

MINUTES OF HELENA MEETING

WATER RIGHTS - STATE/TRIBAL COMPACT

COMMISSION

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October 4, 1979
Capitol Building
Helena, Montana 59601

Attendants: Richard Moy, Dpt. of Nat'l Res, Allen Chronistenr, Montana Atty. Gen Ofc. Henry Loble, Chairman of the Montana Res've Rights Comm, Joe Roberts, Montana Atty. Gen Ofc. Tony Rogers, WCB, Jerry Goldtein, WCB, Fred Houle, Tribal Sec. Tom Pablo, Tribal Chairman, Louie Adams, Tribal Councilman, Evelyn Stevenson, Tribal Atty.

The Meeting began with the discussing ways that the mechanics setting up an agreeable compact could be approached. The State of Montana indicated that its intent to begin exploratory _____, and if these proved worthwhile to report back to the Commission and proceed from there. Tony Rogers asked if the state had given considerable thought to what the authority the state had or clearance that might be needed prior to reaching any legal compact. The Tribes probably would not need any additional authorization to enter into such an agreement beyond the existing statutory language that is now on the books. For example the Indian Reorganization Act. The State responded with the fact that the statutory language of Senate Bill 76 says there are provisions for such an agreement but it was the feeling that Allen Chronistenr that alternate clearance would be needed either a vote of the peoples or congressional legislation--beyond just Montana Legislative action. For example, the federal Indian Intercourse Act will have to be overcome.

There was then discussion of whether any agreement reached between us and the state would go directly to the state court to be made a part of the adjudicatory preliminary decree or would it require state legislative approval first? (Yes it probably would) and would the agreement perhaps have to go to federal court now assigned to the water litigation matter. Then would the court make any compact a part of its federal holding and the water rights suits. Would questions decided by the Federal Courts in the interin while the compact commission is meeting collaterally estop later determinations reached by the commission or with a compact in some way supercede federal court milestones. Allen Chronistenr pointed out his concerns that if the tribes and the state reach a compact and that compact is approved by the state legislative body and then becomes a part of the water courts preliminary decree there is still a statutory period of time. (120 days plus possible extension of time 90 days more I believe) in which individual water users could raise a challenge to the compact.

Allen suggested there theories such as a parens patriae by which the state might be able to make a ruling affecting the peoples of the state. I pointed out that these water rights which the individuals claim the right to are vested rights and the state runs the risk of the fifth amendment taking without due process under almost any theory which I can envision. Certainly, these questions are primary hurdles which we will have to address before proceeding further. Tony suggested that if the federal court adopted any compact agreement then such would be a part of the court holding and not a subject to fifth amendment taking problems as a legislative act. That I still question and we will need to do more research. Most of those in attendance felt that the probability of a challenge to any compact is a very real possibility. Henry Loble, a water right attorney but now chairman of the state reserve water right commission said Unless the Indians get more water than they are entitled to I don't see how there would be any successful challenge. Tony Rogers reiterated that these are real property right which are vested interests in the people and that the state is administrator only over the rights with certain police powers therefore if there are challenges there are issues for litigation concerning taking of properties without just compensation. What about Water users that are now exempted from the adjudicatory process such as domestic users, livestock, water needs etc, and the processibility of those consumers challenging any compact later in the form of a class action suit.

The Tribes expressed **concerns** for the time gun effect if the water rights litigation is not suspended in the federal court and if the adjudicatory process is not suspended as to Indian water rights. That is the Tribes concern about having to work on a compact agreement under some sort of time bomb. There must be some provision to avoid prejudice during this negotiating. Both proceeding need to be stayed in order to avoid prejudice. Joe Roberts sees the negotiating going on simultaneously with the litigations. I feel that is an uncomfortable possibility and Allen Chronitenr does not know how he feels on that. Tony read the language of Section 27 (2) regarding the time frame of the attorney general filing the petition.

Considerable dialogue followed concerning how we would approach the committees with respect to the press. Accepted press coverage omisquotes could have dilittarious effects on a successful negotiation and yet we have to avoid secrecy in some respects in order to keep the water commission and the Tribal Council fully formed. Are the delegates from the water commission bound by the Montana's open meeting law or can they continue secret sessions without being in violation? How will the delegates to this negotiating team report back to the water commission and still keep strategies and work products private because everything reported to the water commission will be subject in that forum to the open meeting law? Feasibility was discussed

of having these sessions consist of all the water commission and all of the Tribal councils and councilmen and everyone felt that such could be to .. cumbersome and we'd bog down. Henry Lobo went on to say his concern was press coverage because of the many times his statements had been taken out of context or a report of an interview had been put in the newspaper when in fact he'd never talked to the reporter. He sees a fellow by the name of Gary Moese from the Associated Press Service as a very irresponsible journalist who has done such. The Flathead responded with some similar comments regarding the journalist who writes on the Flathead matters.

Who can bind the states? What kind of authority does the commission have? Do select delegates from the commission have the same authority that the commission appears to have under Section 27 of S.B.76? What will these sessions consist of? Will the ultimate form the substance of any agreement look like?

Chronistenr feels that the commission and the state legislature would veto any open ended agreement concept. The Tribes feel it will be essential to have some sort of incremental adjustment provision in any agreement to account for future needs and uses. Since the Winters Doctrine clearly includes the language as part of Indian Water Rights these are a serious valuable right vested in the tribal people and there is great concern as to whether any councilmen delegates or tribal attorneys can so affect future generations of the people without perhaps a referendum vote at least for political reasons if nothing else.

Tony said that he saw the tribal concept of any agreement as ultimately showing little more than an agreed to flow in figure, flow out figure and reiterated the need for stage increments thereafter. Richard Moy expressed what the states view might be in keeping with how Colorado had recently looked at water uses. That is, that practicable, irrigatable, acreage would have a priority; there would be provisions for future state/tribal off-stream storage plan, etc., he also wondered what the Tribes position was on instream uses and we replied that in-stream water uses for recreational purposes and for fishing needs were indeed in priority beneficial use.

Chronintenr stated that any incremental clause would be easier to sell to the state legislature if such were tied to actual uses such as future housing needs, reforestation plans and the like.

SUGGESTED APPROACH

Agree beforehand to exchange data; have time for reflection upon each stage of the proceeding; submit progress reports and materials to the Tribal Council and to the commission for their review so that there will be an insurance of involvement from them and yet not make it necessary for them to go over each piece of material the negotiating team has worked with. A critique or synopsis of the sessions would be relayed on and any material would be available whichever group chooses to make an indepth study.

Then the respective Tribal council or water commission would give the delegates the go ahead to meet and progress forward on to another stage of these compact negotiations.

First it is necessary to assess what the availability of water is. There will need to be a collection of data and determination of if there are any practicable problems regarding the devulging of this information. The Tribes are in the process of having a study done by Wayne Criddle regarding our actual availability of water which we do not know yet whether it supports the Tribes position or not. State has not negotiated a comperable study so we will have the leg up in that respect. They of course do have the information from the water right filing which have gone on since before the turn of the century.

*** Do a list of types of information the compact will nee, etc., then set a procedure for exchange. Might was well lay out what they feel is important and the state will do likewise. We will exchange the lists and review them prior to the next meeting. The state points out that they will need all of the figures from Kerr Dam as the dam affects string close.

There was discussion regarding the Bureau of Indian Affairs position on releasing data concerning Tribal water availability and uses since they have maintained that under their fiduciary responsibilities they must refuse to release materials as a protector for the Tribal interests. Tony does not feel that will be any real problem.

Senate Bill 76 calls for an agreement to be reached between the Tribes and state water commission and seems to give the commission legislative authorization to bind the state of Montana although the legislature must review and ratify any agreement and the language includes the need for ratification by the respective Tribal Council and by the United States Congress before it becomes law. This section does state however, that any agreement can go on to the water judge to be included in the preliminary decree even though it may not have yet received Congressional approval as long as the Tribes and the state legislature were satisfied.

We tentatively set December 1, 1979, as the time for exchange of the lists of factual issues because it will take at least that long to collect the data necessary for this exchange. Shortly thereafter we will schedule a meeting to review these lists and what our reactions have been.

It was my general impression that everyone at this meeting came with fairly good intentions in hopes of good faith agreement. They felt of course that the Tribes is in the best position for any ultimate solution because we have the water rights with a priority date--irregardless of whether you use the date of the Treaty of 1855 or a time memorial notion. But the reality of the situation suggests that if we don't reach an equitable solution and the reservation could well be appropriated by downstream out of state users and neither of us would have anything left. I am glad the state of Montana

chose some fairly young, aggressive people to represent the state because they tend to be a bit more open-minded and less bogged down than age old prejudice and reluctance.

Some of the Tribal councilmen will resist any of this because they simply maintain that under the Winters Doctrine and other interpretations of the treaty and the right to to water-- without quantification--past, present, future-- our hours without any strings attached. They are not familiar with some of the recent legal holding and they do not understand the Mecharin amendment which could put determinations on Indian water rights in the state forum. Therefore, part of our job will be to educate our tribal members and leaders along with making sure that Montana officials realize where we are coming from and why. Fred has resisted any motion of having press conferences because his concerns are similar to those of Henry Lobo. Max Baucus has asked both sides if they would consider having a press release and both sides share the same precedency. I personally have always favored retaining a good public relations firm to issue properly timed press releases concerning a variety of subjects and since the need for educating both the indian peoples and the rest of the citizens in Montana in what is the water rights and how are Western water rights different than everywhere else and what is an Indian Water right and why is there concern for choice of forum and choice of law is subject void in their educational data bank. Could some kind of A.B.C learning process be in order? I am not sure how it should be done though, because any slip up could be so critical in regards to these negotiations or sessions and the wrong motor mouth at the wrong time could prove a devastating impact on the end process.

Evelyn M. Stevenson
Tribal Attorney