

## MINUTES

### Montana Reserved Water Rights Compact Commission

January 12, 1981

#### CALL TO ORDER

The seventh meeting of the Reserved Water Rights Compact Commission was called to order following dinner at the Colonial Inn in Helena.

#### ATTENDANCE

Compact Commission members: Mr. Henry Loble, Chairman; Senator Steve Brown, Vice Chairman; Senator Jack Galt; Rep. Daniel Kemmis; and Rep. Audrey Roth.

Others: Robert Person, Director of Legislative Research; Gary Fritz, Administrator of Water Resources; Richard Moy, Chief of the Water Sciences Bureau; D. Scott Brown, Program Manager; Dave Ladd, Attorney for the Compact Commission; Stephen Holnbeck, hydrologist; Cheryl Cordier, stenographer.

#### GENERAL

Chairman Loble opened the meeting at 7:30 p.m. No changes were proposed for the agenda.

The minutes of the previous commission meeting (October 28, 1980) were discussed. Chairman Loble announced that he had written a letter to Rep. John Scully, regarding proposed legislation, soon after the October meeting; however, Rep. Scully did not reply. It was noted also that Sen. Brown's request for David Ladd to report to the commission regarding political compromise in negotiation had been answered in a memorandum sent to the commission soon after the previous meeting.

Rep. Roth moved that the minutes be approved. The motion was seconded, given to a voiced vote, and passed.

Sen. Brown expressed regrets that he has been unable to find the time to attend negotiating sessions. He announced that he may choose to ask the Senate to name a replacement for his seat on the commission, after the Legislature adjourns. Chairman Loble urged Sen. Brown to consider the value of his experience in these negotiations and the important contributions he has made as a member of the commission. Chairman Loble stated that he would not want any commission member to feel as though it becomes necessary to be replaced because he is unable to attend negotiating sessions.

#### PROPOSED LEGISLATION

David Ladd was asked to summarize the most recent revisions proposed by the commission, as decided upon in a telephone conference conducted on December 29. The revisions were prefiled by Rep. Roth and they are as follows.

85-2-217 shall be amended to read:

Suspension of Adjudication. ~~From the time of filing the petition required in 85-2-211 until July 1, 1982, and~~ While negotiations for the conclusion of a compact under part 7 are being pursued, all actions proceedings to generally adjudicate reserved Indian water rights and federal reserved water rights of those tribes and federal agencies which are negotiating, from a source of water in question under this part are suspended, including the obligation to file water rights claims for those reserved rights. ~~Unless an action is commenced or is pending by or on behalf of an Indian tribe to adjudicate water from that source, other than as provided for in Title 85, chapter 2. In such case, the suspension is maintained only if the action is dismissed or if the parties to the action stipulate to the suspension during compact negotiations of all further proceedings in the action except the determination of jurisdictional issues and an order is so issued.~~ This suspension shall be effective until July 1, 1985, as long as negotiations are continuing or ratification of a completed compact is being sought. If approval by the state legislature and tribes or federal agencies has not been accomplished by July 1, 1985, the suspension shall terminate on that date. Upon termination of the suspension of this part the tribes and the federal agencies shall be subject to the special filing requirements set out in 85-2-702(3) and all other aspects of the state water adjudication system provided for in Title 85, chapter 2. Those tribes and federal agencies which choose not to negotiate their reserved water rights shall be subject to the full operation of the state adjudication system and shall not benefit from the suspension provisions set out in this section.

85-2-231 shall be amended to read:

Preliminary decree. (1) ~~Within a reasonable time after the close of the filing period,~~ The water judge shall issue a preliminary decree based on the statements of claim before the water judge, the data submitted by the department, the contents of compacts approved by the Montana legislature and the tribe or federal agency or lacking an approved compact, the filings for federal and Indian reserved rights, and any additional data obtained by the water judge. The preliminary decree shall be issued within 90 days after the close of the special filing period set out in 85-2-702(3) or as soon thereafter as is reasonably feasible. This section shall not prevent the water judge from issuing an interlocutory decree or other temporary decree if such a decree is necessary for the administration of water rights prior to the issuance of a preliminary decree.

(2) The preliminary decree shall contain the information and make the determinations, findings, and conclusions required for the final decree under 85-2-234. The water judge shall include in the preliminary decree the contents of a compact negotiated under the provision of part 7 that has been ~~agreed upon by the parties to the compact~~ approved by the state legislature and the tribe or federal agency whether or not it has been ratified by congress.

(3) If the water judge is satisfied that the report of the water master meets the requirements for the preliminary decree set forth in subsections (1) and (2), and is satisfied with the conclusions contained in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not so satisfied, he may, at his option, recommit the report to the master with instructions, or modify the report and issue the preliminary decree.

85-2-702 shall be amended to read:

Negotiation with Indian tribes. (1) The reserved water rights compact commission, created by 2-15-212, may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts authorized under 85-2-701. Compact proceedings shall be commenced by the commission. The commission shall serve by certified mail directed to the governing body of each tribe a written request for the initiation of negotiations under this part and a request for the designation of an authorized representative of the tribe to conduct compact negotiations. Upon receipt of such written designation from the governing body of a tribe, compact negotiations shall be considered to have commenced.

(2) When the compact commission and the Indian tribes or their authorized representatives have agreed to a compact, they shall sign a copy and file an original copy with the department of state of the United States of America and copies with the secretary of state of Montana and with the governing body for the tribe involved. The compact is effective and binding upon all parties upon ratification by the legislature of Montana, any affected tribal governing body, and the congress of the United States.

(3) Upon approval by the Montana legislature and the tribe or federal agency a compact is to be included in the preliminary decree as provided by 85-2-231. However, if approval of the state legislature and tribe or federal agency has not been accomplished by July 1, 1985, then all federal and Indian claims for reserved water rights which have not been resolved by a compact must be filed with the Department within 60 days. These new filings shall be used in the formulation of the preliminary decree and shall be given treatment similar to that given to all other filings.

85-2-704 shall be amended to read:

Termination of negotiations. The commission or any other party to the negotiations may terminate negotiations by providing notice to all parties 30 days in advance of the termination date. On the termination date, the suspension of the application of part 2 provided for in 85-2-217 shall also terminate. The tribe or federal agency shall file all of its claims for reserved rights within 60 days of the termination date.

Rep. Kemmis asked if any effort had been made to obtain comments from representatives of those tribes already negotiating. He is concerned that they may interpret these revisions as a rules change after the game has started. Scott Brown informed Rep. Kemmis that he had discussed the changes with Tony Rogers, attorney for the Flathead tribes; Reid Chambers, attorney for the Fort Peck tribes; and Jeanne Whiteing and Calvin Wilson, attorneys for the Northern Cheyenne Tribe. According to Mr. Brown, they did not respond negatively. In fact, most of them seemed to agree that it is a reasonable proposal. Mr. Brown had told the attorneys that they would be sent copies of the revisions following this meeting. It was noted, however, that Messrs. Jakub, Meredith and Clear, who represent the federal government, were not notified before this meeting. The commission members agreed that copies of the revisions should be sent to all concerned individuals. Mr. Brown agreed to do so immediately, and to follow them up with telephone calls.

Robert Person explained that the revisions were prefiled in conjunction with four other proposals to amend the adjudication and negotiation processes. Sen. Galt became concerned about the effect that the four additional amendments might have on the amendments requested by the commission. The four additional revisions would (1) clarify the status of fees for those who file domestic and stockwater claims voluntarily, (2) extend the period for filing objections following issuance of the preliminary decree, from 60 days to 90 days, (3) place the administration of the water judges into the Office of the Supreme Court, as opposed to the DNRC, and (4) allow a water judge more than one water master.

Rep. Roth was asked by the other commission members if she would introduce the bill in the House of Representatives. She agreed to do so, and Rep. Kemmis offered his support. Sen. Galt and Sen. Brown then offered to cosponsor the bill in the Senate.

#### BUDGET

Richard Moy reported to the commission that he had received a telephone call late in the preceding week from Jim Williams, a budget analyst in the governor's office. At that time, Mr. Williams informed Dr. Moy that the

budget proposed months earlier by the Compact Commission had been placed in a request by Governor Judge for the establishment of a Missouri River headwaters research institute. Governor Schwinden's proposed budget, which was released on the day of this commission meeting, had eliminated completely the programs listed in Governor Judge's proposed research institute. Therefore, the budget submitted by the commission for the next two fiscal years is in neither the new governor's budget nor the budget of the DNRC. According to Dr. Moy, no one on Governor Judge's budget staff had informed him, or any representative of the commission, that the budget request had been transferred into a larger request to establish the research institute. Furthermore, there is no indication that Governor Schwinden is aware of the predicament facing the commission with respect to its funding.

Scott Brown suggested that, in view of the fact that the Compact Commission is the governor's commission, Chairman Loble ought to consider meeting with Governor Schwinden in order to make these matters known to him and to discuss the progress achieved thus far in negotiations. Sen. Brown recommended further that such a meeting should be arranged to include Leo Berry as well. Gary Fritz agreed to discuss with Mr. Berry the possibility of arranging such a meeting soon. The four legislative members offered their support. Scott Brown and David Ladd agreed to remain in close touch with the commission on this matter, as preparations must be made well in advance of February 6. That is the date on which such requests for new appropriations are expected to be heard by the House Subcommittee on Natural Resources. It is likely that Chairman Loble and other members of the commission will have the opportunity to testify at that time.

#### PROGRESS IN NEGOTIATIONS

Scott Brown summarized the recent negotiating session with representatives of the Fort Peck tribes, which was held in Billings on December 12. The tribes' attorney, Reid Chambers, believes that some of the technical studies needed in these negotiations could be funded jointly by the state and the BIA. Also, he advanced the notion that the state could benefit greatly by agreeing to a very large quantity of water in a settlement of the tribes' reserved water rights. By so doing, according to Mr. Chambers, the state would, in effect, be reserving water within the state and protecting it against claims from downstream states.

Many preliminary matters were discussed in this first session with the Fort Peck tribes and Chairman Loble presented to their representatives President Carter's 10 year plan for identifying ways to which water might be put to use on each reservation. That plan was discussed at length and the discussion led to the conclusion that much technical work is needed. Yet, the tribes have no technical consultant at this time. A second meeting will be held in Poplar in May.

Negotiations with the Northern Cheyenne and Flathead tribes have slowed considerably. The Northern Cheyenne Tribal Council is still undecided about the Tongue River Dam Restoration Project. Until a decision can be made by its members, Jeanne Whiteing believes that another session would accomplish very little. The Flathead tribes have been unable to obtain another technical consultant. Until that position is filled, Tony Rogers believes that another session would not be desirable to the tribes.

Negotiations with the federal government have not progressed significantly in the past two months; however, that is due principally to the fact that the next step is to review the various claims submitted by the federal agencies and those claims are still being prepared. Discussion on substantive matters will begin once the preparation of those claims has progressed sufficiently as to be reviewed in a negotiating session by the commission. It is anticipated that they will be ready within a few months. Although a date has not been chosen, a meeting will be held in Billings before the middle of February in order to discuss legislation and to simply keep in touch.

Chairman Loble, Dave Ladd and Scott Brown have agreed to meet with the Fort Belknap Tribal Council on February 2. Tribal representatives requested their participation in a regular council meeting at which negotiation of reserved water rights will be considered.

MATTERS OF SPECIAL CONCERN AND ADJOURNMENT

Chairman Loble asked if there were any other concerns to be discussed at this meeting. There was no reply. The meeting was adjourned by the chairman at 8:50 p.m.

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