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CONFIDENTIAL ATTORNEY-CLIENT MEMORANDUM

TO: Susan Cottingham, Program Manager
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Reserved Water Compact Commission

FROM: Kimberly A. Kradolfer
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DATE: June 25, 1992

RE: Confidentiality of documents

I am writing to provide authority which supports maintaining some Commission documents as confidential. This memorandum is written to support the checklist which I have prepared to assist Commission staff in determining which documents are confidential and the basis on which they may be protected. I have attached that checklist.

I. BACKGROUND

A. The Associated Press Case.

The issue of what documents may be maintained by a state agency as confidential arises in the wake of the Montana Supreme Court's decision in Associated Press v. Board of Public Eduction, 246 Mont. 387, 804 P.2d 376 (1991). In that decision, the court rejected the argument that the State has a due process right to legal counsel which would allow one state agency to close a meeting to discuss litigation strategy involving a lawsuit against another state agency. It held that the meaning of Art. II, section 9, Mont. Const. (1972), is plain on its face. That provision states:

> **Right to know.** No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure. [Emphasis added.]

The Associated Press case arose in the context of a telephone conference call between members of the Board of Public Education and their legal counsel. The purpose of the call was to discuss litigation strategy in a potential lawsuit which the Board was contemplating filing against the Governor. The suit concerned the Governor's power to limit the Board's rule making authority. There, the Board closed the meeting discuss litigation strategy pursuant to the provisions of section 2-3-203(4), MCA.

The Montana Supreme Court held that under the circumstances of the Associated Press case, the litigation exception was not valid. It held that a State has no right to due process and therefore cannot rely upon a due process right to counsel. It also rejected a separation of powers argument based upon the court's exclusive authority to regulate the practice of law. The court was careful to note repeatedly that the decision was a narrow one limited to the facts at hand. In the opinion, the court recognized that a different situation might be presented where the litigation concerned a state entity and a private individual. 246 Mont. at 392, 804 P.2d at 379-80.

B. The Reserved Water Rights Compact Commission.

The Reserved Water Rights Compact Commission is an agency, unique to Montana, which represents the interests of all citizens of Montana -- not merely specific constituent groups -- in the State's dealings with the tribes over water rights. The Commission was created pursuant to section 2-15-212, MCA. Its duties with respect to negotiations of water rights are set forth in Title 85, chapter 2, part 7, MCA.

Based on the background of the Commission provided to me by Commission staff and counsel, it is my understanding that the legislation creating the Commission was passed after Montana had begun its formal adjudication process for water rights. As that process began, the Indian tribes in Montana filed legal actions in federal court to assert their water rights. Those suits were stayed, and the Commission was created to undertake negotiations between the tribes and the State of Montana over the water rights at issue. It is my understanding that the underlying suits have been dismissed, with the caveat that if negotiations with a tribe reach an impasse or if Congress fails to ratify a negotiated settlement, the tribe can re-initiate suit to seek a determination of its water rights. At this time, several compacts have been entered, although Congressional approval is still pending. Other negotiations have broken down and are currently headed for active litigation.

In its negotiations, the Commission acts to uphold the rights of the citizens of the State of Montana to water. Those rights are recognized in Art. IX, section 3, Mont. Const. (1972). That provision states:

> **Water rights.** (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
>
> (2) The use of all water that is now or may hereafter be appropriated for the sale, rent, distribution, or other beneficial use, the right of way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection therewith, and the sites for reservoirs necessary for collecting and storing water shall be held to be a public use.
>
> (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.
>
> (4) The legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records.

C. Documents Generated By Commission Staff.

The Reserved Water Rights Compact Commission (Commission) has requested me to provide any legal authority which might support maintaining the confidentiality of documents prepared by Commission staff for use in on-going negotiations. This memorandum is written to support the attached checklist (Attachment A) which I have prepared and which gives guidelines to Commission staff on how to determine whether a document may be protected as confidential.

II. MAINTAINING CONFIDENTIALITY

The checklist I prepared relies upon three grounds for maintaining confidentiality. The first is the individual right of privacy. The second is the attorney-client privilege. The third is the work-product doctrine.

A. Public v. Private Documents.

Article II, section 9, Mont. Const. (1972), does not define the term "documents." It is also not clearly defined elsewhere in Montana statute. The Montana Public Records Management Act defines writings as being either public or private. Public writings are:

> [T]he written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and

> executive, whether of this state, of the United States, of a sister state, or of a foreign country.

§ 2-6-101(2)(a), MCA. The act recognizes four classes of public writings: (1) laws; (2) judicial records; (3) other official documents; and (4) public records kept of private writings. All other writings are designated as private. § 2-6-101(3), (4), MCA.

However, the Act also describes "public records" as:

> "Public records" includes any paper, correspondence, form, book, photograph, microfilm, magnetic tape, computer storage media, map, drawing, or other document, including all copies thereof, regardless of physical form or characteristics, that has been made or received by a state agency in connection with the transaction of official business and preserved for informational value or as evidence of a transaction and all other records or documents required by law to be filed with or kept by any agency of the state of Montana.

§ 2-6-202(1), MCA.

I would note that the federal Freedom of Information Act (FOIA) is somewhat analogous to Montana's right to know. See 5 U.S.C. § 552. FOIA applies exclusively to federal agencies and requires that the agencies make information available to the public. 5 U.S.C. § 552(a)(2). The information to which the public is granted access includes final opinions of an agency on a matter, policy statements and interpretations and administrative staff manuals and instructions to staff that affect a member of the public. FOIA also provides a number of express exemptions for documents which agencies may withhold from public scrutiny. The exemptions include such things as personnel records. 5 U.S.C. § 552(b).

FOIA's exemption 5 specifically protects documents which a private party could not discover in litigation with the agency. It was specifically intended by Congress to protect work product documents. N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 154-55 (1975). In N.L.R.B. v. Sears, Roebuck & Co., the Supreme Court also recognized that even where a document is incorporated by reference in a final opinion which is subject to public disclosure, the document is still protected from disclosure if it falls within one of the nine exemptions to the Act. Further, if a final opinion merely refers to the "circumstances of the case," the agency is not required to provide explanatory opinions or explanations of such references. Such a reference does not serve to incorporate draft documents or intra-agency memoranda which would otherwise be exempt from disclosure under the Act. All that is required by FOIA is that the final opinion be made available for inspection and copying.

While an analogy might be drawn between the federal approach and Montana's statutes defining "public records," I am not confident that Montana's courts will have any inclination to interpret the meaning of the term "documents" nearly so narrowly. It is not clear how broad Montana's public records provisions are. However, in light of the Montana Supreme Court's liberal construction of Article II, section 9, in open meeting cases, it is likely that the court will take a broad view of the definitions of public records. If that is the case, Commission documents would be open for public inspection unless another constitutional right, when balanced against the right to know, outweighs that right. One such right is the right of individual privacy. Another would be founded on other constitutional interests which can be balanced against the public right to know. Such interests might include the public's right to due process that will place the public on a level playing field during litigation; the general health, safety and welfare of the public; and the people's right to water. Those interests would encompass the attorney-client privilege and the work-product privilege in any situation where the Commission, acting as trustee of the public, is involved in ongoing negotiations or litigation concerning water rights.

B. Right of Privacy.

As noted above, Article II, section 9, of the 1972 Montana Constitution specifically balances the public's right to know against the individual right of privacy. That provision allows the public to examine documents or observe government deliberations "except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

It is my legal opinion that the Commission must maintain as confidential any material which raises an individual right of privacy. In order to determine whether an individual right of privacy exists, two questions must be considered:

1. Who is an individual?

A number of Montana cases have addressed the right of privacy with regard to a private person. See, e.g., Montana Human Rights Division v.City of Billings, 199 Mont. 434, 649 P.2d 1283 (1982) (personnel information pertaining to an individual must be protected; if released to the Human Rights Commission staff to determine whether a pattern of discrimination exists, information must be adequately screened to prevent identification of any individual); Missoulian v. Board of Regents, 207 Mont. 513, 675 p.2d 962 (1984) (evaluations of the university presidents involves their individual rights of privacy and also raises privacy interests of the numerous administrative staff, faculty members, and other university employees who provided information pertaining to the evaluations); Engrav v. Cragun, 236 Mont. 260, 769 P.2d 1224

(1989) (pre-employment investigations of law enforcement personnel and daily log of phone calls to sheriff's office were protected from disclosure by individual rights of privacy); Flesh v. Board of Trustees, 241 Mont. 158, 786 P.2d 4 (1990) (school board properly closed meeting to consider complaint made against administrator employed by the school district). It is clear that an individual person may raise an individual right of privacy.

The Montana Supreme Court has also held that a corporation can be considered a person for purposes of the constitutional provision. Mountain States Telephone v. Department of Public Service Regulation, 191 Mont. 331, 634 P.2d 181 (1981) (Mountain Bell entitled to assert individual right of privacy to protect information which constituted trade secrets that had been provided to the Public Service Commission for regulatory purposes). Additionally, it is proper for a state agency to assert a right of privacy on behalf of an individual. See Belth v. Bennett, 227 Mont. 341, 740 P.2d 638 (1987) (state auditor could properly assert privacy right of corporation to certain reports submitted to auditor for regulatory purposes).

I would note that Indian tribes are a unique legal entity. They are considered sovereign nations. At the same time, they are governed by law which places the United States government in a parental or fiduciary role to protect the tribes. They have in some jurisdictions been treated as corporations. See 43 U.S.C. §§ 1601 through 1628 (Alaska Native Land Claims Settlement Act of 1971).

For purposes of evaluating "who is a person" within the meaning of the constitutional provision, it appears that any single individual or any corporation can claim that status. It may also be that the tribes can claim that status.

2. What May Be Protected Under the Individual Right of Privacy?

Some documents clearly fall within material which the individual right of privacy protects from disclosure. For example, it is my understanding that some of the materials contained within Commission files include the personnel files of Commission staff. It is my legal opinion that those sorts of materials fall squarely within the individual right of privacy and must be protected from public disclosure. The Commission's failure to protect those documents could result in a suit against the Commission by the individual involved for a violation of his or her right of privacy. See Art. II, § 10, Mont. Const. (1972).[1]

[1]The exceptions to maintaining confidentiality of such materials arise where the individual has expressly waived his right to privacy or where the documents involve a matter of public trust

Other documents, however, may not fall within an obviously recognizable "right of individual privacy." In order to weigh whether or not a document may be protected as private, the Commission staff must apply the test used by the Montana Supreme Court in Missoulian v. Board of Regents, supra, 207 Mont. 513, 675 P.2d 753 (1984). It has two prongs:

First: Does the party involved have a subjective expectation of privacy in the information sought?

Second: If so, is the expectation of privacy one which society is willing to recognize as reasonable?

207 Mont. at 522, 675 P.2d at 967.

In applying the test, the Commission staff should look first to see if there was a subjective expectation of privacy. That is, did the person expect that the document would be held in confidence? One factor that will immediately disqualify the document for protection would be the individual's dissemination of the document to others where he cannot control or prevent dissemination to others. A person who allows review of personnel matters by his attorney or spouse might still have a subjective expectation of privacy. He would certainly not waive his right of privacy with regard to the Commission's actions. However, if the person disseminated the information by sending a copy of it to a newspaper or to a mere

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so serious that the documents must be opened for public scrutiny.

The only case in which the second scenario has been addressed by the Montana Supreme Court was in Great Falls Tribune v. Cascade County Sheriff and City of Great Falls, 238 Mont. 103, 775 P.2d 1267 (1989). There, several officers were disciplined after an investigation into alleged abuse of a suspect. One officer was suspended, one was fired and two resigned as an alternative to dismissal. The Tribune sought the names of the disciplined officers.

The Montana Supreme Court held that the officers occupied positions of great public trust and that their expectation of privacy with regard to having their names released subsequent to the disciplinary action was not one which society would recognize as reasonable. It ordered release of the names of the officers who had been fired or who had resigned. The entirety of the personnel files were not revealed. The name of the suspended officer was not released.

See also Associated Press, et al. v. Department of Corrections and Human Services, Lewis and Clark County Cause No. CDV-92-356, Memorandum and Order of April 14, 1992. (Ordering release of the names of prison guards and officials disciplined in regard to the extraordinary September 1991 disturbance at Montana State Prison.)

acquaintance, he probably does not have a subjective expectation of privacy.[2]

If the person (whether an individual, a corporation, or a tribe), has disseminated the document to others outside the person's legal advisors or client group, Commission staff are not in a position to assert a right of privacy to protect such document. That may not always be known or apparent. But if, for example, the document indicates that it has been widely copied to others, it will likely not be something which can be protected from disclosure. By contrast, if it appears that there was a subjective expectation of privacy, the document is one which must be reviewed further to determine whether it may be released.

In applying the second prong of the test, Commission staff will need to analyze whether the subjective expectation of privacy of the party is one which society is willing to recognize as reasonable. That will require a factual analysis based upon the nature of the particular document and a balancing of the competing public policies of individual right of privacy and public right to know. Commission staff will likely want to seek legal advice on making such a determination if and when a demand is made for a document which seems to meet the subjective expectation prong.

As I indicated above, such matters as personnel data are -- with only limited exception -- well within the sorts of material which the court has recognized as protected by an individual right of privacy. The court has also extended such protection to such matters as trade secrets and confidential industry information submitted to a regulatory agency.

While I am confident that matters such as personnel information can be protected on the basis of the individual right of privacy, I do not foresee that anything else generated by Commission staff would be protected on the basis of an individual right of privacy. However, there may be information submitted to the Commission by individuals or by a tribe which the Commission is requested to keep in confidence, at least for a particular period of time. If the information is the sort of information which can be analogized to trade secrets or confidential industry information, I would recommend that the Commission assert a right of privacy to protect

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[2]I would note that state law specifically requires that an agency maintain confidentiality of personnel records. § 2.21.6415 and §§ 2.21.6606 through 2.21.6622, ARM. Based on those provisions, I would recommend that the Commission maintain confidentiality of such records even if the employee has chosen to disseminate the information unless: (1) the individual has provided the Commission with an express written release; or (2) the Commission is releasing the information pursuant to court order. Cf. Allstate Insurance Co. v. City of Billings, 239 Mont. 321, 780 P.2d 186 (1989).

the item for the requested period of time. If at some point the information is disseminated beyond the Commission in some fashion, it would no longer be entitled to protection. See Kuiper v. District Court, 193 Mont. 452, 460, 632 P.2d 694, 698-99 (1981) (privilege can be waived where person voluntarily disseminates the documents or is aware of wide dissemination, but fails to take legal action to protect the matters from further dissemination).

I recommend that your staff examine documents to determine whether there is arguably a subjective right of individual privacy which might be asserted. The documents should then be reviewed to ensure that any right of privacy has not been waived because the documents have already been disseminated in such a manner that it is clear there is no subjective expectation of privacy. If there is still a subjective expectation of privacy, I recommend that those documents be designated as confidential until they can be reviewed by legal counsel to determine if there is a right which society would recognize as reasonable.

If it is not clear whether an individual right of privacy is implicated which would clearly exceed the public's right to know even after legal counsel has reviewed them, I would recommend that you still protect them as confidential until such time as a demand is made for them. At that time, the Commission legal staff should examine the documents and assert all arguments which support a subjective expectation of a right of individual privacy and then assert any objective grounds that society could recognize as reasonable. A court order requiring dissemination should provide the Commission with judicial immunity in any suit which would be brought to assert that dissemination violated a right of individual privacy. See Knutson v. State, 211 Mont. 126, 683 P.2d 488 (1984). Cf. Brunsvold v. State Fund, 48 St. Rptr. 939, 820 P.2d 732 (1991).

C. The Attorney-Client Privilege and the Work-Product Doctrine.

The attorney-client privilege and the work-product doctrine are not identical, although they are related privileges. The attorney-client privilege protects any communication by a client to his attorney which he regards as confidential in nature and any advice given to the client by the attorney. The client has the power to waive the privilege. § 26-1-803, MCA; Piersky v. Hocking, 88 Mont. 358, 374, 292 P. 725, 730 (1930). The work-product doctrine concerns matters prepared by the client or his representative (including his attorney) in anticipation of or in preparation for litigation. Rule 26(b)(3), Mont. R. Civ. P.

The attorney-client privilege is the oldest of the evidentiary privileges in existence. It predates Elizabeth I, appearing during her reign as unquestioned. 8 J. Wigmore, Evidence, § 2290 (McNaughton rev. ed. 1961). The United States Supreme Court

discussed the rationale for the privilege in Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). There, the Supreme Court stated:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in Trammel v. United States, 445 U.S. 40, 51 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in Fisher v. United States, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

The Montana Supreme Court has adopted intact the rationale from Upjohn in State ex rel. United States Fidelity and Guarantee Company v. Montana Second Judicial District, 240 Mont. 5, 783 P.2d 911 (1989). There, the issue before the court was whether letters written to USF & G by a law firm hired by the insurance company to represent the company and to defend its insured were discoverable in a bad faith action filed after resolution of the underlying claim. The court noted that the privilege has been codified in section 26-1-908, MCA, and applied the privilege to deny discovery.[3]

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[3]In USF & G, the court also noted the elements of the privilege enumerated by the Ninth Circuit in Admiral Ins. v. United States District Court for the District of Arizona, 881 F.2d 1486, 1492 (9th Cir. 1989):

(1) Where legal advice of any kind is sought
(2) from a professional legal advisor in his capacity as such,
(3) the communications relating to that purpose,
(4) made in confidence
(5) by the client,

While the Montana Supreme Court discussed the dangers inherent in protecting information under the privilege where that may obstruct a party's access to the truth, it rejected that danger as being outweighed by the need for the privilege:

> Normally, all communications between attorney and client, including conversations and phone calls, are memorialized in writing. If these writings are all potentially discoverable, the impact on an attorney's ability to fully advise a client would be devastating. An insurance company must have an honest and candid evaluation of a case, possibly including a "worst case scenario." A concern by the attorney that communications would be discoverable in a bad faith suit would certainly chill open and honest communication. An attorney's inability to communicated freely with the client would impede all communications and could diminish the attorney's effectiveness. It could also impede settlements. We conclude that the need for the privilege outweighs any alleged need of the plaintiffs.

240 Mont. at 13, 783 P.2d at 916.

The same considerations have been enunciated by both the United States Supreme Court and the Montana Supreme Court in other cases dealing with the work-product doctrine. See, e.g., Hickman v. Taylor, 329 U.S. 495 (1947); Kuiper v. District Court, supra, 193 Mont. 452, 632 P.2d 694. See also State ex rel. Carkulis v. District Court of the Thirteenth Judicial District, 229 Mont. 265, 746 P.2d 604 (1987) (work-product doctrine within context of criminal case and criminal discovery statutes). See generally Epstein and Martin, The Attorney-Client Privilege and the Work-Product Doctrine, ABA Litigation Section (2d. ed. 1989).

In Hickman v. Taylor, supra, the United States Supreme Court's seminal opinion on work-product privilege, the court addresses the compelling policy reasons for protecting the attorney's mental impressions and opinions from disclosure:

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy

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(6) are at this instance permanently protected
(7) from disclosure by himself or by the legal adviser,
(8) unless the protection be waived.

240 Mont. at 11, 783 P.2d at 914-15.

> without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests.

329 U.S. at 510-11.

The Montana Supreme Court has adopted rules of discovery designed to effectuate this confidential relationship by providing virtually absolute protection for the opinions and mental impressions of counsel. Rule 26(b)(3), Mont. R. Civ. P. See Kuiper v. District Court, supra, 193 Mont. at 462-66, 632 P.2d at 701-02. The work-product rule is not an absolute privilege. The rule is, however, broader in its application that the attorney-client privilege. Id.

Rule 26(b)(3), Mont. R. Civ. P., provides:

> (3) Trial preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. [Emphasis added.]

The work-product doctrine is the principle uniformly relied upon by attorneys for maintaining confidentiality of materials prepared in anticipation of litigation or in preparation for litigation. By the language of the rule itself, such preparation can be by the client or by the attorney. In Kuiper, the Montana Supreme Court recognized that the work-product rule can form the basis for a protective order, even where the work-product materials are in the possession of an adverse party. In that case, the court also held that work-product materials are to be afforded perpetual protection from disclosure. Finally, the court recognized that work-product materials prepared in anticipation of litigation also fall with the protections of the rule. Kuiper v. District Court, supra, 193 Mont. at 463-65, 632 P.2d at 700-02.

While the holding in the Associated Press case rejected the notion that the State has a general due process right to counsel which would allow closing a meeting to discuss litigation strategy by

one state agency for possible use in a lawsuit against another state agency, the ruling was quite narrow. It specifically noted that the question of whether the "right to know" would require the State to reveal its confidences in litigation against private parties was not at issue. 246 Mont. at 392, 804 P.2d at 380.

It is my opinion that reliance upon the attorney-client privilege or the work-product doctrine may be used as a basis for maintaining the confidentiality of documents in only a narrow framework. Such reliance will be allowed by the courts only where the doctrine is an integral part of a constitutional right which can be balanced against the public right to know. I have identified three constitutional rights which I would assert as a basis for asserting the constitutionality of recognizing an attorney-client privilege and work-product privilege held by the Commission which would, under the proper circumstances, outweigh the public right to know. Those rights are an express right to counsel, the general police power of the State, and the rights of the citizens of this State to water. They may arise separately or, more likely, together in the context of Commission negotiations and litigation.

I believe that based on its past decisions, the court will continue to liberally interpret the public right to know. I would therefore caution the Commission against attempting to limit access to any materials, simply because they deal with water rights. Much of such material is not sensitive and should be available to the public. However, where the information is sensitive, it should be protected. That situation will most likely arise in the context of negotiations or litigation where the attorney-client privilege and work-product doctrine will both come into play. The substantive constitutional rights to water and the general police power of the State can then be interwoven with the State's express right to counsel and its attendant privileges to support maintaining the confidentiality of a narrow class of documents which directly implicate the public interest.

1. An Express Right to Counsel.

In the Associated Press case, the Montana Supreme Court rejected the argument that the State has right to due process which would require the court to recognize an inherent right to counsel. However, one argument that was not raised in the case or addressed in the opinion is the argument that the 1972 Montana Constitution clearly contemplated that the State of Montana has a right to counsel. Article VI expressly provides that the State will be represented by an Attorney General, who has been lawfully engaged in the practice of law for at least five years. The powers of the Attorney General were developed at common law. Those common law powers and duties still exist. They have not been abrogated by the adoption of a constitution and statutes pertaining to the Attorney General. State ex rel. Olsen v. P.S.C., 129 Mont. 106, 113-15, 283

P.2d 594, 598-99 (1955); State ex rel. Ford v. Young, 54 Mont. 401, 403-05, 170 P. 947, 948 (1918).

There is no indication in the legislative history surrounding the adoption of Article VI that the people of the State of Montana intended to limit the ability of the Attorney General to enforce the law by limiting the attorney-client privilege all attorneys have with their clients. The privilege is implicit in the right to counsel. Without it, an attorney is unable to maintain the traditional confidences necessary to function and operate as an attorney.

A strong argument can be made that the State of Montana and its citizens have a right to counsel which is expressly recognized by the 1972 Montana Constitution. That right to counsel can be balanced against the public right to know. Where the situation is not one in which one state agency seeks to use the right to allow private meetings to discuss litigation against another state agency, the attorney-client privilege inherent in that right may outweigh the public right to know. That will, of course, depend upon the circumstances and the interests at stake.

2. Police Power.

The police power of a state is inherent in that state's sovereignty. It is reserved to the states under the 10th amendment to the United States Constitution. The police power does not actually derive from a constitutional delegation. Rather, it is an authority coextensive with the constitutional interest. 16A Am. Jur. 2d Constitutional Law, §§ 360-61. The police power of the state consists of its power to legislate or act for the promotion of the health, welfare and safety of the public, for the prevention of offenses against the state, and for the preservation of public order. Yellowstone Valley Electric Co-op Inc. v. Ostermiller, 187 Mont. 8, 15, 608 P.2d 491, 494 (1980); Colvill v. Fox, 51 Mont. 72, 75-80, 149 P. 496, 497 (1915). See also Engrav v. Cragun, supra, 236 Mont. at 264, 769 P.2d at 1227.

In Engrav v. Cragun, the Montana Supreme Court decided the case based upon a balancing of the public right to know against the individual right of privacy. In part, it held that individuals who call the police station have an actual expectation of privacy for the information they give. While they may be willing to report crimes they witness, they may wish to remain anonymous.

However, the court in Engrav also discussed the police power of the state. It stated:

> Public exposure of law enforcement files relating to ongoing criminal investigations would also have a disastrous effect upon law enforcement agencies in the performance of their duty to protect the lives, safety

> and property of persons within their jurisdictions. If criminals and their allies could daily track the progress of investigations into their criminal activities, Montana would become a worldwide mecca for criminal entrepreneurs. The public policy of the state cannot permit this to occur.

236 Mont. at 264, 769 P.2d at 1227.

While the court did not decide the Engrav case based upon the police power of the State, it did discuss and recognize the importance and validity of the State's police power. Again, under the right circumstances, the court may be inclined to recognize that the police power (exercised on behalf of all of Montana's citizens) is a right which can be appropriately balanced against the public right to know. Cf. State ex rel. Smith v. District Court, 201 Mont. 376, 654 P.2d 982 (1982) (criminal defendant's right to a fair trial outweighed public right to know). To the extent that Montana's water rights implicate issues of public health, safety, and welfare, the police power of the state is a constitutional right that should be raised and balanced against the public's right to know.

3. Water Rights.

As noted above, the 1972 Montana Constitution specifically provides that all water is to belong to the State of Montana and it is to be used and appropriated for the use of the people of this State. Art. IX, § 3, Mont. Const. (1972). This constitutional provision strongly recognizes the importance of water to the people of this state. Where, as here, the State of Montana is engaged in negotiations as a part of litigation over those water rights, the constitutional provision is implicated. That provision forms the very basis for the actions of the Department of Natural Resources and Conservation and the state water court in adjudicating water rights. It is also the basis for the creation of the Reserved Water Rights Compact Commission to assist in the determination of the State's water rights and the tribes' reserved water rights.

There is a strong argument that the right of the people of the State of Montana to the beneficial use of the state's water is a compelling constitutional interest which may be balanced against the public right to know. It should outweigh any purported right of private litigants (the tribes or a particular constituency of water users) to obtain disclosure of confidential State documents to use against the State in negotiation efforts or in later litigation. I believe that the court will recognize this right as one which, in the proper circumstances, does outweigh the public right to know.

No public interest would be served by disclosing the State's work-product -- gathered and produced during the course of negotiations with and litigation against Indian tribes over the ownership and use of Montana's water -- to the tribes. Disclosure of such information to the public at large, or to some person or group outside the "client" group, would then require disclosure to the tribe.[4] I do not believe that a court would find that the public right to know outweighs the right and responsibility of the State, as trustee for the public, to pursue negotiations and litigation with the tribes; nor would it outweigh the State's need to operate on an even playing field as it attempts to uphold the public's right to Montana's waters.

D. Maintaining Confidentiality.

As noted above, the attorney-client privilege protect communications which the client intends to be made in confidence. It does not extend to all communications, but only those which are confidential. The privilege is one which is held by the client and which may be waived by the client.

If a privilege has been waived -- even by inadvertent dissemination of privileged material -- it may not automatically be reclaimed in some manner. If confidences shared within the context of the attorney-client privilege or matters which fall within the context of the work-product doctrine are shared with "outsiders," the privilege is deemed waived. Once that has happened, the privileged matters are no longer privileged and may not automatically be protected. That can happen if someone other than the client and the attorney is present during the communication (or has access to written communications) or if the work-product material is shared with persons outside the litigation team.

The Montana Supreme Court held in Kuiper that the work-product rule can, in the proper circumstances, form the basis of a request for a protective order. 193 Mont. at 463, 632 P.2d at 700. The attorney-client privilege should provide a similar basis for such an order. However, there is no guarantee that a court will issue such a protective order. In order to ensure that communications or work-product materials can be maintained as confidential, they should not be shared beyond the "client group."

Courts and commentators have reviewed communications within the corporation setting to determine whether the privilege attached. Some courts had held that lower level corporate employees who are

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[4]Similarly, disclosure to a tribe in absence of a protective order could be construed as a waiver of the privilege and could ultimately require public disclosure of the information. See Kuiper v. District Court, supra, 193 Mont. at 460-63, 632 P.2d at 698-99.

outside the "control group" of a company are not considered automatically as "clients" for purposes of preventing contact by opposing counsel. See Epstein and Martin, The Attorney-Client Privilege and the Work Product Doctrine, supra, at 26-27. However, in Upjohn Co. v. United States, supra, 449 U.S. 383, the United States Supreme Court addressed the applicability of the privilege to the corporate client and its individual employees. There, the court held that communications to the attorney from even those employees outside the "control group" of a corporation were protected by the privilege. 449 U.S. at 390, 391-97; Epstein and Martin, The Attorney-Client Privilege and the Work Product Doctrine, supra, at 26-30.

Here, all communications between Commission staff and legal counsel are protected so long as the privilege has not been waived and the communications divulged to outsiders. Similarly, all materials produced by Commission staff at the direction of the Commission and for use in the negotiations or, ultimately, litigation, are protected by the work-product doctrine so long as they have not been divulged to outsiders.

In order to determine whether the privilege has been waived, staff will need to evaluate whether the communications at issue have been disseminated in some fashion beyond the "client group." I recommend that the Commission take a conservative stance on who is considered within the client group. It should include only Commission members, those staff members authorized to work on a given product, and those persons authorized to review the product. The last group includes the persons identified in the Commission's Memorandum of Understanding with the Office of the Governor, the Office of the Attorney General, the Montana Reserved Water Rights Compact Commission, the Office of the Director of Natural Resources and Conservation (DNRC), and the Office of the Director of Fish, Wildlife and Parks (FWP) (Attachment B).

The Memorandum of Understanding was entered into in 1990, and it recognizes that the offices of the Governor, Attorney General, DNRC, and FWP have interests in being involved in water rights negotiations. Representatives of those offices are regularly contacted for input with regard to ongoing negotiations and litigation. Representatives of those offices provide comments to the Commission for use in the negotiation process and review materials prepared in support of the Commission's positions in those negotiations. Those representatives of the offices which have entered into the Memorandum of Understanding should also be recognized as being part of the "client group," since all have a direct responsibility for and interest in acting on behalf of the citizens of the State of Montana with regard to the State's water rights.

In order to determine whether a matter remains privileged, Commission staff will need to determine whether it has actually been disseminated outside the client group. If it has and no

protective order was sought, the privilege may have been waived. By contrast, if a matter was discussed or disseminated at a "public" meeting -- properly noticed -- but no one outside the client group attended, the matter may be protected since it was not actually disseminated to outsiders.

Dissemination which destroys the Commission's ability to protect confidentiality of a document extends to matters disseminated to the tribes. I have reviewed one of the Commission's sample "408" agreements. (Attachment C.) These are agreements entered into in negotiations with the tribes. They provide that statements or positions taken in the negotiations are not admissible in any trial or later proceeding pertaining to the establishment, quantification, or administration of the tribes' reserved water rights. They are designated as "408" agreements because they provide that regardless of whether the statement or position constitutes an offer of compromise under Rule 408, Mont. R. Evid., it may not be offered as evidence in later proceedings. The Montana Supreme Court recognized in Kuiper that even in a situation where work-product materials have been provided to an adversary during discovery, the rule may still provide a basis for a protective order. However, that case concerned a private corporation and a fair trial was at issue. The Commission should avoid placing itself in a situation where it will need to rely upon such a protective order since there is no guarantee that one will be issued and it may, in fact, be unlikely that one will be provided to protect Commission documents disseminated to the tribes.

Similarly, if the Commission chose to share legal memoranda or other communications from its legal counsel with a tribe during the course of negotiations, the attorney-client privilege would also be waived. Where such materials have been divulged to the tribe during negotiations, they may not be later protected as confidential in the absence of a protective order. They will be open for review by any member of the public who wishes to request access to the information. That will include any member of the tribe, any representative of any other tribe, and any federal agent who wishes to view the materials.

Finally, as noted above, attorney-client communications are permanently protected. State ex rel. United States Fidelity and Guarantee Company v. Montana Second Judicial District, supra, 240 Mont. at 12-15, 783 P.2d at 914-15; Admiral Ins. v. United States District Court for the District of Arizona, supra, 881 F.2d at 1492. See also Clark-Cowlitz Joint Operating Agency v. F.E.R.C., 798 F.2d 499, 502-03 (D.C. Cir. 1986) (permanent protection for transcript of discussions pertaining to civil action). Similarly, work-product materials are permanently protected, as noted above. Kuiper v. District Court, supra, 193 Mont. at 464-65, 632 P.2d at 701. Any document protected by the attorney-client privilege or the work-product doctrine will remain protected until such time as the privilege is waived.

CONCLUSION

In conclusion, it is my legal opinion that the Commission can protect documents as confidential where an individual right of privacy is implicated. It may also maintain documents as confidential where the documents are an attorney-client communication intended to be confidential. Finally, the Commission may maintain as confidential technical information prepared by its staff for use in negotiations and litigation. The last two categories of documents should be protected where, as here, the Commission is involved in litigation with a private party and where the State's ability to protect the health, safety, and welfare of its citizens and its ability to protect the interests of the people of the State in its waters are implicated.

Finally, I would note that you have also asked me to briefly address the procedures which should be followed with regard to the circumstances under which one of its meetings may be closed. It is my understanding that the Commission has maintained the practice of conducting its negotiations in public. It would be my recommendation that such practice be continued, with adequate notice to the public of the meeting, since the Commission falls within the definition of public body set forth in section 2-3-203(1), MCA.

I would recommend that all meetings of the Commission, a quorum of the Commission, or of any committee or subcommittee appointed to conduct business of the Commission be open. A portion of the meeting should be closed only where the Commission chair has made a determination that the demands of an individual right of privacy clearly exceeds the public right to know. § 2-3-203(4), MCA, or where, acting on advise of legal counsel, the Commission determines that the matter to be discussed raises the need to balance the interests discussed within this memorandum privately. That would require a determination that the public's interest in the water rights, the police power of the State of Montana and the State's express right to counsel were sufficient justification under the circumstances to warrant closing the meeting. It is my advice that the Board carefully weigh any decision to close a meeting and to not do so unless the public interest is implicated to a degree that a court will clearly see the need to do so.