

RESERVED WATER RIGHTS
COMPACT COMMISSION



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STATE OF MONTANA

November 12, 1987

Chairman Jack Galt
Members of the Commission

Gentlemen:

During its December 10 meeting, the Commission is scheduled to reassess its policy on the open meeting right-to-know and right-to-participate provisions of state law and to consider procedures that include in its deliberations participation by other claimants of water rights when the same water is subject to Commission negotiations with an Indian tribe or federal agency.

In addition to the need for clear-cut legally compatible established guidelines for its own benefit, it should be remembered that the Commission at its last negotiation session with the Confederated Salish and Kootenai Tribes of the Flathead Reservation, November 18, 1985, agreed to research state law and come to the next session with its position on who would be allowed to attend future sessions. Tribal representatives on at least two occasions asked if the Commission position on the issue was based on law or was just Commission policy.

Enclosed for your consideration prior to the meeting is, along with supporting rationale, a motion I intend to propose as future Commission policy.

Review of early Commission records indicates that in an attempt to appease some tribes who apparently had objected to open meetings and because of concern over the dampening effect of opening negotiation sessions to the public and news media, the Commission assumed with reservations, an interpretation of the open meeting, right-to-know, and right-to-participate laws that rationalized as serving the interest of the state, closing meetings on insistence of a Tribe.

In 1985 that approach was challenged by claimants (who had been excluded from the proceedings) to ownership of rights to the same water for which the Commission was negotiating ownership with Tribal officials.

On November 18, 1985, Commission spokesman Urban Roth elaborated on the Commission's official position on the issue. He told the Salish and Kootenai negotiators that the Commission would consider requests to close sessions on a case by case basis but retained the right to oppose closed sessions.

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The position was rejected by tribal spokesmen who requested that sessions be closed to all but the Commission, the tribes and the United States, and that representatives of the Governor, the Attorney General and the Department of Natural Resources be excluded from the meetings. Also that positions and information presented be held in confidence by the Commission to prevent use against the tribes in case of litigation if negotiations fail. Earlier the tribes had objected to open meetings on the grounds that public discussion could be used for political purposes against them.

Here it is appropriate to note that, one:

The same tribal and federal officials negotiating with the Commission for quantification of federal rights are simultaneously preparing for litigation with the state and are privy to all information and positions of the state commission, and two:

Federal officials as well as some tribes have demanded as a condition of negotiation that representatives of the Governor, the Attorney General and the Department of Natural Resources be fully informed and involved in negotiations and in fact curtailed negotiations until a commitment to that effect was signed by the Governor of Montana and deliberated to the Secretary of the Interior.

From the time the issue surfaced the Commission has been apprehensive that regardless of hoped for benefits, closing meetings was skating on legally thin ice. After listening to one of the state's leading authorities expound on the subject during a seminar on closed meetings attended also by Program Manager Rundle on Chairman Galt's suggestion in Kallispell October 14, there is no question in my mind the apprehension is well founded.

In view of the substance of objections, objective interpretation of the law and the fact that the only compact consummated by the Commission in its eight years of existence was with a reservation that did not object to open meetings, the Commission will do well to reconsider the value of appeasement and adopt a policy that more clearly reflects the intent of the law.

Attendance and Participation of Non Federal Reserved Right Claimants

The Commission, as part of Montana's water right adjudication authority, has the responsibility of negotiating with tribes and federal agencies for ownership and quantification of claimed federal reserved water rights in Montana. Its legal and moral responsibility is to represent the interests of the people of the state.

A major and obvious conflict faced by the Commission is that many of those claims are for the same water that has previously been claimed and put to beneficial use under state law or other justification. The conflicting claims run into the hundreds - maybe thousands - if Western tribes assert claims not just on the reservation but in all drainages in Western Montana as indications are they will.

In many of those cases compacting recognition of federally reserved rights will result in an acre foot for acre foot reduction of a right that has previously been used and recognized under state law. Many of the contested state rights have been exercised for generations. Many were paid for in the purchase price of the land.

The issue is compounded because few federal reserved water rights have been previously claimed and under federal law have not had to be put to beneficial use to maintain ownership as is the case with Montana law.

Claims for state water rights were recognized and preserved in Article IV of the Fort Peck Compact which provided for protection of existing non Indian use of water recognized under state law.

The issue was easily dealt with there because it was apparent early in negotiations that sufficient unclaimed water was available from the Missouri River bordering the reservations that could be and was used to satisfy claims of both Indians and non Indians.

However, no such quantity of unclaimed water exists to satisfy anywhere near the amounts under claim in other areas of the state where dual claims exist. The fact which stands out with abundant clarity in our dealings with the Flathead Reservation where claims for federal reserved rights and claimants for other rights far exceed available water has focused attention on the part the non federal reserved right claimant be authorized to play in negotiation proceedings and raised the specter of court resolution of the issue.

Herein lies the problem: Because of deficiencies in state law and because the Commission has not utilized its rule making authority to correct the fault, claimants of rights in drainages where federal reserved rights are being negotiated are denied rights enjoyed not only by federal right claimants but other state claimants in drainages not involved in negotiations.

Under existing procedure, where no negotiations for federal reserved rights are involved, all claims for water rights, state or federal, are filed with the state by the same date and go in a preliminary decree where all claimants are treated equally in regard to access to information on other claims, the right to be heard by decision making authorities, notification of proceedings, etc.

However, if a tribe or federal agency chooses to negotiate, that tribe or agency's claims do not go into the decree until a compact has been successfully negotiated and ratified by the state or negotiations have been officially terminated.

During negotiations some of which have been going on for years, tribes supported by Department of Interior lawyers and expert witnesses have been free to present and argue their claims for reserved water rights to the Commission, to the exclusion of other claimants. (Federal agencies have not objected to open meetings.)

Neither statutes or official Commission rules provide equal opportunity for presentations, hearing or consideration of those other claimants by the Commission, even though the claims are for the same water and some may, and in some cases undoubtedly do, have a legally superior right.

Using the case of an Indian tribe negotiating for reserved rights as an example: It is not until after the Commission, the tribe and the Department of the Interior have agreed on a compact stipulating ownership and quantification of the tribe's rights and the compact has been agreed upon and ratified by the legislature and signed by the Governor and finally gone into a preliminary decree that non Indian claimants have legal opportunity to raise objection to compact provisions they feel have deprived them of legitimate water rights.

The Irony is that if the court sustains an objection and the tribe claiming the water will not recede from the negotiated agreement, the entire compact is declared void and years of effort have been in vain.

The other option available to the non Indian claimant who feels he has been badly treated, is to marshal sympathetic forces and attack the compact while it is before the legislature for ratification. Again, because the legislature has no authority to amend a compact, its only recourse if it agrees with the complaint is to refuse ratification and the entire compact is void.

The point isn't whether the claims of the non federal reserved right claimants are justifiable or not. The main point is whether they are receiving equal protection and consideration under the law and if the open meeting right-to-know and to-participate provisions of the constitution are being complied with.

It takes a considerable stretch of the imagination, implied loopholes, later legislative hearings and a day in court after ratification notwithstanding to presume the intent of the drafters of Montana's constitution intended that a public financed decision making unit of state government such as the Commission be granted the power to arbitrarily exclude from participation in its deliberations one side of a controversy until agreement with the other had been reached.

It is time, I feel, for the Commission to face up to and deal with the issue. The enclosed proposed motion presented for your consideration is intended to accomplish that.

Sincerely,



W. Gordon McOmber

Enclosure

c: Larry Fasbender
John North
Clay Smith
Marcia Rundle