

Corrections to the transcript of the September 11, 1985, meeting of the Montana Reserved Water Rights Compact Commission and the Confederated Salish and Kootenai Tribes - corrections submitted by the State of Montana

page 1, paragraph 1, line 1 - omit "Chairman of the"  
(following Michael Pablo)

page 1, paragraph last, line 6 - Add "Flathead Irrigation  
Project water users" (following Control)

page 1, paragraph last, line 7 - Add "Flathead Irrigation  
Project water users" (following Control)

page 4, paragraph 1, line 2 - change "you" to read "your"

page 4, paragraph 3, line 4 - change "constricts" to read  
"constrains"

page 4, paragraph 3, line 6 - "constituency" is misspelled

page 4, paragraph 4, line 1 - insert after "compact" the word  
"Commission"

page 10, paragraph 4, line 5 - "accommodate" is misspelled

page 12, paragraph 1, line 4 - "Trochlel" is misspelled

page 19, paragraph last, line 5 - "Moiese" is misspelled

page 28, paragraph 3, line 1 - change "to" to read "into"

page 28, paragraph 3, line 8 - change "constraint" to read  
"constrain"

page 28, paragraph 6, line 2 - change "our" to read "out"

page 34, paragraph 1, lines 8, 9, 11 - "Aquifer" is  
misspelled three times

page 35, paragraph 1, line 3 - "Aquifer" is misspelled

page 35, paragraph 4, line 3 - "occurred" is misspelled

page 36, paragraph 7, line 4 - "aquifers" is misspelled

page 39, paragraph 2, line 6 - "agricultural" is misspelled

page 39, paragraph 6, line 2 - "Moiese" is misspelled

page 40, paragraph 1, line 2 - change "dominate" to "dominant"

page 42, paragraph 3, line 6 - omit the first "would"

page 42, paragraph 3, line 16 - "Tennant" is a proper noun, and the first letter should be capitalized

page 51, paragraph 10, lines 2, 6 - "assessable" is misspelled and should not be confused with accessible.

page 60, paragraph 9, line 1 - change "serious" to read "seriously"

page 61, paragraph 6, line 2 - change "redds" to "rivers"

Extra copy

Joe -

Sept. 11, 1985  
People Present: Pablo

<u>Name</u>	<u>Representing</u>
Joe Dupuis	CSKT
Gordon McArnder, Chairman	Compact Commission
Jack Galt, Vice Chairman	"
Audrey Roth	"
Ave Gmford	"
Scott Brown	"
Urban Roth	"
Marcia Rundle	"
Elsie Armstrong	"
Rich Aldrich	Interior
Bob Delk	"
Ron Therriault	CSK Tribes
John Paulson	MT AG's Office
Mike Pablo	CSK Tribes
Dan Decker	"
James Goetz	"
Chuck Stipe	L 13 C
Alan Mulkern	Joint Board of Control
Peg Trochlel	CSK Tribes <del>(BIA)</del>
Tom Bateridge	"
BERNARD BURNHAM	BIA - PORTLAND AREA
John Neuman	BIA - Flathead Agency
AL SPANG	BIA - FLATHEAD AGENCY
Christa Ull - McDonald	BIA - Flathead Agency

THIS TRANSCRIPT IS A PRELIMINARY DOCUMENT. IT IS SUBJECT TO  
REVIEW AND CHANGE AT THE SUBSEQUENT MEETING OF THE COMPACT  
COMMISSION AND THE CONFEDERATED SALISH AND KOOTENAI TRIBES

Meeting of the Reserved Water Rights Compact Commission  
and  
The Confederated Salish and Kootenai Tribes

Reporter's Draft Transcript

September 11, 1985  
Pablo, Montana

NEGOTIATING SESSION  
RESERVED WATER RIGHTS COMPACT COMMISSION  
and  
THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
SEPTEMBER 11, 1985

NEGOTIATORS:

Michael Pablo, Chairman of the Confederated Salish and Kootenai Tribes, Presiding Chairman

Others Representing the Confederated Salish and Kootenai Tribes:

James Goetz, Attorney; Ron Therriault and Dan Decker;

Representing the Montana Reserved Water Rights Compact Commission:

Gordon McOmber, Chairman; Jack Galt, Ave Linford; Audrey Roth; Urban Roth; Scott Brown, and Marcia Rundle.

OTHERS PRESENT:

Joe Dupuis, Confederated Salish and Kootenai Tribes  
Richard Aldrich, Field Solicitor, Department of the Interior  
Bob Delk, Rights Protection Officer, Bureau of Indian Affairs  
John Paulson, Montana Attorney General's Office  
August Mueller, Bureau of Indian Affairs, Portland Area  
Chuck Stipe, Joint Board of Control  
Alan Mihkelsen, Joint Board of Control  
Peg Trochlel, Confederated Salish and Kootenai Tribes  
Tom Bateridge, Confederated Salish and Kootenai Tribes  
Bernard Burnham, Bureau of Indian Affairs, Portland Area  
John Neuman, Bureau of Indian Affairs, Flathead Agency  
Al Spang, Bureau of Indian Affairs, Flathead Agency  
August Mueller, Flathead Irrigation and Power Project  
Teresa Wall McDonald, Bureau of Indian Affairs, Flathead Agency  
Elsie Armstrong, Reserved Water Rights Compact Commission.

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P R O C E E D I N G S

The proceedings started at 9:00 a.m., September 11, 1985, in the Confederated Salish and Kootenai Tribal Complex.

Mike Pablo, member of the Tribal Council presided at the negotiation session.

Due to equipment failure the introductions of representatives of the Confederated Salish and Kootenai Tribes were not recorded.

Mr. Pablo introduced Ron Therriault, Dan Decker, Jim Goetz, Bob Delk, Peg Trochlel, Tom Bateridge, Bernard Burnham, John Neuman, Al Spang, and Teresa Wall McDonald.

MR. MCOMBER: (Some of Mr. McOmer's introductions were not recorded due to the equipment failure.) Scott Brown, Program Manager for the Commission; Jack, Audrey, have been around since the beginning and Mrs. Armstrong, Elsie Armstrong, is the secretary that was recently obtained, as I indicated to you, and John Paulson with the Attorney General's Office who is an observer and an advisor to the Commission. I think that is the amount of people that came with us, Mr. Chairman.

MR. PABLO: Chuck Stipe, from the Joint Board?

MR. STIPE: Yes, I am Chairman of the Joint Board and this is Alan Mikhelsen. Alan is our Secretary. We represent the irrigators.

MR. MCOMBER: Joint Board of what, Chuck?

MR. STIPE: The Joint Board of Control, it is the elected representatives of the irrigators.

MR. MCOMBER: Of what districts?

MR. STIPE: The three districts, and state. The Joint Board is made up of total membership of each of the three boards.

MR. MCOMBER: Oh

MR. DECKER: I believe we missed Rick Aldrich from the solicitor's office.

MR. ALDRICH: Thanks, Dan.



MR. PABLO: After the last meeting there was a couple of issues that was left open. This is from your letter, Gordon, to Joe Felsman. And, we can start with open meetings and public participation---that was kind of left open last time.

MR. MCOMBER: Would you have any comment on that at this time? We would like to have that added to the agenda.

MR. PABLO: Well, I was just going to start there.

Mr. McOmber: Okay.

MR. GOETZ: Mr. Chairman, I have suggested to the Chairman that we start here because there is some people from the Joint Board of Control here and the whole issue, newspaper participation and the open meetings issue, I think, was left unresolved.

I made some comments in the last minutes, but I indicated that we would have to take it up with the Tribal Council. And we recognize that the state open meetings law but we don't think we are bound by that law, and the Council has taken it up then and we feel that the meetings should be closed---that if we are going to make meaningful progress in negotiations, then we need to have the parties here and not forces who may be divisive or make use of the information for other purposes. And I think anybody who has been in a negotiating situation, a serious one, knows the importance of having the parties there and having some of the sensitive matters kept confidential.

So that's the position we've taken, I think we need to lay that on the table right at the beginning since there are people who are not either representing the Confederated Tribes or the Compact Commission here present at the meeting, and I think we have to resolve that before we get on with other business.

MR. ROTH: Mr. Chairman, may I ask him a question? You indicated that certain matters should be kept confidential. Are you suggesting that the Commission not discharge its obligation to inform the public and those interested as to the progress of negotiations? Keep the---basically the Commission's constituency---advised as to what is transpiring?

MR. GOETZ: Well, you know, I can't tell you how to run your ship, obviously. But I think that when you are talking about a negotiating situation, I think you recognize that there are matters that---at least for the time being, during the process of negotiation---have to be maintained as confidential. And I think that's pretty important in terms of long term effort of reaching agreement.

I don't know if you have looked at your position under the open meetings law or done any research on it. I don't know what your position has to be, but I feel that when you have certain types of meetings, you close them. For example, when you're discussing tactics, in terms of approach toward the Confederated Tribes, it seems to me you close those tactical meetings. So there are lines drawn under that open meetings law, even by you, I suspect.

MR. ROTH: Well, that's true. We have closed sessions and we have open sessions but our past practice has been that all negotiating sessions have been open to the public. As far as I know there hasn't been an exception to that. While we do go on and off the record on occasion, nevertheless, the---I guess what you would call public participation, stays there. They are permitted to stay there. And while I've been negotiating for the Commission, we've not excluded anyone from the negotiating sessions whether we've been off the record or on the record. There has not been a chilling atmosphere that has evolved out of that kind of open discussion.

As a matter of fact, the Fort Peck Compact, as you know, was negotiated in just that kind of atmosphere. So, we don't particularly feel that the fact that the public is at these sessions, necessarily restricts or constricts them. As a matter of fact, we feel pragmatically that in order to serve our constituency---which happens to be the entire state of Montana---that in a sense, it is essential that those parties who have an interest in the compact be present and be able to participate in the sense---or attend, I should not say participate, there is a difference.

The Compact is an autonomous body that is clothed with the authority to negotiate compacts with entities who claim reserved water rights. We are the negotiators---we intend not to abdicate nor to transfer that authority to anyone else. Nevertheless, we prefer to counsel with DNRC, the Attorney General's Office---as a matter of fact, we encourage those agencies, plus the Governor's Office, to have a representative at each and every negotiating session, so that the three main branches of government are totally involved and informed about the negotiating process. They do not participate in the negotiations, but they do attend and we do listen to their suggestions.

By the same token, public members ought to attend. We encourage that attendance. Again they will not participate in the negotiations, but they do have an interest that's intimately involved in the results from negotiations. And I think that our initial position is that they should be permitted to attend. I am not even sure---you did pose a question whether we've researched the implications of the open meeting law---I haven't,

vis-a-vis closing a negotiating session to the public. But I can perceive that if we don't fulfill the requirements of the Montana open meeting law, while you may not be bound to it, nevertheless, the Compact Commission can very well be bound to it, and it could very well sound the death knell to any compact that would be negotiated which violated the terms of the open meeting law in which the public was not permitted to attend. I haven't researched it to that extent but I perceive that as probably the worst case situation that could evolve out of a closed negotiating session.

I suppose there are occasions when we could close it, because you could, I suppose say that, what we are trying to do is settle a law suit or a potential law suit. Right now we've got an adjudication, comprehensive adjudication, of all Montana water rights in progress and basically that is, in a sense, a law suit, so you can say we are negotiating that. But I think we are drawing it a little bit too far to say that kind of characterization would somehow insulate us from the implications of the open meeting law.

MR. MCOMBER: Mr. Chairman, the bottom line for us has been that the tribes says that they will not meet with us or negotiate if the meeting is open, then, obviously, we don't negotiate---but, the decision in effect is up to you.

Mr. GOETZ: That sounds like an ultimatum.

MR. ROTH: Mr. Chairman, I don't know that you mean it as an ultimatum, but certainly that---okay.

MR. MCOMBER: But you know we have---given the closed meeting law---at least we had to offer...

MR. GOETZ: Well, I don't think you can say that, when your counsel says he hasn't researched it, although he has an intuitive opinion on it. If you're saying that we have to take that position because we have dispositive feeling about the open meeting law, when your counsel hasn't researched it, I think that's not a good faith position to take. I---there is no question that the law is out there, and there is no question in my mind that there is some concern. But also, I can envision some real problems with the negotiations if we have the persons attending who are going to make use of the, I am not suggesting that this necessarily would be the case, but who are going to make use of the negotiations for their own purposes, which may detract from the progress. And I think what we should do is caucus on this issue, right at the outset. I wanted to raise it right at the outset because we have the people here from the outside and I thought we should be clear on that and it is something, Mr. McOmber, that you suggested that we address at

some point in the meeting. So, I hate to start right out with a caucus, but I think this is an important enough issue at the outset that we should do that.

MR. MCOMBER: Before we do that, let me expand a little on the situation we find ourselves in. You people represent the tribe or reservation and you represent the governing bodies; the Commission is a long, long, ways from enjoying that kind of authority. We have a House of Representatives with a hundred people, and some are Democrats, some are Republicans. They are businessmen, ranchers, sportsmen, ecologists. In getting this bill approved, then there is the Senate, there is the Governor, as Urban mentioned. We have an Attorney General who is independently elected, with opinions of his own, 800,000 people, many irrigation districts, many irrigators, and as a practical fact of life, we have to get the approval of those people, most of them anyway, to get this through the legislature and make it become law. So you have to understand that we have to communicate with these people at some stage in the game and we have to accept their input.

MR DECKER: I don't believe that the tribe was suggesting that you don't keep the public informed of the progress of the meetings. I don't think we have the intent of suggesting that. I think that that is probably a necessary part of the Commission's function is to keep the people informed of the progress of the committee. However as your counsel has also mentioned, that this, the Compact Commission, is a vehicle by which the State of Montana is utilizing negotiations, in a sense, in lieu of the adjudication process which is allowed by the McCarran Amendment. As counsel has pointed that out, I think you can use that line, that obviously the position is available to the Commission to say, essentially what we are talking about are settlement issues and what the Tribes are talking about with the State is talking about our proprietary interest.

And I think that the Tribes have the right to protect those proprietary interests, and I think the State also has obligation to---in the neogotiation process---to assist both sides in not hindering any negotiation process that discusses sensitive issues. I think part of the Tribes' concern---if you---all you have to do is read the local papers to realize part of the Tribes' concern in having people who are not parties to those negotiations present, and concern about the possibility that then those discussions being used in a fashion that hinders the whole negotiating process. I think we're coming to the table in good faith. We need to be open, keep those things on the table. We are talking about proprietary interests and we need to be ...(inaudible)... now.

And I agree with Mr. Goetz---You really did sound pretty much like an ultimatum---either the tribes are willing to talk about proprietary interests or there is no negotiations with non-member parties here. So that part concerns the Tribes. Again I just totally want to emphasis it is not our intent to say the Commission should not inform the public of the negotiation progress.

MR. MCOMBER: I want you to understand that I never meant it that way---I don't think the Commission ever did. But the question has arisen before and under the restraints of the law, we have a problem. Maybe we feel that the meetings should be closed, but you have to understand that we have perhaps a different law to operate under than you do. I certainly have no objections---I think it's a good idea to caucus---but I did want you to understand that we have some obligations and some practical public relations we have to keep up if any compact ever becomes law. Do you want to call that caucus now?

MR. ROTH: Mr. Chairman, couldn't we discuss this a bit. I know that it is sensitive to the proprietary---whatever proprietary information they have---I am sure that is true of every tribe and agency that we've negotiated with. But basically, whatever that information is is accessible in a lawsuit. There isn't any proprietary information that you can keep from the other party in a lawsuit, except perhaps how you are going to use that tactically to your advantage in the lawsuit. So there isn't anything that you have that isn't accessible to discovery---I don't care what it is, unless it's a consultant who you don't intend to utilize in the event of trial---we would still be entitled to the name of the consultant.

So, we realize that you some suspicion, but I think our success---and we haven't had a lot, but what success we have had in our negotiations, evolved out of the fact that, after the first Fort Peck Compact was sort of buried, the second one evolved out of a lot of communication---a lot of people being involved---a lot of people knowing what the issues are. As a matter of fact, we find that those people who might be most opposed to the compact or to a specific quantity of water or to a specific right which is recognized in an Indian tribe, that those people---those opponents, that---they actually attend the negotiating sessions where those kinds of issues are discussed---begin to understand what the other's position is. That includes your tribal members as well as others---people who are non tribal members.

So there is a benefit that flows from having an open meeting with regard to negotiations. I don't want you to be fearful of the fact that you are always going to be prejudiced. I don't think so, I think there are positive benefits that flow from

this. We will, of course---the state of Montana, is just as interested as you are in not compromising the litigation position by virtue of anything that transpires in these negotiations, and we certainly do intend---prior to getting into substantive negotiations---to have some sort of an agreement which provides that none of the information that is transferred, nothing that is said, nor positions taken will have any effect whatsoever in any lawsuit and---nor would it be admissible. If the information, of course, is data why, obviously, it would be admissible, but admissible based on discovery in a lawsuit.

So I think as far as prejudicing any litigation position is concerned, I don't think you would. That's number one; and number two, I think, you would find that having whoever wants to attend, attend, is actually beneficial to the ultimate success of the compact itself.

MR. PABLO: Jim, do you want a short recess?

MR. ALDRICH: Mr. Chairman, if I might---real quickly Jim---could you define a little bit the restrictions that the Tribe is really interested in having here? I think that, on behalf of the Department of the Interior, everybody knows that we are wearing many hats at these proceedings, and we are going to be representing not only the Tribes and it's interests, but there are some interests of the Flathead Irrigation Project that we have a contractual obligation to protect. There are some, not necessarily conflicting interests, of the Fish and Wildlife Service on the wildlife refuges that we are going to have some interest in. And in conducting these negotiations we would assume that we will have the opportunity to have whatever necessary expertise from within those various federal agencies available to us.

MR. GOETZ: We didn't, we don't have any problem with that. In fact, one of the issues that I think is scheduled, one of the issues that we didn't resolve last time, is who is speaking for the federal enclaves on the reservation, and I think the answer to that is you are, the Department of the Interior. And so in a sense, you are a quasi-party and that would go for the staff too. And I recognize there are two hats, the Flathead Irrigation Project represented by the BIA, and that's another item we've got on the agenda to discuss the the Flathead Irrigation Project. So I am not sure I can define the outlines of what we wanted to do here until we caucus, but I didn't, it wasn't intended to exclude the Department of Interior, of course.

MR. ALDRICH: If I could correct one thing you said, you called us a quasi-party. I think that it is the belief of the federal government that we have a very significant interest in the outcome of the negotiations and we are not here as a quasi-party.

MR. GOETZ: Well, that's the best I could think of---there were alternatives...(laughter) Well, why don't we caucus?

MR. MCOMBER: Could you suggest a room we might be in, Mr. Chairman?

MR. GOETZ: Well why don't you stay here, and we will go find us a room. Do you want to have a confidential caucus, also?

MR. ROTH: Well, we want a confidential caucus, yeh. If you've got this room bugged...(laughter)...tell us now. We don't want any spy dust on...(laughter)

CAUCUS - 10:00 A.M.

BACK IN SESSION - 10:15 A.M.

MR. PABLO: Are we ready to start again, Jim?

MR. GOETZ: Yes, we have had a chance to discuss our position. One thing, Mr. McOmber, I want to point out from the latest minutes---when we were discussing the open meetings issue---on page 41, on top of the page, one of the things you said, is "the policy that has been adopted with other tribes is that we let anyone in unless the tribes doesn't want them in." Is that the case?

MR. MCOMBER: That is what I meant to say, but after you left I was advised that that isn't what I said to you here.

MR. GOETZ: In other words, that's not then the case? So that...

MR. MCOMBER: Oh yes.

MR. GOETZ: So the tribes have had a veto and have had a right to exclude others that they don't want in?

MR. MCOMBER: Well, since I've been here, we haven't been confronted with that issue, but that was---I was advised that that was the policy in effect.

MR. ROTH: Well, that's what Chairman McOmber said---but I am not sure that that covers all the legal implications of the open meeting law. Obviously, as a matter of pragmatic fact, if you want someone excluded and you are not going to negotiate without that person excluded, you can say so. By the same token, the Commission might very well, under the obligations imposed by the open meeting law, be required to say, "well, we

can't meet here and we will have to meet somewhere else where you can't exercise that kind of authority as to who is in the meeting and who is not."

So, I think the Commission will have to take a second look at what the open meeting law means to the Commission and its negotiating meetings with agencies and Indian tribes, before we can really give you a definitive position. Nevertheless, we would like to---insofar as possible---try to convince you that it is in your best interests---and I truly mean that---this isn't posturing or facade---It is in your best interests---if you really do want to negotiate a compact, to have the disparate elements of society and government here to witness the negotiating process because it is in that way that we can best educate those people who need education---with regard to the negotiating process and why various compromises are reached with regard to some crucial issues.

I can't overstress that, and I really mean that. As we caucused we all paused a moment to think about that concept and how important it was to ultimately getting a successful compact with the Fort Peck Tribes. It was essential---it was the core---it was the core reason for having a successful meeting.

The second thing is that we don't want an exercise in futility. That means that, by violating---conceding to your position, and then violate the law, and then voiding whatever we've done. We don't want to do that. I thought of ways, perhaps, that we can accommodate your interests and our interests. One of them would be to require everyone who is in attendance to sign the agreement that whatever information they acquire at a meeting would not be used in any subsequent litigation or whatever we would agree to, has been agreed on, and require each and every person who attends to sign one of those agreements. That would be a way to protect some of your interests.

Another way might be possibly having some executive committee of each party caucus on some issues where you feel proprietary information would be disclosed to those persons you didn't want it disclosed to. I don't know whether that would pass constitutional or statutory muster, but that's another possibility. I am just throwing some things out so that we don't reach an impasse at this premature stage of these proceedings. I suggest that's something that we all can use our imagination and creativity to probably resolve and we shouldn't reach hard and fast positions at this time. But I don't think the subjects are up for discussion today necessarily involve any proprietary information.



MR. GOETZ: We reached a position in the caucus, and we're anxious also not to reach impasse at this early stage. We also agree that there is a need for both sides to research the state open meetings law more definitively, so here is what we suggest. I did want clarification on Mr. McOmber's statement in the previous minutes, but we agree that matters on this agenda that we've got scheduled today are not particularly sensitive. We're willing to proceed with negotiations today on the agenda items and we will consider any other items you want to bring up, but I don't want to make a commitment until we know what those are, and we will then go back and research before the next meeting the open meetings law and I assume you too.

And we want to make it clear that we are reserving the right to assert a confidentiality position in future negotiations and exclude parties, at this time, so you know where we stand on that. It may be that things will go smoothly, and one of the things we will want to look at is whether there is any abuse between the meetings of the issues, by that I mean this information spread publically, or use of the information for purposes that detract from the negotiations. But with those stipulations, we're certainly willing to proceed with the agenda items today. I want to make it clear---and I think you did, Urban, make it clear earlier---but I want to make absolutely clear, that members of the public do not participate here as parties and I want to make it specific to the Joint Board of Control since, of course, we have been in recent litigation with the Joint Board and two of the members are here sitting at the table---almost suggesting that they are parties. And it may just be an accident of the way you were seated, or you may feel you are parties, but I think it is crystal clear from both sides that members of the public do not participate, they are here only as observers.

MR. ROTH: That's correct. I do believe that I made our position crystal clear from the onset, that is we are the agency. Mr. McOmber, is the Chairman of that agency, who will negotiate a compact or, for a compact---that while members of the public and other agencies of government are in attendance, they do not participate in the discussions and they do not have right to participate in the discussions, except at the invitation of both of the parties and agreement by both parties that they can participate.

MR. GOETZ: Well, I suggest we move on with the agenda then.

MR. PABLO: Okay. We had exchange of technical information from the last meeting. I think Scott Brown was to contact Tom Bateridge, did he contact him?

MR. MCOMBER: Scott do you want to comment on that.

MR. BROWN: The exchange of technical information---well, there were---last fall, a few---two or three, perhaps---telephone conversations between myself, Tom and, on one occasion, Peg Trochelel, and we were not able to arrive at a mutually agreeable date to meet in Missoula or here or Helena to discuss those needs. One of the reasons was that we, the Commission and the Commission's staff, soon after that time became involved in the Fort Peck Compact and that took all of our time.

So I apologize on behalf of the Commission that that was never carried out. However, if the two Chairmen are willing, I think in a very short order we could discuss a very comprehensive list of technical needs right here. I'd be happy to go briefly into a discussion of what we---I'd be happy to initiate that or Tom or Peg, or anyone that you feel represents the Tribes, could add his or her comments---if you think that would be productive at this time?

MR. MCOMBER: Mr. Chairman, would you prefer that the two sets of technicians sit down together and come up with a list, or would you like to discuss it at this stage. In view of what Mr. Goetz has just said about the agenda, I think you should respond to that.

MR. PABLO: I think just have the two technical sides sit down and go over a list to bring back for comment.

MR. GOETZ: Well, how extensive---Scott, how extensive is your list?

MR. BROWN: I am sure that it is not completely comprehensive, but I think it is not extensive at all. It could probably be discussed---in fact, I have had only a brief opportunity to discuss it with our special counsel, Urban Roth, and he may, himself, in fact, wish to---because I know he had some thoughts of it, himself---on the issue, himself.

MR. PABLO: We hoped, probably, to get that list and bring it back to the counsel before, to get action on it for this meeting, but we missed the whole cycle.

MR. DECKER: Mr. Chairman, maybe what we should do is, then, after this meeting, possibly have the technical people get together and set up a time when they could get together and discuss technical measures rather than going in (inaudible) at this time.

MR. MCOMBER: Before that, Mr. Chairman---as opposed to us to coming in with a one-sided list---I believe that Scott should talk to your technical people and come up with a comprehensive list that represents viewpoints from both sides.

MR. ROTH: One thing, I think, preliminarily we absolutely need is the land ownership, and who is irrigating and who is not irrigating and what lands they are irrigating. That's essential from your standpoint and it's essential from our standpoint. I think most of that information is accessible---but I think you have more control over who actually owns the land. I think you have control over that information more than we do. I hope you do...(laughter)...otherwise, it's going to be fairly costly and we may need to go into the county records but you know who your tribal members are and probably know what lands they own.

MR. PABLO: You'd want the tribal member ownership from us?

MR. ROTH: We would want the tribal ownership and the non-tribal ownership if you have that---what lands they actually own. We know that you have a map, we have that ownership map ourselves, but we don't know whether it's tribally fee, it's tribally owned in fee, or, I mean, let me go back, whether it's owned by member in fee or non-member in fee is what I meant to say.

MR. BROWN: And, may I add to that, Mr. Roth?

MR. ROTH: You bet.

MR. BROWN: I think it's even more complicated than I---obviously you've thought about this too---by the need to do actually what I consider a title search. 'Cause we are going to be talking about lands that passed from a tribal member, to a non-Indian, and then perhaps to a subsequent non-Indian, and all those things have important implications on the structure of the reserved water right. So the most complicated, one of the most complicated pieces of technical information, I think, is a full land ownership analysis including tracing back parcel by parcel---the transfers of land.

MR. GOETZ: Well, the answer---the partial answer to that is yes, that data is needed; but---and, probably, yes, the tribes have better data than you do on it, but there is a long way to go in terms of tracing the history of the allotments and the homestead parcels and the pattern of ownership, much less the pattern of irrigation. And it is going to be a costly project and I assume that you are not suggesting that the tribes go ahead and fund that and do that and then turn over the information to the Commission. That's an example of the kind of information I think is needed---that one thing we are certainly open to is talking about jointly funding.

MR. ROTH: Why don't we resolve it by having the BIA fund that...(laughter)...and get that information to us in about 90 days or shorter.

MR. GOETZ: Well, I think that's one thing we can take care of here today....(laughter)

MRS. ROTH: Well, Mr. Chairman...

MR. PABLO: Dan?

MRS. ROTH: Go ahead.

MR. DECKER: Mr. Chairman, the point that I was making, just to follow up what Jim was saying, is that we agree that that's research that needs to be done, but it's costly research, it's going to take quite a bit of time, and so that gets to the question of what kind of assistance is the Commission willing to contribute toward an effort like that. There are different problems in getting assistance from the BIA for that same kind of research and maybe Rich might want to comment on that, but that's a pretty massive project and it's such a tough thing, it really is a title search, essentially, for every parcel of land that is within the exterior boundaries of the reservation.

MR. BROWN: I would like to think there is a shortcut, but I haven't been, in the years I've spent dealing with this matter, I have not found an acceptable shortcut, so then the question is who does the work, who is willing to help fund it, and I don't have the authority to decide for the Commission whether or not we are able to participate in those. We recognize the work has to be done; it's the Commission's decision as to whether or not there will be joint studies, if that's what we are talking about.

MR. PABLO: Audrey? Did you want to comment?

MRS. ROTH: Mr. Chairman, I was just going to mention, it seems to me that a lot of that information would be available in data that you already have, such as at the SCS. Isn't some of that available at the county courthouses.

MR. DECKER: Yes, it is but it would cost a lot to go back and go through the---

MRS. ROTH: Research it?

MR. DECKER: Yes.

MR. ROTH: I think perhaps one of the threshold issues is how much that would cost as to who is going to participate, where we are going to get the money, so - do you know, gentlemen, whether anyone within the tribe or the BIA has done anything as far as the cost analysis?

MR. GOETZ: I can't speak for the BIA, I know the tribe has not done any kind of formal, or I don't think so---maybe you should speak to that Dan---cost analysis, we're looking at what kind of staffing would be needed and what kind of time schedule would be consistent with getting that job done. Of course, that's somewhat contingent on funding besides the staff, but it seems to me that that's the type of issue that staff needs to get together and, the two staffs, and get some definition and come back with some input to us on timing, and cost and whether it would need joint cooperation.

MR. BATERIDGE: Mr. Chairman, could I suggest that Scott and I should perhaps get together today and agree on a firm meeting date and time and we could discuss those things in the next two or three weeks.

MR. PABLO: Gordon?

MR. MCOMBER: I was going to say, I certainly agree, Mr. Chairman. I thought we had resolved that at the last meeting that first we need a list of the information that's needed to arrive at a compact. It's getting along to the time when we better take a look at the whole picture and agree on the information that's needed, and then we can take funding and-so-forth from there.

MR. PABLO: Jim?

MR. GOETZ: One of the things that we put on the agenda was that we would like to hear on your Fort Peck experience, and either now or when we get to that agenda item, I would like to know what happened vis-a-vis the Fort Peck Reservation on this---particularly the land ownership history, what did you do about that and was there a joint sponsoring of the research, who bore the cost?

MR. PABLO: Scott?

MR. BROWN: Well, I just wanted to ask if there are any other issues that Tom or any of you feel that should be fleshed out. We spent just a few moments on this land ownership and I think it was a productive discussion, everyone now recognizes the complicated nature of having to do that, and the staffs can discuss and try to determine how much it is going to cost and how much time. But are there any other issues such as irrigability, water availability, or anything else you would like to flesh out for a few moments like that.

MR. ROTH: I was thinking in terms of your claims to aboriginal rights for instream flows, and water sufficient to maintain a fishery. Have you done, acquired any information

with regard to that issue that these folks can talk about exchanging. Obviously we have some information in the lawsuit that you recently filed.

MR. GOETZ: Mr. Chairman, there is some information on that issue, but you should be aware that what the fisheries biologists had to do for our proof in that case is take some shortcuts and they applied what was known as the Tennant method of assessing instream flows which is not something we intend to rely on ultimately in our proof---now---whether it be in terms of negotiating or in terms of ultimate adjudication. We are happy to make that Tennant data available---it is, of course, already public information, and the filings in the federal lawsuit in Helena, and there are other publications---tentative publications---done by the fisheries biologists with respect to the lower Flathead study that is paid for---at least in part---by the Bonneville Power Administration. No problem making that data available either.

MR. ROTH: Excuse me, what did you say, lower Flathead study?

MR. GOETZ: Yes. Isn't that what it is called? There are yearly reports, like two of them published, and that's an ongoing study.

MR. ROTH: Okay.

MR. BROWN: But you don't propose to use that Tennant method in either the negotiations or the litigation, is that---did I understand you correctly?

MR. ROTH: I think what he said is that they reserved the right to define their position by a more precise method if they feel that's necessary.

MR. GOETZ: That's right. I don't know how quickly these negotiations are going to go or what shortcuts we may decide on, I mean sometimes in negotiations you make summary decisions, just by way of compromise. Certainly if we go into water adjudications, we don't propose to use the Tennant method on the, at least on the main streams.

MR. PABLO: Are there any other comments?

MR. ROTH: I assume that subsumed under the "instream flow" data would be the streams and the bodies of water upon which you claim some aboriginal right or reserved water right for instream flows.

MR. GOETZ: Well, there...

MR. ROTH: The identification of the water, as part of the process...

MR. GOETZ: Mr. Chairman, there are two issues here---one is the reservation streams, and the other is the issue of instream flows protected by treaty rights off-reservation. And I think it is important to keep the two separate, because the treaty provisions are different vis-a-vis those issues. Our recent litigation had to do only with streams on the reservation and that's what the data collected so far met, that was submitted in that lawsuit.

Now last time you asked us for some preliminary identification of the streams that we are talking about off-reservation, and Mr. Decker has a sample claim that we have filed in the state adjudication process objecting to the preliminary decree and also a list of drainages. We filed virtually identical objections on the other drainages. You should bear in mind that this gives you an overview of the off-reservation streams we're talking about but it is not complete because preliminary decrees have not been issued by the water court on all the drainages that we will have off-reservation claims to.

But, that also raises a second interesting issue, and that is in terms of researching instream flows---on those off-reservation streams, we're not as far as we are on the reservation streams. And the question is whether there is any help available from you or the Montana Fish and Game Commission, who has some instream flow competency and funding to help out with that.

We want to cooperate, but we want to make sure that this data is not a one-way street. We have a lot of good information that we've been accumulating over the years on the issues up here, but we want some help from the state, if it's going to be a shared data cooperative approach to assembly of the information that's pertinent.

MR. ROTH: I think that's one of the items that the meeting between your technical staff and ours would probably tell us about and that is what data you have presently available. That doesn't mean that you give us access to the data at this particular time but at least we would know what you have, and the state's people can, I suppose, exchange what information we presently have.

The fact, of course, as the Commission has discussed, your claims to off-reservation instream flows does not indicate the position by the Commission that we acknowledge that you have any claims for instream flow rights and streams off the reservation, nor on the reservation, for that matter. This is merely a fact finding mission at this particular time and I don't want to imply at all

that the Commission has taken a position that you have any such rights but only that we are willing to negotiate about those, so there is no misunderstanding as to what our position is at the present time.

MR. PABLO: Tom, can you and Scott get together today sometime and set up a meeting date?

MR. BATERIDGE: Fine.

MR. DECKER: What I have---passing around to members here--- is a list of the off-reservation basins that we've currently filed objections to protect the off-reservation fisheries. And I am just making it available for your information. I guess I have a question, following your statement, do you know at this point in time without the record recognizing that that would mean that we would not have an instream flow right off-reservation for fisheries purposes---whether or not do you know at this time if there is data available from Fish and Wildlife...(inaudible).

MR. ROTH: I don't know.---and I don't know that Scott knows.

MR. BROWN: I gave this just a little thought, and I realize that some objections were made on Flint Creek. The Department of Fish, Wildlife and Parks, yes, has information for Flint Creek, for Rock Creek, in fact for quite a number of tributaries on the Clark Fork. And some of that information has been communicated to the Forest Service. I've made a note here that the technical people should discuss that and at such time I will be better prepared to discuss with Tom where that kind of information is available. We may be able to provide a full list of where on these streams Fish, Wildlife and Parks has done some work. As I look at this list, I think that they have done work related to their Murphy's rights on the Middle Fork, the South Fork, on Rock Creek, Clark's Fork above the Blackfoot.- So quite a few of these, I can already say that the Fish and Game Department, the state's Fish, Wildlife and Parks Department has done some definitive work in these areas.

(Mr. Decker distributed information.)

MR. GOETZ: Mr. Chairman, just so everybody knows the background---they might be familiar with it already---these objections are filed on these drainages pursuant to a stipulation in the lawsuit that the Confederated Tribes have pending against the state of Montana on the general adjudication. It's pending in federal court now before Judge Lovell and, years ago, when the tribes were not in negotiations, that suit was filed to preliminarily enjoin the commencement of



the adjudication insofar as it affected the Confederated Tribes rights. That preliminary injunction was settled with the stipulation by which the BIA and the Tribes would file general claims. And then there was essentially an agreement through the water court that voluntarily refrained from proceeding with preliminary decrees on the reservation, but off the reservation the water court is proceeding. So with respect to those drainages, where preliminary decrees have been issued, the Tribes have made filings pursuant to that stipulation. These that were handed out were examples of those filed.

I might as well, Mr. Chairman, if I may, I might as well, as long as we are on the topic of the suit that came up last time---yesterday we received an opinion and order from Judge Lovell putting that suit on stay. I guess you are well aware of that suit because, now that I think about it, that was the subject of discussion at one of your last meetings. And that, as you know, that the state through the Attorney General's Office, moved to force the Tribes to either prosecute that suit or have it dismissed. We resisted asking that the suit be maintained on a stay basis pending these negotiations and Judge Lovell has now put that suit on a stay basis.

One other thing, if I may, Mr. Chairman---Urban, at the last meeting you mentioned two suits. One was this suit and the other you mentioned was a suit by the federal government regarding, I think, the wildlife refuges on the reservation. I am not familiar with that suit---

MR. ROTH: I'm not either.---I mean, I am familiar with it in the sense that it exists and I, someplace in my notes, I even have sort of an outline of what the federal government is requesting, but as to the status, I don't know and maybe Mr. Paulson would know, from the Attorney General's Office.

MR. GOETZ: How about Mr. Aldrich?

MR. ALDRICH: I am sorry, I was reading the order---

MR. GOETZ: There was a reference in the last minutes by Urban Roth to two federal suits. One of them was the suit I just addressed...the Confederated Tribes against the state of Montana. The other was to a federal suit, I gather, by the Department of the Interior, I guess against the state of Montana, Urban?

MR. ROTH: Yes, I don't---in reviewing my notes preparatory for this meeting, I didn't have a caption on the notes, so I didn't have time to go back into the litigation, I assume that it is a federal action against the state, and it dealt with the Moise Bison Range and various other wildlife refuges, and whether or not it was intervenor in your suit, or an independent suit, I just don't recall.

MR. ALDRICH: I don't know anything about it.

MR. GOETZ: Would you check that, Urban, for us and let us know.

MR. ROTH: Yes.

MR. PABLO: Should we go on. I believe, the general discussion on the Montana-Fort Peck compact?---Gordon?

MR. MCOMBER: Thank you, Mr. Chairman. We are very encouraged that you put this on the agenda. We're pretty elated that the Commission has succeeded in finalizing a compact with these Tribes. To back up a little, to give you a little background. It took, I guess, about five years from the beginning. The Fort Peck Tribes had from the beginning exhibited a very strong interest in a compact and so the Commission zeroed in on that particular Tribe and moved forward. During the time of the 1983 session we thought we had arrived at an agreement for the compact; unfortunately, however, that was not the case. We heard from the Attorney General, from the Department of Natural Resources, and from the Governor, and as a result of that communication, the Commission very reluctantly decided not to submit that proposed compact to the legislature at that time. We went back and just about started over again, and wrote another compact. Many of the issues have been resolved, but not all of them. That was submitted to the 1985 Legislature and went---I guess I can use the word, sailing, through both Houses, and was approved by the Governor.

It was a learning experience for us, and we accept the fact now that we have to involve other people in the state of Montana, and specifically those other agencies that have people with decision making authority and political clout with the Legislature. The compact that we arrived at and we agreed upon, I should tell you, that---we---there is one big difference---one of the differences between the final compact and the 1983 compact was that the 1985 compact was not submitted to the Congress for ratification. It had been assumed earlier that that was necessary and by mutual agreement, Montana statutes were changed to eliminate that requirement. Therefore that compact was not submitted to the Congress for ratification; part of it was---on marketing---a very small, one small issue, and we will talk to you about that in a little bit. I'm just going to introduce each of the main issues and then ask some involvement from other people. Scott, could you sit up here at the table? Mr. Brown?

MR. BROWN: I'd have to sit next to Jim, and I really wanted to avoid that.... (laughter).

MR. ROTH: What did he do, jog this morning and forget to take a shower?... (laughter)

MR. MCOMBER: Quantification was the big issue there, that was the whole thing---determining the amounts of water, agreeing on the amounts of water the compact would allocate to the Fort Peck Tribes, that was obviously the biggest and the toughest question. We---I say we, but I wasn't on the Compact Board at that time---but the technical people did a great deal of work and finally compromised on a process that we agreed upon which would ultimately---ultimately led to the amount of water that the compact specified. You've indicated an interest in this, and I would like Scott to talk to you about the process that was used. Mr. Brown, if you would please?

MR. BROWN: Well, there were a lot of compromises, early compromises, in determining the amount, but it was based on the irrigability standards. And the data that were used to determine irrigability were existing soil conservation service surveys of the four counties there were three surveys of four counties. As a matter of fact, at that time, Peg, was my research assistant and she is more familiar with this than I am.

But after much discussion and attempting to take some short cuts---not turning work into sloppy work, but taking some short cuts---we trimmed the 2.1 million acre reservation down to something workable by eliminating all lands above 2300 feet. The Missouri River enters the Fort Peck Reservation at about 2,000 feet elevation and---I guess you could say, it was a compromise part of the agreement to accept three hundred feet as an acceptable lift---so we drew a three hundred foot contour of the reservation and that eliminated about one, well, roughly two-thirds of the reservation from any further consideration. Now, we knew that there would certainly be some irrigable lands there, if they were litigating and if we were doing a full blown PIA, but we simply had to get it down to something we could work with. So the 700, or so, thousand acres that remained under 2300 feet were analyzed very carefully as to irrigability and we accepted that capability class II, II and IV lands, as determined by the SCS standards, were irrigable. By the way, there were very few class IV lands, a very, very, small percentage of them. I would say 90 or 95 percent of them were capability class II and III, so there is no mistake about them being irrigable if you can find a water supply.

The second step, then, after determining irrigability was to go through this title search or land ownership analysis---separating out lands that would clearly have reserved water rights---that is they belonged to a tribes or to

allottees, or to the United States---and those that belonged to non-Indians and were in fee status. I suppose you could say there were still some questions about the so called Powers-Walton rights but we kind of shoved that aside for the moment. We found below that that roughly 500,000 acres were irrigable but that only 282,000 of them belonged to the Tribes or, that is, clearly had a reserved water right associated with them. We then, after some technical work, found that a 3.6 acre foot per acre diversion rate was reasonable for that area and that the consumptive use requirement in that area, because of climate and soil factors, was 1.8 acre feet per acre.

Well, all of that translates to a total diversion right of 1.05 million acre feet because the 282,000 X 3.6 gets you to just less than a million, but we had to take into account the 10,000 acres that are being irrigated presently under the BIA project. So that moved it up to slightly more than a million acre feet for diversion requirement. The consumptive use requirement being half of that 3.6 acre feet per acre, of course, made a consumptive use right of 525,000 acre feet per year. Of course, there were other considerations. I don't know if you want me to get into those, where we had to---I guess the last thing I would say is that we wanted very much not to upset the operation of the Fort Peck reservoir, there is a traditional operation of Fort Peck reservoir that other mainstream reservoirs depend on---Garrison, Oahe, and on down the line and the tribes were amenable to that---the Fort Peck Tribes were amenable to that---so we have a monthly diversion schedule that allows us to distribute the water for those purposes recognized in the compact in such a way that it does not interfere with the traditional operation of Fort Peck. And that can't be overemphasized---that was very important to the United States and to the state of Montana.

MR. MCOMBER: Well, this is quite a long compact and we are trying to summarize. We would not mind spending all day with you on it but we are just going to hit the high spots. At this stage, does anyone else on the Commission want to comment on the amount. Perhaps you had some questions on---on that issue?

MR. GOETZ: Mr. Chairman---Scott---your definition of the tribal right or the Indian rights included rights that are associated with lands that the tribes now---that are held for the tribes in trust, presently.

MR. BROWN: Yes.

MR. GOETZ: And lands that are held by Indian allottees that are held in trust?

MR. BROWN: Yes.

MR. GOETZ: And what about allotments that are held by non-Indians that are traceable back to---arguably---to an original Indian title and Indian water right.

MR. BROWN: We recognized that there could be some claims for reserved water rights---the so-called, what I call, Powers-Walton rights---but in fact, in our title searches and our ownership analysis, we excluded those lands from the two steps that we took. First, we determined if they were irrigable, by using SCS data; step two was to eliminate those lands that were in the hands of non-Indians---fee patented lands in the hands of Indians---or, excuse me, in the hands of non-Indians.

MR. GOETZ: So they're non-Indian rights. Now the irrigation project, which is a BIA project, that's allocable---to the Indian right?

MR. BROWN: Yes.

MR. GOETZ: Does that serve both Indians and non-Indians?

MR. BROWN: Okay, that was the one exception. In that area where water from the project serves both members of the Tribes and non-members, there was an exception there---from the situation you just raised.

MR. GOETZ: Who did the study on the land ownership and the history, was that a joint study?

MR. BROWN: Well, Interior had been doing that all along, but I can recall our staff and myself going to Billings on a number of occasions, just to kind of keep---so we knew what was going on. We did not help fund the study, though. The BIA offered to undertake that study. Is that accurate Bob? The reason I am asking is that I don't know if the Tribes made any contribution to that or not.

MR. DELK: No, you're right.

MR. GOETZ: May I ask, Mr. Chairman---well who, physically, who did the study? Were they BIA employees, or was it contracted outside.

MR. DELK: No, it was done internally. All that land ownership work was done internally by our title and records people.

MR. PABLO: Dan, did you have a question?

MR. DECKER: Yes, Mr. Chairman. Bob, in relationship to the project at Fort Peck---How did these lands that were identified that Scott talked about...What's the acreage of---What's the size of the project that we are talking about?

MR. DELK: I'm blank. It is about 10 - 12,000 acres seems to me.

MR. BROWN: It was between 10,200 and 10,400 acres and we didn't concern ourselves with how much of it served tribal members and how much of it served non-tribal members. We just said, in this case, the whole amount would be considered part of the tribal rights---just kind of stacked on top.

MR. GOETZ: Mr. Chairman. Who has jurisdiction over, under that compact, over the project?

MR. BROWN: The BIA continues to have jurisdiction over the operation of the project.

MR. MCOMBER: We're going to get into administration here in a little bit which will answer some more of your questions then.

MR. PABLO: Before we go on to that---In that compact, now, that's final or does that go into a preliminary decree and the the decree is open to challenge, or, how does that work?

MS. RUNDLE: It will be---in fact, that may have been done this past week. Did the AG's office secure the signatures, John?

MR. PAULSON: I don't know.

MS. RUNDLE: The notices have been---well, Rich might know, too---well, they'll let me know eventually (laughter).....

MR. ALDRICH: Tell us what you know, Marcia.

MS. RUNDLE: The notices were prepared and there were some proposed changes, I think by Rich and by Reid Chambers, the attorney for the Tribes. But the last word that I had from the AG's office was that the notices and the compacts were being filed...if not this week, within a very short time...with the Water Court. It will then be, according to state law, will be entered into the preliminary decrees in those water basins.

MR. GOETZ: Then what happens?

MR. ROTH: According to the amendments that were passed this last legislature, the preliminary decree is open to objection.

MS. RUNDLE: But the terms of the compact may not be modified without the written consent of the parties.

MR. GOETZ: Mr. Chairman?

MR. ROTH: So, basically, we tried to resolve that due process issue that you raised the last time, but without compromising the agreement of the parties.

MR. PABLO: Jim?

MR. GOETZ: One of the things we raised last time---there was some discussion of at least a preliminary memorandum that had been done and you promised to get that to us. Do you have that?

MR. ROTH: I don't know if we have it, but I think it has been mooted out to a large extent by the legislation that we ultimately supported and that was passed. We believe that whatever due process considerations might have arisen under the old law have been finessed by the provisions of the new law. In other words, there is notice, opportunity to be heard, opportunity to object and, indeed, the compact could be declared void. But the compact terms cannot be changed without the agreement of the parties, so we've preserved the rights of due process; but by the same token we've sprinkled holy water on the compact and it can't be changed, except by agreement of the parties---so we think we have resolved both issues.

MR. GOETZ: I still would like to see your memo.

MR. ROTH: Sure, no problem.

MR. PABLO: Gordon?

MR. MCOMBER: Okay. I would tell you, Mr. Chairman, that---like I mentioned---that we thought we were just about to conclude a compact and we had to back off and start over again. One of the issues was the amount and the people who looked at---when you start talking about a million acre feet of water---and got a little excited---it sounds like a lot of water but, in that case, it amounts to about seven percent of the water that runs out in the Missouri River after all the other diverted rights have been exercised. So it was just seven percent of what was left and we find that if we tell the people that after all the other uses have been taken care of, the amount is only seven percent of what is left, it doesn't sound like that great amount of water. Incidentally, did---Scott, did we send copies of the---you should have had copies of the compact and the explanation sheet.

MR. BROWN: Yes, but if you would like to give the presiding officer a nice bound copy, I have one with me.

MR. MCOMBER: I think we should do that---by all means  
(laughter).....

MR. BROWN: Would you like one?

MR. MCOMBER: ...(laughter)...(inaudible)...autograph it,  
too.

MR. BROWN: Okay. It's in the car; I will bring it out  
afterwards.

MR. MCOMBER: Like I said, there are many issues in here and  
I'm just going to hit the big ones. If you want to ask about  
the others, you are perfectly welcome to do so.

Administration was another problem. The Attorney General was of  
the opinion that administration should be by the state, and the  
Tribes thought it should be by the Tribes. And the Tribes felt  
that recourse should be in the federal court, and, of course,  
the people of Montana, some of them, felt that it should be in  
the state court.

This had been partially resolved in the 1983 compact but we  
compromised a little more and developed a process that we could  
all agree upon and that administrative process, the conclusion  
was, the agreement was that the Tribes would administer the  
tribal water right---it was understood that they would develop a  
tribal water code---they would administer the tribal water  
right, that the state of Montana would administer the non-Indian  
rights on the reservation---I am talking about on the  
reservation and on streams adjacent to the reservation.  
And that if there was a conflict between a tribal right holder  
and a state right holder, that conflict would go to a three-man  
board, three-person board, one person to be appointed by the  
Governor, one by the Tribes, and the two would get together and  
appoint the other. And a procedure was developed to take care  
of the third appointee, if they couldn't agree. The compact  
also provides that someone dissatisfied with the agreement, with  
the conclusion of the three-man, three-person, board, had a  
choice of going either to federal court or to state court, or,  
if they both agreed, to tribal court.

So that, in a nut shell, is how we handled the administration  
problem. Now, we understand that you have a little different  
situation here because there's a larger number of non-Indian  
water right holders on the reservation than there was in Fort  
Peck. As far as irrigation is concerned, on the Fort Peck  
project---the Fort Peck Reservation---outside of that project,  
only about 600 acres were irrigated with tribal water by tribal  
members, so I understand the ratio may be different here.



But, in any rate, that is how we resolved the administrative, administration question. Any questions---or comments---from members?

MR. PABLO: I guess not. Go ahead.

MR. MCOMBER: The big issue from our point of view was the protection of non-Indian water users. Now, after the reservation was established and the Winters decision come out---as I indicated, the tribal members never irrigated very much, but some non-Indians come in and either bought the land or homesteaded---and I believe you have about that same situation here---they acquired that land. And we were very concerned that those rights be protected, and so we did work out an agreement that protected all of those rights. The Tribes agreed to place those rights, in effect, second. The tribal rights that had been exercised are first on the list; next come the rights of those non-Indian water users that put their water to use and acquired a right under state law; and beyond that, future uses come after that. So in effect, the Tribes subordinated to those non-Indian water users the right to use the water they had been using. Any questions on that? or comments?

MR. PABLO: I guess not.

MR. MCOMBER: The next big issue was water marketing, or water leasing. And that Tribe, of course, sits in a very advantageous position right on the Missouri River, and they wanted an agreement with the state, whereby the state would recognize their right to market, in effect, market that water. It was very controversial, and everyone in the state of Montana doesn't agree with the conclusion that we arrived at and some of the other states have questioned that. That's kind of a problem we have with the other states and, certainly, when---if---we ever go to Congress for ratification of a compact in the future, we're going to have to take into consideration the feelings of those other states that very strongly disagreed on that particular issue.

MR. PABLO: That the Tribes and the state both market water?

MR. MCOMBER: Marcia, if you want to go into that in a little detail, that's your speciality.

MS. RUNDLE: Excuse me, what was your question?

MR. PABLO: I was asking about...

MR. MCOMBER: The water marketing provisions...

MR. PABLO: Yeh, the marketing provisions for the state and the Tribes both...

MS. RUNDLE: Well, the marketing provisions that are written into the compact---there are a couple of features that I would mention.

One is that, first of all, it provides for joint marketing---that the state and the Tribes would in partnership market water. Out of Fort Peck Reservoir or out of the Missouri River, below Fort Peck reservoir, if either party has an opportunity to market water, the compact provides that they would offer the other party the opportunity to market with them. That can, of course, be turned down; it is pretty much a right of first refusal. Then, either party can go ahead if the other party doesn't want to market with them.

The marketing is constrained by criteria that were written to the compact. And those criteria mirror pretty much the criteria that had been written into the new water policy act that the legislature passed this last session. The criteria in the water policy act restrain the state's own marketing and provide that the state, before it markets water, must meet certain criteria. Those same criteria, or ones very similar, were written into the compact to similarly constraint marketing jointly by the Tribes and the state, or by the Tribes alone.

MR. GALT: There is also a level there that they have to go the Legislature to....

MS. RUNDLE: Yes, one of the things that is also written into the compact is a cap on the amount of water that can be marketed by the Tribes. When the Legislature passed the water policy act, it provided that, at the present time, the state is authorized through the Department of Natural Resources to market up to 50,000 AFY. The compact provides that the Tribes, the Fort Peck Tribes, are authorized to market water in that amount as well. But, it further provides that if that ceiling on the state's authority to market increases, the Tribes' authority will also increase.

And water that will be marketed---the provision that Senator Galt was referring to is that any diversions that come out of the Missouri River above the Fort Peck Reservoir would require Legislature approval in addition to meeting the terms of the compact.

MR. ROTH: Marcia, I think one of the questions that was raised was---there was some out-of-state opposition or criticism to marketing.

MS. RUNDLE: Yes.

MR. ROTH: Okay. I think, Mr. Pablo, or someone wanted more elaboration than that. Didn't you?

MR. PABLO: Yes.

MR. ROTH: I would too, because I wasn't present at that particular meeting.

MS. RUNDLE: Do you want to talk about that, Mr. Chairman?

MR. MCOMBER: Okay. Marcia and I were invited to attend the meeting of the Western States Water Council, and this included participants from all the western states. They jumped on that marketing provision, particularly California, because they have been---San Diego, California, specifically---because they have been using, the city has been using water that actually, probably, or, I guess it does belong to tribes under the Winters decision. And they are concerned that if we set a precedent, that they are going to have to start buying that water. I know, Urban would probably advise me not to say things as plainly as I do...(laughter)..

MR. URBAN: Now---that's what they said at the meeting, wasn't it?

MR. MCOMBER: So that is their concern and two or three other states had that same concern. But it is rather interesting, that meeting went on for three days, and the compact with the Fort Peck Tribe was the chief item of interest, and I think we did a pretty good job with them, explaining the fact that the Winters doctrine is the Winters doctrine and we just have to accept, sometimes, the facts of life. There was only one provision---Marcia, just briefly tell them about this provision that requires Congressional approval, would you, on marketing.

MS. RUNDLE: Together with the bill---what was our House Bill number? It was, no, our Senate Bill number was 467; that was the compact. But concurrently with the passage of that, the legislature passed Senate Joint Resolution 41, which is a petition to Congress to authorize the Tribes to enter into water agreements that have been authorized by the compact---essentially, seeking federal legislation. And the provision that were suggested and agreed to by the Tribes and the State are included as part of the compact and were passed by the Legislature as Joint Resolution 41. Some of those provisions essentially mirror the Mineral Development Act, that I think Senator Melcher was a co-sponsor of in '82.

MR. MCOMBER: So, we have an understanding with the Tribes that we will support this legislation. However should the legislation fail, it is not going to nullify the compact. But back to your concern, Mr. Chairman, that's where we expect the other states to take a run at us on that particular issue.

MR. RUNDLE: Mr. Chairman, would you like to mention the Missouri Basin States? They---

MR. MCOMBER: Right. There was another meeting of the Missouri River Basin States---this would be more downstream states---and Ave, and let's see, who was there, Jack, and Ave, and---Would you people like to comment on any questions that come up on that issue there or any others?

MR. LINFORD: One of the questions they have is whether or not this compact impinged on the stored flow at Fort Peck. Of course, it doesn't, as Marcia explained to you. Another question they had was how, or whether that we were setting a precedent that would affect all the Missouri River Basin States. And I think they'd overlooked the fact that Wyoming, has had a settlement of water rights, reserved water rights, that do affect those states the same, as part of the Missouri system.

The questions they asked were pretty good questions, but I think after we had our discussion that they thought that the compact did not infringe on their rights, I guess---although they said they reserved the right, like everybody else does, to come back and raise other questions, after they went home and talked to their constituents. But we did have a broad representation of the Missouri River states. I think about the only one that was missing was Minnesota.

They have been concerned, as you know, about the sale of water South Dakota had proposed and that the sort of thing---how this might affect that. I think it was a relief to them to know that the stored water was not in the compact. Although, they have to pay for that stored water, so some of them viewed that with mixed emotions---that, if we had sold, if we had been able to compact stored water, it would reduce the cost to the other states of keeping water stored at Fort Peck.

MR. MCOMBER: Jack or Audrey, do you want to comment on the reaction from the other states?

MR. GALT: Well, that was pretty much it. Outside of, even the attorney that represented Wyoming in their long and arduous, expensive suit on the Wind River thing, even he said that, by golly, you'd better think of negotiations before you go to the litigation thing. Although he admitted that one suit put all his kids through college. ....(laughter)....

MR. PABLO: Okay, I think I might of missed one point on the Fort Peck compact---that the tribes waived their future use right?

MS. RUNDLE: Waived their future use right?

MR. PABLO: Or what was it---what basis?

MR. MCOMBER: Are you talking about subordination to existing users.

MR. BROWN: I think that is what he means...

MR. PABLO: I kind of got turned around there someplace.

MR. MCOMBER: Okay, I'm not very articulate, so you---Scott, why don't you explain that situation.

MR. BROWN: Well, I think you explained it well. But, sometimes it needs to---because it is, it's uncommon for tribes to subordinate their reserved, the future exercise of their reserved water rights to existing uses.

Perhaps it would help for you to realize that there are about 33,000 acres of irrigated lands, a few municipalities, and some insubstantial commercial and industrial uses on what we call the north-south tributaries. They are the tributaries that come into the Missouri River through the Fort Peck Reservation---Porcupine Creek, Wolf Creek, Poplar River, and Big Muddy Creek, principally.

Those 33,000 acres, plus a few other incidental uses, that have been established over the last 70 or 80 years, but in fact are really all junior to the 1888 priority date of the Fort Peck Tribes, were willingly subordinated by the tribes, only with respect to the tribes future exercise of their reserved water right on those streams---not on the Missouri River, just on those tributaries.

So if a tribal member wishes to irrigate on the Poplar River in the future, the Tribe has, whether he likes it or not, forfeited for him his 1888 priority date. He now essentially has a 1985 priority date, because everyone who has exercised a use from the early 1900's through December 31, 1984, and have a valid state water right is now senior to those non-exercised reserved water rights. Does that clear that up?

MR. PABLO: Yes, that is kind of what I understood, but I wanted to make sure that is what I thought I heard.

MR. BROWN: Okay.

MR. MCOMBER: There is kind of two sections to the marketing provisions. One is the marketing of water on the Missouri River and the other one pertains to the water in the tributaries and

boundary streams on the reservation. So there's two different areas there, that water from the Missouri might be sold in large amounts to someone else. But there is a provision whereby, if a non-Indian wants to expand his operation and wants a good, clear title to that water, he can go to the proper authorities and, assumedly for a price, obtain that right. That gets a little complicated, too.

MR. GOETZ: Mr. Chairman, I know that in reading the compact that there are special exceptions, it seems, throughout on the Milk River. First, I'm not sure where it is. Is the Milk River on the east or the west boundary of the reservation and why the exceptions for the Milk River? Why the special treatment?

MR. MCOMBER: Well, from what Scott tells me, the Tribes volunteered that concession from the very beginning---just leave her out---

MR. BROWN: A very small portion of the Fort Peck Reservation intersects with the Milk River. It meanders but as the crow flies it's probably only about 15 to 20 miles of the very lower portion of the Milk River just before it dumps into the Missouri. That's the southwest corner of the reservation and, as Mr. McOmber said, one of the first overtures made by the Fort Peck Tribes was to come into the negotiations and say---"We recognize the Milk River is a real headache for the state of Montana. We have an 1888 priority date on it, but we don't want to complicate matters. We will remove it from these discussions; in other words, we won't make any claims on the Milk River, at any time, now or in the future". That simplified things, so----

MR. GALT: Jim, I am sure that you realize that's the most over-appropriated river in the whole state of Montana. I don't know whether there is enough water to claim.

MR. BROWN: But it should also be stated that, as far as I am aware, all of the irrigated lands along the Milk River where, 30 to 40 years ago because of water quality problems, the BIA stopped applying water from the Milk River to those lands on the reservation and instead developed some pumping and diversion structures to bring Missouri River water up to those lands. So, while it may seem to be a rather a significant concession, I think they were not giving up a great deal and may, in fact, have been doing themselves a favor because there are water quality problems there. So I guess we were doing each other a favor and simplifying the negotiations by eliminating the Milk River.

MR. ALDRICH: Mr. Chairman. You probably really need to talk to the Fort Peck Tribes as to why they made some of these concessions. But, I think that certainly entering into that

determination is the fact that there are four Indian tribes that claim water out of the Milk River and just avoiding the situation of setting tribe against tribe in claiming those waters depending on priority dates---

MR. BROWN: I should have mentioned that.

MR. ALDRICH: The Blackfeet, the Rocky Boy's, and the Fort Belknap Reservations all would be asserting Milk River claims with varying priority dates. And there also, of course, are international concerns on the Milk River system. It is covered by the International Boundary Waters Treaty.

MR. PABLO: Gordon?

MR. MCOMBER: Okay, I think there are a few minor provisions here. There is one that we agreed that the income of any water marketing by the Tribes will not be taxed by the state. There was an understanding that the Tribes could establish instream flows to maintain fish and wildlife resources in the North - South tributaries. But that water that they claim for instream flows would come out of the consumptive use figure established through the compact. The compact---I'll just read this, it's easiest---"Existing uses of water by Indians on the Reservation and future domestic uses of water and stockwater ponds up to 20 acre feet are protected with a priority date of 1888. Further, future uses of the Tribal Water Right will be subordinated to existing non-Indian users of water on the Reservation and all future domestic uses of water and stockwater ponds up to 20 acre feet." So, if somebody wants to go in there and build a house and water a couple of horses, there is protection on that amount of water. I think that's kind of a thumbnail sketch, do you---do you Commission members want to add anything?

MR. GALT: Have you touched on ground water in the compact?

MR. MCOMBER: Right. Do you want---?

MR. GALT: No, I can't. Right off the top of my head, I can't---

MR. MCOMBER: Scott, do you want to touch on the ground water situation.

MR. BROWN: Well, because not much is known about the ground water in that area, it caused some problems for us. The total right, the total diversion right is 1.05 million acre-feet. However, in any year, no more than 950,000 acre-feet-per-year may come from surface water sources. That means at some time in the future, if the Tribe is exercising its full uses of its water right, it may not divert more than 950,000 acre-feet of surface water. The remainder will have to come out of

groundwater. Now, that doesn't mean they have a cap. Their reserved water right is not limited to 100,000 acre-feet of ground water. We don't know how much groundwater is there. Any mix of surface water and ground water, is allowable; but we do have, what we feel is a protective provision in the compact---protective from both our standpoint and theirs---that the quality of any groundwater source cannot be depleted, or degraded, and no aquifer may be mined. So, at some point in the future, whether that aquifer is adjacent to the reservation or on the reservation, we're trying to avoid degrading the quality of those aquifers or permanently mining them, so. That determination will have to be made later, as to whether or not that's being done.

MR. PABLO: Jim.

MR. GOETZ: Well, let's assume you've got somebody within the boundaries of the reservation, who drills a well to use water for irrigation---who administers that?

MR. BROWN: The Tribes.

MR. GOETZ: Throughout---

MR. BROWN: But with the special provision---Marcia, would you like to add something about that provision---the kind of groundwater control?

MS. RUNDLE: Well, it depends on if it's a non-Indian user who is drilling the well for irrigation water, its different than if he is drilling the well for domestic use. As you know, if you aren't using more than 100 gallons per minute, there isn't even a notice requirement. Rather you file a completion, a notice of completion---

MR. GOETZ: With the state.

MS. RUNDLE: with the state, but a non- ---

MR. GOETZ: Is that true of Indians and non-Indians?

MR. ROTH: Well, it would be up to the Indian water code.

MS. RUNDLE: Yes, but---essentially, non-Indian water users would still apply to the state for permits for ground water. Indian water users would apply to the Tribes and, pursuant to their water code, would receive permits.

MR. GOETZ: How do you know which groundwater is Indian and which isn't?



MR. ROTH: Well, there is a provision that you won't---if use of the groundwater would unreasonably interfere basically with the aquifer that you can't---that the state nor the Tribe, neither one, could grant the permit without the consent of the other.

MR. BROWN: And they were just as interested in that provision as we were.

MR. ROTH: Yeh. They wanted to protect water quality and that was the quid pro quo there.

MS. RUNDLE: I think what you are getting at is that, it would have to be an after-the-fact determination. The first time that the problem occurred you would---the appropriate party would challenge the other's permitting of that well that they thought impinged on their water.

MR. GOETZ: I'm trying to get at, basically, the administration issue of who's got control and who administers the groundwater.

MR. ROTH: It's a dual---it hasn't been specifically addressed. If it's going to be a tribal water right either licensed by or granted by the tribe, then it's administered by the tribe. If it's one granted by the state, it's administered by the state. But either side has the right to challenge the other's granting of the right on the basis that it unreasonably interferes, or affects the water quality.

MR. GOETZ: If you have an Indian, for example, who has fee land, drills a major well for irrigation purposes---is it the irrigator's determination of who he or she applies to that determines whether it's an Indian right or non-Indian?

MS. RUNDLE: The tribal water right is defined in the compact to include all uses of water by tribal members, by persons within the Fort Peck Irrigation Project, by those successors-to-allottees that are claiming a Walton-Powers right, and by any leasee of the Tribes; so, anyone within that definition would have to apply to the Tribes. The state will not grant permits to any of those persons for state permits.

MR. ROTH: But I guess his question, Jim's question is this---if a non-member who doesn't fall within any of those definitions wants to use groundwater---to hedge his bet, he would probably apply to the Tribe for a license or permit and also to the state.

MR. PABLO: Is that where that three-party board would become involved, in the challenge?

MR. ROTH: Well, if there is a conflict between a non-member ---or, a tribal and a non-tribal right, yeh. But I think we are talking about that they---if an applicant for a water right wants to insure the fact that he has a water right, he would probably hedge his bet by applying to the Tribe for a permit, for the use of groundwater, just to insure the fact that the amount of water allocated to the Tribes that cannot come from a surface source, wouldn't ultimately infringe upon his right to use in perpetuity that water.

MRS. ROTH: Mr. Chairman. You are talking about an Indian with a water, or who is trying, to--- if he is an Indian with fee land, is he incorporated under this same law?

MR. MCOMBER: Any right he files on would have to be out of the Indians allocation, including the groundwater and the surface water.

MR. GOETZ: If you have a situation where the groundwater supply is being depleted, and you've got competing Indian and non-Indian uses, it's conceded under this compact that the Indian groundwater is part of the tribal reserved rights with the 1888 priority date, and so would take seniority there.

MR. ROTH: If, indeed, there wasn't enough to go around, probably, unless it was a subordinated right---or, I mean, a right to which the tribal right was subordinated.

MR. GOETZ: Well, that subordination seems to me to say that if you've got a reserved---the tribes are saying, if the rights are not developed now---well---that's on the upper tributaries that's doesn't apply to the ground water---

MR. BROWN: Well, I said the tributaries, but Urban is correct. There are---some of those existing uses that the Tribes subordinated to are groundwater, current ground water uses, from aquifers we know nothing about. So you see, we couldn't---there will be some disputes that this board, this joint board, will have to deal with and some determinations made by the board in the future as to whether or not an aquifer is being depleted.

MR. PABLO: Any questions?

MR. ROTH: One remark, I would---I guess, a few remarks, Mr. Chairman, if I may, is that we believe that the reason for our success in the Fort Peck compact negotiations was the willingness on the part of both parties to seek a solution whenever we had reached apparent impasse. We didn't permit impasse to evolve into a muleish situation where neither party was willing to move. As a result, we always attempted to remain

flexible and be as creative as we could to circumvent what appeared to be unalterable positions of the other, and to compromise those areas of conflict. Also, I think, both the Tribes and the Compact Commission developed an understanding of the political hurdles that the other side had to surmount in order to obtain approval of the compact by their respective constituencies. And we tried to work with those political realities in arriving at a compact that would meet those political exigencies as well as the interests of both parties to succeed in the negotiations as much as they possibly could. So I would like to offer those as observations that I have of why we succeeded in these negotiations.

MR. PABLO: I was gonna---when we first began talking about negotiations---the first one that failed was a very big concern.

MR. GOETZ: Mr. Chairman, how long did negotiations take. I think it has been mentioned, about five years---how intense were the meetings, how many per year or per month. We need a feeling, in other words, of what kind of process we are getting into.

MR. MCOMBER: Well, we kind of worked up to kind of a high pitch in 1983 and then when they were temporarily suspended after that---it was damn near two years before we really got up to steam again. And then, those last week we devoted---well, you got a letter asking, suggesting, that, you know, that we put our negotiations with the other tribes on the back burner until we finished this. We worked, just about full time, the Commission did, for the last three or four months on that compact.

MR. BROWN: Three or four months?

....(laughter)....

MR. ROTH: There was an awful lot of work done in those first two years of negotiations---so much of the technical data had been accumulated---land ownership---a lot of those initial issues. Sort of the data base had been acquired, so that when Chairman McOmber retained, the Commission retained my services what we really are talking about is some major adjustments of---sort of conceptual approaches as to how this thing is going to work and that, in time, didn't take very long---in the sense that it happened all within a year, basically, or less than a year maybe. But so much of the work had already been done, the data base had already been gathered, that one can't look at those last, that last time period as being definitive of the time that's required to reach a compact.

MR. MCOMBER: Excuse me just a minute---Scott, we got the compact finished, we signed off on it and the Tribe did, in the middle of the legislative session. The legislature wasn't happy with us at all. I doubt that we would ever get away with it again. So, in the future we must look to having our agreement finalized prior to the session with enough time to bring the legislators up to speed on it. And a lot of other people in the state too. Scott, excuse me.

MR. BROWN: I just want to remind you, you're a farmer and you're used to working daylight 'til dark. That three or four months, we really concentrated a hundred percent of our efforts from about October through April and, before that, as Mr. Roth pointed out we had spent two years, during 1981 and 82, probably a third of our time on the Fort Peck negotiations, because they showed a great promise of reaching a successful----

MR. MCOMBER: I wasn't telling anyone that you were laying around, Scott.

...(laughter)...

MR. BROWN: No, No---I was saying, I think three or four months is pretty conservative.

MR. MCOMBER: I think that you must appreciate the fact that this---that the life of the compact was extended for two years and that I---Senator Galt would know as much about this as anyone, because he is still in there---But if we go back there empty-handed the next time, I think we are going to have some problems. Aren't we, Jack?

MR. GALT: Yes, we will.

MR. MCOMBER: We would like to prioritize our efforts---zero in on those tribes or federal agencies that want to do the same. We have to, of course, keep up our communications with everyone, but if you really want to sit down and get to business with us, we will guarantee the time to do that.

MR. PABLO: Any other questions or comments? I heard someone suggesting that it's time for a lunch break. That took care of number one on the agenda. Do you want to give any similarities and differences between Fort Peck and this reservation?

MR. GOETZ: Well, maybe, Mr. Chairman, maybe we ought to take a few minutes and ask what you perceive to see as common ground between Fort Peck and this reservation and the differences.

MR. MCOMBER: Would you prefer to comment on that, Urban?

MR. ROTH: This is really a thumbnail sketch, but I---some of the similarities are: both reservations have been opened and there have been considerable incursions into the reservation by non-members. This is more extensive on the Flathead than it was on the Fort Peck, but never-the-less, it is an item of commonality between them.

Both have government sponsored irrigation projects on them. There are large non-Indian, non-member populations within both reservations, although the proportion of the non-members on the Flathead is greater than that on the Fort Peck. Both---one of the primary purposes of both reservations was to establish an agricultural industry as the dominant base upon which the tribes would gradually gain self support. And both have developed sophisticated forms of self-government. We were not dealing with unsophisticated tribal governments; both have very well developed tribal governments that have the support of their constituency. And perhaps your tribes are even more advanced in that regard than are the Fort Pecks. But there are a great deal of similarities, there's a great deal of sophistication. Those are some of them, obviously not all of the similarities.

The differences are: you have differences in terrain here. You do not have the broad rolling plains that are extant in the Fort Peck reservation. Here your tribal lands extend from about 10,000 feet above sea level down to about 3,000 feet above sea level. They range from timber and mountainous lands to very, very level valley lands which are amenable to irrigation. Then you have some of your lands in the western region that are quite dry, and probably lend themselves to grazing more than irrigation farming.

On this reservation, you have historical dependency, at least one tribe has historical dependencies on fishing. In addition, your treaty has reserved the exclusive right of fishing within the streams that border or run through the reservation, that's a difference and a significant difference.

There's also a special legislation that has reserved from location or allotment sites that are principally valuable for power sites.

You have various federal enclaves within the reservation--- the Moise, the Bison range. I don't know that that is particularly dissimilar from Fort Peck, except that I think they're more extensive here.

You are, you have---I mean the state, did exercise its right to exercise civil jurisdiction over the tribes in certain areas. The state---this is the only reservation that the state of Montana exercised that right; so that's a difference.

I would say that there is more homogeneity between the tribes within the Flathead reservation and the dominate non-member population here. This is a fact that has been statistically recorded. I don't know how many full-blood members you have, but I suspect that it's less than 175. I think that that proportion of full-blooded members is less extensive than that in the Fort Peck.

Those are some of the differences that I perceive, and I am sure that someone else might have other differences.

MR. PABLO: Yeh. I think that wasn't civil jurisdiction; it was criminal jurisdiction that the state's got.

MR. ROTH: Excuse me?

MR. PABLO: I said, it wasn't civil jurisdiction, it was criminal.

MR. ROTH: Well, don't you have a---haven't you subjected yourselves to the divorce and the adoption laws of the state?

MR. DECKER: Domestic relations---Mr. Chairman---can be handled both places. Essentially, almost all of the domestic relations and ...(inaudible)... laws is handled---for tribal members and Indians---is handled in tribal court now.

MR. ROTH: I see.

MR. DECKER: But it was a limited---it was really limited as far as civil jurisdiction. It specifically excluded alot of civil areas, like hunting and fishing.

MR. ROTH: Right. But I thought that certain domestic relations were included in the---

MR. DECKER: Yes. But, for the most part, now because of the---like the Indian Child Welfare Act, for instance---as an example, adoptions and foster placements and so-forth, there is almost exclusive tribal jurisdiction. So there has been some changes since the proclamations.

MR. ROTH: Perhaps we could ask you what you perceive as similarities and differences.

MR. GOETZ: Mr. Chairman. One of the major differences I see is the pervasive nature of the Flathead Irrigation Project on this reservation, which is one of the reasons we set that as an agenda item. And we will address that, I guess, this afternoon. Beyond that, I am not sure. I don't have much to say about that. You may, Dan.

MR. DECKER: Mr. Chairman, I think Urban probably hit on most of the items, but I agree with Jim, I think the biggest difference is the presence of the irrigation project and the size in comparison to the project at Fort Peck. The other significant differences, of course, which you already mentioned is the strong hunting and fishing rights that are in our treaties and the exclusive nature of them is different than the ... (inaudible) ... on Fort Peck. So, I would think those are probably the two very significant differences.

MR. PABLO: Should we break for lunch---would 1:00 or 1:30 be better?

MR. ROTH: Oh, Mr. Chairman, if I may. Mr. Goetz asked me about the federal suit that I made reference to in the other meeting, and I talked to Rich Aldrich with regard to some notes I had regarding the federal complaint. And he advises me that most likely that is one of the seven lawsuits that is presently stayed under the Adsit decision.

MR. ALDRICH: Mr. Chairman. Mr. Roth's notes were correct that that complaint discusses all of the various federal water rights that would be asserted, like for Moise, for the Flathead Irrigation Project, for the Tribes for whatever purpose. And I am fairly confident that would be the lawsuit that was filed by the Department of Justice on behalf of the Tribes to adjudicate all the water rights, and it is in the same status as the other lawsuits.

MR. PABLO: Well, how about we recess until 1:30.

Recessed at 12:15 and Reconvened at 1:30 p.m.

MR. PABLO: I'll call the meeting back to order. And with that, are there any questions concerned on this number one that we read on our letter to the Commission. If not we will go to number three. That's the tribal explanation of the purpose and outcome of the Tribes' recent litigation against the Flathead Irrigation Project. Jim?

MR. GOETZ: Do you want to hear about this?

MR. PABLO: Maybe they don't want to hear about it.

...(laughter)..

MR. ROTH: Well, we don't want you to beat your chest, but go ahead and tell us.

...(laughter).

MR. GOETZ: I know Marcia was at the hearings, and I don't know to what extent you've been briefed. So I'll give you a brief overview and if there are any questions let me know.

In the middle of July, because of the drought situation, the fisheries problems were called to the attention of the tribal council and toward the end of the month the Council took a position that we should enter into negotiations with the Flathead Irrigation Project to ensure that there are certain minimum instream flows in the major streams for protection of the "brood" fisheries. And, we gave FIPP and the Portland area office of the BIA notice that if we couldn't reach some agreement on releasing certain minimum instream flows, that we would go to court to enforce those rights and we had a negotiation session. The Portland area office appointed a person to come in and talk.

Our view of what happened, and I think the record bears us out, is that Flathead Irrigation Project which, incidently, is a BIA controlled entity, would not agree to releases of the instream flows that we had requested based on our biological opinions. And they would also not suggest alternate minimum instream flows would they would recommend and abide by to protect the fish. So we went to Federal Court Judge Lovell in Helena on the, I think it was the 31st of July or the first of August, for a temporary restraining order based on tribal aboriginal fishing rights as guaranteed by the 1855 Hellgate Treaty. And we made it clear that we were going only for the purpose of the drought, for the purpose of protecting the fishery for this season. We didn't want this construed as a general water adjudication, as I pointed out earlier this morning, because it was an emergency situation and we used the "quick and dirty" methodology called the "tenant method" to access the instream flow recommendations that we needed and we provided affidavits with the necessary technical information.

Based on our presentation in the temporary restraining order hearing which, in a sense, was ex parte, that is with only us applying, but we gave the FIPP notice and so the U. S. Attorney was there with the BIA solicitor and also the Joint Boards were---somehow obtained notice and they were represented by a Helena counsel at the hearing. But we basically did the presentation and Judge Lovell granted the temporary restraining order, although he didn't endorse our particular figures. He just directed that there be waters released during the interim and the procedure then will be within ten days to hold a more formal preliminary hearing with all parties having the right to call witnesses and be heard.

That preliminary injunction hearing was then scheduled for, I think it was, Friday the 9th. We entered into negotiations with the United States to see if we could resolve the issues for the



purpose of the present season and obviate the need for the preliminary injunction hearing. At the temp---at the first hearing, the temporary restraining order hearing, the Joint Boards, through their counsel, moved to intervene as defendants, which we resisted. But after the hearing the federal judge granted them intervention status, so while the Joint Board was a party, our view was that the FIPP, the irrigation project is controlled by the federal government, so they are the necessary party and the one that we dealt with.

We negotiated between the temporary restraining order and the preliminary injunction hearing with the federal government. We made a cautious decision, for which we have been criticized by the Joint Boards, not to include the Joint Boards in that discussion for two reasons: one is that the Joint Boards don't control the system, and two is that we didn't see any meaningful prospect of reaching an agreement with the Joint Boards because of the hostility, because at the hearing they indicated that they flatly would not recognize tribal fishing rights and water rights. And we just didn't think we had time enough to fool around with that aspect of negotiations while still getting ready for the preliminary injunction hearing.

Shortly---the hearing, by the way was rescheduled, cancelled or continued from the 9th to the 12th, which was Monday, and over that weekend we were able to reach an agreement with the federal government, which basically provided that the instream flows that our biologists had recommended would be implemented and a team of hydrologists and biologists, one from the BIA or USGS---in terms of hydrologists, BIA fisheries personnel---and our resource people would get together and work out schedules and modify, if need be, in terms of what the instream flows would be. We were careful to point out that this was not a general adjudication and we provided that the agreement would lapse at the end of October. So, it's for this season only.

Just before the hearing, the State of Montana moved to intervene as a defendant in the case, and moved to dismiss on the grounds that this is a, was a, general adjudication and that jurisdiction should be in state court. And the Joint Boards also moved to dismiss the case on those grounds. So we had the hearing on the 12th of---we resisted the state's motion to intervene because we didn't think it was a state adjudication. And we argued the general dismissal issue and we said that we had no objection to dismissing, because we had our agreement with the feds. They control the project and they have agreed to provide the flows. That's all we ever wanted; and so we suggested---as well the feds suggested---that the case was moot. And after the hearing that morning, basically that's what the federal judge decided.

He granted the state's motion to intervene, denied the preliminary injunction because there was a resolution of the issue and dismissed the case. And so that's the basic technical aspect---our goal, as I have said, was to ensure that certain minimum flows stay in the streams to protect the fishery. And our basic foundation for a theory was based on the "tribal treaty fishing rights" and the aboriginal fishing rights. And I think, Marcia, you were there for both hearings, weren't you?

MS. RUNDLE: Yes.

MR. GOETZ: And, I assume that you have had access to the pleadings to the extent that they may be pertinent. I don't know that that suit has much to do with these negotiations, but we thought you should be apprised of that suit, and what our purpose was in bringing it.

MR. PABLO: Any questions? ...(pause)... You got by cheap. ...(laughter)...

If there isn't, we can go on to No. 3---the general discussion of the Flathead Irrigation and Power Project. For that, I'm going to ask Teresa to go over the background of the project so the Commission will understand it a little bit more.

MS. WALL-MCDONALD: Okay, I will be happy to do so. I plan to present these facts about the Flathead Irrigation Project. I will briefly address the early legislation, the land status and other pertinent facts. I am obligated to inform you that I am not doing this as a representative of the Flathead Irrigation Project, nor am I stating the formal position of the Bureau of Indian Affairs. I am merely providing general information at the request of the Confederated Tribes. For your information, Auggie Miller is the acting Project Engineer. He told me that if I said anything wrong, he would hit me over the head. So--- ....(laughter).

By the Treaty of Hellgate, the Flathead Kootenai and Pend d' Orielles Indians ceded to the United States all their right, title and interest in their aboriginal homeland. A tract of land was reserved from the land ceded, for the exclusive use and occupation of the Tribes. That homeland is commonly known as the Flathead Indian Reservation. In my discussion I will be referring to this map. This is an outline of the Flathead Indian Reservation---the white areas are fee status lands and the gray areas are lands held in trust.

Subsequent to the Hellgate Treaty of 1855, the Flathead Allotment Act was passed on April 23, 1904. This act allotted lands to the Indians and also authorized a formal survey to determine the feasibility of an irrigation project within the Reservation boundaries. The actual irrigation survey began on

July 8, 1907 and the final report was filed November 12, 1907. The final report found that the irrigation possibilities were favorable on the Flathead Reservation.

Therefore the Office of Indian Affairs and the U. S. Reclamation Service entered into an agreement in 1907 whereby the Reclamation Service furnished engineering and field construction expertise, while the Office of Indian Affairs retained ultimate authority for approval of the construction plans. The Reclamation Service provided construction and design assistance until 1924 when the irrigation project was formally transferred back to the Indian Irrigation Service. The Bureau---the Flathead Project has always been under the jurisdiction of the Bureau of Indian Affairs.

The Act of March 3, 1909 provided the first Congressional appropriation for beginning construction of the Flathead Project. Subsequent acts have provided continuing appropriations for the construction work. Prior to 1916, the appropriations were reimbursed from the sale of tribal land and timber belonging to the Flathead Tribes. The Act of 1916 provided that the tribal funds previously utilized should be reimbursed and that payment for irrigation works should be made by the landowner whose land benefitted by the system.

By 1914, 152,000 acres of land within the Reservation boundaries were classified as irrigable, of which 97,000 acres had been allotted to Tribal members and 48,000 had been entered by homesteaders.

Congress has continued since the 1900's to appropriate reimburseable construction dollars for both the irrigation and power systems that are operated by the Flathead Project. The total federal investment as of December, 1982 in the Flathead Project irrigation system is roughly 12 million dollars. Of the total amount invested in irrigation, the unpaid reimburseable federal investment is \$6,055,267.

Today the Irrigation Project supplies irrigation water to approximately 2,600 water users who reside within the Reservation boundaries. The irrigation system has 14 major storage reservoirs within the reservation boundaries with a total storage capacity of approximately 157,000 acre feet. Twelve of these storage reservoirs, which encompass over 9,000 acres, and the main water supply sources are all located on Indian Trust lands owned by the Confederated Salish and Kootenai Tribes.

There are some 108 miles of main supply canals and about 1,000 miles of irrigation distribution canals and laterals, with over 10,000 structures, many of which are located on tribal trust property.

For operational and administrative purposes, the Flathead Project is divided into three main irrigation divisions: the Jocko Division (in this area here) is lying in and receives water from the Jocko River drainage. When looking at the map, it is important to remember that the main irrigation works and facilities are included within these blue, dashed lines. This is the Camas Division, Pablo Division, Post---Mission---and the Jocko Division. But all of the irrigation facilities, distribution lines, or canals are included in within these blue, dashed lines. So someone living in this area here would not receive service from the Flathead Irrigation Project.

MS. RUNDLE: Teresa, could I ask you a question to clarify? I think I misunderstood. First you---I thought that you indicated that it was divided into three divisions---

MS. WALL-MCDONALD: Yes---

MS. RUNDLE: and then, I think you gave five names, am I confused?

MS. WALL-MCDONALD: Yes, excuse me. Each division is then divided into miscellaneous sub-divisions. As I go through this, I will go clarify that.

MS. RUNDLE: Okay, thank you.

MS. WALL-MCDONALD: Okay, but for---Here is the Jocko Division, this lies in the Jocko River drainage and receives water from the South Fork of the Jocko and there's a partial influence from the Middle Fork of the Jocko (which is located right here). I want to make one thing perfectly clear. I didn't attempt to identify all of the main water supply sources. There are many water sources contributing to the Flathead Irrigation Project that are not identified. This is merely for illustration. As you can see, though, the main supply sources located up and down the face of the Mission are located on tribal trust property. So you have the Jocko Division, whose main water supply sources are the South Fork of the Jocko, and there is a partial influence from the Middle Fork of the Jocko River.

The Mission District receives partial influence from the Middle Fork of the Jocko River, the North Fork of the Jocko and Mission Creek. Across the face of the Missions you have the Pablo Feeder Canal. It originates at McDonald Reservoir, and travels north. I believe it is 29 miles long. It intersects over a hundred streams down the face of the Mission, all of which originate on tribal land and then the water is dispersed outward.

As I stated before, there are 12 major storage reservoirs that are located on tribal trust property, such as the Mission Reservoir, McDonald Reservoir, Nine-Pipes, Kicking Horse, and Pablo. And those are all are located on tribal property.

But you have three main divisions and then you have a number of subdivisions. It is my understanding that the lateral systems for the subdivisions can serve only those areas, but the water supply for the main area of the Flathead Irrigation Project is interconnected through storage and feeder canals.

You do have the Camas Division which serves over here and the main water source is the Little Bitterroot River. Over half of the drainage area of the Little Bitterroot River is tribal trust property, but the river itself originates about 20 or 30 miles off the reservation. The map is a little confusing because you have districts versus divisions, but the divisions are separated for operational purposes by the Flathead Irrigation Project. The districts are legal boundaries established by court order under state law in 1926 for the organized water users. You may have a district boundary that is the same area as a division, or you may have a district boundary that includes one or more subdivisions. So, it's a little confusing. Are there any questions?

MR. ROTH: Yes, where does the Joint Board come in as far as it's jurisdiction, where does it's authority eminate from?

MS. WALL-MCDONALD: Well, as stated earlier---over 90---no, I didn't get that far---over 90% of the land served by the Flathead Irrigation Project are held in fee status by non-Indian owners. The non-Indian land owners are represented by state chartered irrigation districts. The districts are known as the Flathead, Mission, and Jocko Districts. Members of the irrigation districts consolidated into a joint board of control in order to coordinate the administration of the districts. The three irrigation districts signed repayment contracts with the U. S. Government in 1928 through 1934, and under the terms of that contract the districts are obligated to collect the O and M assessments from the non-Indian water users. They collect the money and then they later transfer that to the Flathead Project. Then the project bills them for the service. The O and M rate, on the average, is probably \$10.00 per acre.

MR. ROTH: Does the system contemplate that ultimately when the system is paid for that title to the project will be transferred.

MS. WALL-MCDONALD: I will defer that question to the tribal legal counsel that's present.

MR. GOETZ: No.

MR. ALDRICH: The normal process on both reclamation projects would be that if Congress so directed that it would be turned over. But lacking an act of Congress, it will not be turned over.

MR. GOETZ: There is some discussion, by the way---in fact, there is a petition out to transfer control to the Bureau of Reclamation for various reasons. I don't know if you have seen the Mission Valley News last week, but we've got some copies here we have xeroxed for you. And, you're going to get, Teresa, to the study that's---

MS. WALL-MCDONALD: No, but I could address that.

MR. GOETZ: Why don't you address the study that is currently under way---

MS. WALL-MCDONALD: In October of 1984, Senator Melcher met with the Department of the Interior Secretary, William Clark and he expressed a great deal of concern about the operation of the Flathead Irrigation Project. At that time, the Senator was advocating the position of turning over the Irrigation Project to the irrigation districts. Senator Clark called for a comprehensive review of the irrigation project before making any decisions. A team was put together with members from the BIA and the Bureau of Reclamation to come out and do a thorough review of the (inaudible) of the Flathead Irrigation Project to document long-standing problems. That final study, the final draft, will be delivered to the Secretary of Interior on September 30. At that point in time, he will undoubtedly review it, make any recommended changes and then release the study for public distribution.

The project ---I'll go back to this--- the project, first delivered water through constructed irrigation facilities in 1911. As of 1983, the Project delivered over 124,000 acre feet of quota water to approximately 127,000 acres of assessable lands.

Now, it's my understanding that at the beginning of the irrigation season, the project delivers non-quota water, which is termed extra or excess water, and they don't keep track of that water. The figure of 124,000 acre feet delivered in '83 is taken from the quota water---once the project reaches the point where they actually keep track of the water that they're diverting.

About 91.5% of the actual irrigated acreage is land held in fee, largely by non-Indian owners. The remaining 9.5% is trust land, either Tribal or allotted.

The gross crop value in 1983 for lands irrigated by FIP was \$20 million with a per acre value of \$161.00 per acre. The sprinkler crop value for 1983, included in the gross crop value, was \$15 million.

The area has a growing season of about 120 days. The main crops are hay, pasture, grains, with minor crops of potatoes, lentils, sunflowers, soybeans, and fruit. Sprinkler irrigation is practiced on about 48% of the lands served.

As discussed earlier, the non-Indian land owners who are represented by state chartered irrigation districts---and three districts were organized under Montana State Law in 1926---those districts being the Flathead, Mission and Jocko. These three districts signed repayment contracts with the U. S. Government in 1928 through 1934. Under the terms of the contract the districts are obligated to repay the federal government its net investment in irrigation facilities, if the net revenues generated from the sale of electrical energy within the Reservation boundaries are insufficient to meet the debt installments to the U S. Government. To date, all federal investment that has been repaid, roughly \$6 million, has come from net revenues generated from the sale of power.

The administration of the irrigation district functions is coordinated through the Joint Board of Control, composed of irrigation district board members plus one member at large. Tribal members whose land is in trust status are excluded from belonging to an irrigation district. The Tribal member whose land is in trust cannot run for election to the irrigation district board nor can they vote for the district board members.

Currently, the Joint Board is responsible for the collection of irrigation operation and maintenance charges from the water users it represents. In addition, if the net revenues generated from the sale of electric energy are not sufficient to reimburse the federal government, the Joint Board is responsible for the collection of the due payment from its members through a special assessment. To date, this has never happened.

I alluded earlier to the power system operated by the Flathead project. They probably serve over 18,000 customers within the reservation boundaries. I didn't prepare any other information as to the power system because we were mainly concerned with irrigation. But I would be happy to answer any questions if you have any.

MR. ROTH: Where is the power generated?

MS. WALL-MCDONALD: The majority of the power is purchased from the Montana Power Company and BPA. They do have one small hydrogenerating facility within the reservation boundaries called the ...(inaudible)... but the majority of the power is purchased and then retailed to the residents of the reservation.

MR. ROTH: Why aren't tribal members qualified to be members of the district. Is that a tribal rule or is it a district rule?

MS. WALL-MCDONALD: No. That is included in the act of May 10, 1926. That was the act that established irrigation districts, or recommended that they organize. In 1925 Congress had invested over \$5 million into the irrigation system. Little or nothing had been paid on that debt of construction. Before Congress would continue to appropriate money for further development of the irrigation system, they recommended that the water users organize into irrigation districts chartered under state law, so that there would be some sort of legal entity that they could hold responsible for repayment of the federal debt.

MR. MCOMBER: Who do the ditch riders work for? The people that actually open the headgates---who is their boss?

MS. WALL-MCDONALD: The Bureau of Indian Affairs Flathead Project. They are all federal employees.

MR. PABLO: Auggie, sitting there, is the boss.

MR. MILLER: That's correct. (laughter)

MR. PABLO: So, maybe if you have any questions---We just asked Theresa to go through some history, and Auggie is sitting there, he might not agree.

MR. MILLER: No, she's doing a good job.

SENATOR GALT: To go back to Urban's question. Did you say the Indians in these---tribal members in these irrigation districts that have allotted land---what if they own their land?

MS. WALL-MCDONALD: If their land is in fee status---then they do participate within the irrigation districts.

SENATOR GALT: And they can vote, they can be an officer, and have all the other---if they have fee land.

MS. WALL-MCDONALD: Yes. If they choose to exercise that.

SENATOR GALT: Do any of them do that?

MS. WALL-MCDONALD: I am not sure.



SENATOR GALT: No?

MS WALL-MCDONALD: In the 1950's, a tribal member did serve on an irrigation board. It was kind of a good will gesture made by the irrigation districts, but that was just for one year. That is the only time it has happened.

MR. PABLO: Ron, did you have something?

MR. THERRIAULT: No, just to mention that, yes I'm---I have fee land and I am under the project, although there is nothing delivered to me. I pay O and M charges and construction ... (inaudible) ...---I think that's the term they use. I did inquire once about running for office. It's one election, since I don't like to lose them, that I didn't bother to pursue.

MR. GALT: Well, did you say that you paid the O and M and still don't get any water delivered to you?

MR. THERRIAULT: Right.

MR. GALT: Why would you pay your O and M?

MR. THERRIAULT: Because that's the way the policy is set up, and I have---O and M charges were charged against the mass land---the mass acreage originally. I have a portion of that so, they sort of carry it over---since I have a portion of it. The people that own the rest of the land do use irrigation, but I am still attached to it, so I still pay. But after I found out what it took to get away from it, I figured I would be ahead of the game to go ahead and pay it. ... (laughter) ...

MR. ROTH: Theresa, can you make your printed remarks a part of the record, so that we can obtain copies of it?

MS. WALL-MCDONALD: Yes. Mr. Therriault's problem probably comes from the fact that his land is classified as assessable class I or class II lands. That doesn't necessarily mean that he actually irrigates or that he actually puts the water to use, or that he actually receives it, but because it is classified as accessible, he is charged for a fee.

MR. THERRIAULT: I might add, the closest canal is seven tenths of a mile away from it, and we thoroughly discussed: why don't you run a feeder canal into me just so that I could have it and feel comfortable, and that was sort of ruled out.

MS. RUNDLE: If I could go back, Theresa, the three state districts---the three districts organized under state law pursuant to that '26 act are the Jocko, the Mission, and the Flathead.

MS. WALL-MCDONALD: Right.

MS. RUNDLE: But the BIA divisions for operating purposes---what are the names of those?

MS. WALL-MCDONALD: There is the Camas Division--this map is wrong, it should have division instead of district---Camas Division, Mission Division, Jocko Division, Post Division, and the Pablo Division.

MS. RUNDLE: Thank you. So there are five divisions, in three districts?

MS. WALL-MCDONALD: And, the--it is my understanding that the Flathead District includes the area---everything north of Post Creek.

MS. RUNDLE: Would that roughly correspond to Post and Pablo Divisions?

MS. WALL-MCDONAD: Yes.

MS. RUNDLE: And where does Camas belong?

MS. WALL-MCDONALD: The Camas Division belongs within the Flathead District.

MR. MCOMBER: Teresa, do you know if additional lands are capable of irrigation---if there are additional lands capable of irrigation under the gravity system?

MS WALL-MCDONALD: I couldn't answer that---but Tom Bateridge might be able to address that.

MR. BATERIDGE: There probably are. There probably are some tribal lands that are irrigable that could be irrigated by the existing system.

MR. ROTH: Are there any plans to augment the water supply?

MR. MCOMBER: Is there enough water available to get the job done?

MR. BATERIDGE: I am not sure. I can't answer that question.

MS. RUNDLE: Mr. Chairman, if there aren't further questions about the irrigation district. I would be very interested in understanding more about the power project part of it, because I don't quite understand the relationship between the use of

revenues from the power project to pay the O and M charges. Exactly why you're buying power from BPA and Montana Power. You sound like the delivery man. I mean, the FIP is the delivery man for the---

MS. WALL-MCDONALD: I would say that. The main connection between the irrigation and the power divisions is the transfer of what they call net revenues. When FIP retails electrical energy within the reservation boundaries, the cost of that energy is inflated a very small---I am not supposed to call it a profit, but that's really what it is---the price is inflated in order to generate a net revenue that goes back to the federal government to pay them their net investment in the irrigation and the power facilities.

MR. ALDRICH: It's repayment of construction costs as opposed to O and M. I think you said O and M. It is construction costs that they pay.

MS. WALL-MCDONALD: Right. Construction---the power system subsidizes the irrigation system by making all of these installments on the existing construction debt. And I believe, the cost of constructing the power system was a little over 5 million dollars.

MR. ROTH: Are there any plans to augment the supply of water so that the system can be expanded?

MS. WALL-MCDONALD: Not that I am aware of.

MR. ROTH: Are there any potential sources of water from which the project could be expanded?

MR. MUELLER: I would say that if we were to enlarge some of our storage facilities, that many years, that the water would be available. Some years like this year, for instance, there was very little water that would have been available.

MR. ROTH: In other words, in high water years, you're---some of the water is going into, I suppose---

MR. MUELLER: In my estimation, in most years, there would be additional water. In addition, one of our sources of water is, we do have pumps on the Flathead River and this is one year that we've pumped. And according to---the only limitation that I know of now is, in the agreement on Kerr Dam, we're limited to 50,000 acre feet pumped after July 1. And we have to pump considerably beyond the irrigation season to pump that much, because we only pump roughly 400 acre feet a day. So we would have to pump solid for over four months, which would be through the month of October, in order to reach that limit. And it

doesn't even address anything in the calendar year before that, so theoretically we could pump anytime that the river is high enough.

The one limitation on that at the present time is the way our pumps are constructed. When the power---the Montana Power has the lake drawn down in the spring, we can't run our pumps because their intakes are not low enough to prevent ... (inaudible) ... ---so we probably couldn't start pumping before late May most years, but then it would be at least the month of June we can pump, in addition to that 50,000 limitation. So I think we could develop more land.

Also, whatever ground waters are available might be utilized somewhat. Also, early in the year, even sometimes late in the year, there is more return flows than even were required on our ... (inaudible) ... ---this year. It may not be all that significant in a dry year, but this year, most normal years, I think there would be water available, for at least the additional tribal lands.

MS. ARMSTRONG: Mr. Chairman. What was your name, please?

MR. MUELLER: Mueller, August Mueller.

MS. WALL-MCDONALD: Auggie, isn't it correct that you also have two smaller pumps, one in Crow Creek and one on ... (inaudible) ...

MR. MUELLER: Yes.

MS. WALL-MCDONALD: And so those would be to supplement the---

MR. MUELLER: Well, except that these are waters that are addressed elsewhere. It doesn't bring any additional water in. It just makes it available at a different place.

MR. ROTH: Well, besides, you just addressed tribal lands, but the augmentation could also serve non-tribal lands, couldn't it?

MR. MUELLER: Well, you were asking about additional lands---the answer is yes.

MR. ROTH: Yeah. Because about 600 acres are owned in fee by non-members, and most of it is located in the valley, part of the valley, at the lower elevations, as I understand it. So the augmentation could also---

MR. MUELLER: Well, I think the original authorization was something like 140,000 acres---rather than the 127,000 we're currently irrigating. I have not had the time and the opportunity to try to look at where all these lands are.

I would like to address one other issue that Theresa brought over on this power. That the power we get---we get roughly a third of our power for the power project from Kerr Dam, which is a low cost block of power. It's cheap enough so that that more than pays---the difference in price between that block of power and the---what we are paying Bonneville Power will more than pay the costs of the repayment contract. The repayment contract is pretty well laid out in Public Law 80-554, so Congress had intended that it be handled in this manner.

MR. PABLO: Any more questions?

MS. RUNDLE: Mr. Chairman. Teresa, do the irrigation districts or the Joint Board have either authority or responsibility for the operation of the FIP project---either the power or the irrigation part?

MS. WALL-MCDONALD: I would---

MR. MUELLER: It's---I'll answer that. It is the responsibility of the government to operate it. We have a contract to deliver water to the districts. The districts have contract to collect our O and M and pay us for that service.

MR. ROTH: And that is the subject of the federal act?

MR. MUELLER: Yes.

MR. ROTH: Is the contract then incorporated into the federal act?

MR. MUELLER: It works the other way, the federal act is incorporated into the latest contract. Teresa mentioned contracts back in the 30's. The one I am most familiar with is the one that was in the block 49 to 51. I think it was signed in 51. Is that right, Chuck?

MR. STIPE: That's close.

MS. WALL-MCDONALD: According to provisions of Public Law 80-554 which was enacted in 1948---that act specified six obligations, six repayment obligations. Those six obligations are then worked into the repayment contract. I believe the contract is of a financial nature and not necessarily a water delivery contract, but that is just my interpretation of it.

MR. ALDRICH: Mr. Chairman. If I could maybe make some comments and also a little bit of explanation. I think it's also---the Tribe has pointed out that the water users have petitioned to remove BIA. I think that in all fairness, we

should note that the Tribes have petitioned BIA to transfer operation and maintenance of the project from BIA to the Tribes, under what is called a 638 contract arrangement.

MR. DECKER: When was that? We had discussions---

MR. PABLO: There was never a petition.

MR. ALDRICH: There has been a request made by the Tribe, perhaps by previous councils---

MS. WALL-MCDONALD: Mr. Chairman. If I could address that---

MR. ALDRICH: Go ahead.

MS. WALL-MCDONALD: I---I believe that in the early 70's there were some preliminary discussions with officials of the BIA about the possibility of contracting the projects under 93-638. But the Tribes did not file a formal petition. We simply asked for technical assistance and information about that, but the tribes have never formally petitioned to take over.

MR. ALDRICH: I stand corrected on that. I apologize. The other comments will, hopefully, not be as inflammatory. The Joint Board, in response to Urban's request, is a creature purely of state law. The state law provides for the formation of joint boards of irrigation districts where they have a common source of supply. The Milk River Projects are considering one now; there is one in eastern Montana on the lower Yellowstone; Buffalo Rapids, I believe, also has one. So it is purely a creature of state law.

The---as I would gather---the sole function of the irrigation districts---the formation---the authorization in the federal statute was to provide a vehicle whereby the lands could be assessed and taxed for purposes of repayment if it became necessary, but primarily for funding of operation and maintenance purposes. And, then finally, the power subsidy that was discussed here sounds like a miniature Pick-Sloan project. It's just the same type of an operation, on a much smaller scale, as currently exists in the Missouri Basin. I believe, it also exists in the Columbia Basin. It is not at all unusual where authorized by Congress.

MR. MCOMBER: Have I got this down right? You said something like 140,000 acres?

MS. WALL-MCDONALD: Mr. Mueller stated that he believed that the proposed area that they put under irrigation in the early 1900's was 140,000 acres. Currently, the project delivers water to about 127,000 acres.

MR. MCOMBER: And you have 2,600 water users?

MS. WALL-MCDONALD: Yes.

MR. MCOMBER: You've got some pretty small operations here, then---or do they go to people in town. How about city users, that irrigate their lawn, are they included in that?

MS. WALL-MCDONALD: I couldn't answer---

MR. MUELLER: There are some---this does happen---that some lands get---and not only just in town, you'll also have people out in the country that have ten acres also. And many of the allotments were not that big to begin with.

MR. ALDRICH: Mr. Chairman. I think that's the key right there. There were some very stringent acreage limitations on allotment size, and on farm unit size; again, similar to the reclamation 160 acre limitation, but even smaller, insofar as the irrigated portion of the allotments is concerned on the Flathead Reservation.

MS. WALL-MCDONALD: Mr. Chairman. During the allotment process, the tribal members could choose to have 80 acres of irrigated land or 160 acres of timber land.

MR. MCOMBER: That makes for quite an administrative problem, doesn't it?

MS. WALL-MCDONALD: If you go back to the legislative history, behind the 1904 act which provided for allotment to tribal members, you will see that Congressional intent at that time was that the majority of the area served by the Irrigation System would be allotted and would belong to tribal members. There is reference to 3/4 of the area served by the irrigation system would be serving only tribal members.

MR. MCOMBER: What I was getting at is that, hopefully, we'll eventually get to the place where we start looking at who has what. And that's quite a few people to look at, especially if---

MR. DECKER: That goes to the problem on the land title question earlier today. That's exactly the problem. The majority of the allotments in the Mission Valley were 80 acre allotments because they were within those irrigation district areas. So you start out with fairly small parcels of land to begin with. The ...(inaudible)... I believe had 40 acre mineral limitations, but as originally ...(inaudible)... same as a Bureau of Rec project. So, you are dealing with a lot of parcels of land where you are looking a land title records. And then, homestead

lands of course are the same---there are similar land title questions with those lands too. So with all the lands in the areas, we're looking at land title questions. That's a sizeable research project.

MR. ROTH: I think we're all agreed that if everyone within the project put the water to use with reasonable diligence, we might---

MR. DECKER: That's like---get some water to tribal lands that pay currently pay O and M's but don't get water to them.

MR. MCOMBER: Mr. Chairman. Did I understand someone to say that nearly half of the land is irrigated by sprinkler, 40 some percent.

MR. PABLO: Yes.

MR. MCOMBER: There must be a lot of very small sprinkler outfits; you're probably counting the sprinklers in the backyard, aren't you?

MR. MUELLER: Well, not necessarily. There are some pretty sizeable farms that are all irrigated by sprinklers, too. If it's half the land; that doesn't necessarily mean that it is half the users. I have no comment on the number of users, I am just throwing this out.

MR. PABLO: Any further questions or comments?

MR. GOETZ: Mr. Chairman. I should explain that Teresa Wall used to work for the Tribes, and she was the resident expert on the Flathead Irrigation Project. But she's defected to the BIA....(laughter)...She needed special---we asked her to address the group because she is the most knowledgeable person. She needed special permission and she needed to submit her comments to Mr. Mueller; so in fairness to her position, I think we, as long as Mr. Mueller is here, I want it on the record that what she said is accurate as far as you know, or if there are any corrections, we should have them made on the record at this point or additions that have to be made.

MR. MUELLER: She did an excellent job.

MR. PABLO: Thank you, Teresa.

MS. WALL-MCDONALD: Mr. Chairman, I will spread this out on the table, and at a break or at an appropriate time, you may want to look at this very briefly. It is a 1982 map of the Flathead Irrigation Project and this map is a little bit easier to understand than the one I was using up here. But the red lines here, illustrate the ditches and canals, and the way the



system works or was originally designed. In 1918, they were projecting 99,000 acres of irrigable land, but you may want to refer to this.

MR. PABLO: Thank you. Ready to move on to No. 4: the discussion of possible sharing of data collection costs. Do we have any other topics between the Compact Commission.

MR. GOETZ: ...(inaudible)...

MR. PABLO: Yeh, I think the technical people should get together and get a meeting set and then---we've gone over that---

MR. BATERIDGE: Mr. Chairman. We have tentatively scheduled a date and a meeting place---Wednesday the 25th of December in Missoula. And I think our friend, Mr. Delk, is going to find a place for us to meet. Is that right, Bob?

MR. DELK: ...(inaudible)...

..(laughter)...

MR. MCOMBER: Which---which month was that?

MR. BATERIDGE: This month, two weeks from today.

MR. MCOMBER: You said December, so---

MR. BATERIDGE: September.

MR. PABLO: Is that okay with everybody?

MR. MCOMBER: I think so.

MR. PABLO: No. 5---we kind of went over that this morning. Is there any other comments on this? The tribal discussion of off reservation water claims we kinda set it up this morning and gave you copies of the claims. Was that covered well enough?

MR. MCOMBER: Unless counsel has some questions?

MS. RUNDLE: Mr. Chairman. The list that we were given was of streams for which there have been temporary preliminary decrees issued in which the tribes have filed objections. Correct?

MR. DECKER: Yes.

MS. RUNDLE: Can we anticipate that there are many more, a few more, lots more? Do you have a list?

MR. GOETZ: A few more.

MS. RUNDLE: A few more. Are you---

MR. GOETZ: The Bitterroot drainage is one obvious on that---beyond that---

MR. DECKER: Mr. Chairman. As we become aware of decisions that have been put out in the Clark Fort divisions---basins, I guess is what the Water Court refers to them as, there are two basins that touch the Reservation. And our understanding from the comments made by Judge Lessley is that there will probably not be entered preliminary decrees in those two basins. So, there will be objections if that does happen ...(inaudible)... And then there are two additional basins that, as Jim mentioned, cover the Bitterroot basin, which I believe is 76A, where---when one comes out on that basin, we will certainly, I believe at this point in time, be issuing an objection if there is no recognition of our reserved aboriginal right in that basin. It depends. It is kind of on a case by case basis. Judge Lessley has been modifying his temporary preliminary decrees slightly each time, so it just depends on how that decree comes out. If we issue an objection in an additional basin more than the Clark Fork drainage, that has not been issued yet. So, I think we indicated earlier that, in most of the basins in the Clark Fork division, that we would anticipate putting in these kind of objections.

MR. GOETZ: And then the Musselshell. ....(laughter)....

MR. DECKER: ...(inaudible)...

MR. ROTH: While we have seen some of your---the legal arguments that you have advanced, in regard to on stream, or on-reservation instream rights---other than citing the language from your Hellgate Treaty, that gives you the right to fish in common with citizens with regard to public or unclaimed land---Do you have any brief or legal memorandum addressed to the issue of why you have some right to an instream flow off the reservation that is superior to those citizens with whom you fish in common.

MR. GOETZ: No, we have ...(inaudible)...

MR. ROTH: I think to serious consider that, we do need you to advance something in the way of a legal position paper.

MR. GOETZ: You want a response to that? Do you want us to brief the issue for you, is that it?

MR. ROTH: I want you--you're the one asserting it, right at the moment, I guess I'm not too impressed with that claim, but, you know, our minds are open.

MR. DECKER: I would recommend that you read the recent Kittitas case, which is an off-reservation water claim, the Yakima Reservation with a similar treaty. I suppose that would be the first thing I would direct you to---it is a similar treaty provision, it is an off-reservation water claim involving an irrigation district that impacted that reservation.

MR. ROTH: But that isn't ...(inaudible)...

MR. DECKER: I think that's pretty persuasive.

MR. ROTH: But, isn't the impact on the reservation?

MR. DECKER: No. The impact was off the reservation. It was drying salmon eggs off the reservation. The reds that were in question were approximately 50 miles north of the Yakima Indian Reservation.

MR. ROTH: Okay. Yeh, I can see immediate distinctions, but, okay.

MR. GOETZ: Mr. Chairman. My feeling is, Urban, that the treaty is very clear on that. I mean, I don't want to get into a position of where we assert a right, at your demand we submit a brief so that we can persuade you of the merits of our legal position. ...(laughter)... That could go both ways in this negotiations. I think that the case law and the treaty are pretty clear.

MR. ROTH: Well, then, is that the extent---the treaty language and the Kittitas case, is that the extent of it?

MR. DECKER: There is an additional line of cases. There are probably three precedential cases in the Ninth Circuit that in those particular cases are discussing off-reservation water and instream rights.

MR. MCOMBER: Is that what you wanted to know.

MR. ROTH: Well, that's all they're going to give me for the moment, so I guess I'll have to be satisfied with it, I'd prefer---

MR. GOETZ: Well, usually we write our briefs for the judges.  
...(laughter)...

MR. PABLO: Okay, if there aren't any more comments on that, we're on No. 6 now---the discussion of recent litigation between the Montana Department of Fish, Wildlife and Parks and the Montana Water Court.

MR. GOETZ: Thank you, Mr. Chairman. We have moved for amicus status, and been granted that status by the Montana Supreme Court in support of the Fish, Wildlife and Parks petition and I---you probably are aware of that, but I thought we should bring it up and I don't--does the Compact Commission have a position on that suit?

MR. MCOMBER: Individually or collectively?...(laughter)... We are trying to keep our nose out of it.

MR. GOETZ: I don't know that there is much to discuss here, Mr. Chairman. You are probably aware that we have moved for that status.

SENATOR GALT: And it's been granted to you, Jim?

MR. GOETZ: Yes.

MR. PABLO: Montana Power has also got amicus status.

MR. ALDRICH: Is the power company coming in as an amicus or as an intervenor?

MR. GOETZ: An amicus, I believe.

MR. DECKER: That's my understanding.

MR. PABLO: Well, that run through the agenda we have. Gordon, do you have another one or two you might want to bring up here in a short time?

MR. MCOMBER: Well, we want to talk about---we want to recap what we have done before we go home. We want to talk about the next meeting. Do any of the other members have anything else.

MR. ROTH: Yes, there is still another item that kind of dovetails in a sense to the participation and that's our Rule 408 agreement. We still haven't got a signed agreement with regard to the fact that the information, statements, positions, given to the other party or given by a party in these negotiations are inadmissible in any subsequent litigation, nor will it be used as an admission against any party. We've gone into these negotiations with that caveat, and I want to restate it at this time that that is still our position, but I believe that we ought to memorialize our positions in a written document that's agreeable to both parties with regard to that aspect of

our negotiations. And we do have, and I think we have given you, a preliminary form of agreement at the last meeting we were going to get your comments on it, but we haven't gotten those.

MR. GOETZ: We didn't---

MR. DECKER: We haven't seen a 408 agreement.

MR. ROTH: You have not.

MR. DECKER: No.

MR. ROTH: I think Marcia is prepared to give you another one....(laughter)....

MS. RUNDLE: I'm sorry. I thought---I was real certain that at the last meeting we showed you a copy of an agreement that had been proposed very early on in negotiations---maybe in 1980 or '81?

MR. GOETZ: I don't recall that.

MS. RUNDLE: Hmm---

MR. BROWN: I also thought it was one that had been signed with either the Northern Cheyenne or the---

MR. ROTH: We have a recent one. The most recent one, it seems to me we submitted was the Crow. We submitted one to the Crow. That might be the one.

MR. BROWN: It certainly wasn't---

MS. RUNDLE: No--No--This one is specific to the Salish-Kootenai Tribes. I don't have the signature page, but this was in my files. I thought it was a copy of that that I shared with you at the last meeting. That's my only copy that I have with me.

MR. ROTH: Well, while you're reading that, Jim. With regard to the public and unclaimed lands upon which you claim an aboriginal off-reservation instream flow right, how did they coincide with or dovetail with those instream flow rights that the Forest Service is claiming?

MR. GOETZ: Well, if there is water in a stream---whether it be with a federal agency or the Montana Fish and Game Department or the tribes, it is the same water, the fish---the same fish live in it. And the issue, it seems to me, is how much water is necessary to preserve the fisheries. And if there is a Fish and Game instream flow, a Murphy's right, for instance, that's compatible with the tribal rights, the Murphy right doesn't ... (inaudible due to background noise)... more than the tribal right.

MR. ROTH: The alleged tribal right, at this point, alright?

MR. GOETZ: Well, I think we can---I don't think we have to make those qualifications in the negotiations. If you want to---But, the point is that you can have, it seems to me, three overlapping claims on the same water with different priority dates, and they are all compatible.

MR. ROTH: But territorially, they are located in the Department of Interior aren't they?

MR. GOETZ: Well--

MR. ROTH: As far as we know? You are talking about public domain lands, aren't you?

MR. GOETZ: No. The tribal rights are not limited to public domain lands, nor are the Fish and Game instream flow rights. To the extent that the Fish and Game Department has rights. I gather the Forest Service would be.

MR. ROTH: Alright.

MR. GOETZ: Maybe you do need a brief on this.

MR. ROTH: I sure do. ...(laughter)... Actually, I would like more clarification of the territory within which you are claiming these off-reservation instream fishing rights or stream flow rights, vis-a-vis, whether they are owned by the public domain or whether they are Murphy Rights, or whether they don't fall within neither one of those categories.

MR. GOETZ: When an 1855 treaty says that the Indian people have the right to fish at usual and accustomed places, and the U. S. Forest Service isn't even created until the 1890's, and then you get those boundaries---the tribal right can't be confined to public domain as it existed fifty years later.

MR. ROTH: You left out a very, very significant phrase "in common with the citizens". That doesn't raise your fishing right to the level of creating an instream flow right, in my opinion.

MR. DECKER: That's not what the Ninth Circuit has decided.

MR. ROTH: What's that?

MR. DECKER: I said, in contrary to the Ninth Circuit's opinion.

MR. ROTH: Well, I---the Ninth Circuit opinion that you cited has significantly different from any of the facts that you have been citing, in regard to the Flathead Reservation.

MR. GOETZ: Well, we're not leaving out the term, "in common with the citizens of the state". That's in the treaty and nobody has left those words out, as far as I know, in these discussions. We are not making a claim that the off-reservation tribal fishing interests are exclusive to the Tribes. So I want to make that clear that we are not leaving that language out.

MRS. ROTH: You are not making that exclusive to the Tribe, did you just say?

MR. GOETZ: That's right. In the off--the tribal--the treaty language is clear that off-reservations, as Urban points out, the language is "in common with the citizens of the state" or the territory.

MR. BROWN: Mr. Chairman, may I ask. This morning, Urban stated that while the Commission hasn't taken a position on this, and certainly none of us have, we're willing to explore this. In preparation for the meeting that we'll have on the 25th, I plan to come prepared to exchange with Tom, and Peg, and Bob---whoever is there, the information---as much information as I can gather from the state's end as to the streams that have been studied for these instream flow rights, Murphy's rights, reservation requests in the west and so-on. But it would be very useful to us, I think, if we could at some early date get some kind of an idea which streams were the usual places where tribal members fished and what the treaty alludes to. Is it all streams, or is it a certain number of streams? I have no idea--and I'm not sure anyone else has--which streams we are talking about. I think we should know that, and fairly soon.

MR. GOETZ: We gave you a list of the streams this morning.

MR. BROWN: Would that be a comprehensive list, though---of the streams that we would examine? Those for which there have already been temporary preliminary decrees issued.

MR. GOETZ: It would be a comprehensive list of those that have temporary preliminary decrees on them, yes.

MR. ROTH: That's a list of basins, besides. So are you contending that within each and every basin you are---you have an instream flow right to each and every stream within the basin?

MR. GOETZ: Well, I think it's a list of streams, really. It's not a list of basins.

MR. ROTH: Don't they have tributaries to those rivers?--within the basins?

MR. GOETZ: Well, we're talking about, for example, Flint Creek, the Swan River, the South Fork of the Flathead,---

MR. BROWN: So, for example. I believe, Gold Creek, which is one of the tributaries of the Clark Fork---I believe that has been entered in a temporary preliminary decree---that we can assume that since it is not on this list there will probably not be any claim by the tribe for aboriginal rights on the Gold Creek.

MR. GOETZ: ...(inaudible)...question of ...(inaudible)...

MR. DECKER: I don't think we even got a notice on Gold Creek.

MR. BROWN: Well, I am leaving the state, I'm trying---

MR. DECKER: Well, I don't think there's ...(inaudible)... basin listed.

MR. BROWN: Okay.

MS. RUNDLE: I would like to pursue that a little further, though, because I am still not clear---

MR. BROWN: Yes.

MS. RUNDLE: For instance, you listed the Swan River. Does that mean that you have eliminated Squeezer Creek, Goat Creek, Bond Creek---all those small tributaries to the Swan?

MR. DECKER: All we've listed are those basins where we've ...(inaudible)...

MR. BROWN: I see. I asked the question without thinking this through. Gold Creek would be in 76M and so you're saying all tributaries within that basin.

MR. ROTH: Mr. Chairman, I don't have anything else.

MR. PABLO: Well. Shall we break, and both sides caucus and then go over what we did today, and then maybe try to set some dates for the next meeting.

MR. MCOMBER: We would like you to think about the issues that could be discussed at the next meeting, too, in caucus, Mr. Chairman.



MR. PABLO: Okay. A fifteen minute break.

The two parties went into caucus at 2:55 p.m.

The session reconvened at 3:30 p.m.

MR. PABLO: Do we have a date change on that meeting for the technical staff, Tom?

MR. BATERIDGE: Yes, Thursday, the 26th of September at 1:00 o'clock in Missoula.

MR. PABLO: Any particular place, or is he bringing a van from the airport.

MR. DELK: Well, I just scheduled a federal room for the 25th and now it has been changed to the 26th. So--

...(laughter)...

MR. DELK: I think we have a conference room in the federal building.

MR. GOETZ: At whose request was it was rescheduled.

MR. PABLO: Tom.

MR. BATERIDGE: Mr. Chairman, could we clarify who is going to be at that meeting.

MR. GOETZ: Not me.

MR. PABLO: Well---it will just be the technical staff involved.

MR. BATERIDGE: ...(inaudible)... from the Compact Commission and the tribes---all staff.

MR. MCOMBER: Well, if some of the Commission members wish to go, I wouldn't like them to be excluded. I certainly don't intend to go.

MR. BROWN: You know I've invited Ave Linford. And I hope that he will be able to attend, because these kinds of discussions that went on early in the negotiations with the Fort Peck Tribes were benefited by his--by the knowledge he has of--having been the State Soils Conservationist, so---I would appreciate if he could attend these kinds of meetings.

MR. GOETZ: Mr. Chairman, I think what Tom is getting at, there be no legal counsel that be there from either sides.

MS. RUNDLE: I have no intention of attending. I would mention, though, that Dan Kemmis is a Commission member, and lives in Missoula, and sometimes goes to meetings when they are held in Missoula just because it is convenient for him. He doesn't even know about it yet, so I have no idea if he would want to go or not, but---

MR. PABLO: Is he a lawyer?

MR. MCOMBER: Yes.

MR. BROWN: But he---

MR. MCOMBER: Well, what---Mr. Chairman, what is your wishes on it---would you prefer that just technical people be there.

MR. GOETZ: Well, I don't----no, we don't have a problem with Mr. Linford being there for the Commission. But if there is a legal question that arises, though, either both counsel from both sides should be there or no counsel. And that is the reason for the question. And we don't have a problem with Dan Kemmis being there because he is not serving as staff counsel. If he starts making legal opinions or arguments, then our staff will have to get us on the horn and get their miranda warnings...(laughter)...

MR. MCOMBER: It was never intended that legal issues be discussed at that meeting.

MR. PABLO: That's right.

MR. MCOMBER: Okay then?

MR. DECKER: Sounds fine.

MR. MCOMBER: Okay, Mr. Chairman..

MR. PABLO: Okay, now---do we want to agree to a possible next meeting date and agenda items first, or do you kind of want to recap what we felt we went through today.

MR. MCOMBER: We'd like to recap what we did today, Mr. Chairman.

MR. PABLO: Okay, Gordon.

MR. MCOMBER: Okay, this is our recollection of the decisions that have been made and the actions agreed upon for today. The first one is that we both research the open meeting law and come to the next meeting prepared to discuss procedure and methods to deal with this question, including how public information would be handled---and participation of--I shouldn't say participation, but--

MR. PABLO: ...(inaudible)...

MR. MCOMBER: We have to communicate with people other than tribal members. As I indicated to you this morning, it's just a practical, political thing. We have to keep other people---we feel they have an interest in our conclusions---involved. Okay for number one?

Number two was that we have agreed that our technical people would meet---now September the 26th---and return to us with recommendations on what information and data is needed, what information and data is available, what information and data should be developed and, if possible, what the cost of that development would be---a rough estimate of the cost. It is understood that this will be---this information will be a recommendation only, and it doesn't bear with it the authority to make decisions. Okay? Then you're going to review 408---this 408 thing---and discuss that at the next meeting. If you had any other recollections of other issues that we discussed or made a commitment on?

MR. PABLO: Dan or Jim?

MR. GOETZ: Well, those are the outstanding issues, but for summarizing what we did today---the other agenda items, of course that are in the letter---

MR. MCOMBER: Yes.

MR. GOETZ: ---speak for themselves.

MR. MCOMBER: Well, what we were---we were thinking in terms of what needs to be done, what commitments we made today to do something.

MR. PABLO: And as far as---like the way you feel about our alleged claims to instream flow---until certain court cases are settled, I think the State alleges to have jurisdiction, so we are here to negotiate that.

MR. ROTH: We have committed to send you a bound copy of the Fort Peck Compact, so that is another action that we have to take.

MR. MCOMBER: Did I leave anything else out? Then if you want to discuss the next meeting, Mr. Chairman, we're amenable to that.

MR. PABLO: I had---mid November?

MR. ROTH: We were thinking of mid-November, but we wouldn't like to commit to a date today---to see various members time schedules. But within the next week or ten days, we should be able to commit to a specific date.

MR. PABLO: Well, we have to come back to the Council and get everybody lined out here, but we will shoot for mid-November.

MR. ROTH: Yes.

MR. MCOMBER: Okay.

MR. PABLO: Then on the agenda items. I have---

MR. ROTH: Could we---Mr. Chairman, could we discuss the place of the meeting? It has been pointed out to me that most of the meetings have taken place here at the tribal headquarters. And we would suggest that the next meeting take place---that we're going to chair---take place in Helena. We can get an appropriate meeting place available. This would also make it easier for the representative from the AG's office to be present, a member of the DNRC and the Governor's Office also to be present.

MR. MCOMBER: We'd talked previously about a tour of the Reservation, but it's getting kind of late in the year for that. So we'll have to put that off until a later date.

MR. THERRIAULT: ...(inaudible)...---a field trip in---

MR. MCOMBER: Yeah. Is Helena all right?

MR. THERRIAULT: I prefer Spokane, but I will settle for Helena....(laughter)...

MR. PABLO: We'll get the dates and everything, and get the place later---in Helena, some place---you can pick the spot.

MR. MCOMBER. Alright.

MR. PABLO: Okay, Jim? Okay, let's start with the agenda items. We'll start with the---sign the 408 agreement. Number two, I have open meeting status; three, cost sharing of research data; four, results of technical staff meeting; five, news releases; and six, update on Commission talks with the Flathead and Lolo National forest and the Department of the Interior reservations on the Reservation, like the wildlife refuge and on watersheds that come over.

MR. MCOMBER: We are very interested in getting down to the meat of things, and I certainly have no problems with these things mentioned. I question if anyone else does. We would like to get into some meaningful discussions on a few other basic issues. We would like to discuss off-reservation instream flow rights and on-reservation instream flow rights. We would like to discuss---preservation of rights---or protection of rights of non-Indians on the reservation.

MR. DECKER: Mr. Chairman. Going back and, hopefully, not rehashing, but---as we were discussing earlier today---that with our initial meetings with the Compact Commission before we suspended talks back in 1979, when Henry Loble was Chairman for the Commission---It is our recollection and, in conference with other tribal legal staff who were present at those earlier meetings, that initially Chairman Loble took the position, and the Tribes took the position, that the negotiations were not subject to the open meetings law. So, I'd like to request the Tribes' position that the Compact Commission staff go back and go through it's minutes. We're going to go back and look at those minutes, likewise. And, that is my understanding of several discussions on the same thing that we discussed today. And we do have some concerns about that, and I think that those concerns need to be addressed and that we need to reach a common resolution of those concerns. I, like Chairman McOmber, would like to get into substantive issues. But before we ever get into substantive discussions, we would certainly like also to pursue this issue further. I think that we need to reach common resolution on that first.

MR. MCOMBER: Good point.

MS. RUNDLE: Open meetings, then, should be the first thing on that agenda. I---Mr. Chairman, if I could clarify one thing about the 408 agreement. I can't remember exactly how you stated it, but I'm going to assume that between now and the time that we have our next meeting, the counsel for both sides will be in touch with each other as to proposed changes or---

MR. DECKER: Sure.

MR. ROTH: Yeah--I was--actually, you can coordinate that effort with Marcia and she'll call me if she has any questions. And I would anticipate, basically, that by the time of the next meeting the form of the agreement would have been agreed upon, and perhaps even the signed agreement exchanged at that particular time. And, hopefully, that a firm position with regard to the open meeting law had been taken by the Commission and at that meeting that discussion would not take a great deal of time.

There are other issues that we're interested in--information, I guess that we would like to have. We would like the Tribes' position with regard to the Kerr Dam, and with regard to instream---I guess would involve instream flow rights in regard to power sites, power projects---existing and potential. Seems to me we've got to come to grips with some of these larger issues initially to see whether we can proceed through negotiations to get a compact.

MR. GOETZ: Gordon, could you repeat those issues that you have on your list?

MR. MCOMBER: Well, on our list was---first, it was---the report from the technical team. You had that on your list, Mr. Chairman. And, then it was discussion of the off-reservation instream flows and on-reservation instream flows. And then we wanted to discuss the preservation of non-Indian rights---water rights---that would be on the reservation or adjacent to the reservation---those---those people that are using that water now and have a right to it under state law.

MR. PABLO: Are all those---nine items on the agenda? I thought---some of them I don't think will take very long.

MR. MCOMBER: No. That---you have that 408 thing. That's kind of just procedure, is it not?

MR. PABLO: Yeah. You'll get that letter, so it's coming from both sides and it can be signed at that meeting.

MR. MCOMBER: Well, we must deal with this open meeting problem. I---we should come to---arrive at some kind of understanding on that. We certainly can't let that put a stop to the negotiations.

MR. ALDRICH: Mr. Chairman. With respect to, for example, the 408 agreement and all agreements that are reached in these negotiations, I've got to keep pointing out---we're not talking just both parties here. We're talking about a tripartite negotiation. On behalf of the United States, the Department of Justice does have to participate in that 408 agreement, so I would urge both counsels to coordinate with my office and with the Department of Justice in drafting a 408---that agreement.

MR. PABLO: Dan?

MR. DECKER: Rich. It is clear who is representing the Department of Justice, yet, on this matter?

MR. ALDRICH: At this point it still---as far as I know---it is still Pat Barry.

MR. GOETZ: What is your position on the open meetings issue?

MR. ALDRICH: My own personal viewpoint, Jim---like I said---the United States has no comparable requirement that meetings be kept open or closed.

MR. MCOMBER: That was one of the things that we inherited with that new Constitution that the state adopted a little bit ago.

MRS. ROTH: Right.

MR. PABLO: Okay, then Urban, you said you'd like something on the Tribes' position on the Kerr Dam?

MR. ROTH: Yes, on that---and on the Flathead River, and instream flow with regard to power projects and that sort of thing.

MR. PABLO: Well, part of that could hinge on the BIA studies and whatever comes out of that.

MR. ROTH: See, we are not familiar with what is going on. Maybe what you could do is educate us as to the status of that. I know that you've settled---reached a settlement---with the Montana Power Company. I know, I think, that there is a new license issued, is that right? We don't have the license. In terms of the license, we don't know what is going to transpire after that license terminates; whether there has been an agreement to transfer ownership or what we've agreed to; whether there are any plans for building additional power projects within the reservation and power sites and who owns those, or if they have been leased to someone---

MR. PABLO: Jim?

MR. GOETZ: Obviously---

MR. ROTH: We should have, probably, a preliminary idea of how--- of what the quantity of water is that---does the license provide for a certain minimum quantity of water flowing through the dam gates, or---

MR. PABLO: Yeah, that's a minimum flow.

MR. ROTH: So many cfs?

MR. PABLO: I forget what the number was.

MR. DECKER: That's just until the studies---

MR. PABLO: Yeah, that's just--that just hinges on the result of the studies that won't be finished for three years.

MR. ROTH: I see.

MR. GOETZ: Mr. Chairman. On the protection of non-Indian water rights, could we change that wording to protection of alleged non-Indians water rights?

...(laughter)...

MR. ROTH: And you would like some of it back, huh?

MR. GOETZ: Well, if necessary.

MR. PABLO: When, we get---when Jim gets his agenda items down---gets everything down---in a week to ten days, get everything---the dates settled and everything---we'll see everybody in Helena.

MR. MCOMBER: We'll get you a copy of the transcript as soon as it is completed.

MR. PABLO: Okay. Scott?

MR. BROWN: I was---going to say---she should have the transcript ready in a couple weeks---two to three weeks.

MR. PABLO: Okay. Any other comments? Okay.

MR. MCOMBER: Thank you very much.

The meeting adjourned at 3:50 p.m.



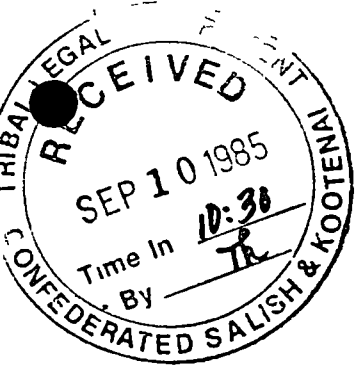
Sept. 11, 1985

People Present

<u>Name</u>	<u>Representing</u>
Joe Dupuis	CSKT
Gordon McArnder, Chairman	Compact Commission
Jack Galt, Vice Chairman	"
Audrey Roth	"
Ave Ginford	"
Scott Brown	"
Urban Roth	"
Marcia Rundle	"
Elsie Armstrong	"
Rich Aldrich	Interior
Bob Delk	"
Ron Therriault	CSK Tribes
John Paulson	MT AG's Office
Mike Pablo	CSK Tribes
Dan Decker	"
James Goetz	"
Chuck Stipe	I B. C
Alan Mulkern	Joint Board of Control
Peg Trochlel	CSK Tribes <del>(BIA)</del>
Tom Bateridge	"
BERNARD BURNHAM	BIA - PORTLAND AREA
John Neuman	BIA - Flathead Agency
AL SPANG	BIA - FLATHEAD AGENCY
Akresa Wall-McDonald	BIA - Flathead Agency
Joe Dupuis	CSK Tribes

OFF-RESERVATION WATER CLAIMS  
OBJECTIONS TO TEMPORARY/PRELIMINARY DECREES  
IN THE CLARK FORK DIVISION

1. 76-I - Middle Fork of Flathead River
2. 76-J - SouthFork of Flathead River
3. 76-K - Swan River
4. 76-GJ- Flint Creek
5. 76-G - Clark Fork River Basin Above the Blackfoot River
6. 76-M - Clark Fork River Between the Blackfoot River and  
Flathead River Basin
7. 76-C - Fisher River Basin
8. 76-D - Kootenai River Basin
9. 76-N - Lower Clark Fork River
10. 76-B - Yaak River Basin
11. 76-E - Rock Creek Basin



43  
DU ALEKSICH, JR., CLERK

*M. Bukwitz*  
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

\*\*\*\*\*

CONFEDERATED SALISH & KOOTENAI )  
TRIBES OF THE FLATHEAD RESERVATION, )  
MONTANA, et al, )  
  
Plaintiffs, )  
  
vs. )  
  
STATE OF MONTANA, et al, )  
  
Defendants. )

CV 81-149-M

OPINION

AND

ORDER

\*\*\*\*\*

Plaintiffs, the Confederated Salish and Kootenai Tribes and certain of their members (hereinafter also "Tribes") instituted this action in 1981, seeking to enjoin the application or enforcement of the Montana Water Use Act of 1973 [§§ 85-2-101 through 85-2-704 and §§ 3-7-101 through 3-7-502, M.C.A. (1983)] on the Flathead Indian Reservation and to any and all waters arising upon, flowing through or under, bordering, or otherwise occurring on the Reservation. The Tribes further seek a declaration that the state's Water Use Act is unlawful and unconstitutional as applied to the Tribes and their members and to all waters arising on the Reservation.

On July 12, 1982, Plaintiff filed a motion for summary judgment. By order of the Hon. Russell E. Smith, dated August 3, 1983, the proceedings were stayed pursuant to stipulation of the parties, who had entered into negotiations. The order required the parties to file a status report every four months, and provided that any party at any time may request the Court to move the case forward, at which time the Court will set a time within which the State of Montana and other defendants shall respond to the Tribes' motion.

The State of Montana has requested this Court to terminate the stay and to set a briefing schedule on the Tribes' motion for summary judgment. The Tribes in turn have withdrawn their motion and seek to have the stay continued. The Tribes further request

that the Court take no action in this matter until the Supreme Court of Montana enters a decision in State of Montana ex rel. Mike Greely, Attorney General, Water Court of the State of Montana and the Judges of that Court, Petitioners, v. United States, individually and as trustee for each of the hereinafter named Indian Tribes, et al., Respondents, No. 84-333 ("State of Montana v. United States").

There are two issues pending before the Supreme Court of Montana in State of Montana v. United States. The first is whether the Disclaimer Clause contained in Article I of the Montana Constitution prohibits state adjudication of Indian water rights. The second issue is whether the adjudication procedures set forth in the Montana Water Use Act are adequate to adjudicate Indian Water Rights. State of Montana v. United States thus represents the latest development in the continuing dispute over the proper forum for adjudication of Indian and federal reserved water rights.

The history of the dispute in Montana dates back to 1979, when Judges Hatfield and Battin of this District dismissed seven consolidated actions brought by the United States for the purpose of adjudicating the water rights of certain Indian tribes as well as Indian and non-Indian individuals in and to certain streams. Northern Cheyenne Tribe v. Tongue River Water Users Association, 484 F.Supp. 31 (D. Mont 1979). The Court cited United States v. Colorado River Water Conservation District, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), for the factors instrumental in its decision to dismiss the action in reference to state proceedings:

in water rights litigation, the interdependency of the various rights; the availability of comprehensive state systems for adjudication of water rights, the stage of the proceedings in the federal court, beyond the filing of the complaint and the motion to dismiss, the extensive involvement of state water rights, and the apparent design of the McCarran Amendment to avoid piecemeal or burdensome litigation.

Northern Cheyenne Tribe, supra, 484 F Supp at 35. The Court then examined Montana's Senate Bill 76 and its provisions for water rights adjudication (now codified in Part Two, Chapter Two, Title 85, M.C.A.), finding that they "reflect both the policy and the essential mechanism for adjudication of state water rights. Adjudication by adversary proceeding initiated by one claimant against all others in his drainage has been forsaken in favor of blanket adjudication of all claims, including federal and federal trust claims." Id., at 35-36 (emphasis in original).

On appeal, the Ninth Circuit Court of Appeals reversed, holding in part that the McCarran Amendment did not grant jurisdiction in a state which "expressly disclaims jurisdiction over Indian lands within its constitution and enabling act." Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080, 1084 (9th Cir. 1982).

The case was ultimately appealed to the United States Supreme Court, which held that the District Court properly dismissed the actions in deference to the state adjudicatory process. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983). In a footnote, the Court stated that "resort to the federal forum should remain available if warranted by a significant change in circumstances, such as, for example, a decision by a state court that it does not have jurisdiction over some or all of these claims after all." Id., 103 S.Ct. at 3215, note 20.

On remand, the Court of Appeals for the Ninth Circuit stated that it believed dismissal to be unwise. "A stay of the federal actions would be preferable to a dismissal here so the federal forum would most readily be available if warranted by a 'significant change of circumstances' . . . ." Northern Cheyenne Tribe v. Adsit, 721 F.2d 1187, 1188 (9th Cir. 1983). The district courts were instructed to stay the actions until "state court proceedings have been concluded." Id., at 1189.

The directives of the Ninth Circuit Court of Appeals in Adsit suggest that this Court should further stay the present proceedings. The Court recognizes that this case is not identical to the actions originally dismissed by District Judges Hatfield and Battin, since it does not expressly request a general adjudication of water rights on the Flathead Indian Reservation. On the other hand, were this Court presently to rule in the Tribes' favor, it would effectively thwart the efforts of the Montana Water Rights Compact Commission and the entire state adjudicatory process. Should the Supreme Court of Montana rule that the state proceedings are inadequate for adjudication of federally reserved water rights, then it may be appropriate for this action to proceed, but not before.

Recently, this Court decided the case of Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Flathead Irrigation and Power Project, et al, Cause No. CV 85-150-M, \_\_\_\_\_ F.Supp \_\_\_\_\_, wherein the Court held that adjudication of water rights, including federally-reserved water rights, is a proper function of the courts of the State of Montana to which this Court would defer. The Court nonetheless issued a Temporary Restraining Order under the emergency circumstances therein claimed, to maintain the status quo while the Tribes' alleged


aboriginal fishing rights guaranteed by treaty were under consideration. The parties introduced evidence purporting to show the present disarray of Montana's water adjudication system, and specifically a petition filed in the Supreme Court of Montana by the Department of Fish, Wildlife and Parks. This and other evidence indicates that the water adjudication process is in the midst of controversy but nonetheless gradually being stabilized and put in order. Under these circumstances, where the Supreme Court of Montana will soon decide these critical issues of disclaimer and adequacy of state proceedings, it would only exacerbate the existing problems should this Court meddle in the water adjudication arena.

It is thus clear that the parties' present remedy is to press action at the state level, not to insist on a federal forum which must remain unavailable in the presence of these unresolved matters of state law.

THEREFORE, IT IS HEREBY ORDERED that all proceedings in this action are stayed until state court proceedings have been concluded or until the further order of this Court.

IT IS FURTHER ORDERED that the parties are to file a status report in this matter once each month, the first such report to be filed on or before September 30, 1985, with additional reports filed prior to the last day of each succeeding month until further order of this Court.

Done and dated this 6 day of September, 1985.

  
\_\_\_\_\_  
CHARLES C. LOVELL  
United States District Judge

IN THE WATER COURTS OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
KOOTENAI RIVER BASIN

1 IN THE MATTER OF THE ADJUDICATION )  
2 OF THE EXISTING RIGHTS TO THE )  
3 USE OF ALL THE WATER, BOTH ) OBJECTIONS OF THE  
4 SURFACE AND UNDERGROUND, WITHIN ) CONFEDERATED  
5 THE KOOTENAI RIVER DRAINAGE AREA, ) SALISH AND KOOTENAI  
6 INCLUDING ALL TRIBUTARIES OF ) TRIBES, MONTANA  
7 THE KOOTENAI RIVER IN LINCOLN )  
8 AND FLATHEAD COUNTIES, MONTANA )  
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I. INTRODUCTION

The Confederated Salish and Kootenai Tribes, Montana (hereinafter referred to as "Confederated Tribes"), and the members thereof, object to the March 22, 1984, issuance of the Temporary Preliminary Decree for the Kootenai River Basin and the Report of the Water Master of the Kootenai River Basin. This objection is made without acceding to the above Court's jurisdiction and without waiving any objection the Confederated Tribes may have to the above Court's jurisdiction on the grounds of (1) inadequacy of state proceedings to adjudicate the rights asserted, (2) violation of the State of Montana Constitution, (3) tribal sovereign immunity, and (4) other grounds.

The Temporary Preliminary Decree affects waters which are a part of the claim of the Confederated Tribes to aboriginal hunting, fishing and gathering rights which date from time immemorial and which are recognized, reserved, and guaranteed by the Treaty of Hellgate, Montana, July 16, 1855, ratified March 9, 1857, 12 Stat. 975. Article 3 of the Treaty of Hellgate provides

1  
2 the Confederated Tribes:  
3

4 The exclusive right of taking fish in all  
5 the streams running through or bordering  
6 said reservation is further secured to said  
7 Indians; as also the right of taking fish at  
8 all usual and accustomed places, in common  
9 with citizens of the Territory, and of  
10 erecting temporary buildings for curing;  
11 together with the privilege of hunting,  
12 gathering roots and berries, and pasturing  
13 their horses and cattle upon open and  
14 unclaimed land.  
15

16  
17 II. ABORIGINAL RIGHTS CLAIM  
18

19 The "Temporary Preliminary Decree" for the Kootenai River  
20 Basin fails to include the water rights claim filed by the  
21 Confederated Tribes and the United States Government for the  
22 protection of their aboriginal treaty rights. On or about April  
23 30, 1982, the Confederated Tribes filed a water rights claim with  
24 the State of Montana for all waters necessary for the protection  
25 of their aboriginal fishing, hunting, gathering, and pasturing  
26 rights reserved by them in the Treaty of Hellgate. The  
27 Confederated Tribes' claim expressly includes off-reservation  
28 reserved waters, and was filed pursuant to a Stipulation entered  
29 into between the Confederated Tribes and the State of Montana.  
30 The Stipulation was entered into and approved by the Federal  
31 District Court of Montana, Missoula Division. See Confederated  
32 Salish and Kootenai Tribes of the Flathead Reservation, Montana  
33 et. al, v. The State of Montana, Docket No. 81-140, November  
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1 1981). 1/ The United States Government, in its capacity as  
2 trustee, filed a similar claim on behalf of the Confederated  
3 Salish and Kootenai Tribes on or about April 29, 1982, for  
4 protection of those aboriginal rights recognized and guaranteed  
5 pursuant to the Treaty of Hellgate. Notwithstanding these  
6 filings, Paragraph 14 of the Water Masters Findings of Fact and  
7 Conclusions of Law:  
8  
9

10 "The Court finds that no individual nor  
11 Department filed any valid instream claims  
12 fish and wildlife instream uses."  
13

14  
15 The Confederated Tribes object to this finding because  
16 it fails to recognize the aboriginal water claims and filings  
17 cited above. While Montana law appears not to accommodate Indian  
18 aboriginal and reserved rights, particularly their priority date  
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28  
29 1/ Part Two of Claim One, Attachment A, Paragraph 3, of the  
30 Confederated Tribes April 30, 1982 Statement of Claim for  
31 Existing Water Rights states: "The Tribes claim for themselves  
32 as a political entity and for their members an instream flow,  
33 dating from time immemorial, in all rivers, streams and other  
34 waters in the State of Montana, navigable or otherwise, necessary  
35 for the protection of those aboriginal rights recognized and  
36 guaranteed by the Treaty of Hellgate, Montana, July 16, 1855, 12  
37 Stat. 975, and all other aboriginal rights and activities pro-  
38 tected by the Constitution and Laws of the United States."  
39 Paragraph 6, states: "This single claim filed by the Tribes  
40 encompasses all uses of off-Reservation water, without regard to  
41 the designation given such use by the State by its forms or  
42 otherwise." The Stipulation, filed by the Court, allows the  
43 Tribes to amend the claim from time to time to make the claim  
44 more specific.  
45

1 from time immemorial (see e.g. §85-2-316) and is therefore  
2  
3 inadequate since such substantive rights exist as a matter of  
4  
5 Federal law, the Master's Findings should be modified to reflect  
6  
7 the aboriginal hunting, fishing, gathering and pasturing rights  
8  
9 of this objector from time immemorial as recognized, reserved and  
10  
11 guaranteed by the Treaty of Hellgate, July 16, 1855.  
12  
13

### 14 III. INADEQUATE NOTICE

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16 The Confederated Tribes also objects to the findings and  
17  
18 conclusions of the Water Master for the Kootenai River Basin, because  
19  
20 they fail to include adequate notice to the Kootenai River water  
21  
22 users that water rights decreed in the Kootenai River Basin may be  
23  
24 subject to the possible senior water claims of the Confederated  
25  
26 Tribes. Although the Notice of Entry of Temporary Preliminary  
27  
28 Decree makes reference to Indian and Federal reserved water  
29  
30 rights under the heading of; "What is a Temporary Preliminary  
31  
32 Decree?", the Water Master's Report, adopted by the Court by  
33  
34 Order dated February 28, 1984, makes no mention of Tribal  
35  
36 reserved water rights in the Kootenai River Basin. (See MCA  
37  
38 §85-2-231(c)). See also, 85-2-701 MCA which declares that "the  
39  
40 water and water rights within each water division are  
41  
42 interrelated \* \* \*." Accordingly, we suggest that the Master's  
43  
44 findings and conclusions include a provision affording adequate  
45  
46 notice to Kootenai River water users of the pendency and possible  
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1  
2 seniority of other claims to water in this and other basins  
3  
4 within the Clark Fork Water Division.  
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6

7  
8 IV. HYBRID DECREE UNAUTHORIZED  
9

10 While there is language in the "Temporary Preliminary  
11 Decree" which purports to preserve the status of the United  
12 States of America in behalf of the United States Forest Service  
13 with respect to reserved water claims and which represents that  
14 no Final Decree will issue until either a compact is negotiated  
15 or approved or the United States of America is given the  
16 opportunity to file and have adjudicated its claim in behalf of the  
17 U.S. Forest Service, (See No. 6 pp. 16, 17), no similar language  
18 is included which purports to preserve the status of the  
19 Confederated Tribes' rights to its aboriginal and reserved claim.  
20 The "Temporary Preliminary Decree" is deficient because it fails  
21 to recognize and protect the Confederated Tribes' aboriginal and  
22 reserved rights.  
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35 The Confederated Tribes further object to the Water  
36 Court's proceeding through the vehicle of a "Temporary  
37 Preliminary Decree" --a hybrid procedure not authorized by  
38 statute--which simply serves to confuse the parties and undermine  
39 the efficacy of the state adjudication process. The February 23,  
40 1984 Order purports to conclude that the "Temporary Preliminary  
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1  
2 Decree" meets the requirements of 85-2-231(1) MCA. 2/ Yet,  
3  
4 subsection (1)(c) of 85-2-231 requires that the decree be based on:  
5

6 The contents of compacts approved by the  
7 Montana Legislature and the Tribe or federal  
8 agency or, lacking an approval compact, the filing  
9 for federal and Indian reserved rights. . . .

10  
11 Clearly the requirements of 85-2-231(1) are not met.  
12  
13 Negotiations between the United States Government and the State  
14 of Montana with regard to the Kootenai River Basin waters are  
15 ongoing pursuant to 82-2-703 MCA. No preliminary decree can  
16 issue until those negotiations conclude or federal filings are  
17 made. See §§85-2-231 (c) and (d), and 85-2-702 (3) MCA. Because  
18 no preliminary decree can issue, a fortiori the requirements of  
19 85-2-231(1) are not met.  
20  
21

22  
23 The Confederated Tribes recognize that a "temporary  
24 decree" or an "interlocutory decree" is authorized by 85-2-231  
25 (d) MCA. Our objection, however, goes to the use of a "temporary  
26 preliminary decree" (emphasis ours). It appears that the Court  
27 intends to give its hybrid "Temporary Preliminary Decree" all of  
28 the substance of a "preliminary decree". Changing its name can  
29 not change its legal effect.  
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44 2/ The Order reads: "the Court finds that the Report meets the  
45 requirements for the Temporary Preliminary Decree set forth in  
46 85-2-231(1) MCA 1978." See also the Water Master's Conclusion of  
47 Law No. 1 ("This Report meets the requirements for a Temporary  
48 Preliminary Decree as required by 85-2-231 MCA 1978").  
49  
50

1 In its February 9, 1984 Memorandum, the Court makes  
2  
3 clear its intention to treat the terms interchangeably:

4  
5 But as a practical matter it is insignificant  
6 whether the decree is called a preliminary or  
7 a temporary decree if they both do the same  
8 thing. Furthermore, if both decrees have the  
9 same legal effect, the use of the normal  
10 procedure, which involves issuance of a  
11 preliminary decree, makes sense because it  
12 is consistent with the general adjudication  
13 procedures established by the Legislature and  
14 the Water Courts, and, therefore best serves  
15 the orderly administration of water rights.

16  
17 Memorandum at 10-11 (emphasis ours). The Court's intent  
18  
19 to treat its Temporary Preliminary Decree as a de facto preliminary  
20 decree is further suggested by the public notice accompanying its  
21 Kootenai River Basin Temporary Preliminary Decree. The notice  
22  
23 states: "IF A RIGHT IS NOT OBJECTED TO, IT SHALL REMAIN  
24  
25 UNCHANGED AND BE ENTERED IN THE FINAL DECREE." (emphasis ours).  
26  
27 This language suggests that the preliminary decree stage would be  
28  
29 omitted if objections are not received. 3/  
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32  
33 Full compliance with 85-2-231 MCA, and full consideration  
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37 3/ Another example is contained in Paragraph 16 of the Water  
38 Master's Report wherein the report states: "The Final Decree of  
39 a Basin shall allow for, and make a part of its provision, the  
40 final agreement of the Federal Reserve rights if any. . . ."  
41 (emphasis ours). To the contrary, 85-2-231(1) MCA requires  
42 federal rights to be factored in during the preliminary decree  
43 stage. It is also noteworthy that Paragraph 16 purports to pre-  
44 serve the status of the United States Forest Service's reserved  
45 water claims but no similar language is included which purports  
46 to preserve the status of the Confederated Tribes' rights to its  
47 aboriginal reserved claim.  
48  
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50

1 of Indian and federal reserved rights is not a mere technicality  
2 (See Memorandum at 10); it is the law. The Confederated Tribes  
3 object to the use of the "Temporary Preliminary Decree" in the  
4 manner it is being used because it circumvents unambiguous state  
5 law, relegates consideration of Indian and federal reserved water  
6 rights to a "later amendments" exercise, and forces the Tribes to  
7 assume the stance of objector. 4/

8  
9 Moreover, adjudication of water rights in the Kootenai River  
10 Basin should be suspended during the pendency of negotiations  
11 with federal agencies over non-Indian reserved water rights  
12 pursuant to 85-2-217 MCA. During that suspension no preliminary  
13 decree should be issued.  
14

#### 15 16 17 18 19 20 21 22 23 24 25 26 V. CONCLUSION

27  
28 The Confederated Tribes respectfully request this Court  
29 to withdraw the "Temporary Preliminary Decree" for the Kootenai River  
30 Basin and the Report of the Water Master on the Kootenai River Basin  
31 to insure compliance with State law. If the Court finds it  
32 necessary for the orderly administration of water rights to  
33 temporarily decree the claims to water on the Kootenai River Basin,  
34 we respectfully submit that the Court if authorized to issue a  
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43  
44 4/ Unless the Confederated Tribes file objections to and  
45 participate in these proceedings to adjudicate the waters of  
46 the Kootenai River Basin, state law may prohibit the Tribes from  
47 attacking the final decree. See 85-2-235 MCA.  
48  
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1 temporary decree for that purpose pursuant to 85-2-231(1)(d) MCA.  
2 We further request that the Water Court delcare that no general  
3 adjudication hearings will be held pursuant to 85-2-233 MCA until  
4 a compact is concluded with the United States Government on  
5 behalf of federal agencies or the Confederated Tribes' claims are  
6 added and a preliminary decree is issued pursuant to  
7  
8  
9  
10  
11  
12 85-2-231(1)(c) MCA.

13  
14 Finally the Confederated Tribes respectfully request  
15  
16 that the Master's findings be amended as follows:

17  
18 Reserved and Aboriginal Water Rights:

19  
20 The determination of water rights in the Kootenai  
21 River Basin is subject to the contents any  
22 future compact negotiated by the Reserved  
23 Rights Compact Commission and Montana Indian  
24 Tribes or the United States Government concerning  
25 reserved water rights, or any water rights which  
26 may result from the future adjudication of Indian  
27 reserved and aboriginal water rights.  
28

29 RESPECTFULLY SUBMITTED this 2 day of August, 1984.  
30  
31  
32

33  
34 \_\_\_\_\_  
35 JAMES H. GOETZ  
36 35 North Grand  
37 Bozeman, Montana 59715  
38 (406) 587-0618

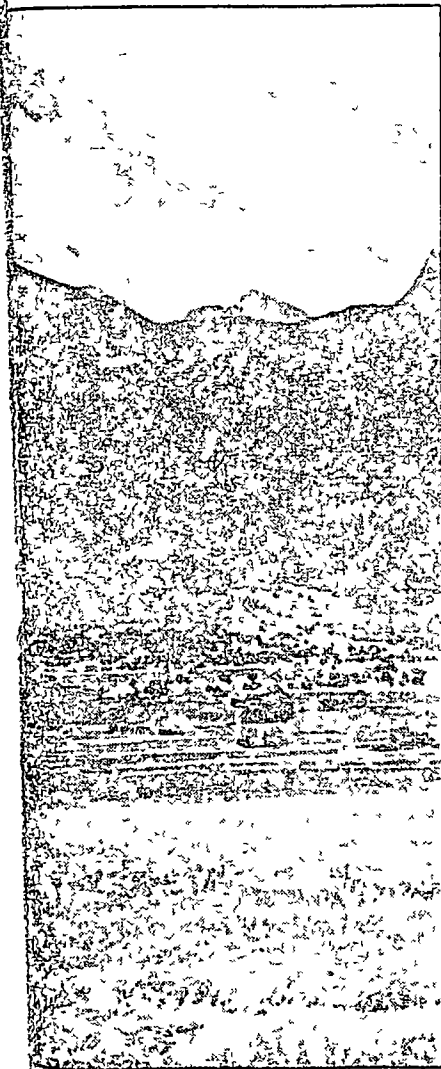
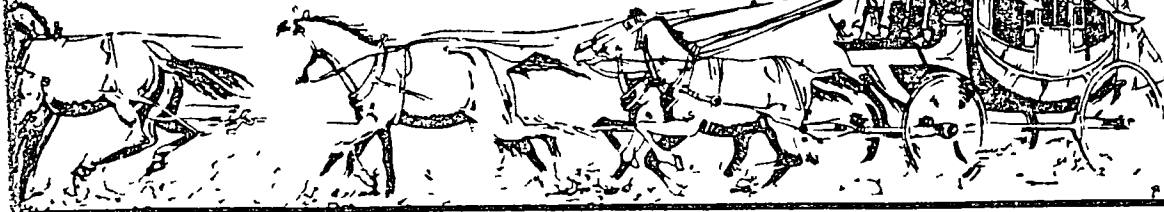
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41 *Daniel F. Decker*  
42 DANIEL F. DECKER  
43 P.O. Box 278  
44 Pablo, Montana 59855  
45 (406) 675-4600

46  
47 ATTORNEYS FOR THE CONFEDERATED  
48 SALISH AND KOOTENAI TRIBES OF  
49 THE FLATHEAD RESERVATION, MONTANA  
50

# LEY NEWS

25

1977 and 1984



### From Project control

## Petitioners want B.I.A. removed

The Joint Board of Control of the Flathead, Mission and Jocko irrigation districts is circulating a petition to all irrigators asking to have the Flathead Project transferred from the Bureau of Indian Affairs to the Bureau of Reclamation

Sen John Melcher has asked for the sentiment of the water users to a transfer of control, the petition planners explained

Chuck Stipe, chairman of the Joint Board, said in announcing the petition drive, "The time is crucial for all of us to make the irrigators' position known. The continued deterioration of the Project and the need to resolve long-standing issues of concern to all of us — the Tribes, Indian irrigators and non-Indian irrigators — requires that we take action now"

The petition drive will be conducted through the local water users associations. Individual irrigators are being urged to contact their water users boards or board members for additional information and copies of the petition

The drive will be conducted from Sept 6 to 20, when the Joint Board

plans to turn the petitions in to the state's congressmen and senators, Stipe said

Water users have long been concerned about the deteriorating condition of the Project's facilities and the B I A 's apparent inability or unwillingness to provide funds and expertise for renovations. But the wording of the petition indicates that recent negotiations over in-stream flows and reservoir levels — which didn't include the water users — were the final straw for the Joint Board of Control

The petition to the Montana congressional delegation says

"Whereas Flathead Irrigation and Power Project facilities are continuing to deteriorate and have not received adequate attention by the Bureau of Indian Affairs

"And whereas the water users were not included in a) the B I A Tribes agreement governing in-stream flows and reservoir pools submitted to the federal court in Helena last month, and b) the meetings held after the dismissal of the lawsuit to determine the precise levels of the in stream flows and those reservoir pools

(Continued on next page)

had been necessary since May

Photo by Dwight Tracy

surprise

Study in ...



*To W. H. - Mc Donald  
comments*

By the Treaty of Hellgate, the Flathead, Kootenay and Pend d' Orielles Indians ceded to the United States all their right, title and interest in their aboriginal homeland. A tract of land was reserved from the land ceded, for the exclusive use and occupation of the Tribes. That homeland is commonly known as the Flathead Indian Reservation (1855).

Subsequent to the Hellgate Treaty of 1855, the Flathead Allotment Act was passed on April 23, 1904. This act allotted lands to the Indians and also authorized a formal survey to determine the feasibility of an irrigation project within the Reservation boundaries. The actual irrigation survey began on July 8, 1907 and the final report was filed November 12, 1907. The final report found the irrigation possibilities were favorable on the Flathead Reservation.

Therefore, the Office of Indian Affairs and the U.S. Reclamation Service entered into an agreement in 1907 whereby the Reclamation service furnished the engineering and field construction ~~enterprise~~, while the Office of Indian Affairs retained ultimate authority for approving construction plans. The Reclamation Service provided construction and design assistance until 1924 when the Flathead Irrigation Project was transferred back to the Indian Irrigation Service. The Flathead Project has always been under the jurisdiction of the Bureau of Indian Affairs.

The Act of March 3, 1909 provided the first Congressional appropriation for beginning construction of the Flathead Project. Subsequent acts have provided continuing appropriations for the construction work. Prior to 1916 the appropriations were reimbursed from the sale of land and timber belonging to the Flathead Tribes. The Act of 1916 provided that the Tribal funds utilized be repaid and that payment for irrigation works should be made by the landowner whose land benefitted.

By 1914, 152,000 acres of land within the Reservation boundaries were classified as irrigable, of which 97,000 acres had been allotted to Tribal members and 48,000 had been entered by homesteaders.

Congress has continued since 1900's to appropriate reimburseable construction dollars for both the irrigation and power systems that are operated by the Flathead Project. The total federal investment as of December 1982 in the Flathead Project irrigation system is 12,477,282. Of the total amount invested in irrigation the unpaid reimburseable federal investment is \$6,055,267.

Today the Irrigation Project supplies irrigation water to approximately 2,600 water users who reside within the Reservation boundaries.

The irrigation system has 14 storage reservoirs with a total storage capacity of approximately 157,000 acre feet. Twelve (12) of these storage reservoirs, which encompass over 9000 acres, and the main water supply sources are all located on Indian Trust lands owned by the Confederated Salish & Kootenai Tribes.

There are some 108 miles of main supply canals and about 1,077 miles of irrigation distribution canals and laterals, with over 10,000 structures, many of which are located on Tribal trust property.

*main irrigation works receiving*

*3 pumping plants  
Flathead River  
refer to map*

For administrative purposes the Flathead Project is divided into 3 main irrigation divisions: the Jocko Division lying in and water ~~supply~~ from the Jocko River drainage, the Camas Division lying in and water supplied from the Little Bitterroot River drainage and the Mission Division lying in the Mission Range with water supplied therefrom. The main irrigation divisions are then divided into miscellaneous subdivisions. The lateral systems for those subdivisions can serve only those areas, but the water supply for all the areas is interconnected through storage and feeder canals. *Example - Pablo Sieder's ant travels 29 miles across face of Mission Range - intersecting over 100 streams which originate on Tribal land*  
The Project first delivered water through constructed irrigation facilities in 1911. As of 1983, the Project delivered over 124,000 acre feet of ~~water~~ <sup>water</sup> to approximately 127,000 acres of assessable lands.

*1 mention  
3 divisions*

About 91.5% of the actual irrigated acreage is land held in fee largely by non-Indian owners. The remaining 9.5% is trust land, either Tribal or allotted.

The gross crop value in 1983 for lands irrigated by FIP was \$20.5 million with a per acre value of \$161.00 per acre. The sprinkler crop value for 1983, included in the gross crop value, was \$15 million.

The area has a growing season of about 120 days. The main crops are hay, pasture, and grains, with minor crops of potatoes, lentils, sunflowers, soybeans, and fruit. Sprinkler irrigation is practiced on about 48% of the lands.

As stated earlier over 90% of lands irrigated are lands held in fee status by non-Indian owners. These non-Indian landowners are represented by state chartered irrigation districts. Three districts were organized under Montana State Law in 1926. The districts are the Flathead, Mission and the Jocko districts. These 3 districts signed repayment contracts with the U.S. Government in 1928 through 1934. Under the terms of the contract the districts are obligated to repay the federal government its net investment in irrigation facilities if the net revenues generated from the sale of electrical energy within the Reservation boundaries are sufficient to meet the debt installment. To date, all federal investment that has been repaid to the U.S. Government, has come from net revenues generated from the sale of power. The non-Indian irrigator has

paid little or nothing for the system that serves his/her land.

Administration of the irrigation districts functions is coordinated through a Joint Board of Control composed of irrigation district board members plus one member at large. Tribal members whose land is in trust status are excluded from belonging to an irrigation district. The Tribal member whose land is in trust can not run for election to the irrigation district board nor can they vote for district board members.

Currently, the Joint Board of Control is responsible for the collection of irrigation operation and maintenance charges from the waterusers it represents, owners of fee patent lands. In addition, if the net revenues, generated from the sale of electric energy, are not sufficient to reimburse the United States for the currently due construction costs on the irrigation system, the Joint Board is responsible for the collection of the due payment from its members through a special assessment. As stated earlier, this has never happened.

(Brief comment on power system)