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NORTHERN CHEYENNE INDIAN RESERVATION

P. 5  
Lobek -  
John Liberty

Location: Lame Deer, MT; Office of Tribal Council President

Date: Tuesday, June 17, 1980

Persons Present:

- Ted Meredith, Department of Interior
- Jeanne Whiteing, Attorney for the Northern Cheyenne Tribe
- Cal Wilson, Attorney for the Northern Cheyenne Tribe
- E. R. Bohannon, Rights Protection Specialist
- Richard May, Chief, Water Sciences Bureau, DNRC
- Scott Brown, Program Manager
- Henry Loble, Chairman of RWRCC
- Dave Ladd, Attorney for RWRCC
- Jack E. Galt, Member of RWRCC
- William M. Day, Member of RWRCC
- Gary Fritz, Administrator, Water Resources Division, DNRC
- Lori Lang, Stenographer

Loble: I guess I can start it off. I don't know exactly what we'll do about the presiding officer for this negotiating session. I'm very willing to do it just to fill in, but I have no feeling about it one way or another.... whether to alternate, and somebody from the Indian tribe preside at one and then we'll preside at another, but I suppose you're going to have some sort of order -- somebody in charge to call on people and try to keep it orderly. If it's all right with you, I'll just start off on this one because I've been working on this for a while.

Whiteing: I wonder if we might just introduce ourselves.

Loble: Yes, I was going to do that. This is the time set for the first negotiating session between the Reserved Water Rights Compact Commission and the Northern Cheyenne Indian Tribe. I think the best way to start off is to have everybody present introduce themselves, and that will give us an opportunity to write down the names and their official title. When you introduce yourself, give your official title. We have representatives here from the Reserved Water Rights Compact Commission and also present are Department of Natural Resources and Conservation staff members who may or may not attend all the time.

(Introductions)

Wilson: Two years. The Chairman's is four years, and the Councilmen's is two years.

Galt: And all the Councilmen run every two years . . . there's no staggered terms?

Wilson: Right.

Galt: Do they run for president or do they elect the president?

Wilson: No, they run for

Loble: Is Mr. Loble pre

Wilson: Both. He is Chairman of the Business Corporation and president of the Board. Some like to be called Chairman and some like to be called president.

Loble: What does he like

Wilson: President, I think

Whiteing: I might just say that this problem really isn't a problem.

Wilson: We're both going to have to sell it as we go along.

Loble: Then we'll go to the next one, if everybody is agreeable:

Desirability and legality of closing the negotiation process to the public. I might say that this came up . . . we had a kind of preliminary meeting with the Salish-Kootenai Tribes, and their attorney, Mr. Tony Rogers talked about this. We are, by the way, having a meeting with them tomorrow in Billings, but I understand Mr. Richard Baenen will be there, not Mr. Rogers. They're out of the same firm -- the Wilkinson, Cragun, & Barker.

The State of Montana has kind of a thing about making everything public, and there's an open meeting law. I don't know if you're familiar with it or not. The press is always very interested in seeing that they have access to all meetings of state bodies and state agencies, and there is a real question in my mind whether negotiating sessions like this can be public without perhaps destroying the whole process. We get involved in all kinds of things . . . we're all familiar with press reports that aren't accurate and cause trouble. I don't know how the tribal representatives feel about this.

Dave Ladd has done some research into the legalities. You might talk a little about it, Dave.

Ladd: The Public Participation statute basically has two sections. One deals basically with notice and due process concerns, and that addresses itself only to commissions, legislative bodies, and basically everything that has the power to make rules, determine contested cases, and enter into contracts. Now I think we can say that really doesn't apply to the Compact Commission, because we have no final binding authority -- can't make decisions on contested cases. Everything eventually must be ratified by the legislature.

A more problematic portion of the statute in the open meeting portions applies to any commission, committee, etc. which uses public funds. Since

we are supported by public funds, it seems that clearly applies. There is, however, a provision in the statute exempting bargaining or settlement sessions or discussion pertaining to litigation, and it's our opinion that the negotiating sessions, while we were just discussing weren't direct settlement talks, do pertain quite directly to litigation, and thus that exception may apply in the case here.

That wording doesn't directly encompass the Compact Commission, but there is a New Hampshire case involving a directly analogous situation where the legislature set up a bargaining commission, and they had the same sort of problem with an open meeting statute. The court held that, on the basis of the conflicting legislative intent, that if the bargaining sessions were open and public it would totally defeat the intent of the legislature because the bargaining sessions would then be meaningless. The legislature could not have meant to destroy the process they set up, and it would have destroyed the bargaining session by requiring that it be held in the open. I think the same reasoning applies here -- that to hold these totally open and public would tend to freeze negotiators into hard positions too early and make the whole negotiating process more difficult -- in essence, destroy it. So I don't think we can construe that the legislature meant by the open meeting sessions to destroy this negotiating process. So I think we can come within that exception, even though it doesn't directly address this situation.

Whiteing: I think it's almost mandatory that the meetings in which there is technical information exposed be completely confidential. We are dealing with only one defendant, and although we hope that ultimately the entire case will be settled, we must realize that we will be talking about information that pertains to the litigation, and we need the assurance that the information will not be used against us in litigation.

Loble: Is confidentiality a different problem?

Ladd: As far as I know, you're addressing the same problem.

Loble: Mountain Bell is currently contemplating, or has brought an act under the Montana confidentiality Constitutional provision, which is a provision about the open access to all public information. This might be a little different problem here. We've got to operate under the laws of the State, and if there are laws that permit that, then we might as well know it right now.

Whiteing: I think it's something that should be looked into. I know we have run into a problem of ordering of information. We have a request to the Department of Interior for litigation in a case. There have been requests for that information.

Fritz: Mr. Chairman? We had an experience negotiating a similar situation with the Canadians, and we have kept material confidential that the Canadians have sent to us, but as I understand, that was primarily because the United States State Department was involved. Because they were involved, we could keep that material confidential. I don't know if that same ability to keep the information confidential would apply here or not.

Loble: Well, I think it's something we're going to have to look at. I think the lawyers for both sides ought to address themselves to those questions and try to get them resolved to everybody's satisfaction. We wouldn't want to substitute our judgment for yours. The reason I think about the confidentiality provision of the Constitution of the State of Montana is because a client of ours had a similar problem in this state, and they had a process they were worried about other people finding out about, so they set that out in an application to the State to get a license -- can it be kept confidential? They were pretty apprehensive about it. I know they didn't actually go ahead with it, but I got some familiarity with it, and that's why I bring that up. I don't remember the Constitutional provision, but there is such a provision -- I do know that.

Whiteing: An additional concern of the tribe is that any information that we disclose will not be used against them in litigation. We would like, preferably written, assurances along those lines.

Brown: I know that it's important, and I agree that any sort of information discussed, and the legality of them, need to be investigated further. But it might be comforting to you to know that in our negotiations with Canada, because of the necessity of bringing the Fort Peck tribes in to those negotiations, we arrived at some arrangements that were satisfactory to them, and maybe that experience can be applied here -- maybe we can build on it. During the two years that I was involved in that, we were confronted by no problems. In fact, we were able to maintain confidentiality. They were free with the information to us, and it hasn't come back to haunt them. I don't see anywhere that it's going to. So, I think we ought to pursue it further, but I hope it's a little comforting to you and the Tribal Council to know that we have had this happen before, and I think it's been very successful.

Loble: I think it should be understood by everybody here what your attitude is on that, and I don't think there's any quarrel with the persons here or with the Commission that it should be kept confidential and that nothing said in these negotiating sessions would be used to the detriment of either side in the subsequent litigation. That's such a substantive part of any settlement negotiations in any lawsuit that you couldn't possibly discuss it if everybody is going to bring it up later. That would be so inhibiting that there just wouldn't be any settlement. That's part of the law in Montana, but I do think that we ought to look into it and be sure that, in addition to the assurances that I'm sure we're ready to give, we will not use it against you in any way -- that we can't be subpoenaed and required by some judge to do it. I think that's part of it.

Whiteing: It certainly is a part of the settlement discussions. This really isn't a normal settlement discussion . . .

Loble: Right.

So that's another legal matter. You're going to have a lot of work.

Day: Mr. Chairman, I think we mentioned at one time the possibility of having the news media at meetings. I think probably it should be understood that, in the event that we get into these meetings, some of the news media will be dissatisfied, or some of the members of the Commission will be dissatisfied.

So if we want to put out a news release, we should have people designated to put out these news releases, and any releases have to meet the approval of these people. Otherwise, the first time that we sit down in a hard negotiating session and somebody's temper flares a little bit and he runs to the news media, it will destroy the whole process.

Loble: Yeah, I hope that doesn't happen. If something does come up about it in the newspaper about it, I do think it's a good idea to check with the other side to see if they really said that. I say that because I was involved in litigation where I was quoted by a newspaper reporter making a pronouncement, and I had never said anything to him -- didn't even know him. Yet there was a whole newspaper article on what I had said. It later developed that he had talked to somebody who said they had talked to me (who hadn't); I don't think that person even knew me very well. The whole thing was a complete fabrication. That can happen, although I think it's unusual. Most newspaper people aren't that devoid of principles, but this fellow was.

Whiteing: I don't think that we have any problems with making sure that anything we have to say will be misconstrued.

Day: Well, I guess the reason that I mentioned that, at the committee meeting for the funding of Senate Bill 76, there were some pretty strong statements made, and to say that we as legislators . . . (unintelligible) . . . statements like that are not true as far as I was concerned, and there is still no intent on my part. If I thought we were going to steal your water rights, I wouldn't want to be a part of it. So that's the reason I made that statement . . . (unintelligible).

Loble: There may be, it seems to me, confusion -- so we'll want to make news releases, and we'll want to get together on that and keep the public informed. We'll want to decide on a news release after a particular meeting, and we'll all give it to the press. I think that will happen.

Does anybody think we should give out a news release on this meeting? It doesn't seem like it to me that we would have to. Well, that's the third item. Well, if nobody has anything on the first three, we can go to four.

We've talked quite a bit about four already.

Galt: Could you read it off for some of us who don't have agendas?

Loble: Sure. Three was desirability of periodic, joint news releases. I don't think there's a great deal to add on to that. Does anybody have anything further to add on to that?

If not, four is the negotiating teams, size, authority, roles, the function of technical staff. It seems to me we've talked about this quite a bit. Does anybody have anything to add?

Brown: Yeah, there were a couple things there that I wanted to know. I know that if I want to contact any of these people, I should first contact Cal. If we're fortunate enough to get this person we're hoping to hire in the next month or so, it might be good for me to come down and spend a couple days here. That way you could get to meet the people that we'll be working with, and give me the clearance that I would need to contact HKM, or for that matter, any consultants that you may have. Can you see a better approach to that?