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FLATHEAD RESERVATION

JUN 25 1980

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

INTER-TRIBAL POLICY BOARD
RESOURCES & CONSERVATION

Date: June 18, 1980

Persons Present:

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

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

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

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

Baenen: That sounds all right to me.

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

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

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

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

Loble: To begin in a preliminary way, my letter to Tony Rogers says that we thought this meeting would be general, and preliminary in nature. We've just got to get some of these things out of the way, and then this would lead into the preparation of the factual data. I think one of the important things is to get to know each other. That's very important.

The first item I had on the agenda is bilateral understanding of negotiating authority. I interpret that to mean to say what authority the representatives have. You've all, I assume, read the statute of this Compact Commission -- a nine member Commission. I would like to say that the composition of the Commission is permanent. It's not going to change every time the government changes or the legislature changes. It's permanent, and I think that's essential.

Let's start with the Commission itself. Briefly, the Commission is authorized to enter into a compact . . . (unintelligible) . . . equitable apportionment of water between Indians and non-Indians, concerned with Indian reserved water rights. As you know, the law specifies that any compact entered into by the Commission must be ratified by the legislature, by the tribe, and by the Congress. You'll be able to say later whether ratification of the compact by the tribe involves referendum of the members of the tribe, or whether it can be ratified by the Council. I don't know that -- you'd have to answer that.

Taking it a step down further, let's take the authorized members of the Commission who are here. The way this stands with the Commission is this: At all negotiating sessions, I anticipate that I will be there as chairman, Scott Brown as our program manager will be present, and Dave Ladd as our attorney will be present. I am an attorney, but I'm not acting as attorney in this particular role that I have as chairman. In addition to that, when the Commission met and considered this, certain members of the Commission were assigned to meet with certain tribes. It was generally decided on the basis of proximity of those members to tribal headquarters. For instance, Dan Kemmis, who's from Missoula, was assigned to this tribe. Steve Brown is the only other one. Steve Brown is in Helena, and he's a Senator. And there's a Senator Jack Galt, who is from Martinsdale. He asked to be included as a member on all tribes. He was in the Northern Cheyenne negotiations yesterday, but he was busy today. In addition, any other member of the Commission who wishes to come is welcome to come.

I'd like to emphasize this: if no other members of the Commission except myself and Scott and Dave show up, we'll still be able to work on the issues. As far as what's agreed upon by the representatives of the Commission at these meetings, I would anticipate that whatever we agree, it will be agreed to -- whatever we agree to here will be ratified by the Commission itself unless something unusual happens. I suppose that's possible; I think it would be rare that that would happen, but I think it's possible. Eventually, of course, the whole Commission . . . I think that covers it. Anybody on the Commission side have anything to add?

Baenen: Subsequent to whatever comments or corrections that Tommy may add to what I say, I think it's fair to say that whoever is here on behalf of the tribe at any given meeting will have the authority to negotiate with you. The tribe has established a negotiating team, and by tribal resolution they may amend what the leader augments at a given session. But whoever shows up will be here with the authority to negotiate. Whatever is negotiated will have to be ratified by the tribe. I don't think I can tell you now if

that means it would have to be by the Council or by referendum. The Council certainly has the power -- the legal authority -- to do it. Whether the Council, under circumstances that may develop, would feel that politically they should do it by its own actions or by referendum -- at this juncture is a question I can't answer, and I expect neither can the Chairman or the Secretary. They do have the authority to ratify it. Anything that ultimately is agreed upon will have to be ratified by the tribe; that's required under the Tribal Constitution and by-laws. Ratification will be . . . (unintelligible)

. . . There's always a question of the . . . (unintelligible) . . . known as the Bureau of Indian Affairs. My preliminary thinking would be that we would definitely want the Bureau of Indian Affairs to put its blessing on the final agreed-upon compact. They will obviously be involved as we get along, because they on the reservation are, through the irrigation project, a very dominant water using organization. We believe that ultimately whatever is agreed upon would want to be ratified by Congress -- it would have to be ratified by Congress, just as on the tribal side. I think we both would be much more secure with what we had concluded, in terms of it being a long-standing, final -- I put quotes around final -- resolution of water rights. You can never finally resolve them. Obviously there's always going to be a potential kink. Hopefully we can negotiate something that we can put to rest and eliminate uncertainty and friction over litigation. We think that if that goes through Congress, that's what will happen. As we see it, the negotiating team, the way it's always worked with the Flathead, the negotiating group -- when it finishes what it considers steps that it can do . . . when it feels that you can't reach what is fair and equitable, then you don't reach an agreement. You don't go back to the Compact Commission and say, we've reached something we can't agree with. When the necessary give and take is over that's involved with negotiations, we can reach that point where we can all say, well, under the circumstances this is what happened in the negotiating agreement; we didn't get everything we wanted, but we didn't lose everything we wanted. I think that's the best way to go. They'll take it to the Council -- the full Council -- and it will be presented so that the recommendation can be to approve. At that time, I suspect the Council will . . . probably not until that time . . . they'll probably not make their decision as to whether they want to do it by Council action or by referendum. To try and forecast the future, it seems to me that the complications involved would make it something that would be very difficult to present by referendum. They could present the principle by referendum, which is that we have agreed on something -- the negotiating team has agreed upon it, the Council has probably agreed upon it, or it probably wouldn't have been presented to the people. I don't know that that would make much sense, but that's a matter that involves political decisions, and I certainly can't forecast what way they might go.

We would also either currently seek Bureau approval. We might seek informal Bureau approval. We probably would have informal Bureau approval . . . (unintelligible) . . . federal capacity because it has some water rights on the reservation, depending on what they do in connection with the irrigation project, and in connection with the tribe . . . (unintelligible) . . . have other areas above and below the reservation that could be affected by whatever compact is reached.

Loble: What Department is that?

Ladd: Fish and Wildlife, Parks and Recreation. . .

Baenen: They're all Interior Department. Everything on the reservation, as far as I know, is Interior Department. So we probably will have, at least informally, clearance by those people. It seems to me that if we work out something and we're all in agreement, we would have little problem going in to Congress and going through the State. We'd say, here it is; we've worked it out and it's satisfactory. Here's the proposed bill; let's have the hearing and take it from there. So that's basically how we see it, and any changes would be ones that we can't anticipate at this time.

Loble: I might say one thing. I think it's best that when somebody speaks that we let him finish whatever they're going to say -- make a little note -- and then ask them your question. Otherwise you throw a guy off. I just did it; I'll try not to do it again.

I wanted to ask you what the tenure of your tribal officials is. What's their term of office? When is the next election?

Baenen: Let me back up a step first before I answer that. I want to ask Fred or Tom if they have anything they wanted to say on my comments.

Houle: The Council appointed . . . (unintelligible) . . . BIA . . . Rights Protection specialist. . .

Baenen: Council members are elected on the four year terms. There's a 10 person Council; there are elected five every two years, having just finished an election in December. So the present Council will remain . . . new members take office on the first meeting after the first of January preceding the month of elections. So the next election will be in December of '81. The present Council will continue as it is. There is a revised Constitution and by laws which is under consideration; it will be voted on by the Tribal members this summer -- that's an open question. There's nothing in that that would be voted in that would basically affect either what we're doing or the composition of the Council in terms of present people who serve out their terms. There would be new elections; there would still be staggered elections every two years.

Loble: Would we be able to get a copy of the Constitution and by laws?

Baenen: . . . (unintelligible) . . . have it as an exhibit. We either have it as an exhibit or they do, so there's always . . . Sure.

Loble: I might take the information mentioned today . . . It might be helpful for you to know the way the Northern Cheyenne did their (unintelligible). Ted Meredith was there yesterday, and Mr. Bohannon -- he's a retired BIA officer. I think . . . (unintelligible). He was sitting in for Mr. Jennings, who couldn't make it. I just thought I would tell you that. Anybody have anything else to add?

Baenen: We've talked about this off and on for a couple of years -- we talked about a compact before the Compact Commission . . . (unintelligible). We talked about the possibility of the Flathead because of the hydrology -- it lends itself for all of the state to look at the possibility of a compact because we really, with minor exception, are dealing with either run-off or one main body of water . . . the Flathead River either coming in or coming out. Which means there should be some agreement on what is going to come in and what is going to go out. You could take what's in the middle and maybe

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

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

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

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

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

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

Brown: He's Bureau Chief of the Water Sciences Bureau. They have probably most of the technical experts we'll be using as we acquire data and verify data.

Loble: Gary Fritz . . .

Brown: He's Administrator of the Water Resource Division. He's Rich's supervisor and administrator of the entire division, which includes water rights, engineering, the Water Sciences Bureau, water planning, . . . I guess that's about it. Gary is directly involved in all water-related issues in the state.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Loble: You mean periodically have a public meeting?

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

Loble: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

(Tape being changed)

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

Loble: Evelyn Stevenson.

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

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

reasons which are obvious, and he asked me if he could be invited to these meetings. I was noncommittal about it, and I didn't ask him to these meetings and I didn't tell him what happened. I tell you that so you can . . . I assume that's your problem and not mine. If you want me to ask him, I'll ask him.

Baenen: I don't have any problem with Jack attending.

(Conversation not pertaining to negotiations)

Baenen: I have no problem. One of the very important issues that we'll be talking about is the issue of water (unintelligible) for both (unintelligible) and sites down the stream. It's a very important question; the company is not in the abstract. I feel that . . . (unintelligible). I guess maybe what you could tell Jack is that you mentioned in passing to Baenen, and he says fine, but will save the company a lot of time and expense, that we'll tell him when we get into the area of the Flathead River flow as it might affect the hydro-electric sites, and he can come to those specific meetings -- he doesn't have to sit around when we're worrying about (unintelligible) Creek. It will save time and effort for him.

Loble: Okay.

(Lunch)

Loble: . . . Dan Kemmis is our Representative in the legislature, and we're going to have a problem of when we go back to legislature for funding -- it's always better if they have a good image of us. He thinks toward the end that it would be a good idea that we get some publicity about various meetings that we have of a general nature like this one. Maybe we can call (unintelligible) just to say that we did have a meeting, that some of the general ground work was done to enter into some serious negotiations . . . procedural matters and things of that kind. Issue a news release, and then the legislators around the state read it and they may know that we're working.

Baenen: I have no problem with news releases as long as we're doing them.

Loble: Who on our staff is a good news releaser?

Brown: I'm not trying to get out of it; I'm just trying to think of the best way to do it. Perhaps the best way to do it is for you two gentlemen, as chairmen, is to have someone following each meeting with the proper newsperson right there, and give it to him straight.

Loble: Well, I think we ought to write it out.

Baenen: Somebody can put together a news release and they can call, you know, two people are going to put this one . . . they can call Fred and say, this is what it is, and the rest of us can say that's fine -- we don't have any problem with it -- then it can be turned over. Or if we're the ones writing it, we can call whomever you designate; we can do that at each of our meetings.

Brown: Okay, then I'll take a crack at it and clear it through you and clear it through . . .

Loble: Can you call Jeanne Whiteing and Cal Wilson, and see if we can do one for the Northern Cheyenne?

Brown: Yes, I'll do that with Jeanne, too. But for our purposes, would you like me to contact you, Fred? Okay.

Houle: And if I'm not there, you can contact Evelyn Stevenson.

Loble: The next item that is number six: Form of the agreement, fundamental understandings of provisions, amendments, alterations, administration, mechanics for resolution of disputes, necessity of establishing separate entity to administer Compact, and if established, staffing, funding, form, and autonomy of same. This was Dave's idea to put that in there. I don't think we're going to come to any real conclusions on that right now. The Yellowstone River Compact . . . has a compact -- in that case there's a representative from Montana, one from Wyoming, and none from North Dakota, which is a (unintelligible) state, and then they have one federal representative, USGS who acts as chairman of it and votes in case of a tie. They haven't done a great deal because they really haven't had to . . . (unintelligible). I think it's a matter of what I think about and decide when we get a compact, how it is administered -- whether it's done by the tribe on one side and the DNRC on the other, or whether we have the Commission, the representatives from both, . . . (unintelligible). I don't think we can decide that right now. It's something we'll have to think about and perhaps discuss.

Baenen: I think everything that's in here, we have tentative thoughts on -- they are all thoughts that will be molded, shaped, rejected as we go along because this really becomes . . . six really encompasses what we come up with. In other words, how we do it is going to be influenced, I think, in part as to what we are doing. This is really the heart of what we're going to be dealing with, down to the substance as opposed to . . . for example, a form of agreement -- we're talking about, I think, whatever we have to get it approved by Congress, whether it's, say, a committee report or whatever it is. I think the same thing about provisions, amendments, and alterations. Administration is one, I think, I'll get a better feel for as we find out who's going to be involved in the various inputs -- how does the federal government feel about getting involved? . (unintelligible) . . . How we resolve disputes that will be shaped, in part, by . . . (unintelligible). Maybe we can reach a type of agreement where we have two . . . (unintelligible). And again, I don't know if it's a dispute among the people with fee land instead of what happens on water that gets resolved between, you know, . . . by state aspects of the Compact people saying look, this is all we've got for you people, and I'm going to resolve your dispute. And if it's a dispute over the tribe, it's the same way; we say, look, under the Compact, we only get so much for you people, and we'll resolve the dispute. But if the dispute is between whether or not there's been a proper allocation between the trust land and the non-trust land, well then . . . (unintelligible). I would have a better feel for how I might want to propose a structure that we will want, and get more into the substance of what we're putting together. This really covers the (unintelligible).

Loble: Anybody have anything further on that?

If not, we'll get on to the next one. I just noticed here -- Joe Roberts used to be a contact in the government's office. . . (unintelligible).

Baenen: Well, he's your contact, he's not ours. It was my understanding we do everything through you guys. We had our first meeting with the Governor, and the Attorney General, and Allan Chronister and Joe Roberts. It was my understanding that we do everything through your office.

Loble: We're going to talk to Allan -- Allan Chronister. . .

Baenen: We don't have any problem with . . . you can talk to anybody and everybody. But we won't talk to anybody in the state unless we come through you. On the other hand, you can talk to either me or Fred. You don't necessarily have to . . . (unintelligible).

Loble: Number seven is ratification or rejection, tribal, legislative, Congressional, preliminary court proceedings. Well, on that one we all know it has to be ratified by the tribe, the legislature, and the Congress. The law does say that after it is ratified by the tribe and the legislature, it can be entered as part of the preliminary decree of the court. That raises the question of course, of what happens (unintelligible). Does that mean the court can change and alter the compact? Well, I don't think so. I don't think it means that; I don't see how it could mean that. How can the court change a compact and still have a compact? If they change anything in it, then it's got to go back and be ratified by the tribe, the legislature, and . . . (unintelligible). They can't alter the agreement of the parties, as I see it. There is some ambiguity in that the law does not say that the compact is unalterable by the courts. I wish it did say that, but it doesn't. The remark has been made by a legislative member of the Commission, Mr. Willie Day that he thought that that problem might be solved at the time of the ratification. He thought the legislative resolution might make it specific that the compact can't be altered in court. What do you think of that?

Kemmis: Well, I guess the way that I look at it is that the compact is not a compact until it is ratified by Congress. Until then, it's something short of being a compact. I think that we do have a problem with our legislature's address.

Loble: Have the legislature address it?

Kemmis: Yes. The other question that I have is exactly what the language means here. The language is the water judge shall include in the preliminary decree the contents of the compact that has been agreed upon by the parties of the compact -- whether or not it has been ratified by Congress. I guess that it's clear that that means that there has to be approval of the tribal governing body of the legislature before it . . . (unintelligible).

Loble: I can't say that I'm in entire agreement with you that the court can change it before the Congress . . . (unintelligible). It seems to me that it would be very difficult for the courts to change that because then it would no longer be any sort of an agreement between the tribe and the Commission.

Baenen: Well, I don't believe they can alter what we have agreed on, but all that they're dealing with is its decree, and until the legislature tells them otherwise specifically, then I suppose that they could decree something that's different than what we agreed on. I would just feel better if it was clear that the court did not have that expression. I don't think that it's fair. I don't think that they can change the compact, but I think they can do whatever it wants with a decree.

Baenen: They could do something that would make the compact not workable by virtue of what they did . . . (unintelligible). I think that we have a practical and a legal problem that we should be alert to and worry about as we get down the line. It takes a pretty gutsy judge to have to present it to them and say we're waiting for Congress to approve it and it's taking care of 25 years of water rights litigation, and says, well, I'm going to change it. But on the other hand, you never know. We'll have to all be alert to it.

Loble: I think it's better to get it out of the way -- get a legislative declaration on it. Anybody have anything more on that?

Eight: Meetings, format, frequency, location. Format is concerned, I think, with . . . we probably agreed on that when we said we'd alternate chairmen. The location, I think, will depend on the particular circumstances. Probably Helena on the one hand, and Pablo on the other. The frequency -- there's several views on that. One is to have it when it looks like we ought to have it -- just wait until things build up and then have it. The other one, and I favor this a little bit, is to set one at the conclusion of each negotiating session, let's say for this one, two months from now. And then that gives us a goal to shoot at. We would decide at this meeting certain things that we would want to discuss at the next one -- certain, perhaps, things that need to be done by the next one. This way, you can solve the problem of individual time schedules. You set the form up ahead so everybody would be ready to go. It will ensure that we do have a regular meeting. If it happens when we get up to the meeting, I'm not advocating a useless meeting. If we get up to the time of the meeting and don't have anything to talk about, well, then let's not have it. But I would like to decide at the end of this one if we're going to have a meeting in, say, August, and then shoot for it. I'd like to hear from you on that.

Baenen: I would heartily favor your suggestion. I think we should set meetings in advance and anticipate that basically, we'll have a meeting every two months. Let's say a week or two weeks or at the end of the first month after this meeting, we exchange what we feel will be an agenda for that meeting, since we don't have items right now. And then check a week or so before the meeting to find out if there may be a reason to not hold the meeting -- for any number of reasons. But at the time it's cancelled, the next one should be scheduled because we have scheduling problems -- everybody has four different places to go. If you don't have it on the calendar, and you're free and we're not, and we're free and they're not -- it's just as (unintelligible).

Loble: Good. So at the end of this meeting we'll set a date.

Why don't we leave nine for the last. Let's go to ten. As far as mailing to us is concerned -- documents and correspondence -- I think you would either do that to me with a copy to Scott Brown, or if you feel that it's better to address it to him because of the subject, send it to Scott, with a copy to me. We'll take care of sending it to the Commission members or the government officials. How do you want us to mail?

Baenen: Copy to our office. It doesn't make any difference, but I guess we should be consistent. Why don't you address them to Tony -- Tony Rogers and Fred Houle.

Scott, I have to get your address.

Brown: It's 32 South Ewing, Helena 59601.

Loble: And I'm Box 176.

Baenen: I'm going to change that. Let me have you send it to me, only because I always have more tribal problems than Tony. Sometimes when I get it first, . . . (unintelligible) . . . and I'll just send it down to him. Just send it to me.

Brown: Did you also say that we will send copies to Fred's office?

Baenen: Yes.

Loble: Preliminary discussion of the extent of the Winter's Doctrine. Well, I don't know how much we can do of that. That was my idea.

Sooner or later, in order to confront the issues involved, we're probably going to have to know what the position of the tribe is on various aspects of the Winter's Doctrine. Are we talking about ground water? What priority date? What's the uses? . . . (unintelligible) . . . How much of a problem do we have as far as the rights of lands which have gone into fee ownership, both Indian and non-Indian? . . . (unintelligible) . . . that has happened.

Baenen: It's gone in and out, and back in?

Loble: Yes. I think all of those things are important for us to know as we prepare for negotiations.

Baenen: I would like to suggest that much of the positions that the tribe may take on those issues might be resolved, and not have to be positions so much as something that comes out of the negotiations, once we find out all of what's been. . . In other words, it may well be that there's no . . . we both may agree that we should have a certain amount of in-stream reserve water for the purposes of fish and wildlife, both from the state's standpoint and the tribe's standpoint. Since we both agree to it, since there's enough water to go around, we can avoid thrashing over whether or not this is the Winter Doctrine right or this is a right that the state wants to claim. I agree with you that every topic that you mentioned, and I have a laundry list which I don't know if it's complete, but I made a laundry list in the past of all the various issues as seen from our side -- not what our position was on those, necessarily, but all the various issues that have to be (unintelligible) . . . planned categories, status categories, and time and place. I guess we could say that an easy answer that at the start of negotiations, we'll claim everything and you can claim nothing, and then let's take a look at what we've got and see if we can't work out something that will take care of everybody. Or to put it another way, we may not have to resolve some issues until . . . we may not have to determine what a position is until push comes to shove in a given area where we've got a problem because there isn't enough, or somebody downstream is raising hell because they say, but if you take that much more, then there's not going to be enough down there. You know, for the state of the public position we take the position, I think everybody does, that water rights are an intensive litigation. You can tell me what the position is that's most favorable to the tribe, and I'll tell you that's what our public positions are on the Winter's Doctrine as far as litigation. When it comes to sitting down at a negotiating table, we look at a package. There's no specific non-negotiable position on (unintelligible). We'll look at a package thing that will be acceptable to everybody -- give and take.

Loble: Probably some of the . . . (unintelligible) . . . Yutes . . . I don't know how much luck they've had getting approved by either the tribe or the legislature, but the approach there was they went on an irrigable acres. Then decided the important (unintelligible), then they decided how many acre feet was needed. Then they decided diversion and depletion. Then they finally ended up with an amount of water that the Yutes would get, and it was understood, I believe, that Yutes could use that water even though they got it for irrigable -- for agricultural; they could use it for anything they wanted. Then I think they threw in 10,000 acre feet for industrial use -- municipal and industrial. Whether they addressed the aesthetic and recreational uses, I don't know.

Brown: Well, the way that was handled, even though everything was based on irrigable acreage, it was stated to the tribes, and it is stated so in the agreement that the tribe may use that water -- both the depletion and the diversion allowance -- they may use those amounts as they see fit, or in uses. There's one catch. The State of Utah administered that compact, and in Utah presently there is no recognition of non-consumption uses or in-stream uses. So if the tribe were to ratify that compact as it is, which they have not done yet, but the state legislature has -- and immediately seek to set aside a portion of that for in-stream flows, they would be unable to do that. Now, Utah seeks to resolve that by going to its next legislative session with a request to allow for that. They're setting a precedent; they realize that -- that under these circumstances and other circumstances where in-stream flows ought to be considered, that they're will to set that precedent.

Baenen: In terms of specifics, without having available all the information that we'll be negotiating from -- Tony, . . . (unintelligible) . . . presently . . . whether it's trust land or fee land and all the rest, why, it's pretty difficult in any event to say, well, we can take it this way, and box and package what we agreed, with this wrapping saying that this will be what the tribes would receive, and this would be what the federal government would receive, and this is what would be available to the state . . . (unintelligible) . . . under state laws, but we'll word it so that all the irrigable acreage be used as you want because that will be more palatable or something. That's packaging, I think. In a sense, what you do is you say, well, we won't resolve . . . we won't make it part of the compact, the statement that the state agrees that these are Winter's Doctrine rights -- we don't have to. What we'll say is that this is what we've agreed to, and we've got a catch phrase, . . . (unintelligible) . . . and you can do with it what you want. But that's something we'll have to deal with as we go along.

Loble: Using the subject of (unintelligible), there's some doubt about whether the Winter's Doctrine covers it. It hasn't been fully cited. Those who say it does cover it are looking at the Cappaert case, I guess. You can also read that case; if they didn't, they didn't decide it. I suppose the factual preparation of the . . . (unintelligible) . . . include underground water.

Baenen: I would hope that we, I would have to confer with the engineers, I would assume that the company will have to have ground water information because of the effect of ground water use on surface water in any event. If, just for purposes of discussion, and let's assume that ground water is not covered by Winter's Doctrine, but we know that ground water use can affect

surface water, and if that's the case, we're making agreements for surface water only; we have to know where there's going to be no more ground water (unintelligible) because of the effect on surface water. I think that we will probably have to expect that data, would probably have to collect it in any event; we certainly will want to have it. Our men in the office are trying to collect it -- it's a more difficult collection process. I think a discussion of something such as the Winter's . . . there's a type of issue we would certainly want to be in closed session. That's where the negotiations can get side-tracked or certainly seriously deferred by a newspaper article where they're saying that (unintelligible) . . . claim applies priority date 1855 date, you know, ground water, surface water, rain water. But we can sit down and . . . on both sides, and you can interpret this way, and we can interpret that way, maybe we can work out something where we don't have to make a definitive decision.

Certainly, if he comes from the tribe's standpoint, . . (unintelligible) . . get cases that it represents . . . (unintelligible). I don't mean to say that this is a Communist amount of water; we can all sit down without regards to legal principles and rights . . . (unintelligible) . . . can account our differences over what it is, and then negotiate those out satisfactorily.

Loble: Anybody have anything to add on this subject?

Ladd: I think there are enough areas in the Winter's Doctrine, of course, that are very vague and debatable anyhow, but I think the spirit of negotiations is enhanced best in those areas where it might be a little more clear so we avoid getting hung up on doctrinal approaches or labels. It seems what we're after is a rather comprehensive agreement, and I can even envision ending up with some sort of agreement that you may say, well, this amount of water represents this type of right in this issue and that issue; and we may insist on, no, it doesn't -- it represents something else. But as long as we reach an agreement on some sort of comprehensive portion -- that seems to be what's important.

Loble: I notice in typing this, there was a topic nine on whether the federal people ought to be here. Somehow this got dropped. I think we'll leave that up to you, as to when you're going to invite federal people. I know Meredith is very interested in coming -- very. That's the matter which you'll decide. We would like . . . the only interest I had . . . we want the federal people to be supportive of the results and not feel that they're left out.

Baenen: I see federal involvement on two levels. One is because of the trust relationship with the tribe, . . . (unintelligible) . . . Some of those interest are proprietary, and some of those interests are managerial for non-Indians. As I mentioned to Tony, I told him that my feeling was that there was no need to get the federal people involved in either level until we get through the organizational meetings because they're basically going to go along with how we want to organize it and set it up. They may have some good ideas, and in that event we miss the benefit of having those thoughts. But basically, they don't need organizational meetings to achieve your request. I think, though, that very early on, like perhaps the next meeting, have the invitation extended best as we can. Tell them when the meeting is starting, and we would like you to show up. Also (unintelligible), shortly down the road, we're going to suggest the federal government come in wearing another hat. Now, whenever you want to bring in . . . if they're happy to let you

sit there in a conflict of interest as long as we're happy to let you sit there in a conflict of interest, we're happy as long as you decide the conflict in favor of the tribes as opposed to the Bureau (unintelligible), why perhaps we could have you along in those capacities. But we'll have to have them in, and we certainly need all the support. When I say we, we not only as the Indians, but what we will all be trying to accomplish -- it will need all the support we can get, and that's one more area we can certainly keep cultivated.

Loble: We've completed all of the topics. Before we go on to the discussion of possible agenda items for the next meeting, and when it might be, does anybody have anything further to add?

One thing, we are having a Commission meeting possibly in Billings on the 24th of July. We're going to have it someplace in the Federal Building, and we don't know the exact time, but tentatively have it set for 9:00, and that was depending on the airplane schedules. One item we're going to talk about is, we're going to have a presentation of the building of the new Tongue River Dam, which is of interest to the Northern Cheyenne Tribes. There's one reason we're having it in Billings is the Northern Cheyenne expressed an interest to come and have the meetings here. I thought I'd tell you that in case you want to come -- make plans.

So, for our next meeting, I'll get out a calendar here.

Ladd: Our other meeting was the 12th, wasn't it?

Loble: When did we set that up?

Ladd: The 12th.

Loble: Oh, you are so right. I wrote down 19 and put 2 on top of it.

Brown: Where would we like to have this meeting -- in Pablo?

Baenen: Where is the meeting on the 12th?

Brown: Here, in Billings.

Loble: That's the one that's in the Federal Building. Our Commission meeting we haven't decided on yet.

Brown: We think we can meet there also at that time. I'm going to get together with Ted.

Loble: So the meeting August 12 will be in Billings at the Federal Building at 9:00 with the Northern Cheyenne. So we have open the 19th. Well, it doesn't have to be on a Tuesday. The only reason we picked Tuesday was that it gave people a day to travel.

Baenen: The 19th? Fine.

Loble: Okay, where would you like to have it?

(General discussion deciding to have the meeting in Pablo)