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FLATHEAD RESERVATION

Location: Billings, MT; Inter-Tribal Policy Board Office

Date: June 18, 1980

## Persons Present:

Scott Brown, Program Manager, RWRCC  
 David Ladd, Attorney, RWRCC  
 Fred Houle, Jr., Executive Secretary, Flathead Tribes  
 Gene Grant, Assistant Director, MITPB  
 Tom Pablo, Chairman, Flathead Tribes  
 Richard Anthony Baenen, Wilkinson, Cragun, & Barker, Counsel  
 Henry Loble, Chairman, Compact Commission  
 Daniel Kemmis, Member, Compact Commission  
 Lori Lang, Stenographer

Loble: The Reserved Water Rights Compact Commission is happy to have the opportunity to meet with the Confederated Salish - Kootenai Tribes and their representatives. We're happy to enter into negotiations, which we think is the best way to solve the problems that exist. We think it's better than litigation; we think you have that idea too, or you wouldn't be here.

Yesterday we met with the Northern Cheyenne Tribal representatives, and they feel that way about it. We're anxious to get into negotiations.

As you know, I'm chairman of the Compact Commission, and as these meetings progress, it seems to me that it is necessary to have somebody preside over a meeting like this. Yesterday we kind of hit on the solution that somebody from the Compact Commission would preside at one meeting, and the next meeting somebody from the tribe would preside.

Baenen: That sounds all right to me.

Loble: Inasmuch as I formed the agenda, I presided down there, and if it's all right with you I'll just go ahead.

We did think it was necessary to have a record of what was said. Lori works for the Kelly organization, which provides secretarial services in Billings. She came down to Lame Deer, and she's here today trying to make a record as best she can of what happens. Then we'll see that everybody gets copies of it.

Does anybody have anything to say in a preliminary way before we start on the agenda?

Baenen: I don't think so; I think we can just get started on it. I think we'll start with your agenda and work our way through it. Some of the matter you've got on there, I think we can probably answer immediately -- give you some direct answers today, with the recognition that everything we say is final, obviously subject to the political end or legal checks you may want to do later on. But I think we can start with your list and work our way down.

reach some agreement. I think there's good possibilities of that. I don't know all of the hydrology on that, but . . . (unintelligible).

Loble: I think that's right. By the way, you mentioned hydrology. We have a hydrologist who is going to work for the Compact Commission.

Brown: His name is Steve Holnbeck. There is some question that we're going to get the funding, but we're 95% certain that he will be coming on soon -- July 15.

Loble: We might as well let it all hang out. We can talk about funding a little bit. There's a little confusion about our appropriations -- for the Compact Commission. Senate Bill 76 had a general appropriation; the whole bill didn't specifically mention the Compact. Some question has been raised as to whether that general appropriation made for the administration of Senate Bill 76 applied for our particular Compact Commission.

So far, the Department of Natural Resources and Conservation has been very good to us. As a matter of fact, their money for administration of Senate Bill 76 comes out of the fee claims -- the fee for filing claims for water under Senate Bill 76. Everybody who wants to have a water right has to file. It's \$40, I think, and that's where the money is coming from. And that's not coming in fast, so what they're doing is borrowing against the general fund. In order to try to pin down just where the Commission stands in this matter, we're in the process of seeking an opinion from the Attorney General, Mr. Greely, on the Commission itself. We're hoping that he will say that we're in the same status as everybody else under Senate Bill 76. -- So far, we don't have any real serious problem about funding. We're able to pay our Program Manager and our attorney and our hydrologist and the wages I get, and Dan gets, and members of the Commission. But I wanted you to know about that.

I think you may understand, and I should have added this in a preliminary way, that the Department of Natural Resources and Conservation -- the members of that act as our staff. We are independent; we are not under the control of the Director of the Department in any way, nor are any of our employees -- they're under our control. Nevertheless, they're in it. And there's no question about it because they have the expertise. Our Program Manager's office is at the DNRC. Steve Rich, our attorney, has an office out there, and they help us as much as they can. There are people who are assisting us -- there are people who are assisting us. There's Rich Moy. What's his title?

Brown: He's Bureau Chief of the technical examination. They have probably most of the data and verify data.

Loble: Gary Fritz . . .

Brown: He's Administrator of the Compact Commission. He's Rich's supervisor and administrator of the Compact Commission. He's water rights, engineering, the Water Compact Commission. I guess that's about it. Gary is directly involved in all water-related issues in the state.

Loble: We do anticipate that they may show up from time to time. Those are the principle ones. There may be others.

Let's go to two on the agenda: Desirability and legality of closing the negotiation process to the public. And I would add to that the word confidentiality. This is a matter that is of great interest to you, I know. It's a

matter of great interest to every tribe, and it is to us. We think it's going to be very difficult -- impossible, really -- to negotiate in the public eye and in the eye of the press. We hope that can be avoided. That's the first facet. The second facet is the keeping of information confidential. Say you give us information -- we don't want to discourage that -- so everything is confidential. I want to tell you a problem we have.

Montana has an open meeting law that says that all meetings of boards and commissions be open to the public. There are some exceptions, and I'm going to ask Dave Ladd, our attorney to say a little more. We're currently in the process of researching it, and we hope that you will, too, so that we'll be able to come up with a definitive answer. The second aspect of it is confidentiality. There's a Constitutional provision in the 1972 Constitution that provides that, roughly, the public shall have access to all the data and freedom of information. I know that, in my legal work, with clients there has always been some apprehension, particularly, you may have some company with an industrial project that they want to keep quiet. Some of them have been apprehensive about that Constitutional provision -- that it might override, and they made an application, say, to do something on state land that they might have to disclose to the state agency -- they would not be able to keep it confidential. We don't have an answer to that right now. We are going to look into it, and the attorneys for the Northern Cheyenne Tribe are going to look into it, and I think you will as well. Dave, would you expand on that a little, please?

Ladd: The statute in Montana is a Public Participation in Government Statute, basically with two sections. The first section deals with notice and due process considerations -- that sort of thing. That applies mostly to commissions that have the ability to take final action, make a determination in contested cases, and similar actions. I think we can safely say that that part would not apply, since the Compact Commission has no final authority. We can't make any decision that will really affect contested rights without ratification. The second portion is the open meeting statute, and that directly does deal with the Compact Commission because it covers any commission, committee, or other governmental body that runs on public funds. Of course, we're totally supported by public funds, so that's applicable. There is, however, an exception in there that meetings may be closed if the talks relate to litigation or collective bargaining. We, of course, don't directly fit within that exception, but we're coming close to concluding that our talks do, indeed, relate to litigation since the Compact Commission is a part of the whole adjudication scheme in the state. I think what we'll decide is to look on these talks as settlement talks and then we'd be able to avail ourselves with that exception -- the talks relating to litigation.

The confidentiality question is a little less clear. I'm not aware in initial research, that there's any case law interpreting that, or frankly, any case law on Montana open meeting statute, or at least any that's relevant. There's a couple of cases that don't deal with the (unintelligible) of the statute. I think if we look at the confidentiality thing in the same light, considering these to be sort of settlement discussions, that an exception will have to be implied or created for such settlement talks. It would be meaningless for, say, any government department to totally open up its files concerning active litigation. So, while there is no exception in the Constitution dealing with confidentiality, I think that that issue would have to be resolved that way. So, in conclusion, I think we will be able to close the meetings. I think, in fact, that it's essential that the meetings do be closed to the press.

Baenen: My personal feeling is that we agree that it's difficult or perhaps impossible to negotiate in the eye of the public. I would hope that we could work out something that when we reach those aspects of negotiations where it is more crucial, that we make an exception at that time. On the other hand, as much as I dislike anybody around when I'm working, I think there's a very political process (unintelligible). And I think that we ought to consider among ourselves whether or not in the long run we can make our meetings open so that the people know they're there -- even if they never attend -- which I suspect will be the case after the first meetings. We can establish a record so that when Joe Schmoe, be he tribal member, federal employee, non-tribal member, stands up and starts attacking the fact that there's been some type of various negotiations going on, we can say that this has been an open process from start to finish. I think we have a better chance of selling on all levels what we put together; I anticipate somewhere along the line each of us will have to use muscle on our respective constituents to make them understand that, in the long run, this is best for them. We each have our hardcore individuals who we have a little trouble with. It's reassuring to know that we have an out when we need it for closed sessions, but my policy feeling is that we have no problem with them being open. It's easier to deal with people -- it may delay things at the start because they may be disruptive in asking to be heard, and it may go slowly -- but I think overall we have a better chance by keeping them open; but we don't have to send them invitations. Do whatever the law says you have to do, and we'll have it. I think you end up going a long ways. The confidentiality question does present a little more difficult topic, but there are some ways to deal with that. That is, (unintelligible) all the records that we're not turning over to you, but why don't you and your people come over and sit down with our technical people, and you review them all here in our office and then you can go back to Helena, and you'll know basically what we've got here. And we can do the same thing, so we don't have their documents; we happen to have a good idea of what's in them and perhaps we've got enough ideas of what's in them to go ahead and do negotiating. If you've got a memory lapse, you can pick up the telephone and call our hydrologist and say, I just can't remember what it was I read about Crow Creek -- what type of run-off are we having in critical years. I think we can deal with those. I think that the best way for us to go is to . . . I'll put it in negative: I think it would probably be counter-productive of what we're trying to achieve to have somebody hear now that the policy for the negotiating for the Compact Commission and the Indian tribe are closed sessions. If somebody says, well, what is the policy -- well, the policy is that these are open meetings; generally, these are open meetings. Of course, if it involves litigation, now and then we may have to have a closed session just because it does involve litigation. Our policy is not to try and avoid that situation. I think that we can make good progress, and . . . (unintelligible) . . . background mix that whatever we come up with is more politically palatable. It may be more palatable . . . (unintelligible). . . feeling that, well, I don't really know what the Commission did -- and I never will understand what they did -- but they did it in open session, that it was basically the state representatives working in the open, and that they say this is a good idea . . . (unintelligible).  
 - If they're affected by it, they might accept it.

Loble: I think the problem of open meetings and confidentiality doesn't rest so much with the Commission as it does for the tribes, to tell you the truth. We're not really apprehensive about it. One thing we would like along the

the line would be an open confrontation with the press where . . . if somebody can't get in, and he starts writing about the secretive things that are going on -- my gosh, they can really just rip you to pieces, and we don't want that. You don't either.

Baenen: Well, the Tribal members and the Council are used to the kind of meeting where majoritally and collectively would, if one wanted to, let all the red-necks come in and raise hell -- and so the delegates and the Mod Squad show up at the meeting and raise hell. We can all sit there and let them get it off their chests and then go on. If it reaches the point where you can't get anything done and you're spending all your time dealing with them, then we can retire over coffee and decide whether or not we're reaching a point where maybe we're going to have to either start having our meetings in Flat-head Valley or Lame Deer . . . There are some practical ways to at least reduce those problems. I think the confidentiality we'll just have to take on an ad hoc basis -- it's something that obviously most of what we have, and most of what you have that we might be concerned about disclosing now, in terms of everybody as opposed to you people -- you might be concerned about disclosing to everybody . . . (unintelligible) . . . will end up subject to discovery in litigation at whatever state that litigation takes place. Ultimately, what's going to be discoverable in any event is merely a word product that you would base (unintelligible) your lawsuit to explain your position. If the same word product is in the negotiation -- X amount of water available in a critical water year -- and leave many claims hanging around. . . (unintelligible) . . . develop on the reservation turned into tribal . . . do that for 10,000 acres, you know, we anticipate that kind of thing -- you can't do that in the abstract. That's fine, if you don't know there's enough water available. So I think we have to take that on an ad hoc basis. We don't approach it as a matter of policy that we want everything closed, and as a matter of policy, we don't want to spill anything that is ultimately going to be used by somebody else. So the policy should be open, closed if we have to -- but let's use an open approach and take care of the confidentiality on an ad hoc basis.

Kemmis: Maybe one point of clarification we could get behind us now, rather than waiting until there is an audience in the room, and that is the question of whether spectators will be allowed to participate in the negotiations. It seems to me it would be better to settle that now rather than to wait until somebody asks us.

Loble: There's that Public Participation statute . . .

Kemmis: I think I agree with David that that very clearly doesn't apply.

Ladd: Well, the Public Participation statute is the entire statute -- that first section, I think, does not apply. The only one we're concerned with is . . . (unintelligible).

Loble: Well, I'd like to have some discussion on this. What do you think?

Kemmis: We've got enough work to do and a hard enough job to do without speeches.

Pablo: . . . (unintelligible) U.S. Senate did a lousy job because they let it get completely out of hand. I don't remember who chaired the hearing in

Helena for Senate Bill 76, but they kept it under control . . . (unintelligible).

Baenen: If we do well enough with the agenda, and we put on the agenda the starting time and concluding time and everything is listed, and we indicated who the chairman is going to be, which we can do on our alternating basis; we can have in there, for example, that we start it at 9:00, we can have . . . say we have eight items -- and we list four in the morning and four in the afternoon -- one of the things we could do is go from, say, 9:00 to 10:30, and then at 10:30, show that we'll have a 15 minute public participation. And they can make their comments and ask questions out of those 15 minutes, and then we'll just schedule them in -- any possibilities -- and then we pick up again at 10:45 and go to 12:15, and break till 1:15, and then go till 3:30, and have it open from 3:30 until 3:45, and then go until 5:30. We can show them that they've got some time if they want it, and perhaps, to the extent that they are there with something other than (unintelligible) with the Council or somebody else. Have them put their comments in writing or something. But I would agree, we're not going to get much done if we start off with, you know, the third negotiating session comes to order, and somebody jumps up and says Mr. Chairman. Thirty minutes later you're listening to this passionate speech as to why whatever. That has a tendency to (unintelligible) better than, I am sure, what your elected representatives . . . it sets off the person next to him, and pretty soon somebody is talking about how their grandmother's farm -- it happens to be in Wyoming -- is suffering from lack of water. I think, basically, I would agree to reduce it to a point of very little public participation. On the other hand, I think if we can sit a minute . . . (unintelligible).

Grant: I agree with Tom. I think that public participation is very important, and I think . . . (unintelligible), but I think that you, maybe you could schedule a meeting, say, two hours -- say, from 9:00 to 11:00 -- for the public, then from then on have a closed meeting and use this for things that are really important about what the public has said. I agree with the gentleman here that there's going to be a lot of stuff that's going to be irrelevant -- sure, that's common with anybody.

Baenen: That's right. We have two different . . . (unintelligible). For our sessions, I think you do have to make some allowances for public participation. I think it can be flexible -- keeping in mind the overall goal of trying to make progress. If we don't show up with the feeling that this is an iron-clad agenda in terms of 20 minutes for the public to speak, and it turns out that 45 very concerned citizens from someplace have motored 200 miles and want to be heard -- a good chairman can perhaps suggest to them, well, can't you all go out in the other room and get a spokesperson because we can't listen to all you persons. Then the two spokespersons could take it from there.

Brown: I think -- if I may comment on this for a moment -- first of all, we're faced with a completely opposite situation from what we have on the Northern Cheyenne, and that's fine. I think we can adjust to this situation and, as you say, from a practical sense meet in Missoula or any number of things. But if we're going to do it, for one -- we're going to have to do it for both, I'm not saying both tribes, but we're going to have people who think they're going to be affected, whether they are or not -- non-Indians who think they

are going to be affected, either above or below the Flathead Reservation are also going to want to put in their two cents' worth. We have given only a little bit of thought to how we might handle this educating the public. It's probably going to be easier for us to do it under these circumstances, but either way, it's going to be time consuming.

Baenen: This is just general -- I sit here and think about Flathead, and I don't recognize that you people are talking about other reservations . . . (unintelligible) . . . multiple situations.

Loble: I don't see why we couldn't do one thing with one, and a different way with another. I don't see a reason why we can't do it that way.

Baenen: I was thinking that maybe if we run into a very concentrated desire of the people to have a public participation, maybe we'll have to add a day on to the sessions, with Monday as public session -- the public is invited to come in at 10:00 and tell us all they want us to hear. As soon as we start on our agenda, . . . that might be a way to do it -- just sit there and let them give us all their thoughts and ideas and their criticisms and concerns.

Loble: I don't have any personal difficulty with that at all -- none whatever. You've got people in your tribe who want to be heard -- let's give them a chance to.

Brown: And under those circumstances, it seems to me now that we would be better off to be off the reservation -- keep those things separate, and then we can be hearing non-Indians -- they're going to be affected by these. We're better off to hold those in Missoula or in Kalispell or something like that.

Ladd: We had spoken, I guess, or at least tossed around the idea of having sort of an independent, really -- I guess it would be almost one-sided things -- talk about the Commission having say, a public meeting to address the concerns of the non-Indians. And one of those concerns is, of course, any of those meetings are going to attract some folks that have some rather vocal views on it, and the thought was that maybe the meetings where we're addressing some Indian concerns would be separate, and these wouldn't have anything to do with our negotiating sessions -- they'd basically be just sort of a public relations and reporting thing. My only concern with having them at the negotiating sessions might be that both radical elements might end up in a shouting match between each other in the audience. Now I don't know if that's a real concern or not, but that's something that I bring up that you might want to think about.

Baenen: We could even split them -- have a public session on Monday and a negotiating session scheduled in Helena for Wednesday.

Ladd: There really isn't any need to tie them together, I think.

Brown: We're just feeling our way out here, but I agree with Dan -- I think we need to resolve something here today on how might do it as best we can. I wouldn't think that we would have to have these public sessions every negotiating session, at all. Set aside every third one, or something like that.

Baenen: My feeling on the negotiating session, those sessions best take place either in Helena or . . . either place where records and staff are going to be.

As I see it now, there may be a reason to have one in Kalispell, and there may be a reason to have one in (unintelligible). Basically, in terms of the working session, I know from the tribe's standpoint and the administrator's standpoint, the negotiating sessions in Helena would be more smoothly run because there won't be 4000 people coming through the front door and wanting to talk to Tommy or to somebody else. Now you may have the same problem in Helena -- it's your telephones that are ringing as opposed to theirs.

Brown: Well, we could get around that by getting out of our office -- going across town or something.

Houle: Well, on the whole issue, I don't see how you can do any serious negotiating with the public interfering. I agree we ought to hold a meeting before hand and explain what we're going to do, and tell them once we get something done, we'll hold public hearings on them. I have trouble seeing each meeting being interrupted by public input. I think it would be counter-productive, to say the least . . . (unintelligible).

Loble: You mean periodically have a public meeting?

Baenen: It seems to be the concensus -- that public meetings basically not be related to the negotiating process.

Loble: Okay.

Kemmis: Well, I wouldn't have any objection to the suggestion that 20 minutes be set aside in case anyone does show up. As long as it is fairly strictly controlled and it's clear that the rest of the time it's only the negotiating people that will be allowed to participate, I think maybe that's a good pressure release valve.

Loble: Yeah, I basically would be opposed if some people show up, and say, well we are here. I don't know -- something about that I just don't like to say, but I think we can be flexible about this.

Baenen: Yeah, we're certainly, as they say, plowing new ground or something like that.

Loble: Yeah, we are. Maybe there won't be as much interest in it as we think.

Houle: And both sides have public officials available to them.

Loble: . . . (unintelligible). would be the desirability of periodic joint . . . (unintelligible). Scott was involved in some negotiations. Where was that?

Brown: Between Saskatchewan and Montana with the International Joint Commission. They were very closed meetings because of the nature of those negotiations. Even more confidential than that were the negotiations between United States and Canada. The IJC operates under strict confidentiality -- even more so than the Fort Peck tribes. But the two chairman simply got together after each session and released a brief news release. You might have to both here -- you might have to do that as well as . . . If you're going to allow the public in, you're going to have newsmen in. That's something that we haven't really talked about here. You're going to have newsmen there, and



they're going to be recording things as they hear them. Sometimes they can misconstrue something, so you might be wise to still consider a joint news release and say this is what we want to be heard on the radio or television.

Loble: There are places in Helena where, if we have meetings, like in the Governor's Reception, where the newspaper reporters drop in always because there is always something going on. And there are other places where they would seldom go. I'm kind of inclined towards the latter. I've had some miserable experiences with newspaper reports where I've been reported as saying something I didn't say at all and don't even believe.

Baenen: We have a general office policy of not talking to the press. Lawyers . . . (unintelligible) . . . I consented to talk to a reporter on two very implicit grounds. Number one is it was for attribution only. I explained to her for attribution only meant she didn't talk to me -- my name was not to be used. Besides that, what they were . . . (unintelligible) . . . they were all wrong.

I think we should consider on an ad hoc basis to watch the Flathead area where the news stories are constantly erroneous, as they come from at least one would be journalist. I think that we should be prepared to issue joint news releases for two reasons. One, to correct if there might be an error. And one, to make certain that the press has a statement as to what we feel we have done. And two, that the people will kind of want . . . to keep the public informed as to what's going on.

Loble: I think an ad hoc basis is fine. For instance, for this one I don't see any reason for a news release at all. But there will be some, I think, where we will like one. That sound all right to everybody?

Number four: the negotiating teams, size, authority, roles, the function of technical staff. Well, on our side, we've already discussed that pretty well. And far as our technical staff, I think it was . . . (unintelligible) . . . Tony Rogers, Al Chronister, and Joe Roberts. We talked along the line of their being technical staff which would meet independent of the negotiating team to (unintelligible). And later on that would be reported onto the results of what they discussed, and what they decided on would be reported to the negotiating -- the respective negotiating teams.

(Tape being changed)

Baenen: . . . to make certain that somebody in the (unintelligible) has settled the (unintelligible) because that's a very sensitive subject and some of the places you may want to go, the tribe will have to take some steps to make sure everything is taken care of so that it doesn't become a cause. Other than that, I think (unintelligible) is the contact person to all of that at the reservation, and if Fred's not available I guess (unintelligible). And two, (unintelligible) couldn't be with us today because he had a meeting.

Loble: Evelyn Stevenson.

Brown: Yes, I recognize the name; I haven't met Evelyn.

Loble: By the way, to go back to this, I don't know if I mentioned this to you -- did I ever tell you that Jack Burke, the Vice President of Montana Power Company, came in to see me? He was interested in these negotiations for