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State of Montana

Reserved Water Rights Compact Commission

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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 entire76 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

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up with some agreement as to the administration waters on the Flathead Reservation, we could probably 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 litigated 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 occurrence 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 negotiation 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 posture and we are continuing to make that offer and we are continuing to be available 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 negotiations with us, that was the gist 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 to 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 Attorney 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. Tweeten: 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 issue 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 way 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 accordance 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 reinstate 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 negotiating 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 determine 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 jurisdiction. 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 credibility, 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.