

01/09/15 Ronan Compact Commission Meeting

Bill Slack: Good Evening. I'm Bill Slack. I've listened patiently to all this two or three hours of your lawyer, and nearly all of your compact negotiating meetings and I've heard the same thing over and over that this compact is supposed to alleviate us of the problem of having to go to court. And here tonight, in the statement that's on the handouts and the like, repeated reference to having to go to court to settle these issues. I wonder what we've been doing the last 15 years if we still have to go to court. My question, in the previous meeting (same evening) Melissa Hornbein in her rather long explanations made the statement that the basic underlying water right belongs to the tribe. My question is very simple. What legal precedent do you base that on? I'd like to answer that for you quickly, there is none, and I'm sure you're aware of it, otherwise the tribes would not have filed that basic premise in the U.S. district court to have that proved. And on that one issue, all these other questions, conflicts that we being up, hang on that one issue. If this belongs to the tribe, then what rights do we have. And the answer is none as far as our water rights are concerned. And it spins off on all property rights they've been brazen enough to make those kind of statements in the district court. The question still goes back to what legal precedent do you use for that foundation of this whole compact.

Melissa Hornbein: So as I mentioned earlier, the issue of ownership of the project right is a disputed one. There have been multiple claims filed for those rights, when the tribes file their claims there will be yet another set of claims filed for those rights. They certainly have what we call colorable legal claims to the irrigation project rights as part of the federal reserved water right created when the United States reserved the Flathead Indian Reservation from the public domain. I'm not saying that a court would say that ultimately it's theirs or not. Again, not to dispute an issue, both in front of the federal court currently, and potentially in front of the water court. What was facing us in the negotiations is the issue of 1) a disputed water right between three different parties, the tribes, the United States and the Flathead Joint board of Control, and 2) a question of priority. If the FJBC were to end up with title to those water rights, what would it achieve then in the face of existing legally recognized and senior tribal instream flow water rights that have the ability to significantly impact the project. The focus of the settlement was on trying to protect the actual on farm deliveries for the project while recognizing the tribal instream flow right. If the most important question to answer is the underlying question of bare legal title to those water rights. I think the best place for resolution is the judicial system and not through a negotiated settlement. But the commission had to take into account, we try to protect existing actual water use, and the best way we could do that is through the way the compact quantifies the right and places limitations on the tribal instream flow rights to protect historic farm deliveries. So that was the settlement option, but again that's not the only option and if the real important question is bare legal title, regardless of whether you get actual real wet water on the ground, that is a judicial determination.

Chris Tweeten: Let me just add to that. It's important to remember with respect to every issue that we've talked about and will talk about relating to the compact, that this is a settlement of disputed legal claims. It's the same thing that happens every day around the country where lawyers will consider a lawsuit that's been filed and will reach an out of court settlement. And both sides have the option to

force that matter into court, force it to go to trial, or to be decided by a judge in one procedure or another. But the fact is that 95% of the litigation cases in the United States settle. Only 5% of them are determined on their merits by the court. And there's a reason for that. And the reason for that is that it's almost universal, that a negotiated settlement is preferable to rolling the dice on a win or lose situation in front of a court. Usually these settlements result in a resolution of the claims that provides something for both sides without giving either side everything that they might ask for from the court. And the parties consider their relative position. They decide they may go to court, sure they might win, they might get everything they're asking for. But on the other hand, since this is a disputed claim, I could go to court and I could lose everything and the other side could win 100% of what they claim. And I could walk away with nothing. Is it better for me to walk out of this situation with some things of value, than to walk away from this situation with nothing. In this context, that's a question that's more important than it is with respect to most automobile accidents. People's lives are at stake and we're aware of that. The legislature could turn down this compact, and folks could go to the water court and the water court would be happy to consider the merits of the arguments and decide who owns the project water right and what merit the tribe's claims have and do they have off reservation water rights. If that's a question on which the tribe's win, the consequences for the state of Montana are going to be truly dire, because they're going to make that argument not only with respect to the counties surrounding the reservation, but with respect to probably 2/3 of the state of Montana.

From Audience: Scare tactics

Chris Tweeten: let me just say that I think many irrigators on the reservation have been scared as well, but things that aren't true about the compact. Compact opponents have been shopping around for years. You need to listen to the facts and make your own decisions with respect to whether the compact is a good deal or not. We're not doing anything more than telling you what we envision will occur if this compact doesn't pass. And it may be as bad as we say or maybe it won't, but we have every reason to think that the water court's going to have to spend a substantial amount of time sorting out these water rights and that individual water users are going to have to show up to defend their own claims. I know that some irrigators have been asking the attorney general to make the commitment that the state of Montana will step into the adjudication and defend their water rights claims with respect to the tribe's claims and as I understand it, the attorney general has not made that commitment. And the reason I think is because the attorney general can't legally make that commitment. Leave that all aside, you decide what's a scare tactic and what isn't. It's simply a sober analysis of the legal positions of both sides and you all make your decisions based on where that analysis comes down. The point is that important matters are settled all the time without either side getting everything they want but both sides getting a settlement that they can live with. And that's what we've been doing in settling the reserved water rights claims in Montana since 1985. And the legislature has ratified every single compact that we've reached including two compacts last session with the sole and singular exception with the compact for the Flathead Reservation. So people ought to be asking themselves why it is that the compact commission came up with settlements the legislature was willing to wholeheartedly approve for twenty, almost thirty years, and now all of a sudden it's sold out the state of Montana. Does that seem plausible to folks that this would be the way the compact commission does its business.

I would suggest that it is not plausible, and you ought to consider this compact on its merits, and look at the provisions and decide whether the compact is a deal that provides adequate protections for irrigators and other water users within the boundary of the reservation or not. And make your decision on that basis and don't let anybody whisper in your ear what the compact does or doesn't do. Look at it for yourself, because a lot of the complaints about the compact that are floating around have no support in the compact language itself. I read a letter to the editor in the Missoulian a couple of ago that complained about provisions of the compact that appeared in the 2013 compact that in fact have been removed from the 2015 compact. And yet this compact opponent wrote this letter still leading people to believe that these provisions are still part of the deal. Well they're not.

From Audience: The new compact just came out by the way

Chris Tweeten: Well that's true, but we've been talking about these provisions in the compact for months in public meetings that many people including you have been in attendance at. So the suggestion that suddenly these things are being brought out full blown without you having any opportunity to know what they are is not exactly correct. The public has had all kinds of opportunities to watch us discuss these provisions in this new compact, and so I think that's a red herring. The point is make your own decision, look at the provisions in the document and figure out whether the people who are talking to you know what they're talking about with respect to the deal or not. And make your own judgments. We think that we've been honest with you about the deal, and from the very beginning, and the opponents to the compact will tell you we haven't. I think you're wrong. But make your own decision, look at the documents and make up your own mind before you go down to the legislature.

Bill Slack: Thanks Chris. That's a long answer to the question, it must be pretty important.

Chris Tweeten: Yeah Bill I think it is important, and that's why I offered it up for your consideration. People have to understand the context in which this deal was being made. We didn't need to show up on an ad hoc basis to make life miserable for folks in the Mission Valley. Your legislature told us to come here and negotiate a settlement and that's what we have done to the very best of our ability. Just like we did with all the other compacts.

Bill Slack: I guess the observation I have, is what you're telling us here, is that you made this decision when you made this decision when you began to negotiate, rather than negotiating for us, you've been negotiating for the other side. Thank you.