**FLATHEAD JOINT BOARD OF CONTROL**

SPECIAL MEETING MINUTES

**ST. IGNATIUS, MONTANA**

September 25, 2014

**PRESENT**

**Flathead: Wayne Blevins, Paul Guenzler, Shane Orien, Bruce White, (Trent Coleman – Absent)**

**Jocko: Boone Cole, Kerry Doney, (John Trimble – Absent)**

**Mission: Jerry Laskody, Tim Orr, Gene Posivio**

**Member at Large: Ted Hein**

**Consultant:** **Jon Metropoulos**

**Staff: Johanna Clark**

**Project:** Absent

**CTO** – 1:07 p.m.

Pledge of Allegiance was conducted.

Chairman Wayne Blevins moved to Approve Agenda as presented and was 2nd by Commissioner Boone Cole. Motion carried.

Billing Statements and Warrants as listed in the September Budget were approved as presented by Executive Secretary Shane Orien.

Commissioner Boone Cole motioned to approve the August 18th minutes as presented and was seconded by Commissioner Tim Orr. Motion carried.

**Agenda Item #1 – Hiring of FERC counsel regarding low cost block of power.**

Consulting Attorney Jon Metropoulos made a brief statement defining FERC, $200,000 to $300,000 revenue per year. Tribes have hired a number of firms already regarding this issue. The firm up for consideration has significant experience regarding the FERC process and is aware of current FJBC budget issues.

Kathleen Mazure and associates attended the meeting by phone. The firm has been in practice since 1980. Defend rights while keeping rates low is her goal for the FJBC. Tyler Mansholt specializes in hydropower and natural gas issues. 1985 case review and court claim 1969 to 1972, this is not a typical case. FERC generally does not approve settlements that bind commissions although in this case it seems to have done so. FERC is a difficult entity to determine what will happen and where the cost is going to be. You can settle at any time and they cannot force litigation. This issue does not have to be in front of a judge. Paper hearing is less expensive. (No cross examination, etc.)

Jon Metropoulos clarified, if firm was to be retained, the first step would be to gather information and order documentation from FERC. We would then decide on whether there would be a hearing and if so, which type of hearing would be preferable. Kathleen responded that a pre-filing meeting would be a possibility. A complainant would have the burden of proof and we need to avoid that position. Files are on micro-fish at FERC and it is time extensive to retrieve such documents. 90% we would want to respond to initial filing. Time frame is one year to have a hearing. FERC could sit on our request for up to 111/2 months. Going forward with the process would not obligate the board to do everything. We would work together on how to move forward.

This firm has represented central Montana for a number of years. Success rate has been high throughout the state. Settlements have been approx. 25 million. The firm is creative in finding ways to save client rates.

Commissioner Tim Orr questioned the location of the FERC meeting. (Montana or D.C.)

Gene Erb wanted to know if she was familiar with the Winters Doctrine and the original license of KERR Dam. Kathleen stated she had read case records, not original documents. He also questioned who was paying the additional fees associated with hiring of another legal firm. Commissioner Boone Cole asked about the retainer. Kathleen responded that the fees would be hourly. He questioned if she was familiar with Sen. Jackson's comments. (The firm ended there conference call at 1:33 p.m.)

Member at Large Ted Hein questioned the duties of the firm and if she would also review Net Power Revenue's. Consulting Attorney Jon Metropoulos responded that FERC was limited in its scope and that the Federal Court would address Net Power Revenue's. Commissioner Paul Guenzler questioned amount of funds needed from the FJBC for how many hours of work. Consulting Attorney Jon Metropoulos stated he was unaware at this time of budget needs for such services of another legal firm. $200,000.00 is his estimate to complete the issue. The FJBC is not committed to the entire process with additional options due to the compact and settlement. Consulting Attorney Jon Metropoulos stated his support of hiring the firm.

Chris Sullivan stated the importance of documenting the firm's findings to avoid having to do it again in the future. Bill Slack stated Net Power spins off of Low Block Power. (15,000 horse power) A user has to pay for the Low Cost Block and it was established at the cost of production. When Kerr Dam was relicensed it paid off the project and the tribe's received their portion of it, the tribe stated that there was an inflationary factor. No-one seemed to have specifics on the matter. The cost of producing power is not changing that much over the years, the Dam has been built and debt has been repaid. $200,000 per year over 50 years would repay the project debt. Since 1985 the monies have been applied to Kerr Dam Low Cost Block. The tribe has been very careful and has kept rates at the lowest acceptable rate. Commissioner Bruce White asked if Bill had seen the new structure of operation for Kerr Dam once purchase is complete. (12 paid positions before you even got to Dam operation.) Commissioner Jerry Laskody recommended having one firm look into all of the issues now instead of hiring additional firms will only cost more money down the road. Kate V. made a brief statement describing her research with Net Power Revenues and Low Block of Power as well as a brief position statement of Sen Jackson.

Dick Erb questioned what other parties would be involved. Consulting Attorney Jon Metropoulos responded that there is a difference in parties. Bill Slack stated that Footnote 28 in the FERC License 1985 is a good source of information. Member at Large Ted Hein brought up Reclamation Funds and Non Consumable water leases wanting to know where the money is now that was received for such leases. 638 projects are associated with this problem. Gene Erb asked why this was not done in 2010 or prior when the project was transferred. 60% irrigators signed up to pay the project off; he recommends contact law enforcement and the issue of requesting a forensic audit. Why do we still have liens on our water rights? That is concerning.

Chairman Wayne Blevins called for a Motion.

Commissioner Shane O'rien stated that there was not a lot of work at this time, they will be preparing and gathering information first. Consulting Attorney Jon Metropoulos responded that the request for documents is time extensive and no work would be performed during that time. Member at Large Ted Hein questioned the time frame this issue would take. Consulting AttorneyJon Metropoulos stated that it could take years; there is no way of being able to tell at this juncture. With a compact it could be as soon as this Christmas, if not it could be years. Member at Large Ted Hein stated that it is in the best interest for all irrigators to achieve a good compact.

Commissioner Paul Guenzler stated that $50,000.00 would not get us a lot and all of the reserve would be gone. Commissioner Jerry Laskody stated that $50,000 would buy about 1400 hours of work. Commissioner Shane Orien stated that there might be additional funds that could be drawn from other areas within the budget; the board needs to have priorities. Commissioner Tim Orr reminded the board what this issue is worth; we need to get the action started. “Time is of essence.” Commissioner Jerry Laskody stated the board could authorize 1,000 hours of work for the current fiscal year.

* Commissioner Jerry Laskody motioned to retain the Duncan, Weinberg, Gentler and Pembroke, P.C. and allocate 100 hours or $50,000.00 for services within the 2014 fiscal year. Commissioner Tim Orr 2nd the Motion.

Chris Sullivan questioned accountability and report accessibility from all consulting attorney that could be available to the public.

* Chairman Wayne Blevins called for a vote. Commissioner Kerry Doney and Commissioner Paul Guenzler - Nay.
* Motion carried 8-2

Commissioner Kerry Doney stated that additional legal counsel would raise admin charges for irrigators. Commissioner Shane O'rien responded that Commissioners have lowered admin rates for some districts (Mission and Jocko Irrigation District) and that he will ensure accountability for all FJBC funds and budgets.

**Agenda Item #2 – Communication Policy**

Consulting Attorney Jon Metropoulos described the DRAFT communication policy. Hupp Firm representative gave a brief explanation of the intent of the policy. Commissioner Boone Cole asked the difference of definition of communication. Commissioner Paul Guenzler questioned the fair information delivery. Member at Large Ted Hein questioned oral communication. Consulting Attorney Jon Metropoulos recommended addressing the issue in October at the next regular meeting. Kate V. questioned the confidentiality policy and how it relates to board members. Commissioner Boone Cole asked the legal team in regards emails and if all commissioners should receive the same email. The firm does not recommend utilizing email; they are all a matter of public record.

* Member at Large Ted Hein moved to table the item until the meeting in October. Commissioner Boone Cole 2nd. Motion carried unopposed.

**Agenda Item # 3 – Position Statement**

(Cory Swansen, Montana Attorney General Office attended by phone.)

Consulting Attorney Jon Metropoulos made a brief statement in regards to the road map presented to the board for approval.

* Negotiating Team: Ed Everart (Engineer), Commissioner Jerry Laskody, Consulting AttorneyJon Metropoulos and rep from Hupp Firm would be the negotiating team preferable to Consulting Attorney Jon Metropoulos.

Cory S. stated views on negotiations; the FJBC is not a formal party. There has been a loss of expertise due to that factor. Our office has communicated with all parties. The governor wants irrigators concerns to be met. The FJBC input in invaluable from the AG point of view. This process requires and will benefit from the AG involvement and present the needs of all the parties involved. The AG is asking for specific nuts and bolts for making this compact work for farmers and irrigators on the reservations. This does not mean that everything recommended or asked for will be in it. This may be the only chance to input all views and the FJBC needs to take it. A compact that is not done by Christmas has a diminished chance of success in legislature.

Chris Sullivan questioned the seriousness of parties review UMO concerns. Cory responded there is no negotiating going on regarding the issue as of this date. There may be in the future. Chris asked if the FJBC has enough power to push the subject. He responded that the AG's office is interested but he cannot speak of the opinion of the other parties. The tribe and the state may not be open to discussing. Dick Erb questioned the rules of the game allowing public participation. Consulting Attorney Jon Metropoulos responded that all decisions will be made in public.

Negotiation Process and Team and Position Statement - The position statement although 9 pages, addresses the three main concerns of the FJBC as well as supporting information.

* Property right in the project (Project right, FJBC- bare legal title to the water right, Land Owner- beneficial title.) Water right 1855 certificate issues per acre to each owner
* Verify that water delivery is adequate. The modeling is not an operational model. No parties can verify it. Historical beneficial uses/ the water use agreement does not allow for that process.
* UMO/UMB – does not protect non-tribal water users and uses.

Consulting Attorney Jon Metropoulos stated that the FJBC needs to provide a proposal to Cory S. so that FJBC issues may be addressed in upcoming negotiations. Commissioner Bruce White questioned the UMO/UMB/ On and off project water rights. Consulting Attorney Jon Metropoulos responded that it responds to the entire scope. Member at Large Ted Hein questioned the individual water right as per his Fee Patent. Metropoulos responded that if they did not file in 1983, it is lost. Member at Large Ted Hein questioned if it was a Federal Reserve Water Right. Jon Metropoulos responded that there are arguments on both sides of the issue, but that to prevail, a project right that is owned by the districts on behalf of the fee-land owner. Member at Large Ted Hein stated the right is set aside and that the Winter's Doctrine states it is not governed by the state. Jon Metropoulos responded his disagreement with that opinion. Kate V. presented information disputing Member at Large Ted Hein's believes and explained the adaptive management issues as they relate to water rights. Jon Metropoulos responded that this document is not specific; it is only a position to secure a voice in upcoming negotiation. Sheila V. asked if the grand bargain would be removed by this position statement. Does the FJBC proposal keep us under the state and not under the tribes? Jon responded that he thinks the current FJBC proposal will protect non-tribal rights. Gene Erb commented on a recent trip to Helena, he saw water rights that were filed in 1982 by the FJBC. Jon Metropoulos responded that the only concern of the board is with the FJBC filings. Kate V. commented that the abstracts need to be adjusted; historic water right is the actual water rights.

Cory stated his agreement with Jon Metropoulos's opinion on how to present the issues. The AG's office will do a better job of representing irrigators with FJBC input. Susan Lake commented the importance of having water at the end of the day. UMB is a huge part of this and by arguing the point will be a deal breaker. Commissioner Boone Cole responded that Susan should run for tribal council so that irrigators could have a vote. Susan responded that we no longer have a CME and that was our voice. Jerry Laskody thought if agencies could encourage the tribe and the BIA to release information to the FJBC that would assist in the issues. Bill Slack commented that this is a settlement proposal, not a litigation issue. Commissioners need to be careful not to jeopardize the first attempt. We need to get things moving ahead. Member at Large asked about the third item, UMO. Kate V. asked why the state does not go and research the records for themselves while being observed by a third party. The information is in the abstracts and all the issues are related.

Commissioner Tim Orr commented that the history is important. He provided a brief history on how water rights were filed on behalf of the irrigators by the FJBC commissioners at that time. Kate V. stated that is the place to start evaluating historic use. Dick Erb stated that the FJBC needs to get a contract for a biological study of fishery requirements and verify if the information is accurate. Jon Metropoulos asked Cory if there was more time available to get a document to the AG's office. Cory responded that time is of the essence and that if the FJBC takes too long, its voice and concerns will not be utilized. “This train is leaving the station, the only question is if you are going to be on board or not.” Member at Large Ted Hein stated that the UMO needs to be addressed and placed on the table. Commissioner Tim Orr stated that this compact is so complicated; it needs years to make it right, not days or months. We have to live with it as well as the generation to follow. Cory responded that the patience factor is limited. If there is no agreement we are moving towards litigation. This is a fleeting opportunity.

Commissioner Bruce White questioned being able to get some of the historical use data. Cory stated that the DNRC has asked for them and that the FJBC has requested the same. The DNRC have not had their requests met from the BIA. This metric analysis done by satellite snap shot was utilized because of the lack of historic documents. It has been a well proven method with other issues and other agencies. Adaptive Management is to meet all the requirements. Jon Metropoulos stated that the FJBC asked the tribes to show the FJBC the model. They refused any data delivery. Dick Erb stated that the study was insufficient in its study, it cannot be accounted and used for historic delivery. Commissioner Boone Cole believes that discovery has been requested to delivery all historic delivery documents. Dana Hupp commented that she has hopes that the courts will grant discovery. Kate V. stated that filings were in fact at the DNRC and it is starting place.

Consulting Attorney Jon Metropoulos stated there are three alternatives, go forward, go forward with issues 1& 3, take less than a week and formulate another position statement. Commissioner Jerry Laskody spoke of the 1939 report on Diversions.

* Commissioner Jerry Laskody moved: Position statement will be tabled for four to five working days with an additional meeting being called later next week. Commissioner Bruce White 2nd. Motion carried unopposed.

**Agenda Item #4: District Court Interpleader**

It is the opinion of legal counsel that current cases should be dismissed. The purpose behind the previous actions has run its course. Quick-claim deed from the FID backs to the FJBC all property and water rights. Commissioner Boone Cole asked if it would take any resources from the FJBC. Dana commented that pending litigation takes resources. There is a creditability issue and it is our opinion that it is not needed right now, we would dismiss without prejudice.

Commissioner Jerry Laskody motioned to dismiss interpleader case in 20th district and the water court without prejudice and to have the FJBC receive the assets from the Flathead Irrigation District to include the building located at 524 N. Main Street in Saint Ignatius and the water rights. Commissioner Tim Orr 2nd.

Commissioner Shane O'rien amended the motion to only include the water rights claims due to financial matters of the separate irrigation districts. Member at Large Ted Hein 2nd the motion.

Vote was called. Motion carried unopposed.

**Agenda Item #5: BIA Turnover**

Consulting Attorney Jon Metropoulos gave a brief description of the BIA turnover suit and the cost associated with such positions. Authorize to write a letter to the BIA requesting data. It will save money and time. October 6th, hearing unless parties can agree outside of court.

Commissioner Bruce White motioned to send the letter and was 2nd by Shane Orien. Motion Carried unopposed.

**Adjourned at 4:44 p.m.**