DRAFT MEMO

TO: Jack Galt, Chairman; Chris Tweeten, Vice-Chair
FROM: Marcia Rundle, Counsel
DATE: November 19, 1987

Re: Application of Open Meetings Statute to Negotiations with Indian Tribes

An Attorney General Opinion has been requested on the issue of whether the director of the Department of Fish, Wildlife and Parks can negotiate in closed sessions with tribal representatives to resolve conflicting state and tribal hunting and fishing regulations on the Flathead Indian Reservation. Although this question does not address the authority of the Compact Commission to close negotiating sessions as anticipated under circumstances defined by current Commission policy, it is my recommendation that the Commission should respond to the invitation from the Attorney General's office to comment on the draft opinion.

While the issue has not to my knowledge been addressed, it would seem that Indian tribes are no less entitled to claim constitutional rights to privacy than are corporations. During negotiations with the Compact Commission, tribes have asserted privacy rights to protect the confidentiality of information supporting their positions in negotiations. Both the Northern Cheyenne and the Confederated Tribes anticipated the need to assert such a right in 1980; the Confederated Tribes did assert the right in one session with the Commission held on November 18, 1985.

In the circumstances at issue, a narrow exception could be drawn that parallels the position that the Commission adopted in 1980 and reaffirmed in 1985: that is, that all negotiating sessions with tribes shall be open to the public and all documents submitted to the state shall be available to the public, except when a determination is made by the appropriate state official that the negotiating session or documents must be treated as confidential to protect the tribe's right to privacy, and the tribe indicates that no further negotiations can occur unless the sessions and the information are kept confidential.

The Montana Constitution

The constitutional provision directly at issue provides as follows:

> Right to know. 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. Article II, Section 9, Montana Constitution. (emphasis added).

However, from a review of the constitutional convention transcripts, and from Judge Bennett's opinion in the Belth case, it is clear that three constitutional provisions are involved in this issue:

> An extraordinary theme ran through the proposal and consideration of three entirely novel sections of the 1972 Constitution. They were the 'right of participation' Section 8, sometimes called the 'open meeting' section; the 'right to know' Section 9, and the 'right to privacy' Section 10, all found in the 'declaration of rights' Article II. The theme was that except as it may be limited by the right of the individual to personal privacy, there is to be in Montana a broad-based, pervasive and absolute right of citizens to know what is going on in their government and a right to participate in government untrammeled by the government itself. Cited by Justice Sheehy, dissenting from the holding in Belth v. Bennett, 44 St. Rptr. 1133, 1140 (1987).

In the decisions rendered to date, the Montana Supreme Court has weighed these protections of the right of the public to participate in the government decision-making process against the right of the individual or corporation to privacy.

Montana Supreme Court Cases

In 1981, the Montana Supreme Court held that corporations, as well as individuals, are covered by the exception to the "right to know" constitutional provision when demands of privacy clearly exceed merits of public disclosure. Mountain States T & T v. PSC, 654 P.2d 181 (1981).

In that case, the Court discussed the necessity of evenhanded application of the right of privacy to entities other than individuals because of the competing constitutional rights of due process and equal protection guaranteed by both state and federal constitutions. While I have not yet researched cases to determine whether courts have explicitly held tribes to be "persons" within the meaning of these constitutional provisions, I assume here that tribes are at least as entitled to assert these constitutional rights as are corporations.

If it is correct that tribes are entitled to constitutional guarantees to privacy, due process, and equal protection, then the issue is whether information concerning tribal proprietary interests in natural resources, including water, fish and wildlife, timber, minerals, etc. can be protected from disclosure in negotiating sessions with state representatives because the tribal rights outweigh the public right to participate in government decision-making.

In Mountain States v. PSC, the Court held that trade secrets submitted to the PSC to support the position of the utility in rate hearings could be protected from disclosure. The Court found that in the circumstances presented in Mountain States, the interests of the public could be protected by the PSC and the consumer counsel having access to the information in the ratemaking determination and the interests of the corporation in protecting information concerning its property rights could be simultaneously protected by limited dissemination of the information. Mountain States, at 189.

In a 1987 case, the Montana Supreme Court affirmed that corporations are entitled to the privacy exception in the state Constitution. Belth v. Bennett, 44 St. Rptr. 1133. To balance the competing constitutional rights at issue, the court applied the two-part test that the court has established for determining whether an asserted constitutional privacy interest is sufficient to overcome the open meetings requirement.

> The test is whether the person involved had a subjective or actual expectation of privacy and whether society is willing to recognize that expectation as reasonable. Citing Missoulian v. Board, 675 P.2d 962, 967 (1984)

Belth, at 1137. The court went on to state:

> ...time, place and status are factors in the reasonableness determination. But the determination should include consideration of all relevant circumstances, including the nature of the information sought. Citing Missoulian, 675 P.2d at 968.

Belth, at 1137. Upon analysis, the court held that the privacy interests at stake were substantial and that the insurance companies' expectations of privacy were reasonable. Belth, at 1138. That analysis included consideration of the statutory scheme under which insurance companies are regulated by the state of Montana, the nature of the information, and the availability of the information through other means.

The legislature specifically authorized the department to "negotiate and conclude" an agreement with the Confederated Tribes and specified in the authorizing statute that "any agreement entered into under (the statute) must also satisfy the requirements of Title 18, chapter 11. Section 87-1-228, Mont. Code Ann. (1987).

The expressed intent of the legislature as set forth in that statute is important evidence of the interests of the tribe and the public in the negotiations currently at issue:

> Whereas, by treaty of July 16, 1855, between the United States of America, represented by Isaac I. Stephens, governor and superintendent of Indian affairs for the territory of Washington, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend Oreille Indians, the said Indians were given the

> exclusive right to fish and hunt on the Flathead Indian reservation and the privilege of hunting in their usual hunting grounds on large areas of Montana; and whereas, nonmembers of the tribes have the right to hunt and fish on Indian lands by sufferance of such tribes only; and whereas, it appears to be to the common advantage of the state and such Indian tribes that hunting and fishing regulations and privileges on other lands of the state and on Indian lands shall be uniform and that hunting and fishing on such Indian lands shall be in common with the public, now, therefore, the department may negotiate and conclude an agreement with the council of the Confederated Salish and Kootenai Tribes of the Flathead Indian reservation...Section 87-1-228, Mont. Code Ann. (1987).

At a minimum, this language would appear to recognize the substantial treaty interests of the Tribes, and to identify substantial public interests in the resolution of differences between hunting and fishing regulations through negotiations between the department and the Tribes.

One of the factors employed by the Court in both the Mountain Bell and Belth decisions in weighing the private interests and the public interests involved was whether the public interest in access to the information was otherwise guaranteed. In the Mountain Bell case, the access of the PSC and the consumer counsel to the information was found to protect the public interest; in the Belth case, the availability of other comparable information was found to protect the public interest.

In the current negotiations, the public has been kept informed through meetings held by the governor and the director with the elected representatives of the public and through public hearings with the public. It is my understanding that the director has committed to continuing that process of informing the public, and that meetings of the Fish and Game Commission to discuss the agreement will also be open to the public. Thus, the public has access to the information about the recommended agreement without being party to the actual negotiations. Consideration of the public interest by a court might also include an evaluation of the effect of open negotiations on the willingness of the parties to discuss interests candidly and to consider controversial or politically difficult options.

Governing Montana Statutes

In addition to the open meetings statute, a specific statutory scheme governing agreements between the state and tribal governments is involved in the question submitted to the Attorney General: The State-Tribal Cooperative Agreements Act, Title 18, Chapter 11, Mont. Code Ann. (1987). The statutory authorization to the Compact Commission to negotiate quantification of tribal water rights is a separate and distinct statute. Title 85, Chapter 2, Part 7, Mont. Code Ann. (1987).

State-Tribal Cooperative Agreements Act:

The State-Tribal Cooperative Agreements Act authorizes public agencies to enter into agreements with tribal governments "to perform any administrative service, activity, or undertaking that any of the public agencies or tribal governments entering into the contract is authorized by law to perform"(Section 18-11-103(1)), requires that any such agreements must be "authorized and approved by the governing body of each party to the agreement"(Section 18-11-103(1), and that such agreements must be approved by the attorney general of Montana (Section 18-11-105). Limitations on the agreements are specified, including applicable federal laws and tribal laws. Section 18-11-110.

It is clear that regulation of hunting and fishing is a "service, activity, or undertaking" that the DFWP is "authorized by law to perform". Although it is not clear from the statute, presumably the Fish & Game Commission is the "governing body" of the DFWP and the Commission would have to authorize and approve any agreement negotiated by the DFWP, in addition to the approval by the Attorney General.

Evaluation of the application of the open meetings statute to the current negotiations must include recognition that these negotiations are unique in kind, that they are specifically authorized by statutes that explicitly recognize public interests in successful negotiations between state agencies and tribes, and that they are subject to approval by the governing body of the DFWP, presumably the Fish & Game Commission, an entity that clearly is a public agency subject to the open meetings law. Under the terms of the State-Tribal Cooperative Agreements Act, neither the department director nor any other Individual can, bind the state to the terms negotiated with tribes concerning hunting and fishing regulations. The agreement must be approved by the Fish & Game Commission.

Water Rights

As part of the general stream adjudication, the legislature has established the Montana Reserved Water Right Compact Commission, Section 2-15-212, Mont. Code Ann. (1987), and has authorized the commission to:

> ...negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts authorized under 85-2-701. Section 85-2-702, Mont. Code Ann. (1987)

Section 85-2-701(1) expresses the intent of the legislature:

> ...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 following expression of intent recognizes the interests of the public in having a unified water adjudication:

> Because the water and water rights within each water division are interrelated, it is the intent of the legislature to conduct unified proceedings for the general adjudication of existing water rights under the Montana Water Use Act. Section 85-2-701, Mont. Code Ann. (1987).

Compacts negotiated under this statute must be ratified by the legislature of Montana and by the governing body of the negotiating tribe, and must be approved by the appropriate federal authority. Section 85-2-702(2) Mont. Code Ann. (1987). The Compact Commission has no independent authority to bind the state; its authority is limited to concluding compacts and submitting them to the legislature for ratification.

The process employed by the Compact Commission since 1980 has been structured to keep the public informed about negotiations through open commission meetings, through public hearings in communities close to federal reservations, and through Commission participation in business, political and agricultural meetings. Thus, state citizens have three distinct forums in which to participate in the compacting process: (1) Commission meetings and public hearings on proposed compact provisions (hearings have been held with regard to the Fort Peck compact and with regard to negotiations with the National Park Service); (2) legislative hearings on compacts submitted by the Commission; and, (3) water court proceedings which provide water users a right to object to the provisions of the compact.

In 1980, on the advice of counsel, the Commission adopted a policy that was reaffirmed in 1985 that all commission negotiating sessions would be presumed open, but that the Commission reserved the right to close sessions with tribes or federal agencies to protect the confidentiality of information submitted by the other party, upon a determination that the privacy rights of the other party outweighed the public right to observe negotiations and that negotiations could not otherwise proceed. It should be noted that only one three-hour part of one session has ever been closed. That session between the Confederated Tribes and the RWRCC was held on November 18, 1985 in the State Capitol in Helena.