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Reserved Water Rights Compact Commission

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MEMORANDUM

TO: Gordon McOmber, Compact Commission Chairman
Urban Roth, Special Counsel

FROM: Scott Brown, Program Manager *SB*

SUBJECT: Summary of Meeting of Technical Advisers to the
Reserved Water Rights Compact Commission and the
Confederated Salish and Kootenai Tribes, September 26,
1985

DATE: October 7, 1985

On September 11, 1985, during the second meeting of the Compact Commission and the Confederated Salish and Kootenai Tribes at Pablo, the technical advisers for both parties were instructed to meet in order to ascertain what kinds of technical information are needed for these negotiations. That meeting took place on Thursday, September 26 in Missoula. A list of those who attended is attached.

I opened the meeting by describing the information that the Commission staff has gathered to date. That information is listed below.

Historical

- Hellgate Treaty of 1855
- Early historical accounts as documented by the BIA
- Constitution and Bylaws of the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana

Flathead Irrigation Project

- 1962 BIA Completion Report. (Bob Delk noted that the project cannot be expanded without Congressional authorization.)

D. Scott Brown, Program Manager
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Kerr Dam

- Copy of stipulation between Montana Power Company and the Tribes (I summarized what he believed to be the primary terms of the stipulation).

Soils

- Mr. A. B. Linford reported on the availability of soil survey data, (see below).
- BIA request for proposal for irrigable land classification study.

Instream Flows

- The Tribes have filed claims for instream flows in essentially all the basins in Western Montana.

Existing Uses

- We have information on existing uses of some major basins (North Fork and Middle Fork Flathead River) adjacent to the reservation.

Prior to this meeting, Ave Linford had visited the office of the State Soil Conservationist in Bozeman. He reported to this group the following information concerning soil surveys of the counties involved.

- a. The Lake County survey will undergo a final review during the spring of 1986. The field work is complete and the raw soils data are available.
- b. The Missoula County survey is complete, but it will not be published for two or three years. All of the raw soils data are available.
- c. Field work for the Sanders and Flathead County surveys has begun. The reservation lands will be completed first, but the fieldwork, correlation of soils data, and field review may require two years or more.

Tom Bateridge pointed out that the information that I listed was generated by other agencies and that it is all public information. He explained that each of the Tribes' technical advisers present was prepared to describe ongoing studies the tribes are undertaking.

Dave Cross, a tribal fisheries biologist, began by describing a five-year fisheries study of the lower Flathead River. The study is two years from completion. The study will recommend alternatives for fishery management on the Reservation. Mr. Cross expressed concern that the study may not be suitable for

specifically identifying an instream flow requirement that translates to a Tribal water right for instream flow. This fisheries management study is being conducted jointly with the Montana Department of Fish, Wildlife and Parks. Two published annual reports are available through the Department, a third is due in February. (We have requested copies of those reports.)

Brad Trosper from the Tribes' real estate office discussed the accessibility and status of the SCS soil surveys. He also discussed land ownership on the Reservation, which tends to be very dynamic. He indicated that there is no compiled record of historic land ownership; he added that the Confederated Salish and Kootenai Tribes are actively seeking to reacquire non-Indian fee lands on the reservation.

Kenn Cartier, a hydrologist for the Tribes described the surface and ground water monitoring program that began in October, 1983. There are 11 surface water gaging stations on the reservation that are monitored jointly by the Tribes and the USGS. The data from these stations are public information. In addition, the tribes alone maintain 50 surface water gaging stations and approximately 40 observation wells. The data generated from these stations and wells are considered confidential tribal data.

The 11 joint stations are continuously recorded, whereas the 50 tribal gaging stations are recorded on a weekly basis and will be used to simulate flows for these streams lacking long term flow records.

The wells are sampled quarterly, some in conjunction with the USGS. A report is expected to be published soon, but it is unknown whether this will be public information (refer to two maps attached).

Discussion continued on the following topics:

- a. BIA-funded irrigation suitability classification (probably more like a practicably irrigable acreage study than any other soil classification.)
- b. The adequacy of a soil survey as a means of arriving at irrigable acreage.
- c. The adequacy of an irrigable land standard alone, considering other water uses on this reservation including timber production, fisheries and power generation. Mr. Bateridge emphasized that the Tribes' position is that other water uses on the reservation will have to be considered as part of the Tribes' water right.

Bob Delk explained that the Bureau of Indian Affairs in Billings has thus far contributed \$900,000 toward data collection and technical studies on the Flathead Reservation. In addition, the Tribes have expended roughly one-half million dollars, and the

BIA office in Portland has also contributed money. Mr. Delk's point is that the Tribes have generated real, primary data over the past three years, but there has been no indication that the State is willing to contribute to primary studies such as these. Mr. Delk added that the Department of the Interior would be willing to share its data if he believed the Tribes and the Compact Commission are equally committed. But Mr. Delk feels that the Tribes and Interior must be cautious so as to avoid laying their cards on the table in the absence of the State making an equal commitment.

Another discussion followed concerning the necessity of updating land ownership on the reservation. It was agreed that the Walton-Powers claims must be accurately identified before the tribal reserved water right can be quantified. After considerable discussion of the complicated history of land transfers, the conclusion seemed to be that Walton-Powers claims can be identified only by conducting a thorough title search for all lands formerly allotted or in trust status. Mr. Trospen indicated that he has given some thought to such a study and he estimates that it would cost approximately \$250,000.

As an alternative to the land ownership study, I suggested that the Water Court may be able to create special conditions that would flush out the Walton-Powers claims before final discussions concerning the Tribes' quantity of reserved water right would be conducted. In other words, a court-imposed verification of all non-Indian claims, including Walton-Powers claims, followed by a temporary preliminary decree, could dispose of the need for a detailed, historic land ownership study. Since the verification process and decree are inevitable, it may be to everyone's advantage to carry them out in advance of a final agreement on quantity. (This would reverse the order in which those steps were taken in the case of negotiations with the Fort Peck Tribes.)

After a short break, it was decided to list the technical studies that are essential to these negotiations.

- A. Soil Surveys. Although Lake and Missoula County soil surveys are complete, Flathead and Sanders Counties will not have usable data for at least one year. The Tribes are assisting with these surveys.
- B. Land Ownership. No summary exists. The complicated history of land transfers on the Reservation may take six months to a year to complete and cost as much as \$250,000.
- C. Flathead Irrigation Project. Senator Melcher has asked the Department of the Interior to reevaluate the management procedures on the project and to review the necessity of a change in management. A copy of the

Department's review and recommendations will be public in 30-60 days. The Commission's staff has concluded that a tour of the project is needed as soon as possible.

- D. Instream Flow Requirements. The Tribes' study of fishery management in the upper Flathead River will not be completed for two years.
- E. Existing Uses. The Compact Commission's staff has summarized uses on the North and Middle Forks of the Flathead River. The existing uses on the Reservation will require careful study. The Commission staff is equipped to undertake that study, but it will take approximately 12 to 16 weeks.

Tom Bateridge stated that he senses the State has a feeling of urgency in these negotiations. He emphasized that the Tribes' technical studies will not be completed for several years, but added that litigation would probably take longer and cost more money. He asked if the Commission intended to conclude these negotiations before the next legislative session.

Mr. Linford assured Mr. Bateridge that this is the most complex set of issues the Commission has attempted to negotiate to date and it would not be realistic for the Commission to expect to submit a Flathead compact to the 1987 Legislature.

The discussion came to a close and the meeting was adjourned.

Since the meeting, the Commission staff has discussed preparations for the November 18 negotiating session with the Confederated Salish and Kootenai Tribes. The following tasks should be completed.

1. Acquire two annual reports of fisheries management studies and determine cost of study. Determine if the study is directly applicable to the Tribes' instream flow right.
2. Acquire Morrison-Maierle report that was alluded to in the discussions with the technical advisers for the Tribes.
3. Acquire 1907 pre-feasibility studies associated with the Flathead Irrigation Project.
4. Acquire Interior's report on management directives for irrigation project, when available.
5. Prepare brief report on flow data available for surface water on the Reservation.
6. Research any ground water data available for the area.

7. Scan soil survey data already completed and prepare follow-up memo.
8. Obtain information concerning other federal reserves which affect these negotiations (National Bison Range, Glacier National Park, Ninepipe and Kicking Horse Wildlife Refuges).
9. Obtain any information available concerning Kerr Dam and the stipulation between Montana Power Company and the Tribes.
10. Acquire annual reports of the Flathead Irrigation Project.

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