VOLUME NO. 42 OPINION NO. 51

FISH, WILDLIFE, AND PARKS, DEPARTMENT OF - Discussions between director of Department of Fish, Wildlife, and Parks and representatives of Confederated Salish and Kootenai Tribes not subject to open meeting law;
INDIANS - Discussions between director of Department of Fish, Wildlife, and Parks and representatives of Confederated Salish and Kootenai Tribes not subject to open meeting law;
OPEN MEETINGS - Discussions between director of Department of Fish, Wildlife, and Parks and representatives of Confederated Salish and Kootenai Tribes not subject to open meeting law;
STATE AGENCIES - Application of open meeting law to director of Department of Fish, Wildlife, and Parks;
ADMINISTRATIVE RULES OF MONTANA - Section 12.2.305;
MONTANA CODE ANNOTATED - Sections 2-3-101 to 2-3-114, 2-3-201 to 2-3-221, 2-3-202, 2-3-203, 2-15-112(1), 2-15-124(8), 2-15-3301, 18-11-103;
MONTANA CONSTITUTION - Article II, section 9;
OPINIONS OF THE ATTORNEY GENERAL - 37 Op. Att'y Gen. No. 170 (1978).

HELD: Discussions between the director of the Department of Fish, Wildlife, and Parks and representatives of the Confederated Salish and Kootenai Tribes are not subject to Montana's open meeting law. Final decisions by the director may, however, be subject to the public participation provisions in sections 2-3-101 to 114, MCA, which give the public the opportunity to be heard at open meetings if an agency decision is of "significant interest."

7 January 1988

Larry J. Nistler
Lake County Attorney
Lake County Courthouse
Polson MT 59860

Dear Mr. Nistler:

You requested my opinion on the following question:

> Whether discussions between the director of the Department of Fish, Wildlife, and Parks and representatives of the Confederated Salish and Kootenai Tribes are subject to Montana's open meeting statutory provisions.

I conclude that such discussions do not constitute a "meeting" under section 2-3-203, MCA, because the director of the Department, when acting alone on behalf of the Department, does not fall within the scope of the term "quorum of the constituent membership" used in that provision.

The facts giving rise to your question are undisputed. The director and tribal representatives have met regularly to discuss entering into a state-tribal cooperative agreement which would resolve potential conflicts over regulation of on-reservation hunting and fishing. Such a cooperative agreement is authorized by Title 18, chapter 11, MCA. Section 18-11-103, MCA, permits a public agency, such as the Department, to enter into an agreement with any one or more tribal governments "to perform any administrative service, activity, or undertaking that any of the public agencies or tribal governments entering into the contract is authorized by law to perform." As Department head, the director is generally empowered to act on the Department's behalf in securing such agreements. §§ 2-15-112(1), 2-15-3301, MCA. When attending the discussions the director was at times accompanied by his attorney and a regional supervisor. However, their presence could have no legal effect on securing the state-tribal agreement, since the authority lies in the director alone. The question presented here is whether the negotiations between the director and tribal representatives are subject to Montana's open meeting law, §§ 2-3-201 to 221, MCA.

Montana's open meeting requirements are founded in the Constitution, article II, section 9:

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

This provision is implemented in part by the open meeting law. Section 2-3-203(1), MCA, states:

> All meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds must be open to the public.

That section further provides that a public meeting may be closed if the discussion relates to a matter of individual privacy and the presiding officer determines that the demands of individual privacy exceed the merits of public disclosure. The meeting may also be closed to discuss litigation and collective bargaining strategy. §§ 2-3-203(3), (4), MCA. But see 37 Op. Att'y Gen. No. 170 at 716 (1978). Because I conclude that no "meeting" has occurred here, there is no need to discuss whether the privacy or litigation exceptions apply to the discussions at issue.

The term "meeting" is defined in section 2-3-202, MCA:

> As used in this part, "meeting" means the convening of a quorum of the constituent membership of a public agency or association described in 2-3-203, whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power. [Emphasis added.]

Only such meetings are subject to the open meeting statutory requirements. § 2-3-203(1), MCA. The term "constituent membership" is not defined but presumably refers to a group of individuals possessing statutory authority to make decisions on behalf of the involved public agency by majority action. Examples of constituent memberships include the various state government commissions or advisory councils and numerous local government entities such as county commissions and school boards. Conversely, the department head of a state agency, such as the director here, can hardly be viewed as the "constituent membership" of his agency when carrying out statutory responsibilities vested in him alone. At the outset, therefore, substantial textual difficulties accompany the contention that discussions between the director and tribal representatives fall within the scope of section 2-3-202, MCA. The inapplicability of the "meeting" definition to a department head acting alone is further highlighted by the quorum requirement in section 2-3-202, MCA, and the utilization of the words "deliberations" and "discussion" in sections 2-3-201 and 2-3-203, MCA.

"Quorum" is not specifically defined in the open meeting law. However, it is generally held that in the absence of a contrary statutory provision, a quorum consists of a majority of the entire body. Black's Law Dictionary 1421 (4th ed. 1968); Mad Butcher, Inc. v. Parker, 628 S.W.2d 582, 585 (Ark. Ct. App. 1982); Alonzo v.

Louisiana Dept. of Highways, 268 So. 2d 52, 54 (La. Ct. App. 1972). See § 2-15-124(8), MCA (defining a quorum for quasi-judicial boards as "a majority of the membership"). The term "quorum" is typically used in the context of a deliberative body consisting of members who act collectively. E.g., State v. Conrad, 197 Mont. 406, 643 P.2d 239, 241 (1982); Board of Trustees v. Board of County Commissioners, 186 Mont. 148, 606 P.2d 1069, 1071, 1073 (1980); Alonzo v. Louisiana Dept. of Highways, 268 So. 2d at 54. See 74 C.J.S. 171 (1951) ("The idea of a 'quorum' is that when that required number of persons goes into a session as a body the votes of a majority thereof are sufficient for binding action. Thus the word 'quorum' implies a meeting, and the action must be group action, not merely the action of a particular number of members as individuals") (citations omitted). Use of "deliberations" and "discussions" in the context of open meeting laws connotes collective discussion and collective acquisition of information among the "constituent membership" of the agency. See Grein v. Board of Education, 343 N.W.2d 718, 722 (Neb. 1984); Stockton Newspapers v. Members of the Redevelopment Agency, 214 Cal. Rptr. 561, 564 (Cal. Ct. App. 1985); Accardi v. Mayor and Council of City of North Wildwood, 368 A.2d 416, 421 (N.J. 1976); cf. People ex rel. Hopf v. Barger, 332 N.E.2d 649, 658-59 (Ill. 1975). Indeed, to hold that an agency director alone is a "quorum of the constituent membership" of such agency effectively means that he would be deemed meeting with himself--a conclusion directly at odds with common sense. See MacLachlan v. McNary, 684 S.W.2d 534, 537 (Mo. Ct. App. 1984) (a single-member body cannot have public meetings).

It is thus evident that the discussions between the director and tribal representatives or other members of the public do not fall within the scope of section 2-3-202, MCA. The inapplicability of the open meeting statutory provisions, however, does not mean an agency decision to enter into a state-tribal cooperative agreement is immune from public scrutiny prior to the agreement being consummated. The Department has developed procedures pursuant to section 2-3-103(1), MCA, to "assure adequate notice and [to] assist public participation before a final agency action is taken that is of significant interest to the public." See § 12.2.305, ARM. While the issue of whether a cooperative agreement arising from the current negotiations is of "significant interest to the public" is not before me, the notice requirement must be liberally construed to achieve the salutary purpose of the public participation provisions in sections 2-3-101

to 114, MCA. Compliance with these provisions will permit full public involvement in governmental decisionmaking.

THEREFORE, IT IS MY OPINION:

> Discussions between the director of the Department of Fish, Wildlife, and Parks and representatives of the Confederated Salish and Kootenai Tribes are not subject to Montana's open meeting law. Final decisions by the director may, however, be subject to the public participation provisions in sections 2-3-101 to 114, MCA, which give the public the opportunity to be heard at open meetings if an agency decision is of "significant interest."

Very truly yours,

MIKE GREELY
Attorney General