

THESE MINUTES ARE SUBJECT TO CHANGE
UNTIL THEY ARE OFFICIALLY ADOPTED BY THE COMMISSION

MINUTES
MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION
MAY 11, 1987

CALL TO ORDER

The fortieth meeting of the Montana Reserved Water Rights Compact Commission was called to order by Chairman Jack Galt at 9:00 a.m., May 11, 1987, in the Board of Natural Resources Conference Room, Lee Metcalf Building, Helena, Montana.

ATTENDANCE

Commission Members Present: Senator Jack E. Galt, Chairman; Mr. Chris Tweeten, Vice-Chairman; Mr. Carl Davis; Mr. Everett Elliott; Mr. Gene Etchart; Representative Dennis Iverson; Mr. Gordon McOmber; and Representative Gary Spaeth.

Commission Member Absent: Senator Joe Mazurek.

Others Present: Marcia Rundle, RWRCC Attorney/Program Manager; Greg Ames, RWRCC Agricultural Engineer; Lynda Saul, RWRCC Hydrologist; Susan Cottingham, RWRCC Research Specialist; Mary Bertagnoli, RWRCC Secretary; John North, Governor's Office; John Paulson and Clay Smith, Attorney General's Office; and Larry Fasbender and Rich Moy, Department of Natural Resources and Conservation.

ORDER OF BUSINESS

Chairman Galt welcomed Representative Dennis Iverson from Whitlash to the Commission. Chairman Galt noted that Representative Iverson is very knowledgeable on state water issues and that he served two terms as the chairman of the Environmental Quality Council. The agenda for the meeting was then adopted. The minutes for the November 21, 1986 and January 17, 1987 meetings were approved.

Mr. McOmber suggested that the minutes of the January 28, 1987 meeting be changed as follows:

On page 8 of the minutes, Mr. McOmber requested addition of the following sentence: "In response to a question, Mr. Deik said the BIA had a handle on the amount and the ownership of Walton-Powers rights on the Reservation, but that the Anderson case complicated the issue by requiring a complicated trail of ownership."

On page 11 of the minutes, Mr. McOmber requested that it be noted that he was not the source of the information that he relayed to Mr. Mikkelsen about federal warnings to homesteaders on the Flathead Reservation. He clarified

that he was quoting from information given him by staff and that he actually believes that the Reclamation issued that warning "as a kind of a 'cover your tail' thing on all the projects".

Legislation

Chairman Galt asked Ms. Rundle to report on the outcome of the legislative session.

Ms. Rundle reported that Senate Bill 92 extended the authority of the Compact Commission until 1993. Ms. Rundle reported that a letter of thanks will be sent to Senator Stimatz who carried the bill in the Senate and to those tribes and organizations that came and supported the Commission's legislation. She also thanked Representative Iverson who carried the bill in the House and the other members of the Commission who attended the hearings.

Ms. Rundle reported that House Bill 754, which directs prioritization of the state-wide adjudication process, specifies that the Commission should make the negotiations of water rights claimed by the federal government or Indian tribes in the basins identified in the bill its highest priority, to the maximum extent possible. Ms. Rundle further stated that the initial priority is the Milk River and that parties involved in drafting the bill understand that the Commission will not be able to simultaneously focus on negotiations in each basin identified in the legislation.

Representative Iverson stated that both Senate Bill 92 and House Bill 754 were proposed by the Water Policy Committee. He also said that there was a very thorough consultation with Judge Lessley and others as to what the priority basins should be for the statement of intent in House Bill 754.

Ms. Rundle stated that House Bill 770, which was introduced by the Joint Board of the Flathead Irrigation Districts, was tabled in committee and was not brought out after that point.

Budget Report

Ms. Rundle reported that the Commission was originally budgeted at \$202,000 per year for the current biennium. She reminded the Commission that earlier in the year when the Governor mandated a two percent cut, the Commission had agreed to take a twenty-percent cut to assist the Water Resources Division in achieving the mandated cut. Ms. Rundle pointed out that the savings were primarily from vacancy savings, not hiring contracted legal counsel, and less travel than planned. She stated that by the end of the fiscal year the Commission's budget would reflect \$60,000 in unexpended funds.

Ms. Rundle reported that the allocation of the 88-89 biennium's budget of just over \$229,000 per year is identical to the previous biennium's budget, with increases for inflation, more negotiating activity, and full staffing. Ms. Rundle stated that the Commission's budget was presented as a line item in House Bill 2 and was passed as presented.

Report from Negotiating Team Chairs

U.S. Forest Service

Mr. McOmber stated that in 1985 the Commission evaluated the legality of the claims of the Forest Service. He explained that, with the approval of the Commission, Mr. Urban Roth, the Commission's chief negotiator at the time, had stated in previous negotiating sessions with the U.S. Forest Service that the Commission recognized their claim for a federal instream right. After the 1985 evaluation, the Commission asked the Forest Service to respond to some specific issues and in November, 1986, they attended a Commission meeting to deliver that proposal. Mr. McOmber said that it was the understanding of the Commission at the time that the staff would evaluate the Forest Service's proposal and get back to them. He stated that Ms. Saul has done quite a bit of work on the hydrology, that Mr. Ames is working on the economics of the evaluation, and that as soon as the comparison between the present proposal of the U.S. Forest Service and their previous proposal was completed, the negotiating team and staff will visit the drainages in the proposal: Big Creek and Savenac Creek in the Lolo Forest on the St. Regis drainage, and Elk Creek out of Augusta in the Lewis and Clark Forest. The staff is also comparing the proposal the Forest Service made on Big Creek, Savenac Creek, and Elk Creek with the one they made on Rock Creek to see if they complied with the Commission's request for information.

Mr. McOmber stated further that, in his opinion, the Forest Service claims are based on the proposition that dewatering a stream infringes on the claimed right of the Forest Service and that the Commission should evaluate the effect of dewatering on some of Montana's streams. He stated that the Forest Service has claimed two types of instream flows, one for streambed preservation and the other under the Multiple-Use-Sustained-Yield Act which is for fishery protection and recreation. Mr. McOmber also recommended that the Commission proceed with caution on the type of methodology used to quantify the Forest Service's right. He expressed his opinion that once a methodology is adopted it may be regarded as a precedent that could be hard to back off from.

Mr. McOmber said that once the negotiating team has evaluated the Forest Service's proposal, made the field trip to the drainages listed in the proposal, and considered the different methodologies used in quantifying the federal reserved right, they will present their recommendations to the Commission.

Mr. Etchart moved that the Commission authorize the Forest Service negotiating team and the staff to take a trip to review the proposals made by the Forest Service. Mr. Elliott seconded the motion which passed without opposition.

Ft. Belknap Tribe

Representative Iverson reported that there were a series of informational meetings in Havre, Malta and Glasgow recently on the Milk River Basin. He explained that due to the overallocation problems in the Milk River Basin the legislature put it at the top of the priority list to be completed in the adjudication. He said that the overallocation problem has caused piracy and shortages of water for irrigation. He also explained that by international

treaty the province of Alberta has a right to about 37 percent of the annual streamflow of the Milk River. They are currently using only about 2.8 percent. The Canadian government is, however, considering building a dam to store their water and to start using it, which would cause economic problems to the irrigation districts downstream.

Representative Iverson said that since many of the people that are involved in the various conflicts on the Milk River Basin were going to be present at the informational meetings in Havre and he had another commitment, he requested Ms. Rundle monitor those meetings. Ms. Rundle then reported that Mr. Ames and she did attend the informational meeting in Havre at Representative Iverson's request. Ms. Rundle stated that the Milk River Irrigation Districts have hired Bob Fagerberg, a consultant from Wyoming, to assess options for the Milk River Project and make recommendations. Mr. Fagerberg has recommended that the R & B work be emphasized and that the Virgelle Diversion or any other diversion to augment water supply be very low on the priority list, so that the results of the R & B work can be assessed before a massive construction project is started. Ms. Rundle stated that the irrigators are looking for funding for both the new construction and for the rehabilitation of the existing project. The current proposal is to seek Congressional authorization for funding under the Pick Sloan Plan.

Ms. Rundle stated that there was also discussion about the Canadian storage project and the potential benefits of that storage to Montana. She said that the Commission staff would continue to work with the DNRC staff to stay informed on progress with the Milk River proposal. Ms. Rundle proposed a meeting between the Ft. Belknap negotiating team and the DNRC to coordinate efforts in the Milk River Basin.

Representative Iverson commented that if federal monies were used to stabilize the available water supply, it would definitely be in the Commission's best interests.

Ms. Rundle also reported that the Ft. Belknap Tribal Council is going to meet on June 1, 1987, and that authority to meet with the Commission was on their agenda, as well as consideration of having a permanent water policy team.

Mr. McOmber discussed an article recently published in the Great Falls Tribune in which Mr. Aldrich from the Bureau of Reclamation pointed out that the Tribes have first right on the Milk River and its tributaries and that because of the dry year, warnings would be issued and enforced if necessary. Representative Iverson again stated that piracy is a big issue on the Milk River, but because there is no decree, those uses cannot be declared illegal yet.

U.S. Fish and Wildlife Service

Chairman Galt referred to a memorandum prepared by Mr. Ames and Ms. Saul regarding the U.S. Fish and Wildlife Service's claims and asked if all the claims had now been verified. Ms. Saul said that the Commission staff needs to discuss some claims further with either Cheryl Willis or the technical staff of the U.S. Fish and Wildlife Service. Chairman Galt asked if the U.S. Fish and Wildlife Service had indicated a willingness to meet with the

Commission's negotiating team. Ms. Rundle stated that she spoke with Ms. Williss after the last Commission meeting. Ms. Williss did not see any point in meeting with the Commission unless they received in writing at least a general statement whether the Commission accepts their claims or, if not, what problems the Commission has with those claims. Ms. Rundle said that the U.S. Fish and Wildlife Service is interested in having a productive negotiating session, but they don't feel that will occur until they receive a statement from the Commission regarding their claims. She then suggested that if the Commission wanted to discuss more of the specifics that it defer discussions until Executive Session.

Crow Reservation

Ms. Rundle reported that she has received calls regarding a proposed storage project in Wyoming, from an attorney in Washington, D.C. who represents a private landowner on the Little Big Horn River in Wyoming. The landowner is opposed to the storage project proposed by the Little Horn Group in Sheridan, Wyoming, which is currently before FERC for licensing. The project is proceeding despite the fact that the Crow Tribe's reserved water rights on the Little Big Horn River have not been quantified. She reported that the river is also being studied for designation as a wild and scenic river. However, there is no agreement between Wyoming and Montana as to how the Little Big Horn River fits into the Yellowstone Compact. Ms. Rundle said that the attorney was interested in coming to Montana in the near future to meet with members of the RWRCC negotiating team for the Crow Reservation and representatives of DNRC who work with the Yellowstone Compact Commission.

Mr. McOmber stated that Wyoming hired a consultant, Mr. Jones, to represent the Little Horn Group and that a couple of years ago Mr. Jones, Mr. Pelcyger from the Crow Tribe, the DNRC, and the Compact Commission met to discuss the project and that there might be a review of that meeting in the RWRCC files.

Mr. Moy stated that Governor Herschler of Wyoming set up a negotiating team with the DNRC to work out differences on the Little Big Horn as regards the Yellowstone River Compact. Mr. Moy said that the team has met only twice with the Department and not much has been accomplished. However, the DNRC has done a very extensive modeling of the Little Big Horn Basin and from their analysis summer flows are used primarily on the BIA project in the Little Big Horn Basin in Montana. Mr. Moy stated further that, while the Department has made no specific recommendation regarding the scoping of the EIS and wild and scenic river designation, the concern is that the reserved water rights for the Crow Tribe be satisfied and that any wild and scenic river designation preserve the water quality for uses within the state of Montana.

Chairman Galt asked Mr. Moy if the Little Big Horn River was mentioned or quantified in the Yellowstone River Compact. Mr. Moy said that Montana's position has been that the Little Big Horn was not apportioned in Article V of the Yellowstone River Compact, because it was unclear how to handle reserved water rights at that time. He said that Wyoming's position is that since it was left out of Article V the Little Big Horn River should be excluded from the Compact.

Vice-Chairman Tweeten stated that currently there are funding problems with some of the tribal governments in the state and he asked if Mr. Real Bird was still in charge of the Crow Tribe. Ms. Rundle said that as far as she knows he is.

Confederated Salish and Kootenai Tribes

Vice-Chairman Tweeten reported that House Bill 770, introduced by the Joint Board of Control to bring the irrigation districts in as a negotiating party in reserved water rights negotiations, was not passed by the legislature. Vice-Chairman Tweeten explained that once he receives a copy of the transcript of the hearing on H.B. 770, he intends to convene a meeting with the attorneys for the Joint Board of Control to clear up any misunderstandings that might exist.

Vice-Chairman Tweeten stated that he hoped to establish a position as to what the Joint Board can legitimately expect the Commission to do in the process of negotiating a compact with the Flathead Tribes. He also said that before any serious negotiations take place the Tribes will have to evaluate their position on where the Joint Board fits into negotiations since, in his opinion, a compact with the Flathead Tribes is not likely to be adopted by the legislature unless the Joint Board's interests have been accommodated. Vice-Chairman Tweeten reminded the Commission members that at the January 28, 1987, meeting Dan Decker, attorney for the Confederated Salish and Kootenai Tribes, stated that the Commission is responsible for representing the Joint Board's interests, but cannot communicate with them on matters of substance regarding negotiations.

Mr. Elliott said at that meeting the Joint Board expressed the opinion that the Commission was in violation of the open meeting law because it excluded the Joint Board from negotiations with the Tribes. He asked if there had been any action brought against the Compact Commission. Vice-Chairman Tweeten stated that the Commission has not been sued yet, but that he intends to discuss open meetings with Dan Hoven and Leo Berry, attorneys for the Joint Board of Control, in order to reach some agreement on the issue.

Ms. Cottingham described the kinds of historical information on the Flathead Tribes available at the National Archives in Seattle, including the allotment rolls with the original report on the secretarial water rights on the Reservation. She said that she has summarized the information indexed on the Flathead Tribes as well as for the Ft. Belknap Reservation, if anyone would like a copy.

Mr. McOmber stated that in earlier negotiations with the Confederated Salish and Kootenai Tribes, reference was made to a 1907 feasibility study. He stated that the Tribes and the Commission agreed to review it, but that he has never seen a copy of it. He asked Ms. Cottingham if she has seen it. Ms. Cottingham said that she had not seen the study, but had seen reference to it. She said her impression of the study was that it was a survey of the Reservation before the project was authorized in 1908. Mr. McOmber stated that, in his opinion, the federal government knew when the project was built that there were too few Indians there to justify the project and that possibly the federal government should be approached for a resolution of this problem. He asked Ms. Cottingham to provide him with any information she came across that would justify that position.

Mr. McOmber discussed the open meeting law. He stated that, in his opinion, it was not the intent of the Constitution that a state agency would sit down with people on one side of an issue and develop a position and exclude other involved persons until a position had been developed and then have a public meeting for their input. Mr. Davis added that the laws on open meetings are vague and ambiguous. He stated that it is unclear what the legislature intended when it expanded the laws on the right to privacy and the right to know. Representative Iverson stated that the statutes have clarified the issue of open meetings by providing that closed negotiations or strategy sessions for the purpose of negotiations are allowed under that law. Vice-Chairman Tweeten remarked that there is, however, a question as to whether those statutes are constitutional.

Mr. McOmber stated that at the last meeting with the Flathead Tribes, the Commission and the Tribes agreed to evaluate their position on the open meeting laws and that if the Commission arbitrarily changed its position at this point, the Tribes could conceivably consider it to be a breach of faith.

Vice-Chairman Tweeten stated that the Commission needs first, to reach a consensus with the Joint Board regarding negotiations and second, to meet with the Tribes to discuss the Commission's proposal and explain that if a compact is going to be negotiated, the issue of open meetings must first be resolved.

Ms. Rundle reminded Commission members of a briefing memo she had prepared for the Governor's Office regarding problems on the Flathead Reservation and asked Mr. North to explain the current situation on the Reservation. Mr. North listed the following issues: regulation of fishing on the south end of Flathead Lake; regulation of fishing and hunting on and off the Reservation, and whether the conservation districts have the authority to implement the streambank preservation law within the reservation. He stated that the Department of Fish, Wildlife and Parks is currently negotiating with the Tribe on the questions of fishing and hunting jurisdiction. Mr. North stated his understanding that the conservation districts within the Flathead Reservation are maintaining that they have the right to enforce streambank preservation laws on lands owned by non-tribal members. He said that the issues appear to be heating up on the Reservation and that the Governor's Office has been receiving a number of calls from people in the area.

Ms. Rundle noted that, if the Department of Fish, Wildlife and Parks is able to negotiate agreements with the Tribes for joint management or joint permitting on the Reservation, it will establish a framework for those kinds of agreements, and it may convince people on the Reservation that negotiated agreements are possible. Vice-Chairman Tweeten stated that, in his opinion, there is a widely held perception on the part of the non-Indians that the tribal government has and always will act unreasonably toward the non-Indians in their attempts to regulate. He agreed that if the Department of Fish, Wildlife and Parks can negotiate a settlement of those issues with the Tribes, the perception of the Tribal government as an unreasonable bureaucratic entity can be broken down, which would in turn help the Commission negotiations.

Vice-Chairman Tweeten discussed the letter the Commission received from Mac Cole asking the Commission to designate a representative to serve on a task force along with representatives designated by the BIA and the Tribes, and an independent biologist to review and evaluate instream flow

methodologies for fisheries. He said the task force would advise the firm retained by the U.S. to perform instream flow studies for the Flathead Reservation as to the relative merits of the methodologies that exist for quantifying instream flows for fisheries. The Vice-Chairman stated that at its January 28, 1987 meeting, the Commission decided to take no action on the request until it first had an opportunity to evaluate the methodologies. He asked the Commission for further clarification since he felt that a response back to the U.S. was necessary. Mr. McOmber suggested that since the Commission regards adoption of a methodology of establishing instream rights as a major policy issue, it should advise the federal government that it is considering the matter presently and will respond to their invitation when a position is developed.

Representative Spaeth stated that, in his opinion, there is no one methodology that is acceptable. He further stated that, in his opinion, the Commission should respond in some positive fashion in a relatively quick manner or it is going to appear that it is dragging its feet.

Mr. Davis questioned whether the Compact Commission could become involved in other advisory committees and still be able to maintain its necessary neutrality. Representative Iverson asked why it was not a good idea to engage in a joint project to determine a methodology. Vice-Chairman Tweeten stated his understanding of Mr. McOmber's position: that he did not want the Commission to get locked into a particular methodology decided on by technicians, without the understanding and affirmative action of the Compact Commission, and that the decision on a particular methodology should be made in-house before taking part in any sort of a joint study.

Mr. McOmber clarified that his motion at the last meeting was that the Commission postpone action on this letter until it has had time to review the methodologies. He also explained that one of the first things the Commission did when it was established was to adopt a position that the program manager would not negotiate for the Commission without specific authorization. Mr. McOmber stated that before the former chairman retired, he proposed that the former program manager receive a pay raise, which was approved by the Commission. The resulting position description, however, authorized the program manager to negotiate on behalf of the Commission. Mr. McOmber said that the former program manager subsequently met with representatives of the Forest Service to discuss an instream flow methodology, with Mr. McOmber's approval. When the methodology was presented to the Commission, it became the focus of the negotiations. Mr. McOmber cautioned the Commission against appearing to endorse any particular methodology because of this past experience. Mr. McOmber also said that the Commission should regard selecting a methodology as a major policy decision. He suggested having the Commission's staff review the different methodologies and that then the Commission members decide what methodology to use as part of negotiations with the Confederated Tribes.

Mr. Davis stated that the purpose of the study is to quantify the instream flow needs for the reservation and that, in his opinion, the Commission should not designate a representative to serve on the committee until it knows whether instream flows are going to be part of its obligation in negotiations.

Vice-Chairman Tweeten moved that a letter be sent to Mr. Cole advising him that the Commission has decided not to participate in the joint study but would appreciate being advised of its results. Mr. Elliott seconded the motion which passed without opposition.

Tongue River Reservoir - Northern Cheyenne Reservation

Mr. Ames stated that the DNRC had recently prepared for and scheduled a repair project on the Tongue River Reservoir. He said the DNRC requested his assistance in putting together a pumping project in order to provide additional flows over the reservoir to satisfy the fish and wildlife needs downstream while repairs were being made. He then gave a slide presentation to Commission members that detailed the Tongue River and repair project.

Mr. Moy thanked Mr. Ames for doing an outstanding job organizing the pumping project and thanked the Commission for allowing him the time to help the DNRC out. He said that without Mr. Ames's expertise the project would not have been completed.

Ms. Rundle reported that Ms. Whiteing is still working with Mr. Kersich on a proposal for the Northern Cheyenne Tribe. She said that according to John Echohawk, the executive director for NARF, another staff attorney will take over as negotiator for the Tribe after Ms. Whiteing gets the proposal put together.

Bureau of Land Management

Ms. Rundle stated that until a decision was made on the Don Brown case before Judge Bennett, the DNRC does not want to get into more substantive negotiations with the BLM. She also mentioned to Mr. Etchart, chairman of the BLM negotiating team, that if he was interested in floating a stretch of the Wild and Scenic River to contact her.

Equipment Acquisition

Ms. Rundle explained that the computer equipment the Commission now owns is out-dated and does not provide adequate capacity to deal with the large amount of information that needs to be analyzed. She asked Mr. Ames and Ms. Saul to explain further the kind of analysis updated equipment would make possible.

Mr. Ames stated that he and Ms. Saul examined the Commission's current resource management system to determine the degree of its accuracy, equipment used in other agencies, and the current state-of-the-art in resource management equipment. Mr. Ames and Ms. Saul gave a slide presentation detailing the Commission's current equipment and its functions as well as current state-of-the-art equipment they viewed when they visited the USDA Soil Conservation Service and the Water Resources Department of the State of Idaho in Boise. Ms. Rundle added that the quality of the input on the new system would be superior and would include: digitized LANDSAT scenes, infrared photographs, high altitude photographs, digitized soils information, and digitized stream flow information. She emphasized how important the credibility of the base information is and that there have been problems with the quality of information generated from existing equipment.

Mr. Ames presented examples of how the Navajo Indian Reservation used their hardware and software equipment to quantify their water rights in the Arizona adjudication. Also included in his presentation were maps sent to the Commission courtesy of the Water Resources Department of Idaho showing analysis done on the Fort Hall Indian Reservation.

Mr. Ames stated that after looking at a dozen companies, two companies have been selected that work under a cooperative agreement to offer a single package of hardware and software. Ms. Saul added that the proposed system is IBM personal-computer-based and will have many other functions in addition to managing the natural resource data.

Mr. Elliott asked if the equipment cost would come out of the present budget. Ms. Rundle stated the recommendation is that the Commission purchase the software and lease the hardware for four years with an option to buy or to upgrade the equipment at that time and that the bulk of the expenditures would be taken from this fiscal year's budget.

Chairman Galt asked Mr. Fasbender if he had any comments on the new equipment acquisition. Mr. Fasbender said that, in his opinion, it is important for the Department and the State to move more rapidly in this area of technology. Mr. Fasbender stated that as far as the Compact Commission is concerned the new equipment will provide some immediate benefits due to the kinds of information it can generate. He explained further that the new system will dramatically improve the Commission's ability to have knowledge about the Indian reservations, federal agencies, water usage, water availability, and acreages. He also noted that the federal government is keeping all the information that they are generating for potential litigation and, in many cases, the information pertaining to the Indian reservations is too old.

Mr. Elliott moved that the Commission move forward on Option #1 of the proposal to rent the hardware and purchase the software. Vice-Chairman Tweeten seconded the motion and after discussion the motion passed without opposition.

Mr. Moy added that, in his opinion, the biggest long-range advantage to this system is that the other western states are using it primarily for the adjudication and the management of existing water rights.

The Commission recessed and reconvened in Executive Session to consider negotiation strategy concerning the U.S. Fish & Wildlife Service claims. Following the Executive Session, Mr. McOmber moved that the secretary be instructed to maintain a list of motions, actions taken and assignments made at each Commission meeting with a followup on which motions, actions, and assignments have been completed and which ones are still pending. Vice-Chairman Tweeten seconded the motion which passed without opposition.

Chairman Galt tentatively scheduled the next meeting of the Commission for June 19, 1987.

The meeting adjourned at 1:30.