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MEMORANDUM

To: Henry Loble

From: David Ladd

THE EFFECT OF STATUTORY REQUIREMENTS FOR PUBLIC PARTICIPATION IN GOVERNMENTAL OPERATION ON THE RESERVED WATER RIGHTS COMPACT COMMISSION

The Montana Code requires that the people of Montana be afforded a reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of that agency. MCA 2-3-101. In addition, statutemandates that meetings of public bodies be open to the public. MCA 2-3-201. These statutes are based on provisions of the Montana Constitution Article II, Sections 8 and 9 which establish a public right of participation and a right to know. The question presented is whether: 1) these statutes do apply to the Compact Commission and 2) if they do apply, what functions or meetings of the Commission are subject to these statutes?

The Montana Statute

The chapter of the Montana Code dealing with public participation contains two parts. Part 1, Notice and Opportunity to be Heard, requires each agency to develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. Those procedures are intended to "assure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public" MCA 2-3-103(1).

The governor is charged with the responsibility of ensuring that each agency adopt rules and guidelines which will facilitate public participation. MCA 2-3-103.

Part 2, Open Meetings, requires that "all meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds shall be open to the public" MCA 2-3-203. The statute directs liberal construction of these requirements. MCA 2-3-201.

Applicability of the Statute to the Compact Commission

Part 1, Notice and Opportunity to be Heard. Initially it must be determined whether the Compact Commission is an agency subject to these statutes. In Part 1 an "agency" is defined as "any board, bureau, commission, department, authority or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts." Exceptions are provided for the legislature, the judicial branch, the governor and the state military establishment. MCA 2-3-101(1).

"Rule" is defined as "any agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of any agency." Exceptions are provided for statements dealing with internal management of the agency and declaratory rulings about the applicability of a statute.

"Agency action" is defined as "the whole or a part of the adoption of an agency rule, the issuance of a license or order, the award of a contract, or the equivalent or denial thereof."

The intent of Part 1 of the statute is to protect the rights of the public from secret final action taken without an opportunity for those affected by the decision to be heard. The statute is directed at those agencies which have the power to "make rules, determine contested cases or enter into contracts." The Compact Commission has none of these powers. The powers granted to the Compact Commission are set out in title 85 chapter 2 part 7: "The Compact Commission may negotiate with the Indian tribes or their authorized representatives jointly or severally to conclude compacts... for the equitable division and apportionment of waters between the state and its people and the several Indian tribes claiming reserved water rights within the state." The Compact Commission itself does not have the power to take final or binding action. Any compact becomes effective and binding only "upon ratification by the legislature of Montana, any affected tribal governing body, and the Congress of the United States." MCA 85-2-702(2). Thus, it is unlikely that the Compact Commission is an agency for purposes of Part 1 of this statute.

Under this reasoning the Compact Commission may not be governed by Part 1. That section basically addresses constitutional concerns about secret decisionmaking which might deprive the residents of the state of valuable entitlements without the due process of law. Since any compact will undergo full public debate in the legislature and would only become effective and binding upon approval of the legislature, each resident's constitutional rights will be protected.

Part 2, Open Meetings. The more troublesome portion of the Public Participation statute for the Compact Commission is Part 2 which deals with open meetings. In other jurisdictions parties have attempted to avoid open meeting and public participation laws by arguing that subordinate

committees whose only function is to make recommendations to the governing body are not encompassed by those statutes. Adler v. City Council of Culver City 184 Cal App. 2d 763, 7 Cal. Rptr. 805 (1960) (Zoning Commission), Selkowe v. Bean 249 A2d 35 (NH 1969) (Finance Committee of City Council). The case law on the point is somewhat conflicting; however, a pattern is discernible. Most of the cases which find an agency not to be bound by a public participation law do so on the basis that the committee is not a governing body and not authorized by law to act on behalf of the state. Commissions which arise independent of the governing body most often under an independent city charter, are most likely to be found not to be governed by public participation laws. Adler, supra, zoning commission, Selkowe, supra, finance committee of city council, Beacon Journal Publishing Co. v Akron 209 NE2d 399 (OH 1965), City Civil Service commission and other bodies created by executive order of the mayor. The Compact Commission's authority arises by statute directly from the legislature. Most often commissions authorized specifically by law to act on behalf of the state are subject to public participation laws . Beacon Journal, supra, assessment equalization board created by an act of the legislature and subject to the open meeting law.

The statutory language of Part 2 removes any doubt about the applicability of the part to the Compact Commission: "All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds shall be open to the public." The Compact Commission, which operates only on public funds, must be included.

It appears that the Open Meetings statute is applicable to the Compact Commission as an entity. Even though it might be argued otherwise it seems more prudent to proceed under the assumption that the statute does apply. Under this assumption it becomes necessary to consider whether the statute applies to the particular kinds of meetings which the Compact Commission holds.

Application of the Statute to Compact Commission Meetings and Negotiating Sessions

In general, open meeting statutes have been liberally construed. Their purpose is deemed to be protection of the public and to that end the statute is interpreted in a light most favorable to the public. ALR3d 1070§ 4. The Montana statute specifically declares that the provisions of the statute be liberally construed. MCA 2-3-201.

Such statutes are increasingly being interpreted as having application to informal meetings as well as formal sessions. The Montana statute defines a meeting as any convening of a quorum of the agency to "hear, discuss or act upon a matter" even if the body only has advisory powers or is merely a subcommittee of another public body. MCA 2-3-202,203

The Montana law does, however, allow a closed meeting "to discuss a strategy to be followed with respect to collective bargaining or litigation when an open meeting would have a detrimental effect on the bargaining or litigating position of the public agency." MCA 2-3-203(3). The meetings of the Compact Commission and the negotiating sessions with the tribes and federal government might be excluded from the open meeting statute under this exception.

There are two types of meetings vital to the function of the Compact Commission. First, the meetings of the Compact Commission itself and

second, the actual negotiating sessions. The exception for strategy sessions relating to litigation appears to allow the Compact Commission meetings in which an approach and strategy for the negotiating sessions is discussed to be closed. Since the state is undergoing a general adjudication of all water rights in the state and Indian water rights are included in that adjudication by virtue of the Supreme Court's order required by SB76, the Compact Commission's meetings discussing strategy may be considered strategy sessions concerning litigation. The litigation was actually initiated by the Supreme Court's order. With respect to Indian and federal reserved rights claims, such litigation is merely suspended while negotiations are proceeding. Termination of the negotiations would activate the adjudication of Indian and federal reserved rights. To the extent that open meetings would have a detrimental effect on the bargaining or litigating position of the Commission, statutory interpretation of both the Open Meeting law and Senate Bill 76 would indicate that the Commission's meetings may be closed.

There is no case law construing relevant portions of the language of the Montana statute. Numerous other states have similar open meetings statutes. Most of those statutes provide exceptions for personnel matters, labor negotiations and legal consultations or strategy sessions relating to pending or impending litigation or other legal proceedings. Case law clearly supports the right of a public body to meet in private with an attorney to discuss current or impending legal matters. Minneapolis Star v. Housing and Redevelopment Authority for Minneapolis 251 NW2d 620 (Minn. 1976), Oklahoma Ass'n. of Mon. Attys. v. State 577 P2d 1310 (Okl. 1978). However, such holdings are based largely on the attorney-client privilege rather than statutory interpretation.

Since the Montana statute plainly provides an exception for strategy sessions about litigation without invoking the attorney-client privilege, the important issue becomes whether the Compact Commission's meetings relate to litigation. Statutory construction is determinative of this issue since there is no case law.

The legislature made clear their intent that Indian and federal reserved rights be included in the general adjudication mandated by Senate Bill 76: "It is the intent of the legislature that the attorney general's petition required in (section 16) include all claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by 43 U.S.C. 666." MCA 85-2-701. The McCarran Amendment (43 U.S.C. 666) waives sovereign immunity and gives consent to join the United States as a defendant in a general adjudication conducted in a court. Senate Bill 76 effectively commences the procedures for a general adjudication of water rights in the state courts, including Indian and federal reserved rights. Further provisions of Senate Bill 76 suspend all actions to general adjudicate reserved Indian water rights while compact negotiations are being pursued. Breakdown of the negotiations would remove that suspension of the general adjudication.

It thus appears that the meetings of the Compact Commission insofar as they pertain to the negotiations do relate to litigation. The meetings of the Compact Commission may be closed to the extent that they concern discussion of strategy to be pursued in the negotiations.

The Negotiating Sessions

The actual negotiating sessions may be detrimentally affected if they are required to be conducted in open meetings. The free exchange necessary for compromise may be restricted. It is in the best interests of all parties that the negotiating sessions be closed.

Most of the arguments discussed thus far apply equally well to the negotiating sessions. It is possible that the negotiating sessions may not constitute a "meeting." Montana statute defines a meeting as the convening of a quorum of the members. MCA 2-3-202. There may not be a quorum of the Commission members at each negotiating session so those sessions would not be a "meeting."

Cases in other jurisdictions have found that meetings need not be open unless final action is to be taken. Adler v. City Council, supra, Beacon Journal v. Akron, supra. These decisions are based on the intent of open meeting statutes to prevent secret decisions which affect rights of the public. Since any compact must be approved by the legislature, it may be argued that no final action is taken at the negotiating sessions.

These arguments are not without merit; however, they do appear to be a bit technical. In view of the fact that the legislature directed that the open meeting statute be liberally construed, further support is needed to conclude that the negotiating sessions may be closed.

A New Hampshire case is analogous to the situation of the Compact Commission. In Talbot v. Concord Union School District 323A2d 912 (1974) a newspaper reporter was refused admission to the negotiating sessions between the school board and union representatives. In this case the parties agreed that the facts did not fit any of the express exceptions of New Hampshire's right to know law. The court found that the right to know law did not apply to the bargaining session.

The New Hampshire Supreme Court noted that the presence of the press at the negotiating sessions "would inhibit the free exchange of views and freeze negotiators into fixed positions from which they could not recede without loss of face." The collective bargaining process itself might be

destroyed if each step of the negotiations was conducted in the presence of the press and public.

The New Hampshire case, like the present situation of the Compact Commission, involved conflicting legislative policies. In New Hampshire the legislature had adopted a bill guaranteeing the right of public employees to "negotiate the terms of their contractual relationship with the government by using the well established techniques of private sector bargaining." Open negotiations would prevent the effective functioning of the collective bargaining process. The New Hampshire Court quotes a Florida decision, "meaningful collective bargaining in the circumstances here would be destroyed if full publicity were accorded at each step of the negotiations." (Talbot at 914 quoting Bassett v. Braddock, 262 So. 2d, 425, 426 (Fla. 1972)). The court found it unlikely that the legislature intended the right to know law to destroy the very negotiation process established by legislative action. Thus, it was held that the negotiating sessions between the school board and the union were not subject to the right to know law. In so deciding, the court noted that any agreement reached in negotiations must be approved at a public meeting before final adoption.

The situation with the Compact Commission is directly analogous. Totally open negotiations with the tribes would severely hamper if not completely halt the negotiations process. Open negotiating sessions would have a detrimental effect on the bargaining position of the Commission. That negotiating process was explicitly set up by the Montana legislature. Thus if the negotiations are to continue in a meaningful fashion they must be conducted in a closed session. It is improbable that the legislature would intend to so severely restrict the negotiating process it specifically

established. In addition, like the agreement in the Talbot case, any compact agreed to must be approved by the legislature. The public's right to know will be amply protected by that approval process.

It seems crucial to the success of the compact process that the negotiating sessions be closed. The statutory language provides exceptions where the bargaining position of the public agency would be detrimentally affected. MCA 2-3-203. While the negotiating session of the Compact Commission do not fit directly within one of those specific exceptions, it seems likely that the same reasoning should apply to negotiations of the Compact Commission and would have been included in the statute had the legislature considered the problem.

Conclusion

Whether the Compact Commission's meetings and negotiating sessions may be closed to the press and public at large is a close question. There is little case law or prior experience with the statute to provide guidance in applying the statute to these facts. However, two conclusions may be reached with reasonable certainty:

1. The meetings of the Compact Commission may be closed to the extent that they concern strategy for the negotiating sessions.
2. The negotiating sessions may be closed because an open session would be detrimental to the bargaining position of the Commission and could threaten the negotiating process itself.

The statutory language and what little relevant case law exists support these conclusions. The intent of the public participation statutes is to protect the public interest. Premature publicity could threaten the negotiating process established by the legislature and thus adversely affect the public interest. It is in the public interest that the negotiations proceed in a constructive fasion and therefore be closed to the press.