quantification, any unquantified water would be 'surplus' or non-reserved waters. It seems to me that you need to, under his scenario, that you need to do the quantification before you can address that question. I mean, we are starting with the proposition that all waters are reserved waters of the Tribe, but I think we are here to negotiate on that question.

URBAN ROTH: Well, we anticipated that you were and that's why I put it right out on the table. There is no sense beating around the bush. I understand that is your initial position, but I guess the question is whether, and you have answered it, whether or not you are going to negotiate about that, and whether you are willing to negotiate with regard to subordinating to existing uses; whether or not you are willing to, let's say, talk about a water bank for non-Tribal member development, etc. Things of this nature, it seems to me, are subjects of deep concern to the state.

JIM GOETZ: Well, we are realistic enough to appreciate the fact that those issues are going to be the subject of negotiation and we wouldn't be here if we didn't recognize that, so . . .

URBAN ROTH: I appreciate that.

JIM GOETZ: . . . you know, we are going to discuss those. When you talk about a water bank, it raises an interesting issue, and that is, whether there might be, as a subject of this negotiation, the possibility of water development projects.

URBAN ROTH: Jim, I guess, I think I can speak for the

Commission in this respect that basically we don't foreclose any subject that deals with reserved water rights from discussion. Even with regard to the off-Reservation rights, we are willing to listen to your position even if we take a position that we don't believe is appropriate for a compact. So, to answer your question, we are willing to listen to a proposal, study it, and come back with an answer.

JIM GOETZ: Along those lines, it seems to me maybe to make it a little more specific, that we might reach a position where the Tribe feels that it has x amount of reserved waters. They seem inconsistent to you with the rights of existing users, and realistically there is that kind of conflict, but that conflict may be able to be resolved through the funding of water development projects. See what I'm driving at? Has this issue been raised at all with respect to the other negotiations?

URBAN ROTH: Yes, it has, and the problem you face as soon as you talk about, I guess, joint or water development projects is funding. Whether you can realistically project what the Legislature or the Tribes, or the B. A. or anyone else is going to do with regarding to funding water projects. So, initially they have. If you are going to define the projects, then you have that initial problem. But just putting in language that some projects can be jointly developed, or something like that, probably doesn't have as much initial resistance.

JIM GOETZ: On the . . .

URBAN ROTH: We've discussed it. To answer your question, yes, we have discussed it.

JIM GOETZ: On the bifurcated administration question, the

Tribe's position is that it has the authority to regulate waters on the Reservation. Again, it's like your approach to off-Reservation rights. We are willing to listen to anything you have to say on that, and consider it. We consider it to be a legitimate subject of negotiation. It does occur to me that we can negotiate quantification in theory without resolving the regulatory jurisdiction issue.

URBAN ROTH: Yes, you can. I guess the problem is that some of the fundamental reasons for entering into a compact are being overlooked. Seems to me that the parties should attempt to resolve, and as far as possible, as many of the issues that can foment litigation in the future as they possibly can. Maybe in a last ditch effort reach a compact, quantification might be the only thing that you could agree upon, but I guess I would perceive that as somewhat of a failure if we are not able to tackle and resolve some of the other issues. Because litigation is expensive, I think destructive of good relations, makes lawyers rich, but clients poor, so on and so forth. I would say that we shouldn't look at that as what we are trying to achieve here initially anyway. Let's not limit ourselves to just quantification, let's look at all the plethora of issues and see whether or not we can reach agreement on most of them or some of them. That's what the Commission, I think, is looking at, rather than just a narrow view of what our role is here. The way I perceive it is, people can always litigate, but . . .

JIM GOETZ: I agree with that. I think we want to talk about . . .

URBAN ROTH: . . . I think it's harder to negotiate and reach agreement, but in the long run I think you have achieved a

heck of a lot more if you can reach agreement.

JIM GOETZ: What did you do on your initial Fort Peck agreement on administration?

URBAN ROTH: Well we have that joint board, which really wasn't viable because it wasn't practical. What ever kind of administration you agree upon, it seems to me you have deal with what water situations . . . farmer A with a head gate problem, or somebody cutting somebody's water off, and you have to be able to get to some kind of a forum very quickly and resolve that before your crops dry up, or whatever it is. So, that particular joint board did not resolve that kind of a problem; it wasn't practical, it wasn't speedy. As you well know in water litigation in the state, you do have a forum that you can go to and you can get relieve, you can get a ditch writer or commissioner or something else appointed to resolve those disputes and basically the rights of the party are reserved through the adjudicative process. Whatever we decide upon, both parties, it seems to me, have an interest in a practical and speedy type of resolution process. It can't be so cumbersome that it isn't practical. As far as I know, the water courts of the state have been rather neutral as far as their racial orientation is concerned. I don't foresee them as being bent one way or the other. Some of our notions of inequality I don't think are realistic today. As I say, the State has an administrative setup right now that is in place and usable and satisfy the practical and speedy requirements.

JIM GOETZ: Okay.

URBAN ROTH: One position we have taken, Jim, is with regard

to the Tribal right per se, the amount of water that is required, or which is recognized as required to satisfy the primary purposes of the Reservation, that the Tribes have the full authority to allocate that among its members or its licensees, lessees or whatever. We have recognized this and I think you know that. So there is no sense in telling you that we haven't been receptive to that kind of an approach. Disputes among Tribal members should be resolved in their Tribal forum. We have taken as a conceptual approach.

JIM GOETZ: In other words, disputes between Tribal members even where they are not talking about reserved waters?

URBAN ROTH: Well, no, just reserved waters, that's all we are talking about. If they are appropriative rights, then I think they properly belong in the state forum.

JIM GOETZ: Anything else on Item 5 that you can think of?

URBAN ROTH: No. I guess we would like something more from you, you know, identify . . . you should be prepared to start identifying streams. And if you have done any work on it, what kind of an instream level are you talking about? But you may want to wait until we have taken a position as to whether that is a negotiable subject.

JIM GOETZ: Yes, I think that would be the appropriate order.

URBAN ROTH: Okay.

DAN KEMMIS: Excuse me just a second, Urban.

URBAN ROTH: Sure, Dan.

DAN KEMMIS: Could I just speak to you folks?

(Break)

URBAN ROTH: Jim, going back to that off-Reservation

subject, Dan has, I think, made a very cogent observation, and that is that before the Commission can really take a position on that, they have to know the scope of the problem. Is it all of Western Montana, all of Montana, you know, how far reaching is the . . .

JIM GOETZ: What do you mean "problem"?

(Laughter)

URBAN ROTH: Should we take in Idaho?

(Laughter)

URBAN ROTH: So, I think maybe we ought to know what streams you are talking about. I think you can do that, and to what extent, how far up the stream, you know. Is it public domain? Are you claiming these on private fee lands, state lands, or just federal public domain, unoccupied? So if you could scope the question before us before the next meeting, we would appreciate it.

JIM GOETZ: Well, I think we . . .

URBAN ROTH: Give us time, you know, for the Commission to get together on it.

JIM GOETZ: We can within fairly broad outlines. You know, I don't know that we are going to be prepared to talk about how far up the stream, or public domain, or that type of thing, but, you know, we can give you an idea of the streams that we . .

URBAN ROTH: You could probably give us at least a conceptual idea of where you feel these ancestral hunting and fishing rights still exist, can't you?

JIM GOETZ: Well, basically Western Montana, if that is going to do you much good.

URBAN ROTH: Well, are you contending that they exist on private fee lands? Do you contend that they exist on state-owned lands or just federal public domain land? I think you can differentiate between types of land ownership where you think these exist.

JIM GOETZ: Well, we will see what we can get to you on that.

URBAN ROTH: Okay. Then the last item is the schedule of information, and I am not sure what you meant by that. Is that the same thing as technical, historical and legal, or does it kind melt into what Scott's going to do?

GORDON McCOMBER: Partially. It's everything. Schedule of meetings and development of all information that is needed to arrive at a conclusion. (inaudible) . . . technical information as well as . . .

URBAN ROTH: I guess part of that we had discussed, Scott, and your technical people getting together, and they will be getting back with regard to the type of information. Then there will be decisions made as to what can be exchanged, and I guess a schedule will have to await the second one. But if we can expedite that without a formal meeting, I think it would help both parties. And then the last thing would be, what do you perceive each party should do before the next meeting, and when should we meet next, and does it appear that the process can be a viable process, all of that lumped into one? My perception is that you are looking forward to negotiations as perhaps a method by which water problems can be resolved, and you are willing to enter into viable negotiations toward that end. If so, how do we start getting this thing into shape so that we can proceed?

JIM GOETZ: Well, what do you suggest? If you are asking when the next meeting should be set, you know, we can talk about that. I think we have got, I don't know if we want to wait and see how long it takes the technical people to get together and get back to the respective sides, but we have various questions such as this last one on off-Reservation, which we are going to address.

URBAN ROTH: And we, too, to some extent, but we need more information from you.

JIM GOETZ: And we are going to be in a position, we will know more tomorrow, as you will, about the federal lawsuit.

GORDON McOMBER: Well, I can tell you what we have been doing. We review the transcript and then put together a laundry list. We do and the Tribe does . . . (inaudible) . . . communication there . . . (inaudible) . . . we visibly discuss what should be approved in the next meeting. May new thoughts will arise in a day or two.

URBAN ROTH: Jim, have you seen our, what we call our 1984 Proposal to the Fort Peck Tribes?

JIM GOETZ: No.

URBAN ROTH: I suggest, Scott, would you make that available to Dan, and to Jim? Do you want us to send one over to you, Micky, or will one to Dan be enough, and you can make what ever copies you need?

(inaudible discussion)

URBAN ROTH: All right. Why don't you take a look at that. We've put a lot of thought into it. See if that provokes any thoughts on your part besides, "Hell no."

(Laughter)

SCOTT BROWN: Dan, don't you have a copy of it?

DAN DECKER: Yes, I have a copy.

SCOTT BROWN: I'll send Jim one. I'll send a couple of copies.

GORDON McOMBER: That indicates the Commission's position on those issues as of that time, of course. That draft has been accepted by the Fort Peck people and, of course, is subject to change, but it does indicate the position of the Commission at the time it was written.

JACK GAULT: As it applies to that one Reservation?

URBAN ROTH: As it applies to that one Reservation. It's not meant as a precedent, but at least it's an outline of subject matter.

GORDON McOMBER: Urban, what would you think of adopting the same procedure we did with the last Tribe, that is, review the proceedings of the meeting, compare notes and then get back together?

JIM GOETZ: You are going to have the transcript typed up, I take it?

SCOTT BROWN: Yes, it takes about a week to have it typed up and usually about two weeks to have it printed. I'm sorry that it can't be available faster than about two to three weeks, but that's the best I can do.

JIM GOETZ: And once that's available, then what do you do, kind of draw up a list of what you think should be on the next agenda?

GORDON McOMBER: And communicate, basically.

JIM GOETZ: That sounds reasonable.

GORDON McCOMBER: I should tell you that, probably you know that we have spent nearly the last two years communicating with the Tribes, getting them to talk to us, and now that we have accomplished that, we have six of the seven Tribes that we are dealing with, we do have a scheduling problem. We are going to have to establish a calendar and try and get things lined up in a way that will accommodate as many people as possible. We have had some comments from the federal people, as well as state people, that we have called meetings too quickly. So, it is our intention to lay out a schedule and basis, so what I am saying is, it won't be right away. We just want to have time within the next month or even probably two to keep working on this.

JIM GOETZ: So we are looking at maybe the end of January or thereafter as the next meeting?

GORDON McCOMBER: I'd say anyway, that long.

JIM GOETZ: I just want to find out when the Senate Ag Committee meets and we will set it then.

(Laughter)

GORDON McCOMBER: Well, if we could do that and you could communicate with . . . we'll go through the same process then, Scott as we have been doing with the Crow, and get back together then.

SCOTT BROWN: May I suggest that we would communicate with our parties, but Urban . . . (inaudible). . . setting up an agenda.

URBAN ROTH: The thing about it is, Jim, we want your participation in setting up an agenda. We don't want to say, "This is the agenda." We want you to give us your input, because

otherwise the negotiating process is too one-sided. We want your thoughts, and Dan's thoughts, and Mr. Feldman's thoughts as to what you want to talk about at these meetings, because we are interested in getting this thing moving. If you just leave it sort of fuzzy, or too fuzzy, then it seems to me you are not making any progress.

JIM GOETZ: I like the idea of reviewing the transcript and then making up an agenda list, each of us, and then getting together and talking about . . .

(End of Tape 1, Side 2)

DAN KEMMIS: . . . get together.

JIM GOETZ: Yes, my understanding was that they would get together informally between now and the next meeting some time.

SCOTT BROWN: I would think that would help your development of an agenda, so I will talk with Tom and Kate . . . (inaudible) agree to do that and we can set up a meeting, hopefully before Christmas, to help you with an agenda.

GORDON McOMBER: Okay, there are a few other things we should touch on. The open meeting law we had. Do you have problems with the press being involved, ordinary citizens walking in and being involved?

JIM GOETZ: No, we will want to take it up with the Council, but I don't think we have any problems with that.

GORDON McOMBER: We are pretty severely restricted under state law. I think . . .

(Laughter)

URBAN ROTH: As Goetz well knows.

JIM GOETZ: That's why I said I didn't have any problem with it.

GORDON McOMBER: The policy that has been adopted with other Tribes is that we let anyone in unless the Tribe doesn't want them in. As far as news handling, we haven't issued press releases. We are, on occasion, asked for comments. We make them of a general nature. We do not mention generally specific Tribes, so if that is all right with you . . .

JIM GOETZ: That's fine with us.

GORDON McOMBER: The cost of transcripts, we rotate this. We have with the other Tribes. We pay the expense one time, the Tribe pays it the other, or split it. We generally have just split it down the middle.

SCOTT BROWN: I think essentially split it today with Diane's help.

GORDON McOMBER: And the chairmanship, we traditionally have rotated, too. We handle it one time and you handle it the next time, if that's agreeable.

URBAN ROTH: So, Mr. Fallsman, we would expect or his designee to chair the next meeting.

JIM GOETZ: Yes, that's fine with us.

GORDON McOMBER: One more thing. It's understood, it should be understood that the people doing the technical work, the conclusions they arrive at are subject to approval by the entire Commission. Legislature delegated that responsibility to the Commission. (inaudible) great length. It should be understood that everything everyone does is subject to the final approval of the Commission. Is that a good understanding of what we are going to do?

JIM GOETZ: Now, on that last point, we are in the same

position with respect to the Tribal Council, of course, too. I want that understood. We are subject to going back to the Tribal Council for approval and ratification of what we do as well as our technical people.

GORDON McOMBER: Anything else?

URBAN ROTH: I guess maybe just to expand on your last thought. Reid Chambers used the word "conceptualize" and that's what I perceive we are doing, is putting out concepts and trying to develop positions and things like that, rather than concrete proposals at this stage. Is that your perception?

JIM GOETZ: Yes.

GORDON McOMBER: Okay then. I guess we are ready adjourn. We would like to use your room here for a little bit. Is that all right with you?

?: Certainly.

?: Sure

GORDON McOMBER: Okay, if no one has anything else today, we stand adjourned.

Nov. 19, 1984

RWRC - Conf Salish & Kootenai
Tribes

First Neg. Session

Gordon McCampbell	R.W.R.C.C.
Glenn Galt	"
Mickey Pahl	CS & KT
Daniel J. Decker	CS & KT
JAMES H. GUETZ	"
Daniel Kemmis	RWRC
Marcia Rundle	"
Jack Galt	"
Scott Brown	RWRC
ROGER THOMAS	SOLICITORS OFFICE, BILLINGS
Clayton Mott	CS & KT
Bob DeK	BIA - Billings
Pronda Camel	BIA - Flathead Agency
Tom BATERIDGE	CS & KT
Peg Truhell	CS & KT
Diane Hogan	Steno

Please attach to transcript

able
~~Kemmis~~ Kemmis