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Reserved Water Rights Compact Commission

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August 28, 1981

MEMORANDUM

TO: Henry Loble, Chairman, and
Members of the Commission

FROM: Scott Brown, Program Manager
Dave Ladd, Attorney

SUBJECT: Assessment of each negotiating setting: the federal agencies, the Northern Cheyenne Tribe, the Sioux and Assiniboine tribes, the Assiniboine and Gros Ventre tribes, and the Confederated Salish and Kootenai tribes.

The following assessments have been prepared for discussion at the ninth meeting of the commission, which is scheduled to be held September 9. The views and recommendations expressed have not been reviewed critically by the chairman or other commission members; therefore, they are subject to being accepted or rejected, partially or wholly, by the commission.

The agenda proposed for the meeting, which was distributed two weeks ago, was prepared in a manner that will permit a very general discussion of the progress of each negotiating setting during the morning session, but a detailed assessment of each negotiating setting in the afternoon. In that manner, Ronald Allen and Robert Mahoney, representing the Department of Defense, and James Henry, representing the Turtle Mountain Chippewas, will be given an opportunity to understand the general nature of the work of this commission before discussions are held with them concerning their respective interests.

ASSESSMENT

The commission is engaged in formal negotiations with the United States departments of Agriculture and the Interior, the Northern Cheyenne Tribe, the Fort Peck tribes and the Fort Belknap tribes. Formal negotiations had been initiated with the Flathead tribes; however, they were terminated by action of the tribal council.

A few aspects of negotiations have been recurrent from one negotiating setting to another, particularly in the early sessions. Early sessions

have been devoted principally to becoming acquainted, winning the trust of the opposite party, establishing fundamental ground rules, and discussing the relationships between a negotiated agreement, or compact, and the adjudication process. Listed below are those discussion topics that have arisen somewhat uniformly in every negotiating setting.

- (a) negotiating authority
- (b) open meeting statutes, the Commission's policy regarding open/closed meetings, and confidentiality requirements
- (c) preliminary aspects of a compact
 - (i) binding effect
 - (ii) administration
 - (iii) ratification
- (d) relationship between negotiations and the adjudication process
 - (i) suspension from filing
 - (ii) the preliminary and final decrees
 - (iii) objections and hearings following issuance of the preliminary decree
 - (iv) alterations to an agreement by the water courts
- (e) involvement of Justice and Interior officials
- (f) technical information, the roles of technical personnel, and the exchange of information

The remainder of this assessment will be a discussion of those aspects that are unique to each negotiating setting. Some recommendations will be offered.

Northern Cheyenne Tribe

Designated tribal representatives:

1. Allen Rowland, Tribal President
2. Ted Risingsun, Councilman
3. Edwin Dahle, Councilman
4. Calvin Wilson, Tribal Attorney
5. John E. Echohawk, Attorney, Native American Rights Fund
6. Jeanne S. Whiteing, Attorney, Native American Rights Fund

Formal negotiating sessions:

1. June 17, 1980, Lame Deer
2. August 12, 1980, Billings
3. February 18, 1980, Billings
4. May 12, 1980, Billings

Confidentiality became a major concern of the tribe's representatives early in these negotiations. Consequently, an agreement was drafted and submitted by the commission at the second meeting. The agreement, as presently proposed, states that (a) a compact with the Northern Cheyenne Tribe, once concluded and ratified as prescribed by statute, shall be

effective and binding on all parties and (b) that Rule 408 of the Montana Rules of Evidence is applicable to these negotiations. Basically, Rule 408 is interpreted to mean that the information obtained in the course of negotiations would not be used in litigation unless that information is otherwise discoverable. The agreement has been discussed and altered to a minor degree at each subsequent meeting. Henry Loble, Allen Rowland, and Mike Greely have signed or agreed to sign the document. The signatures of authorized Justice and Interior officials are being sought by the tribe's attorneys.

The rehabilitation and enlargement of the Tongue River project has been perhaps the primary concern of the tribe's representatives in these negotiations. The alternatives deemed by DNRC officials to be feasible alternatives were discussed in depth at the second meeting, but it has been a topic discussed at each meeting of the commission and the tribe. While the DNRC has attempted to gain support for a particular, preferred option, the tribe and the commission have avoided a show of support. Probable reasons for an unwillingness to openly support a particular option are: (a) the tribe would be restricted very early in the process to a guaranteed storage right that would be in the range of 20,000 - 30,000 acre feet of water per year and (b) the commission members have preferred not to place all of the emphasis of these negotiations upon a project that has a poor chance, at best, of being funded.

There are good reasons for selecting and showing joint support for a sound option within the next nine to twelve months, but neither the tribe nor the commission should be expected to support an option in the absence of accurate water allocation projections by the DNRC and Bureau of Reclamation. Such projections should provide estimates of the quantities of water that would be expected on a firm basis, 90 percent of the time, 80 percent of the time, and so forth. The feasibility studies, still lacking a start, are intended to provide that information; however, it is doubtful that the feasibility studies planned are intended to evaluate in depth an array of options for solving the problems that exist already or are feared along the Tongue River.

An attempt was made six months ago to begin an exchange of technical information. The commission provided to tribal representatives a report entitled "A Stochastic Approach to Streamflow Synthesis for Rosebud Creek." It had been agreed by tribal representatives that similar water supply figures, as determined by the tribe's consultant, would be provided to the commission; however, the exchange remains one sided. It had been intended that the initial exchange would clear the way for subsequent exchanges involving land classification studies, groundwater studies, water availability studies and more.

Initially, the delay was caused by indecision on the part of Justice officials, but once that obstacle was removed, months ago, the decision was made by the tribe's attorneys and consultants to continue holding the water supply data, as it may require more work. Apparently, a lesson was learned by the tribe's consultant as a result of Wyoming's Wind River litigation and they have advised the tribe to be more prepared for the courtroom when dealing with technical data in support of water rights claims.

No other tribe in Montana has performed more technical studies of its reservation than has the Northern Cheyenne Tribe. We were optimistic that that would be a major factor in our progressing as rapidly as can be expected toward a settlement. But, the information remains unavailable and the commission may be faced with a very difficult decision to either accept the delay as being legitimate or interpret the delay as an unnecessary stalling tactic. If the decision goes to the latter, the solution is to set forth a schedule according to which information must be exchanged and decisions rendered; otherwise, actions to terminate negotiations would be initiated by the commission.

The decision by the commission to set a deadline on the period for negotiations was a wise decision. It may well be necessary to establish periodic deadlines throughout the process in order to progress meaningfully.

A course of action that might prove successful is as follows.

The commission would propose to the tribe that two separate agreements must be worked out simultaneously. The first agreement would be contingent upon an enlarged Tongue River Reservoir. The second agreement would be contingent upon circumstances as they exist, or no additional water.

It would be necessary to carefully evaluate the effect that each agreement might have on areas adjacent to the reservation. The evaluation should follow a reasonable schedule, which would be developed jointly. The desired effect would be the establishment of periodic deadlines for exchanging information and rendering decisions with respect to vital legal and technical matters.

The commission can no longer afford to wait for the tribe to make its offer. By presenting technical information in a systematic fashion, the commission can take the active roll in these negotiations.

The next negotiating session with the Northern Cheyenne has not been scheduled for a particular date; however, Mrs. Whiteing has indicated that they would probably be able to discuss the adequacy and availability of their technical data by the middle or end of October.

Assiniboine and Sioux Tribes

Designated tribal representatives:

1. Norman Hollow, Tribal Chairman
2. Caleb Shields, Councilman
3. Walter Clark, Councilman
4. Reid Chambers, Attorney

Formal negotiating session: December 12, 1980, Billings

The success of negotiations with the Fort Peck tribes will depend heavily upon our ability to allocate water out of Fort Peck Reservoir.

In the first and only formal negotiating session, the usual preliminary matters were discussed; however, at the outset Mr. Chambers expressed a

willingness on the part of the tribes to forego future development along the Milk River, the Poplar River, and Big Muddy Creek in lieu of rights to stored water in the Missouri River and the authority to market a portion of the water.

Mr. Chambers proposed that the commitment of a handsome share of stored water to the tribes would have the same effect as that which is intended by imposing a statewide adjudication of water rights: Montana is demonstrating to other states that it has a need for the water that arises within its boundaries and those other states should not presume that they can claim large quantities of seemingly unappropriated water.

Confidentiality is only a moderate concern of the Fort Peck tribes. Their representatives admit that technical studies are severely lacking; therefore, there is little information to exchange. In a series of telephone conferences earlier this year, Mr. Chambers proposed that the commission and the tribes should undertake joint studies of such requirements as water supply, soils capabilities, groundwater supply and quality, and any other areas that can be studied jointly. There has been no response by the commission to that proposal, probably because until recently little was known concerning the studies that have been completed by other agencies. More recently, the commission's technical staff has reviewed the background information and has assembled

- (a) adequate to excellent water supply data for the Milk, Missouri, and Poplar rivers,
- (b) a land classification performed by the Bureau of Reclamation for lands along the Milk and Missouri rivers,
- (c) a recent, but unpublished soils survey of the reservation land excluded from the classification described above,
- (d) limited groundwater data, and
- (e) water use records of the tribes' irrigation project on the Milk River.

A complete land classification of the Fort Peck Reservation would permit a reasonably accurate estimate of irrigable lands, similar to the work that has been done with respect to the Northern Cheyenne Reservation. Assuming that irrigable lands could serve as the accepted standard, and Mr. Chambers' offer to concede future development on the tributaries to the Missouri River is sincere and accurate, then an agreement may be possible without having to inventory existing usage on the four main streams--the Milk River alone would be a nightmare.

Probably the only discrepancy in Mr. Chambers' proposal is that he did not infer that the quantity of the right should be linked to some reasonable and legally accepted standard, such as irrigable land. Clearly, the water is available--even in the absence of a complete land classification that is obvious. Therefore, the important questions to be considered are as follows.

- (a) Are the tribes willing to concede future development along the Milk, Poplar, and Big Muddy?
- (b) Is the commission authorized to allocate Fort Peck water? If not, can the commission and the tribe work together to secure a reasonable allocation from one federal water "depository" to another?

(c) Would the commission be willing to authorize marketing arrangements for a portion of the allocation, even if such an arrangement with the tribes would produce direct competition for the state's marketable share of Fort Peck water?

(d) Are both parties agreeable to a standard that links the quantity of the reserved right to irrigable lands, but does not necessarily limit the uses to agriculture?

The commission has expressed an eagerness to resume talks with representatives of the Fort Peck tribes on numerous occasions. Nine months have passed since the first session. Mr. Hollow recently informed the commission's program manager that tribal elections are forthcoming and therefore the meeting scheduled for late September may be postponed once again; perhaps as late as November. Clearly, the same recommendations concerning strict scheduling and the establishment of periodic deadlines, as discussed above in regard to negotiations with the Northern Cheyenne Tribe, should be seriously considered in these negotiations as well.

Assinboine and Gros Ventre Tribes

Negotiations with the Fort Belknap tribes have yet to be formalized; however, the council has demonstrated that it is sincerely interested in serious negotiations.

The information prepared and distributed to the commission prior to and following the meeting at Fort Belknap approximately three weeks ago assesses the situation as accurately as can be expected at this time. Please refer to those assessments.

A request has been made known to the tribes' attorney, Mr. Lamebull, that the commission desires to continue talks without delay. A formal session, assuming the commission receives notification of the tribes' designated representatives, has been proposed for September 22 and 23, at Fort Belknap. One of those days would be used for the purpose of touring the reservation, particularly areas along People's Creek and Little People's Creek.

United States Departments of Agriculture and Interior

Designated representatives:

1. Edward Meredith, Field Solicitor, USDI, Billings
2. Lawrence Jakub, General Counsel, USDA, Missoula
(James Clear, Attorney, Justice Dept., Special Observer)

Formal negotiating sessions:

1. April 7, 1980, Helena
2. October 22, 1980, Missoula
3. February 25, 1981, Billings
4. June 1, 1981, Helena

Early talks with representatives of the federal agencies focused on a few of the more controversial aspects that can arise in talks between state and federal entities concerned with water rights; however, most of the controversy has been dispelled and a rather smooth dialogue has evolved over the past six months. In fact, there may be but one major

issue remaining in these negotiations: instream flow protection on forest and BLM lands.

Once the decision was made by the various federal agencies to file use rights and certain reserved rights according to the requirements of adjudication, the commission became relieved of a rather considerable responsibility. While the agencies were at first reluctant to submit to the requirements of adjudication, their decision to file is actually the only logical choice, at least until some important decisions are rendered by the water courts. Likewise, other potential problems were eliminated by the decision of the federal agencies to file for future appropriations, just as an individual would be required to file for a new appropriation. Those decisions are to be considered significant, but the possibility has not been eliminated that the federal agencies and the commission may be forced into negotiating those issues that might fall into a gray category or are "weeded out" once the water courts begin evaluating claims and preparing to issue preliminary decrees. For that reason, it would be advisable for the commission and the water judges, or their staffs, to communicate regularly as federal claims are being evaluated. In that manner, issues that may become negotiable issues will not come as a surprise. In fact, it is conceivable that the commission, the water courts, and the federal agencies may become engaged in a special kind of negotiations over certain issues that do not conform precisely to the rules of the adjudication process.

The decision regarding additional protection for instream flows on forest and BLM lands is being approached in a logical manner as proposed. The methods that would be used to quantify instream flow requirements are being evaluated. The next step involves the simultaneous actions of determining water availability and identifying areas of potential conflict. Supplied with those kinds of information and a careful evaluation of the means already available to the federal government for protecting instream flows, the commission will be able to decide whether or not there is sufficient rationale for deciding in favor of Mr. Jakub's proposal.

There are no formal sessions planned with Agriculture or Interior; however, technical personnel are evaluating the various methods for determining instream flow requirements and recommendations are forthcoming within the next 30-45 days.

Confederated Salish and Kootenai Tribes

Slightly less than a year after negotiations had been initiated with the Flathead tribes, the tribal council voted rather convincingly to terminate negotiations with the commission. No reasons for the action were offered.

During the period of formal negotiations, two meetings were conducted, but at least a few attempts were made by the commission to encourage more frequent meetings and the discussion of more substantive matters. The tribes' attorneys preferred waiting until another technical consultant could be hired. The issues discussed in the two meetings were strictly preliminary in nature.

It has been suggested by Mr. Meredith, Field Solicitor for Interior, that some of the tribal council members wish to reconsider their decision to terminate negotiations and resume talks with the commission. If such a request is made, it is recommended that the commission should accept the proposal only with the understanding that the negotiations would follow a strict schedule for exchanging technical information and deciding important legal and technical issues. It is further recommended that such an understanding be in the form of a legally binding written document, or agreement, and that failure to follow the schedule with reasonable diligence would result in actions by the commission to terminate the negotiations permanently.

Finally, it is possible that the tribes of the three remaining reservations, the Blackfeet, the Crow, and the Rocky Boy's, may choose to enter into negotiations at this rather late hour. The same recommendation offered with respect to the Flathead tribes may be particularly appropriate for them as well.

The suspension from filing may be their only inducement, but that may not be so bad, as it opens the door for friendly settlement talks and greatly enhances the opportunities for improved state-tribal relations. On the other hand, the commission simply cannot remain engaged in talks that are obviously not leading toward an eventual settlement and for that reason the stipulations would be necessary.