MEMORANDUM

TO: FILE

FROM: CLAY R. SMITH
Assistant Attorney General

DATE: 16 March 1987

RE: Legal Issues Arising in Connection With Ordinances 44D and 87A of the Confederated Salish and Kootenai Tribes

This memorandum will summarize the facts and issues which would likely be presented by a State-initiated civil action challenging jurisdictional aspects of Ordinances 44D and 87A of the Confederated Salish and Kootenai Tribes (Tribes). It will further address such action's possible duration and cost.

I. ORDINANCES 44D AND 87A.

A. Ordinance 44D.

Ordinance 44D is the most recent version of a tribal ordinance regulating hunting,[1/] fishing,[2/] and

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[1/] "Hunting" is defined as the pursuing of "wildlife for food, material or sport whether or not an actual taking is involved." (Ch. 1, pt. 3.13.)

[2/] "Fishing" is defined as "the taking of fish by one line and not to exceed two hooks, or two artificial

recreational[3/] activities within the Flathead Indian Reservation. As to hunting and fishing regulations, it is premised on the principle that "[t]he Tribes and their members, pursuant to the treaty of Hellgate and subsequent federal law, possess the exclusive right to hunt and fish within the exterior boundaries of the Reservation and the Tribal Council is empowered to condition, limit, or prohibit nonmember hunting and fishing thereon." (Ch. 1, pt. 2, § 1.b.) As to recreation regulation, the ordinance is based on the notion that "[t]he Tribal Council is empowered to exclude nonmembers from restricted lands and waters of the Reservation and to regulate, condition and limit use, recreational or otherwise, which may be made by nonmembers of restricted lands and waters." (Id. at § 1.f.)[4/] The primary purpose of the ordinance is to

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(Footnote Continued)

flies or two artificial lures, and includes snagging when so specified by regulation." (Ch. 1, pt. 3.11.)

[3/] "Recreation" is defined as "snowmobiling, off-road driving, picnicking, camping, boating, skiing, hiking, photography, swimming and other related activities." (Ch. 1, pt. 3.21.)

[4/] The term "restricted lands" is not specifically defined in the ordinance but appears to mean all lands other than "fee status lands" or "fee lands" as defined in chapter 1, part 3.10. Permits for recreational

establish a tribal permit system which will regulate all of these activities by nonmembers, although it does address both on- and off-reservation hunting and fishing by tribal members. Ordinance 44D will supersede Ordinance 44B (ch. 6, pt. 3) and is scheduled to become effective on April 1, 1987.

The ordinance authorizes hunting, fishing, and recreation on the reservation by nonmembers between 12 and 65 years of age if they have secured a current Tribal Use and Conservation Permit. (Ch. 1, pt. 5, § 1.a(1).)[5/] Nonmembers 65 years or older may hunt and fish without a permit but are otherwise subject to season, bag, and other tribal restrictions. (Id. at § 1.a(3) and (4).) The permit requirement also does not apply, inter alia, to the recreational activities of nonmembers on fee status lands. (Id. at § 1.b(1).) Fishing and hunting stamps must additionally be procured to engage in those activities. (Ch. 1, pt. 5, § 3(b) and (c).) Finally, the terms of the permit require the

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(Footnote Continued)

activities on fee status lands are not required. (Ch. 1, pt. 5, § 1.b(2).)

[5/] Tribal permits have a maximum duration of 12 months commencing on March 1 of each calendar year but may also be purchased for shorter periods. (Ch. 1, pt. 5, § 5.)

nonmember (1) to comply with all applicable tribal and federal laws or regulations; (2) to consent to the Tribes' jurisdiction "over any dispute arising from ... use of th[e] permit[;]" (3) to be bound by the Tribes' civil sanctions if determined to have violated tribal law while engaged in permitted activities; and (4) to hold the Tribes safe and harmless from any loss or injury occurring from any activities associated with a permit's use. (Ch. 1, pt. 5, § 3(d).)

The tribal court is given exclusive jurisdiction to enforce the ordinance. (Ch. 1, pt. 6, § 1.) Violation of the ordinance may result in "civil penalties" not to exceed $500 for each act of noncompliance. The ordinance further provides for the posting of bond by a nonmember at the time he is cited by a tribal officer for a violation. (Ch. 1, pt. 8.) The bond may be in cash or personal property; the citing officer is also authorized to impound such person's property as a bond. All fees from permit and stamp sales, fines and forfeited bond amounts are required to be deposited into a special account for use in furthering the conservation of tribal fish, wildlife, and natural resources. (Ch. 1, pt. 9, § 1.)

The ordinance does not require tribal members to secure a permit as to on-reservation fishing, hunting, or recreational activities. It does impose certain

hunting and fishing restrictions, such as prohibition of certain hunting aids and limited taking of grizzly bears. (Ch. 2, pt. 1, § 2 and pt. 2, § 1.) It further accords members the right to hunt on "aboriginal territory off of the Reservation in accord with applicable Tribal and Federal law and regulation." (Ch. 2, pt. 3, § 1.) The ordinance imposes a permit requirement on members as to off-reservation moose hunting on "open and unclaimed lands" but not as to other big game hunting. (Id. at § 3.) On-reservation fishing by members is, absent special regulations, unrestricted, while off-reservation fishing within the Tribes' "aboriginal territory" is deemed governed only by applicable tribal and federal law. (Ch. 3, pts. 1 and 2.) Significant restrictions exist in connection with nonmember hunting and fishing, including (1) restriction of hunting privileges to pheasants and migratory water fowl (ch. 2, pt. 4, § 1); (2) closure of certain drainages to any fishing or hunting (ch. 2, pt. 4, § 4; ch. 3, pt. 3, § 2); and (3) tribal control over season, bag, and catch limits (ch. 2, pt.4, §§ 2 and 7; ch. 3, pt. 3).

B. Ordinance 87A.

Ordinance 87A, also known as the Aquatic Lands Conservation Ordinance, was adopted in December 1985.

The purpose of the ordinance is "to prevent the degradation of Reservation waters and aquatic lands by regulating construction or installation of projects upon aquatic lands whenever such project may cause erosion, sedimentation, or other disturbances adversely affecting the quality of Reservation waters and aquatic lands." (Pt. II, § 2.) "Reservation waters" refers to "all naturally occurring bodies of waters within the exterior boundaries of the Reservation," tributaries to such waters and any adjacent wetlands, while "aquatic lands" means "all land below the mean annual high water mark of a Reservation water body." (Pt. III, § 1.c and m.) The term "project" is defined in relevant part as "a physical alteration of aquatic lands, wetlands, or Reservation waters, not otherwise exempted by this Ordinance or implementing regulations, which has the potential to cause a material change in the condition of such lands or water in contravention of a policy of this Ordinance." (Id. at § 1.1.)

The ordinance requires any person commencing a project to secure a permit authorizing such work from the Tribes' Shoreline Protection Board. (Pt. III, § 2; pt. IV, §§ 1 and 3.) An adverse determination by the Board on a permit application is subject to administrative appeal under the Tribal Administrative Procedures Ordinance and, if necessary, to appeal to the

tribal courts. (Pt. VI, §§ 1 and 2.) Noncomplying projects are also subject to public nuisance abatement proceedings in tribal court which can impose monetary penalties of not less than $25 or more than $500 for each day the noncomplying project is maintained, and can order restoration of the damaged lands at the expense of the responsible party. (Pt. V, § 2.) Detailed regulations have been issued under the ordinance which set forth, inter alia, application-review criteria and enforcement procedures.

II. FEDERAL JURISDICTION ISSUES.

If the State challenges portions of Ordinances 44D and/or 87A as outside the permissible scope of tribal sovereignty, its claim would present a question of federal common law as to which jurisdiction under 28 U.S.C. § 1331 exists. National Farmers Union Insurance Companies v. Crow Tribe, 471 U.S. 845, 852-53 (1985); Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972). Consequently, even were the action commenced in state district court, it would undoubtedly be removed to federal court pursuant to 28 U.S.C. § 1441 by the tribal defendants. Such removal would be without prejudice to any subject matter jurisdictional defenses which the defendants might later raise. E.g., Schroeder v. Trans World Airlines, Inc., 702 F.2d 189 (9th Cir. 1983); Cook

v. Weber, 698 F.2d 907 (7th Cir. 1983); Armor Elevator Co. v. Phoenix Urban Corporation, 493 F. Supp. 876 (D. Mass. 1980), aff'd 655 F.2d 19 (1st Cir. 1981); Cogo v. Central Council of Tlingit & Haida Indians, 465 F. Supp. 1286 (D. Alaska 1979). The most likely defense of that nature is sovereign immunity; it is also very possible that they would assert a second defense predicated on comity to tribal court proceedings which, while not precisely jurisdictional in nature, would seek to avoid immediate resolution of the merits of the State's claims.

A. Sovereign Immunity.

It is well established that an Indian tribe is immune from suit without express congressional authorization or its own consent. E.g., Three Affiliated Tribes v. Wold Engineering, 106 S. Ct. 2305, 2313 (1986); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, (1978); A. K. Management Company v. San Manuel Band of Mission Indians, 789 F.2d 785, 789 (9th Cir. 1986); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479-80 (9th Cir. 1985); Chemehuevi Indian Tribe v. California State Board of Equalization, 757 F.2d 1047, 1051 (9th Cir. 1985), rev'd on other grounds, 106 S. Ct. 289 (1986). Nonetheless, the Supreme Court and the Ninth Circuit have recognized that declaratory and

injunctive relief is available against tribal officers in their individual capacities under certain circumstances. Analogizing tribal immunity to that of the United States, the Ninth Circuit stated in Chemehuevi, 757 F.2d at 1051:

> The Supreme Court has recently reiterated the analytical distinction between suits against a sovereign entity and those brought against the officers or employees of the sovereign. Absent consent, a suit against a sovereign entity is barred; it is only when the plaintiff nominally sues an official that a more thorough examination of the sovereign status of the defendant must be made.... If the official's acts exceeded the authority granted by the sovereign, or when an officer has acted unconstitutionally, the suit is deemed to be one against the officer in his or her individual capacity. Because the suit is thus not against the sovereign, it is not barred.

The analogy between federal and tribal sovereign immunity, however, is not complete since tribes, unlike the United States and the several individual states, are not generally subject to constitutional restraints and therefore cannot act unconstitutionally. E.g., Santa Clara Pueblo v. Martinez, 436 U.S. at 56; Talton v. Mayes, 163 U.S. 376, 382-85 (1896); Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 964 n.31 (9th Cir.), cert. denied, 459 U.S. 977 (1982). This distinction was noted in Babbitt Ford, Inc. v. Navajo Indian Tribe, 519 F. Supp 418, 425, (D. Ariz. 1981), rev'd on other grounds, 710 F.2d 587 (9th Cir.), cert.

denied, 466 U.S. 926 (1983), where the district court concluded that nonmonetary relief was available against certain tribal officers who acted outside the scope of the tribe's sovereign authority:

> Consistent with Larson [v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949)], federal sovereignty is limited only by the Constitution of the United States. Tribal sovereignty, on the other hand, is limited by a number of sources. Tribal sovereignty is limited by those portions of the Constitution that are "explicitly binding[;] ... it is limited by Congress' plenary control[;] ... and it is limited by inconsistent treaty provisions. ... Finally, tribal sovereignty is limited by the 'overriding interests of the National Government.' ...
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> As this Court stated earlier, the core of plaintiffs' complaints is the extent to which an Indian tribe can assert jurisdiction over non-Indians. It is this exact question that controls the issue of sovereign immunity. If, under the circumstances, the officer-defendants' acts are within the limits of Tribal sovereign power, then plaintiffs' action is barred by sovereign immunity. If the acts are excessive, the plaintiffs will prevail. [Citations omitted.]

The court thus concluded that the jurisdictional issue and the merits of the nonmembers' claims were inextricably connected; i.e., that the jurisdictional question could not be resolved without first determining the merits of the involved claim.

Several Ninth Circuit decisions subsequent to the district court determination in Babbitt Ford indicate either expressly or by negative implication that, to the extent assertion of tribal jurisdiction is improper,

declaratory and injunctive relief is available against the involved tribal officials. In Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), cert. denied, 459 U.S. 967 (1982), the court refused to enjoin tribal officers from enforcing building, health, and safety regulations against a nonmember who owned a store on fee land. The court asserted federal jurisdiction under 28 U.S.C. § 1331 and then addressed the merits of the nonmembers' claim without discussion of the sovereign immunity issue.

The court similarly found § 1331 jurisdiction in Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983), cert. denied, 467 U.S. 1214 (1984), over a claim by nonmember owners of businesses located on fee lands within a reservation that a tribe's license tax was outside its sovereign authority. The court termed as the "dispositive issue" the question of whether the nonmembers' claim was barred by sovereign immunity and discussed the parameters of that doctrine:

> That Indian tribes possess immunity from suit in state or federal courts has long been settled. ... In addition, tribal immunity extends to tribal officials acting in their representative capacity and within the scope of their authority. ... However, tribal sovereign immunity is not absolute. Rather, immunity from suit is similar to other aspects of tribal sovereign powers. Immunity exists only at the sufferance of Congress and is subject to complete defeasance. ... A tribe may also waive its immunity to suit. ... An expression of waiver must be unequivocal;

> waiver cannot be implied. ... However, tribal immunity is not a bar to actions which allege conduct that is determined to be outside the scope of a tribe's sovereign powers.

Id. at 1321 (citations & footnote omitted). It then stated that, because the tribe "has not consented to be sued or waived sovereign immunity in this action ... nor has the Tribe been divested of its immunity by Congress[,]" the claim was barred "if the enactment and implementation of a business tax is within tribal sovereign powers[.]" Id. at 1322. Relying on Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), the court thereafter concluded that the tribe possessed the inherent power to impose the challenged tax. Snow's discussion of the sovereign immunity doctrine was later clarified in Chemehuevi, 757 F.2d at 1052, to the extent that the earlier case could be construed as sanctioning suit against a tribe under any circumstances; however, Chemehuevi did not otherwise repudiate Snow's sovereign immunity analysis.

Finally, in Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir.), cert. denied, 466 U.S. 426 (1983), the Court sustained a tribe's jurisdiction to enforce its laws regulating on-reservation repossession of member-owned vehicles by nonmembers. As in Cardin and Snow, federal jurisdiction was predicated on § 1331 and, while there was no discussion of the

sovereign immunity question, the court carefully explored the extent of inherent tribal authority in rejecting the nonmembers' claim. Since Babbitt Ford was decided eight days after Snow and authored by the same judge, there is little basis upon which to believe that the immunity issue was overlooked; it was, again, simply subsumed into determination of the merits. See Hardin v. White Mountain Apache Tribe, 779 F.2d at 478-79 (discussing questions of scope of tribal sovereignty and tribal immunity simultaneously).

It therefore appears clear that a properly-pled claim can be asserted against tribal officials to test alleged jurisdictional excesses in Ordinances 44D and 87A. Although sovereign immunity will presumably be raised as a defense, it should have no analytical significance independent of the merits' determination. Indeed, any other result would effectively insulate from challenge the exercise by tribal officials of authority granted under a tribe's ordinances or regulations--a result patently at odds with the repeated recognition by the Ninth Circuit and the Supreme Court of federal question jurisdiction as to claims that such officials have exceeded inherent or other tribal authority.

B. Exhaustion of Tribal Court Remedies.

In two recent decisions, National Farmers Union Insurance Companies v. Crow Tribe, supra, and Iowa Mutual Insurance Company v. LaPlante, 55 U.S.L.W. 4170 (Feb. 24, 1987), the Supreme Court has required exhaustion of tribal judicial remedies before recourse to federal court for the purpose of challenging tribal court jurisdiction. Although these cases involved federal court actions initiated by persons who were already subject to the challenged tribal court proceedings, the Tribes may contend that exhaustion of their judicial remedies is required if there are ongoing tribal court proceedings where the jurisdictional issues have been raised by a person other than the State.

National Farmers Union arose from a tribal court action filed by a member of the Crow Tribe against an elementary school district alleging negligence on the latter's part. After the school district failed to timely answer, default judgment was entered. The school district and its insurer then initiated an action in federal district court and contended that the tribal court had no jurisdiction over the school district. The district court eventually enjoined the tribal court proceedings but was reversed on jurisdictional grounds by the Ninth Circuit. The Supreme Court concluded that, while federal jurisdiction existed under § 1331, the

school district and its insurance carrier were obligated to exhaust tribal court remedies before commencing the federal action:

> [W]e conclude that the answer to the question whether a tribal court has the power to exercise civil subject matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed. ... Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, executive branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
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> We believe that examination should be conducted in the first instance by the tribal court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the tribal court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the tribal court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

471 U.S. at 855-57 (footnotes omitted).

The Court reiterated the above in Iowa Mutual where, after a tribal court had denied an insurer's motion to dismiss for lack of subject matter jurisdiction, the insurer filed a federal action in which it alleged diversity jurisdiction under 28 U.S.C. § 1332 and essentially sought determination of the merits of the claim still pending in tribal court. The district court dismissed the complaint after concluding that Montana state courts would refuse to assert jurisdiction over the insurer's claim and that it therefore did not have jurisdiction since federal diversity jurisdiction is derivative of state court jurisdiction. The Ninth Circuit affirmed the dismissal on the same ground. The Supreme Court reversed the lower courts insofar as they found no federal jurisdiction but remanded with instructions that the case be stayed until conclusion of tribal court proceedings or dismissed without prejudice. 55 U.S.L.W. at 4173.

In remanding, the Court observed that "[e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite" and compared the exhaustion principle to the federal abstention doctrine. 55 U.S.L.W. at 4172 n.8. It further stated that "[t]ribal authority over the activities of non-Indians on

reservations lands is an important part of tribal sovereignty" and that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statutes." Id. at 4172. Thus, although the Court later stated that "the Blackfeet Tribal Courts' determination of tribal jurisdiction is ultimately subject to review" by federal courts, it left little doubt that, in the ordinary case, tribal courts will have civil jurisdiction over the conduct of nonmembers on "reservation lands." Ibid. The Court further held that, if such jurisdiction was found, the merits of the underlying claim could not be relitigated by the federal district court. Id. at 4172-73.

Taken together, National Farmers Union and Iowa Mutual leave no doubt that, once a tribal court proceeding has commenced against an individual, he will be barred from seeking federal review of either the tribal court's adjudicatory jurisdiction or, presumably, the tribe's underlying regulatory jurisdiction until exhaustion of tribal court remedies, including any available appeal procedures, has occurred except in extraordinary circumstances.[6/] Thus, if tribal court

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[6/] Exhaustion is not required "where an assertion of tribal jurisdiction 'is motivated by a desire to harass

proceedings have been initiated against a person for violation of Ordinance 44D or 87A, that person must, as a condition precedent to federal court review, litigate his jurisdictional claim before the tribal courts. An unanswered question is whether, should such proceedings be commenced, a later federal action by the State raising a similar challenge would be stayed under general abstention principles pending the outcome of the tribal court proceedings. There is, consequently, some possible benefit in an early determination by the State of whether it intends to challenge objectionable aspects of the ordinances.[7/]

(Footnote Continued)

or is conducted in bad faith,' ... or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." National Farmers Union, 471 U.S. at 856 n.21. Accord Iowa Mutual, 55 U.S.L.W. at 4172 n.12.

7/ It should be noted that Iowa Mutual is troublesome, or at least confusing, as to what issues can be reviewed by a federal court after exhaustion has occurred. Quite clearly, it holds that, should the civil adjudicatory jurisdiction of the Blackfeet tribal courts be upheld, those courts' determination of the merits of the LaPlantes' claims cannot be relitigated. What remains unresolved is whether such a relitigation bar exists as to tribal court determinations of claims premised on a challenge to a tribe's regulatory jurisdiction. If the relitigation bar did extend to such claims, tribal courts would be a convenient forum through which a tribe's regulatory jurisdiction could be expanded and

III. THE MERITS.

Any challenge to Ordinances 44D and 87A must consider two issues, one procedural and the other substantive: (1) Whether the ordinances have received any required approval by the Secretary of the Interior; and (2) whether the Tribes possess inherent or other authority to regulate those nonmember activities governed by the ordinances on State- or nonmember-owned lands within the reservation. The first issue is analytically straightforward, while the second is complex.

A. Secretarial Approval.

Article VI, section 1(i) of the Tribes' Constitution and By-Laws authorizes their tribal council "[t]o promulgate and enforce ordinances, subject to review by the Secretary of the Interior, which would provide for assessments or license fees upon nonmembers doing business within the reservation, or obtaining special rights or privileges." Article VI, section 1(n)

(Footnote Continued)

would counsel early commencement of federal actions by persons affected by tribal regulation but not yet involved in a tribal court proceeding.

further provides that the tribal council has the power "[t]o promulgate and enforce ordinances which are intended to safeguard the peace, safety, morals, and general welfare of the Confederated Tribes by regulating the conduct of trade and the use and disposition of property upon the reservation, providing that any ordinance directly affecting nonmembers shall be subject to review by the Secretary of the Interior." Consequently, to the extent the ordinances apply to nonmembers, their effectiveness is conditioned on secretarial approval. See Kerr-McGee Corporation v. Navajo Tribe, 471 U.S. 195 (1985). It appears that Ordinance 87A has been approved but that Ordinance 44D has not. An oral inquiry has been made to the Office of the Regional Field Solicitor to determine the Secretarial approval status of both ordinances.

B. Scope of Tribal Regulatory Jurisdiction.

1. Applicable Standards.

There is, as a general matter, no bright-line test for determining the scope of tribal regulatory jurisdiction. The Supreme Court has instead typically undertaken a careful analysis of relevant treaties, federal statutes, executive branch policies, and prior decisions when confronted with the question of whether certain action was within tribal powers. E.g., Merrion

v. Jicarilla Apache Tribe, 455 U.S. at 139-41; Montana v. U.S., 450 U.S. 544, 563-66 (1981); Washington v. Confederated Tribes of Colville, 447 U.S. 134, 152-53 (1980); Wheeler v. United States, 435 U.S. 313 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978); see National Farmers Union, 471 U.S. at 855. Nonetheless, two cases--Montana v. United States, supra, and New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983)--provide some specific guidance with respect to the permissible scope of state and tribal jurisdiction over hunting and fishing activities; Montana is also relevant to the Tribes' ownership interest in the streambeds of on-reservation navigable streams.

Montana arose from an action filed by the United States seeking (1) to quiet title in its name to the bed of the Big Horn River, (2) a declaratory judgment that it and the Crow Tribe had sole authority to regulate hunting and fishing within the latter's reservation, and (3) an injunction to require Montana "to secure the permission of the Tribe before issuing hunting or fishing licenses for use within the reservation." 450 U.S. at 549. As to the first claim, the Court held that the bed of the Big Horn River, a navigable stream, was conveyed to Montana at the time of statehood, relying on the strong presumption that "the Federal Government holds such lands in trust for future States, to be

granted to such States when they enter the Union and assume sovereignty on an 'equal footing' with the established States." Id. at 551.[8/] It rejected the contention that, under the 1851 Treaty of Ft. Laramie, II C. Kappler, Indian Affairs, Laws and Treaties 594, 595 (1904), title to the streambed was reserved in trust for the Crow Tribe merely because the Tribe did "not surrender the privilege of hunting, fishing, or passing over any of the tracts of country" referred to in the treaty or that, under the 1868 Treaty of Ft. Laramie, 15 Stat. 649, 650, the reservation's lands were "set apart for the absolute and undisturbed use and occupation" of the tribe, stating that "[t]he mere fact that the bed of a navigable water lies within the boundaries described in the [1868] treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance." Id. at 554. The Court also noted that, at the time of the 1851 and 1868 treaties, no "public exigency" existed "which would have required Congress to depart from its policy of reserving

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[8/] The beds of nonnavigable streams are the property of the adjacent riparian owners (450 U.S. at 551) and thus present distinct regulatory issues even if the beds of the navigable streams on the same reservation are deemed to be held in trust for the tribe.

ownership of beds under navigable waters for the future States" and that the Crow Tribe was not significantly dependent on fisheries for subsistence. Id. at 556.

The claim concerning the tribe's authority to regulate nonmember hunting and fishing had, through the course of the litigation, been narrowed to "the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by non-members." 450 U.S. at 557.[9/] The Court initially rejected the Ninth Circuit's reliance on the 1868 Ft. Laramie treaty as basis for the authority claimed by the tribe, reasoning that, while the treaty provided for lands to be "set apart for the absolute and undisturbed use and occupancy of the Indians," the tribe was impliedly not given authority over lands not subject to such exclusive use and occupancy. Id. at 558-59. The Court further rejected the court of appeals' conclusion concerning the effect of the General Allotment Act of 1887, 24 Stat. 1388, and the Crow Allotment Act of 1920, 41 Stat. 751, and stated that, after review of the legislative and executive assimilation policy underlying

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[9/] The Court approved summarily the court of appeals' holding that the tribe could prohibit nonmembers from hunting and fishing on trust or tribal lands and/or condition such activities on securing a tribal permit and complying with tribal regulations. 450 U.S. at 557.

those statutes, "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." Id. at 599 n.9.

The Court then held that the tribe's inherent authority was "not so broad" as to support hunting and fishing regulation of nonmembers on nontribal fee lands. It stated that such authority had normally been limited to matters of internal concern involving tribal members and that "the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 464 (citations omitted). Regulation of hunting and fishing by nonmembers on nontribal land was then characterized as having "no clear relationship to tribal self-government or internal relations." Ibid. Most importantly for present purposes, the Court noted that tribes may retain "inherent sovereign powers to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," citing as examples (1) activity by nonmembers who have entered into a consensual relationship with the tribe or

its members and (2) activity of nonmembers which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566 (citations omitted). The Court found no consensual relationship and no threat to the tribe's political or economic security with respect to the nonmembers' hunting and fishing.

New Mexico v. Mescalero Apache Tribe, supra, involved a suit by a tribe against New Mexico to enjoin the latter from regulating on-reservation hunting and fishing by nonmembers. The reservation consisted of 460,000 acres, of which the tribe owned all but approximately 194, and the record established that the tribe, with federal assistance, had extensively developed the reservation's hunting and fishing resources for economic self-sufficiency purposes. 462 U.S. at 326-29. New Mexico had not, in contrast, "contribute[d] in any significant respect to the maintenance of these resources, and [could] point to no other 'governmental function it provides[.]'" Id. at 342.

In rejecting New Mexico's claim of concurrent hunting and fishing regulatory jurisdiction, the Court summarily distinguished Montana, stating that, "[u]nlike this case, [it] concerned land located within the reservation but not owned by the Tribe or its members."

462 U.S. at 330-31 (emphasis in original). The Court then applied the interest-balancing test articulated in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980),[10/] and concluded that, while the federal

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[10/] Bracker involved the application of motor carrier license and use fuel taxes to a non-Indian logging enterprise doing business solely on the Ft. Apache Indian Reservation. All of the non-Indian enterprise's activities were pursuant to a contract with a tribally-owned business, and the challenged taxes pertained to work conducted only on Bureau of Indian Affairs or tribal roads. Such work was also subject to comprehensive federal regulations which control the harvesting of tribal timber and the use of BIA roads and was further conducted under the BIA's daily supervision. 448 U.S. at 145-48. The Court began its preemption analysis by noting that "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members" exist: (1) preemption by federal law and (2) infringement "'on the right of reservation Indians to make their own laws and be ruled by them.'" Id. at 142. The Court also recognized that difficult questions are presented by a state's assertion of regulatory authority over non-Indians within a reservation and articulated a general analytical approach to resolving those questions:

> In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Id. at 144-45. Under these principles, the Court held the taxes preempted because (1) "the federal regulatory scheme was so pervasive as to preclude the additional

and tribal interests were substantial, the state's interest was limited to loss of license revenue and was, standing alone, "simply insufficient to justify the assertion of concurrent jurisdiction." 462 U.S. at 343.

Although Montana and Mescalero Apache arose in part from a common issue--regulation of on-reservation hunting and fishing by nonmembers--they presented substantially different claims and facts. Montana sets out those analytical standards which apply to the question of whether a tribe may regulate nonmember activity on nontrust or nontribal lands and Mescalero Apache establishes those standards which govern concurrent state regulatory authority over nonmembers on trust or tribal lands. Montana is additionally pertinent because of its streambed-ownership analysis since the ownership determination will, as to activities associated with on-reservation navigable streams, control whether a presumptive absence of tribal jurisdiction over nonmember activities exists or whether the interest-balancing test for concurrent state jurisdiction under White Mountain Apache applies.

(Footnote Continued)

burden sought to be imposed" by Arizona and (2) the state was "unable to identify any regulatory function or service performed by [it] that would justify the assessment of taxes for activities on Bureau and tribal

2. Ninth Circuit Application of Montana's Standards.

The Ninth Circuit has applied Montana in both streambed-ownership and tribal regulatory authority contexts. The court has narrowly construed Montana's holding in streambed cases and more broadly applied its reasoning as to those instances when tribes may exercise civil jurisdiction over nonmember activity on nontrust and nontribal lands.

a. Streambed Ownership.

In Confederated Salish & Kootenai Tribes v. Namen, supra, the court concluded that the south half of Flathead Lake had not been conveyed to Montana at the time of statehood but, rather, had been reserved in trust for the Tribes under the Hell Gate treaty. Accord Montana Power Company v. Rochester, 127 F.2d 189 (9th Cir. 1942). It distinguished Montana on several grounds: (1) the Hell Gate treaty expressly referred to the lake in setting the reservation's boundaries;

(Footnote Continued)

roads within the reservation." Id. at 148-49. Accord Ramah Navajo School Board v. Board of Revenue, 458 U.S. 832, 839-42 (1982).

(2) the United States was anxious at the time of the treaty's execution to open for non-Indian settlement the Washington Territory with the Tribes' consent; and (3) at least one of the tribal parties to the treaty heavily depended on fishing for its livelihood. 665 F.2d at 962. Accord United States v. Washington, 694 F.2d 188 (9th Cir. 1982), cert. denied, 463 U.S. 1207 (1983). Namen's analysis was further crystallized in Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251, 1258 (9th Cir. 1983), cert. denied, 465 U.S. 1049 (1984), in which the court, relying on Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), and Skokomish Indian Tribe v. France, 320 F.2d 205 (9th Cir. 1963), stated:

> [W]here grant of real property to an Indian tribe includes within its boundaries a navigable water and a grant is made to a tribe dependent on the fishery resource in that water for survival, the grant must be construed to include the submerged lands if the Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant. In such a situation, the Government's awareness of the importance of the water resource to the Tribe taken together with the principle of construction resolving ambiguities and transactions in favor of Indians warrants the conclusion that the intention to convey title to the waters and lands under them to the Tribe is "otherwise made very plain" within the meaning of [United States v. Holt State Bank, 270 U.S. 49, 55 (1926)]. [Footnote omitted.]

Thus, at least in the Ninth Circuit, tribes will be deemed to own navigable waters within their reservation if, when the reservation was created, they were "dependent on the fishing resource in that water for survival."

Whether the court of appeals application of Montana is correct may obviously be disputed. Montana stated that "[a] court deciding a question of title to a bed of navigable water must ... begin with a strong presumption against conveyance by the United States ... and must not infer such a conveyance 'unless the intention was definitely declared or otherwise made plain,' or was rendered 'in clear and especial words' ... or 'unless the claim confirmed in terms embraces the land under the waters of the stream[.]'" 450 U.S. at 552 (citations omitted). With the possible exception of the south half of Flathead Lake, textual application of Article II of the Hell Gate Treaty does not support a reservation of streambeds in trust for the Tribes.[11/] The Ninth

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[11/] Article II sets forth the reservation boundaries as follows:

> Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on the Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west

Circuit's heavy reliance on the "public exigency" exception, although not implausible, further has the effect of negativing an extremely strong presumption on a rationale seemingly applicable to any reservation.[12/]

(Footnote Continued)

> the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, and the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning.

[12/] The Court's explanation of its interpretation of the "public exigency" exception in Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd., 713 F.2d 455, 457 (1983) (per curiam), cert. denied, 465 U.S. 1049 (1984), reveals the breadth of its approach:

> We gleaned from [prior] cases, first, the proposition that the avoidance of hostility arising from a tribe's inability to reach a water resource on which it depends for survival can create a "public exigency" within the meaning of Shively v. Bowlby, 152 U.S. 1, 48, 14 S. Ct. 548, 566, 38 L. Ed. 331 (1893), and, second, the principle that, where such an exigency exists, the United States' clear awareness of the tribe's needs taken together with the principle of construction resolving any ambiguities in agreements with the United States in favor of the Indian tribes warrants the further conclusion that the Government intended to meet the tribe's needs by granting to the Indians the land and the water on which they were dependent for survival.

Carried to its logical conclusion, this reasoning would mean that, by virtue of the Winters doctrine, virtually all tribes would have the beds of navigable streams within their reservations impliedly reserved on their

It can thus be argued that, for purposes of determining ownership, the Court's test is specious and ultimately confuses the issue of ownership with the question of whether, because of certain treaty-secured rights, a tribe may be entitled to exercise exclusive or concurrent jurisdiction over use of a particular resource.

b. Tribal Regulatory Jurisdiction.

As discussed above, the Ninth Circuit found valid in Cardin v. De La Cruz, supra, the application of tribal building, health, and safety regulations against a nonmember who operated a grocery and general store on fee-owned land. The court concluded that, under Montana, tribal regulation was justified both because the nonmember, by marketing his goods to members, had entered into a consensual business relationship with the tribe and its members and because "the conduct that the Tribe is regulating 'threatens or has some direct effect on ... the health or welfare of the [T]ribe.'" 671 F.2d at 366. The court applied Montana similarly in Babbitt

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(Footnote Continued)

behalf. See Winters v. United States, 207 U.S. 564, 576 (1908) ("[t]he lands [to which the tribes had been relegated] were arid, and, without irrigation, were practically useless").

Ford where it concluded that nonmember vehicle-repossession activities arose from a commercial relationship with tribal members and could affect the tribe's welfare because "[r]epossesion has a potential to leave a tribal member stranded miles from his or her nearest neighbor ... [and] may escalate into violence, particularly if others join the affray." 710 F.2d at 593.

In Namen, the court of appeals distinguished Montana in holding that the Tribes could regulate the riparian rights of non-Indians who owned land bordering the south half of Flathead Lake. It first reasoned that Montana was not controlling because the Supreme Court had expressly recognized tribal authority to regulate nonmember conduct on trust or tribal lands. 665 F.2d at 964. The court then stated that, ownership issues aside, the second exception to the general rule in Montana against tribal authority over nonmember activity also applied because "[s]uch conduct, if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources." Ibid.

3. Ninth Circuit's Analysis Concerning Concurrent State and Tribal Jurisdiction Over Nonmember Hunting and Fishing.

The Ninth Circuit anticipated Mescalero Apache's analysis in White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir. 1981), in which it addressed the authority of Arizona and Washington to enforce their hunting and fishing laws on nonmembers engaged in those activities on, respectively, the White Mountain Apache and Colville Indian Reservations. The court recognized that determination of the states' jurisdiction required resort to Bracker's interest-balancing test and identified four general factors as significant in assessing the affected state, federal, and tribal interests: (1) "the extent to which the state license fee damages the tribal economic interest (and related federal policy)" (id. at 1282); (2) whether state season, size, and other substantive limits are consistent with tribal regulations (id. at 1282-83); (3) "the extent to which fish and game migrate across reservation boundaries" (id. at 1283); and (4) whether state license fees are related to fish-and-game services performed by the state on the reservation (id. at 1283-84).

Although observing that "[t]he tribal interest in raising revenues for essential governmental programs does gain strength when the revenues are derived from

value generated on the reservation by activities involving the tribes and when the taxpayer is the recipient of tribal services" and requiring that the economic effect of the state regulation on the tribes be explored by the district courts, the court stated that this factor "will not receive great weight in the preemption scales[.]" 649 F.2d at 1282. Concerning the impact of state substantive regulations, the court distinguished those which are similar or more lenient than a tribe's from those which are more stringent; in the former situation the adverse impact on tribal interest is nonexistent since compliance with tribal laws ensures compliance with state regulation, while in the latter situation the only prejudicial effect was deemed to be on tribal revenues which "is not [an] overly weighty" consideration. Id. at 1282-83. The court found as particularly important to a state's interest the migratory nature of the involved fish and game, remarking that "[s]tates have an obvious interest in conserving animals which, if protected, would move off reservation on to state lands" and that they further "have an interest in animals that migrate from state lands, where they survive by virtue of the states' conservation efforts[.]" Id. at 1283. The final factor--the extent to which state license fees coincide with the cost of on-reservation fish and game services--

was not assigned a specific weight by the court but has been typically viewed as significant. See Washington v. Confederated Tribes of Colville, 447 U.S. 134, 157 (1980); Crow Tribe v. Montana, 650 F.2d 1104, 1116-17 (9th Cir. 1981), amended, 665 F.2d 1390, cert. denied, 459 U.S. 916 (1982).

The Ninth Circuit has not revisited the issues in White Mountain Apache Tribe, but there is no reason to believe its analysis would not be followed. See Yakima Indian Nation v. Whiteside, 617 F. Supp. 735, 743-44, 747 (E.D. Wash. 1985) (applying Montana standards to determine whether tribe could impose land-use restrictions on nonmember-owned land and Bracker standards to determine whether county had concurrent jurisdiction); see also Knight v. Shoshone & Araphoe Indian Tribes, 670 F.2d 900, 902-03 (10th Cir. 1982) (applying only Montana standards to question of whether tribal zoning ordinance applied to non-Indian owned lands where concurrent state jurisdiction was not at issue). Consequently, whether the State has concurrent jurisdiction over nonmember hunting and fishing throughout the reservation thus appears susceptible to determination with reference to several specific criteria. Obviously, if the Tribes do not have jurisdiction over nonmember hunting and fishing on nontrust and nontribal lands, the State's claim to

concurrent jurisdiction over such activity of nonmembers on trust and tribal lands would be greatly enhanced because of the migration consideration.

4. General Conclusions.

The above analysis suggests that the Ninth Circuit will apply Montana as narrowly as possible. With respect to the streambed-ownership issue, the court of appeals' application is less than compellingly reasoned, but what may be lacking in fidelity to Montana is amply compensated for in clarity. There thus seems little question that, if litigated, the court would find that the beds of navigable streams within the reservation were not granted to Montana upon statehood and, instead, remain in trust for the Tribes. If ownership is vested beneficially in the Tribes, Namen dictates that tribal regulatory authority will be deemed to follow. Consequently, any challenge to Ordinance 87A and the fishing component of Ordinance 44D, to the extent such fishing occurs on navigable streams, must be undertaken with recognition that the Tribes will be deemed to have concurrent, and perhaps exclusive, jurisdiction by the district court and the Ninth Circuit; whether the Supreme Court would accept the court of appeals' reasoning if certiorari was granted is open to substantial question.

If it is assumed the State prevails on the streambed-ownership issue, a potentially complicating factor is the effect of the second paragraph in Article III of the Hell Gate treaty: "The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." The Tribes will contend that, at least as to fishing, their right is exclusive and that exclusivity carries with it the authority to preclude all nonmember fishing irrespective of the streambed ownership. They will also likely argue that, because of such exclusive right and their tradition of fishing as a means of substinance, the tribal welfare is immediately furthered by the ordinances. These arguments may well overstate the importance of the treaty's "exclusiveness" language,[13/]

[13/] In United States v. Dion, 106 S. Ct. 2216, 2219 (1986), the court stated that, "[a]s a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. ... These rights need not be expressly

but it seems likely the Ninth Circuit will apply the second exception in Montana to find concurrent jurisdiction if the Tribes can show an environmental or conservation need, and not merely a financial incentive, to regulate nonmember activities on nontrust and nontribal lands.

Whether the State had concurrent jurisdiction over nonmember hunting and fishing activity on trust or tribal lands would presumably be determined in accordance with White Mountain Apache. Although the facts relevant to that determination must be developed, it appears probable that a strong argument for such jurisdiction exists. It is unclear, moreover, if Ordinance 44D is intended to relegate exclusive regulatory authority to the Tribes. Finally, it is more difficult to predict the outcome of this issue with respect to Ordinance 87A in the absence of more directly relevant case law, but regulatory history and reservation demographics tend to favor concurrent jurisdiction over nonmembers.

(Footnote Continued)

mentioned in the treaty." [Footnote omitted.] Dion thus suggests that the explicit reservation of fishing rights in the Hell Gate treaty has little analytical significance.

IV. DURATION AND COST OF LITIGATION.

The length of any litigation is largely dependent on its factual complexity. Presently, if all on-reservation jurisdiction issues are pursued, the parties will undoubtedly wish to adduce, inter alia, (1) those historical facts relevant to the "public exigency" consideration involved in the streambed-ownership question; (2) those facts germane to the concurrent hunting and fishing jurisdiction issue identified in White Mountain Apache; (3) the history of state regulation as to streambed protection and the lack of tribal involvement; and (4) all facts bearing upon whether the Tribes' ordinances are essential to furthering environmental and conservation needs.

It is possible that a preliminary injunction could be requested fairly early on in the litigation. Whether such a motion should be made depends substantially on the degree of harm accruing to the State during the action's pendency. If the State's prior regulatory functions are unaffected in the short-term by the contested portions of the ordinances, the status quo ante may in effect be continuing, and a preliminary injunction would thus serve no purpose. If, however, the State believes its interests are being, or will be, adversely and irreparably affected, preliminary injunctive relief should be sought within two to three

months after the action is filed. Because the granting or denial of a preliminary injunction is an appealable order, it is conceivable that requesting such relief will delay final resolution of the action. Absent an interlocutory appeal, trial on the merits should occur within 12 to 24 months of the action's filing.

Litigation expenses are equally difficult to predict. Nevertheless, it appears that the action can be handled by agency attorneys without the need for employment of outside counsel and that most expert testimony could be supplied by agency personnel. There may be a need for outside expert testimony on historical or anthropological issues although, at this time, the cost associated with such testimony appears relatively insignificant. It can be expected that the Tribes will vigorously oppose the action and that two to three agency attorneys should be assigned to the case. The amount of their time required to litigate it will vary substantially depending upon discovery and trial demands. Other agency personnel would be involved in both fact-gathering and expert witness functions. As with most complex litigation, therefore, the ultimate cost, in terms of monetary and personnel-resource expenditure, will be significant but cannot be predicted with real accuracy.

MEMORANDUM

February 17, 1987

TO: Marcia Rundle
Staff Attorney/Program Manager

FROM: Susan Cottingham SC
Research Specialist

Political subdivisions and public corporations who have filed SB 76 claims for water rights include cities, towns, counties, conservation districts, school districts, water and sewer districts, grazing districts and irrigation districts. It is not possible at this time to identify all of the entities who might be involved in compact negotiations if HB770 is passed. However, I have assembled the following partial lists.

SUBJECT: Preliminary List: Municipalities and Political Subdivisions on or adjacent to Indian Reservations or on ceded Indian lands that have filed SB 76 Claims

City of Browning
East Glacier Water & Sewer District
East Glacier County Water & Sewer District
City of Polson
City of Ronan
Arlee School District
Town of Elmo
Charlo Water District
Town of Hardin
City of Lodge Grass
City of Havre

SUBJECT: Preliminary list of federal irrigation projects delivering water to state irrigation districts. Note: Only two Water User's Associations are listed, but the number is undoubtedly larger.

Indian Irrigation Projects

Flathead Reservation:

Flathead Joint Board of Control, St. Ignatius
Camas Irrigation District
Mission Irrigation District
Jocko Irrigation District

Crow Reservation:
Big Horn Irrigation District
Lower Little Horn Irrigation District
Upper Little Horn Irrigation District
Bozeman Trail Ditch Co. (Water User's Association)
Two Leggins Water Users Association

Fort Belknap Reservation:* (Water is delivered by BOR Milk River Project)
Fort Belknap Irrigation District, Chinook

Bureau of Reclamation Projects

Milk River Irrigation Project* (Delivers water to Ft. Belknap Reservation)
Alfalfa Valley Irrigation District, Malta
Dodson Irrigation District, Malta
Glasgow Irrigation District, Glasgow
Harlem Irrigation District, Harlem
Malta Irrigation District, Malta
Paradise Valley Irrigation District, Chinook
Zurich Irrigation District, Chinook

Pick-Sloan, Missouri Basin Project
Lower Yellowstone Project Board of Control, Sidney
Intake Irrigation District, Sidney
Lower Yellowstone Irrigation District No. 1, Sidney
Lower Yellowstone Irrigation District No. 2, Sidney
Savage Irrigation District, Sidney

Crow Creek Pump Unit
Toston Irrigation District

Helena Valley Unit
Hellena Valley Irrigation District, Helena

Buffalo Rapids Project Board of Control, Terry
Buffalo Rapids Irrigation District No. 1, Terry
Buffalo Rapids Irrigation District No. 11, Terry

East Bench Irrigation District, Dillon
West Bench Irrigation District, Dillon
Huntley Project Irrigation District, Ballantine

Fort Shaw Irrigation District, Fort Shaw
Greenfields Irrigation District, Fairfield

CONFIDENTIAL

RESERVED WATER RIGHTS COMPACT COMMISSION

STATE OF MONTANA

MEMORANDUM

TO: Marcia Rundle, Staff Attorney/Program Manager
FROM: Susan Cottingham, Research Specialist SC
SUBJECT: "Secretarial Water Rights"/Joint Board Legislative Proposal

DATE: January 15, 1987

The Joint Board of Control of the Flathead Irrigation Districts, through its legal representative, has suggested that a special kind of water right exists on the Flathead Indian Reservation, necessitating a legislative expansion of RWRCC negotiating authority.

On December 22, 1986, Leo Berry, counsel for the Joint Board, made an informal presentation to one of the RWRCC negotiating teams regarding so-called "Secretarial water rights." He asserted that the irrigators on the Reservation who are represented by the Joint Board have essentially "three different types of water rights... They have appropriated rights. They have reserved rights which they have succeeded from allottees, original allottees, and they have Secretarial rights which are federally created water rights that the Secretary of the Interior issued back when the irrigation project was developed." (Transcript of Meeting, 12/22/86, p. 1). He went on to emphasize that "these are federally created Secretarial rights. They're not reserved rights in any way in the context of reserved rights." (Transcript, p. 2). For this reason, the Joint Board believes the authority of the RWRCC should be expanded to include the ability to negotiate with the Joint Board for these "non-reserved Federal rights." Mr. Berry also indicated at that time that he believed that there weren't very extensive irrigation works in place at the time the Flathead Indian Irrigation Project was built and "So, the water rights we're talking about are those that were put to use pursuant to the construction of the project." (Transcript, p. 8).

At this meeting, Commission members requested that the staff research the history of these rights. Accordingly, I've examined current RWRCC files which contain some information on these "Secretarial rights," looked at SB 76 claims filed on the Flathead Indian Reservation, and researched potentially applicable statutes and case law. I have also looked into the history of irrigation on the Reservation contained in documents at the State Historical Library.

Marcia Beebe Rundle
Legal Counsel/Program Manager
1520 East Sixth Avenue
Helena, Montana 59620-2301
(406) 444-6841

Essentially, the term "Secretarial water rights" refers to "rights" identified through a process that the Interior Department developed to examine and confirm water rights in existence before development of the Flathead Indian Irrigation Project. According to the Comprehensive Review Report on the Flathead Indian Irrigation Project "In 1912, after concern over water rights was expressed by the Agency Superintendent, the Acting Commissioner of Indian Affairs authorized investigation of private ditches and water rights within Flathead Indian Irrigation Project boundaries. The Superintendent, pursuant to the Commissioner's direction, formed a committee to make the investigations. The Committee was instructed to give careful consideration to all evidence of irrigation, both in the past and at the time, and to determine the size and capacity of all ditches with the view of protecting the Indians' water rights." (emphasis added). (Comp. Review Report, Background p. 2-5).

Apparently, extensive irrigation systems were already in place at the time the Flathead Indian Irrigation Project was authorized. Evidently, Project planners contemplated destruction of some of the old ditches during Project construction. Water users at the time wanted confirmation of their rights and the subsequent survey by the Committee and approval of their findings by the Secretary of the Interior provided this confirmation.

A brief look at the history of irrigation on the Reservation prior to Project authorization shows the growth of Indian irrigation over the years. Indian agents for the Jocko Agency indicated that as early as the mid-1860's land was being fenced and plowed and ditches were being prepared for irrigation (letter from Augustus Chapman to USDIA, 4/20/1866). It would be several decades, however, before any extensive irrigation was in place and in the meantime, agents reported "appalling conditions" of starvation and disease on the Reservation. Little financial support came from the Federal government during this period despite provisions in the Articles of Agreement of 1872 (removing the Flathead Tribes from the Bitterroot to Jocko Reservation) which promised land, buildings, equipment and assistance in "fencing and breaking up of fields." In 1876, agent Medary reported that nearly 100 Indians desired to be farmers, but had no equipment. From 1877 to 1893, however, under the management of Indian agent Peter Ronan, "Flathead agricultural improvements were significant. During his 16 years in office, the cultivated acreage for the Confederated Tribes increased to 10,600 acres." (1893 Annual Report, cited in "Early Administration of the Flathead Indian Reservation 1855-1893" by R.D. Selfried, U.M., 1968, p. 176).

Credit for improved irrigation should also be given to Eneas, Chief of the Kootenai Tribes, living along Flathead Lake, who "worked diligently to convert his impoverished people to agrarian ways", even using his government income to buy agricultural equipment. (Selfried, p. ____)

Thus, by 1911 (only 3 years after the first authorization of Flathead Indian Irrigation Project), a Map of the Flathead Indian Reservation, prepared by the Department of the Interior, Office of Indian Affairs, showed extensive irrigation in place. On this map, the Reservation is broken into four "Farmer's Districts", apparently administered by "expert farmers" headquartered at the Agency. Signed documentation by each of the farmers for each district shows approximately 26,800 acres "under cultivation by the Indians", close to another 25,000 acres "leased to whites" and 275 miles of

irrigation canals. It was these rights that the Committee was authorized to investigate. A letter dated June 27, 1912 from C.F. Hauke, Flathead Agency, to the Commissioner of Indian Affairs advised that the "Secretary of the Interior approved a recommendation that a Committee which should include the Superintendent of the Reservation, the Engineer engaged in the work, and an Indian to be selected by the Indians, to be appointed to make an examination for the purpose of determining the lands affected by appropriation of water and that all lands so irrigated should be determined to have a paid up water right under the new system."

The Committee Report, completed in 1919 states: "The following are the principles observed in making the findings of the Committee...together with recommendation with regard to the taking over of old ditches... The Committee is required to determine the status of all water rights claims conflicting with the U.S. and to make recommendation as to whether and to what extent the old ditches should be taken into consideration on the question of charges for construction and O & M costs..."

"The principles observed in making the findings of the Committee were as follows: The State of Montana was admitted to the Union November 8, 1889, whereas the Flathead Reservation was established by the Treaty with the Indians of July 16, 1855. Water being essential to industrial prosperity, a reservation of Indian land carries with it an implied reservation of sufficient water to serve the irrigable land within such reservation of all natural streams, springs, lakes or other collections of still water within the boundaries of said tract."

"The waters of the Flathead Indian Reservation are therefore inseparably appurtenant to the allotted lands and the unallotted irrigated lands of the Reservation and were, in substance, appropriated to these lands when the Reservation was established and its control must vest in the U.S. Government."

The Committee, therefore, proceeded to investigate the irrigation systems in place, to hold hearings and to issue specific reports on each allotment. Their final report also recommends "...that wherever practicable the U.S. refrain from destroying private ditches; that the allottee or his successor in interest be allowed to use his old ditches to irrigate that portion of his allotment that is determined to have a valid water right, but if the allottee elects to exchange his water right for a water right in a government ditch he should be entitled to a paid up water right to the extent of 100 percent of the cost of construction for that acreage that is determined to have a valid water right but that he should be required to pay operation and maintenance charges on the total irrigable acreage of his allotment."

Thus, it is apparent that the Committee, in reporting to the Commissioner of Indian Affairs, was concerned solely with water rights on allotments (reserved water). Nowhere do they concern themselves with an investigation of any "surplus", unallotted lands.

According to the Comprehensive Review Report: "The Assistant Secretary of the Interior approved the committee's report on November 25, 1921. The right to the use of water as set forth in the approved report became known as "Secretarial Water Rights" in order to differentiate them from Flathead Indian

Irrigation Project water rights. Following the approval of the committee's report by the Secretary, the U.S. proceeded to file with the State of Montana for additional water on the reservation for use on the Flathead Indian Irrigation Project. Today, "Secretarial Water Rights" use continues. The Flathead Indian Irrigation Project delivers some of the water connected with those rights in project facilities and charges a nominal O & M charge for the service. Other water connected with "Secretarial Water Rights" is delivered through private ditch systems." (p. 2-6)

A couple of early statutes have been cited as Congressional authority for secretarial approval of existing rights on the Reservation.

The Committee itself referred to Section 9 of the Act of May 29, 1908 as its authority. This section "authorizes the Secretary of the Interior to perform any and all acts to make such rules and regulations as may be necessary and proper for the purpose of carrying into effect the provision for the irrigation of the allotted lands and unallotted irrigable lands to be disposed of under the Act of April 23, 1904." (from Committee report 12/10/19.) The 1904 Act referred to provided for the allotment of the Flathead Reservation and the sale of any surplus, unallotted lands. (33 STAT 302). This 1908 Act (35 STAT 444, 448) which was the initial authorization for the Flathead Indian Irrigation Project also states that "lands irrigable under systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. All land allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system..."

Perhaps the clearest language authorizing determination of existing rights is contained in the Indian Appropriation Act of 1916 (39 STAT 123, 142) which stated "That the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations and issue such notices as may be necessary to carry into effect the Provisions of this Act and he is hereby authorized and directed to determine the area of land on each reservation which may be irrigated from constructed ditches and to determine what allowance, if any, shall be made for ditches constructed by individuals for the diversion and distribution of a partial or total water supply for allotted or surplus unallotted land: Provided, that if water be available prior to the announcement of the charge herein authorized, the Secretary of Interior may furnish water to land under the systems on the said reservations making a reasonable charge therefor, and such charges when collected may be used for construction and maintenance of the systems through which such water shall have been furnished."

There is no reference to this statute in any of the Committee documents I've seen. However, this statute was referred to in a memo to the Associate Solicitor of Indian Affairs from the Billings Field Solicitor, dated 4/24/69. It states: "Secretarial rights specified the acreage for which O & M charges (and construction charges) did not have to be paid. Where existing irrigation works had been affected by Project construction, the Secretarial right also granted a carriage right in the project system. This was pursuant to the Indian Appropriation Act of May 18, 1916 (39 STAT 123, 142)."

Other early statutes which may be applicable are:

1. The General Allotment Act of 1887 (24 STAT 390). Section 7 states "That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of Interior be, and is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations."

2. The Act of June 21, 1906 (34 STAT 325, 354) amended the 1904 Flathead Reservation Allotment Act (33 STAT 302). Section 19 states: "That nothing in this Act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the Act of the use of water appropriated or used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs constructed and used by them in the appropriation and use of said water."

One document that does seem particularly relevant is the Petition for Irrigation Districts "In the Matter of the Formation of the Flathead Irrigation District" which was made pursuant to the Act of May 10, 1926 (44 STAT 453, 464). The petition states: "2. That an irrigation system has been constructed by the United States under the Federal laws, for the irrigation of that portion of the Flathead Irrigation Project of the United States, situated within the counties of Lake and Sanders, State of Montana; that all of the lands irrigable from the constructed irrigation system of the Flathead Irrigation Project except such areas as have been granted a paid-up water right by the Secretary of Interior on account of use of water prior to the construction of the above-named irrigation system and excepting trust patent Indian lands, are included in the proposed Irrigation District..." (dated June 12, 1926) (emphasis added).

This appears to be the clearest confirmation that water uses in existence prior to the establishment of the Flathead Indian Irrigation Project, as confirmed by the Secretary of Interior ("Secretarial Water Rights"), were not considered part of the Flathead Indian Irrigation Project for purposes of repayment of construction and O & M charges nor as part of the Irrigation Districts formed to execute repayment contracts for delivery of water from the project.

There is little applicable case law regarding "Secretarial water rights". Flathead water right cases that deal with this issue are: nine companion Moody cases, 48 F2d 327 (1931), rev. 66 F2d 999 (1933), 70 F2d 835 (1934); U.S. v. McIntire, 101 F2d 650 (1939); and U.S. v. Alexander, 131 F2d 359 (1942).

The Court of Appeals, in the Moody case rehearing of a dismissal order said:

> "If no greater amount of water is claimed for the allotments in question upon this appeal than are stated in the report of the committee made to the Secretary of the Interior respecting diversions and applications of water for irrigation purposes prior to the initiation of the Flathead Reclamation Project and such amount of water is recognized as properly

apportioned to said lands in the administration of the project, then the Secretary of the Interior would be the only additional necessary party to actions for the determination of questions whether such lands were liable to construction maintenance, and operation charges imposed on account of the project." (66 F2d 1003) The Court cited the language of the 1916 Act in its opinion.

The next case that made any reference to "Secretarial rights" was U.S. v. McIntire, (100 F2d 650) which generally held that "where waters of [a] creek on [an] Indian reservation were impliedly reserved to Indians by treaty, no title to waters could be acquired by any one except as specified by Congress." In this case the Court simply stated, "Finally, appellees mention that the Secretary of the Interior had allocated certain water rights which, it is said, had been appropriated prior to 1909. Whether or not the Secretary of the Interior acted erroneously in those cases is a question which is not before us."

The only case which deals directly with "Secretarial water rights is U.S. v. Alexander, (131 F2d 359) which was a "suit by the United States of America against B.W. Alexander and others to enjoin defendants from diverting water through their privately constructed ditches in excess of amounts allotted by the Secretary of the Interior..."

In this case the Ninth Circuit Court stated that Secretarial decrees relating to private rights were not such rules as the Secretary of Interior was authorized to prescribe by the General Allotment Act in order to secure "just and equal distribution" of water on the reservation, the violation of which might be the basis for injunctive relief against wrongful diversion by owners of Indian allotments through privately constructed ditches. The Court notes that no rules had been promulgated under the General Allotment Act; "There not being a rule or regulation, of course a violation thereof could not be shown." At any rate, "The so-called "Secretarial decrees" related to alleged "private" rights and were not of the character required."

The Court also summarized the argument of the U.S.: "The government on this appeal does not rely upon the "Secretarial decrees" and makes no attempt to sustain their validity. It contends, on the contrary, that all irrigable lands on the Flathead Indian Reservation, whether allotted or surplus, have equal water rights and that all diversions, whether from government or private ditches, are to be administered by the project engineer. The government further contends that the diversions made by the defendants are in excess of their pro rata share..." The U.S. asked for injunctive relief but the court denied this relief.

Particularly instructive in this case are the "Findings of Fact, Conclusions of Law and Order" by the U.S. District Court (cause #1529). Finding of Fact #51 states: "Purporting to act pursuant to the Acts of Congress of June 21, 1906 (34 STAT 354) and May 29, 1908 (35 STAT 448-450), the Secretary of the Interior appointed a committee to make findings of the water rights on the Flathead Reservation in Montana. This committee made personal investigations on the ground and heard testimony and reviewed surveys made by engineers of the U.S. Reclamation Service of each tract of land on the Flathead Indian Reservation in Montana where irrigation had been used and early water right developments made prior to the year 1909."

Finding of Act #61 states: "In concluding its report the committee said: "Filings are continually being made in Sanders, Missoula and Flathead counties claiming use to the rights of the water of the streams of the Flathead Reservation. These waters are determined by the committee to be a tribal asset of the Indians allotted on the Flathead Reservation and to be appurtenant to the allotted lands and the unallotted irrigable lands as approved by the Secretary of the Interior, and settlers on ceded lands are subordinate in right to the needs and uses of the Indian allotments and farm units."

I can find no other cases that deal directly with the nature or legal basis of these so-called "Secretarial water rights."

The final task in my research was to look at SB 76 claims to see whether these "Secretarial water rights" had been claimed, what documentation was provided, and what priority dates were claimed. A random check of Flathead Basin water right claims with pre-1908 priority dates shows both diversity and creativity in how these rights are claimed. Some claimants indicate specifically that these are "Secretarial water rights", others check boxes for decreed rights or use rights and claim the priority date in the findings of the Committee report. Almost all pre-1908 claims I checked had attached as documentation the form the Committee used to confirm these existing uses. (See attached SB 76 claim #149480). Several claimants also attached a notarized statement claiming an 1855 priority date as successors in interest to Flathead allottees. (See attached SB 76 claim #153970).

It is clear from a number of letters and documents in these claim files that administratively these "Secretarial water rights" are considered to be private, non-Project water. (The Comprehensive Review Report mentions this as well.) The administrative distinction probably stems from the initial Committee recognition (and Secretarial approval) that those having pre-Project water rights should not pay construction charges if their ditches were destroyed during Project construction.

In summary, "Secretarial water rights" were simply confirmation by the Secretary of Interior of water uses existing on Indian allotments before construction of the Flathead Indian Irrigation Project. The lands found to have these rights were specifically excluded from the Irrigation Districts when they were formed in 1926.

Bibliography: References, Cases, Statutes, Maps

REFERENCES/MAPS

Transcript, meeting of Reserved Water Rights Compact Commission Fish and Wildlife Service Negotiating Team with Leo Berry, Counsel for Joint Board of Control, 12/22/86.

Comprehensive Review Report on the Flathead Indian Irrigation Project, Background and Legal Report, October 1985, Bureau of Reclamation/BIA-Prepared at the direction of the Secretary of Interior.

Ketcham, Rev. W.H.; Conditions on the Flathead and Ft. Peck Indian Reservations, 1915.

Selfried, R.P.; "Early Administration of the Flathead Indian Reservation 1855-1893", 1968 University of Montana Masters Thesis.

Ronan, Peter; Historical Sketch of the Flathead Indian Nation for the Years 1813-1890, Journal Publishing Co., Helena, 1890.

Map of Flathead Indian Reservation, Montana 1911, Department of Interior, Office of Indian Affairs (B-247, Historical Society Library, Helena).

Excerpts, Report of the Committee to the Commissioner of Indian Affairs, letter dated 12/10/19, Flathead Agency, Dixon, Montana.

Memo to Associate Solicitor, Indian Affairs from Field Solicitor, Billings, dated 4/24/69.

CASES

Moody v. Scheer (nine companion cases), 48 F2d 327 (1931), rev. 66 F2d 999 (1933), 70 F2d 835 (1934).

U.S. v. McIntire, 101 F2d 650 (1939).

U.S. v. Alexander, 131 F2d 359 (1942).

Findings of Fact, Conclusions of Law and Order, Cause #1529, U.S. District Court for the State of Montana.

STATUTES

General Allotment Act of 1887 (24 STAT 390).
Flathead Reservation Allotment Act, April 23, 1904 (33 STAT 302).
Act of June 21, 1906 (34 STAT 325).
Act of May 29, 1908 (35 STAT 444).
Indian Appropriation Act of 1916 (39 STAT 123).

Act of May 10, 1926 (44 STAT 453).

Petition "In the Matter of the Formation of the Flathead Irrigation District, June 12, 1926.

Microfiche, SB 76 Claims, Basin 76L, Department of Natural Resources and Conservation, Helena, Montana.

Form No. 78-1 R2/80

76L

STATEMENT OF CLAIM FOR EXISTING WATER RIGHTS

119480

RECEIVED
APR 28 1982
MONTANA D.N.R.C.
MISSOULA FIELD OFFICE

IRRIGATION

For the Water Courts of the State of Montana

LP-C
*76L-1517

1. Owner of Water Right: Hargnard Jr. (Last) / Raymond (First) / C. (Middle Initial)
   Co-Owner or Other Interest Owner: ____ (Last) / ____ (First) / ____ (Middle Initial)
   Address: Rt 1 Box 130
   City: St. Ignatius State: Montana Zip Code: 59865
   Home Phone No.: 745-4176 Business Phone No.: 721-2604

2. Person completing form: Hargnard (Last) / Wendy (First) / A. (Middle Initial)
   Address: 707 Continental Way
   City: Missoula State: Montana Zip Code: 59803
   Home Phone No.: 721-1265 Business Phone No.: 721-2604

3. Name of ditch, creek or river: Unnamed

4. Use: ☒ Irrigation

5. Method of Irrigation Use: ☐ Sprinkler ☐ Furrow ☒ Flood

6. Source of Water: (Check Only One)
   - Spring — Name ____
   - Well — Name ____
   - ✓ Stream — Name Unnamed — Tributary of Post Creek
   - Lake — Name ____ — Stream ____ — Tributary of ____
   - Reservoir — Name ____ — Stream ____ — Tributary of ____

7. Point of Diversion: County Lake
   ~~NE SE~~ Section ~~4~~ 33 T 18 N R 20 E W
   LOT SE SE Lot ____ Block ____ Subdivision ____ 19 N 20 W

8. Means of Diversion:
   - ☐ Pump Capacity ____ gpm
   - ☒ Headgate and ditch or pipe
   - ☒ Flood and dike

9. Means of Conveyance:
   - ☒ Ditch
   - Pipeline
   - Other. Explain ____

9. Place of use and acres irrigated. County Lake

8.7 acres, ____ Lot, ____ Block, ____ ¼ NE ¼ NE ¼, Section 4, T 18 N/S, R 20 E/W

9.5 acres, ____ Lot, ____ Block, SE ¼ SE ¼ SE ¼, Section 33, T 19 N/S, R 20 E/W

____ acres, ____ Lot, ____ Block, N½ ¼ EE ¼ ¼, Section 33, T 19 N/S, R 20 E/W

____ acres, ____ Lot, ____ Block, ____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S, R ____ E/W

____ acres, ____ Lot, ____ Block, ____ ¼ ____ ¼ ____ ¼, Section ____, T ____ N/S, R ____ E/W

18.2 Total acres. Subdivision ____

10. Flow rate claimed: 1.5
- ☑ cubic feet per second
- ☐ gallons per minute
- ☐ miner's inches

11. Volume claimed: 18.2 acre-feet per year

12. Period(s) of use: 5 (Month) 1 (Day) to 10 (Month) 31 (Day)

13. Check one:
- ☐ Decreed Water Right
- S ☐ Filed Appropriation Right — Priority date or date of first use: Hour 1 / Month 1 / Day 1 / Year 1898
- ☐ Use Water Right
- ☒ Secretarial Water Right

14. Attach copies of the Decree, Record of Filing or Proof of Use Right. Allotment # 566

15. Attach copies of aerial photographs, U.S. Geological Survey maps or such other documents necessary to show point of diversion, place of use, place of storage, and conveyance facilities.

16. Notarized Statement signed by claimant.

STATE OF MONTANA)
:ss.
County of Missoula)

I, Raymond C. Norgaard Jr., having been duly sworn, depose and say that I, being of legal age and being the claimant of this claim of existing water right, and the person whose name is signed to it as the claimant, know the contents of this claim and the matters and things stated there are true and correct.

Raymond C. Norgaard

Subscribed and sworn before me. this 23rd day of April 19 82.

Notary Public for the State of Montana

Residing at Missoula, MT

My Commission expires February 22, 1985

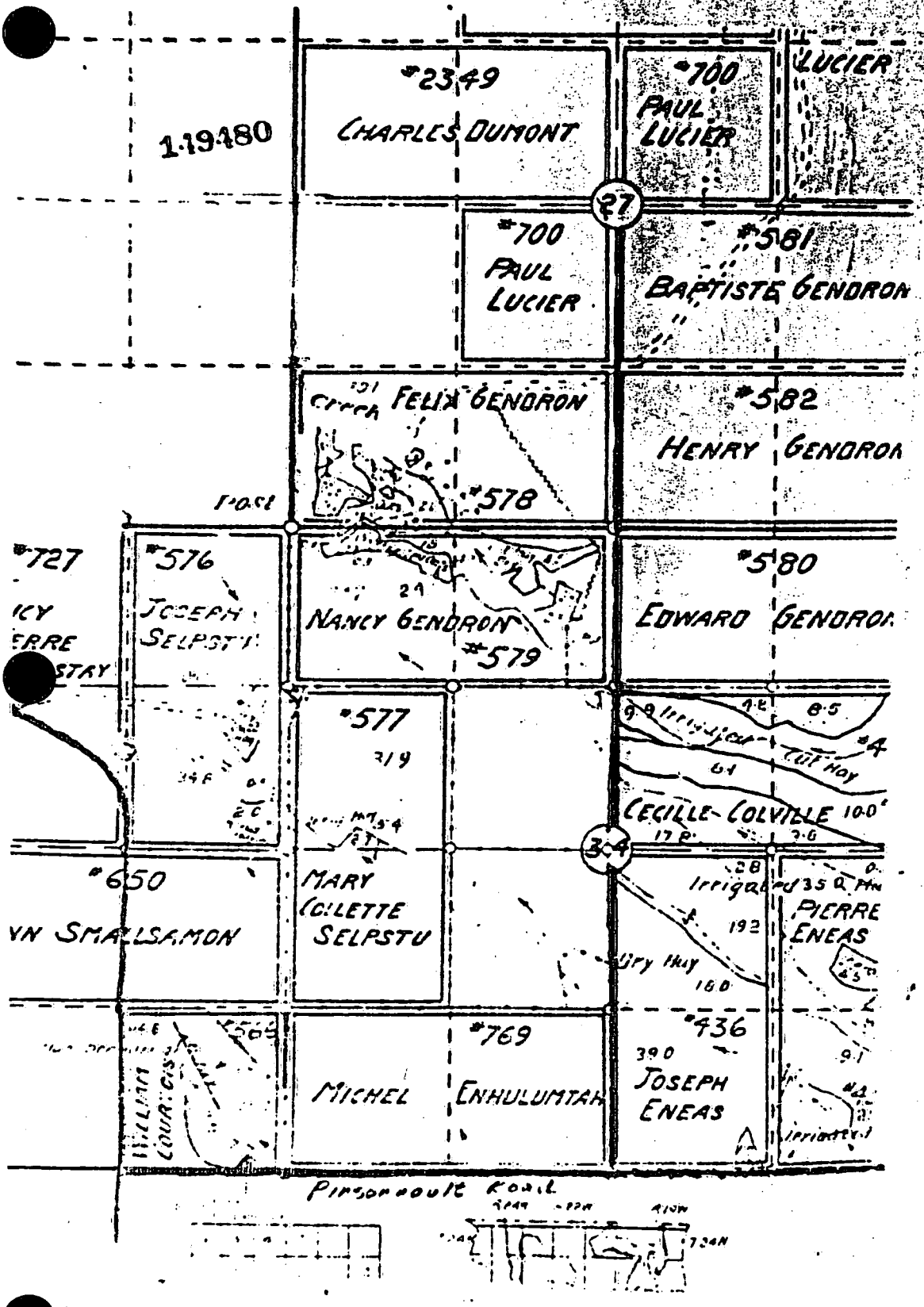
149480

William Courtois
Allotment No. 566
NW¼NE¼ Sec. 4, T. 18 N., R. 20 W.
SE¼SE¼ Sec. 33, T. 19 N., R. 20 W.

The Committee, on May 9th, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of William Courtois, being allotment No. 566, comprising the NW¼NE¼ Sec. 4, T. 18 N., R. 20 W., and SE¼SE¼ Sec. 33, T. 19 N., R. 20 W., and testimony was taken on November 15, 1913, and

Upon further investigation on the ground, testimony taken and from facts shown on Plat D-1402, Sheet 14-22, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that the predecessor in interest of the allottee in about 1898 constructed ditches diverting from an unnamed stream in NW¼SE¼ Sec. 4 for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated intermittently 8.7 acres in the NW¼NE¼ Sec. 4, T. 18 N., R. 20 W., and 9.5 acres in the SE¼SE¼ Sec. 33, T. 19 N., R. 20 W.;

that said 18.2 acres hereinbefore described are determined to have a valid and subsisting water right from unnamed stream in the NW¼NE¼ Sec. 4, T. 18 N., R. 20 W., to the extent of 1 acre foot per acre per annum, or a total of 18.2 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.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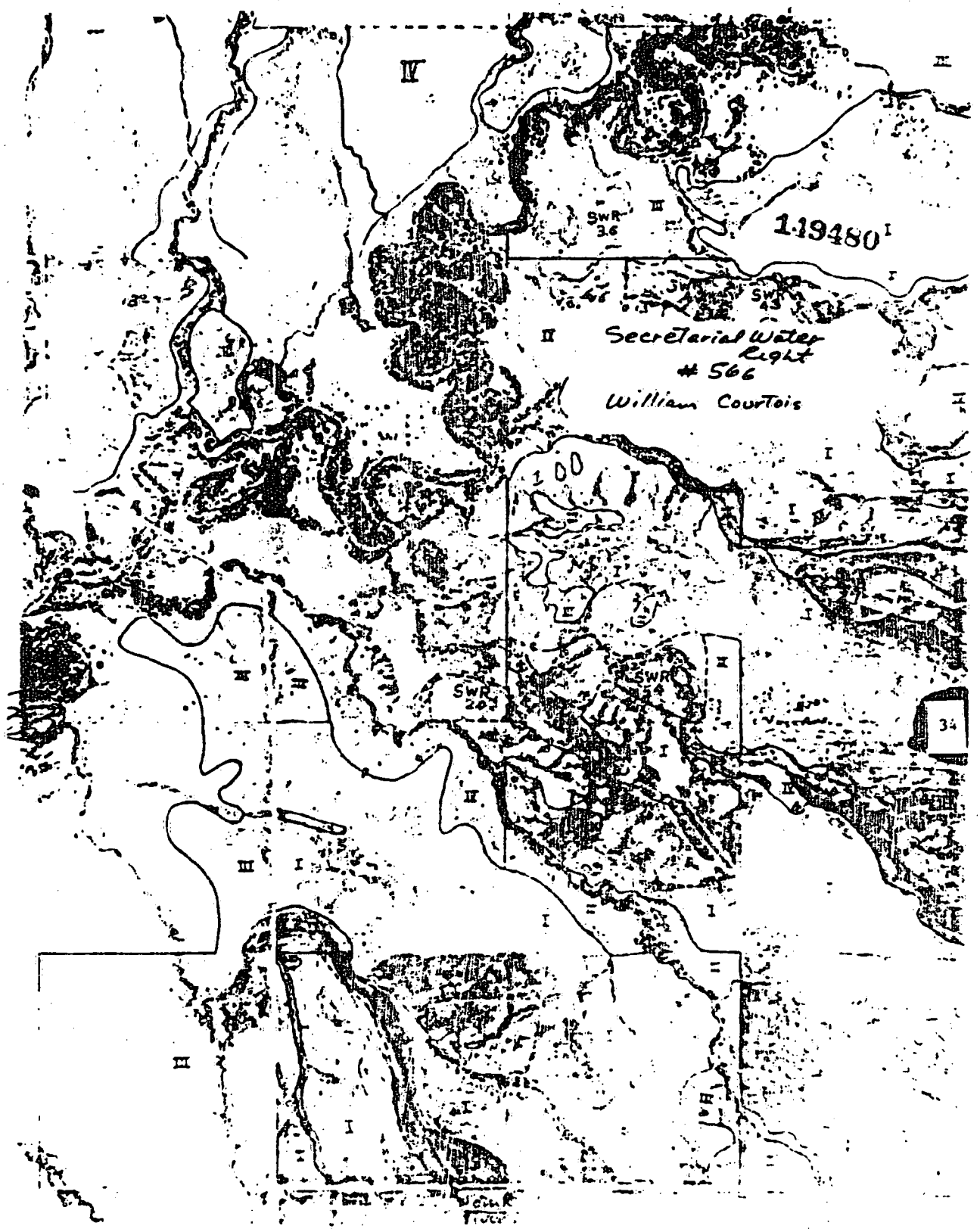
*2349
CHARLES DUMONT
*700
PAUL LUCIER
LUCIER
27
*700
PAUL LUCIER
*581
BAPTISTE GENDRON
FELIX GENDRON
*582
HENRY GENDRON
*578
*727
*576
JOSEPH SELPSTU
NANCY GENDRON
*579
*580
EDWARD GENDRON
*577
319
CECILLE-COLVILLE
34
*650
MARY COLETTE SELPSTU
PIERRE ENEAS
*769
*436
MICHEL
ENHULUMTAH
JOSEPH ENEAS
PIPESTONE ROAD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Secretarial Water Right
#566
William Courtois
100
SWR 36
SWR 43
SWR 20
SWR 54

MEMORANDUM December 19, 1986

TO: Marcia Rundle

FROM: Susan Cottingham SC

SUBJECT: History of the National Bison Range

The National Bison Range was withdrawn from the Flathead Indian Reservation by an Act of Congress on May 23, 1908. (35 Stat 267) The acreage limits were enlarged by Congress on March 4, 1909 (35 Stat 1051) and specific lands reserved and approved by the President on June 15, 1909. By Executive Order 3596, on December 22, 1921, the Bison Range was "further reserved and set apart for the use of the Department of Agriculture as refuges and breeding grounds for birds."

In discussing the priority date for water reservations for the purposes of the National Bison Range, counsel for the U.S. Fish and Wildlife Service has asserted that the correct priority date should be July 15, 1855, the date of the original reservation of land for the Flathead Tribe by means of the Hellgate Treaty. The rationale offered at the meeting of November 14, 1985 between the federal government and the Reserved Water Rights Compact Commission was that "the purposes for which they were reserved for the Bison Range were a portion of the purposes for which the Reservation was set aside...and all we're saying is that we're continuing that use, although we're not allowing the taking of animals...the critters were there before. There may be more of them now than there were then. We're not taking them the way they were then." Mr. Robert Green (USFWS) then stated: "...we contend the same thing would be going on on the Bison Range, that the wildlife were there, that it was an accepted part of the Reservation, and that all we've done is applied some sound scientific management practices to the same purpose." (pp. 14-16, Reporter's Transcript, November 14, 1985)

Because of these statements you have asked for research into the history of bison on the Flathead Indian Reservation. Numerous accounts in the archives of the Historical Society (newspaper clippings, pamphlets, interviews, etc.)

refer to the fact that bison had dramatically disappeared from the Rocky Mountain region by the middle of the 1870's. Apparently, no bison existed on the reservation at that time and so a Pend d'Oreille Indian named Sam Walking Coyote, who had been wintering in the Milk River Country, was encouraged to bring four young bison he had captured back to the Flathead Reservation. Some accounts suggest he arrived in 1873 or 1874, others as late as 1878.

At any rate, these four bison grew to thirteen by 1884 when Walking Coyote sold them to A.C. Allard and Michel Pablo. Allard and Pablo continued to build up the herd and in 1903 the Allard-Pablo Ranch acquired all the bison owned by one Buffalo Jones. However, after Allard died, Pablo decided he could not afford to maintain a herd which had grown to almost 1000 bison. And so, through an agent named Howard Eaton, he began to sell off the herd. Pablo tried to interest both the U.S. government and the newly-formed American Bison Society in the purchase of the herd, without success. According to Historical Society records, "early in 1907, the Canadian government, through Mr. Eaton, bought the herd and early in that year paid a deposit on the purchase."

Colorful newspaper accounts document the "last great Buffalo roundup" which took three years to complete. Details vary, but approximately 700 bison were eventually shipped to Alberta; the Canadian government paid around $150,000 for the herd. An account in the Montana Standard in 1933 states "Montana lost the Pablo herd because neither the state nor the federal government cared to purchase them and Pablo was unable to bear the cost of maintenance...."

During the three year roundup and shipment to Canada, and perhaps because of it, Congress designated the National Bison Range and the first thirty-seven bison, acquired from several private herds, were released on the Range on October 17, 1909.

In sum, apparently no bison existed on the Flathead Reservation at the time of its creation in 1855; four bison were brought onto the Reservation by a Pend d'Oveille in the mid-1870's and purchased by private landowners in 1884. This herd, which grew to almost 1000 by 1907, was sold to the Canadian government after the U.S. government's refusal to purchase it.

The purpose for which the National Bison Range was established, the protection and preservation of bison, does not appear to have been a purpose for which these (or any) reservation lands were dedicated by either the federal or the tribal governments at any time prior to 1908.

References: History of the National Bison Range

Qua quei, or how the buffalo were saved/Jim Jennings. —Saint Ignatius, Mont.: Mission Valley News, c1974.

The Last of the buffalo comprising a history of the buffalo herd of the Flathead Reservation and an account of the great round up. --Cincinnati: Tom Jones, 1909.

Stereopticon pictures showing the Roundup of 1907. Probably printed in 1907 with a preface. Montana Room, Parmly Billings Library.

THE CATTLEMAN, January, 1949, "Michel Pablo, Buffalo King", by Elizabeth Lent.

GREAT FALLS TRIBUNE, Sept. 4, 1955, "Old timer recalls dramatic bison drive", as told by Arthur Ray, Sr. to Olga Roat.

MONTANA, Magazine of the North Rockies, Oct. - Nov., 1979, "Bringing in the Buffalo," by Mark Newman.

OUT WEST, Oct. 1954, "No Kiddin!" by John Kidder.

ROCKY MOUNTAIN HUSBANDMAN, August 14, 1930.

THE LAST OF THE BUFFALO, Comprising a history of the Buffalo herd at the Flathead reservation and an account of the last great Buffalo roundup.

"Walking Coyote, Flathead Indian, Started Foundation Herd of Buffalo, Which Later Became Nationally Known; Finally Sold to Canadian Government" by Ellen Nye, The Jordan Tribune, Jan. 9, 1933.

"Management of the Nat'l Bison Range", paper by John Schwartz, Fish and Wildlife Service.

Historical summaries: press clippings file on the history of the National Bison Range, Montana State Historical Society Library, Helena, MT.

"Pablo's Mt. Buffalo Formed Nucleus for Huge Canadian Herd of Bison" Mt. Standard, 10/15/33.

Report of Peter Ronan - agent for Flathead Indians. U.S. Documents No. 2637, 8/16/88.

Account by Michel Pablo. Missoulian, 10/13/07.

Ron Marcoux
Pat Graham
Bob Lane
Eileen Shore
Al Elser
Candy West
Marcia Rolle
Jim Cross - Wildlife
Jim Hunt - Enforce

Jan. 14.
3 pm.
DFWP - DNRC - RLWRCC

4 Conservation Districts - esp. Lake County Conservation District.
310 permit authority -

Ordinance 87-A - Tribal - Aquatic Lands Cons. Ordinance
Will enforce 3/1/87

CSKT - Ordinance 440.
Cite Moscalara Apache

Dept. opposed (Elser Memo) -
= discriminatory against non-members -
> not resource-based - might not the purpose.

Fisheries - accept Tribal jurisdiction - cooperative development of regulations - for Flathead Lake -

Moose - OK?

Pheasant - OK?
Drawing - hunting season - Tribe/state cooperative -

Ordinance 440 - more comprehensive?

Al Elser - justifications -

Ron Marcoux - joint adoption and enforcement best solution - for resource management -

SPA - Pat Graham -
DFW take the lead -
Jurisdiction -
Bob Lane -
State agency may have to comply with both State and Tribal ordinances - i.e. Dept of Highways should be ordered to comply with Tribal -

1) Resource can't be managed in checkerboard fashion — would be best to have consistent regs and enforcement - who gets fees? who enforces? joint license? split fees? joint enforcement?

2) Analyze from resource perspective and go on record with suggestions to improve.

December 13, 1985

Dear :

A complete copy of the transcript of our recent negotiating session with representatives of the Confederated Salish and Kootenai Tribes is enclosed. The session was conducted at Helena, November 18, 1985.

Please be reminded that this document is to be treated with strict confidentiality.

Sincerely,

D. SCOTT BROWN
Program Manager

DSB:ea

Enclosure

Sen. Joseph P. Mazurek
Reserved Water Rights
  Compact Commission
P.O. Box 1715
Helena, MT 59601Joe‼
‼
Mrs. Audrey G. Roth
Reserved Water Rights
  Compact Commission
Box 489
Big Sandy, MT 59520Audrey‼
‼
Mr. William M. Day
Reserved Water Rights
  Compact Commission
Star Route Box 24
Fallon, MT 59326Willie‼
‼
Mr. Everett C. Elliott
Reserved Water Rights
  Compact Commission
P.O. Box 1431
Conrad, MT 59425Everett‼
‼
Mr. A. B. Linford
Reserved Water Rights
  Compact Commission
1400 West Palm Valley Drive
Apt. #21
Harlingen, TX 78552Ave‼
‼
Mr. Chris D. Tweeten
Reserved Water Rights
  Compact Commission
Justice Center
215 N. Sanders
Helena, MT 59620Chris‼
‼
Mr. Daniel Kemmis
Reserved Water Rights
  Compact Commission
2907 Juneau
Missoula, MT 59801Daniel‼
‼
Mr. Larry Fasbender, Director
Department of Natural Resources
  and Conservation
1520 East Sixth Avenue
Helena, MT 59620Larry‼
‼

Ms. Mona Jamison
Chief Legal Counsel
Governor's Office
Room 204, State Capitol
Helena, MT 59620Mona‖
‖
Mr. Clay Smith
Assistant Attorney General
Department of Justice
Room 317, Justice Center
215 N. Sanders
Helena, MT 59620Clay‖
‖

A S 16

December 6, 1985

Dear :

A complete copy of the transcript of our recent negotiating session with representatives of the Confederated Salish and Kootenai Tribes is enclosed. The session was conducted at Helena, November 18, 1985.

indent please

Please be reminded that this document is to be treated with strict confidentiality.

Sincerely,

D. Scott Brown
Program Manager

DSB:lp

Enclosure

not printed yet -
A Scott 16
Merge list on
A Scott 16a

Joseph P. Mazurek (Joe)
Audrey G. Roth
Wm. M. Day (Willie)
Everett C. Elliott

A.B. Linford (Ave)
Chris D. Tweeten
Daniel Kemmis (Daniel)
Larry Fasbender
Mona Jamison
Clay Smith

Dear Joe :

A complete copy of the transcript of our recent negotiating session with representatives of the Confederated Salish and Kootenai Tribes is enclosed. The session was conducted at Helena, November 18, 1985.

Please be reminded that this document is to be treated with strict confidentiality.

Sincerely,

D. Scott Brown
Program Manager

State of Montana

Reserved Water Rights Compact Commission

Ted Schwinden
Governor

W. Gordon McOmber, Chairman

Jack E. Galt, Vice Chairman
William M. Day
Everett C. Elliott
Daniel Kemmis

A. B. Linford
Joseph P. Mazurek
Audrey G. Roth
Chris D. Tweeten

Urban L. Roth, Special Counsel

MEMO

TO: Commission Members
FROM: Marcia Rundle
DATE: November 6, 1985

RE: Confederated Salish and Kootenai Negotiations

At the last negotiating session with the Confederated Salish and Kootenai Tribes, the Tribes requested that the Commission confirm that the position which had been reported to them early in the negotiations remained in force in the current negotiations. That is, they wished confirmation that the Commission's policy was to hold open negotiating sessions unless the tribe or federal agency insisted on closed sessions.

Chairman McOmber confirmed that that established policy of the Commission remained in force. The negotiators for the Tribes expressed that the position of the Tribal Council was that the negotiating sessions should be closed. The Tribes raised the issue at the beginning of the session because two representatives of the Joint Board were in attendance and had seated themselves at the table with the representatives of the Tribes, the Commission, and the Department of Interior. It was agreed that nothing on the agenda for that session could not be discussed in open session, and the negotiating session continued.

I am enclosing the memo written for the Commission by David Ladd, upon which the Commission position was originally based, and a memo which I have just completed. My conclusions are as follows:

1. There is no controlling case law on the issue; however, I would not suggest requesting an Attorney General's opinion at this time.

2. There is no new law upon which to base a reversal of the position taken by the Commission in 1980.

3. The potential costs are primarily political, rather than legal. There may be other ways, such as frequent meetings with the representatives of the Joint Board, to inform the water users on the Reservation about the negotiations, if the Tribes are not persuaded that it is in the best interests of all to hold open sessions.

cc: Urban Roth
Scott Brown

D. Scott Brown, Program Manager
Marcia Beebe Rundle, Legal Counsel

32 South Ewing
Helena, Montana 59620
(406) 444-6601

State of Montana

Reserved Water Rights Compact Commission

Ted Schwinden
Governor

W. Gordon McOmber, Chairman

Jack E. Galt, Vice Chairman
William M. Day
Everett C. Elliott
Daniel Kemmis

A. B. Linford
Joseph P. Mazurek
Audrey G. Roth
Chris D. Tweeten

Urban L. Roth, Special Counsel

MEMO

TO: Commission Members
FROM: Marcia Rundle
DATE: November 6, 1985

RE: Confederated Salish and Kootenai Negotiations

Early in negotiations with the Confederated Salish and Kootenai Tribes, the Commission disclosed to the Tribes that the Commission policy was to hold open negotiating sessions unless the tribe or federal agency insisted on closed sessions. At the last negotiating session, the Tribes requested that the Commission confirm that that position remained in force in the current negotiations. The Tribes raised the issue at the beginning of the session because two representatives of the Joint Board were in attendance and had seated themselves at the table with the representatives of the Tribes, the Commission, and the Department of the Interior.

Chairman McOmber confirmed that the Commission had not changed that established position. The negotiators for the Tribes then expressed that the position of the Tribal Council was that the negotiating sessions should be closed. However, it was agreed that nothing on the agenda for that session could not be discussed in open session, and the negotiating session continued.

Both parties agreed to research the issue of whether the open meetings statutes apply to negotiations of the Compact Commission prior to the next session. I am enclosing the memo written for the Commission by David Ladd, upon which the Commission position was originally based, and a memo which I have just completed.

My conclusions are as follows:

1. There is no case law on the issue of whether the open meetings statute applies to negotiating sessions. After discussions with other state attorneys and the counsel for the Governor, I would not suggest requesting an Attorney General's opinion at this time, pending the response of the Tribes and the Joint Board at future sessions.

D. Scott Brown, Program Manager
Marcia Beebe Rundle, Legal Counsel

32 South Ewing
Helena, Montana 59620
(406) 444-6601

2. There is no new law upon which to base a reversal of the position taken by the Commission in 1980. That position should be clarified, however, as it presumes a finding that open sessions would be detrimental to the negotiations. In my opinion, that determination can only be made at each session based on the agenda for that session, which is what was done at the last meeting.

3. The potential costs are primarily political, rather than legal. There may be other ways, such as frequent meetings with the representatives of the Joint Board, to inform the water users on the Reservation about the negotiations, if the Tribes are not persuaded that it is in the best interests of all to hold open sessions.

cc: Urban Roth
Scott Brown

State of Montana
Reserved Water Rights Compact Commission

Ted Schwinden
Governor

W. Gordon McOmber, Chairman

Jack E. Galt, Vice Chairman
William M. Day
Everett C. Elliott
Daniel Kemmis

A. B. Linford
Joseph P. Mazurek
Audrey G. Roth
Chris D. Tweeten

Urban L. Roth, Special Counsel

MEMO

TO: Commission Members
FROM: Marcia Rundle
DATE: November 6, 1985

RE: Confederated Salish and Kootenai Negotiations

Early in negotiations with the Confederated Salish and Kootenai Tribes, the Commission disclosed to the Tribes that the Commission policy was to hold open negotiating sessions unless the tribe or federal agency insisted on closed sessions. At the last negotiating session, the Tribes requested that the Commission confirm that that position remained in force in the current negotiations. The Tribes raised the issue at the beginning of the session because two representatives of the Joint Board were in attendance and had seated themselves at the table with the representatives of the Tribes, the Commission, and the Department of the Interior.

Chairman McOmber confirmed that the Commission had not changed that established position. The negotiators for the Tribes then expressed that the position of the Tribal Council was that the negotiating sessions should be closed. However, it was agreed that nothing on the agenda for that session could not be discussed in open session, and the negotiating session continued.

Both parties agreed to research the issue of whether the open meetings statutes apply to negotiations of the Compact Commission prior to the next session. I am enclosing the memo written for the Commission by David Ladd, upon which the Commission position was originally based, and a memo which I have just completed.

My conclusions are as follows:

1. There is no case law on the issue of whether the open meetings statute applies to negotiating sessions. After discussions with other state attorneys and the counsel for the Governor, I would not suggest requesting an Attorney General's opinion at this time, pending the response of the Tribes and the Joint Board at future sessions.

D. Scott Brown, Program Manager
Marcia Beebe Rundle, Legal Counsel

32 South Ewing
Helena, Montana 59620
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cc: Urban Roth
Scott Brown

CONFIDENTIAL MEMO

TO: Commission Members
FROM: Marcia Rundle
DATE: November 6, 1985

RE: Request from the Confederated Salish and Kootenai Tribes for clarification of the Commission's position on open negotiating sessions.

ISSUE:

Is the Commission required by Montana's open meetings statutes to allow members of the public to attend negotiating sessions with federal agencies and Indian tribes?

CONCLUSION:

The Commission is not required by law to allow members of the public to attend negotiating sessions because a negotiating session is not a "meeting" within the meaning of the open meetings statute. Even if a negotiating session were held to be a meeting within the meaning of the statute, a session may be closed if an open session would be detrimental to the bargaining position of the Commission and would threaten the negotiating process.

BACKGROUND:

Early in the Commission's history, David Ladd reviewed Montana's public participation statutes and case law from other jurisdictions and concluded that negotiating sessions may be closed, because an open session would be detrimental to the bargaining position of the Commission and could threaten the negotiating process itself. (Ladd memo, page 10).

Relying on the legal memo from Mr. Ladd, the Commission informed the tribes and agencies with whom it was negotiating, that the Commission's policy was to hold open sessions unless the other party wanted the sessions closed. The Confederated Salish and Kootenai Tribes, and apparently several other negotiating entities, were given a copy of the Ladd memo. The Tribes have requested confirmation that the Commission's position on this issue has not changed.

DISCUSSION:

Since Mr. Ladd prepared the memo for the Commission, the Montana Supreme Court has decided a handful of cases involving the constitutional and statutory provisions concerning the public's right-to-know. None of these cases raised the issue of closed negotiating sessions; nor have any cases directly on point been found in other jurisdictions.

Case law from other jurisdictions, while more extensive than that developed to date by the Montana Supreme Court, is not very instructive, because the statutes on public participation and open meetings vary considerably from state to state. The cases reviewed by Mr. Ladd are most analogous, and they involve meetings which were closed to discuss litigation, not actual negotiating sessions. As he noted, the courts generally have relied on attorney-client privilege in upholding closed meetings in these cases.

In my opinion, Mr. Ladd's conclusions are legally sound and there is no new law on which to base a change in the Commission's established policy. In addition, my review of the constitutional and statutory provisions and the case law suggests that negotiating sessions are not meetings within the meaning of the statute and, therefore, are not required by law to be open.

This memo will review the evolution of the open meetings statutes in Montana and will discuss the penalties for violation of the statutes. The conclusions are the same as those reached in the Ladd memo, although the analysis is slightly different. Finally, this memo provides a brief synopsis of recent Montana Supreme Court decisions interpreting the open meetings statutes.

THE EVOLUTION OF MONTANA'S OPEN MEETINGS LAW

Montana's laws governing public participation are codified in Title 2, Chapter 3, Montana Code Annotated (MCA), in two parts. Part 1, Notice and Opportunity to be Heard, was enacted in 1975 to establish the legislative guidelines mandated by Article II, Section 8 of the 1972 Montana constitution. Part 2, Open Meetings, was enacted in 1963, a decade before the new constitution was ratified. Part 2 was amended in 1975 after ratification of the new constitution, and again in 1977 and in 1979.

Part 2--Open Meetings

The 1972 constitution included the following new provision:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. (Art. II, §9, MONT. CONST. 1972).

This new constitutional right-to-know was preceded by a 1963 statute which stated:

> The legislature finds and declares that public boards, commissions, councils, and other public agencies in the state exist to aid in the conduct of the peoples' business. It is the intent of this act that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the act shall be liberally construed. (MONTANA SESSION LAWS, Ch. 159, 1963; Section 2-3-201, MCA, 1983).

The 1963 law provided that all meetings of public or governmental bodies were to be open to the public, but it allowed statutory exceptions to be "otherwise specifically provided by law," and it listed six exceptions for meetings "involving or affecting" national or state security, employee discipline, other personnel matters, financial decisions, license revocations, and law enforcement.

In 1975 the legislature expanded the scope of the open meetings statute by deleting the exceptions for meetings regarding security matters and financial decisions. It also deleted the language allowing other exceptions to be provided by law and inserted the following language to conform the statute to the new constitutional provision:

> All meetings...shall be open to the public. Provided, however, the presiding officer of any meeting may close the meeting during the time any of the following items are discussed, if, and only if, the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure:... (MONTANA SESSION LAWS, Ch. 474, 1975, Section 2-3-202, MCA, 1983).

Those items which could merit closure of a meeting were the four exceptions retained from the 1963 act relating to employee disclipline, other personnel matters, license revocation, and law enforcement.

In 1977, the legislature amended the open meetings law to explicitly authorize closed meetings to discuss any matters of "individual privacy", and clarifying that the individual could waive the right of privacy and request that the meeting be open. The four exceptions remaining from the 1963 act were deleted. In addition, the following language was added:

> However, a meeting may be closed to discuss a strategy to be followed with respect to collective bargaining or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public agency. (MONTANA SESSION LAWS, Ch. 567, 1977; section 2-3-202, MCA, 1983).

This amendment created an exception to the open meetings law which is consistent with the exceptions for notice and public participation in part 1. In doing so, it raised some interesting constitutional questions which are beyond the scope of this memo.

In addition, Chapter 567 defined "meeting" as a convening of a quorum of the public body, in person or by electronic means, to "hear, discuss or act upon a matter" within its authority; set forth the contents of minutes to be kept and made available for public investigation; provided that meetings could be recorded by the press; and provided that decisions made in violation of the law were voidable.

In 1979, the latest amendment to the open meetings law clarified that the law applied to committees and subcommittees appointed by a public body to conduct the business of the agency. The legislative history of Chapter 380 indicates that the intent of the legislature in adopting this amendment was to make clear that a public body could not avoid the effect of the open meetings law by meeting as a subcommittee.

However, the legislature did not amend the definition of "meeting" in the statute, so this amendment must be construed together with that definition as it was written two years earlier. Thus, it is not clear whether a subcommittee composed of less than a "quorum of the constituent membership" is subject to the open meetings requirement. The degree of authority the subcommittee has may be relevant to this issue.

Two members of the Commission, the chairman and the vice-chairman, are members of each negotiating team. Other members also attend negotiating sessions, at their discretion; but rarely is a quorum of commission members present at a negotiating session. In my opinion, unless a quorum of the membership is present, negotiating sessions do not constitute meetings within the meaning of the statute. It is, in my opinion, relevant that the negotiating team cannot act upon any proposals which have not already been considered and acted upon by the full Commission.

Even if a quorum of the Commission is present at a negotiation session, the Commission may still rely on the conclusion reached by David Ladd that negotiations sessions may be closed if an open session would have a detrimental effect on the negotiating position of the Commission. That conclusion is based on analysis that includes the negotiations sessions within the collective bargaining and litigation exception to the open meetings law. Again, that exception raises constitutional issues that have not yet been addressed by the Court. However, two recent cases by the Montana Supreme Court do demonstrate that the Court will look to the underlying purpose of the statutes and will consider whether full public disclosure is a reasonable and rational means to achieve the purpose inherent in the constitutional provisions.

PENALTIES:

A review of the penalties for violation of the open meetings law further suggests that the law is inapplicable to the Commission negotiating sessions. In 1975, Chapter 474 revised the criminal statute on official misconduct to include in the list of offenses "knowingly conduct(ing) a meeting of a public agency in violation of section 82-3402 (now, section 2-3-203).

The State v. Conrad decision declared this provision of the official misconduct statute void for vagueness as applied to alleged violations of the open meetings law. Therefore, the penalty for violation is that a decision made in a closed meeting is voidable. Section 2-3-213 provides:

> Any decision made in violation of 2-3-203 (open meetings) may be declared void by a district court having jurisdiction. A suit to void any such decision must be commenced within 30 days of the decision.

It is difficult to identify any decisions which the Commission makes in the process of negotiations that are final and, therefore, subject to challenge. Prior to the final approval of a compact, all decisions are necessarily tentative and subject to further modification through the process of negotiations.

The worst penalty that could be incurred would be that a decision could be voided by a court, and costs of the suit could be assessed against the Commission. But, if any decision were declared void, the Commission need only reconvene in open session to reaffirm the decision.

In sum, it is highly advisable that final approval of a compact be made at an open meeting of a quorum of the Commissioners, even though legislative ratification of the Compact would make any challenge of Commission approval moot. Of course, the issue of potential political costs from a challenge to a closed session is a separate issue and may be much more significant than the legal costs.

MONTANA CASE LAW

The six decisions by the Montana Supreme Court concerning the open meetings statutes which have been decided since the Commission first considered this issue, neither confirm nor refute the legal conclusions made by Mr. Ladd. However, it must be emphasized that case law is always going to be of questionable value in resolving the basic issue of whether the open meetings statute applies to the Compact Commission. The Commission is a unique governmental entity, created solely to negotiate the settlement of pending federal and state suits concerning federal reserved water rights. Cases involving other state or local government entities will never be precisely on point.

The recent cases decided by the Montana Supreme Court involved actions of Boards of County Commissioners (2), local school boards (2), the Public Service Commission (1), and the Board of Regents of Higher Education (1).

These cases make it clear that two out of three County Commissioners cannot meet either in person (State v. Conrad and Palmer, ____Mont.____,643 P.2d 239, 39 St. Rep. 680 (1982))) or on the phone (Board of Trustees v. Board of County Commissioners, 186 Mont. 148, 606 P.2d 1069 (1980))) and finally decide any issue without giving notice in accord with statutes governing Boards of County Commissioners. Obviously, a meeting of two members of a three member board constitutes a quorum.

However, absent statutes like those directing specific notice procedures for county commissioners, notice need not be by publication, if a radio announcement provides sufficient opportunity to the public to be heard before final decision. (Sonstelie v. Board of Trustees, ____Mont.____, 658 P.2d 413, 40 St. Rep. 179 (1983)) Further, school boards cannot close a meeting to a teacher to discuss that individual's salary under the "collective bargaining" exception, where the teacher is acting on his own behalf and the decision would affect no other teachers. (Jarussi v. Board of Trustees, ____Mont.____, 664 P.2d 316, 40 St. Rep. 720 (19834)) It is noteworthy that the Court did not address the constitutionality of the collective bargaining and litigation exception in the Jarussi case. It is assumed that the constitutional issue was not raised by the parties.

These cases are useful to the Commission primarily because the decisions suggest activities which might generate political opposition and possible legal action against the Commission; regardless of the merits of a legal challenge. To be cautious, it may be advisable for the Commission not to make final decisions through telephone "meetings". Also, continuation of public notice of Commission meetings in both written andelectronic media is advisable, although the Commission's activities are arguably exempt from the notice and opportunity to be heard provisions of the Public Participation statutes. (Ladd Memo, page 3).

Lastly, the Montana Supreme Court has balanced competing constitutional rights in upholding closed meetings by the Board of Regents during job performance evaluations for University presidents (Missoulian v. Board of Regents, ____Mont.____, P.2d____, 41 St. Rep. 110 (1984)) and in denying public access to trade secrets submitted by a private corporation in a rate case. (Mountain States Telephone and Telegraph v. Department of Public Service Regulation, ____Mont.____, 634 P.2d 181, 38 St. Rep. 1479 (1981).

The Court has not yet been presented with a case where the collective bargaining exception was the basis for closure of a meeting and has therefore not ruled on the constitutionality of that statute. A district court has held the collective bargaining and litigation exception unconstitutional. (Rickey v. Board of Trustees, Fifth Judicial District, Beaverhead County, Cause No. 10023 (1983). The case was withdrawn on appeal.

THE EFFECT OF STATUTORY REQUIREMENTS FOR PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATION ON THE RESERVED WATER RIGHTS COMPACT COMMISSION

The Montana Code requires that the people of Montana be afforded a reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of that agency. MCA 2-3-101. In addition, statute mandates that meetings of public bodies be open to the public. MCA 2-3-201. These statutes are based on provisions of the Montana Constitution Article II, Sections 8 and 9 which establish a public right of participation and a right to know. The question presented is whether: 1) these statutes do apply to the Compact Commission and 2) if they do apply, what functions or meetings of the Commission are subject to these statutes?

The Montana Statute

The chapter of the Montana Code dealing with public participation contains two parts. Part 1, Notice and Opportunity to be Heard, requires each agency to develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. Those procedures are intended to "assure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public" MCA 2-3-103 (1). The governor is charged with the responsibility of ensuring that each agency adopt rules and guidelines which will facilitate public participation. MCA 2-3-103.

Part 2, Open Meetings, requires that "all meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies

supported in whole or in part by public funds or expending public funds shall be open to the public" MCA 2-3-203. The statute directs liberal construction of these requirements. MCA 2-3-201.

Applicability of the Statute to the Compact Commission

Part 1, Notice and Opportunity to be Heard. Initially it must be determined whether the Compact Commission is an agency subject to these statutes. In Part 1 an "agency" is defined as "any board, bureau, commission, department, authority or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts." Exceptions are provided for the legislature, the judicial branch, the governor and the state military establishment. MCA 2-3-101 (1).

"Rule" is defined as "any agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of any agency." Exceptions are provided for statements dealing with internal management of the agency and declaratory rulings about the applicability of the statute.

"Agency action" is defined as "the whole or a part of the adoption of an agency rule, the issuance of a license or order, the award of a contract, or the equivalent or denial thereof."

The intent of Part 1 of the statute is to protect the rights of the public from secret final action taken without an opportunity for those affected by the decision to be heard. The statute is directed at those agencies which have the power to "make rules, determine contested cases or enter into contracts." The Compact Commission has none of these powers. The powers granted to the Compact Commission are set out in title 85 chapter 2 part 7: "The Compact Commission may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts...

for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state." The Compact Commission itself does not have the power to take final or binding action. Any compact becomes effective and binding only "upon ratification by the legislature of Montana, any affected tribal governing body, and the Congress of the United States." MCA 85-2-701 (2). Thus it is unlikely that the Compact Commission is an agency for purposes of Part 1 of this statute.

Under this reasoning the Compact Commission may not be governed by Part 1. That section basically addresses constitutional concerns about secret decision-making which might deprive the residents of the state of valuable entitlements without the due process of law. Since any compact will undergo full public debate in the legislature and would only become effective and binding upon approval of the legislature, each resident's constitutional rights will be protected.

Part 2, Open Meetings. The more troublesome portion of the Public Participation statute for the Compact Commission is Part 2 which deals with open meetings. In other jurisdictions parties have attempted to avoid open meeting and public participation laws by arguing that subordinate committees whose only function is to make recommendations to the governing body are not encompassed by those statutes. Adler v. City Council of Culver City 184 Cal App. 2d 763, 7 Cal. Rptr. 805 (1960) (Zoning Commission). Selkowe v. Bean 249 A2d 35 (NH 1969) (Finance Committee of City Council). The case law on the point is somewhat conflicting; however, a pattern is discernable. Most of the cases which find an agency not to be bound by a public participation law do so on the basis that the committee is not a governing body and not authorized by law to act on behalf of the state. Commissions which arise independent of the governing body, most often under

an independent city charter, are most likely to be found not to be governed by public participation laws. Adler, supra, zoning commission, Selkowe, supra, finance committee of city council, Beacon Journal Publishing Co. v. Akron 209 NE2d 399 (OH 1965), City Civil Service commission and other bodies created by executive order of the mayor. The Compact Commission's authority arises by statute directly from the legislature. Most often commissions authorized specifically by law to act on behalf of the state are subject to public participation laws. Beacon Journal, supra, assessment equalization board created by an act of the legislature and subject to the open meeting law.

The statutory language of Part 2 removes any doubt about the applicability of the part to the Compact Commission: "All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds shall be open to the public." The Compact Commission, which operates only on public funds, must be included.

It appears that the Open Meetings statute is applicable to the Compact Commission as an entity. Even though it might be argued otherwise, it seems more prudent to proceed under the assumption that the statute does apply. Under this assumption it becomes necessary to consider whether the statute applies to the particular kinds of meetings which the Compact Commission holds.

Application of the Statute to Compact Commission Meetings and Negotiating Sessions

In general, open meeting statutes have been liberally construed. Their purpose is deemed to be protection of the public and to that end the statute is interpreted in a light most favorable to the public. ALR3d 1070§ 4.

The Montana statute specifically declares that the provisions of the statute be liberally construed. MCA 2-3-201.

Such statutes are increasingly being interpreted as having application to informal meetings as well as formal sessions. The Montana statute defines a meeting as any convening of a quorum of the agency to "hear, discuss or act upon a matter" even if the body only has advisory powers or is merely a subcommittee of another public body. MCA 2-3-202,203.

The Montana law does, however, allow a closed meeting "to discuss a strategy to be followed with respect to collective bargaining or litigation when an open meeting would have a detrimental effect on the bargaining or litigation position of the public agency." MCA 2-3-203(3). The meetings of the Compact Commission and the negotiating sessions with the tribes and federal government might be excluded from the open meeting statute under this exception.

There are two types of meetings vital to the function of the Compact Commission. First, the meetings of the Compact Commission itself and second, the actual negotiating sessions. The exception for strategy sessions relating to litigation appears to allow the Compact Commission meetings in which an approach and strategy for the negotiating sessions is discussed to be closed. Since the state is undergoing a general adjudication of all water rights in the state and Indian water rights are included in that adjudication by virtue of the Supreme Court's order required by SB 76, the Compact Commission's meetings discussing strategy may be considered strategy sessions concerning litigation. The litigation was actually initiated by the Supreme Court's order. With respect to Indian and federal reserved rights claims, such litigation is merely suspended while negotiations are proceeding. Termination of the negotiations would activate the adjudication of Indian

and federal reserved rights. To the extent that open meetings would have a detrimental effect on the bargaining or litigating position of the Commission, statutory interpretation of both the Open Meeting law and Senate Bill 76 would indicate that the Commission's meetings may be closed.

There is no case law construing relevant portions of the language of the Montana statute. Numerous other states have similar open meetings statutes. Most of those statutes provide exceptions for personnel matters, labor negotiations and legal consultations or strategy sessions relating to pending or impending litigation or other legal proceedings. Case law clearly supports the right of a public body to meet in private with an attorney to discuss current or impending legal matters. Minneapolis Star v. Housing and Redevelopment Authority for Minneapolis 251 NW2d 620 (Minn. 1976), Oklahoma Ass'n. of Mun. Attys. v. State 577 P2d 1310 (Okl. 1978). However, such holdings are based largely on the attorney-client privilege rather than statutory interpretation.

Since the Montana statute plainly provides an exception for strategy sessions about litigation without invoking the attorney-client privilege, the important issue becomes whether the Compact Commission's meetings relate to litigation. Statutory construction is determinative of this issue since there is no case law..

The legislature made clear their intent that Indian and federal reserved rights be included in the general adjudication mandated by Senate Bill 76: "It is the intent of the legislature that the attorney general's petition required in (section 16) include all claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666." MCA 85-2-701. The McCarran Amendment (43 U.S.C. 666) waives sovereign immunity and gives consent to join the United States as a defendant in a general adjudication conducted in a court.

Senate Bill 76 effectively commences the procedures for a general adjudication of water rights in the state courts, including Indian and federal reserved rights. Further provisions of Senate Bill 76 suspend all actions to adjudicate reserved Indian water rights while compact negotiations are being pursued. Breakdown of the negotiations would remove that suspension of the general adjudication.

It thus appears that the meetings of the Compact Commission insofar as they pertain to the negotiations do relate to litigation. The meetings of the Compact Commission may be closed to the extent that they concern discussion of strategy to be pursued in the negotiations.

The Negotiating Sessions

The actual negotiating sessions may be detrimentally affected if they are required to be conducted in open meetings. The free exchange necessary for compromise may be restricted. It is in the best interests of all parties that the negotiating sessions be closed.

Most of the arguments discussed thus far apply equally well to the negotiating sessions. It is possible that the negotiating sessions may not constitute a "meeting." Montana statute defines a meeting as the convening of a quorum of the members. MCA 2-3-202. There may not be a quorum of the Commission members at each negotiating session so those sessions would not be a "meeting."

Cases in other jurisdictions have found that meetings need not be open unless final action is to be taken. Adler v. City Council, supra, Beacon Journal v. Akron, supra. These decisions are based on the intent of open meeting statutes to prevent secret decisions which affect rights of the public. Since any compact must be approved by the legislature, it may be argued that no final action is taken at the negotiating sessions.

These arguments are not without merit; however, they do appear to be a bit technical. In view of the fact that the legislature directed that the open meeting statute be liberally construed, further support is needed to conclude that the negotiating sessions may be closed.

A new Hampshire case is analogous to the situation of the Compact Commission. In Talbot v. Concord Union School District 323A2d 912 (1974) a newspaper reporter was refused admission to the negotiating sessions between the school board and union representatives. In this case the parties agreed that the facts did not fit any of the express exceptions of New Hampshire's right to know law. The court found that the right to know law did not apply to the bargaining session.

The New Hampshire Supreme Court noted that the presence of the press at the negotiating sessions "would inhibit the free exchange of views and freeze negotiators into fixed positions from which they could not recede without loss of face." The collective bargaining process itself might be destroyed if each step of the negotiations was conducted in the presence of the press and public.

The New Hampshire case, like the present situation of the Compact Commission, involved conflicting legislative policies. In New Hampshire the legislature had adopted a bill guaranteeing the right of public employees to "negotiate the terms of their contractual relationship with the government by using the well established techniques of private sector bargaining." Open negotiations would prevent the effective functioning of the collective bargaining process. The New Hampshire Court quotes a Florida decision, "meaningful collective bargaining in the circumstances here would be destroyed if full publicity were accorded at each step of the negotiations." (Talbot at 914 quoting Bassett v. Braddock, 262 So. 2d, 425, 426 (Fla. 1972). The court found it unlikely that the legislature intended the right to know

law to destroy the very negotiations process established by legislative action. Thus, it was held that the negotiating sessions between the school board and the union were not subject to the right to know law. In so deciding, the court noted that any agreement reached in negotiations must be approved at a public meeting before final adoption.

The situation with the Compact Commission is directly analogous. Totally open negotiating with the tribes would severely hamper if not completely halt the negotiations process. Open negotiating sessions would have a detrimental effect on the bargaining position of the Commission. That negotiating process was explicitly set up by the Montana legislature. Thus if the negotiations are to continue in a meaningful fashion they must be conducted in a closed session. It is improbable that the legislature would intend to so severely restrict the negotiating process it specifically established. In addition, like the agreement in the Talbot case, any compact agreed to must be approved by the legislature. The public's right to know will be amply protected by that approval process.

It seems crucial to the success of the compact process that the negotiating sessions be closed. The statutory language provides exceptions where the bargaining position of the public agency would be detrimentally affected. MCA 2-3-203. While the negotiating sessions of the Compact Commission do not fit directly within one of those specific exceptions, it seems likely that the same reasoning should apply to negotiations of the Compact Commission and would have been included in the statute had the legislature considered the problem.

Conclusion

Whether the Compact Commission's meetings and negotiating sessions may be closed to the press and public at large is a close question. There is little case law or prior experience with the statute to provide guidance

in applying the statute to these facts. However, two conclusions may be reached with reasonable certainty:

1. The meetings of the Compact Commission may be closed to the extent that they concern strategy for the negotiating sessions.
2. The negotiation sessions may be closed because an open session would be detrimental to the bargaining position of the Commission and could threaten the negotiating process itself.

The statutory language and what little relevent case law exists support these conclusions. The intent of the public participation statutes is to protect the public interest. Premature publicity could threaten the negotiating process established by the legislature and thus adversely affect the public interest. It is in the public interest that the negotiations proceed in a constructive fashion and therefore be closed to the press.

Scott

CONFIDENTIAL MEMO

TO: Commission Members
FROM: Marcia Rundle Marcia
DATE: November 6, 1985

RE: Request from the Confederated Salish and Kootenai Tribes for clarification of the Commission's position on open negotiating sessions.

ISSUE:

Is the Commission required by Montana's open meetings statutes to allow members of the public to attend negotiating sessions with federal agencies and Indian tribes?

CONCLUSION:

The Commission is not required by law to allow members of the public to attend negotiating sessions because a negotiating session is not a "meeting" within the meaning of the open meetings statute. Even if a negotiating session were held to be a meeting within the meaning of the statute, a session may be closed if an open session would be detrimental to the bargaining position of the Commission and would threaten the negotiating process.

BACKGROUND:

Early in the Commission's history, David Ladd reviewed Montana's public participation statutes and case law from other jurisdictions and concluded that negotiating sessions may be closed, because an open session would be detrimental to the bargaining position of the Commission and could threaten the negotiating process itself. (Ladd memo, page 10).

Relying on the legal memo from Mr. Ladd, the Commission informed the tribes and agencies with whom it was negotiating, that the Commission's policy was to hold open sessions unless the other party wanted the sessions closed. The Confederated Salish and Kootenai Tribes, and apparently several other negotiating entities, were given a copy of the Ladd memo. The Tribes have requested confirmation that the Commission's position on this issue has not changed.

DISCUSSION:

Since Mr. Ladd prepared the memo for the Commission, the Montana Supreme Court has decided a handful of cases involving the constitutional and statutory provisions concerning the public's right-to-know. None of these cases raised the issue of closed negotiating sessions; nor have any cases directly on point been found in other jurisdictions.

Case law from other jurisdictions, while more extensive than that developed to date by the Montana Supreme Court, is not very instructive, because the statutes on public participation and open meetings vary considerably from state to state. The cases reviewed by Mr. Ladd are most analogous, and they involve meetings which were closed to discuss litigation, not actual negotiating sessions. As he noted, the courts generally have relied on attorney-client privilege in upholding closed meetings in these cases.

In my opinion, Mr. Ladd's conclusions are legally sound and there is no new law on which to base a change in the Commission's established policy. In addition, my review of the constitutional and statutory provisions and the case law suggests that negotiating sessions are not meetings within the meaning of the statute and, therefore, are not required by law to be open.

This memo will review the evolution of the open meetings statutes in Montana and will discuss the penalties for violation of the statutes. The conclusions are the same as those reached in the Ladd memo, although the analysis is slightly different. Finally, this memo provides a brief synopsis of recent Montana Supreme Court decisions interpreting the open meetings statutes.

THE EVOLUTION OF MONTANA'S OPEN MEETINGS LAW

Montana's laws governing public participation are codified in Title 2, Chapter 3, Montana Code Annotated (MCA), in two parts. Part 1, Notice and Opportunity to be Heard, was enacted in 1975 to establish the legislative guidelines mandated by Article II, Section 8 of the 1972 Montana constitution. Part 2, Open Meetings, was enacted in 1963, a decade before the new constitution was ratified. Part 2 was amended in 1975 after ratification of the new constitution, and again in 1977 and in 1979.

Part 2--Open Meetings

The 1972 constitution included the following new provision:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. (Art. II, §9, MONT. CONST. 1972).

This new constitutional right-to-know was preceded by a 1963 statute which stated:

> The legislature finds and declares that public boards, commissions, councils, and other public agencies in the state exist to aid in the conduct of the peoples' business. It is the intent of this act that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the act shall be liberally construed. (MONTANA SESSION LAWS, Ch. 159, 1963; Section 2-3-201, MCA, 1983).

The 1963 law provided that all meetings of public or governmental bodies were to be open to the public, but it allowed statutory exceptions to be "otherwise specifically provided by law," and it listed six exceptions for meetings "involving or affecting" national or state security, employee discipline, other personnel matters, financial decisions, license revocations, and law enforcement.

In 1975 the legislature expanded the scope of the open meetings statute by deleting the exceptions for meetings regarding security matters and financial decisions. It also deleted the language allowing other exceptions to be provided by law and inserted the following language to conform the statute to the new constitutional provision:

> All meetings...shall be open to the public. Provided, however, the presiding officer of any meeting may close the meeting during the time any of the following items are discussed, if, and only if, the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure:... (MONTANA SESSION LAWS, Ch. 474, 1975, Section 2-3-202, MCA, 1983).

Those items which could merit closure of a meeting were the four exceptions retained from the 1963 act relating to employee disclipline, other personnel matters, license revocation, and law enforcement.

In 1977, the legislature amended the open meetings law to explicitly authorize closed meetings to discuss any matters of "individual privacy", and clarifying that the individual could waive the right of privacy and request that the meeting be open. The four exceptions remaining from the 1963 act were deleted. In addition, the following language was added:

> However, a meeting may be closed to discuss a strategy to be followed with respect to collective bargaining or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public agency. (MONTANA SESSION LAWS, Ch. 567, 1977; section 2-3-202, MCA, 1983).

This amendment created an exception to the open meetings law which is consistent with the exceptions for notice and public participation in part 1. In doing so, it raised some interesting constitutional questions which are beyond the scope of this memo.

In addition, Chapter 567 defined "meeting" as a convening of a quorum of the public body, in person or by electronic means, to "hear, discuss or act upon a matter" within its authority; set forth the contents of minutes to be kept and made available for public investigation; provided that meetings could be recorded by the press; and provided that decisions made in violation of the law were voidable.

In 1979, the latest amendment to the open meetings law clarified that the law applied to committees and subcommittees appointed by a public body to conduct the business of the agency. The legislative history of Chapter 380 indicates that the intent of the legislature in adopting this amendment was to make clear that a public body could not avoid the effect of the open meetings law by meeting as a subcommittee.

However, the legislature did not amend the definition of "meeting" in the statute, so this amendment must be construed together with that definition as it was written two years earlier. Thus, it is not clear whether a subcommittee composed of less than a "quorum of the constituent membership" is subject to the open meetings requirement. The degree of authority the subcommittee has may be relevant to this issue.

Two members of the Commission, the chairman and the vice-chairman, are members of each negotiating team. Other members also attend negotiating sessions, at their discretion; but rarely is a quorum of commission members present at a negotiating session. In my opinion, unless a quorum of the membership is present, negotiating sessions do not constitute meetings within the meaning of the statute. It is, in my opinion, relevant that the negotiating team cannot act upon any proposals which have not already been considered and acted upon by the full Commission.

Even if a quorum of the Commission is present at a negotiation session, the Commission may still rely on the conclusion reached by David Ladd that negotiations sessions may be closed if an open session would have a detrimental effect on the negotiating position of the Commission. That conclusion is based on analysis that includes the negotiations sessions within the collective bargaining and litigation exception to the open meetings law. Again, that exception raises constitutional issues that have not yet been addressed by the Court. However, two recent cases by the Montana Supreme Court do demonstrate that the Court will look to the underlying purpose of the statutes and will consider whether full public disclosure is a reasonable and rational means to achieve the purpose inherent in the constitutional provisions.

PENALTIES:

A review of the penalties for violation of the open meetings law further suggests that the law is inapplicable to the Commission negotiating sessions. In 1975, Chapter 474 revised the criminal statute on official misconduct to include in the list of offenses "knowingly conduct(ing) a meeting of a public agency in violation of section 82-3402 (now, section 2-3-203).

The State v. Conrad decision declared this provision of the official misconduct statute void for vagueness as applied to alleged violations of the open meetings law. Therefore, the penalty for violation is that a decision made in a closed meeting is voidable. Section 2-3-213 provides:

> Any decision made in violation of 2-3-203 (open meetings) may be declared void by a district court having jurisdiction. A suit to void any such decision must be commenced within 30 days of the decision.

It is difficult to identify any decisions which the Commission makes in the process of negotiations that are final and, therefore, subject to challenge. Prior to the final approval of a compact, all decisions are necessarily tentative and subject to further modification through the process of negotiations.

The worst penalty that could be incurred would be that a decision could be voided by a court, and costs of the suit could be assessed against the Commission. But, if any decision were declared void, the Commission need only reconvene in open session to reaffirm the decision.

In sum, it is highly advisable that final approval of a compact be made at an open meeting of a quorum of the Commissioners, even though legislative ratification of the Compact would make any challenge of Commission approval moot. Of course, the issue of potential political costs from a challenge to a closed session is a separate issue and may be much more significant than the legal costs.

MONTANA CASE LAW

The six decisions by the Montana Supreme Court concerning the open meetings statutes which have been decided since the Commission first considered this issue, neither confirm nor refute the legal conclusions made by Mr. Ladd. However, it must be emphasized that case law is always going to be of questionable value in resolving the basic issue of whether the open meetings statute applies to the Compact Commission. The Commission is a unique governmental entity, created solely to negotiate the settlement of pending federal and state suits concerning federal reserved water rights. Cases involving other state or local government entities will never be precisely on point.

The recent cases decided by the Montana Supreme Court involved actions of Boards of County Commissioners (2), local school boards (2), the Public Service Commission (1), and the Board of Regents of Higher Education (1).

These cases make it clear that two out of three County Commissioners cannot meet either in person (State v. Conrad and Palmer, ____Mont.____,643 P.2d 239, 39 St. Rep. 680 (1982))) or on the phone (Board of Trustees v. Board of County Commissioners, 186 Mont. 148, 606 P.2d 1069 (1980))) and finally decide any issue without giving notice in accord with statutes governing Boards of County Commissioners. Obviously, a meeting of two members of a three member board constitutes a quorum.

However, absent statutes like those directing specific notice procedures for county commissioners, notice need not be by publication, if a radio announcement provides sufficient opportunity to the public to be heard before final decision. (Sonstelie v. Board of Trustees, ____Mont.____, 658 P.2d 413, 40 St. Rep. 179 (1983)) Further, school boards cannot close a meeting to a teacher to discuss that individual's salary under the "collective bargaining" exception, where the teacher is acting on his own behalf and the decision would affect no other teachers. (Jarussi v. Board of Trustees, ____Mont.____, 664 P.2d 316, 40 St. Rep. 720 (19834)) It is noteworthy that the Court did not address the constitutionality of the collective bargaining and litigation exception in the Jarussi case. It is assumed that the constitutional issue was not raised by the parties.

These cases are useful to the Commission primarily because the decisions suggest activities which might generate political opposition and possible legal action against the Commission; regardless of the merits of a legal challenge. To be cautious, it may be advisable for the Commission not to make final decisions through telephone "meetings". Also, continuation of public notice of Commission meetings in both written andelectronic media is advisable, although the Commission's activities are arguably exempt from the notice and opportunity to be heard provisions of the Public Participation statutes. (Ladd Memo, page 3).

Lastly, the Montana Supreme Court has balanced competing constitutional rights in upholding closed meetings by the Board of Regents during job performance evaluations for University presidents (Missoulian v. Board of Regents, ____Mont.____, P.2d____, 41 St. Rep. 110 (1984)) and in denying public access to trade secrets submitted by a private corporation in a rate case. (Mountain States Telephone and Telegraph v. Department of Public Service Regulation, ____Mont.____, 634 P.2d 181, 38 St. Rep. 1479 (1981).

The Court has not yet been presented with a case where the collective bargaining exception was the basis for closure of a meeting and has therefore not ruled on the constitutionality of that statute. A district court has held the collective bargaining and litigation exception unconstitutional. (Rickey v. Board of Trustees, Fifth Judicial District, Beaverhead County, Cause No. 10023 (1983). The case was withdrawn on appeal.

THE EFFECT OF STATUTORY REQUIREMENTS FOR PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATION ON THE RESERVED WATER RIGHTS COMPACT COMMISSION

The Montana Code requires that the people of Montana be afforded a reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of that agency. MCA 2-3-101. In addition, statute mandates that meetings of public bodies be open to the public. MCA 2-3-201. These statutes are based on provisions of the Montana Constitution Article II, Sections 8 and 9 which establish a public right of participation and a right to know. The question presented is whether: 1) these statutes do apply to the Compact Commission and 2) if they do apply, what functions or meetings of the Commission are subject to these statutes?

The Montana Statute

The chapter of the Montana Code dealing with public participation contains two parts. Part 1, Notice and Opportunity to be Heard, requires each agency to develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. Those procedures are intended to "assure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public" MCA 2-3-103 (1). The governor is charged with the responsibility of ensuring that each agency adopt rules and guidelines which will facilitate public participation. MCA 2-3-103.

Part 2, Open Meetings, requires that "all meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies

supported in whole or in part by public funds or expending public funds shall be open to the public" MCA 2-3-203. The statute directs liberal construction of these requirements. MCA 2-3-201.

Applicability of the Statute to the Compact Commission

Part 1, Notice and Opportunity to be Heard. Initially it must be determined whether the Compact Commission is an agency subject to these statutes. In Part 1 an "agency" is defined as "any board, bureau, commission, department, authority or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts." Exceptions are provided for the legislature, the judicial branch, the governor and the state military establishment. MCA 2-3-101 (1).

"Rule" is defined as "any agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of any agency." Exceptions are provided for statements dealing with internal management of the agency and declaratory rulings about the applicability of the statute.

"Agency action" is defined as "the whole or a part of the adoption of an agency rule, the issuance of a license or order, the award of a contract, or the equivalent or denial thereof."

The intent of Part 1 of the statute is to protect the rights of the public from secret final action taken without an opportunity for those affected by the decision to be heard. The statute is directed at those agencies which have the power to "make rules, determine contested cases or enter into contracts." The Compact Commission has none of these powers. The powers granted to the Compact Commission are set out in title 85 chapter 2 part 7: "The Compact Commission may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts...

for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state." The Compact Commission itself does not have the power to take final or binding action. Any compact becomes effective and binding only "upon ratification by the legislature of Montana, any affected tribal governing body, and the Congress of the United States." MCA 85-2-701 (2). Thus it is unlikely that the Compact Commission is an agency for purposes of Part 1 of this statute.

Under this reasoning the Compact Commission may not be governed by Part 1. That section basically addresses constitutional concerns about secret decision-making which might deprive the residents of the state of valuable entitlements without the due process of law. Since any compact will undergo full public debate in the legislature and would only become effective and binding upon approval of the legislature, each resident's constitutional rights will be protected.

Part 2, Open Meetings. The more troublesome portion of the Public Participation statute for the Compact Commission is Part 2 which deals with open meetings. In other jurisdictions parties have attempted to avoid open meeting and public participation laws by arguing that subordinate committees whose only function is to make recommendations to the governing body are not encompassed by those statutes. Adler v. City Council of Culver City 184 Cal App. 2d 763, 7 Cal. Rptr. 805 (1960) (Zoning Commission). Selkowe v. Bean 249 A2d 35 (NH 1969) (Finance Committee of City Council). The case law on the point is somewhat conflicting; however, a pattern is discernable. Most of the cases which find an agency not to be bound by a public participation law do so on the basis that the committee is not a governing body and not authorized by law to act on behalf of the state. Commissions which arise independent of the governing body, most often under

an independent city charter, are most likely to be found not to be governed by public participation laws. Adler, supra, zoning commission, Selkowe, supra, finance committee of city council, Beacon Journal Publishing Co. v. Akron 209 NE2d 399 (OH 1965), City Civil Service commission and other bodies created by executive order of the mayor. The Compact Commission's authority arises by statute directly from the legislature. Most often commissions authorized specifically by law to act on behalf of the state are subject to public participation laws. Beacon Journal, supra, assessment equalization board created by an act of the legislature and subject to the open meeting law.

The statutory language of Part 2 removes any doubt about the applicability of the part to the Compact Commission: "All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds shall be open to the public." The Compact Commission, which operates only on public funds, must be included.

It appears that the Open Meetings statute is applicable to the Compact Commission as an entity. Even though it might be argued otherwise, it seems more prudent to proceed under the assumption that the statute does apply. Under this assumption it becomes necessary to consider whether the statute applies to the particular kinds of meetings which the Compact Commission holds.

Application of the Statute to Compact Commission Meetings and Negotiating Sessions

In general, open meeting statutes have been liberally construed. Their purpose is deemed to be protection of the public and to that end the statute is interpreted in a light most favorable to the public. ALR3d 1070§ 4.

The Montana statute specifically declares that the provisions of the statute be liberally construed. MCA 2-3-201.

Such statutes are increasingly being interpreted as having application to informal meetings as well as formal sessions. The Montana statute defines a meeting as any convening of a quorum of the agency to "hear, discuss or act upon a matter" even if the body only has advisory powers or is merely a subcommittee of another public body. MCA 2-3-202,203.

The Montana law does, however, allow a closed meeting "to discuss a strategy to be followed with respect to collective bargaining or litigation when an open meeting would have a detrimental effect on the bargaining or litigation position of the public agency." MCA 2-3-203(3). The meetings of the Compact Commission and the negotiating sessions with the tribes and federal government might be excluded from the open meeting statute under this exception.

There are two types of meetings vital to the function of the Compact Commission. First, the meetings of the Compact Commission itself and second, the actual negotiating sessions. The exception for strategy sessions relating to litigation appears to allow the Compact Commission meetings in which an approach and strategy for the negotiating sessions is discussed to be closed. Since the state is undergoing a general adjudication of all water rights in the state and Indian water rights are included in that adjudication by virtue of the Supreme Court's order required by SB 76, the Compact Commission's meetings discussing strategy may be considered strategy sessions concerning litigation. The litigation was actually initiated by the Supreme Court's order. With respect to Indian and federal reserved rights claims, such litigation is merely suspended while negotiations are proceeding. Termination of the negotiations would activate the adjudication of Indian

and federal reserved rights. To the extent that open meetings would have a detrimental effect on the bargaining or litigating position of the Commission, statutory interpretation of both the Open Meeting law and Senate Bill 76 would indicate that the Commission's meetings may be closed.

There is no case law construing relevant portions of the language of the Montana statute. Numerous other states have similar open meetings statutes. Most of those statutes provide exceptions for personnel matters, labor negotiations and legal consultations or strategy sessions relating to pending or impending litigation or other legal proceedings. Case law clearly supports the right of a public body to meet in private with an attorney to discuss current or impending legal matters. Minneapolis Star v. Housing and Redevelopment Authority for Minneapolis 251 NW2d 620 (Minn. 1976), Oklahoma Ass'n. of Mun. Attys. v. State 577 P2d 1310 (Okl. 1978). However, such holdings are based largely on the attorney-client privilege rather than statutory interpretation.

Since the Montana statute plainly provides an exception for strategy sessions about litigation without invoking the attorney-client privilege, the important issue becomes whether the Compact Commission's meetings relate to litigation. Statutory construction is determinative of this issue since there is no case law..

The legislature made clear their intent that Indian and federal reserved rights be included in the general adjudication mandated by Senate Bill 76: "It is the intent of the legislature that the attorney general's petition required in (section 16) include all claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666." MCA 85-2-701. The McCarran Amendment (43 U.S.C. 666) waives sovereign immunity and gives consent to join the United States as a defendant in a general adjudication conducted in a court.

Senate Bill 76 effectively commences the procedures for a general adjudication of water rights in the state courts, including Indian and federal reserved rights. Further provisions of Senate Bill 76 suspend all actions to adjudicate reserved Indian water rights while compact negotiations are being pursued. Breakdown of the negotiations would remove that suspension of the general adjudication.

It thus appears that the meetings of the Compact Commission insofar as they pertain to the negotiations do relate to litigation. The meetings of the Compact Commission may be closed to the extent that they concern discussion of strategy to be pursued in the negotiations.

The Negotiating Sessions

The actual negotiating sessions may be detrimentally affected if they are required to be conducted in open meetings. The free exchange necessary for compromise may be restricted. It is in the best interests of all parties that the negotiating sessions be closed.

Most of the arguments discussed thus far apply equally well to the negotiating sessions. It is possible that the negotiating sessions may not constitute a "meeting." Montana statute defines a meeting as the convening of a quorum of the members. MCA 2-3-202. There may not be a quorum of the Commission members at each negotiating session so those sessions would not be a "meeting."

Cases in other jurisdictions have found that meetings need not be open unless final action is to be taken. Adler v. City Council, supra, Beacon Journal v. Akron, supra. These decisions are based on the intent of open meeting statutes to prevent secret decisions which affect rights of the public. Since any compact must be approved by the legislature, it may be argued that no final action is taken at the negotiating sessions.

These arguments are not without merit; however, they do appear to be a bit technical. In view of the fact that the legislature directed that the open meeting statute be liberally construed, further support is needed to conclude that the negotiating sessions may be closed.

A new Hampshire case is analogous to the situation of the Compact Commission. In Talbot v. Concord Union School District 323A2d 912 (1974) a newspaper reporter was refused admission to the negotiating sessions between the school board and union representatives. In this case the parties agreed that the facts did not fit any of the express exceptions of New Hampshire's right to know law. The court found that the right to know law did not apply to the bargaining session.

The New Hampshire Supreme Court noted that the presence of the press at the negotiating sessions "would inhibit the free exchange of views and freeze negotiators into fixed positions from which they could not recede without loss of face." The collective bargaining process itself might be destroyed if each step of the negotiations was conducted in the presence of the press and public.

The New Hampshire case, like the present situation of the Compact Commission, involved conflicting legislative policies. In New Hampshire the legislature had adopted a bill guaranteeing the right of public employees to "negotiate the terms of their contractual relationship with the government by using the well established techniques of private sector bargaining." Open negotiations would prevent the effective functioning of the collective bargaining process. The New Hampshire Court quotes a Florida decision, "meaningful collective bargaining in the circumstances here would be destroyed if full publicity were accorded at each step of the negotiations." (Talbot at 914 quoting Bassett v. Braddock, 262 So. 2d, 425, 426 (Fla. 1972). The court found it unlikely that the legislature intended the right to know

law to destroy the very negotiations process established by legislative action. Thus, it was held that the negotiating sessions between the school board and the union were not subject to the right to know law. In so deciding, the court noted that any agreement reached in negotiations must be approved at a public meeting before final adoption.

The situation with the Compact Commission is directly analogous. Totally open negotiating with the tribes would severely hamper if not completely halt the negotiations process. Open negotiating sessions would have a detrimental effect on the bargaining position of the Commission. That negotiating process was explicitly set up by the Montana legislature. Thus if the negotiations are to continue in a meaningful fashion they must be conducted in a closed session. It is improbable that the legislature would intend to so severely restrict the negotiating process it specifically established. In addition, like the agreement in the Talbot case, any compact agreed to must be approved by the legislature. The public's right to know will be amply protected by that approval process.

It seems crucial to the success of the compact process that the negotiating sessions be closed. The statutory language provides exceptions where the bargaining position of the public agency would be detrimentally affected. MCA 2-3-203. While the negotiating sessions of the Compact Commission do not fit directly within one of those specific exceptions, it seems likely that the same reasoning should apply to negotiations of the Compact Commission and would have been included in the statute had the legislature considered the problem.

Conclusion

Whether the Compact Commission's meetings and negotiating sessions may be closed to the press and public at large is a close question. There is little case law or prior experience with the statute to provide guidance

in applying the statute to these facts. However, two conclusions may be reached with reasonable certainty:

1. The meetings of the Compact Commission may be closed to the extent that they concern strategy for the negotiating sessions.
2. The negotiation sessions may be closed because an open session would be detrimental to the bargaining position of the Commission and could threaten the negotiating process itself.

The statutory language and what little relevent case law exists support these conclusions. The intent of the public participation statutes is to protect the public interest. Premature publicity could threaten the negotiating process established by the legislature and thus adversely affect the public interest. It is in the public interest that the negotiations proceed in a constructive fashion and therefore be closed to the press.

Ted Schwinden
Governor

State of Montana
Reserved Water Rights Compact Commission

W. Gordon McOmber, Chairman

Jack E. Galt, Vice Chairman
William M. Day
Everett C. Elliott
Daniel Kemmis

A. B. Linford
Joseph P. Mazurek
Audrey G. Roth
Chris D. Tweeten

Urban L. Roth, Special Counsel

MEMORANDUM

TO: Urban Roth

FROM: Scott Brown

SUBJECT: DISCUSSION BY COMMISSION CONCERNING THE FLATHEAD JURISDICTION SUIT - PORTION OF MEETING OF JULY 25, 1985

DATE: September 9, 1985

Mr. McOmber: We've also received communication from Confederate and Kootenai Salish in regard to this case, Chris would you like to review that, Marcia?

Ms. Rundle: Well, all of the Commission members were sent a copy of the letter directly by Scott, and essentially their position is that it seems inconsistent and inappropriate for the state to, on one hand, to negotiate with the tribes and on the other hand advance them litigation on the same issue; and we did discuss this off the record the last time and the Commission at that time decided not to take a position on the state's action, and the Chairman responded to Mr. Steele's letter and indicated that we would discuss it at this meeting and get back to them.

Mr. Kemmis: What is the Attorney General's position on this strategy?

Mr. Tweeten: The background is that in about 1982 you may recall that the Flathead Tribes severed negotiations and a couple of months after that filed a law suit in federal court challenging the on federal water grounds the entire .....76 adjudication process included presume we use negotiations. They maintain that litigation posture and come back to the negotiating table until last year. The law suit was stayed, cross motion for summary judgement was filed in brief and the law suit was then stayed pending the outcome of the Adsit case. After Adsit came down, the state and the tribe entered into a settlement negotiations, the thought was that if we could come

D. Scott Brown, Program Manager
Marcia Beebe Rundle, Legal Counsel

32 South Ewing
Helena, Montana 59620
(406) 444-6601

up with some agreement as to the administration waters on the Flathead Reservation, we could probaly settle that law suit and negotiations on quantification could go forward from that point with the understanding that whatever we agree with on administration would then be brought into the compacting process. The tribe then acquired their attorneys and their in-house council took over the responsibility for awhile - see- and some of the negotiations essentially broke down and the state of the law suit had been conditioned on the progress of the settlement of the negotiations and when it became apparent that the settlement negotiations broke down the Attorney General's office and the jurisdiction project attorneys that were handling the case determined that the case ought litgitated ought to be dismissed. That was the position we discussed with the Compact Commission and discussed it with Urban Roth and the decision was made to ask Judge Smith to set a briefing schedule dissolve a stay and consider the cross motions for summary judgement. The Tribe has asked the court for some additional time to file an amended complaint in the case to take into account the decision in the Adsit Case and that motion is now revised and Judge Smith has now excused himself because he used to represent the Flathead Irrigation District and the case as I understand it will be transferred to Judge Lovell because all of Judge Smith's cases will be transferred to Judge Lovell, and that is where the law suit stands right now.

Mr. Kemmis: Why as a matter of policy would it be more appropriate to pursue that aspect of those Tribal rights, in that way rather than through Compact negotiations?

Mr. Tweeten: I am not sure that we made the decision as a matter of policy. Our view is that this is their law suit. The Attorney General's view is that this is their law suit, they are the ones that filed, and they are the ones that chose to litigate rather than negotiate in the first instance and that if there our a point in the negotiations is settled of the law suit and then the law suit ought to be either litigated or dismissed. In our view they have nothing to lose by dismissing the law suit, they don't have a statute of limitations problem, because this is an ongoing type of situation and they are not litigating about a specific occurence so they don't have a statute of limitations problem. There is no reason for the law suit to remain on the books

Mr. Kemmis: The question of administration is in effect it is not substantially different from the question of administration that we will face with other tribes as we negotiate compacts with them.

Mr. Tweeten: That's true, but the law suit does not only deal with administration. According to the law suit the allegations of the complaint are that the Flathead Tribes have a prior and a paramount right to every drop of water on the reservation. There are no surplus waters on that reservation for the state to

administer or for the state to permit or to be appropriated under state law. Those are the allegations of the complaint. It goes beyond the subject of administration and they argue that as a matter of federal law the state cannot do anything regarding water rights within the boundaries of the Flathead Reservation or regarding any waters outside the reservation which they claim the water right.

Mr. Kemmis: As I understand this the state's position is that the Tribe would not be injured by dismissing the suit, the corresponding question then, I take it, would be how is it that the state is injured by maintaining the stay? Why should we maintain the stay, what do we lose by taking that position. There is always in the background of negotiations such as the ones that we are involved in here, there is always the threat of litigation, we understand that , and so you are saying, the Attorney General's office is saying, that yes, that is right, we are not trying to take away the Tribe's threat of litigation but if that is the case, what difference does it make, if it is .. under a stay, why not maintain the stay and go ahead and negotiate?

Mr. Tweeten: Well, a couple of reasons. I haven't been closely connected with the specifics and the process for some time, so I am not sure I am accurate of what the factors were that led up to the decision, but our view is that we are in a very favorable position in terms of the litigation. We think the Adsit case resolved in our favor virtually all the issues raised in this case so if we were to litigate it we are in a strong position to win the case. The second point is that the Tribe has not in the past been reluctant to use these litigations as a lever in the negotation process and we think we can eliminate that if the case is either litigated or dismissed at least in the present term we understand that there is always a possibility to dismiss it that they can refile it a later time. Those are the considerations we have. I guess that is really beside the point for purposes of what is on the table for the Commission today, because whatever recommendation the decision has been made by the Attorney General's Office to take that position and I think this Commission is going to assert that it has any right to tell the Attorney General not to litigate the case, and I don't think the Tribe is asking for that. I think we have taken the position at a prior meeting that we are not going to take any position as far as the litigation is concerned, I think that is the position the Commission ought to take. The Attorney General doesn't...the law suit does not necessarily have any effect on what the Commission does with negotiations. We offered to negotiate with them after they filed the lawsuit we have always been available to negotiate on that posuture and we are continuing to make that offer and we are continuing to be availble to negotiate and if the tribe wants to negotiate with us we will negotiate with them. If they prefer to litigate the case, it is their law suit, they are the ones that filed it, and they can litigate it if they want.

Mr. Kemmis: I just don't think that we can take the position that there isn't a vital connection. There is, of course, a vital connection, there always is, it is in the nature of what it is that we are opt to, that those who negotiate have in the background the possibility of litigation, the alternative courses of action, and you don't generally successfully pursue both at the same time. I think that the tribes are right to suggest that there is an inconsistency here. I think, that if in fact the Commission has taken the position that we are not going to even make recommendations to the Attorney General we have fallen short of our responsibility. It is in effect one or the other, and if we are going to negotiate the issue of administration then that is what we are in the business to do and we should do that, I am not saying that we should do anything to take away the Attorney General's capacity to successfully litigate that issue, but it just doesn't make sense for the state of Montana to be in effect operating through two instrumentalities at the same time in the way we are right now.

Mr. Tweeten: What I object to most about the entire course of discussions that has gone on between the tribe and the state regarding this litigation is the fact that they put the responsibility on the state for the existence of this litigation, it is equally and inconsistent, I would submit, that the tribe to demand that this litigation would remain on the docket and negotiate at the same time. It is their law suit, they filed it in the first place, they chose to litigate, we didn't, we didn't file the law suit. It was their decision, they don't like having the law suit hanging over the head of these negotiations they can dismiss it, they filed the suit, they made the decision, they are going to have to live with it.

Mr. Kemmis: Litigation is always in the background, sometimes it is filed and sometimes it is not filed yet. It is not a point of honor.

Mr. Tweeten: But Dan, do you think it is fair for them to suggest to us that it is our responsibility that this litigation is in place and cast an appol(?) over these negotiations?

Mr. Kemmis: No, to the extent that they are suggesting that the existence of the litigation is our fault, I don't find that those suggestions, but maybe I missed it, but I think that there are two possible positions; one is to say you have to dismiss the law suit, and take what they pursue to be certain risks about whether they can refile it or not, when we say that you don't have a statute of limitations problem, my understanding is that they are not all that comfortable with it.

Mr. Tweeten: We don't know that, we have asked them why they object to dismissing the case, and they have never given us a satisfactory answer. We don't know what their theory is as to

why they want to keep the case on the books. We can't conceive a sound reason for it so we are forced to conclude that they have some strategic purpose in mind in terms of litigation. That is the only rationale reason that we can come to.

Mr. Kemmis: But I think, it can also be said, that it isn't clear why the state has to remove the litigation, why can't the state continue to operate under the stay. I don't hear the logic of the response to that, so I think that both sides could be accused of taking unreasonable positions, but what I don't think is that we can go ahead and act as if there is no connection between our ability to negotiate effectively with the Salish and Kootenai and this question. There is a connection and it ought to be resolved in some kind of unified manner, and it is not.

Mr. Linford: Isn't it a point here, it may be a point here that the Salish and Kootenai have terminated the services of their former attorneys, they have a new attorney. Scott and I ran into him the other day down in Bozeman and he indicated that they were going to do something, and I guess this is part of what he did.

Mr. Kemmis: Who was that?

Mr. Linford: Jim Goetz. We just met with him briefly, he didn't bring this matter up, except to say that he thought they would be coming active in negotations with us, that was the jist of what he said to us.

Mr. Kemmis: My point is that, I don't understand how the state of Montana can address this issue by speaking through, in effect, two mouths at the same time. I think we have to decide who it is that is going speak for the state on this. That is a typical situation, that their attorney would be speaking to us at the same time that they are speaking to a different attorney.

Mr. Tweeten: We attempted to do that, Dan, we tried to settle this law suit through the Attoney General's Office, we negotiated with them to try to get some sort of idea of what they had in mind for settlement and to explain to me what the process was. We had a meeting with them in March or April of 1984 at which we discussed this very subject, we had some of the negotiations in mind at that time and this was about the time Wilkinson, Cragun & Barker ceased to represent the tribe, and we agreed with them, they said they had just had tribal government put into place and it would take some time to formulate a position, give us 90 days and we will give you some idea of what our position is on these issues. We were very specific in discussing with them what we feel were the core issues on the law suit, on which we would like to know what their negotiating position was. Well, 90 days came and went, and we didn't hear anything from them, we contacted them again and told them we were still interested in negotiating and wanted to get this

information and wanted to negotiate a settlement and once again they didn't give us any information. We had a second meeting with them, we laid it on the table for them and they consistently refused or declined to inform us of what position they wanted to take to settle the law suit. Now, hopefully negotiations in this form will be more productive than that.

Mr. Kemmis: But they won't work, as long as the litigation is

Mr. Tweeten: Well then the tribe can dismiss it.

Mr. Kemmis: Or we could return to the stay.

Mr. Tweenten: We made the decision that that is not satisfactory.

Mr. Kemmis: Well, in doing so you have seriously impacted the prospect of negotiations. That is my point. Decisions like that seriously impact the process of negotiations, in exactly the same way that we were told by the Attorney General's Office that the decisions we had made in the earlier Fort Peck contract affected the process of litigation.

Mr. Tweeten: I don't agree at all. If the Flathead Tribe are going to negotiate with us in good faith, if they want to negotiate a settlement rather than litigate a settlement they will dismiss their law suit and come to the table.

Mr. Kemmis: Well, then the question is does the Compact Commission take that position as well or not. Are we in accord with that position on the behalf of the Attorney General?

Mr. Tweeten: I don't think we have to be. All we have to say is that we are willing and able to negotiate with you, please come to the table and we will sit down and discuss these issues.

Mr. McOmber: Will that effect issue that kind of invitation, the first isssue of discussion is that it exists.

Mr. Kemmis: Well, tell me about that. What is the status of the invitation.

Mr. McOmber: It is kind of informal

Mr. Brown: Well, Dan Decker tried to call you while you were in Anchorage, but I spoke with him and they want very much to meet with the Commission as soon as possible and Dan did not dwell on it but he did mention that this is one of the things he refers often to the fact that the state appears to be speaking two different sources here.

Mr. Kemmis: Of course.

Mr. Brown: But he really did not over emphasize that, he said, they were more interested in getting back to the negotiating table and getting all of the issues in front of us, and would like to hear from the Commission following this meeting, not necessarily on this issue, he made that clear, but simply on the request to meet in Pablo sometime on the 1st or 15th of September, and so that is their request.

Mr. Tweeten: Maybe we should accept it.

Mr. Kemmis: Well when we do, then we have to know when we appear there what our position is on this issue, and we have to know what our position is as a Commission. That is my point. We simply can't go there and say we don't have a position on this question. We can't be in opposition.

Mr. McOmber: Why not?

Mr. Tweeten: I think we can.

Mr. McOmber: I mean this statement that has been made here that there is no water left to negotiate about. That is a very important question, if that is the case may be we should (inaudible) I don't like to see this Commission used as a pawn in this case.

Mr. Tweeten: That is precisely what is happening.

Mr. McOmber: I am wondering if the state had a case going that the tribe wanted to dismiss if they would look at it (inaudible)

Mr. Tweeten: I guess my point is this, we do have a case. In SB 76 adjudicates those rights, but it stayed by statute while these negotiations take place.

Mr. Kemmis: My point is that if we go and sit down with the tribe and we are asked in effect what is our position on this law suit, and we say we have no position, what we really mean, what we have to mean, is that our position is the position of the Attorney General. That we back the position of the Attorney General. There has to be an answer to their question. We can't simply shrug and say that it is not our business. It is our business. If our position is that we agree with the Attorney General's Office, and here is the issue, the issue is - must the tribe dismiss the law suit in order to proceed with the negotiations on the issues that were raised. That is the question. If our answer to that, is yes, then fine, lets tell them that that is our answer, but let's not shrug and say we don't have a position, and the reason we shouldn't do that is because it raises questions for our authority to negotiate on behalf of the state and we cannot afford to have those questions raised. We have to have authority to negotiate on behalf of the state and that means that we have to have positions on crucial issues. So lets have a position on this issue.

Mr. McOmber: How about the rest of you members?

Mr. Galt: I thought we had taken a position.

Mr. Kemmis: No, we took a position to keep our hands off. And that is not acceptable.

Mr. Galt: That is not acceptable to you.

Mr. Kemmis: Thats right. But it is not acceptable - it should not be acceptable to the Commission because it will raise the question of our authority to negotiate on behalf of the state.

Mr. Galt: I think our authority has already been established. We have already made a compact. I don't think this questions our authority at all.

Mr. Kemmis: They have questioned our authority.

Mr. Tweeten: I don't see that in the letter either. I mean they can question on how the state arrives at its position as far as the law suits are concerned, but I think we can make it clear that our authority is to negotiate with a compact quantifying the water rights. In addition to that we can take it upon ourselves to negotiate other ancillary issues regarding water between the state and the tribe including issues of administration. That is the authority we have, what we don't have is the authority to decide what is going to happen to the law suit because that is the Attorney General's responsibility.

Mr. Kemmis: And that is exactly the reason that our authority was questioned, and we were under a cloud of question for a period of almost two years because it was not clear that we had the authority to speak for the state; it was not clear for exactly the same reason, because having attempted to speak for the state we then got into the position where the Attorney General said, no, but when it comes to matters of litigation you, the Commission, whatever you may have said, is not to be accepted.

Mr. Tweeten: I think that is reputing history, I don't think that is what happened.

Mr. Kemmis: That is clearly the perception that the tribes have.

Mr. Tweeten: That perception is inaccurate. The Commission made the decision. The Attorney General did not tell the Commission you may not submit this compact to the Legislature.

Mr. Kemmis: No, you probably understand that.

Mr. Tweeten: The decision was made by the Commission. The Chairman has acknowledged that repeatedly in trying to deflect these charges.

Mr. Kemmis: The key issue seems to me is one of maintaining the situation that we have now established. where our authority is accepted and the wa y to maintain that is, it seems to me, to make it clear that we have positions on the important issues that affect negotiations, not to simply sit down at the table; this is the situation that exists. We would sit down, our Commission, the tribe would ask us what is your position on this, and we would in effect say we do not have a position on it, some other instrumentality in the state has total control over that. I don't want to be in that position. I want us to have a position. I am not afraid I am going to lose as far as the position we take, I will be on the minority on that, that's why, at least we will have a position. I guess that is what I ask.

Mr. Elliott: I am just curious in relation to the time sequence in relation to the position, we took the position at the May 15 meeting In according to the information we have here, it was May 17th when the state filed a motion. When we received the letter dated June 27th from the Salish Kootenai, the feeling that I got from reading the letter is because of the action of the stay in place is the group --(inaudible) --negotiation questioned by them. I mean that's the way they view us, and that's the way I read the letter.

Mr. McOmber: Scott, did you (inaudible) is this what they wanted to discuss among other things? Were they asking, did he seem to implicate that they wanted a yes or no at this time, or do they want to discuss it?

Scott: Again, he didn't dwell on it, and he certainly didn't indicate that at that negotiating session he would expect the Commission to have a position or anything else. We didn't discuss it, in fact, at length. He just said that's one of the important issues on our mind, but it is one of many issues and we need to get back to the negotiating table, and the sooner the better.

Mr. McOmber: Okay, Dan, don't you think we could sit down and talk to him before we make a yes or no decision on this. --look at some of the other issues.....

Mr. Kemmis: I don't know. I'm trying to be careful (inaudible) and I think that in the long run our credibility depends upon our being able to take positions. If you want to go there and say we haven't formulated a position on this yet, we would like to hear what your position is, we will consider them what ours will be. I suppose that would be okay, but I think what we are being asked to do by the Attorney General's Office is not to take a position.

Mr. Tweeten: Mr. Chairman, the Attorney General's Office , I don't think, has asked the Commission to do anything. This item was on the agenda and we discussed what the Commission's response to the existence of the lawsuit would be, and with that feedback from the Commission in mind the decision was made by the Attorney General on how to proceed. I don't know that there has been a formal request from the Attorney General at this time asking the Commission for a recommendation as to whether we should proceed or not. I don't think that has happened.

Mr. Kemmis: I really don't have any quarrel with what the Attorney General has done under the circumstances, I think that as the litigating office of the state that basically doing what it should do, I am concerned about maintaining not only the fact that appearance of coordination between these two, and if anything should know the importance about this body ------know. Sooner or later we are going to have to take a position on this issue. I don't see how it is going to get any easier.

Mr. McOmber: What is the history of our negotiations? Scott, fill us in.

Mr. Brown: They were one of the first tribes entering the negotiations. In fact we met with the Flathead Tribes and the Northern Cheyenne Tribes in Billings back in June of 1980, but we held only two negotiating sessions with them before they terminated negotiations for reasons we still don't understand and were never communicated to us. Then approximately two years later they sent us another letter asking us to reinitiate negotiations. They had new representatives, a new attorney, they are represented by a new attorney, both a resident attorney, Dan Decker and Jim Goetz, and as you know we have had one meeting with them, one formal negotiationing session and they are requesting another. In my own, if our successes in negotiations with other tribes are an indication, I agree, at first you need to just sit down and get to know each other. We don't know their new negotiators, they don't know our new negotiating team. This Commission has changed personalities, and for two or three meetings, you just have to sit down and come to an understanding with each other and then you start to developing strategies. That is my suggestion.

Mrs. Roth: Jack and I went to a meeting in 1980, 1979, something like that, with the Salish, Kootenai, they were very hostile, very unaccepted, and they said they wanted no more negotiations. They wanted nothing more to do with any of us. Since that time, apparently their attitude has changed.

Mr. Brown: That was not a member of the negotiating team. In fact, Mr. Swaney, you are talking about Bearhead Swaney? - who was not a member of the Tribal Council at that time either, and

he entered the public meeting and if you know Bearhead Swaney, I need not say anymore. I think he is on and off the Tribal Council, and at that time he was not on the Tribal Council.

Mrs. Roth: He was very vocal.

Mr. Tweeten: Mr. Chairman, would you entertain a motion at this time.

Mr. McOmber: Yes.

Mr. Tweeten: I would move that we accept their invitation to schedule a negotiating session between the first and 15th of September, and that we inform them at that time if the issue arises that the Commission has not taken a position, and then detetermine whether we must take a position on that issue in order to proceed with the negotiations.

Mr. McOmber: Can you repeat that?

Mr. Tweeten: It is in three parts, first, I think it is clear that we have to meet with them, and we should accept their invitation to meet in Pablo, and we should do it between the 1st and 15th of September as they asked, if the issue arises, secondly, we should inform them that we have not taken an issue on that question because it is not a subject within our jurisdiction. If that position causes them a problem, and I am not sure it will, then it seems to me we have to take steps to reassess whether we want to go on record as saying the Attorney General decision is right or wrong.

Mr. Galt: I second that motion.

Mr. Kemmis: No, The only part of the motion that I have any difficulty with is that when you say that we have not taken a position, and you said something about we are not sure whether it is in our jurisdiction.

Mr. Tweeten: That's right..

Mr. Kemmis: Okay, is it necessary for us to say that.

Mr. Tweeten: I will strike that from the motion. That is my view, but I don't necessarily think that is the representation we have to make. I don't have any problem with that.

Mr. Kemmis: Okay. I think that we should be quite clear in fact that the reason we have not taken a position is simply because we want to hold judgement on the matter until we hear what their position is. And that I don't want to give any information that we have any doubts about whether it is within our juridiction. When I say that, I don't mean that I think that the Commission has any jurisdiction over the decisions that the Attorney General has.

Mr. Tweeten: We can entertain those doubts, as long as we don't express them.

Mr. Kemmis: That's right. But sooner or later, I think, in order to maintain our credability, we have to make it clear that we know that we have jurisdiction to take positions on all important issues, and then we can address ourselves to what our position on that issue should be. With that, I support the motion.

Mr. McOmber: It seems to me that with the trained diplomats we have and the skilled attorneys we have, there should be a resolution on this issue without - (inaudible)-- but anyway, any further discussion about the motion. All in favor, say aye --- those opposed - no.

Votes

Mr. McOmber: The ayes have it. So ordered.

September 5, 1985

TRIBE: Confederated Salish and Kootenai Tribes of the Flathead Reservation

DESIGNATED NEGOTIATING REPRESENTATIVES:

August 16, 1984: The Tribe officially designated the following representatives: Council Chairman Joseph Felsman, Councilmen Michael Pablo and Ron Therriault, and attorneys Daniel Decker and James Goetz.

MEETINGS/NEGOTIATING SESSIONS HELD:

June 18, 1980: Introductory session; major topics included discussion of open meetings, public participation, statements to news media, the process of incorporating compacts into the water court proceedings, standards for quantification, and federal involvement.

September 16, 1980: Discussion topics included: federal involvement in the negotiations, proposed Rule 408 agreement on confidentiality, the finality of compacts, the incorporation of compacts into the state's general adjudication process, public notice of meetings, exchange of information list, a future tour of the Reservation, the status of non-Indian water uses on the Reservation, and secretarial water rights

May 1981: The Confederated Tribes filed suit against the State in federal court, seeking an injunction against the State from issuing any permits for water use on the Flathead Reservation, federal court adjudication of all water rights on the Reservation, and tribal jurisdiction over all water on the Reservation. The Tribes simultaneously discontinued negotiations with the Compact Commission.

July 19, 1984: Informal meeting at the Tribal Headquarters in Pablo to discuss the possibility of resuming negotiations.

November 19, 1984: Discussion topics included: the proposed amendments to SB 76, a proposed Rule 408 agreement, the pending litigation and the relationship between a proposed settlement of that litigation and negotiations with the Commission, open meetings, public participation, and aboriginal rights off-reservation as a proposed topic of negotiations.

TYPES OF INFORMATION GATHERED

Historical Background

Important cases regarding the Flathead Reservation include U.S. v. McIntire, 101 F.2d 650 (1939), State v. Stasso, 172 Mont. 242 (1977), and the pending water case, Confederated Tribes v. State , (CV-81-147).

Technical information gathered includes soil survey maps and data for Lake County and partial review of land classification maps and data.

POSITIONS TAKEN

The Tribes resumed negotiations in the Fall of 1984 after suspending talks in 1981. They have indicated that they prefer to negotiate but that they intend to proceed with caution. It is not known what effect the approval of the Fort Peck Compact will have on their willingness to negotiate, nor what the effect of the State's proposed action in the pending lawsuit will have.

The Tribes suggested that the technical staff from each party meet and determine what information needs to be developed; and they agreed to develop a general outline of the scope of aboriginal rights they will be claiming off reservation. The Commission agreed to keep the Tribes informed about legislative hearings as they occurred; we also agreed to have the technical staff meet and discuss the information base available and what additional information is needed; and we agreed to provide any memos or research on the questions they raised regarding challenges to compacts in the water court.

SCOTT

MEMO

To: Commission Members
From: Marcia Rundle MR
Date: May 14, 1985

Re: Confederated Salish & Kootenai Tribes v. State of Montana (United States District Court for Montana No. 81-149M)

On Monday, May 13, 1985, I attended a meeting at the Attorney General's office at which the pending "Flathead Water Case" was discussed by Helena McClay and Deirdre Boggs of the Indian Jurisdiction Project, Assistant Attorney General Clay Smith, Commission Member Chris Tweeten and DNRC Director Larry Fasbender. My purpose in being at the meeting was to observe the discussion and to advise the participants that the Commission would discuss the case at its meeting on Wednesday, May 15, 1985.

The Confederated Tribes filed this suit in federal court in 1981. It is the last civil case remaining on Judge Smith's docket. Ms. McClay has indicated that there is some concern on the part of the court that the case be moved along because it is the last one. In addition, the attorneys for the Indian Jurisdiction Project feel that it is not desirable to have a suit pending with no action for such an extended period.

Initially the Tribes filed the case to enjoin the State DNRC from implementing SB76 on the reservation. Since then, however, the Tribes have filed claims in water court and have resumed negotiation with the Commission. Last November, the Tribes' representatives and the State's representatives met and ultimately agreed to stay any action on the lawsuit until after the legislature so that the Tribes would know if the Commission was going to be extended. Now that the Commission has been extended, the attorneys for the Indian Jurisdiction Project are proposing that the state request that the court either dismiss the case or set a briefing schedule.

Many of the issues addressed in the lawsuit will be answered by the pending case in the Montana Supreme Court, State of Montana v. U.S. (Montana Supreme Court No. 84-333). That case will not, however, resolve remaining issues of administration of water rights on the reservation. Everyone present at the meeting appeared to agree that it is preferable to negotiate a resolution to the issue of administration. However, the attorneys for the A.G. feel that it is not desirable to have this suit pending indefinitely.

It is likely that the Confederated Tribes may again challenge the State to identify just who speaks for the State of Montana on settlement of reserved water rights issues. The A.G.'s office is proposing to litigate this case; the Compact Commission is authorized to negotiate the same issues, and has resumed negotiations with the Confederated Tribes at their request. However, there are rumors afloat that the State considers the Flathead Reservation "a good one to litigate." If the Tribes are cautious about dismissing their federal suit, it is probably not without reason.

While I cannot discern what, if anything, of real value is gained for the Tribes by keeping that case on hold, if they believe that is is important for them to have it stayed, it must have some value. It is very hard to judge whether they will litigate rather than dismiss the case, but the consensus of the attorneys at the meeting was that they will litigate.

In my opinion, it won't hurt negotiations to stay the case at least until the Montana Supreme Court issues its decision in Montana v. U.S. so that the Tribes can make a decision knowing the result of that case. On the other hand, it is likely that negotiations will not be enhanced by a decision to push for dismissal or briefing at this time. While it probably is not desirable to leave this case pending indefinitely, the Commission has successfully resolved the issue of federal reserved rights for one Reservation by focusing on practical solutions rather than erudite legal positions. It does not seem that the long-range interests of the State would be harmed by staying this suit another short while.

MEMO

TO: Commission Members, Urban Roth, Scott Brown
FROM: M. Rundle
RE: Flathead Negotiations
DATE: November 19, 1984

In his letter of October 31, 1984, agreeing to meet with the Compact Commission, Tribal Council Chairman Joseph Felsman suggested three topics for discussion at our November 19, 1984 meeting. Those items were:

(1) legislation to extend the compact negotiations deadline;
(2) coordination of the negotiations process with settlement of the Tribes' regulatory jurisdiction case; and
(3) off-reservation water claims.

The following is an attempted "best guess" at the positions and the bases for the positions of the Tribes on these three issues.

(1) Dan Decker indicated in an informal discussion with Gordon McOmber, Scott Brown and myself that the Confederated Tribes support extension of the deadline. They can be expected to support the proposed amendments of the Select Committee on Indian Affairs.

Those amendments have been discussed to some extent at each of our recent negotiating sessions. There may be an offer from the Tribes to testify at legislative hearings in support of the extension. They may want to know the position of the Commission on the other proposed amendments, especially those concerning the finality of negotiated compacts.

The Commission has not taken a position on these specific amendments but my understanding of the discussions to date is that the Commission has always taken the position that the terms of any compact are final and could not be changed by unilateral action by either party (or by the Water Court).

(2) The regulatory jurisdiction case filed in 1981, the Confederated Salish and Kootenai Tribes v. Montana raised numerous issues, most of which remain unresolved. The Adsit decision determined that under federal law (the McCarran Amendment) state courts have concurrent jurisdiction to join the Tribes in a general adjudication of water rights.

The issues of whether the SB 76 process is a general adjudication within the meaning of the McCarran Amendment and whther Montana law (the disclaimer in the Montana Constitution) prevents the state from asserting jurisdiction have been presented to the Montana Supreme Court on a Writ of Supervisory Control. The Supreme Court has not yet decided whether or not to accept jurisdiction to hear these issues.

Regardless, one of the primary issues in the Confederated Tribes' suit remains; that is, the extent to which the state can assert regulatory authority over water on the Reservation.

The Tribes assert that the State has no regulatory power over water on the reservation and rely on a Ninth Circuit case which ruled that water rights could not be acquired on the Flathead Reservation by filing claims for appropriated rights pursuant to Montana law. United States v. McIntire, 101 F.2d 650 (9th Cir. 1939). The following language is illustrative of the firmness with which the circuit court asserted that principle.

> It is clear . . . that the lands now owned by appellees were within the area mentioned in the treaty as being reserved to the Indians.
>
> The waters of Mud Creek were impliedly reserved by the treaty to the Indians. (citing Winters) . . . The United States became a trustee, holding the legal title to the lands and waters for the benefit of the Indians. (citing Hitchcock) . . . Being reserved no title to the waters could be acquired by anyone except as specified by Congress . . .
>
> Appellees seem to contend that Michael Pablo acquired by prior appropriation the rights in question by local statute or custom. . . (T)he Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation. In fact, the Montana enabling act specifically provided that Indian lands, within the limits of the state, "shall remain under the absolute jurisdiction and control of the Congress of the United States."

It is likely that the Attorney General's office and the Tribes still disagree on the effect of the passage of the McCarran Amendment and the Adsit decision on this decision.

(3) In 1984, the Ninth Circuit recognized a reserved right for instream flows to protect hunting and fishing rights reserved by the 1864 treaty with the Klamath Indians. United States v. Adair, 723 F.2d 1394, 1408-11. The Adair decision recognized the survival of treaty rights to hunt and fish in ancestral territory reserved by treaty even after the termination of the reservation. Adair at 1414.

> (W)ithin the 1864 Treaty is a recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a continued right to support its hunting and fishing lifestyle on the Klamath Reservation. Such rights were not created by the 1864 Treaty, rather, the Treaty confirmed the continued existence of these rights. Adair at 1414.

The court identified the right as a non-consumptive, instream use of water.

> (T)he right to water reserved to further the Tribe's hunting and fishing purposes is unusual in that it is basically non-consumptive...The holder of such a right is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses (absent indipendent consumptive rights). Rather, the entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies. Adair at 1411.

The Hellgate Treaty with the Flathead and Kootenai Tribes (and others) specifically reserved to the tribes their traditional hunting/fishing rights.

> The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. Article III.

The Montana Supreme Court has held that this provision was a reservation of rights by the tribes rather than a grant of rights by the federal government. The Court held that the aboriginal rights protected by Article III reserved

> for present day members of the tribes signing that document the right to hunt game animals free from state regulation on lands ceded by the tribes to the federal government. State v. Stasso, 172 Mont. 242, 248 (1977).

Finding that the right to hunt on open and unclaimed lands outside the present reservation boundaries, but within the aboriginal hunting territory of the tribe, had not been impaired by subsequent laws or treaties, the Court upheld the rights of tribal members to hunt on National Forests.

It is likely that the Tribes are going to want to talk about the Adair case, in principle if not by name.

MEMO

TO: Commission Members, Urban Roth, Scott Brown
FROM: M. Rundle
RE: Flathead Negotiations
DATE: November 19, 1984

In his letter of October 31, 1984, agreeing to meet with the Compact Commission, Tribal Council Chairman Joseph Felsman suggested three topics for discussion at our November 19, 1984 meeting. Those items were:

(1) legislation to extend the compact negotiations deadline;
(2) coordination of the negotiations process with settlement of the Tribes' regulatory jurisdiction case; and
(3) off-reservation water claims.

The following is an attempted "best guess" at the positions and the bases for the positions of the Tribes on these three issues.

(1) Dan Decker indicated in an informal discussion with Gordon McOmber, Scott Brown and myself that the Confederated Tribes support extension of the deadline. They can be expected to support the proposed amendments of the Select Committee on Indian Affairs.

Those amendments have been discussed to some extent at each of our recent negotiating sessions. There may be an offer from the Tribes to testify at legislative hearings in support of the extension. They may want to know the position of the Commission on the other proposed amendments, especially those concerning the finality of negotiated compacts.

The Commission has not taken a position on these specific amendments but my understanding of the discussions to date is that the Commission has always taken the position that the terms of any compact are final and could not be changed by unilateral action by either party (or by the Water Court).

(2) The regulatory jurisdiction case filed in 1981, the Confederated Salish and Kootenai Tribes v. Montana raised numerous issues, most of which remain unresolved. The Adsit decision determined that under federal law (the McCarran Amendment) state courts have concurrent jurisdiction to join the Tribes in a general adjudication of water rights.

The issues of whether the SB 76 process is a general adjudication within the meaning of the McCarran Amendment and whther Montana law (the disclaimer in the Montana Constitution) prevents the state from asserting jurisdiction have been presented to the Montana Supreme Court on a Writ of Supervisory Control. The Supreme Court has not yet decided whether or not to accept jurisdiction to hear these issues.

Regardless, one of the primary issues in the Confederated Tribes' suit remains; that is, the extent to which the state can assert regulatory authority over water on the Reservation.

The Tribes assert that the State has no regulatory power over water on the reservation and rely on a Ninth Circuit case which ruled that water rights could not be acquired on the Flathead Reservation by filing claims for appropriated rights pursuant to Montana law. United States v. McIntire, 101 F.2d 650 (9th Cir. 1939). The following language is illustrative of the firmness with which the circuit court asserted that principle.

> It is clear . . . that the lands now owned by appellees were within the area mentioned in the treaty as being reserved to the Indians.
>
> The waters of Mud Creek were impliedly reserved by the treaty to the Indians. (citing Winters) . . . The United States became a trustee, holding the legal title to the lands and waters for the benefit of the Indians. (citing Hitchcock) . . . Being reserved no title to the waters could be acquired by anyone except as specified by Congress . . .
>
> Appellees seem to contend that Michael Pablo acquired by prior appropriation the rights in question by local statute or custom. . . (T)he Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation. In fact, the Montana enabling act specifically provided that Indian lands, within the limits of the state, "shall remain under the absolute jurisdiction and control of the Congress of the United States."

It is likely that the Attorney General's office and the Tribes still disagree on the effect of the passage of the McCarran Amendment and the Adsit decision on this decision.

(3) In 1984, the Ninth Circuit recognized a reserved right for instream flows to protect hunting and fishing rights reserved by the 1864 treaty with the Klamath Indians. United States v. Adair, 723 F.2d 1394, 1408-11. The Adair decision recognized the survival of treaty rights to hunt and fish in ancestral territory reserved by treaty even after the termination of the reservation. Adair at 1414.

> (W)ithin the 1864 Treaty is a recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a continued right to support its hunting and fishing lifestyle on the Klamath Reservation. Such rights were not created by the 1864 Treaty, rather, the Treaty confirmed the continued existence of these rights. Adair at 1414.

The court identified the right as a non-consumptive, instream use of water.

> (T)he right to water reserved to further the Tribe's hunting and fishing purposes is unusual in that it is basically non-consumptive...The holder of such a right is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses (absent indipendent consumptive rights). Rather, the entitlement consists of the right to prevent other appropriators from depleting the streams waters below a protected level in any area where the non-consumptive right applies. Adair at 1411.

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Dan K, Jack G, Urban R.,

Nov. 19, 1984 RWRCC - Conf. Salish & Kootenai Tribes

First official meeting

G.M. - introductions and opening statements
D Decker - introductions
G.M. - legislation has been drafted
J.G. - diffs between Comm's & Sal. Indian Comm.?
M.R. - Defined diffs...
J.G. - Question about enforceability of an agreement. Would we supply any info about a non-Indian's due process? How binding on individuals?
UR - some speculation
maybe a savings clause is necessary so that the whole compact isn't voided on the

DK - expect that some one will challenge
allow the due process issues to be raised

UR notice in the prelim decree take care of procedural process, but unless there's a forum provided, substantive ~~or~~ due process

J.G. But, if we give individuals a chance, do we reopen the whole process to being litigated?

U.R. How much of an impediment?
J.G. Not much

D.K. will look over old legal research & be prepared to discuss it at next meeting

G.M. Thoughts on Congr. nat. vs. decree?

J.G. - No, but we support extension

D.K. - Worthwhile for CSKT to testify

** S.B. will notify CSKT when to testify

J.G. general concepts

U.R. Technical & legal info needed for a basis for discussions

Ours is an open door policy... sharing techn. data.

Legal memos might persuade us to reconsider our position

Historical info

1. what abt. Secretarial Water Rights?
2. what abt. rights of the Bison Range?
3. USFS

J.G. We haven't considered #2, #3

Council will consider proposal to share data. Data is being considered, may be held close to their chests.

U.R. Agreement could be reached by CC & CSKT not to allow evidence disseminated in neg. to

be used in lit. . . protects both parties.

J.G. Maybe joint projects that require log. expenditure of $ . . . maybe aerial photos

** I suggested techn. people can meet & make sugg. to the parties as to techn. needs & schedule

Fri 21 Meeting, then dinner Commission

** J.G. Cautiously, but allow techn. people to do as el proposed.
U.R. emphasized joint studies

Item IV Jurisdiction . . . the suit

J.G. options CSKT hasn't made up its mind

see tapes U.R. would like to have it dismissed.

off-res. water rights

U.R. We've rec. Adair

J.G. What is Comm's position?
U.R. no position... are they res. rts?
ds Adair an anachronism?
J.G. We want them to be part of neg. & make position known (Comm's position)

U.R. What about bifurcated admin., excess water?

J.G. Berry seems to have defined excess water (Letter of 9/13/84)

* U.R. We haven't foreclosed consid. on any proposal... whether it's joint water development, off-res. rts., whatever

* * J.G. Our initial position is that the CSKT have auth. to admin. all rts on the res., but will consider alt. proposals by the Comm. in these neg.

J.G. Quantify only?
U.R. might have to, but prefer not to exclude admin etc.

U.R. discussed advantages of state court resolution of disputes, but tribes should allocate the res. wt.

J.G. all disputes between tribal members in tribal court?

U.R. No, not approp. wts, just res. wts.

* U.R. What is the scope of the tribes' off-res. claims? Which streams? On private lands? On fed. domain? the Comm. should know the extent, before expressing opinion on incl. them in neg.

*** Techn. people should include this in their del.

J.G. General idea... basically W. Mont.

U.R. Can we dev. a schedule before the next meeting?

* Send Dan & Jim a copy of 84 Ft. Peck Compact

Transcript will be sent, then Urban & Jim should communicate to set up an agenda

Techn. people: get together before Christmas and help UR & JG set agenda

Mr. Felsman will preside over next meeting.

J.G. Tribal council must ultimately auth. the outcome

We agreed soil survey

Ave Linford — Can we accept one another's data?
Jim/Bob — State has to appreciate the techn. studies are the tribes' case... if they show it & state is not satisfied

Soil Survey data + IRRSYSS 3 mos.

Tom. est. — $250,000 to trace titles & det. uses of water on fee lands

or

a proper verification ... could the court require Walton-Powers claimants to now make their claim & document it? Then temp. prel. decree would precede compact.

We need guidance.

Instream Flow Studies -- 2 yrs away
USFWS on lower Flathead flawed

Flathead Irrig. Project
recent Yandum study BorR BIA
We need — Water Mgmnt Plan

Water Availability

In 6 mos. to 1 yr: tribes are equipped

Brian note
USGS station to do all of this out us.

Technical people agreed there's no possibility of a compact

* Tour soon Tom is willing... check ☐

Dave Cross - fisheries

3rd yr fisheries study of S. ½ of Flathead Lake & lower Fl. River (5 yr. study)
avail thru DFWP ... annual reports on stock, env. problems, i.f. needs may be an incidental outcome of this tribal study. See Geo. Holton.

Brad Trosper Real estate office

soil surveys ... close contact ~ Sanders Survey
land ownership

Ken Cartier - Hydrologist 2 maps handed out

Many stations est. in 1983 public data if jointly ~ USGS

11 CSK-USGS (continuous
50 CSK stations

Wells monitored quarterly ~ USGS
Report anticipated.

July 12, 1984

Mr. Felsman introduced everyone.

Mr. McAmber urged reconsid. of decision to term. neg.

Adj... questions about reserved water (quantity)... statewide Commission make-up. no conflicts ε tribes... motivated by the determination of quant. res. rts.

In H. Lohle's absence, comm. needed a neg.

It was the Commission's decision to pull away from the Fort Peck Compact.

Mickey Pablo asked why neg.; if after reconsid. talks, Comm. won't submit it to leg... Trust is hard to restore.
G.M. expl. that now a procedure exists... won't happen again. Comm. will have to
M. Pablo asked if a procedure has been developed.
G.M. said one has

Ron _____ Does the Comm. recognize tribes' sovereignty?
Do the members appreciate the sophi. of the tribes' gov't?
Urban is dishonest.... Felsman ε Ron...
Urban followed up the Supreme Court decision with additional, abrasive remarks about the

* Ron pointed out political problems...; constituents know Urban... council members must consider that

** Gordon emphasized: if neg. get underway again, technical people can begin working together.

Month	DATE	FAVORABLE FLOW (CFS)	(AF)
January	1-2	175	694
	3-18	100	3,173
	19-20	75	297
	21	50	99
	22-23	75	297
	24-31	100	1,586
February	1-6	100	1,190
	7-26	175	6,940
	27-28	200	793
March	1-31	200	12,295
April	1-28	200	11,105
	29-30	616	2,443
May	1-6	616	7,329
	7-14	880	13,960
	15-20	1320	15,705
	21-23	1760	10,470
	24-26	2200	13,088
	27-28	2640	10,470
	29	3080	6,108
	30-31	3520	13,960
June	1	3520	6,980
	2	4400	8,725
	3	3080	6,108
	4	2200	4,363
	5	1760	3,490
	6	1320	2,618
	7	880	1,745
	8	616	1,222
	9-30	200	8,725
July	1-31	200	12,295
August	1-31	200	12,295
September	1-30	200	11,898
October	1-31	200	12,295
November	1-30	200	11,898
December	1-14	200	5,552
	15-31	175	5,899
			248,110

RICHARD,
AFTER A BRIEF INTRO TO THE RESERVED RIGHTS DOCTRINE & THE COMPACT COMMISSION, I FOLLOWED THIS OUTLINE. PLEASE RETURN
TI

April 2, 1981 talk to Ronan Chamber of Commerce

LAND OWNERSHIP ON FLATHEAD RES... 7,000/125,000 ACRES OF PROJECT
BIA WAS CHOSEN TO FILE FOR PROJECT PARTICIPANTS
FLEXIBILITY IN NEG.
50,000 CFS RIGHT AT NOXON COUPLED WITH 70 YR RECORD 21,000cfs
3,150 vs 16,000

FORMAL NEGOTIATIONS WITH:
USDI & USDA
N. CHEYENNE, CONF. SALISH & KOOTENAI, ASSINIBOINE & SIOUX OF FORT PECK,
& STRONG INDICATIONS THAT ASSINIBOINE & GROS VENTRE OF FORT BELKNAP & CHIPPEWA-CREE OF ROCKY BOY'S WILL ENTER INTO NEGOTIATIONS

* FLATHEAD TRIBES AMONG THE FIRST TO ENTER INTO NEGOTIATIONS

PRELIMINARY MATTERS:
- NEGOTIATING AUTHORITY
  a. TRIBES
  b. COMMISSION
- REPRESENTATION
- FEDERAL AGENCY INVOLVEMENT
  a. JUSTICE
  b. BIA
- RELATIONSHIP TO ADJUDICATION
  TRIBES HAVE BEEN CONCERNED THAT A COMPACT MIGHT BE SUBJECT TO MODIFICATION BY WATER JUDGE, SO MUCH DISCUSSION HAS CENTERED ON THE FATE OF A COMPACT, SHOULD ONE BE FORMULATED... PRELIMINARY DECREE, FINAL DECREE, LEGISLATIVE & CONGRESSIONAL RATIFICATION, TRIBAL RATIFICATION

- FUNDAMENTAL UNDERSTANDING REGARDING THE RESERVED RIGHTS DOCTRINE
- CONFIDENTIALITY REQUIREMENTS
- RELATIONSHIP TO LITIGATION

THE SUIT AGAINST MONTANA'S WATER USERS, FILED IN BEHALF OF ALL THE TRIBES BY THE JUSTICE DEPT. HAS BEEN A CONCERN OF INDIVIDUALS THROUGHOUT THE STATE AND IS THEREFORE A CONCERN OF THE COMMISSION...

LITIGATION WILL CONTINUE AS WILL NEGOTIATION, BUT LITIGATION WILL BE PURSUED PERHAPS MUCH LESS VIGOROUSLY WHILE NEGOTIATIONS ARE UNDERWAY.

A SATISFACTORY AGREEMENT WOULD RESULT IN THE SUIT BEING DROPPED BY SIGNATORIES TO A COMPACT

- APPROACHES TO AN EXCHANGE OF TECHNICAL INFORMATION THAT WILL ALLOW QUANTIFICATION OF THE RESERVED RIGHT

PRINCIPAL ISSUES TO BE RESOLVED:

1. PRIORITY DATES - RESERVATION WAS ESTABLISHED IN 1855 BY THE HELLGATE TREATY... SENIOR
2. CLAIMS TO GROUNDWATER RIGHTS
3. QUANTITY OF WATER REQUIRED TO SERVE THE PURPOSES FOR WHICH THE LAND WAS RESERVED
4. EFFECTS OF THOSE USES ON NON-INDIAN USERS, ADJACENT TO THE RESERVATION
5. ADMINISTRATION OF A COMPACT, IN OTHER WORDS, WHO WILL ADMINISTER RIGHTS AND ENFORCE COMPLIANCE?

3 AREAS IN WHICH TECHNICAL WORK IS CERTAIN TO BE ESSENTIAL:

1. A DETERMINATION OF IRRIGABLE LANDS ON THE RESERVATION:
   SOILS SURVEYS → LAND CLASSIFICATION
   ECONOMICS . . . PERHAPS

2. A DETERMINATION OF EXISTING WATER USES ON LANDS AFFECTED BY RESERVED WATER RIGHTS:
   AERIAL PHOTOGRAPHY
   REMOTE SENSING

3. A DETERMINATION OF WATER AVAILABILITY:
   USGS STREAM GUAGING

S. Brown

M E M O R A N D U M

TO: File

FROM: Program Manager

SUBJ: Ideas and concerns expressed by representatives of the Compact Commission and the Flathead tribes at a meeting in October, 1979. (From H. Loble's notes.)

DATE: July 8, 1980

Al Chronister: Should an agreement be reached, he believes that the federal government would not interfere with the tribe's wishes.

On Parens patria: Chronister thinks a compact would be binding on state water users. Tony Rogers thinks it would not legally bind some citizens. Certain users are not required to file under SB 76 (domestic and stockwater use s are not required to be filed). Such users may, following a compact, file a class action suit, challenging the agreement.

Tony Rogers: He is uncertain how proceedings would be suspended during negotiations and is concerned that the passage of time in these negotiations might cause prejudice among judges, particularly in the event that negotiations fail.

Henry Loble: The state will be careful not to discuss these negotiations with federal agency representatives unless tribal representatives are present.

Tony Rogers: Winters Doctrine is open ended. The tribes will want to consider uses other than irrigation. Loble agreed we would. Rogers asked: How will Montana justify its future needs? He is also concerned that the tribes will be providing all the data. He doesn't want it to be a one way exchange. BIA may have much streamflow data.

Tony Rogers: The tribes would like to know what information will be needed and how it will be exchanged.